

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

**COMPLAINT R2-2017-1022
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF**

**STUART AND ERIC DEPPER
FAILURE TO SUBMIT TECHNICAL REPORTS
FORMER GLOVATORIUM FACILITY
OAKLAND, ALAMEDA COUNTY**

This Administrative Civil Liability Complaint (Complaint) alleges that Messrs. Stuart and Eric Depper (collectively, the Dischargers) failed to provide a complete technical report as required by the San Francisco Bay Regional Water Quality Control Board in a Water Code section 13267 Order (13267 Order). The 13267 Order required a technical report documenting completion of a conduit study and a public participation plan for cleanup activities associated with the former Glovatorium, Inc. (Glovatorium) site. The Regional Water Board is authorized to impose administrative civil liabilities pursuant to Water Code section 13268 for the alleged violation. This Complaint is issued under the authority of Water Code section 13323. The proposed liability is \$88,000.

The Assistant Executive Officer of the Regional Water Board hereby gives notice that:

1. The Dischargers allegedly violated provisions of law for which the Regional Water Board may impose administrative civil liability. This Complaint presents the factual basis for the alleged violations, legal and statutory authorities (including citations to applicable Water Code sections), and case-specific factors used to propose an \$88,000 liability for the alleged violations.
2. Unless waived, the Regional Water Board will hold a hearing on this matter on November 8, 2017, in the Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, California, 94612. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for judicial civil liability. The Dischargers or their representative(s) will have an opportunity to be heard, and to contest the allegations in this Complaint and the Regional Water Board's imposition of civil liability. The Dischargers will be mailed an agenda approximately ten days before the hearing date. A meeting agenda will also be available at http://www.waterboards.ca.gov/sanfranciscobay/board_info/agenda.shtml. The Dischargers must submit all legal arguments and written evidence concerning this Complaint to the Regional Water Board not later than 5 p.m. on October 9, 2017, so that such legal arguments and written evidence may be considered.
3. The Dischargers can waive their right to a hearing to contest the allegations contained in this Complaint by signing and submitting the enclosed waiver and paying the civil liability in full or by taking other actions as described in the waiver form.

FACTUAL BASIS FOR THE ALLEGED VIOLATION

1. Glovatorium is a former dry cleaning business in Oakland that operated out of two connected parcels between Manila Avenue and Broadway at 38th Street, identified as Alameda County Assessor's Parcel Numbers 12-982-10 and 12-982-16. As discussed in Exhibit A (section II), these parcels are associated with three addresses: 3815 Broadway and 3820 and 3822 Manila Avenue (collectively, the Site). The former Glovatorium was a dry cleaning business that operated six underground storage tanks (USTs) storing Stoddard solvent, fuel oil, and possibly waste oil from 1968 until the tanks were closed in 1997. Glovatorium operated dry-cleaning machines that used perchloroethylene (also known as tetrachloroethylene, PCE, or PERC) from the mid-1980s through 1996 (Exhibit A, section III). As discussed herein and in Exhibit A, discharges of waste occurred during the operations of Glovatorium.
2. Robert Depper and his wife, Martha, purchased the Site in 1968. Robert Depper operated the Glovatorium business from 1968 to 1992.
3. Upon the deaths of Robert and Martha Depper, ownership of the Site transferred to two of their sons, the Dischargers, in 2011, and they are the current owners of the Site. Exhibit A provides more details concerning their ownership and responsibilities at the Glovatorium.
4. The Executive Officer issued a 13267 Order on July 17, 2015, via U.S. Mail and electronic mail. The 13267 Order identified Glovatorium and the Dischargers as responsible parties because they are current and/or former owners or operators of the Site, and requested the submittal of a conduit study and public participation plan for the Site. (See Exhibit A, section IV.)
5. The 13267 Order correctly identified Glovatorium as a responsible party because it was a previous operator that caused the discharges of waste that contaminated the Site. Glovatorium is not named in this Complaint because Regional Water Board staff was unable to confirm that Glovatorium's designated agent for service of process, or any person authorized by the corporation to receive service, received the 13267 Order. The Secretary of State's website has two entries for the Glovatorium, Inc., one of which lists the corporation's status as dissolved, the other as "FTB [Franchise Tax Board] suspended." As explained below, the Dischargers received the 13267 Order and responded through their consultant, Franklin Goldman.
6. Glovatorium's operations caused discharges of waste the Site. At least two of the Site's USTs leaked on or before 1990. Operational practices also caused unauthorized discharges of waste into drains at the Site (Exhibit A, Section III). Environmental investigations of the soil, groundwater, and soil vapor at the Site discovered petroleum hydrocarbon constituents, perchloroethylene, and other chlorinated solvent compounds consistent with chemical and petroleum products used by Glovatorium, including an 8.5-foot-thick layer of free-phase Stoddard solvent in the ground below the Site (Exhibit A,

section V). Discharges of waste have migrated into groundwater, which is considered waters of the State.

7. Contamination at the Site requires cleanup. Alameda County Health Care Services Agency (Alameda County) started regulating the Site under a local oversight program from 1989 until March 31, 2012 (Exhibit A, section V), when oversight was transferred to the Regional Water Board (Exhibit A, section VI). The Dischargers requested Site closure at least five times.¹ Each time, the regulatory agency overseeing the Site denied the requests and communicated the rationale and any unmet Site closure requirements to the Dischargers (Exhibit A, sections V and VI). Despite direction for additional work, and without approval, the Dischargers stopped cleanup and groundwater monitoring activities in 2015.
8. Regional Water Board staff took action to move the Site toward closure. On May 28, 2015, the Executive Officer issued a tentative Cleanup and Abatement Order (CAO) to the Dischargers for their comments, which were due on June 30, 2015.
9. The tentative CAO would have required the Dischargers to complete nine tasks. Task 1 of the tentative CAO (Task 1) required the Dischargers to “Submit a technical report acceptable to the Executive Officer documenting completion of an up-to-date conduit study. A conduit study is required to evaluate the role of subsurface utilities in the migration or accumulation of the constituents of concern in the [Site’s] subsurface.”
10. Task 2 of the tentative CAO would have required the Dischargers to “Submit a technical report acceptable to the Executive Officer to ensure adequate public participation will be undertaken at key steps in the remedial action process leading to case closure.”
11. Regional Water Board Staff delayed issuance of the tentative CAO to investigate the Dischargers’ claims that additional responsible parties should be named in the tentative CAO. To expedite completion of Task 1 and Task 2, the Executive Officer issued the 13267 Order to the Dischargers on July 17, 2015. The 13267 Order referenced the draft tentative CAO and required the Dischargers “to submit by August 31, 2015, a technical report documenting the completion of a conduit study [Task 1] and a public participation plan [Task 2].”
12. The need for a conduit study and public participation plan was documented in the referenced draft tentative CAO, which describes in great detail the potential health risks of building occupants and neighboring sites due to unaddressed discharges at the Site.
13. On August 27, 2015, Franklin Goldman submitted comments on the tentative CAO and responded to the 13267 Order on behalf of the Dischargers (13267 Order Response). The portion of the 13267 Order Response pertaining to the conduit study and public

¹ The Dischargers requested closure at least five times as documented in Exhibit A and in this Complaint: from Alameda County in 2004 and 2011; and from the Regional Water Board in 2013, 2015, and 2016. They also petitioned the denials to the State Water Board in 2011, 2014, and 2016.

participation plan technical reports (Conduit Study Response and Public Participation Plan Response, respectively) contained excerpts from previously submitted reports and communication from regulatory agencies, which Regional Water Board staff reviewed prior to issuing the 13267 Order. For example, Attachment F of the Conduit Study Response consisted of text and figures from two previously submitted SOMA Environmental reports: (1) *Re-Evaluation of Preferential Pathways* report, November 3, 2005, and (2) *Site Investigation, Monitoring Well Modifications, Extraction Well Installation, and Continued MPE Pilot Testing* report, August 17, 2009. The Conduit Study Response failed to evaluate potential impacts and substantiate the potential presence of contamination within identified conduit structures (a storm drain and a sanitary sewer pipeline), and failed to propose a recommendation to abate any potential risks to public health and the environment. The Public Participation Plan Response contained a public notification document for the Site that the Regional Water Board authored and issued in relation to the tentative CAO, a site map, and a list of mailing addresses for interested parties. The Public Participation Plan Response failed to discuss specific public participation activities and associated timelines, and did not include any elements of planning that would allow the public to participate in, and be informed about, the Site cleanup and case closure process.

14. On January 7, 2016, the Regional Water Board Executive Officer issued a Notice of Violation (NOV) to the Dischargers because they failed to submit an acceptable conduit study and public participation plan by August 31, 2015. The NOV also reiterated the following:
 - a January 2011 work plan to assess the extent of petroleum free product and to evaluate the potential for vapor intrusion to affect indoor air has not been implemented;
 - the Dischargers suspended groundwater monitoring at the Site without approval from the Regional Water Board and staff are unable to assess current groundwater conditions;
 - updated information is needed on sources of contamination at the Site (e.g., there are no new data from well MPE-2 where source product was observed to be increasing, and potential secondary sources of contamination below the Site building have not been evaluated);
 - the stability of chlorinated volatile organic compounds in groundwater have not been defined in the vicinity of residential properties down-gradient of the Site; and
 - the vapor intrusion pathways from soil to buildings at the Site and at nearby down-gradient properties have not been evaluated.

15. On January 28, 2016, Franklin Goldman responded to the January 7, 2016, NOV on behalf of the Dischargers (NOV Response). The NOV Response failed to provide new data or relevant information to fulfill the 13267 Order requirements. Instead, the NOV Response argued that the 13267 Order Response was not deficient.

16. In a January 30, 2016, letter, Franklin Goldman submitted the fifth request for Site closure on behalf of the Dischargers. The letter requested Site closure under the Low-Threat Underground Storage Tank Closure Policy (Closure Policy) and provided a Human Health Risk Assessment for the Site. The Human Health Risk Assessment included results from a soil vapor investigation Optimal Technology conducted on November 23, 2015, in which soil vapor samples were collected from 11 locations throughout and adjacent to the Site. All samples collected contained PCE, and six samples collected contained trichloroethylene (TCE).
17. In a July 26, 2016, letter, the Regional Water Board Executive Officer rejected the Dischargers' fifth request for site closure. The response discussed Closure Policy criteria that were not met and how data gaps and deficiencies in standard practices made the submitted Human Health Risk Assessment inadequate. The Dischargers petitioned the closure rejection to the State Water Board.
18. On August 11, 2016, State Water Board staff agreed with Regional Water Board staff's determination that all of the Closure Policy criteria have not been met and that closure of the Site was inappropriate.
19. On March 20, 2017, Regional Water Board Assistant Executive Officer issued a second NOV to the Dischargers for failure to submit an adequate conduit study and public participation plan as required by the 13267 Order. The second NOV explained that the 13267 Order Response and NOV Response were inadequate because of the deficiencies discussed above. The Dischargers have not responded to the second NOV.

ALLEGED VIOLATIONS

20. **Violation 1:** The Dischargers failed to submit an acceptable conduit study for the Site by August 31, 2015, as required by the 13267 Order. As of the date of this Complaint, the technical report is 717 days past due.
21. **Violation 2:** The Dischargers failed to submit an acceptable public participation plan for the Site by August 31, 2015, as required by the 13267 Order. As of the date of this Complaint, the technical report is 717 days past due.

LEGAL AUTHORITY

22. Water Code section 13323 authorizes the Regional Water Board to issue a complaint to any person on whom administrative civil liability may be imposed under its statutory authority. This Complaint alleges the Discharger's act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability, and the proposed civil liability.
23. There is no possibility that the imposition of an administrative civil liability may have a significant effect on the environment. (Cal. Code Regs., tit. 14 §§ 15378 and 15061,

subd. (b) (3).) This enforcement action is also exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, Title 14, section 15321.

24. Notwithstanding the issuance of this Complaint, the Regional Water Board and/or the State Water Board shall retain the authority to assess additional penalties against the Dischargers for other violations of the 13267 Order for which a liability has not yet been assessed or for violations that may subsequently occur.

STATUTORY LIABILITY

25. Any person failing or refusing to furnish technical or monitoring program reports as required by Water Code section 13267 is guilty of a misdemeanor and subject to penalties under Water Code section 13268(b). (Wat. Code, § 13268, subd. (a)(1).)
26. The Regional Water Board may impose administrative civil liability for non-discharge violations of a 13267 Order on a daily basis. The maximum civil liability for each violation is \$1,000 per day of violation. (See Wat. Code, § 13268, subd. (b)(1).)

PROPOSED CIVIL LIABILITY

27. **Minimum Liability:** The minimum administrative civil liability for the violations is \$2,990 (rounded). This is based on the upper range estimate of the Dischargers' economic benefit realized by the discharger for failure to submit a technical report for a conduit study and public participation plan for the Site, plus 10 percent.
28. **Maximum Liability:** The maximum administrative civil liability for Violation 1 is \$717,000, and the maximum administrative civil liability for Violation 2 is \$717,000. The total maximum administrative civil liability for Violations 1 and 2 is \$1,434,000. This is based on the maximum allowed by Water Code section 13268: \$1,000 for each day in which the violations occurred.
29. **Proposed Liability:** The Regional Water Board Assistant Executive Officer proposes that administrative civil liability be imposed in the amount of \$88,000. The Exhibit B attachment (incorporated herein by this reference) presents a discussion of the factors considered and the values assessed to calculate the proposed liability in accordance with the Enforcement Policy and Water Code section 13327. The Proposed Liability is within the maximum liability allowed by statute.

August 16, 2017

Dyan C. Whyte
Assistant Executive Officer

Date

Attachments: Exhibit A: Site History Memo
 Exhibit B: Factors Considered in Determining Administrative Civil Liability

EXHIBIT A

Site History Memorandum

STUART DEPPER AND ERIC DEPPER FAILURE TO SUBMIT TECHNICAL REPORTS FORMER GLOVATORIUM FACILITY OAKLAND, ALAMEDA COUNTY

I. INTRODUCTION

This memorandum provides context and support for findings in Administrative Civil Liability Complaint No. R2-2017-1022 (Complaint) and the proposed administrative civil liability assessment against Messrs. Stuart and Eric Depper (collectively, Dischargers) for violations of technical reporting requirements issued pursuant to Water Code section 13267. Following is historical information on the site at issue, including Glovatorium Inc. (Glovatorium) site operations, Depper family ownership and operation, and the regulatory interactions that lead to issuance of the technical reporting requirements allegedly violated.

II. SITE DESCRIPTION AND HYDROLOGY

Glovatorium is a former dry cleaning business in Oakland. Two connected parcels between Manila Avenue and Broadway Street at 38th Street are associated with Glovatorium operations: 3815 Broadway (Alameda County assessor's parcel number [APN] 12-982-10) and 3822 (or 3820) Manila Avenue (APN 12-982-16) (collectively, the Site) (see Figure 1). Messrs. Stuart and Eric Depper also own two neighboring residential properties, 3816 Manila Avenue (APN 12-982-15) and 348 38th Street (APN 12-982-14), which may or may not have been involved in Glovatorium operations. For the purposes of this Complaint, the residential properties are not included as part of the Glovatorium Site.

Groundwater flows through the Site from the northeast to the southwest (Re-evaluation of Preferential Pathways, SOMA Environmental Engineering, Inc. [SOMA Environmental] [Nov. 3, 2005], at p. 12). Subsurface utilities at the Site, including a storm drain culvert and a sanitary sewer pipeline (see Figure 2), have been identified as possible preferential flow pathways for contaminants migrating away from the Site (previously referenced document at p. 20). The storm drain is a 54-inch nominal diameter utility that passes through the Site from Manila Avenue to the west to 38th Street to the south (as shown in Figure 2). The depth of the top of the storm drain below the Site ranges from approximately 4 to 8.7 feet below the ground surface (previously referenced document at p. 15). The sanitary sewer pipeline is a 10-inch nominal diameter utility that connects floor drains at the Site to the main sewer pipeline on Manila Avenue. The sanitary sewer line running below the Site is located at depths between approximately 2 to 5 feet below the ground surface (previously referenced document at p. 16). Groundwater at the Site is shallow, with average depths to groundwater varying seasonally between 4 and 14 feet below the ground surface, fluctuating above and below the depth of storm drain and sanitary sewer utilities in the Site's subsurface (previously referenced document at p. 12).



Figure 1. Map showing approximate boundaries of parcels owned by the Dischargers. Parcels outlined with a thick red border are considered part of the Site. Parcels outlined with a dashed line are not considered part of the Site. Base map modified by Maya McInerney to highlight the approximate boundaries of the parcels owned by the Dischargers. Source: GoogleEarth, retrieved August 2, 2017.

The nearest surface water body down-gradient of the Site is Lake Merritt, which lies approximately 1.1 miles south. The nearest public supply well is located approximately 4.6 miles to the east. East Bay Municipal Water District (EBMUD) provides water to the area, and neither the well nor the lake are currently used for municipal water supply.

III. GLOVATORIUM OPERATIONS AND SOURCE OF CONTAMINATION

Six underground storage tanks (USTs) at the Site were used to store Stoddard solvent, fuel oil, and possibly waste oil. The USTs were closed in place in 1997 (previously referenced document at p. 8). The volumes of the six USTs ranged from 800 gallons to 5,000 gallons (Letter to Stuart Depper, HK2, Inc./SEMCO [Aug. 1, 1997], at p. 1). The approximate locations of the USTs closed in place at the Site are shown in Figure 2. According to an August 30, 2016, letter from the Dischargers' consultant, Franklin Goldman of Environmental and Hydrogeological Consulting, dry cleaning operations at the Site used Stoddard solvent beginning in 1968 and used perchloroethylene (also known as tetrachloroethylene, PCE, or PERC) from the mid-1980s through 1996 (Letter to Regional Water Board, Franklin Goldman [August 30, 2016], at p. 3).

A release occurred at the Site in or before 1990. During a fuel tank and piping inspection at the Site by Petrotech on May 22, 1990, at least one UST was found to be functioning improperly, and a Glovatorium representative provided information that pumping issues from the tanks

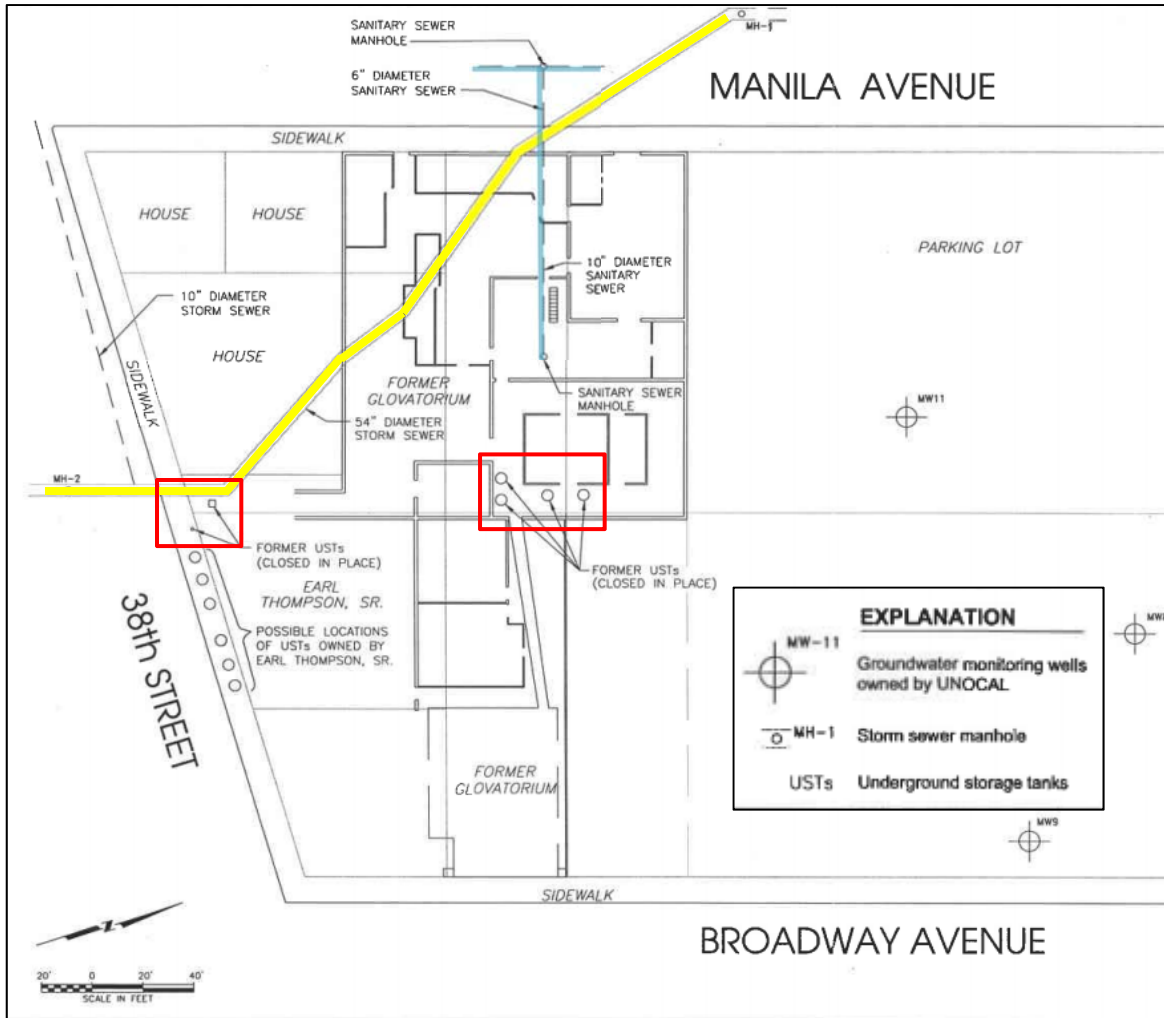


Figure 2. LFR Levine-Fricke Site vicinity map showing locations of USTs, storm sewer, and sanitary sewer in relation to the Site. Locations of USTs closed in place are shown in red boxes. Location of storm sewer is highlighted in yellow, and location of sanitary sewer is highlighted in blue. Base map modified by Maya McInerney to highlight location of USTs, storm sewer, and sanitary sewer. Source: Results of Utility Survey and Work Plan for Soil and Grab Groundwater Investigation, LFR Levine-Frick (May 6, 1999).

began shortly after the October 17, 1989, earthquake (Letter to Eric Depper, Petrotek [May 31, 1990]). On October 15, 1990, soil and liquid samples were collected at the Site as part of an Oakland Police Department search warrant (Letter to Robert Depper, Alameda County Health Care Services Agency [Alameda County] [Jan. 8, 1991], at p. 1). Alameda County communicated sampling results to Robert Depper in a January 8, 1991, letter that identified a release of petroleum and Stoddard solvent and determined that “there are clearly leaks or holes (or both) in the underground tank cluster under the floor of the building” (previously referenced document at p. 2). Leak testing of the USTs in 1997 confirmed that there were holes in two of the tanks (Letter to Stuart Depper, HK2, Inc./SEMCO [Aug. 1, 1997], at p. 3).

Operational practices were also responsible for releases from the Site. Former Glovatorium employees have reported that cleaning fluids and wastewater containing dry cleaning fluids

were routinely allowed to flow into the sanitary sewer system through floor drains at the Site (Sentencing Memorandum, Alameda County District Attorney's Office [Oct. 6, 1995], at p. 7). EBMUD issued a wastewater discharge permit to the Glovatorium, effective March 21, 1992, that prohibited the discharge of dry cleaning waste and required floor and sewer drains previously used to dispose of waste to be sealed (EBMUD Waste Discharge Permit [Mar. 21, 1992]). The drains were not sealed in a timely manner and hazardous waste was improperly stored and disposed of at the Site (Sentencing Memorandum, Alameda County District Attorney's Office [Oct. 6, 1995], at p. 7).

IV. OWNERS AND OPERATORS

Robert Depper and his wife, Martha, purchased the Site in 1968 and began operating the Glovatorium business at the Site as early as 1968 (Letter to San Francisco Bay Regional Water Quality Control Board [Regional Water Board], Franklin Goldman [Aug. 30, 2016], at p. 2). Two of Robert and Martha Depper's sons, Stuart and Eric Depper, became owners of the Site and Glovatorium business in around March 2011 and had responsibility for dry cleaning operations at the Site prior to this date, as further discussed below:

1. Stuart Depper became an owner of the Site around March 2011, receiving a 49 percent ownership share as part of a Settlement Agreement according to the second amendment of the Martha R. Depper Living Trust (Letter to Regional Water Board, Harris, Hamman & Glick [May 24, 2017], at pp. 110-111). Prior to ownership, Stuart Depper was an operator at the Site from approximately 1989 through 1995 (Letter to Regional Water Board, Franklin Goldman [Aug. 30, 2016], at p. 2).
2. Eric Depper became an owner of the Site around March 2011, receiving a 49 percent ownership share as part of a Settlement Agreement according to the second amendment of the Martha R. Depper Living Trust (Letter to Regional Water Board, Harris, Hamman & Glick [May 24, 2017], at pp. 110-111). Eric Depper conducted operations at the Site prior to ownership. Eric Depper owned and operated Professional Industrial Services at the Site starting in 1993 and was a route truck driver for Glovatorium from 1989 through 1992 (Letter to Regional Water Board, Franklin Goldman [Nov. 27, 2015], at p. 2).

V. ALAMEDA COUNTY OVERSIGHT

Alameda County was the lead regulatory agency under the local oversight program from 1989 until 2012. Here is a brief summary of events during that time:

- **1989 through 1994**
Alameda County inspected the Site in 1989 and issued a notice of violation identifying violations of California Code of Regulations Titles 19, 22, and 23 (Letter to Stuart Depper, Alameda County [Jul. 10, 1989], at pp. 2-3). This was the first in a series of Site inspections that occurred from 1989 through 1994. Inspectors communicated violations found during the inspections to Stuart and Robert Depper. These violations related to the improper handling, storage, and disposal of hazardous materials, as well as insufficient monitoring and permitting of USTs at the Site (Letters to Stuart Depper, Alameda County [Jul. 10, 1989; May 2, 1990; Aug. 20, 1990; and Sept. 23, 1994]; Letter to Robert Depper, Alameda County [Jan. 8, 1991]).

- **1995**

As a result of investigations that took place from 1989 through 1994, Robert Depper plead no contest to charges under the Health and Safety Code for illegally disposing hazardous waste by allowing USTs to leak and disposing of hazardous waste in a dumpster (Sentencing Memorandum, Alameda County District Attorney's Office [Oct. 6, 1995], at p. 7). Stuart Depper plead no contest to a felony charge under the Health and Safety Code for illegally disposing of hazardous waste by allowing USTs to leak (previously referenced document at p. 8). In the Sentencing Memorandum dated October 6, 1995, Deputy District Attorney Lawrence Blazer cited the following aggravating factors to show that the violations were unusually egregious: (1) the persistent nature of the violations, after repeated warnings; (2) the fact that some of the violations continued to that day; (3) the fact that the defendants, particularly Stuart, had lied to environmental regulators or avoided responsibility; and (4) the extraordinarily hostile attitude of the defendants toward regulators (previously referenced document at p. 11).

- **1997**

In accordance with an April 28, 1997, Order for Tank Closure and Preliminary Investigation from Alameda County Superior Court, the Site's six USTs and associated piping systems were backfilled with cement-sand slurry or pea gravel and closed in place (Order for Tank Closure and Preliminary Investigation, Alameda County District Attorney's Office [Apr., 28, 1997]; Letter to Stuart Depper, HK2, Inc./SEMCO [Aug. 1, 1997], at p. 2). (Four of the closed tanks are located inside a building at the Site, and two are located under the sidewalk on 38th Street. Tank locations are shown in red boxes in Figure 2.)

- **1998 through 2001**

GeoSolve, LLC, LFR Levine-Fricke, and SOMA Environmental conducted investigations at the Site (Second Phase Subsurface Investigation Report of Hydrocarbons, GeoSolve, LLC [Oct. 13, 1998]; Results of Utility Survey and Work Plan for Soil and Grab Groundwater Investigation, LFR Levine-Frick [May 6, 1999]; Workplan to Conduct Additional Investigation at the Former Glovatorium, SOMA Environmental [Jun. 15, 2001]). Investigation activities included a groundwater monitoring and sampling.

- **2002 through 2012**

Investigations detected free product at the Site up to 8.5 feet in thickness; removal of the free product began June 11, 2002 (Free Product Removal Report, SOMA Environmental [Jun. 28, 2004], at pp. 5-6, and 8).

On September 30, 2004, Stuart Depper submitted the first request for Site closure (Human Health Risk Assessment and Request for Site Closure at the Former Glovatorium Site, SOMA Environmental [Sept. 30, 2004]). Alameda County rejected the closure request because, contrary to SOMA Environmental assertions and evidence, (1) the VOC plumes did not appear to be shrinking, (2) well yield alone was insufficient to show that groundwater below the Site should not be classified as a drinking water source, (3) groundwater modeling results were inconclusive, (4) the uncertainty analysis was

insufficient, and (5) soil and groundwater remediation may be necessary at the Site (Letter to Stuart Depper, Alameda County [Jun. 21, 2005], at pp. 3-4).

On November 3, 2005, SOMA Environmental submitted a report concluding that “a 54-inch storm drain and main sanitary sewer line along Manila Avenue are among those structures that could act as preferential flow pathways [for contaminant transport]” (Re-evaluation of Preferential Pathways, SOMA Environmental [Nov. 3, 2015], at p. 20).

From 2002 through 2012, remediation activities at the Site included (1) removal of free product from monitoring wells and (2) operation of a multi-phase extraction system to treat soil (vapor) and groundwater (First Semi-Annual 2012 Groundwater Monitoring and Interim Remedial Action Report, SOMA Environmental [May 1, 2012], at pp. 5-6). From September 2008 through April 2012, approximately 274,000 gallons of groundwater were treated and discharged into the EBMUD sewer system under permits from EBMUD (Second Semi-Annual 2012 Self-Monitoring Report, SOMA Environmental [Jan. 16, 2013], at p. 5). During its operation, the multi-phase extraction system removed approximately 8,110 pounds of volatile organic compounds (as Stoddard solvents) from Site groundwater (First Semi-Annual 2012 Groundwater Monitoring and Interim Remedial Action Report, SOMA Environmental [May 1, 2012], at p. 19). This treatment system has remained offline since April 6, 2012 (Second Semi-Annual 2012 Self-Monitoring Report, SOMA Environmental [Jan. 16, 2013], at p. 6).

SOMA submitted a *Workplan to Delineate Extent of Free Product and Conduct Soil Vapor Sampling* on January 26, 2011, and an addendum to the workplan on March 28, 2011, (collectively, the Workplan) to address increasing thickness of petroleum free product observed in well MPE-2 (from 0.24 feet in February 2010 to 2.44 feet in August 2010) and well MPE-3 (from 0.34 feet in February 2010 to 0.84 feet in August 2010). On April 27, 2011, Alameda County approved the Workplan, which included four tasks: (1) permit acquisition, health and safety plan preparation and subsurface utility clearance; (2) soil boring advancement; (3) soil vapor study; and (4) report preparation. The Workplan has not been implemented.

On September 19, 2011, through his consultant, Stuart Depper submitted a second request to close the Site (Letter to Alameda County, Franklin Goldman [Sept. 19, 2011]). Alameda County denied the request, stating, “Given the site conditions, it is clear that additional work is needed at this site and that a request for closure is not appropriate” (Letter to Stuart Depper, Alameda County [Nov. 16, 2011], at p. 1).

On November 18, 2011, Stuart Depper petitioned the State Water Resources Control Board (State Water Board) for UST site closure. On January 26, 2012, Alameda County responded to a State Water Board request for information, highlighting the work that still needed to be done at the Site, which included, among other findings, the need to conduct additional free product removal and soil vapor sampling, as well as the need to address the potential for rebound and the generation of daughter products (Letter to State Water Board, Alameda County [Jan. 26, 2012], at pp. 2-3). In this letter, Alameda County noted that, in its review of the Petition, it found “that the justifications presented lack technical merit and in several cases are misleading, incomplete, or erroneous” and that “The

Petition demonstrates an inordinate degree of bias in its technical evaluations that is not commensurate with accepted industry practice” (previously referenced document at p. 1). Stuart Depper withdrew this petition for UST site closure in an April 20, 2013, letter to Ben Heningberg of the State Water Board.

VI. REGIONAL WATER BOARD OVERSIGHT

On May 31, 2012, Alameda County Environmental Health transferred the Glovatorium case to the Regional Water Board. Regional Water Board staff then began actively regulating cleanup activities at the Site.

In 2012, free product at the Site was analyzed and determined to be predominately Stoddard solvent (a type of petroleum hydrocarbon) (Letter to Regional Water Board, Franklin J. Goldman [Dec. 27, 2012], at p. 1). Franklin Goldman continued monitoring groundwater wells at the Site from 2012 through March 2015, reporting that concentrations of chlorinated volatile organic compounds and petroleum hydrocarbons in groundwater were substantially above vapor risk levels and drinking water standards (Final Groundwater Monitoring Report of Hydrocarbons Related to the Underground Storage Tanks, Franklin Goldman [Mar. 20, 2015]).

On October 2, 2013, Franklin Goldman submitted a third Site closure request under the Low-Threat Underground Storage Tank Closure Policy (Letter to Regional Water Board, Franklin Goldman [October 2, 2013]). Regional Water Board staff did not respond to the case closure request within 60 days. On December 12, 2013, Stuart Depper filed a case closure petition requesting State Water Board Review.

Regional and State Water Board staff subsequently visited the Site on April 24, 2014, and met with Stuart Depper, Steven Depper (representing Martha Depper), and Franklin Goldman to discuss Site cleanup (Board Storm Water Screening Inspection Form, Regional Water Board [Apr. 24, 2014]).

On May 28, 2014, Regional Water Board staff issued a letter to Stuart Depper rejecting the third request for Site closure for reasons that included (1) a lack of data to substantiate that the petroleum and PCE groundwater contaminant plumes are stable or decreasing in areal extent, and (2) a lack of data to determine whether there has been a significant post-remediation rebound of petroleum and solvent compounds in groundwater. The May 28, 2014, letter also required Stuart Depper to submit a technical report pursuant to Water Code section 13267 to address impediments to case closure and to update the Site’s Conceptual Site Model. The letter restated the need for four consecutive quarters of groundwater sampling and analysis to determine plume stability and evaluate rebound.

State Water Board staff reviewed the Regional Water Board staff decision to deny case closure, stating in its August 12, 2014, response, “requirements for case closure have not been met at this time and, therefore, closure of the UST case is not appropriate. Current Site conditions support a potential threat to human health, safety, and the environment. At this point in time, insufficient data are available to determine that corrective action ensures the protection of human health, safety, and the environment. Case closure is inappropriate at this time” (Letter to Stuart Depper, State Water Board [Aug. 12, 2014], at p. 4).

On March 5, 2015, Regional Water Board Assistant Executive Officer Dyan Whyte sent a notice of violation to Stuart Depper because he failed to submit the technical report required in the May 28, 2014, letter.

On March 31, 2015, Franklin Goldman submitted a letter on behalf of the Dischargers containing a technical report and a fourth request for Site closure (Request for Closure, Update of Conceptual Site Model, and Technical Reporting to Substantiate Plume Stability and Regional Board Impediments to Closure Associated with the UST Investigation Area, Franklin Goldman [Mar. 31, 2015]). This communication referenced recent groundwater monitoring data, including the data for the prior three consecutive quarters. On May 7, 2015, Franklin Goldman submitted an annex to the March 31, 2015 communication that further discussed monitoring efforts and the Dischargers' request for Site closure (Annex to Technical Report dated March 31, 2015, Regarding the Former Glovatorium, Franklin Goldman [May 7, 2015]).

On May 28, 2015, Regional Water Board staff issued the Dischargers a tentative Cleanup and Abatement Order (tentative CAO) pursuant to Water Code section 13304. The tentative CAO summarized the Site's regulatory status and proposed cleanup requirements. Tentative CAO findings established the need to further characterize petroleum compounds and chlorinated solvents remaining in soil, soil vapor, and groundwater at the Site. The first two of nine tasks in the tentative CAO required completion of a conduit study to characterize pollutant migration and accumulation in subsurface utilities (Section C, Task 1) and a public participation plan for the remedial action and case closure process (Section C, Task 2). In a June 11, 2015, letter to the Regional Water Board, the Dischargers requested a 60-day extension to the original June 30, 2015, deadline for submitting comments on the tentative CAO. On July 17, 2015, the Regional Water Board Executive Officer approved the request, extending the deadline to August 31, 2015.

The Regional Water Board Executive Officer also issued the Dischargers a requirement for technical reports pursuant to Water Code section 13267 (13267 Order) on July 17, 2015. The 13267 Order required the Dischargers to complete the first two tasks in the tentative CAO, expediting the tasks prior to the preparation of a remedial action plan. Specifically, the 13267 Order required the Dischargers to submit a technical report documenting the completion of a conduit study (Task 1) and a public participation plan for the Site (Task 2) by August 31, 2015. The Dischargers failed to submit a complete conduit study and public participation plan for the Site.

As further discussed in the accompanying complaint, the Regional Water Board Executive Officer and Assistant Executive Officer issued two notices of violation informing the Dischargers of these violations and potential penalties and they have yet to comply.

EXHIBIT B

Alleged Violation and Factors in Determining Administrative Civil Liability

STUART DEPPER AND ERIC DEPPER FAILURE TO SUBMIT TECHNICAL REPORTS FORMER GLOVATORIUM FACILITY OAKLAND, ALAMEDA COUNTY

The State Water Resources Control Board Water Quality Enforcement Policy (May 2010) (Enforcement Policy) establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors required by Water Code section 13327. Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount for each of two violations is presented below.

ALLEGED VIOLATIONS

On July 17, 2015, the San Francisco Bay Regional Water Quality Control Board (Regional Water Board) Executive Officer issued a requirement for a technical report to Messrs. Stuart and Eric Depper (collectively, the Dischargers) pursuant to Water Code section 13267 (13267 Order). The 13267 Order required the Dischargers to submit a technical report documenting completion of a conduit study and a public participation plan for the former Glovatorium, Inc. (Glovatorium) site in Oakland, California, identified as Alameda County Assessor's Parcel Numbers (APNs) 12-982-10 and 12-982-16 (Site).¹ The conduit study and public participation plan were due August 31, 2015. As of the date of this Administrative Civil Liability Complaint (Complaint), the Dischargers have allegedly failed to submit an adequate conduit study and public participation plan, both of which are violations of the 13267 Order subject to administrative civil liability as set forth below.

Violation 1: Failure to Submit Technical Report for Conduit Study

The Dischargers failed to submit an acceptable conduit study for the Site as due August 31, 2015 (717 days of violation). As detailed in the Complaint, the Dischargers' August 27, 2015, Conduit Study and Public Participation Plan and January 28, 2016, response to a Notice of Violation (NOV) (collectively, 13267 Responses) did not contain new information as the 13267 Order required. The 13267 Responses contained text and figures from previous investigative reports, information that originally supported the need for and issuance of the 13267 Order. The 13267 Responses allege that the storm drain and sanitary sewer are acting as preferential pathways, but fail to provide evidence to confirm or deny this allegation or substantiate whether the identified storm drain and sewer lines are the sources of PCE contamination at the Site and nearby

¹ Glovatorium's former operations have been associated with two connected parcels between Manila Avenue and Broadway Street at 38th Street: 3815 Broadway (APN 12-982-10) and 3822 (or 3820) Manila Avenue (APN 12-982-16). The Dischargers also own two neighboring residential properties, 3816 Manila Avenue (APN 12-982-15) and 348 38th Street (APN 12-982-14) that may or may not have been involved in Glovatorium operations. The residential properties may be included as part of the Site for future enforcement actions, including a Cleanup and Abatement Order under Water Code section 13304, if additional evidence is obtained that connects the properties to Glovatorium operations.

properties. Additionally, the 13267 Responses failed to provide adequate recommendations to abate identified risks to public health and the environment. The failure to submit an acceptable conduit study is a violation of Water Code section 13267 and subject to administrative liabilities pursuant to Water Code section 13268(b)(1).

Violation 2: Failure to Submit Technical Report for Public Participation Plan

The Dischargers failed to submit an acceptable public participation plan for the Site as due August 31, 2015 (717 days past due). The 13267 Responses are unacceptable because they failed to discuss specific public participation activities and associated timelines; did not include any elements of planning that would allow the public to participate in, and be informed about, the Site cleanup and case closure process; and concluded that the Site cleanup is complete. The failure to submit an acceptable public participation plan is a violation of Water Code section 13267 and subject to administrative liabilities pursuant to Water Code section 13268(b)(1).

ADMINISTRATIVE CIVIL LIABILITY CALCULATION STEPS

STEP 1 – POTENTIAL FOR HARM FOR DISCHARGE VIOLATIONS

This step does not apply because the violation is not a discharge.

STEP 2 – ASSESSMENTS FOR DISCHARGE VIOLATIONS

This step does not apply because the violation is not a discharge.

STEP 3 – PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS

The Enforcement Policy specifies that, for non-discharge violations, an initial liability be determined from the maximum per-day liability multiplied by the number of days in violation and a per-day factor that ranges from 0.1 to 1 (based on a matrix) corresponding to the Potential for Harm and Deviation from Requirement. The Potential for Harm reflects the characteristics and/or the circumstances of the violation and its threat to beneficial uses. Deviation from Requirement reflects the extent to which a violation deviates from the specific requirement violated. Non-discharge violations harm or undermine the regulatory program.

Potential for Harm

The evaluation of Potential for Harm considers whether the characteristics of the violation present a minor, moderate, or major threat to beneficial uses.

Violation 1: The Potential for Harm is **moderate**.

A “moderate” Potential for Harm applies to a violation that “present[s] a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.” (Enforcement Policy, p. 16.)

The Dischargers' failure to submit an acceptable conduit study for the Site presents a substantial threat to beneficial uses. The circumstances of the violation indicate a substantial potential for harm because a conduit study is needed to characterize subsurface utilities that may be preferential pathways for contaminants to migrate from the Site. Subsurface utilities were likely installed in excavated trenches backfilled with material that may be porous or less consolidated than surrounding soil. Sand, for example, is a common porous backfill material because sand consolidates less over time and provides better support for pipelines. A utility corridor can be the path of least resistance when it comes to subsurface contaminant migration, and its characterization is important for a Site Conceptual Model. When sewers pass through contaminated groundwater, not only is the area around the sewer a potential conduit for contaminants, but the sewer itself may receive groundwater inflow. Once in the sewer line, contaminants in groundwater may partition into the gas phase, increasing the risk for vapor intrusion impacts.²

As discussed in Exhibit A, groundwater fluctuates above and below the depth of storm drain and sanitary sewer utilities in the Site's subsurface. The utilities may be conduits for the preferential migration of petroleum hydrocarbon and chlorinated solvent compounds as free product, constituents dissolved in groundwater, and vapors moving through soil gas. The concentrations of these compounds present in soil, groundwater, and soil vapor at the Site were above the acceptable risk level when last reported to the Regional Water Board in 2015 (see Table 1). A conduit study is necessary to characterize the nature and extent of pollutants at the Site, and to complete an evaluation of potential risks to offsite receptors, particularly indoor air risk to the neighboring community.

There is also substantial harm to the regulatory process. The failure to submit an acceptable conduit study delays the cleanup process and prevents Regional Water Board staff from moving this case to closure. The Dischargers have substantially impaired the Regional Water Board's ability to perform its statutory and regulatory functions. The last data reported for the Site was in 2015. The Regional Water Board does not have current information on the Site's contamination levels and never received confirmation that the utility conduits are or are not potential pathways for contaminant migration. As detailed in Exhibit A, the Site is not ready for closure based on existing data.

Violation 2: The Potential for Harm is **moderate**.

The Dischargers' failure to submit an acceptable public participation plan for the Site presents a substantial threat to beneficial uses. The circumstances of the violation indicate a substantial potential for harm because there are no means by which the public (interested persons) will be informed of proposed contaminant characterization, remediation, and monitoring at the Site. There is substantial potential for harm to human and environmental health because the Dischargers have not fully characterized contaminants at the Site and the neighboring community may be at risk. Moreover, the Dischargers have failed to properly inform the public of the potential risks. The contamination of the soil, groundwater, and soil vapor at the Site (see Table 1) indicate potential risks to human health at and nearby the Site.

² McHugh, T., P. Loll, and B. Eklund. 2017. *Recent advances in vapor intrusion site investigations*. Journal of Environmental Management. p. 1-10.

The failure to submit a public participation plan negatively affects the transparency of the regulatory process and stifles community awareness of a cleanup process that poses potential risks to human health. The Regional Water Board’s ability to perform its statutory and regulatory functions has been substantially impaired.

Table 1. Soil, groundwater, and soil vapor contamination present at the Site during 2015 analysis

Contaminant	Soil (mg/kg)		Groundwater (µg/L)		Soil Vapor (µg/m ³)	
	Maximum Level at the Site ¹	Residential / Commercial Shallow Soil Direct Exposure Human Health Risk Levels ²	Maximum Level at the Site ³	Groundwater MCL ⁴	Maximum Level at the Site ¹	Residential / Commercial Soil Gas Vapor Intrusion Human Health Risk Levels ²
PCE	0.708	0.6/2.7	90	5	116,583	240/2,100
TCE	0.0094	1.2/8.0	24	5	2,476	240/3,000
TPHss	-- ⁵	160/820	8,100	150 ⁶	-- ⁵	68,000/570,000
cis-1,2-Dichloroethene	0.0067	19/90	1,200	6	ND ⁷	4,200/35,000

Bold text highlights reported contaminant concentrations above acceptable contamination levels.

1. Soil samples were collected from the Site on November 11, 2015. Soil vapor samples were collected from the Site on November 23, 2015. Soil and soil vapor analysis results were reported to the Regional Water Board in a January 30, 2016, communication (*Shallow Soil Sampling and Sub-slab Soil Gas Investigation and Human Health Risk Assessment of Chlorinated Solvents & Request for UST Site Closure*).
2. Value from Regional Water Board *ESL Workbook* (Tier 1 ESLs Summary Tables), February 2016 Rev.
3. Groundwater samples were collected most recently from the Site on March 3, 2015. Analysis results were reported to the Regional Water Board in a March 20, 2015, report (*Final Groundwater Report of Hydrocarbons Related to the Underground Storage Tanks*).
4. MCL = Maximum Contaminant Level
5. TPHss not tested
6. MCL for TPHss not available. The value shown is the human health based number calculated for exposure to TPHss contaminated tap water.
7. ND = Non-Detect

Deviation from Requirement

The evaluation of the Deviation from Requirement considers whether the characteristics of the violation present a minor, moderate, or major impact to the effectiveness of the requirement.

Violation 1: The Deviation from Requirement is **major**.

A “major” Deviation from Requirement is one where “the requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).” (Enforcement Policy, p. 16.)

The 13267 Responses rendered the requirement for a conduit study ineffective because the Dischargers did not submit current and responsive information that fully evaluated subsurface utilities. The 13267 Responses recycled content from older reports and did not advance Regional Water Board staff’s understanding of the Site or alleviate concerns about the possibility of contaminants preferentially migrating through utility conduits.

Violation 2: The Deviation from Requirement is **major**.

The 13267 Responses rendered the requirement for a public participation plan ineffective because they did not include any elements of planning for the public to participate in the Site cleanup and case closure process. In place of an acceptable public participation plan, the

Dischargers submitted a public notification document that Regional Water Board staff authored and issued for the tentative Cleanup and Abatement Order (CAO) for the Site, a Site map, and a list of mailing addresses for interested parties. The 13267 Responses did not discuss specific public participation activities and associated timelines that would involve the public in the cleanup process for the Site.

Per-Day Factor

Based on the above Potential for Harm (**moderate**) and Deviation from Requirement (**major**) and the matrix in Table 3 of the Enforcement Policy, the per-day factor must be between 0.4 and 0.7. The Per-Day Factor selected is the middle of this range, **0.55**.

Multiple Day Adjustment

Violations under Water Code section 13268 are assessed on a per-day basis. The two violations at issue, however, qualify for an alternative approach to penalty calculation under the Enforcement Policy. For violations that last more than 30 days, the daily assessment can be less than the calculated daily assessment provided that the assessment is no less than the per-day economic benefit, if any, resulting from the violation. To make this adjustment, the Regional Water Board must find that the violation (1) is not causing daily detrimental impacts to the environment or the regulatory program, (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis, or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If the Regional Water Board makes one of these findings, an alternate approach may be used for penalty calculations for multiple-day violations.

The Regional Water Board Prosecution Team (Prosecution Team) has determined that the Dischargers' failure to submit technical reports for the conduit study and public participation plan results in no economic benefit from the illegal conduct that can be measured on a daily basis. The Dischargers have delayed payment of the costs associated with producing the required technical reports, and these technical reports are still outstanding and must be completed. The only economic benefit gained by the Dischargers' delay is the time value of money, which is further discussed below in Step 8.

The above finding justifies use of the alternative approach to penalty calculation for multiple day violations. For this adjustment, the Enforcement Policy provides that an initial liability is to be assessed for the first day of the violation, plus each five-day period until the 30th day, plus each 30-day period thereafter. Thus, the minimum number of days to be assessed for each violation is 29 days.

The Prosecution Team alleges the minimum number of days of violation for Violation 2. For Violation 1, however, an increase in days of violation is justified and appropriate. The technical report for the conduit study is essential to understanding the fate and transport of subsurface contamination and characterization of the Site, particularly with respect to the migration of soil gas vapors through subsurface conduits and the potential for vapor intrusion to impact public health and the environment. The significance of the conduit study warrants doubling the minimum day reduction, which results in 58 days of violation for Violation 1.

Initial Liability

Violation 1 Initial Liability: \$1000/day x (0.55 Per Day Factor) x (58 days) = \$31,900

Violation 2 Initial Liability: \$1000/day x (0.55 Per Day Factor) x (29 days) = \$15,950

STEP 4 – ADJUSTMENTS TO INITIAL LIABILITY

The Enforcement Policy specifies that three additional factors should be considered for modification of the initial liability: the violator's culpability, the violator's efforts to clean up or cooperate with the regulatory authority, and the violator's history of violations.

Culpability

The culpability factor addresses the Dischargers' responsibility for the violations due to any oversight, disregard, lack of attention or precaution, or omission (i.e., negligence) that may have contributed to the violations. The Enforcement Policy specifies that higher liabilities should result from intentional or negligent violations as opposed to accidental violations. It specifies use of a multiplier between 0.5 and 1.5, with a higher multiplier for intentional or negligent behavior.

Violations 1 and 2: The culpability multiplier is **1.3**. As discussed above, no new information was submitted in response to the 13267 Order that would advance the cleanup process or improve understanding of Site conditions. Instead, Regional Water Board staff received arguments as to why additional evaluation of the Site is unnecessary. The 13267 Order required the Dischargers to provide additional, current, and more specific information needed for the Site. If the previously submitted information was sufficient, the Executive Officer would not have issued the 13267 Order. A reasonably prudent person would understand that submitting reports from previous investigations and submitting previous documents authored by Regional Water Board were inadequate to comply with the 13267 Order requirements.

Cleanup and Cooperation

The cleanup and cooperation factor addresses the extent to which the discharger voluntarily cleaned up and cooperated in returning to compliance and correcting environmental damage. Adjustment 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 there is a lack of cleanup and cooperation. The Enforcement Policy provides for this adjustment to reflect the extent to which a violator voluntarily cooperated in returning to compliance and correcting environmental damage.

Violations 1 and 2: The cleanup and cooperation multiplier is **1.2**. The Dischargers have yet to submit an acceptable conduit study and public participation plan, are not fully cooperating with Regional Water Board staff, have delayed remedial investigation, and have not taken action to engage the neighboring community in a cleanup process that could pose a risk to human health.

The Dischargers have had approximately two years to submit acceptable technical reports. While the Dischargers submitted timely responses, the responses were deficient and unacceptable. The

conduit study and public participation plan requirements were first included in a tentative CAO issued May 28, 2015. The same requirements (Tasks 1 and 2 of the tentative CAO) were required in the 13267 Order after the Regional Water Board Executive Officer granted the Dischargers a time extension for commenting on the tentative CAO. The Dischargers' August 27, 2015, response was unacceptable (see above) and Regional Water Board Executive Officer issued an NOV on January 7, 2016. The Dischargers responded to the NOV on January 28, 2016, asserting that the August 27, 2015, report was not deficient because "the site has been very thoroughly investigated, monitored and cleaned up" and a "request for further conduit studies...is simply redundant and a waste of money..." The 13267 Responses disregard regulatory direction and show a lack of cooperation in returning to compliance.

History of Violations

The Enforcement Policy provides that where there is no history of repeated violations, a minimum multiplier of 1.0 should be used.

Violations 1 and 2: The history multiplier is **1.0** because the Dischargers do not have a formal enforcement history.

STEP 5 – DETERMINATION OF TOTAL BASE LIABILITY

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

Violation 1:

Total Base Liability = \$31,900 (Initial Liability) x 1.3 (Culpability Multiplier) x 1.2 (Cleanup and Cooperation Multiplier) x 1.0 (History of Violations Multiplier)

Total Base Liability = \$49,764

Violation 2:

Total Base Liability = \$15,950 (Initial Liability) x 1.3 (Culpability Multiplier) x 1.2 (Cleanup and Cooperation Multiplier) x 1.0 (History of Violations Multiplier)

Total Base Liability = \$24,882

COMBINED TOTAL BASE LIABILITY

The combined Total Base Liability for Violations 1 and 2 is \$74,646

STEP 6 – ABILITY TO PAY AND TO CONTINUE IN BUSINESS

The Enforcement Policy provides that if there is sufficient financial information to assess the violator's ability to pay the Total Base Liability or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability may be adjusted downward if warranted.

After the tentative CAO and 13267 Order were issued, the Dischargers stated that insurance money is no longer available to fund corrective actions and that no other assets exist to perform the Site cleanup. In October 2015, Regional Water Board staff referred the Dischargers to the SB455 grant program for Site cleanup financial assistance, but the Dischargers failed to apply for such grants. A preliminary asset search revealed sufficient information to suggest that the Dischargers have sufficient assets and the ability to pay the proposed liability.

The Dischargers share ownership in four Oakland properties: 3815 Broadway (APN 12-982-10), 3822 Manila Avenue (APN 12-982-16), 3816 Manila Avenue (APN 12-982-15), and 348 38th Street (APN 12-982-14). The Oakland properties have assessed values of \$133,792, \$189,505, \$37,692, and \$41,421, respectively, totaling \$402,410. The Dischargers also have interest in a property located at 1251 Homestead Avenue, Unit # 166, in Walnut Creek, with an assessed value of \$135,304.

Eric Depper has additional separate assets. He owns Professional Industrial Services (aka Turnout Services), an industrial laundering business with addresses in Chico and at the Site. D&B Market Identifiers estimates that Professional Industrial Services has \$227,403 in annual sales. Tax assessor records show that Eric Depper is a part owner of a property with a restaurant building located at 1711 Mitchell Avenue, Saint Joseph, Missouri, with an assessed value of \$30,880. He also owns a condominium located at 1216 Sycamore Dr., Unit #1, in Antioch, with an assessed value of \$59,096. Last, the Fourth Amendment to the Martha R. Depper Living Trust (Fourth Amendment) executed on May 22, 2015, states that Martha Depper (Trustor) intends that Eric Depper will receive all of her interest in the real property located at 31 Muth Drive in Orinda. The Fourth Amendment further states that Martha Depper is amending her will to distribute any and all of the Trustor's interest in 31 Muth Drive to Eric Depper. The assessed value of 31 Muth Drive is \$151,176. Martha Depper passed away on June 2, 2015. In a communication to Regional Water Board staff on May 24, 2017, Eric Depper's legal counsel said that a petition was filed in Butte County Superior Court to determine ownership of some assets in the Trust. The status of this litigation is unknown.

Stuart Depper has interests in at least one dry cleaning business outside of Oakland. He is a registered agent of Annavan Corp. located at 1380 East Avenue in Chico. Stuart Depper's wife, Van Uong (aka Thanh V. Uong, Thanh Van T. Uong, and Van Uong Depper), is a principal of Annavan Corp. Annavan Corp.'s estimated annual sales are unknown.

Stuart Depper had significant assets in two properties that he transferred to his wife Van Uong through nominal interspousal deed transfers. In 2008, Stuart Depper transferred his interest in 1163 Sunriver Lane in Redding to Van Uong when the property had an assessed total value of \$324,360.³ In 2011, Stuart Depper transferred his interest in 4623 Welding Way in Chico to Van Uong (Thanh V. Uong) when the property had an assessed total value of \$635,000.⁴

Based on the above preliminary asset search, the Prosecution Team is providing an initial showing that the Dischargers have sufficient assets to pay the proposed liability. The initial

³ The last available tax assessment information for 1163 Sunriver Lane is from 2015. The assessed value was \$343,000.

⁴ The last available tax assessment information available for 4623 Welding Way is from 2015. The assessed value was \$673,757.

showing shifts the burden of proof for this factor to the Dischargers to produce sufficient evidence that they lack an ability to pay.

STEP 7 – OTHER FACTORS AS JUSTICE MAY REQUIRE

The Enforcement Policy provides that if the Regional Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require.” The Enforcement Policy includes the costs of investigation and enforcement as “other factors as justice may require” that can be considered when determining an appropriate liability.

Regional Water Board prosecution staff incurred \$13,339 in staff costs to investigate this case and prepare this analysis and supporting information. Staff costs were calculated as follows:

\$9,348	= 246 hours x \$38 per hour (Environmental Scientist)
\$57	= 1 hour x \$57 per hour (Engineering Geologist)
\$2,900	= 29 hours x \$100 per hour (Senior Engineering Geologist)
\$654	= 6 hours x \$109 per hour (Environmental Program Manager I)
\$399	= 3 hours x \$133 per hour (Assistant Executive Officer)
\$13,358	= Total staff costs

The Enforcement Policy gives the Regional Water Board discretion to consider staff costs in relation to the total base administrative civil liability. Increasing the total base liability by \$13,358 is warranted given the totality of the circumstances and is intended to serve as a sufficient general and specific deterrent against future violations.

The Total Base Liability after adjusting for staff costs and other factors is **\$88,004**.

STEP 8 – ECONOMIC BENEFIT

The Enforcement Policy requires recovery of the economic benefit gained associated with the violations plus 10 percent. Economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation.

The assessment of economic benefit the Dischargers gained considered both delayed and avoided costs for failing to submit an acceptable conduit study and public participation plan. Utilization of U.S. EPA economic modelling software, BEN, allowed for accurate estimation of economic benefit using the cost estimate prepared by SOMA Environmental Engineering, Inc. (SOMA Environmental) in relation to a “Workplan to Delineate Extent of Free Product and Conduct Soil Vapor Sampling.” The Dischargers approved the Workplan on January 26, 2011, but never instructed SOMA Environmental to begin the work detailed within the Workplan. On February 7, 2016, SOMA Environmental prepared a detailed cost estimate assumed to equate to the cost for performing the required conduit study (\$27,156). Preparation of an acceptable public participation plan was assumed to be equivalent to the line item in the cost estimate for report preparation (\$4,760).

Model inputs for BEN included the total cost estimate of \$31,196, a noncompliance date of August 31, 2015, (original due date for the requirement) and a compliance date of November 8, 2017 (Board hearing date for this matter). The model estimated an economic benefit of \$2,715

for delaying completion of the requirements. This delayed cost assumes that an acceptable conduit study and public participation plan will be submitted.

The overall economic benefit realized by the Dischargers plus 10 percent is therefore \$2,990 (rounded). The adjusted Total Base Liability from Step 7 is unchanged because it is more than this value.

STEP 9 – MAXIMUM AND MINIMUM LIABILITY

a) *Minimum Liability*

The minimum administrative civil liability for the two violations is \$2,990 based on the upper range estimate of the Dischargers' economic benefit realized by failing to submit the conduit study and public participation plan, plus 10 percent.

b) *Maximum Liability*

The maximum administrative civil liability for Violation 1 is \$717,000, and the maximum administrative civil liability for Violation 2 is \$717,000. The total maximum administrative civil liability for both violations is \$1,434,000. This is based on the maximum allowed by Water Code section 13268: \$1,000 for each day in which the violation occurred.

STEP 10 – FINAL LIABILITY

The final liability proposed is **\$88,000** (rounded) for Violations 1 and 2 based on consideration of the penalty factors discussed above. It is within the minimum and maximum liabilities allowed by statute.