

North Coast Regional Water Quality Control Board

ATTACHMENT A LIABILITY METHODOLOGY FOR ENCLAVE LP FAILURE TO INSTALL REQUIRED BEST MANAGEMENT PRACTICES AND ALLOWING CONSTRUCTION-RELATED DISCHARGES TO CONTINUE WITHOUT CORRECTIVE ACTIONS IN SONOMA 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 multi-step approach is discussed below, as is the basis for assessing the corresponding score and final liability amount. The Enforcement Policy can be found at:

[2017 Water Quality Enforcement Policy](https://www.waterboards.ca.gov/water_issues/programs/enforcement/water_quality_enforcement.html)

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Enclave LP (Discharger) is regulated by the Construction General Permit, State Water Resources Control Board Order No. 2009-0009-DWQ, as amended by Orders 2010-0014-DWQ and 2012-0006-DWQ (Construction General Permit). On October 3, 2018, the Discharger submitted its Notice of Intent (NOI), enrolling the Marlow Commons Subdivision (Project) for coverage under the Construction General Permit. According to supporting information filed with the NOI, the project is a Risk Level 2, per Construction General Permit definitions, because it has a medium sediment risk factor and because it drains via a nearby storm drain to Piner Creek, which converges with Santa Rosa Creek, which discharges to the Laguna de Santa Rosa, and eventually to the Russian River. The Russian River is a receiving waters with sensitive receptors, and its watershed is Clean Water Act section 303(d)-listed for sediment impairment and with Beneficial Uses that include Spawning, Reproduction, and/or early Development (SPWN), Cold Freshwater Habitat (COLD), and Migration of Aquatic Organisms (MIGR) identified in the *Water Quality Control Plan for the North Coast Region* ([Basin Plan](#)). The Project comprises five acres of land disturbance, to construct high density residential homes, and is located at 2199 Marlow Road, in Santa Rosa, Sonoma County (Site).

On December 16, 19, and 22, 2019, Regional Water Board staff inspected portions of the Site, each time observing features and conditions that violated provisions of the Construction General Permit that remained unchanged/uncorrected from visit to visit. Staff subsequently reviewed reports prepared by the Qualified Storm Water Pollution

Prevention Plan (SWPPP) Practitioner (QSP), and by the City of Santa Rosa during site inspections, demonstrating that conditions and violations observed by Regional Water Board staff had been present prior to December 16, had continued to be present after December 22, 2019, and were corrected some time before January 15, 2020. This liability methodology focuses on one of those violations, as discussed below.

Violation 1 – Failure to Comply with Construction General Permit Attachment D, Provision D.2. (Requirement to Maintain Effective Ground Cover); Non-Discharge Violation

Construction General Permit Attachment D, Provision D.2, requires that:

“Risk Level 2 dischargers shall provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.” Inactive areas of construction are areas of construction activity that have been disturbed and are not scheduled to be re-disturbed for at least 14 days.

The Discharger failed to have effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots as required by General Construction Permit Attachment D, Provision D.2. This liability methodology is for the five days between the first date the Site was inactive, December 17, to when staff last observed the violations on December 22, 2019, for a total of five calendar days of violation. The Discharger’s own stormwater consultant inspected the Site during the rainfall event on December 18, 2019 and continued to persistently remind the Discharger of their ongoing need for effective soil cover in its inspection reports.

QSP inspection reports for December 6, 10, 16, 18, and 19, 2019 all identify exposed soil areas in need of erosion control, in violation of Construction General Permit Attachment D, Provision D.2. The latter three reports explicitly notify the Discharger that the continued lack of erosion control was a deficiency requiring corrective action. Similarly, the City of Santa Rosa staff observed deficient erosion control on the Site on December 12, 2019. Regional Water Board staff observed the same consistent deficiencies on December 19 and 22, 2019.

Rainfall events occurred on December 18 and 22, 2019. Erosion control deficiencies remained uncorrected throughout and following this period to at least December 27, 2019 when City of Santa Rosa Staff last informed the Regional Water Board that the deficiencies were not yet corrected.

For the purpose of this methodology and settlement resolution, staff propose to assess a per day liability for a non-discharge violation for the five-day period Regional Water Board staff, the Discharger’s QSP, and the City of Santa Rosa continually notified the Discharger of the violations at the Site.

Step1: Potential for Harm for Discharge Violations

Not applicable

Step 2: Assessments for Discharge Violations

Not applicable

Step 3: Per day Assessments for Non-Discharge Violations

Statutory Maximum Penalty: \$10,000 per day

Discussion:

The Enforcement Policy directs staff to identify an initial liability factor for each non-discharge violation considering Potential for Harm and the extent of deviation from applicable requirements, and it provides a matrix (Table 3 of the Enforcement Policy), in which to determine the per day factor using these considerations.

Potential for Harm: There are three categories for Potential for Harm: Minor, Moderate, and High. Based on the definitions provided in the Enforcement Policy, staff deem the Potential for Harm for this violation to be “Moderate,” because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm. The project is a Risk Level 2 per Construction General Permit definitions because it has a medium sediment risk factor and because it drains via a nearby storm drain to Piner Creek, and eventually to the Russian River. The Russian River is a receiving water with sensitive receptors. The Russian River Watershed is Clean Water Act section 303(d)-listed for sediment impairment and with Beneficial Uses that include Spawning, Reproduction, and/or early Development (SPWN), Cold Freshwater Habitat (COLD), and Migration of Aquatic Organisms (MIGR) identified in the *Water Quality Control Plan for the North Coast Region* ([Basin Plan](#)). Failing to implement soil cover creates a substantial potential for harm to the receiving waters and their beneficial uses during storm events.

Deviation from Requirement: There are three categories for Deviation from Requirement: Minor, Moderate, and High. Based on the definitions provided in the Enforcement Policy, staff deem the Deviation from Requirement for this violation to be “Major” (“[t]he requirement was rendered ineffective in its essential function”) because the Discharger failed to install erosion control BMPs on exposed soils throughout the Site. With no erosion control BMPs in place, soils threatened to erode and transported to and through the Site perimeter BMPs. Rainfall events during the period from December 18 to 22 likely caused additional erosion and the transport of fine sediment to and beyond the Site perimeter BMPs.

Initial Liability Factor: Using Table 3 in the Enforcement Policy, a “Moderate” Potential for Harm and a “Major” Deviation from Requirement yield a midpoint per day factor of **0.55**

Days of Violation: 5 Days. Though the violation extended from December 6 to December 27, 2019, at a minimum, for early settlement staff is alleging the five days starting December 18 at the start of a rain event to 22, 2019 when Regional Board last observed the Site. Prior to this specific rain event, the Discharger was notified of the inadequate BMPs on the Site by Regional Board staff, the Discharger's QSP, and the City of Santa Rosa. During the storm is when the soil cover and other BMPs were most critically needed to prevent polluted storm water from discharging from the Site.

Initial Liability for Violation #1: = (5 days)x(0.55)x(\$10,000) = \$27,500

Step 4: Adjustment Factors

The three additional factors for potential modification of the ACL amount are: the violator's degree of culpability, the violator's prior history of violations, and the violator's voluntary efforts to clean up, or its cooperation with regulatory authorities after the violation.

Adjustment for (1) Degree of Culpability

This factor is the violator's degree of culpability prior to the violation, and ranges from 0.75 to 1.5, with a higher multiplier for intentional misconduct and gross negligence, and a lower multiplier for simple negligence. A test for whether a discharger is negligent is what a reasonable and prudent person would have done or not done under similar circumstances. Staff have assigned value of **1.4** for this factor.

Discussion:

The series of events, and the extensive communications demonstrate the Discharger's willful failure to make any corrections on the Site .

The Discharger enrolled the project for coverage under the Construction General Permit in October 2018. The QSP inspected the Site regularly in November and December 2019 and emailed reports to both the Discharger and the City that identified specific deficiencies.

The compliance checklists in the QSP's December 6 and December 10, 2019, inspection reports, both had items checked "No," indicating non-compliance. Specifically, the checklist item "Erosion control BMPs are installed properly and not in need of maintenance?" was checked "No," in both reports. The reports also included "FYI: Remember to cover areas of exposed soil prior to rain event. The use of geo-textile/ mats are great ways to protect the [S]ite from erosion" and "FYI: Remember to cover all areas of exposed soil prior to rain events in order to protect surface water quality and prevent the [S]ite from erosion." The December 10 report indicated that there had been 2 inches of rainfall since the previous inspection, and additional rain was predicted for upcoming days. These reports were designed to notify the Discharger to implement effective soil cover erosion control measures in both QSP reports. The Discharger continued to fail to cover all areas of exposed soil.

One would expect a reasonable and prudent Construction General Permit permittee to take steps to deploy erosion control measures and to inspect and maintain Site BMPs. This Discharger did not do so.

On December 12, 2019, City of Santa Rosa staff observed that “all areas of disturbed soil” were not “protected from erosion through the implementation of acceptable soil stabilization practices,” The City inspection report directed the Discharger to “cover disturbed soil until work begins,” and to have this completed by December 16, 2019. This clear and precise notification of lacking or poor erosion control BMPs was six days after the QSP’s December 10, 2019 inspection, and two days before the first alleged day of violation. One would expect that even a negligent discharger would make an effort to implement the actions recommended by the QSP and directed by the City.

On December 16, 2019, when the Discharger was to complete the corrective action requested by the City, the QSP inspected the Site. The QSP cited in his report that, “The areas of exposed soil on-site are in-active and need to be covered to protect the [S]ite from wind erosion.” The QSP repeated a few times in his comments that the Discharger needed to install BMPs over the exposed soil while the Site was inactive, and during times of rain. The QSP went on to comment that the exposed soil needed proper erosion control BMPs during rain events to protect surface water quality. A reasonable discharger would first implement his SWPPP as designed, maintain the BMPs, and take corrective action when their own QSP highlights inadequacies.

Regional Water Board staff also visited the Site briefly on December 16, 2019 and advised on-site staff that the Regional Board would be returning to inspect the Site.

On the morning of December 17, 2019, shortly after the QSP had emailed his report of the previous day’s inspection to the Discharger and the City, City of Santa Rosa staff emailed the Discharger’s contractor directing him to make the necessary corrections on the Site by the end of the day. Instead, the contractor replied (incorrectly) that the Regional Board and QSP corrections were not necessary and clarified that the Site has not been active for two weeks.

Regional Water Board staff sent an email explaining the Regional Water Board staff’s expectations and that provided additional notice that an inspection was forthcoming. After the QSP, City staff, and Regional Water Board staff informed the Discharger the Site needed immediate corrective action, including covering exposed soils on the Site, the Discharger did not implement any BMPs. A reasonable discharger would make attempts to correctly implement its SWPPP, comply with the Construction General Permit, and comply with inspectors’ directions.

On December 18, 2019, the QSP inspected the Site during a storm. His report indicated the Site has been in-active for 14 days, and soil was exposed during a rain event. The report included that the Site should be covered to protect surface water quality and runoff. The use of Geotextiles & Mats was approved in the SWPPP and would best protect the Site from erosion and keep the surface runoff clean. The QSP once again

recommended the Discharger implement erosion controls per the project SWPPP to protect the Site from erosion and remain in compliance with the Construction General Permit. The QSP documented several additional BMP-related deficiencies not specific to effective soil cover.

The QSP's reported findings suggest that rather than improving, Site conditions were persistently out of compliance. Exposed soil remained uncovered and subject to erosion and accumulating at and overwhelming Site sediment controls. The consequences of continued failure to cover exposed soils were becoming increasingly apparent on the Site per the QSP report. No effort to cover exposed soils or otherwise bring the Site into compliance with applicable permit requirements occurred.

On December 19, 2019, the QSP inspected the Site after the storm. His report is similar to his inspection of the previous day, showing largely the same deficiencies and areas of non-compliance. Regional Water Board staff arrived at the Site and observed uncovered soil, erosional rills and sediment deposits leading toward the public roadway, and sediment deposits on the sidewalk adjacent to the roadway, outside of the project Site perimeter controls. Staff offered to show the Site representative the locations of concern. The representative declined and incorrectly stated the project stormwater consultant had said this was not an issue. Given that the QSP's reports for inspections on both December 18 and December 19 identified numerous non-compliance issues, including issues related to sediment controls, it is unlikely that the QSP said that sediment deposits on the sidewalk were not an issue. The Discharger's representative represented an unwillingness to acknowledge any water quality concerns on the Site.

Later that day, City staff issued a Stop Work Order after observing that disturbed soils remained uncovered and other deficiencies had not yet been corrected. When Regional Water Board staff stopped by the Site and looked at the Site from the sidewalk on December 22, 2019, the disturbed area was still uncovered and wet from a rain event earlier that morning.

Given the series of events, the extensive and specific communications to and with the Discharger's representative, and his continued lack of effort to make any corrections on the Site, the Discharger's actions can only be considered willful. A culpability factor of at least 1.4 is appropriate.

Adjustment for (2): History of Violations

This factor pertains to the discharger's prior history of violations. Staff have assigned a value of **1.0** to this factor.

Discussion: There are no known similar adjudicated violations against the Discharger.

Adjustment for (3) Cleanup and Cooperation

Value: 1.2

This factor pertains to the discharger's voluntary efforts to clean up and/or cooperate with regulatory authorities in returning to compliance after the violation. This value ranges from 0.75 to 1.5, using the lower multiplier where there is exceptional cleanup and cooperation compared to what can reasonably be expected, and higher multiplier where there is not. A reasonable or prudent response should receive a neutral value of 1. Adjustments above that amount should be applied where the discharger's response to a violation falls below the normally expected response. In this case, staff have assigned a value of **1.2** for this factor.

Discussion:

As noted above, the QSP, the City, and Regional Water Board staff communicated with the onsite representatives several times about violations, areas of non-compliance, and deficiencies on the Site. On December 17, 18, and 20, during and immediately following significant rainfall, the QSP emailed inspection reports to the discharger reporting on the numerous deficiencies and areas of noncompliance mentioned above. On December 19, City staff discussed the matter with the Discharger, and on December 20, Regional Water Board staff spoke with him. Corrective actions occurred over the next three weeks, as confirmed by City staff on January 15, 2020. The corrective actions implemented after weeks of communication with the Discharger and its contractor were not timely as what would be expected of a reasonable and prudent person would do.

Step 5: Total Base Liability: \$46,200

(Initial Liability Amount) x (Degree of Culpability Factor) x (History of Violations Factor) x (Cleanup and Cooperation Factor) = Total Base Liability

$(\$27,500) \times (1.4) \times (1) \times (1.2) = \$46,200$

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

The Total Base Liability Amount may be adjusted according to a discharger's ability to pay the liability amount and to continue in business. This factor is not adjusted for this case because the Discharger appears to have the ability to stay in business if issued a \$46,200 liability. The value of the real estate asset and sales for the Marlow Commons residential development alone far exceeds the proposed administrative civil liability. This five-acre lot is permitted for high density residential development in the City of Santa Rosa and would sell for much more than the \$46,200 in proposed liability. The Discharger has not demonstrated an inability to pay.

Step 7: Economic Benefit

Discussion:

The economic benefit realized by the Discharger for failing to deploy adequate erosion control over bare soil is quite a minimal delayed cost. Specifically, the economic benefit

Attachment A: Administrative Civil Liability Methodology Summary

would be the delayed cost of implementing erosion and sediment controls between the Regional Water Board's first inspection on December 16 through when the City of Santa Rosa staff witnessed improved sediment and erosion controls on January 15, 2020. For this methodology, Regional Water Board staff is rounding down the factor to zero for efficiency.

Step 8: Other factors as justice may require

Value: 1.0

Discussion:

In the interest of early resolution and litigation risks, the Regional Water Board Prosecution Team is considering as resolved for no assessed liability the following additional violations: 1) Construction General Permit Attachment D, Provision E.1 violations regarding perimeter controls, 2) Attachment B, Provision J.2 violations regarding the Storm Water Pollution Prevention Plan (SWPPP) and 3) Construction General Permit Prohibition III.B for unauthorized discharges over the course of December 18-22, 2019. These violations are further described in the cover letter to this methodology. Additionally, the costs incurred by the Water Quality Board to conduct this investigation and enforcement may be considered "other factors as justice may require" and could be added to the liability amount. The cost of investigation and enforcement are not added to this liability at this time in the interest of reaching settlement.

Step 9: Maximum and Minimum Liabilities

Maximum Liability

Value: \$50,000

Discussion:

Based on California Water Code section 13385: \$10,000 per day of non-discharge violation for five days.

Minimum Liability

Value: Minimal delayed costs plus an additional 10%, and less than the proposed liability

Discussion:

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 Amount

Value: \$46,200

Discussion:

The final liability amount is the total liability after application of any adjustments for the ability to pay, economic benefit, and other factors as justice may require. The final liability must be more than the minimum liability and less than the maximum liability. Here, the initial liability of \$46,200 is less than the statutory maximum liability for five days of one violation. Therefore, the final liability amount is \$46,200.

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