

ORDER NO. R5-2023-0501
ACCEPTANCE OF SETTLEMENT OFFER AND WAIVER OF RIGHT TO A HEARING
FOR
HILBERS NEW HOME COMMUNITIES
TIMBERWOOD ESTATES
NEVADA COUNTY

By signing below and returning this Acceptance of Settlement Offer and Waiver of Right to Hearing (Acceptance and Waiver) to the Central Valley Water Board, Hilbers New Home Communities (Discharger) hereby accepts the Settlement Offer described in the letter dated 05 October 2022 and titled Offer to Settle Administrative Civil Liability, Hilbers New Home Communities, Timberwood Estates, Nevada County, WDID 5S29C381693 and waives the right to a hearing before the Central Valley Water Board to dispute the alleged violations described in the Settlement Offer and its enclosures.

The Discharger agrees that the Settlement Offer shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the Central Valley Water Board to assert jurisdiction over the alleged violations. The Discharger agrees to perform the following:

- Pay an administrative civil liability in the sum of seventy-three thousand one hundred eighty-seven dollars (\$73,187) by cashier's check or certified check made payable to the "State Water Resources Control Board Cleanup and Abatement Account". This payment shall be deemed payment in full of any civil liability pursuant to Water Code section 13385 that might otherwise be assessed for violations described in the Settlement Offer and its enclosures.
- Fully comply with the conditions of the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order 2009-0009 DWQ (General Permit) at the Timberwood Estates construction project.

The Discharger understands that by signing this Acceptance and Waiver, the Discharger has waived its right to contest the allegations in the Settlement Offer and the civil liability amount for the alleged violation(s). The Discharger understands that this Acceptance and Waiver does not address or resolve any liability for any violation not specifically identified in the Settlement Offer and its enclosures.

Upon execution by the Discharger, the Acceptance and Waiver shall be returned to the following address:

Central Valley Regional Water Quality Control Board
Attention: Kari Holmes, Supervisor, Enforcement Section
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

The Discharger understands that federal regulations require the Prosecution Team to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action for violations of an NPDES permit. Accordingly, this *Acceptance and Waiver*, prior to being formally endorsed by the Central Valley Water Board Executive Officer (acting as head of the Advisory Team), will be published as required by law for public comment

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

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

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

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

HILBERS NEW HOME COMMUNITIES LP

By: Original Signed by Kurt Hilbers

Title: Managing Partner

Date: 02 November 2022

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

By: PATRICK PULUPA, Executive Officer

**PENALTY CALCULATION METHODOLOGY
FOR
HILBERS NEW HOME COMMUNITIES
TIMBERWOOD ESTATES
NEVADA COUNTY**

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

(https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf)

Background

On 25 October 2021, staff from the Central Valley Regional Water Quality Control Board (Board) conducted an inspection of the New Home Communities (Discharger) Timberwood Estates project (Project). The Project received coverage under the State Water Resources Control Board's *Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction and Land Disturbance Activities, Order 2009-009-DWQ*, as amended by Orders 2010-0014-DWQ and 2012-0006-DWQ (Construction General Permit) on 17 November 2017 and is categorized as a Risk Level 3 project. Risk Level 3 is the highest Risk Level assigned under the Construction General Permit for projects with a higher potential for sediment discharge. Generally speaking, one of the main purposes of the Construction General Permit is to minimize the amount of pollutant discharge with storm water runoff from a construction project, especially during rain events. In 2019, The Discharger was previously issued Administrative Civil Liability Order R5-2019-0525 for \$160,875 for violations of the Construction General Permit.

The 25 October 2021 inspection was conducted during a major storm event that produced over 13 inches of rain between 21 and 25 October 2021, as measured by rain gauge CA-NV-52 located in Grass Valley. During the inspection, Board staff observed that sediment control best management practices (BMPs) installed at the project were worn and needed replacement, and several areas of disturbed soil had no or ineffective erosion control BMPs, resulting in a discharge of turbid storm water with a turbidity measured by the Project's Qualified Storm Water Pollution Prevention Plan Practitioner (QSP) of 975 Nephelometric Turbidity Units (NTU). The Numeric Action Level for turbidity contained in section V.B.2 of the Construction General Permit is 250 NTU. The implementation of BMPs observed during the inspection did not meet the best available technology economically achievable (BAT) for toxic pollutants and non-conventional pollutants and best conventional pollutant control technology (BCT) for conventional pollutants, also referred as the BAT/BCT standard required by the Construction General Permit.

Following the 25 October 2021 inspection, the Central Valley Water Board issued a Notice of Violation (NOV) for violations of the Construction General Permit observed during the 25 October 2021 inspection. The NOV required the Discharger to upload all inspection reports

conducted by the Project’s QSP leading up to the October 2021 storm event as well as documentation of corrective actions taken following the storm events. Review of the inspection reports and accompanying photos showed that the Project did not have BMPs that met the BAT/BCT requirement between 1 October 2021 through 30 October 2021, when the Discharger installed additional erosion control and sediment control BMPs. Board staff conducted a follow-up inspection during a rain event on 9 November 2021. During that inspection, Board staff sampled the storm water discharge from the Project. The inspection and the turbidity of the discharge on 9 November 2021 confirmed that the BMPs implemented in response to the NOV met the BAT/BCT standard.

Violation 1 – Failure to minimize or prevent pollutants in storm water discharges

Dischargers are required to minimize or prevent pollutants in storm water using controls, structures and management practices that achieve BAT/BCT standard.

There were six days of precipitation between 1 October 2021 and 30 October 2021, four of which produced greater than 0.5 inches of rain. The Prosecution Team alleges that storm water discharged from the Project on days with greater than 0.5 inches of precipitation and the BMPs installed on those days of discharge did not meet the BAT/BCT standard, in violation of the Construction General Permit. Attachment E, section A.1.b, Effluent Standards, in the General Permit 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.*

PENALTY FACTOR	VALUE	DISCUSSION
Step 1, Factor 1: The Degree of Toxicity of the Discharge (physical, chemical, biological, or thermal characteristics of the discharge)	2	High levels of turbidity in storm water discharges, such as those described herein, can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat. Here, a score of 2 is appropriate because the 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 threat to potential receptors).
Step 1, Factor 2: Actual Harm or Potential Harm to Beneficial Uses (harm	2	Discharges from the Project flow to Olympia Creek which flows to Wolf Creek which discharges to the Bear River. The Wolf Creek Watershed is designated by the State Water Board as a high-risk

PENALTY FACTOR	VALUE	DISCUSSION
or potential for harm to beneficial uses)		receiving water watershed. According to the Board's Basin Plan, the beneficial uses of the Bear River include aquatic freshwater habitat and wildlife habitat. Photographs from the Project's QSP and turbidity samples collected during the 25 October 2021 inspection show turbid discharges from the Project. Due to the dilution expected between the discharge locations and water bodies with beneficial uses, the discharge was expected to have a below moderate impact to beneficial uses, likely to cause harm in the short term but not appreciable harm in the long term. Therefore, a score of 2 is appropriate.
Step 1, Factor 3: Susceptibility to cleanup or abatement	1	The sediment from the turbid discharge was deposited over a long distance and cleanup or abatement of 50% or more of the material would not be possible. Therefore, a score of 1 is appropriate.
Step 1, Final Score: Potential for Harm	5	The Potential for Harm score is the sum of Factors 1 through 3 for Step 1, shown above. The total Potential for Harm score is 2+2+1 = 5.
Step 2: Per Gallon and per Day Factor for Discharge Violations	0.15	The "Deviation from Requirement" is major because the Discharger did not implement or maintain required erosion and sediment control BMPs, rendering the permit's BAT/BCT effluent standard ineffective, resulting in a discharge from the Project with a turbidity almost four times the NAL. The Potential for Harm from step one of 5 and the Major Deviation was used to determine both the per gallon and per day factors of 0.15 from Tables 1 and 2 of the Enforcement Policy.
Step 2: Volume Discharged	n/a	The Prosecution Team did not to calculate the discharge volume at this time. The Prosecution Team reserves the right to include the volume discharged in the penalty calculation should this matter proceed to hearing.
Step 2: Adjustment for High Volume Discharges	n/a	The Prosecution Team chose not to calculate the discharge volume at this time. The Prosecution Team reserves the right to assess penalties for the volume discharged should this matter proceed to hearing.
Step 2: Days of Discharge	4	According to rainfall data from station "Grass Valley 0.4SE, CA-NV-52", there were a total of six days of

PENALTY FACTOR	VALUE	DISCUSSION
		rainfall, four of which had rainfall over ½” between 1 October 2021 and when compliant BMPs were installed on 30 October 2021. The Prosecution Team alleges that runoff was generated and discharge from the Project occurred on days where over ½” of rain was recorded at the nearby weather station when BMPs did not meet the Construction General Permit’s BAT/BCT standard.
Step 2: Initial Liability for Violation #1	\$6,000	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (0.15 x 4 days x \$10,000/day = \$6,000).
Step 3: Per Day Assessments for Non-Discharge Violations	n/a	This step does not apply to this violation as it is a discharge violation.
Step 4: Adjustments for Discharger Conduct: Culpability	1.4	The Discharger has retained the services of a Qualified SWPPP Developer and Practitioner who is responsible for advising the Discharger on what BMPs are required to be installed. Board staff has inspected the Project prior to the October 2021 storm events 11 times since 2018. The Discharger was issued an Administrative Civil Liability Order in November 2019 for similar violations. The Discharger should be fully aware of the Construction General Permit’s requirements and the consequence of not having BMPs installed that meet the BAT/BCT requirement during rain events. Therefore, an adjustment factor of 1.4 is appropriate.
Step 4: Adjustments for Discharger Conduct: History of Violations	1.1	The Central Valley Water Board issued Hilbers New Home Communities Administrative Civil Liability Order R5-2019-0525 in November 2019 for similar violations of the Construction General Permit. Therefore, an adjustment factor of 1.1 is appropriate.
Step 4: Adjustments for Discharger Conduct: Cleanup and Cooperation	1.1	Following the 25 October 2021 inspection, the Discharger exhibited the level of cleanup and installation of BMPs expected. However, the Discharger did not upload all inspection documents including the Rain Event Action Plan (REAP) and pre-rain event inspection reports leading up to the October 2021 storm events. It is unclear whether

PENALTY FACTOR	VALUE	DISCUSSION
		these inspections were conducted. Therefore, an adjustment factor of 1.1 is appropriate.
Steps 1-4: Total Base Liability for Violation #1	\$10,164	The base liability is calculated as the initial liability multiplied by each of the above three factors. (\$6,000 x 1.4 x 1.1 x 1.1 = \$10,164).

Violation 2 – Failure to implement erosion control BMPs on active areas in violation of the Construction General Permit

During the Project inspection on 25 October 2021, Board staff observed that the Risk Level 3 Project had large areas of disturbed soil without the required erosion control BMPs during a storm event. Attachment E, section E.3, Sediment Control, in the General Permit states: *Risk Level 3 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.* Board Staff alleges that the Discharger was in violation of this requirement for a period of six days of precipitation that occurred between 1 October 2021 and 30 October 2021.

PENALTY FACTOR	VALUE	DISCUSSION
Step 1: Actual Harm or Potential for Harm for Discharge Violations	n/a	This step is not applicable because the violation is not a discharge violation.
Step 2: Per Gallon and Per Day Assessments for Discharge Violations	n/a	This step is not applicable because the violation is not a discharge violation.
Step 3, Non-Discharge Violations: Potential for Harm	Moderate	The failure to install appropriate erosion controls led to the discharge of turbid, sediment laden water. Discharges of sediment can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat. Therefore, a “Moderate” potential for harm factor is appropriate.
Step 3, Non-Discharge Violations:	Major	The “Deviation from Requirement” is major because the Discharger did not implement required erosion control BMPs prior to a major forecasted storm event

PENALTY FACTOR	VALUE	DISCUSSION
Deviation from Requirement		on several disturbed soil areas of the Project rendering the permit requirement ineffective. Therefore, a Major deviation from requirement factor is appropriate.
Step 3, Non-Discharge Violations: Per day factor	0.55	The value of 0.55 was determined from Table 3 in the Enforcement Policy. The middle value was chosen at this time.
Step 3, Non-Discharge Violations: Days of Violation	6	The Discharger is required to implement erosion control BMPs on all disturbed soil areas prior to all rain events. The Prosecution Team alleges that the Discharger was in violation of the erosion control BMP requirement on all days with greater than 0.1 inches of precipitation. During the period between 1 October 2021 and when the Discharger installed erosion control BMPs on 30 October 2021, there were six days of rainfall with greater than 0.1 inches of rain.
Step 3: Initial Liability for Violation #2	\$33,000	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day ($0.55 \times 6 \text{ days} \times \$10,000/\text{day} = \$33,000$).
Step 4: Adjustments for Discharger Conduct Culpability	1.4	The Discharger has retained the services of a Qualified SWPPP Developer and Practitioner who is responsible for advising the Discharger on what BMPs are required to be installed. Board staff has inspected the Project prior to the October 2021 storm events 11 times since 2018. The Discharger was issued an Administrative Civil Liability Order in November 2019 for similar violations. The Discharger should be fully aware of the Construction General Permit's requirements and the consequence of not having BMPs installed that meet the BAT/BCT requirement during rain events. Therefore, a culpability adjustment factor of 1.4 is appropriate.
Step 4: Adjustments for Discharger Conduct History of Violations	1.1	The Central Valley Water Board issued Hilbers New Home Communities Administrative Civil Liability Order R5-2019-0525 in November 2019 for similar violations of the Construction General Permit. Therefore, a History of Violations adjustment factor of 1.1 is appropriate.
Step 4: Adjustments for Discharger	1.1	Following the 25 October 2021 inspection, the Discharger exhibited the level of cleanup and

PENALTY FACTOR	VALUE	DISCUSSION
Conduct Cleanup and Cooperation		installation of BMPs expected. However, the Discharger did not upload all inspection documents including the REAP and pre-rain event inspection reports leading up to the October 2021 storm events. It is unclear whether these inspections were conducted. Therefore, a cleanup and cooperation adjustment factor of 1.1 is appropriate.
Total Base Liability for Violation #2	\$55,902	The base liability is calculated as the initial liability multiplied by each of the above three factors (\$33,000 x 1.4 x 1.1 x 1.1 = \$55,902).

Other Factor Considerations

Total Base Liability for all violations is \$66,066 (\$10,164 for Violation #1 + \$55,902 for Violation #2 = \$66,066). The Enforcement Policy states that five other factors must be considered before obtaining the final liability amount.

PENALTY FACTOR	VALUE	DISCUSSION
Step 6: Ability to Pay and Continue in Business	No adjustment	Board staff does not have information suggesting that the Discharger cannot pay the proposed penalty and continue in business.
Step 7: Economic Benefit	\$32	Board staff estimated the economic benefit for each violation. The cost of installing BMPs which would have avoided the violations were estimated at \$16,987. Since these BMPs were installed following the violations, this cost was considered a delayed cost. The economic benefit of delaying these costs was estimated using the EPA's BEN model. Calculations showing the estimated Economic Benefit are included as Attachment A.
Step 8: Other Factors as Justice May Require	\$7,121	The costs of investigation and enforcement are "other factors as justice may require" and are added to the liability amount. The Board has incurred approximately \$7,121 in staff costs associated with the investigation and enforcement of the alleged violations. The estimated staff costs used in Step 8 are included as Attachment B.
Step 9: Maximum Liability	Over \$100,000	Based on California Water Code section 13385, the maximum liability is \$10,000 per day per violation and \$10 per gallon. The maximum penalty of \$100,000 is

PENALTY FACTOR	VALUE	DISCUSSION
		calculated using only days of violation (10 days x \$10,000 per day) and does not include gallons discharged as the Prosecution Team has not estimated the discharge volume. The Prosecution Team reserves the right to include the volume discharged in the penalty calculation should this matter proceed to hearing. In addition, the Prosecution Team reserves the right to assess penalties for other violations observed during the 25 October 2021 storm event that were not included in this settlement if this matter proceeds to hearing.
Step 9: Minimum Liability	\$35	Based on California Water Code section 13385, civil liability must be at least the economic benefit of non-compliance. Per the Enforcement Policy, the minimum liability is to be the economic benefit plus 10%.
Step 10: Final Liability	\$73,187	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability but cannot exceed the maximum liability. The Final Liability is \$73,187 (\$66,066 + \$7,121 = \$73,187)

- Attachments:
- A. Economic Benefit Calculation
 - B. Staff Cost Estimate

Economic Benefit Analysis											
Timberwood											
Compliance Action	Delayed?	One-Time Non-Depreciable Expenditure				Non-Compliance Date	Compliance Date	Penalty Payment Date	Discount Rate	Benefit of Non-Compliance	
		Amount	Basis	Date	Delayed?						
Hydromulch with Tackifier	Y	\$ 5,625	CCI	10/6/2021	Y	10/18/2021	10/30/2021	12/25/2022	7.50%	10	
Mobilization of BMP Installer	Y	\$ 500	CCI	10/6/2021	Y	10/18/2021	10/30/2021	12/25/2022	7.50%	1	
Fiber Roll	Y	\$ 9,212	CCI	10/6/2021	Y	10/18/2021	10/30/2021	12/25/2022	7.50%	17	
Inlet Filter	Y	\$ 1,650	CCI	10/6/2021	Y	10/18/2021	10/30/2021	12/25/2022	7.50%	3	
Income Tax Schedule: Corporation									Total Benefit: \$		32
USEPA BEN Model Version: Version 2022.0.0 (June 2022)											
Analyst: Jennifer McGovern, Valaree St. Mary											
Date/Time of Analysis: 9/28/22 12:12											
Assumptions:											
<ul style="list-style-type: none"> o Cost estimates and compliance actions provided by Regional Board Staff o Failure to implement construction BMPs which included hydromulch with tackifier, fiber rolls, inlet filters, and mobilization of BMP installer was delayed, not avoided o BMP installation adjusted using the construction cost index (CCI) o Non-compliance and compliance dates for each compliance action provided by Regional Board Staff o The penalty payment date is assumed to be 3 months from the date of analysis o The discharger is assumed to operate as a for-profit entity 											

Table 1. Staff Cost Summary

	Quantity	Unit Cost	Total Cost
Inspections	2	\$ 472.65	\$ 945.31
Inspection Reports	2	\$ 549.82	\$ 1,099.65
Notice of Violations	1	\$ 390.67	\$ 390.67
ACL Prep	1	\$ 4,685.79	\$ 4,685.79
Total Staff Costs		\$ 7,121.42	

Table 2. Staff Cost Calculation

Inspection	Hours ¹	Ave Cost/Hour ²	Cost
Water Resource Control Engineer	4	\$ 118.16	\$ 472.65
Senior Environmental Scientist	0	\$ 154.34	\$ -
Supervising Water Resources Control Engineer	0	\$ 179.32	\$ -
Assistant Executive Officer	0	\$ 185.26	\$ -
Cost per Inspection			\$ 472.65
Inspection Report	Hours	Ave Cost/Hour	Cost
Water Resource Control Engineer	4	\$ 118.16	\$ 472.65
Senior Environmental Scientist	0.5	\$ 154.34	\$ 77.17
Supervising Water Resources Control Engineer	0	\$ 179.32	\$ -
Assistant Executive Officer	0	\$ 185.26	\$ -
Cost per Inspection Report			\$ 549.82
Notice of Violation	Hours	Ave Cost/Hour	Cost
Water Resource Control Engineer	2	\$ 118.16	\$ 236.33
Senior Environmental Scientist	1	\$ 154.34	\$ 154.34
Supervising Water Resources Control Engineer	0	\$ 179.32	\$ -
Assistant Executive Officer	0	\$ 185.26	\$ -
Cost per Notice of Violation			\$ 390.67
ACL Preparation	Hours	Ave Cost/Hour	Cost
Water Resource Control Engineer	20	\$ 118.16	\$2,363.27
Senior Environmental Scientist	8	\$ 154.34	\$1,234.72
Supervising Water Resources Control Engineer	4	\$ 179.32	\$ 717.28
Assistant Executive Officer	2	\$ 185.26	\$ 370.52
Cost per Notice of Violation			\$4,685.79

Notes:

- 1 Inspection Time includes in-office pre-inspection research and drive time.
- 2 Hourly costs from SWRCB Office of Enforcement Fiscal Year 2020-2021 Billing Costs Summary, mid range salary used.