

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

TECHNICAL ANALYSIS

Proposed Administrative Civil Liability
Contained in Complaint No. R9-2015-0166

Against

San Diego Association of Governments
Rail Projects Within the LOSSAN and Mid-Coast Corridor

Noncompliance with

State Water Board Order No. 2009-0009-DWQ,
As amended by Order No. 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 Quality Control Plan for the San Diego Basin

and

Water Code Section 13376

and

Clean Water Act Section 301

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A. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence that support the findings in Administrative Civil Liability Complaint No. R9-2015-0166 and the recommended assessment of administrative liability in the amount of **\$50,000** against the San Diego Association of Governments (Discharger) for violations of State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, NPDES No. CAS000002, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* (Construction Storm Water Permit), as amended; Water Quality Control Plan for the San Diego Basin (Basin Plan); California Water Code (Water Code) section 13376; and Clean Water Act section 301.

The Complaint was issued because Discharger failed to implement legal requirements during construction of a second set of tracks in the railroad corridor within the Rose Canyon Open Space Park (Project). Discharger's failure to comply with the requirements resulted in the direct discharge of sediment to Rose Creek, approximately four miles upstream of Mission Bay, on September 15, 2015.



Location Map: Elvira to Morena Double Track Project.

On June 16, 2015, Jim Linthicum, the Legally Responsible Person (LRP) for Discharger, submitted a Notice of Intent for the Project under the Construction Storm Water Permit. In addition, Discharger characterized the Project as being "Risk Level 2." Pursuant to the 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)." The LRP based its Risk Level 2 determination on a "High" sediment risk and a "Low" receiving water risk.

Discharger identified Mid-Coast Transit Contractors (MCTC) as its contractor. MCTC's website describes MCTC as heavy civil constructors specializing in construction management/general contractor for rail projects that have constructed several large scale rail projects in the region.

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 (BAT) and best conventional pollutant control technology (BCT) is 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) 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. The Construction Storm Water Permit identifies erosion control BMPs as the primary means of preventing storm water contamination and sediment control BMPs as the secondary means of preventing storm water contamination. 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.

The Construction Storm Water Permit requires Risk Level 2 projects to minimize or prevent pollutants in 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. The Construction Storm Water Permit further requires Risk Level 2 projects to implement effective soil cover BMPs for inactive¹ areas, effective perimeter control BMPs to sufficiently control erosion and sediment discharges, and appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active² construction.

Risk Level 2 projects are also required to effectively manage all run-on, all runoff within the site, and all runoff that discharges off the site, conduct weekly BMP inspections, develop a Rain Event Action Plan (REAP), conduct visual inspections during qualifying rain events,³ and perform sampling and analysis of storm water discharges.

C. SEPTEMBER 15, 2015 DISCHARGE EVENT

On September 15, 2015 the San Diego Water Board received a citizen complaint of discharges to Rose Creek from Discharger's Project east of Interstate 5 and south of Regents Road. The complainant provided the San Diego Water Board with photographic evidence of an active discharge.

San Diego Water Board inspectors responded to the complaint at approximately 2:00 p.m. on September 15, 2015. At that time, the bulk of a storm had passed and it was not actively raining. Rainfall data from Miramar Marine Corps Air Station, approximately six miles from the Project, indicated that light rain was recorded beginning at approximately 8:00 a.m. with a period of heavy rain between 11:00 a.m. and 1:00 p.m. The rainfall total for the September 15, 2015 storm event at the Miramar Marine Corps Air Station was 0.87 inches.

The San Diego Water Board inspectors observed the Project from the Rose Creek Hiking Trail, where Regents Road terminates at the edge of Rose Canyon. The San Diego Water Board inspectors observed evidence of numerous sediment discharges from the Project. The following photograph of an active discharge was taken by the Complainant on September 15, 2015 prior to the San Diego Water Board inspectors' arrival (Photograph 1):

¹ Inactive areas of construction are areas that have been disturbed and are not scheduled to be re-disturbed for at least 14 days.

² Active areas of construction are areas undergoing land surface disturbance. This includes construction activity during the preliminary stage, mass grading stage, streets and utilities stage and the vertical construction stage.

³ A qualifying rain event is any event that produces 0.5 inches or more of precipitation within a 48 hour or greater period between rain events.



Photograph 1: Discharge of sediment to a culvert discharging to Rose Creek.

The same storm drain culvert observed by the San Diego Water Board inspectors showed residual sediment, overwhelmed sediment control BMPs (gravel bags), no visible erosion control BMPs and severe rilling of the surrounding slopes (Photograph 2):



Photograph 2: Storm drain culvert (also pictured in photograph 1) with evidence of sediment discharge and erosion of surrounding slopes.

A constructed access road with no erosion control BMPs and an overwhelmed row of sediment control BMPs (gravel bags) provided a conduit for a large volume of storm water run-on to be directed to a storm water culvert as indicated in Photograph 1. The absence of erosion control BMPs in all directions upgradient of the culvert allowed storm water to convey sediment directly into Rose Creek. The lack of erosion control BMPs is depicted in the following photograph (Photograph 3):



Photograph 3: Constructed “bowl” around storm drain culvert with no apparent erosion control BMPs and ineffective sediment control BMPs.

In the following days, Discharger implemented more robust erosion and sediment control BMPs within the constructed “bowl” including redirecting the run-on away from exposed soils, stabilization of exposed soils with protective blankets and bonded fiber matrix, and extensive sediment controls around the inlet structure. The following photograph (Photograph 4) depicts the level of BMP implementation that should have been present prior to the September 15, 2015 storm event:



Photograph 4: Constructed "bowl" around storm drain culvert after implementation of erosion and sediment control BMPs.

Additional discharge points with evidence of sediment discharges were also observed by the San Diego Water Board inspectors. As shown below (Photograph 5), there are no erosion control BMPs visible and there is standing sediment laden storm water at the entrance of the culvert's discharge point to Rose Creek:



Photograph 5: Second culvert with evidence of sediment discharge and no erosion control BMPs.

The following photograph (Photograph 6) shows the same culvert after Discharger implemented erosion control BMPs:



Photograph 6: Second storm drain culvert after implementation of erosion control BMPs.

The San Diego Water Board inspectors observed a third culvert that showed evidence of an additional sediment discharge to Rose Creek. The photograph below (Photograph 7) shows the absence of erosion control BMPs, indications of storm water flows entering the storm drain culvert, and ponded sediment laden storm water adjacent to the inlet:



Evidence of sediment laden storm water discharge to storm drain. Ponded water in front of exit point.

Photograph 7: Third storm drain culvert with evidence of sediment laden storm water discharge.

In addition to the evidence of discharges, the San Diego Water Board inspectors also observed the absence or lack of adequate erosion control BMPs on slopes that appeared to be inactive. The visible sediment control BMPs (straw wattles) appeared to be installed incorrectly as evidenced by erosion and rilling on the unprotected slope (Photographs 8 and 12):



Evidence of sediment control BMP failing and sediment leaving the exposed slope.

Photograph 8: Inactive slope with no evidence of erosion control BMPs. Rilling on slope indicates that sediment control BMP (straw wattle) was improperly installed by rills evident below wattles.

San Diego Water Board inspectors found areas that appeared to be active lacking erosion control BMPs (runoff control and soil stabilization) as illustrated in the following photograph (Photograph 9):



Photograph 9: Active area with no erosion and sediment control BMPs. The storm drain culvert is the same as depicted in Photograph 7.

San Diego Water Board inspectors also observed run-on that continued to enter the Project and inadequate perimeter controls (Photographs 10 and 11):



Photograph 10: Run-on onto project. With inadequate perimeter controls.



Photograph 11: Inadequate run-on and perimeter controls.

The San Diego Water Board inspectors also observed slopes with no linear controls along the toe and grade breaks. The lack of linear controls along grade brakes resulted in erosion rilling as shown in the Photographs 12 and 13 below:



Photograph 12: Slope with no linear controls at toe of slope and improperly installed straw wattles as evidenced by sagging.



Photograph 13: Slope with no linear controls along grade break with erosion rills visible.

The San Diego Water Board inspectors also observed heavy equipment parked on bare dirt with no drip pads to contain leaking fluids from contacting storm water. Where drip

pads were deployed, most were no longer located under the appropriate area of the vehicle to capture drips, as they were not anchored properly (Photographs 14 and 15):



Drip pad is located in the cab of the vehicle not under it.

Photograph 14: Construction equipment with no drip control BMPs.



Photograph 15: Construction equipment with no drip control BMPS.

Towards the conclusion of the inspection, representatives of MCTC made contact with the San Diego Water Board inspectors. They indicated that the Project's Qualified Storm Water Pollution Prevent Plan Practitioner (QSP) had not yet arrived on site. When asked what was done to prepare the Project for the storm event, they responded that a binder/tackifier (erosion control BMP) was sprayed on exposed slopes prior to the rain event. Documentation later provided by MCTC indicated that an insufficient amount of product was applied based on the amount of disturbed area and the amount of product purchased. In addition, the product was applied with insufficient time to "cure" prior to the onset of rain (less than 24 hours) likely causing what material was there to be washed away making it unobservable by the San Diego Water Board inspectors and completely ineffective as an erosion control BMP.

The MCTC representatives also indicated that run-on from a broken storm drain culvert in the neighborhood located above the Project to the northeast was not identified prior to the storm event, causing a large amount of unanticipated run-on to flow into the constructed "bowl" depicted in photographs 1, 2, 3, and 4.

On September 23, 2015 Discharger notified the San Diego Water Board that water quality samples taken during the September 15, 2015 rain event exceeded the Numeric Action Level for turbidity at all sampling locations.

D. NOTICE OF VIOLATION R9-2015-0154

On September 29, 2015, the San Diego Water Board issued Discharger a Notice of Violation based on the observed violations of the Construction Storm Water Permit during the September 15, 2015 inspection. On October 20, 2015, Discharger submitted its response to the Notice of Violation. The response included photographic evidence indicating that a significant amount of work was performed implementing BMPs at every location identified by the San Diego Water Board inspectors as deficient.

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 wellbeing of man, plants and wildlife.”

The Basin Plan also designates water quality objectives to protect the designated beneficial uses. Water Code section 13050, subdivision (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.”

Water quality objectives are numerical values for water quality constituents or narrative descriptions based on sound water quality criteria needed to protect the most sensitive beneficial uses designated for a water body.

The Basin Plan has designated the following beneficial uses for Rose Canyon:

- Industrial Service Supply (IND) (potential)
- Contact Water Recreation (REC-1)
- Non-contact Water Recreation (REC-2)
- Warm Freshwater Habitat (WARM)
- Cold Freshwater Habitat (COLD)
- Wildlife habitat (WILD)

F. ALLEGED VIOLATIONS

Discharger is required to ensure that its Project is in compliance with the requirements of the Construction Storm Water Permit, Basin Plan, Water Code section 13376 and Clean Water Act section 301. The Complaint alleges the following violations:

1. Discharges of Sediment to Rose Creek Upstream of Mission Bay

Discharger violated Waste Discharge Prohibition No. 8 in Chapter 4 of the Basin Plan which states, "Any discharge to a storm water conveyance system that is not composed entirely of "*storm water*" is prohibited unless authorized by the Regional Board."

Discharger violated Provision III.A of the Construction Storm Water Permit which states, "Dischargers shall not violate any discharge prohibitions contained in applicable Basin Plans or statewide water quality control plans. Waste discharges to Areas of Special Biological Significance (ASBS) are prohibited by the California Ocean Plan, unless granted an exception issued by the State Water Board."

Discharger violated Provision III.B of the Construction Storm Water Permit which states, "All discharges are prohibited except for the storm water and non-storm water discharges specifically authorized by this General Permit or another NPDES permit."

Discharger violated Provision V.A.2 of the Construction Storm Water Permit which states, "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."

Discharger violated Section A.1.b. of Attachment D of the Construction Storm Water Permit which states, "Discharger 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."

Discharger violated Clean Water Act section 301 which states, "Except as in compliance with this section and section 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

Discharger violated Water Code section 13376 which states, "A person who discharges pollutants or proposes to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or a person who discharges dredged or fill material or proposes to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of discharge in compliance with the procedures set forth in Section 13260."

2. Failure to Implement Adequate Erosion Control BMPs

Discharger violated Section D.2 of Attachment D of the Construction Storm Water Permit which states, "Risk Level 2 dischargers shall provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots."

3. Failure to Implement Adequate Sediment Control BMPs

Discharger violated Section E.1 of Attachment D of the Construction Storm Water Permit which states, "Risk Level 2 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."

Discharger violated Section E.3 of Attachment D of the Construction Storm Water Permit which states, "Additional Risk Level 2 Requirement: Risk Level 2 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction."

4. Failure to Implement Adequate Run-on/Runoff Control BMPs

Discharger violated Section F of Attachment D of the Construction Storm Water Permit which states, "Risk Level 2 dischargers shall effectively manage all run-on, all runoff within the site and all runoff that discharges off the site. Run-on from offsite shall be directed away from all disturbed areas or shall collectively be in compliance with the effluent limitations in this General Permit."

5. Failure to Implement Good Site Management (Housekeeping) BMPs

Discharger violated Section B.3.b. of Attachment D of the Construction Storm Water Permit which states, "Risk Level 2 dischargers shall implement good housekeeping for vehicle storage and maintenance, which, at a minimum, shall consist of the following: Place all equipment or vehicles, which are to be fueled, maintained and stored in a designated area fitted with appropriate BMPs."

G. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

Pursuant to Water Code section 13385, any person who violates Water Code section 13376, waste discharge requirements issued pursuant to Chapter 5.5 of the Water Code (i.e., NPDES Permits), a basin plan prohibition, or a requirement of section 301 of the federal Clean Water Act shall be liable civilly.

Pursuant to Water Code section 13385, subdivision (c), the maximum civil liability that may be administratively imposed by the San Diego Water Board for a violation of an NPDES permit is ten thousand dollars (\$10,000) for each day the violation occurs plus ten dollars (\$10) per gallon discharged but not cleaned up that exceeds 1,000 gallons.

Water Code section 13385, subdivision (e) specifies the factors that the San Diego Water Board shall consider in establishing the amount of discretionary liability for the alleged violations. 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."

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy), provides a penalty calculation methodology for Water Boards⁴ 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, when there is a discharge, 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. Water Boards shall calculate the Potential for Harm by determining the actual, potential, 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 of Requirement of the violation.

⁴ "Water Boards" refers to the State Water Resources Control Board and the Regional Water Quality Control Boards.

For each non-discharge violation Water Boards shall calculate an initial liability factor, considering the Potential for Harm and extent of Deviation from Requirements. Water Boards shall use 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, for discharge and non-discharge violations, Water Boards shall use three adjustment factors for modification of the initial liability amount. These factors include: 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 1: DISCHARGES OF SEDIMENT TO ROSE CREEK TRIBUTARY TO MISSION BAY

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) has assigned a score of **3 (moderate)** out of 5 to Factor 1 of the penalty calculation because:

- a. Sediment was directly discharged to Rose Creek at three separate discharge points.
- b. Impacts to the beneficial uses of Rose Creek were reasonably expected.
- c. Sediment was indirectly discharged to Mission Bay.
- d. Mission Bay, near the mouth of Rose Creek, is designated as an impaired water body for eutrophication and lead impairments pursuant to Clean Water Act section 303(d). Storm water runoff containing sediment discharged from the Project likely transported other pollutants such as nutrients; therefore it is reasonable to state that the unauthorized discharge had a potential to further degrade the already impaired waters of Mission Bay.
- e. Sediment discharges negatively impact water contact and non-contact recreation, warm, and cold water habitat beneficial uses.

- f. Sediment discharges can adversely affect photosynthesis which aquatic organisms depend upon for survival.
- g. Sediment discharges that produce turbidity can be directly lethal to aquatic life. The Basin Plan has established a water quality objective for turbidity in the Miramar Hydrologic Area (906.40) of 20 NTU. All water quality samples of discharges from the site on September 15, 2015 exceeded the water quality objective for turbidity in the receiving waters.

The Enforcement Policy defines **Moderate** for discharge violations 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).

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

A score between 0 and 4 is assigned based on a determination of whether the discharged material poses a negligible (0), minor (1), moderate (2), above moderate (3), or major (4) risk or threat to potential receptors. "Potential receptors" are those identified considering human, environmental and ecosystem health exposure pathways.

The Prosecution Team assigns a score of **2 (moderate)** because:

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

The Enforcement Policy defines a score of **2** as:

Discharged 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.)

Factor 3: Susceptibility to Cleanup or 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, a score of **1 (one)** is assigned 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 (six)**.

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 of accurately determining the volume of sediment discharged during the discharge event, civil liability was only calculated on a per day basis for this violation.

Per Day Assessments for Discharge Violations

Extent of Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirements “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major).

The Prosecution Team has determined that the Deviation from Requirement is **Major** because the Construction Storm Water Permit prohibits all discharges except for storm water and non-storm water discharges specifically authorized by the permit. Only discharges that have been controlled with BMPs that achieve BAT and BCT are authorized. Because Discharger did not implement BMPs that achieved BAT and BCT, the requirements of the Construction Storm Water Permit were “rendered ineffective.”

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 Rose Creek and Mission Bay 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:

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

$$(0.220) \times (\$10,000) = \mathbf{\$2,200}$$

Days of Discharge Violation

According to the documentation included with this Technical Analysis, Discharger was in violation of the discharge prohibitions for **1** day (September 15, 2015).

Step 3 – Per Day Assessment for Non-Discharge Violations

Not applicable to discharge violations.

Step 4 – Adjustment Factors

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s culpability, the Discharger’s efforts for cleanup and cooperation after the violation, and the Discharger’s history of violations.

Culpability

An adjustment for the initial liability based on the Discharger’s culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

The Prosecution Team assigns a culpability multiplier of **1.4** for the violation because Discharger is an established entity with extensive experience in the construction of linear projects. As such, it should have been able to adequately plan and implement necessary BMPs in a timely manner to reduce sediment in storm water discharges to the MEP.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for cleanup and cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent.

The Prosecution Team assigns a Cleanup and Cooperation multiplier of **1.1** because Discharger made significant efforts to return the site to compliance immediately after the storm event by implementing appropriate erosion control, sediment control, run-on/runoff control, and housekeeping BMPs. However, the Discharger was slow to respond to the Prosecution Team's requests for information, and often needed multiple requests.

History of Violation

Where there is a history of repeat violations, the Enforcement Policy recommends a minimum multiplier of 1.1 should be used. The Prosecution Team assigns a History of Violations multiplier of **1.0** for this violation because Discharger does not have a history of construction storm water violations determined by this Board.

Step 5 – Determination of Initial Amount of Liability

The Base Liability amount for this violation 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:

$$(\text{Per Day Assessment}) \times (\text{Days of Violation}) \times (\text{Culpability}) \times (\text{Cleanup/Cooperation}) \times (\text{History of Violation}) = (\text{Base Liability Amount})$$

$$(\$2,200) \times (1) \times (1.4) \times (1.1) \times (1.0) = \mathbf{\$3,388}$$

Step 6 – Ability to Pay and Ability to Continue in Business

See section G. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

See section G. Factors Associated With All Violations

Step 8 – Economic Benefit

See section G. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See section G. Factors Associated With All Violations

Step 10 – Final Liability Amount

See section G. Factors Associated With All Violations

VIOLATION 2: FAILURE TO IMPLEMENT EROSION CONTROL BMPs

STEP 1 - Potential for Harm for Discharge Violations

Step 1 does not apply to non-discharge violations.

STEP 2 – Assessment for Discharge Violations

Step 2 does not apply to non-discharge violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. \$10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major).

The Potential for Harm for this violation was characterized as **Moderate** because:

- Discharger failed to provide effective soil cover for several inactive areas, even though Discharger indicated that soil binder was applied.
- Discharger constructed several “bowls” around existing storm drain culverts without effective soil cover that exacerbated sediment discharges into receiving waters.

- Ineffective or non-existent erosion control BMPs poses a moderate potential for harm if there is storm water or non-storm water runoff that flows through the construction site, erodes exposed soil areas generating sediment that can be transported in runoff to receiving waters.

The Enforcement Policy defines **Moderate** Potential for Harm as:

The characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major).

The Prosecution Team has determined that the Deviation from Requirement is **Major** because San Diego Water Board inspectors observed the lack of erosion controls on inactive areas that directly contributed to the discharge of sediment into receiving waters.

The Enforcement Policy defines **Major** Deviation from Requirement as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Per Day Factor and Per Day Assessment

Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement erosion control BMPs is **0.55** in Table 3 of the Enforcement Policy. Calculating the Per Day Assessment is achieved by multiplying:

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

$$(\$10,000) \times (0.55) = \$5,500$$

Days of Non-Discharge Violation

According to the documentation included with this Technical Analysis, Discharger was in violation of the erosion control requirements for inactive areas of Section D.2 in Attachment D to the Construction Storm Water Permit for 1 day (September 15, 2015).

Step 4 – Adjustment Factors

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's culpability, the Discharger's efforts for cleanup and cooperation after the violation, and the Discharger's history of violations.

Culpability

An adjustment for the initial liability based on the Discharger's culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

The Prosecution Team assigns a culpability multiplier of **1.4** for the violation because Discharger was aware of the requirement, had the capability to implement the requirement, but negligently allowed the construction site to be virtually unprotected through the lack or absence of erosion control BMPs. Discharger's lack of BMP implementation resulted in multiple direct discharges to Rose Creek upstream of Mission Bay.

Although Discharger's evidence indicates that erosion control BMPs were implemented the day before the storm event (soil binder), there was too little applied too late rendering it completely ineffective.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for cleanup and cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent.

The Prosecution Team assigns a Cleanup and Cooperation multiplier of **1.1** because Discharger made significant efforts to return the site to compliance immediately after the storm event including the implementation of erosion control BMPs. However, the Discharger was slow to respond to the Prosecution Team's requests for information, and often needed multiple requests.

History of Violation

Where there is a history of repeat violations, the Enforcement Policy recommends a minimum multiplier of 1.1 should be used. The Prosecution Team assigns a History of Violations multiplier of **1.0** for this violation because Discharger does not have a history of construction storm water violations determined by this Board.

Step 5 – Determination of Initial Amount of Liability

The Base Liability amount for this violation 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:

$$\text{(Per Day Assessment)} \times \text{(Days of Violation)} \times \text{(Culpability)} \times \text{(Cleanup/Cooperation)} \times \text{(History of Violation)} = \text{(Initial Liability Amount)}$$

$$(\$5,500) \times (1) \times (1.4) \times (1.1) \times (1.0) = \mathbf{\$8,470}$$

Step 6 – Ability to Pay and Ability to Continue in Business

See section G. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

See section G. Factors Associated With All Violations

Step 8 – Economic Benefit

See section G. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See section G. Factors Associated With All Violations

Step 10 – Final Liability Amount

See section G. Factors Associated With All Violations

VIOLATION 3: FAILURE TO IMPLEMENT ADEQUATE SEDIMENT CONTROL BMPS

STEP 1 - Potential for Harm for Discharge Violations

Step 1 does not apply to non-discharge violations.

STEP 2 – Assessment for Discharge Violations

Step 2 does not apply to non-discharge violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. \$10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major).

The Potential for Harm for this violation was characterized as **Moderate** because:

- Ineffective perimeter controls allowed sediment to be discharged from the Project directly to Rose Creek and indirectly to Mission Bay.
- Improperly implemented sediment controls on areas undergoing active construction contributed to the discharges of sediment directly to Rose Creek and indirectly to Mission Bay.
- Ineffective sediment control BMPs posed a moderate potential for harm when storm water runoff flowed through the Project, eroded exposed soil areas, generating sediment that was transported in runoff directly to Rose Creek and indirectly to Mission Bay.

The Enforcement Policy defines **Moderate** Potential for Harm as:

The characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major).

The Prosecution Team has determined that the Deviation from Requirement is **Major** because San Diego Water Board inspectors observed the lack of or ineffective sediment controls that directly contributed to the discharges of sediment into receiving waters in violation of the Construction Storm Water Permit.

The Enforcement Policy defines **Major** Deviation from Requirement as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Per Day Factor and Per Day Assessment

Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement adequate sediment control BMPs is **0.55** in Table 3 of the Enforcement Policy. Calculating the Per Day Assessment is achieved by multiplying:

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

$$(\$10,000) \times (0.55) = \$5,500$$

Days of Non-Discharge Violation

According to the documentation included with this Technical Analysis, Discharger was in violation of the sediment control BMP requirements for active areas of Section E.1, E.2, and E.3 in Attachment D to the Construction Storm Water Permit for **1** day (September 15, 2015).

Step 4 – Adjustment Factors

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's culpability, the Discharger's efforts for cleanup and cooperation after the violation, and the Discharger's history of violations.

Culpability

An adjustment for the initial liability based on the Discharger's culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

The Prosecution Team assigns a culpability multiplier of **1.4** for the violation because the Discharger was aware of the requirements, had the capability to implement the requirements, but intentionally or negligently allowed the construction site to be virtually unprotected through the lack or absence of sediment control BMPs. Discharger's lack of BMP implementation resulted in multiple direct discharges to Rose Creek upstream of Mission Bay.

Although there were some sediment control BMPs implemented, most were totally ineffective due to the absence of erosion control BMPs and a reasonable and prudent person would know that sediment control BMPs without erosion control BMPs would not be effective during a storm event with measureable precipitation.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for cleanup and cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent.

The Prosecution Team assigns a Cleanup and Cooperation multiplier of **1.1** because Discharger made significant efforts to return the site to compliance immediately after the storm event including the implementation of perimeter control BMPs, linear sediment control BMPs along the toe of slopes, face of slopes, and grade breaks, and runoff and soil stabilization control BMPs. However, the Discharger was slow to respond to the Prosecution Team's requests for information, and often needed multiple requests.

History of Violation

Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used. The Prosecution Team assigns a History of Violations multiplier of **1.0** for this violation because Discharger does not have a history of construction storm water violations determined by this Board.

Step 5 – Determination of Initial Amount of Liability

The Base Liability amount for this violation 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:

$$\begin{aligned} & (\text{Per Day Assessment}) \times (\text{Days of Violation}) \times (\text{Culpability}) \times (\text{Cleanup/Cooperation}) \times \\ & \quad (\text{History of Violation}) = (\text{Base Liability Amount}) \end{aligned}$$

$$(\$5,500) \times (1) \times (1.4) \times (1.1) \times (1.0) = \mathbf{\$8,470}$$

Step 6 – Ability to Pay and Ability to Continue in Business

See section G. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

See section G. Factors Associated With All Violations

Step 8 – Economic Benefit

See section G. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See section G. Factors Associated With All Violations

Step 10 – Final Liability Amount

See section G. Factors Associated With All Violations

VIOLATION 4: FAILURE TO IMPLEMENT ADEQUATE RUN-ON AND RUNOFF CONTROL BMPs

Step 1 – Potential for Harm for Discharge Violations

Step 1 does not apply to non-discharge violations.

Step 2 – Assessment for Discharge Violations

Step 2 does not apply to non-discharge violations.

Step 3 – Per Day Assessment for Non-Discharge Violations

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. \$10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major).

The Potential for Harm for this violation was characterized as **Major** because:

- This is a linear project, located at the bottom of a large canyon in a developed area. As such, the Project is expected to have large volumes of run-on and runoff flows bisecting the site.
- Run-on flowing over disturbed areas increases the potential for sediment discharges into receiving waters.
- Runoff leaving disturbed areas increases the likelihood of sediment in discharges to receiving waters that have not been reduced to the maximum extent practicable (MEP).

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major).

The Prosecution Team has determined that the Deviation from Requirement is **Major** because the San Diego Water Board deems the lack of run-on and runoff controls to be directly linked to some of the sediment discharges. Discharger acknowledged that it did not properly identify run-on flows from a broken culvert off-site, rendering the requirement ineffective of its essential function.

The Enforcement Policy defines **Major** Deviation from Requirement as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Per Day Factor and Per Day Assessment

Using a Potential for Harm determination of **Major** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement run-on and runoff control BMPs is **0.85** in Table 3 of the Enforcement Policy. Calculating the Per Day Assessment is achieved by multiplying:

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

$$(\$10,000) \times (0.85) = \$8,500$$

Days of Non-Discharge Violation

According to the documentation included with this Technical Analysis, Discharger was in violation of the run-on and runoff control requirements of Section F in Attachment D to the Construction Storm Water Permit for 1 day (September 15, 2015).

Step 4 – Adjustment Factors

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s culpability, the Discharger’s efforts for cleanup and cooperation after the violation, and the Discharger’s history of violations.

Culpability

An adjustment for the initial liability based on the Discharger's culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

The Prosecution Team assigns a culpability multiplier of **1.4** for the violation because Discharger was aware of the requirements, had the capability to implement the requirements, but negligently allowed the construction site to be virtually unprotected through the lack or absence of run-on and runoff controls BMPs. Discharger's lack of BMP implementation resulted in multiple direct discharges to Rose Creek upstream of Mission Bay.

A reasonable and prudent person would have considered that a construction site located in the bottom of a canyon surrounded by urban development would be subject to more run-on/runoff and would have evaluated the off-site flows to determine the source and magnitude of flow to their Project as part of the development of a Storm Water Pollution Prevention Plan.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for cleanup and cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent.

The Prosecution Team assigns a Cleanup and Cooperation multiplier of **1.1** because Discharger made significant efforts to return the site to compliance immediately after the storm event by installing adequate run-on controls which divert storm flows away from disturbed soils. However, the Discharger was slow to respond to the Prosecution Team's requests for information, and often needed multiple requests.

History of Violation

Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used. The Prosecution Team assigns a History of Violations multiplier of **1.0** for this violation because Discharger does not have a history of construction storm water violations determined by this Board.

Step 5 – Determination of Initial Amount of Liability

The Base Liability amount for this violation 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:

$$\text{(Per Day Assessment)} \times \text{(Days of Violation)} \times \text{(Culpability)} \times \text{(Cleanup/Cooperation)} \times \text{(History of Violation)} = \text{(Base Liability Amount)}$$

$$(\$8,500) \times (1) \times (1.4) \times (1.1) \times (1.0) = \mathbf{\$13,090}$$

Step 6 – Ability to Pay and Ability to Continue in Business

See section G. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

See section G. Factors Associated With All Violations

Step 8 – Economic Benefit

See section G. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See section G. Factors Associated With All Violations

Step 10 – Final Liability Amount

See section G. Factors Associated With All Violations

**VIOLATION 5: FAILURE TO IMPLEMENT GOOD SITE MANAGEMENT
“HOUSEKEEPING” BMPS**

Step 1 – Potential for Harm for Discharge Violations

Step 1 does not apply to non-discharge violations.

Step 2 – Assessment for Discharge Violations

Step 2 does not apply to non-discharge violations.

Step 3 – Per Day Assessment of Non-Discharge Violations

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. \$10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major).

The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement adequate vehicle storage and maintenance BMPs poses a substantial potential for harm if there is storm water or non-storm water runoff that flows through and transports oil, grease, or fuel from the construction site to receiving waters.

The Enforcement Policy defines **Moderate** Potential for Harm as:

The characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.”

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major).

The Prosecution Team has determined that the Deviation from Requirement is **Moderate** because while Discharger failed to implement drip pads for all construction vehicles stored on the site, there were some drip pads deployed but no longer in the proper location thereby rendering the intended effectiveness of the requirement partially compromised.

The Enforcement Policy defines **Moderate** for non-discharge violations as:

The intended effectiveness of the requirement has been partially comprised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).”

Per Day Factor and Per Day Assessment

Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to implement vehicle fluid leak BMPs is **0.35** in Table 3 of the Enforcement Policy. Calculating the Per Day Assessment is achieved by multiplying:

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

$$(\$10,000) \times (0.35) = \$3,500$$

Days of Non-Discharge Violation

According to the documentation included with this Technical Analysis, Discharger was in violation of the vehicle storage and maintenance requirements of Section B.3.a in Attachment D to the Construction Storm Water Permit for **1** day (September 15, 2015).

Step 4 – Adjustment Factors

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's culpability, the Discharger's efforts for cleanup and cooperation after the violation, and the Discharger's history of violations.

Culpability

An adjustment for the initial liability based on the Discharger's culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

The Prosecution Team assigns a culpability multiplier of **1.4** for the violation because Discharger was aware of the requirements, had the capability to implement the requirements, but negligently allowed the Project to be unprotected through the lack or absence of housekeeping BMPs during a forecasted rain event. Discharger's failure to implement adequate housekeeping BMPs by way of ineffective or missing drip pads under construction vehicles created a potential for pollutants other than sediment to be discharged to receiving waters.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for cleanup and cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier

where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent.

The Prosecution Team assigns a Cleanup and Cooperation multiplier of **1.1** because Discharger made significant efforts to return the site to compliance immediately after the storm event by purchasing drip pans that cannot be easily displaced during a storm event. However, the Discharger was slow to respond to the Prosecution Team's requests for information, and often needed multiple requests.

History of Violation

Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used. The Prosecution Team assigns a History of Violations multiplier of **1.0** for this violation because Discharger does not have a history of construction storm water violations determined by this Board.

Step 5 – Determination of Initial Amount of Liability

The Base Liability amount for this violation 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:

$$\begin{aligned} & (\text{Per Day Assessment}) \times (\text{Days of Violation}) \times (\text{Culpability}) \times (\text{Cleanup/Cooperation}) \times \\ & \quad (\text{History of Violation}) = (\text{Base Liability Amount}) \end{aligned}$$

$$(\$3,500) \times (1) \times (1.4) \times (1.1) \times (1.0) = \mathbf{\$5,390}$$

Step 6 – Ability to Pay and Ability to Continue in Business

See section G. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

See section G. Factors Associated With All Violations

Step 8 – Economic Benefit

See section G. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See section G. Factors Associated With All Violations

Step 10 – Final Liability Amount

See section G. Factors Associated With All Violations

G. FACTORS ASSOCIATED WITH ALL VIOLATIONS

Step 6 – Ability to Pay and Ability to Continue in Business

Discharger's 2014 Comprehensive Annual Financial Report indicated that its San Diego County Transportation Improvement Program (TransNet) is funded by a 0.5% sales tax initiative through 2048 with revenues from this program alone for Fiscal Year 2013/2014 of over \$280 million. Discharger has a continuous source of funding for their capital improvement projects (which specifically includes environmental mitigation), and its ratio of current (liquidable) assets to current liabilities is greater than 3.5, indicating a strong cash balance that easily meets their short-term debt/liability obligations. As a result, the Prosecution Team has determined that Discharger has the ability to pay the recommended liability amount.

Step 7 – Other Factors as Justice May Require

For Violation No. 1: Although the Project experienced three separate unauthorized discharges to Rose Creek, for this case the Prosecution Team has elected to evaluate the three separate discharges from the Project as one violation. Without attempting to calculate the gallons discharged from each of the three discharge points, the penalty calculation methodology calculates a penalty amount of \$3,388, which is disproportionate to assessments made for gallons discharged or multiple discharge points, and is not reflective of the seriousness of the violation. In addition, had the Prosecution Team elected to recommend administrative penalties for each of the three separate discharges, using the same factors in the penalty calculation methodology the total recommended penalty amount for the discharges would have been nearly the statutory maximum of \$10,000 for one discharge violation. As a result, the Prosecution Team proposes to assess the maximum per day penalty allowed by the Water Code of \$10,000 per violation. Therefore, the recommended penalty amount for Violation 1 is **ten thousand dollars (\$10,000)**.

For Violation 4: The Enforcement Policy's penalty calculation methodology calculated a penalty for failing to implement adequate run-on/runoff control BMPs (Violation 4) of \$13,090, which is above the statutory maximum allowed under the Water Code. As a result, the Prosecution Team has lowered the recommended penalty for Violation 4 to the statutory maximum of **\$10,000**.

The San Diego Water Board has incurred approximately **\$7,934** in staff costs associated with investigating the violations and preparing the Complaint. These staff costs are not divided by violation.

Step 8 – Economic Benefit

The Prosecution Team has determined that Discharger achieved an economic benefit from failing to install the appropriate pollution control devices (erosion controls, sediment controls, run-on/runoff controls, and good housekeeping measures) prior to the September 15, 2015 storm event. Using information provided by Discharger and based on the United States Environmental Protection Agency’s BEN model, Discharger’s delayed costs associated with the implementation of the appropriate pollution control devices prior to the September 15, 2015 storm event was **\$565**.

Step 9 – Maximum and Minimum Liability Amounts

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum administrative civil liability that the San Diego Water Board may assess for each violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation); and when a discharge occurs, (b) ten dollars (\$10) for every gallon discharged, over one thousand (1,000) gallons discharged, that was not cleaned up. For Violation 1 (discharge violation) the Prosecution Team is proposing the assessment of civil liability for the discharge of sediment to waters of the United States only on a per day basis based on the difficulty calculating the gallons discharged for this type of construction project. The Maximum Liability Amount that could be assessed for each violation is shown in the table below:

Violation Number	Violation Description	Days of Discharge	Maximum Liability (CWC §13385)
1	Discharges to Rose Creek Tributary to Mission Bay	1	\$10,000
2	Failure to Implement Erosion Control BMPs	1	\$10,000
3	Failure to Implement Sediment Control BMPs	1	\$10,000
4	Failure to Implement Run-on/Runoff BMPs	1	\$10,000
5	Failure to Implement Housekeeping BMPs	1	\$10,000
		Total	\$50,000

Minimum Liability Amount

Water Code section 13385, subdivision (e) requires that when pursuing administrative 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 Enforcement Policy requires that the adjusted Total Base Liability Amount be at least ten percent (10%) higher than the Economic Benefit.

The economic benefit calculated for the violations alleged in ACL Complaint R9-2015-0166 is \$565. This economic benefit is based on delayed costs associated with the implementation of BMPs (Violations 2 – 5), which resulted in a discharge violation (Violation 1). In accordance with the Enforcement Policy, the minimum liability amount for the violations addressed in Complaint R9-2015-0166 is **\$622**.

Step 10 – Final Liability Amount

Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed administrative civil liability for the violations alleged in ACL Complaint R9-2015-0166 are as follows:

Violation Number	Violation Description	Proposed Liability Amount
1	Discharges to Rose Creek Tributary to Mission Bay	\$10,000
2	Failure to Implement Erosion Control BMPs	\$8,470
3	Failure to Implement Sediment Control BMPs	\$8,470
4	Failure to Implement Run-on/Runoff BMPs	\$10,000
5	Failure to Implement Housekeeping BMPs	\$5,390
TOTAL BASE LIABILITY AMOUNT		\$42,330

The Prosecution Team finds that it is appropriate to increase the Total Base Liability amount to the maximum liability amount of **\$50,000** to recover a portion of the staff costs incurred to date. This increase is in consideration of the costs of investigation and enforcement relative to the Total Base Liability amount and is warranted given the totality of the circumstances and is intended to serve as a sufficient general and specific deterrent against future violations.

H. TOTAL PROPOSED LIABILITY AMOUNT

The total proposed liability amount for the violations addressed in Complaint No. R9-2015-0166 is **\$50,000**. A summary of the staff costs incurred to date is provided in Attachment 2. A summary of the methodology used by the Prosecution Team to calculate the proposed administrative civil liability is summarized in Attachment 1, Penalty Methodology Decision of Complaint No. R9-2015-0166.

Step 1: Potential Harm Factor

Violations	Harm/Potential Harm to Beneficial Uses [0 - 5]	Physical, Chemical, Biological or Thermal Characteristics [0 - 4]	Susceptibility to Cleanup or Abatement [0 or 1]	Total Potential for Harm [0 - 10]
Violation 1	3	2	1	6

Step 2: Assessments for Discharge Violations

Violations	Per Gallon Factor					Statutory or Policy Max per Gallon [\$]
	Potential for Harm [0 - 10]	Deviation from Requirement [minor, moderate, major]	High Volume Discharges [yes / no]	Gallons Discharge	Total Per Gallon Factor	

No Per Gallon Discharge Violations

Violations	Per Day Factor				Statutory Max per Day [section 13385]
	Potential for Harm [0 - 10]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 1	6	Major	0.22	1	\$10,000

Step 3: Per Day Assessments for Non-Discharge Violations

Violations	Per Day Factor				Statutory/ Adjusted Max [section 13385]
	Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 2	Moderate	Major	0.55	1	\$10,000
Violation 3	Moderate	Major	0.55	1	\$10,000
Violation 4	Major	Major	0.85	1	\$10,000
Violation 5	Moderate	Moderate	0.35	1	\$10,000

Initial Liability From Steps 1 - 3

Violation 1: $(.22) \times (1) \times (10,000) = \$2,200$
 Violation 2: $(0.55) \times (1) \times (\$10,000) = \$5,500$
 Violation 3: $(0.55) \times (1) \times (\$10,000) = \$5,500$
 Violation 4: $(0.85) \times (1) \times (\$10,000) = \$8,500$
 Violation 5: $(0.35) \times (1) \times (\$10,000) = \$3,500$

Step 4: Adjustments

Violations	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Multiple Violations (Same Incident)	Adjusted Days of Violation
All Violations	1.4	1.1	1	n/a	n/a

Step 5: Total Base Liability Amount

(Per day Factor x statutory maximum) x (Step 4 Adjustments)	
Violation 1:	$(\$2,200) \times (1.4) \times (1.1) \times (1) = \$3,388$
Violation 2:	$(\$5,500) \times (1.4) \times (1.1) \times (1) = \$8,470$
Violation 3:	$(\$5,500) \times (1.4) \times (1.1) \times (1) = \$8,470$
Violation 4:	$(\$8,500) \times (1.4) \times (1.1) \times (1) = \$13,090$
Violation 5:	$(\$3,500) \times (1.4) \times (1.1) \times (1) = \$5,390$

Step 6: Ability to Pay / Continue in Business

[Yes, No, Partly, Unknown]
 Yes

Step 7: Other Factors as Justice May Require

Costs of Investigation and Enforcement	\$7,934
Penalty Adjustment for Violation 1	\$6,854
Penalty Adjustment for Violation 4	(\$2,155)

Step 8: Economic Benefit

\$565

Step 9: Maximum and Minimum Liability Amounts

	Minimum	Maximum
Violation 1	\$622	\$10,000
Violation 2	\$622	\$10,000
Violation 3	\$622	\$10,000
Violation 4	\$622	\$10,000
Violation 5	\$622	\$10,000

Step 10: Final Liability Amount

(total base liability) + (other factors)
 \$50,000

Attachment 2

San Diego Association of Governments
Elvira to Morena Double Track Project
ACL Complaint R9-2015-0166
Staff Cost Summary

STAFF	HOURS	MONTHLY SALARY	Hourly	Hourly total	Benefits	Total
CCLEMENTE	16.00	\$9,899	\$57.11	\$913.77	\$394.84	\$1,308.61
RSTEWART	118.00	\$6,490	\$37.44	\$4,418.28	\$1,909.14	\$6,327.41
JHAAS	1.50	\$11,447	\$66.04	\$99.06	\$42.80	\$141.87
JSMITH	1.50	\$12,620	\$72.81	\$109.21	\$47.19	\$156.40
	137.00			TOTAL COSTS		\$7,934.30

Staff Cost Summary from September 15, 2015 through November 20, 2015