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6 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
7 NORTH COAST REGION

8 In the Matter of:)
9 SONOMA LUXURY RESORT LLC) **PROSECUTION TEAM'S**
10 ADMINISTRATIVE CIVIL LIABILITY) **REBUTTAL BRIEF**
11 COMPLAINT NO. R1-2020-0027)
12 _____)

13 **I. INTRODUCTION**

14 Administrative Civil Liability Complaint No. R1-2020-0027, which includes Attachment A
15 thereto (Complaint), alleges that Sonoma Luxury Resort LLC (Discharger) committed 38 violations
16 based on evidence that Discharger failed to implement the requirements of State Water
17 Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended by Order
18 Nos. 2010-0014-DWQ and 2012-0006-DWQ, National Pollutant Discharge Elimination System
19 (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land
20 Disturbance Activities (Construction General Permit or CGP) and meet the conditions of the Clean
21 Water Act Section 401 Water Quality Certification issued to the Discharger (401 Certification)
22 while conducting construction work on 65 acres of land on a 258 acre property in the hills in the
23 northern portion of the unincorporated urban boundary of the City of Healdsburg, in Sonoma
24 County (Site).

25 On November 23, 2020, Discharger submitted its trial brief which set forth a multitude of
26 arguments attempting to reduce Discharger's liability in this matter. While the Prosecution Team
27 disagrees with many of the assertions in the trial brief, the Prosecution Team identified several
28 issues that merit rebuttal briefing by the Prosecution Team:

1 First, Discharger argues (at pp. 6-7) that imposition of the liabilities proposed in the
2 Complaint “violates [Discharger’s] substantive due process as well as Section 13385 of the Water
3 Code.” This argument fails because it is a mis-reading of the CGP, and Discharger’s case law
4 citations are not applicable.

5 Second, Discharger claims (at pp. 9-10) that, for violation 37, the Prosecution Team cannot
6 establish a violation of the Basin Plan because the sampling locations relied upon do not have a
7 particular symbol on the USGS topographic map. Discharger’s brief presents a flawed reading of
8 the applicable standards.

9 Third, Discharger argues (at pp. 11-12) that “when there is a discharge, but no [Best
10 Management Practices (BMP)] violation, there is . . . no basis for” assessing a liability on a per
11 gallon basis under Water Code section 13385(c)(2). Discharger’s argument fails to acknowledge
12 the allegations of the Complaint, and the plain text of the applicable law.

13 Each of these arguments is addressed in detail below.

14 **II. THE PROPOSED LIABILITY DOES NOT VIOLATE CONSTITUTIONAL RIGHTS NOR IS**
15 **IT INCONSISTENT WITH WATER CODE SECTION 13385**

16 Discharger argues (at pp. 6-7) it is being unfairly punished twice for the same conduct,
17 claiming (at p. 6) that the proposed liability “violates substantive due process as well as Section
18 13385 of the Water Code.” There are several flaws with this argument.

19 First, each of the CGP sections violated, as described in the Complaint, are applicable to
20 the Site. It is true that the same area of the Site may have several CGP violations, but that is simply
21 a function of the text of the CGP and the Discharger’s conduct. Second, the Complaint does not
22 place Discharger’s substantive due process rights in jeopardy. The Complaint simply sets forth the
23 applicable CGP sections that were violated, and proposes a liability for such violations. The cases
24 Discharger cites have no application to this matter. Finally, although Discharger references Water
25 Code section 13385, Discharger fails to explain how or why it believes such section is implicated.
26 For this reason, the Prosecution Team ignores that argument.

27 **a. DISCHARGER IS PROPERLY LIABLE FOR EACH OF THE CGP VIOLATIONS**

28 Contrary to Discharger’s argument, the Complaint explicitly works to avoid penalizing the

1 same conduct twice. Regional Water Board staff observed, measured, and documented (or the
2 Discharger reported) multiple violations of both the CGP and 401 Certification at the Site.
3 However, the Complaint only alleges violations of the CGP, and not the analogous 401
4 Certification sections, to avoid double counting overlapping violations of the 401 Certification.
5 Section II.A of Attachment A presents nine distinct non-discharge provisions and two distinct
6 discharge provisions of the CGP that Discharger violated and the dates of each violation. Section
7 III.A of Attachment A documents staff observations and photographic evidence of inadequate or
8 ineffective BMPs for non-discharge violations 1 through 36 and the specific number of
9 observations by date¹. In this section staff repeatedly describe where BMPs were inadequate or
10 ineffective, violating specific provisions of the CGP. For example, on November 29, 2018, through
11 December 4, 2018, staff observed over 100 locations where BMPs were not effectively reducing or
12 preventing pollutants in storm water discharges (Violation 9). While staff observed over 100
13 instances of this violation, only one violation per day for each distinct CGP provision is alleged in
14 the Complaint.

15 Prosecution Team exhibits 25 through 33 contain photos demonstrating hundreds of
16 specific observations that were referenced in the Complaint. In several instances a single photo
17 shows multiple violations of the CGP. For example, the image below shows a portion of the Site
18 on November 29, 2018, with: 1) ineffective BMPs to reduce or prevent pollutants in storm water
19 discharges (failing to comply with CGP Provision Attachment E, Section B.5.e); 2) ineffective soil
20 cover for inactive areas (failing to comply with CGP Provision Attachment E, Section D.2); 3) lack
21 of linear sediment controls at the toe of slope, face of slope, and grade breaks of exposed slopes
22 to comply with sheet flow lengths (failing to comply with CGP Provision Attachment E, Section
23 E.4); and 4) ineffective run-on and runoff controls to be in compliance with effluent limitations
24 (failing to comply with CGP Provision Attachment E, Section F. In this instance, the Prosecution
25 Team alleged one violation per day for each of the four CGP provisions noted. The four violations

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28 ¹ The number of instances where violations were observed is summarized in Attachment A on pages 22, 27, 42, 48, 56,
57, and 68. Additionally, exhibits 25 through 33 include supporting photographic documentation of each of the
instances observed.

1 occurred for a period of six days.



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10 Contrary to Discharger’s claims, the Complaint could have sought to impose additional
11 liability by alleging additional violations for the numerous other locations (or instances) where
12 similar violations occurred that same day, but didn’t. Each of the violations in the Complaint
13 represents the proper interpretation of the CGP and the Enforcement Policy.

14 b. THE COMPLAINT DOES NOT VIOLATE ANY DUE PROCESS RIGHTS

15 The two cases cited by Discharger (at p. 7) are not applicable to this matter. Specifically,
16 Discharger cites *In re No. Dist. of Cal. "Dalkon Shield" IUD Products*, 526 F. Supp. 887, 899
17 (N.D.Cal.1981) (vacated on other grounds *in Abed v. A. H. Robins Co.*, 693 F.2d 847 (9th Cir.
18 1982)) and *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz*
19 *Mobile Estates* (2001) 94 Cal. App. 4th 890, 913 (2001) for the proposition that “overlapping
20 damage awards” violate due process rights.

21 The *Dalkon Shield* case has no bearing on this matter because in that case the court
22 weighed whether to certify a class action lawsuit, as requested by the manufacturer of a defective
23 product, to reduce “[t]he potential of abuse implicit in repeated awards of punitive damages based
24 on the same conduct,” so that the manufacturer would face one punitive damage claim, rather
25 than multiple punitive damage claims if the class were not certified. 526 F.Supp. at 899. Such
26 rationale has no application to this matter.

27 Similarly, the *De Anza* case also presented a punitive damages question: whether plaintiffs
28 were entitled to recover punitive damages, when a statute provided that punitive damages were

1 not available. Unsurprisingly, the *De Anza* court held that punitive damages were not recoverable.
2 94 Cal.App.4th at 916.

3 The cases cited by Discharger are inapplicable because they relate to damages claims.
4 Damages, as defined by Black's Law Dictionary (11th ed. 2019), means "[m]oney claimed by, or
5 ordered to be paid to, a person as compensation for loss or injury." The Complaint does not seek
6 damages; it seeks to impose a statutory liability. There is no claim that the proposed liability in the
7 Complaint is intended to "compensate" the state for "loss or injury," as that is not how the
8 applicable Water Code sections are drafted. Instead, the applicable statutes set forth liability
9 amounts, measured in days and gallons, which are then put through the Enforcement Policy's
10 methodology. The Prosecution Team and the Regional Water Board are bound to follow the
11 terms of the Enforcement Policy. Discharger's citations to cases regarding punitive damages are
12 irrelevant, and Discharger fails to cite to any case adopting its argument in the context of a
13 proceeding such as this. Moreover, the Prosecution Team is aware of no such case.

14 **III. THE SAMPLING LOCATIONS WERE PROPER**

15 Discharger claims (at pp. 9-10) that, for violation 37, the Prosecution Team cannot
16 establish a violation of the Basin Plan because the sampling locations relied upon do not have a
17 particular symbol on the USGS topographic map. Discharger's brief presents a flawed reading of
18 the applicable standards.

19 "Waters of the state" is defined at Water Code section 13050, subsection (e), as "any
20 surface water or groundwater, including saline waters, within the boundaries of the state."
21 Furthermore, the US EPA has delegated responsibility for implementation of portions of the CWA
22 to the State and Regional Water Boards, including the National Pollutant Discharge Elimination
23 System (NPDES) and Water Quality Certification programs. "Under the Porter-Cologne Water
24 Quality Control Act, California state law designates the State Water Resources Control Board and
25 nine regional boards as the principal state agencies for enforcing federal and state water pollution
26 law and for issuing permits. See Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370,
27 13377." *San Francisco Baykeeper v. West Bay Sanitary Dist.*, 791 F.Supp.2d 719, 729 (2011).
28 Under Federal law four clear categories of waters are federally regulated as Waters of the U.S.:

- 1 1. The territorial seas and traditional navigable waters,
- 2 2. Perennial and intermittent tributaries to those waters,
- 3 3. Certain lakes, ponds, and impoundments, and
- 4 4. Wetlands adjacent to jurisdictional waters

5 Discharger appropriately enrolled in the CGP, obtained an individual permit from the
6 U.S. Army Corps of Engineers to perform the project pursuant to CWA, section 404, and
7 received a 401 Certification by the Regional Water Board requiring compliance with
8 state standards. Holding these permits is just one of many lines of evidence validating
9 that discharges from the Site are indeed to streams or watercourses within the
10 jurisdiction of the Regional Water Board. Additionally, on December 7, 2018 Regional
11 Water Board staff provided Discharger with correspondence including weblinks to the 2014/2016
12 Integrated Report – 303(d) Listed Waters Impaired for Sediment, that illustrates Foss Creek and
13 Lytton Creek as “Waters of the U.S.” under the jurisdiction of the Regional Water Board:

14 [SEE IMAGE ON FOLLOWING PAGE]

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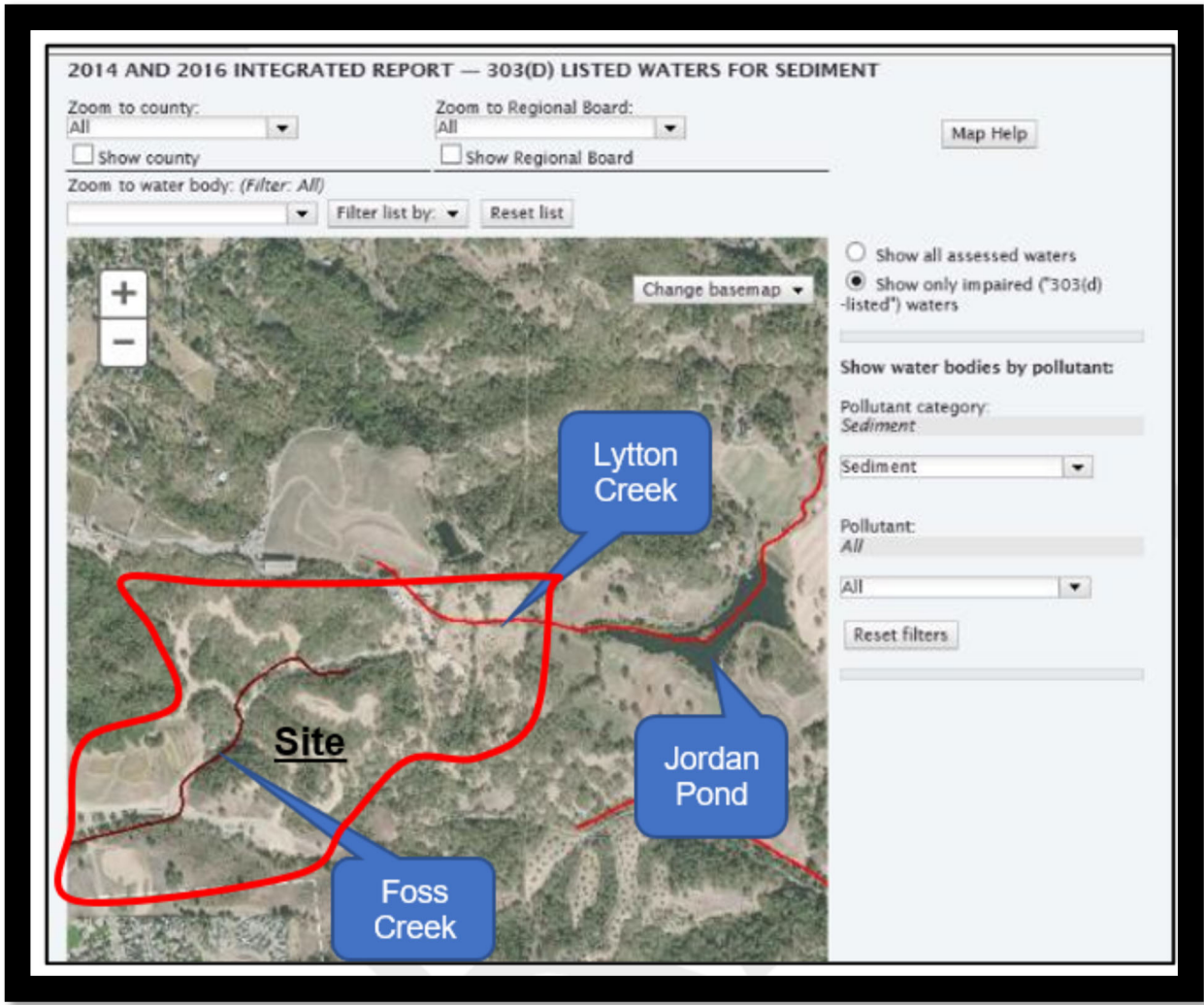


Figure 1. This image shows the 303(d) listed waters impaired for sediment in red with overlays showing the approximate Site boundaries and the headwaters of Foss Creek and of Lytton Creek as they flow through the Site. Base image taken from the State Water Board 2014 and 2016 Integrated Report Website.

For these reasons, Discharger’s argument fails, as the sampling locations were proper.

IV. PER GALLON ASSESSMENTS ARE PROPERLY ALLEGED IN THE COMPLAINT

Discharger argues (at pp. 11-12) that “when there is a discharge, but no BMP violation, there is . . . no basis for” assessing a liability on a per gallon basis under Water Code section 13385(c)(2). This is not true.

The non-discharge (i.e., BMP) violations and unauthorized discharge violations are separate provisions of the regulations. See, for example, CGP Section III.A; Basin Plan Section 4.2.1; CGP Section III.B; and 401 Certification Condition 7. The Prosecution Team *can* allege non-

1 discharge and discharge violations but is not required to do so and did not do so in all instances.
2 The discharge violations occurred during the rain events that resulted in the discharge of polluted
3 runoff from the Site to surface waters during days where staff determined the Site violated
4 provisions of the CGP.

5 A storm water discharge is considered unauthorized if it meets one or more of the
6 conditions outlined in Attachment A of the Complaint, (at pp. 92-93). The CGP allows for the
7 discharge of treated storm water under specific conditions. However, this is contingent on
8 compliance with conditions of the CGP (see CGP, Findings, Section I.A.2, p. 1, Special
9 Provisions, Section IV.A.1 & 2, p. 22) and the “implementation of Best Available Technology
10 Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) to
11 reduce or eliminate pollutants in storm water runoff.” (See CGP, Effluent Standards and
12 Receiving Water Monitoring Narrative Effluent Limitations, Section V.A.2, p. 28.) Staff determined
13 that storm water discharges from the Site were unauthorized based on numerous violations of the
14 CGP, such as failure to implement adequate BMPs, failure to take corrective actions after
15 exceeding Numeric Action Levels (NALs), failure to implement BAT/BCT to reduce or eliminate
16 pollutants in storm water runoff, failure to prevent the discharge of sediment, and failure to prevent
17 degradation of downstream receiving waters. Additionally, violations of the Basin Plan were
18 demonstrated in receiving-water sampling results. These violations were present in individual
19 tributary areas at such a scale that none of the tributary areas identified in the Complaint produced
20 discharge that would be authorized under the CGP and other applicable regulations. As such, the
21 Complaint properly alleges discharge violations.

22 Additionally, the Discharger argues (at p. 14) that “[w]hen the NTU results for Pass 1 are
23 reviewed, there was not an exceedance of the permitted NTU’s” (i.e., 250 NTUs), and that “there
24 is no overlap between the alleged discharges and exceedance of the effluent standard”². The
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28 ² Page 18 of Attachment A summarizes the CGP, 401 Certification, and Basin Plan provisions that were violated and are associated with the unauthorized discharge of storm water

1 CGP requires the Discharger to meet narrative and numeric Effluent Standards³ and Receiving
2 Water Limitations⁴. The sample results from the Pass I location are instream samples that can be
3 used to demonstrate a violation of Receiving Water Limitations which include Basin Plan Water
4 Quality Objectives. However, these instream sample results cannot be used to demonstrate a
5 violation of the numeric Effluent Standards. Nonetheless, the Discharger did in fact collect effluent
6 samples and reported exceedances of the numeric Effluent Standards on November 27, 2018⁵
7 (see Prosecution Team exhibit 15, p. 26).

8 It is important to note that the Effluent Standards are expressed as a 250 NTU effluent
9 Numeric Action Levels (NALs), and a 500 NTU Receiving Water Monitoring Trigger. These
10 Effluent Standards are not Receiving Water Limitations, but rather triggers that require specific
11 actions. As required in Section V. B and C of the CGP and depicted in Figure 2 below, when the
12 effluent⁶ exceeds 250 NTU, the Discharger is required to implement corrective actions until the
13 effluent turbidity is below the 250 NTU standard and on-site BMPs meet BAT/BCT. When the daily
14 average effluent exceeds 500 NTU, the Discharger is required to conduct instream receiving water
15 monitoring for the duration of the project (Section V.C. of the CGP). Again, the 250 NTU and 500
16 NTU values within the CGP are triggers for corrective action and instream monitoring respectively,
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18 ³ CGP Effluent Standards, Section V.A., page 28. “Dischargers shall minimize or prevent pollutants in storm water
19 discharges and authorized non-storm water discharges through the use of controls, structures, and management
20 practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.”

21 CGP Effluent Standards, Section V.B, page 29. “For Risk Level 2 and 3 dischargers, the NAL storm event daily
22 average for turbidity is 250 NTU. The discharger shall take actions as described [Section V.B.3 and 4] if the discharge
23 is outside of this range of turbidity values.

24 CGP Effluent Standards, Section V.C, page 30. “The receiving water monitoring triggers for Risk Level 3 dischargers
25 with direct discharges to surface waters are triggered ..., or when the daily average effluent turbidity exceeds 500
26 NTU.”

27 ⁴ CGP Receiving Water Limitations, Section VI.C, page 31. “The discharger shall ensure that storm water discharges
28 and authorized non-storm water discharges will not contain pollutants that cause or contribute to an exceedance of any
applicable water quality objectives or water quality standards (collectively, WQS) contained in a Statewide Water
Quality Control Plan, the California Toxics Rule, the National Toxics Rule, or the applicable Regional Water Board’s
Water Quality Control Plan (Basin Plan).”

⁵ The Discharger calculated an average effluent concentration of 751 NTU for samples collected on November 27,
2018. This data was presented in an ad hoc report uploaded by the Discharger to the publicly accessible Stormwater
Multiple Application and Report Tracking System (SMARTS) on December 5, 2018.

⁶ CGP, Appendix 5: Glossary, page 4. “Effluent: Any discharge of water by a discharger either to the receiving water
or beyond the property boundary controlled by the discharger.”

1 and are not the criteria established for the protection of beneficial uses. Therefore, even if the
2 Effluent Standards were met or no effluent data was collected during the alleged discharge
3 events, there were exceedances of the Receiving Water Limitation during the rain events that
4 occurred on February 1-2, 2019, May 16, 2019, and May 18-19, 2019. As noted in Attachment A
5 of the Complaint (at pp. 92-93), a discharge is considered unauthorized when either an Effluent
6 Standard or Receiving Water Limitation (collectively, WQOs) is exceeded, when a CGP or Basin
7 Plan Provision/Prohibition is violated, or when the discharge is caused by a lack of adequate and
8 effective BMPs, structures and controls that utilize the BAT/BCT. For each of the six alleged
9 discharge events, one or more of these conditions were present as summarized below.

10 1. September 30 to October 1, 2018: 900,000 gallons over a 2-day period.

11 a. Discharger violated Basin Plan Prohibitions by discharging sediment from a
12 construction site to receiving waters.

13 b. Discharger violated Narrative Effluent Standards by failing to implement BMPs that
14 meet BAT/BCT.

15 2. November 20-24, 2018: 2.2 million gallons over a 5-day period.

16 a. Discharger violated Basin Plan Prohibitions by discharging sediment from a
17 construction site to receiving waters.

18 b. Discharger violated Narrative Effluent Standards by failing to implement BMPs that
19 meet BAT/BCT.

20 3. November 27-29, 2018: 2.2 million gallons over a 3-day period.

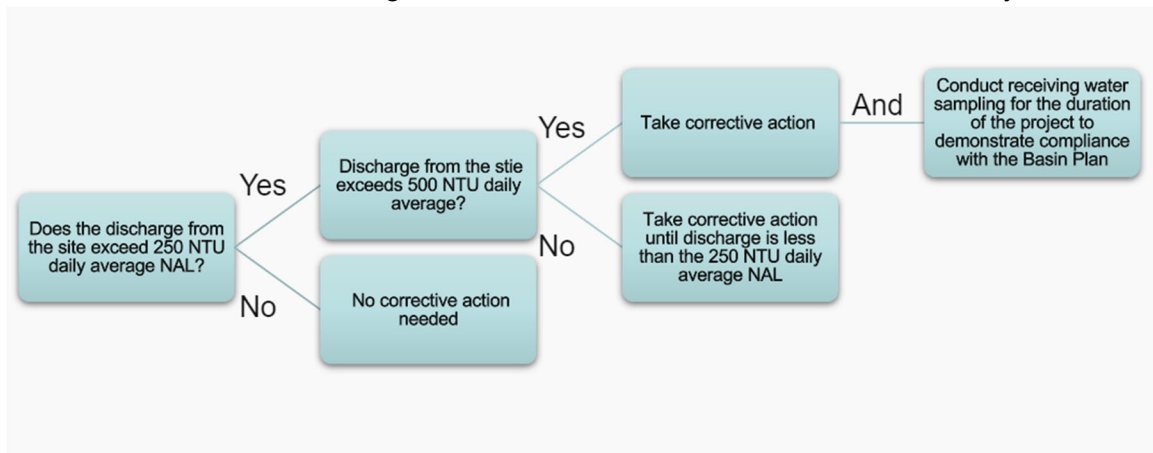
21 a. Discharger violated Basin Plan Prohibitions by discharging sediment from a
22 construction site to receiving waters.

23 b. Discharger violated Narrative Effluent Standards by failing to implement BMPs that
24 meet BAT/BCT.

25 c. Exceeded Receiving Water Limitations of Basin Plan WQOs on November 29,
26 2018.

27 d. Discharger violated numerous CGP Provisions as detailed in Attachment A of the
28 Complaint, pp. 22 – 76.

- 1 4. February 1-2, 2019: 2.2 million gallons over a 2-day period.
 - 2 a. Discharger violated Basin Plan Prohibitions by discharging sediment from a
 - 3 construction site to receiving waters.
 - 4 b. Discharger violated Narrative Effluent Standards by failing to implement BMPs
 - 5 failing that meet BAT/BCT.
 - 6 c. Exceeded Receiving Water Limitations of Basin Plan WQOs on February 2-4, 2019
 - 7 d. Discharger violated numerous CGP Provisions as detailed in Attachment A of the
 - 8 Complaint, pp. 22 – 76
- 9 5. May 16, 2019: 1.6 million gallons over 1-day period
 - 10 a. Discharger violated Basin Plan Prohibitions by discharging sediment from a
 - 11 construction site to receiving waters.
 - 12 b. Discharger violated Narrative Effluent Standards by failing to implement BMPs
 - 13 failing that meet BAT/BCT.
 - 14 c. Exceeded Receiving Water Limitations of Basin Plan WQOs on May 16, 2019.
- 15 6. May 18-19, 2019: 295,000 gallons over a 2-day period
 - 16 a. Discharger violated Basin Plan Prohibitions by discharging sediment from a
 - 17 construction site to receiving waters.
 - 18 b. Discharger violated Narrative Effluent Standards by failing to implement BMPs
 - 19 failing that meet BAT/BCT.
 - 20 c. Exceeded Receiving Water Limitations of Basin Plan WQOs on May 18 & 19 2019.



28 Figure 2. Determining Compliance with Effluent Standards

1 The Discharger further argues (at p. 13) that “both authorized and unauthorized releases
2 were occurring at the Property at the same time and Violation 38 does not distinguish between the
3 two.” and that the “Board takes the [erroneous] position that if offsite runoff crosses a portion of
4 the Project then the runoff becomes unauthorized.”

5 As noted above, staff properly alleges unauthorized discharge violations. When runoff from
6 upstream tributary areas outside the project (commonly referred as “run-on”) comingled with
7 unauthorized runoff from disturbed downstream tributary areas, staff also properly included the
8 entire comingled volume in the liability. Per Attachment E, Section F, of the CGP, “run-on from off
9 site shall be directed away from all disturbed areas or shall collectively be in compliance with the
10 effluent limitations in this General Permit.”

11 The Discharger did not implement actions at the Site to redirect run-on away from all
12 disturbed areas within individual tributary areas. As the water flowed downstream from
13 undisturbed areas, it comingled with sediment-laden runoff and sediment discharges from
14 disturbed areas. Since this comingled discharge caused an exceedance of water quality standards
15 in downstream receiving waters, then the entire volume of runoff, including the volume upstream
16 from undisturbed areas was unauthorized, and thus was properly included in the liability.
17 Specifically, the entire volume of sediment laden runoff that discharged to receiving waters alleged
18 in the Complaint includes comingled run-on and runoff from the Passalacqua tributary area, Road
19 4, 5, and 8 tributary areas, and the Resort tributary area⁷.

20 As required by the December 28, 2018, Water Code Section 13267 Order, the Discharger
21 used a method known as the United States Department of Agriculture, Natural Resources
22 Conservation Services Urban Hydrology for Small Watersheds Technical Release 55 (TR-55)⁸ to
23 estimate the volume of stormwater that discharged to receiving waters. This Discharger’s
24 response to the 13267 Order includes a watershed tributary area map and storm water runoff
25

26 ⁷ Regional Water Board staff took a conservative approach in assessing liability on the volume of unauthorized storm
27 water discharged to surface waters by excluding the run-on from the Sonoma County Landfill property and rounding
down the total estimated volume of discharge for each storm event.

28 ⁸ United States Department of Agriculture’s [TR-55 Manual](#) describes in detail the method used for calculating
stormwater runoff in applicable watersheds.

1 calculations, which are presented in Prosecution Team exhibit 15 (at pp. 28-29). Using the volume
2 estimates provided by the Discharger's consultant and using the TR-55 method, staff estimated a
3 total of 9.4 million gallons of discharge during the six distinct storm events⁹ (see Prosecution
4 Team exhibit 2: Attachment A, pp. 90-94).

5 **V. CONCLUSION**

6 Discharger's trial brief makes a series of arguments that are not supported by the facts or
7 law. The Prosecution Team reserves the right to refute such arguments at the hearing. However,
8 the Prosecution Team provides this rebuttal brief to refute the arguments described above.

9 Date: December 1, 2020

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11 Daniel S. Kippen, Senior Staff Counsel
12 Prosecution Team

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⁹ The Discharger estimated the total volume discharged to receiving waters during the 2018 storm events. Staff estimated the total volume discharged to receiving water during the 2019 storm events using the same TR-55 method.