

1 FRED M. BLUM, ESQ. (SBN101586)
fblum@behblaw.com
2 MICHAEL E. GALLAGHER, ESQ. (SBN 195592)
mgallagher@behblaw.com
3 EARL L. HAGSTRÖM (SBN 150958)
ehagstrom@behblaw.com
4 BASSI, EDLIN, HUIE & BLUM LLP
500 Washington Street, Suite 700
5 San Francisco, CA 94111
Telephone: (415) 397-9006
6 Facsimile: (415) 397-1339

7 Attorneys for alleged Discharger
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12 **STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
13 **NORTH COAST REGION**

14
15 **Administrative Civil Liability Complaint No. R1-2020-0027**

16 **Amending Complaint No. R1-2020-0009**
17

18 **IN THE MATTER OF: SONOMA LUXURY RESORT LLC, SAGGIO HILLS DEVELOPMENT**
19 **PROJECT SITE (A.K.A. MONTAGE HEALDSBURG) 16840 HEALDSBURG AVENUE, HEALDSBURG,**
20 **CA 95448**

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22 **TRIAL BRIEF FOR DISCHARGER**
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TRIAL BRIEF FOR DISCHARGER

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1 **I. INTRODUCTION**

2 The Amended Civil Liability Complaint (“CLC”) alleges a multitude of disparate facts
3 regarding the occurrences of actions at 16840 Healdsburg Avenue, Healdsburg, CA 95448 (“the
4 Property”) and attempts to weave them together into a tapestry that supports a penalty
5 assessment of over \$6 million. However, if the Board looks beyond the allegations, the CLC
6 does not present a tapestry that is a coherent picture or properly reflects the laws, regulations or
7 permits that should provide the thread to construct the tapestry.¹

8 Violation 38 is where all of these deficiencies come together to undermine the major
9 penalty allegations of the CLC. The Violation is founded on Water Code §13885(c)(2) which
10 allows a penalty enhancement where there is a violation of the CGP and a resulting discharge
11 from the Project. There is no basis for the enhancement when there is a Construction General
12 Permit (“CGP”) violation and no discharge or where there is a discharge but no CGP violation.
13 When the dates of the alleged violations are matched up with days in which there are alleged
14 discharges from the Property, the CLC’s demands for significant penalties craters. The CLC
15 asks for penalty enhancements for days in which there is not allegation of specific violations.²
16 The allegations of 33 days of discharges is reduced to four.

17 Perhaps the most substantial deficient in the CLC is its failure to distinguish between the
18 Property as a whole and the smaller portion of the Property that are subject to the laws,
19 regulations and permits at issue. The Property consists of approximately 260 acres of land. Only
20 a small part of the Property, approximately 65 acres or 25%, is subject to the Construction
21 General Permit (“CGP”) that is at the heart of the CLC. *CLC*, at 2. The 65 acres (“the Project”) is

23 ¹ SLR is not arguing that there should be no assessment against them; but only that it fair and
24 based on the alleged facts. Attachment A to this Brief contains a table of those Violations which
25 SLR is and is not contesting. The failure to contest a violation is not an admission that it
26 occurred but only SLR will not be contesting the admission.

27 ² May 16 and 18-19 of 2019.

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1 that part of the Property that is being disturbed by the ongoing construction. *April 1, 2016*
2 *Notice of Intent.*

3 The alleged violations, and the resulting penalty assessments, do not distinguish between
4 the Property and the Project. As an example, Violation 37 alleges that SLR violated the Basin
5 Plan § 3.3.17 by permitting discharges from the Construction Site which resulted in turbidity
6 increases of more than 20% above background in receiving waters. *CLC*, at p. 6, ¶18. However,
7 the locations in which the samples were taken to support the allegations contain runoff from the
8 Property as a whole and no attempt is made to distinguish between turbidity resulting from the
9 Project and other parts of the Property.

10 As a further example, Violation 38 alleged a penalty enhancement for the discharge of
11 runoff from the Property. *Id.* The penalty enhancement predisposes that that there was first a
12 violation of the CGP. Yet, the CGP only applies to the part of the Property in which there is
13 construction activity. *CGP*. at 7-10. There is no attempt made to distinguish between discharges
14 resulting from the Project and other parts of the Property.

15 An additional significant deficiency in the CLC is that it is based on numerous alleged
16 violations of the CGP where the predicate facts supporting a violation are shown. As an
17 example, Violations 5, 14, 22, 30 and 36 allege a violation for the failure to properly manage
18 runoff. *CGP*, Att. E, § F. Section F is very specific as to what is required. It requires that
19 “[r]un-on from off site shall be directed away from all disturbed areas or shall collectively be in
20 compliance with the effluent limitations in this General Permit.” *Id.* The effluent limitation for
21 turbidity in the CGP is 250 NTU’s and there is no allegation that during the relevant time period
22 that the runoff collectively exceeded 250 NTUs. *Id.* at §A(2).

23 Another example are Violations 2, 10, 16, 19, 26 and 32 which allege a violation in
24 relation to inactive areas. The permit defines inactive areas as one that has been inactive for 14
25 day. *Id.*, Att. E, § D.2, fn. 1. The facts alleged in the CLC or the attached Methodology do not
26 properly allege the predicate facts that the areas were inactive for 14 days.

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1 The CLC also alleges numerous days of violations where the alleged facts only support a
2 single day. As examples, Violations 7 and 8 allege violations that were observed on November
3 29, 2018. *Methodology A*, at 28-9. Yet, the CLC asks for penalties for 6 days, without any
4 allegation that the violations continued past the single day they were observed. *Id.* at 39.

5 Not only does the CLC not properly track the CGP, but where it alleges a violation of the
6 Basin Plan, it ignores the requirements in the Basin Plan that are necessary to prove the violation.
7 As an example, Violation 37 alleges that SLR violated the Basin Plan § 3.3.17 by permitting
8 discharges from the Construction Site which resulted in turbidity increases of more than 20%
9 above background in receiving waters. *CLC*, at 6, ¶18. The Basin Plan is very specific as to
10 where the samples to establish the violation need to be taken; even providing the reference to maps
11 that are to be used. *Basin Plan*. at §4.2.2(B)(2). Yet Methodology A shows that the samples
12 were not taken from approved locations.

13 In the end the tapestry that makes up the CLC unravels.

14 There is also a major procedural problem with the hearing going forward on December
15 11, 2020 as a virtual hearing. The statutes and regulations that empower the Board to proceed do
16 not allow for a virtual hearing. Among other things, there is no statutory basis for the Board to
17 swear in witnesses remotely or to take testimony remotely. SLR objects to these procedures and
18 does not consent to a virtual hearing.

19 The Governor's order which the Board is basing its authority to proceed remotely does
20 not support this deviation from the statutes and regulations. The Governor is empowered to
21 suspend certain laws in a state of emergency, but that is different from any power to modify or
22 add to existing statutes. In addition, the Governor's did not specifically mention any changes in
23 the rules and regulations affecting adjudicatory hearing procedures. Even if the Governor has
24 the power to alter hearing procedures, the Board does not. There is no legal basis for the virtual
25 hearing to go forward.

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1 **II. EVIDENTIARY ISSUES**

2 **A. HEARSAY EVIDENCE**

3 The Board may accept and consider hearsay evidence, but is limited in using such
4 evidence. Hearsay evidence may be used to supplement or explain other evidence in the
5 proceeding, "but over timely objection shall not be sufficient in itself to support a finding unless
6 it would be admissible over objection in civil actions." GOV'T CODE, §11513 (Westlaw 2020).

7 The Board is seeking to introduce a significant amount of documentary evidence, all of
8 which would be considered hearsay. Before any of the documentary evidence is admissible the
9 Board must first produce evidence that the hearsay supplements. SLR hereby objects on hearsay
10 grounds to each and every exhibit on the Board's list.

11 **B. BURDEN OF PROOF**

12 Critical to the resolution of this CLC is a determination of party bears the burden of proof
13 as to disputed issues. The analysis is divided into three sections. The first will discuss
14 Violations 1 through 37, the second Violation 38.

15 **1. Violations 1 through 37**

16 The gravamen of Violations 1 through 37 is that SLR violated provisions of the Basin
17 Plan or its CGP in constructing and maintaining the best management practices ("BMPs") that
18 were available. The Water Board has the burden of proving that the violation occurred.
19 *State of California v. City and Violation of San Francisco* (1979) 94 Cal.App.3d 522.

20 The burden is different when it comes to the penalty assessed. The statute allows for a
21 penalty of up to \$10,000 per day. Courts have interpreted this language to mean that once a
22 violation has occurred, the Water Board assesses a penalty, and then it is the burden of the
23 alleged violator to show that a different penalty should be assessed. *Id.*

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1 **2. Violation 38**

2 Violation 38 alleges that SLR failed to prevent the unauthorized discharge of millions of
3 gallons of storm water. The penalties are “not to exceed ten dollars (\$10) multiplied by the
4 number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.”
5 The Water Board has the burden to prove (1) the violation of law, and (2) the number of gallons
6 that were released in violation of law. Sonoma has the burden to prove that a violation less than
7 \$10 per gallon is justified. *Id.*

8
9 **III. ANALYSIS OF LIABILITY FOR VIOLATIONS 1 THROUGH 38**

10 The liability analysis will be divided into two sections. The first discusses Violation 1
11 through 36, and the next Violation 37. Violation 38 does not allege any new violations and will
12 be discussed in a different section.

13 **A. VIOLATIONS 1 THROUGH 36**

14 Violations 1 through 36 allege a myriad of violations of the CGP. Each of the Violations
15 is tied to a specific requirement detailed in Attachment E of the CGP. The Violations are
16 grouped based on the time period that the violations are alleged to have occurred. In reviewing
17 both the CLC and Attachment A: Methodology there are major flaws in the analysis.³

- 18 • The CLC alleges overlapping violations in which the same acts are alleged more than
19 once and penalties are demanded for the same conduct in more than one alleged
20 Violation.
21 • The rationale for the violation, as explained in Exhibit A, does not demonstrate a
22 violation of the specified BMP.

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26 ³ There are also issues regarding how the penalty amount is assessed. These will be discussed as
27 part of the analysis of Violation 38.

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- 1 • The number of days in which the violation is alleged to have occurred is not consistent
2 with the facts alleged in the Methodology.

3 **1. The CLC improperly alleges overlapping violations in which the same**
4 **acts are alleged more than once and penalties are demanded for the**
5 **same conduct in more than one alleged Violation.**

6 The CLC seeks to penalize SLR for the same conduct in multiple Violations. The CLC
7 allegations fit a pattern. For each temporal grouping, the CLC first makes a general allegation
8 that SLR did not follow the required BMPs. Then it goes on to allege specific violations
9 occurred.

10 As an example, Violations 1, 9, 15, 18, 25, and 31 allege that SLR failed “to ensure
11 effectiveness of existing BMPs to reduce or prevent pollutants in storm water discharges and
12 authorized non-storm water discharges on October 3, 2018 (Violation 1), November 29 through
13 December 4, 2018 (Violation 9), January 7, 2019 (Violation 15), January 18, 2019 (Violation
14 18), February 1, 2019 (Violation 25), and February 4, 2019 (Violation 31).” *CLC* at p. 5, ¶9.
15 Other Violations cite to specific violations that would be part of the overall alleged “failure to
16 effectively manage” Construction Site run-off.

17 The allegations that allegedly occurred on October 3, 2018 an example of this overlap.
18 After making the general allegation of failing to prevent or reduce improper storm water
19 discharges in Violation 1, the CLC goes on to allege four specific instances in which BMP’s
20 were not instituted and which resulted in improper discharges. For instance, Violation 2 alleges
21 a failure to implement soil coverings on slopes. (CGP, Att. E, D2). Thus, SLR is being
22 penalized for failing to implement soil coverings on slopes. Once as part of Violation 1 and a
23 second time for Violation 2.

24 This multiple assessment of liability and/or penalties violates substantive due process as
25 well as Section 13885 of the Water Code. As a general rule, “[a] defendant has a due process
26 right to be protected against unlimited, multiple punishment for the same act. A defendant in a

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1 civil action has a right to be protected against double recoveries not because they violate ‘double
2 jeopardy’ but simply because overlapping damage awards violate that sense of ‘fundamental
3 fairness’ which lies at the heart of constitutional due process. *In re No. Dist. of Cal. "Dalkon*
4 *Shield" IUD Products*, 526 F. Supp. 887, 899 (N.D.Cal.1981) (vacated on other grounds in *Abed*
5 *v. A. H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982)). Overlapping damage awards, “violate that
6 sense of ‘fundamental fairness’ which lies at the heart of constitutional due process.” *De Anza*
7 *Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates* (2001) 94
8 Cal. App. 4th 890, 913 (2001).

9 **2. The rationale for the violation, as explained in Exhibit A, does not**
10 **demonstrate a violation of the specified BMP.**

11 Violations 2, 10, 16, 19, 26, and 32 allege that Sonoma “violated CGP Attachment E,
12 Section D.2 by failing to provide effective soil cover for inactive areas and all finished slopes,
13 open space, utility backfill, and completed lots” *CLC* at p. 5, ¶10. However, the CLC
14 appears to ignore the definition of “inactive” as stated in the CGP. “Inactive areas of
15 construction are areas of construction activity that have been disturbed and are not scheduled to
16 be re-disturbed **for at least 14 days.**” CGP Att. E, § D.2)(Emphasis added).

17 Nowhere in the CLC or Attachment A is there any allegation or even inference that the
18 areas that the Water Board believes inactive were actually inactive for a 14 day period.

19 Violations 4, 13, 21, 29, and 35 alleges that Sonoma “violated CGP Attachment E,
20 Section E.4 by failing to have adequate or effective linear sediment controls along the toe of the
21 slope, face of the slope, and at the grade breaks of exposed slopes to comply with sheet flow
22 lengths. . . .” *CLC* at p. 5, ¶12. The described basis for the claim are the visual observations of
23 inspectors. However, the specific BMP is not a general requirement for linear sediment controls,
24 but a specific requirement “to comply with sheet flow lengths in accordance with Table 1.” *CGP*
25 Att. E, §E4. Nowhere in the CLC or Attachment A is there any allegation regarding the failure
26 to apply the proper “sheet flow lengths in accordance with Table 1.” (*Id.*)

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1 Violations 5, 14, 22, 30, and 36 allege that Sonoma “violated CGP Attachment E, Section
2 F by failing to effectively manage all run-on, all runoff within the Site and all runoff that
3 discharges off the Site” (CLC at 5, ¶13) However, the description of the BMP neglected to
4 include the last sentence. That reads: “Run-on from off site shall be directed away from all
5 disturbed areas or shall collectively be in compliance with the effluent limitations in this General
6 Permit.” *CGP* Att. E, Section F.

7 Section F sets up different obligations based on whether the discharge originated within
8 the area regulated by the permit or not. If the discharge originated off the Project the discharger
9 has two options. If the discharge is “collectively . . . in compliance with the effluent limitations
10 in this General Permit” there is no further obligation. If it is not, than the discharger must direct
11 the discharge “away from all disturbed areas”

12 Nowhere in the CLC or Methodology A is there any allegation regarding whether the
13 discharge originated on or off the Construction Site. Nor is there any allegation to show the
14 collective discharge violated the effluent limitations or was not directed away from disturbed
15 areas.

16 **3. The number of days in which the violation is alleged to have occurred**
17 **is not consistent with the facts alleged in Methodology A.**

18 Violations 6 through 14 allege different BMP violations spanning a 6 day period from
19 November 29, 2018 through December 4, 2018. As stated in Methodology A, the factual basis
20 for the Violations is an inspection that occurred on November 29, and again on December 3rd and
21 4th. The Methodology concedes that not all of the alleged violations that were found on
22 November 29th were also found to exist on the subsequent visits. The statement in the
23 Methodology that during the December 4th inspection “staff observed **many** of the same
24 conditions or violations observed on the November 29 inspection” Methodology A, at
25 27)(Emphasis added). Clearly, not all the alleged violations observed on November 29th were
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1 again observed on November 30th and December 1st through the 4th. Yet every alleged violation
2 is alleged to have continued through December 4th.

3 Moreover, the charging allegations do not allege that the alleged violations continued for
4 the entire time period. Violation 6 is only alleged to have occurred on November 29th. *CLC* at p.
5 5, ¶14. The same is true for Violations 7 and 8. *Id.* at p. 6, ¶¶15 & 16.

6 **B. VIOLATION 37**

7 The allegation supporting Violation 37 is that SLR “violated CGP Section VI.C and
8 Basin Plan Section 3.3.17 by discharges from the Construction Site which resulted in turbidity
9 increases of more than 20% above background in receiving waters on 33 days between
10 November 29, 2018 and May 19, 2019.” *Id.* at p. 6, ¶18.

11 The CLC and Methodology A does not support the allegations. There are at least two
12 reasons.

- 13 • The Allegations ignore the Board’s Nonpoint Source Measures Enforcement Policy
14 contained in §4.2 of Chapter 4 of the North Coast Basin Plan; and,
- 15 • The allegations wrongly assume that the discharge tested only tested water that were part
16 of an unauthorized releases from the Project, which it did not.

17 **1. The Allegations ignore the Board’s Nonpoint Source Measures**
18 **Enforcement Policy contained in §4.2 of Chapter 4 of the North Coast**
19 **Basin Plan.**

20 Chapter 4 of the North Coast Basin Plan delineates the implementation policy for the
21 previous chapters. Chapter 3 contains the general prohibition concerning increases in turbidly
22 and Chapter 4 determines how the general prohibition is enforced.

23 Section 4.2.1 defines the general discharge prohibition for construction activities to
24 include “[t]he placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen
25 material from any logging, construction, or associated activity of whatever nature at locations
26 where such material could pass into any **stream or watercourse** in the basin in quantities which

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1 could be deleterious to fish, wildlife, or other beneficial uses is prohibited.’ (Basin Plan, Ch. 4,
2 §4.2.1-2)(Emphasis added). Included in the prohibition is increasing turbidity more than 20%
3 above background levels. *Id.*, §4.2.2-A2.

4 The prohibitions in Section 4.2.1 do not apply to all water ways but only to those defined
5 as a “stream or watercourse.” Stream or watercourse has a very specific definition that is
6 contained in Section 4.2.2-B2. It is:

7 The definition for "stream or watercourse" as those terms are used in the waste
8 discharge prohibitions relative to logging and construction activities shall be
9 interpreted by the Regional Water Board to mean the following: Natural
10 watercourse as designated by a solid line or dash and three dots symbol shown in
11 blue on the largest scale United States Geological Survey Topographic Map most
12 recently published.

13 In order for Violation 37 to be substantiated, the Water Board must prove that the 20%
14 increase over natural background took place in a “[n]atural watercourse as designated by a solid
15 line or dash and three dots symbol shown in blue on the largest scale United States Geological
16 Survey Topographic Map most recently published.” However, the two locations which were
17 chosen by the Board are not on locations “designated by a solid line or dash and three dots
18 symbol shown in blue on the largest scale United States Geological Survey Topographic Map. . .
19 .” These are Foss 1 for background and Pass 1 for the downstream sample. Methodology A, at
20 p. 83, Table 1.

21 As a result, the data relied on by the Water Board is insufficient to satisfy the proof
22 requirements. This cannot be cured by choosing a different downstream sampling location since
23 the background sample still would have been taken at an improper location.
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1 discharge over 1,000 gallons. WATER CODE, §13855(c)(2) (Westlaw 2202). Where there is a
2 BMP violation, but no discharge from the Project on that day, there is no basis for an
3 enhancement. Similarly, when there is a discharge, but no BMP violation, there is also no basis
4 for an enhancement. The bottom line is that an enhancement applies only when there is a
5 discharge from a part of the Project where BMP violations have been proven to exist. The
6 gallons discharged from that location at that time may serve as a basis for penalty enhancement.
7 A discharge of this type would be correctly termed an unauthorized discharge.

8 Based on the evidence in the CLC and Methodology A, the Board cannot satisfy its
9 burden to prove the number of gallons of unauthorized discharges. The inability to do so is
10 caused by the Board's:

- 11 • Inability to prove BMP violations on days when most of the offsite discharges
12 occurred;
- 13 • Inability to distinguish between discharges that were authorized and
14 unauthorized; and,
- 15 • Inability to prove that any offsite discharges flowed through a part of the Project
16 in which there was a BMP violation.

17 1. **There are only four days in which an alleged BMP violation coincided**
18 **with an alleged offsite discharge.**

19 The CLC alleges that the unauthorized discharges took place over numerous separate
20 days and totaled approximately 9.4 million gallons. Excluding the May, 2019 days, for which no
21 BMP violations are alleged, the alleged days were November 20, 2018 to November 24, 2018,
22 November 27, 2018 to November 29, 2018 and February 1, 2019 to February 2, 2019. When the
23 days in which a BMP violation is alleged to occur are compared to the days in which a discharge
24 occurred there are only 4 days in which both occurred.

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		10.3.18	11.27.18	11.28.18	11.29.18	11.3.18	12.1.18	12.2.18	12.3.18	12.4.18	1.7.19	1.18.19	2.1.19	2.4.19
Days where discharge alleged	11.20.18													
	11.21.18													
	11.22.18													
	11.23.18													
	11.24.18													
	11.27.18		✓											
	11.28.18			✓										
	11.29.18				✓									
	2.1.19												✓	
	2.4.19													

Of the 9.4 million gallons of alleged unauthorized discharged, only 4 coincided with days on which there were also allegations of BMP violations. As a result, the maximum gallons which the Board can utilize in calculating the penalties for Count 38 are 2.64 million gallons.⁴

2. The CLC does not distinguish between discharges that were authorized and unauthorized

The CLC assumes that the entirety of the discharges came from the Project and were unauthorized releases. The CLC restricts the Violation to unauthorized discharges. *CLC*, at p. 6, ¶19. An unauthorized release can only come from the Project since that is the only land subject to the CGP. Yet both authorized and unauthorized releases were occurring at the Property at the same time and Violation 38 does not distinguish between the two.

⁴ There are 10 alleged days of discharge. Only 4 of which coincide with dates of BMP violations. Thus, only 40% of the discharges are relevant. The equation for determining the maximum unauthorized discharges is $6.6 \times .4 = 2.64$

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1 The Board takes the position that if offsite runoff crosses a portion of the Project then the
2 runoff becomes unauthorized. There is nothing in the CGP or the Basin Plan which states or
3 even implies that a discharge that begins offsite and then crosses the Project automatically
4 changes its regulatory character. The opposite is true. Section F of Attachment E to the CGP
5 prescribes SLR's obligations in relation to run-on from off the Project. It reads in pertinent part:
6 "Run-on from off site shall be directed away from all disturbed areas or shall collectively be in
7 compliance with the effluent limitations in this General Permit." CGP Att. E, § F.

8 Under Section F, if the discharge originated off the Project, the discharger has two
9 options. If the discharge is "collectively . . . in compliance with the effluent limitations in this
10 General Permit" there is no further obligation. If it is not, than the discharger must direct the
11 discharge "away from all disturbed areas. The interpretation put forward by the Board is directly
12 contradicted by the CGP. The CGP states that the turbidly numeric standard for the Construction
13 Site is 250 NTU. CGP, Att. E, §A2; State Water Board Order No. 2009-0009-DWQ ("Order"),
14 at p. 9, ¶53, p. 28, §V(A) (Table 1), p. 29, §V(B)(2))

15 When the NTU results for Pass 1 are reviewed, there was not an exceedance of the
16 permitted NTU's on any of the days in which there was both a discharge and a BMP violation.
17 Methodology A, at p. 83-4 (Table 1)). There is no overlap between the alleged discharges and an
18 exceedance of an effluent standard.

19 The Board has the burden of proof on the issue of the number of gallons of discharges
20 that are subject to the enhanced penalty. It cannot meet the burden based on any allegations in
21 the CLC or Methodology A.

22 **3. The Board cannot prove that any offsite discharges flowed through a**
23 **part of the Project in which there was a BMP violation.**

24 Even if the Water Board's argument regarding the effect of offsite discharges running
25 through the Project prevails, it would still have to demonstrate a connection between the location
26 of on the Project of the run-on and a BMP violation. It would be ludicrous if an authorized

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1 discharged became unauthorized by simply running over a part of the Construction Site that was
2 in full compliance with the BMPs.

3 The Water Board has the burden of proving the number of unauthorized gallons that were
4 released on a day or days in which there were BMP violations. The Water Board cannot.

5 **4. Effect Of Proper Calculation Of Unauthorized Discharges.**

6 When the proper discharges are applied it results in a significant reduction in the properly
7 assessed penalties against SLR. This is even considering that all other factors remain the same.
8 When reduction based on the correlations of dischargers with days of violations and discharges
9 from none Project areas the penalties are as stated below.

10

Scenarios	Potential for Harm Score	Deviation from Requirement	Per Day/ Gallon Factor	Culpability	Penalty for V38	Penalty for V38 based on violations and discharge coinciding (2.64M gallons)	Penalty Reduction for V38 None Construction Site (38%)
WB Scenario (6,597,000 gallons)	7	Major	0.41	1.4	\$3,844,078 (6,597,000 gallons)	\$1,515,360	\$939,523

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17 **IV. PENALTY ANALYSIS**

18 The structure of the penalty analysis contemplated by the CLC is different in relation to
19 Violation 38 than it is to the other Violations. While structurally different, the variables that the
20 used are the same. For our purposes, we focus on three variable factors that are separately
21 delineated as to Violation 38: (1) Degree of Toxicity of the Discharge (“DOT”); (2) Actual Harm
22 or Potential Harm to Beneficial Uses (“AH”), and (3) Culpability. A downward departure for
23 any of these factors significantly decreases the “potential for harm” score and the resulting per
24 day/gallon factor.

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1 A. **THE CULPABILITY SCORE IS UNREASONABLY HIGH.**

2 The CLC's adjustment" of penalties levied against SLR upward by applying a
3 "Culpability Multiplier" is unjust and unsupported by the facts. Methodology A provides: "The
4 culpability multiplier ranges between 0.75 and 1.5, with a higher multiplier for intentional
5 misconduct and gross negligence, a lower multiplier for more simple negligence, and a neutral
6 assessment of 1 where a discharger is determined to have acted as a reasonable and prudent
7 person would have. The imposition of a 1.4 Culpability Multiplier to more than sixty percent
8 (60%) of the alleged violations, requires the Board prove SLR was grossly negligent in
9 complying with permit requirements and recommendations by the Board or intentionally
10 disregarded permit requirements and recommendations by the Board. As shown in numerous
11 emails between Mr. Chris Theiss, Senior Project Manager for the SLR project and Water Board
12 staff SLR made substantial efforts to comply with permit requirements and Board
13 recommendations and correct issues as they arose on an ongoing basis.

14 SLR neither ignored nor intentionally disregarded permit requirements or Board
15 recommendations. In a Project this large and complex missteps are bound to occur. Such
16 missteps may be negligent, but do not rise to the level of intentional misconduct or gross
17 negligence. The same rationale holds true for the imposition of a 1.3 Culpability Multiplier to
18 Violations 15 and 16.

19 In response to the cease work order the Board issued after the November 29, 2018
20 inspection, Mr. Chris Theiss communicated with the teams working on the site and directed them
21 to bring the site into full compliance and address the issues outlined in the order. Further
22 evidence of SLR's commitment to compliance at the project was its timely response in correcting
23 the issues raised by the Water Board, which had precipitated the November 29, 2018 cease work
24 order, as the cease work order was rescinded the Water Board only required SLR implement a
25 few additional measures. There is no substantial evidence that SLR failed to cooperate or did less
26 than they could to remedy the issues outlined in the cease work order. Additionally, on

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1 November 30, 2018, Mr. Theiss conferred with Mr. Bob Keyes, SLR’s consultant, to implement
2 improvements to the site before receiving the cease work order.

3 On December 7, 2018, Mr. Theiss communicated to the Board that the teams were
4 waiting for areas to dry out so that they could use heavy equipment to improve troubled areas.
5 Mr. Theiss also indicated that the Board could expect great improvements to BMPs. Further in
6 an email exchange dated 12/7/2018 between Mr. Puget and Mr. Theiss regarding Saggio Hills
7 Receiving Water Monitoring. Mr. Puget was complementary, thanking Mr. Theiss for his
8 responsiveness and proactive stance: “...thanks for responding to our inspection with additional
9 BMPs and a follow up on this particular issue. I like that you are engaging a biologist, but should
10 caution you that since project activities and creek alterations have already begun the project
11 needs prior approval from the Regional Water Board to do the bioassessmentThe next step
12 should be to officially request an exception. At that point I can elevate the request. Through, as I
13 stated previously with the alterations to the creek already done and fine sediment discharges into
14 waters of the state my executives may not grant the exception.”

15 On December 12, 2018, after a Board inspection, Mr. Theiss updated SLR teams advising
16 them that the Board would soon recommend that construction resume and shared that the Board
17 was impressed with BMP improvements since its first visit on November 29, 2018. Furthermore,
18 in an email from Mr. Theiss to Mr. Puget dated December 12, 2018, Mr. Theiss attached a work
19 plan with annotated photos of the BMPs in place that showed steps taken by SLR to address
20 enumerated violations

21 On December 13, 2018, Mr. Theiss sent an email to Mr. Jeramiah Puget, thanking him
22 for the second chance and assuring him that they would keep a close eye on the BMPs during
23 upcoming rain events after receiving a conditional resume work permit. Even after the Water
24 Board lifted the work order, SLR continued to monitor the situation. On December 16, 2018, Mr.
25 Keys sent Mr. Theiss an email update indicating minor improvements were needed. All of
26

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1 which supports SLR's ongoing effort to work with the Water Board to achieve and maintain
2 compliance.

3 In a December 13, 2018 email exchange between Robert Green and Jeremiah Puget, Mr.
4 Puget discussed a conditional approval to resume work. Mr. Green stated: This is to
5 acknowledge our receipt thereof and to let you know that we are already meeting with our
6 contractors developing further internal procedures to make sure that our team complies with the
7 requirements outlined. SLR's commitment to being proactive is also shown in a December 14,
8 2018 email from Mr. Jason Griffin, President of ASP to Mr. Theiss, Mr. Puget and others
9 notifying the Water Board that ASP will be monitoring the forecast and rain fall quantity over
10 the weekend and will be onsite Monday morning to preform visual observations and sampling (if
11 needed) of all locations identified on the Sample Location Map and will follow up with the
12 reports as needed and required. ASP made a site visit this afternoon at 4:00pm and the current
13 rain fall quantity is less than 0.10".

14 Throughout January and February 2019, Mr. Theiss was in regular communication with
15 the Water Board regarding the additional requirements to keep the site open and worked to
16 ensure that the teams maintained and repaired BMPs. Throughout the wet season in March and
17 April 2019, Mr. Theiss continued to cooperate with the Water Board and made efforts to
18 improve site conditions. When the Water Board issued a conditional notice to resume work in
19 March/April, Mr. Theiss made it clear to the SLR teams need to be extra cautious and make
20 maintenance and repair of BMPs a top priority.

21 Communications between Mr. Theiss, the Water Board, SLR's consultants, and its
22 contractors are evidence of continued cooperation and efforts to achieve full site
23 compliance. SLR's continued efforts demonstrate that violations at the site were not a result of
24 intentional misconduct or gross negligence.

25 On February 6, 2019, the Water Board issued another cease work order for violations and
26 deficiencies in BMP implementation observed throughout the site on January 18, February 1 and

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1 February 4, 2019. SLR acted immediately to address violations. In the Water Board inspection
2 that took place on February 1, 2018, the Water Board alleged that while various BMPs were in
3 place, they were insufficient to prevent runoff from construction activities. Mr. Theiss reiterated
4 to the SLR teams that BMP maintenance and repair was the first priority. Mr. Theiss also shared
5 his teams' commitments with the Water Board to persuade them to allow work to continue.

6 In a February 7, 2019 email from Mr. Theiss to Ms. Moore and Mr. Josh Luders, Mr.
7 Theiss advised that in his opinion the Resort (and total site) will be ready for a follow up
8 inspection at some point in the middle of next week but with the recent enhancements should
9 continue to see better sampling results with the upcoming rains. In addition to the items noted in
10 our ASP inspection reports and REAP (attached), Wright Contracting has committed the
11 following to us....

- 12
- 13 1. Cleaning the paved road surfaces – daily
- 14 2. Consolidating and covering all dirt/mulch stockpiles
- 15 3. Replacing all damaged straw wattles daily as needed
- 16 4. Spreading hay on all disturbed/exposed earth
- 17 5. Installing additional check dams in the creeks
- 18 6. Repairing and reinforcing all DI protection and inlet filtration
- 19 7. Rock at the spa pad – maintain as necessary
- 20 8. Silt fence along primary road ways
- 21 9. Minimizing areas of soil disturbance at guestroom areas with clear gravel paths to each
22 unit
- 23 10. If RWQCB allows, cleaning all sediment from any on site streams

24 In order to maintain BMP's through the wet weather, Wright plans to add field staff to
25 help manage the ongoing day-to-day SWPPP maintenance. SWPPP will be more closely
26

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1 monitored on the subcontractor level, and will be a regular topic in all future subcontractor
2 meetings.

3 As evidenced by a February 26, 2019 email from Mr. Theiss. To Ms. Heaven Moore,
4 when problems were spotted at the Project, SLR promptly notified the Water Board. “This email
5 is to notify the RWQCB of the 20% NTU exceedance at the DL6 discharge on site. Per condition
6 11 of the 401 permit this email is intended to meet the notification requirement in the event an
7 exceedance occurs. Depending on what the upstream baseline is other sampling points may or
8 may not be in exceedance of 20% (Expecting to learn more about this on Thursday). As you’ll
9 see in the attached data some sampling points have decreased in turbidity from the upstream
10 baseline. There’s been approximately 7” of rain on site thus far between yesterday and today and
11 have had a few small points of erosion failure which is to be expected but have crews on site
12 repairing as required.

13 In a February 28, 2019 Email exchange between Robert Green and Jeremiah Puget, both
14 expressed appreciation for meeting at Water Board on this date which both parties found
15 productive. The Water Board’s satisfaction with SLR’s compliance and responsiveness is also
16 shown an email (dated March 29, 2019) from Heaven Moore to Chris Theiss Ms. Moore stated
17 that efforts taken by SLR were acceptable. She stated that:

18 [t]his e-mail is provided to notify you that Regional Water Board staff have
19 inspected the installed enhanced filtration system and found it to be operating in a
20 method consistent with the proposed design presented on March 5th, 2019. As a
21 result, Saggio Hills has met conditions 1 and 2 set by the Regional Board and may
22 resume work, under conditions previously specified via e-mail on March 8th, 2019
23 and March 11th, 2019.

23 In another email dated March 29, 2019 from Mr. Theiss to Ms. Moore, Mr. Theiss
24 commented that:

25 we greatly appreciate the NCRWQCB’s consideration in lifting the cease work
26 with the below conditions. I’ve shared your email with our project team and we’ll
27 be getting the specific subcontractors back to work strategically as we watch the

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1 forecast with more upcoming rain. We'll continue to make the basin plan
2 compliance the top priority on the project site. Also thanks for the approval on
3 CDFW creek restoration planting work. We'll work closely with all agencies to
4 ensure that scope and the timing of it doesn't negatively impact water quality.

4 **B. THE BOARD'S USE OF DOT AND AH TO INCREASE THE PENALTY ASSESSMENT**
5 **WAS IMPROPER**

6 The Water Board, in assessing the penalty to be levied against SLR, improperly applied
7 DOT and AH. Its application not only has no factual foundation, but the CLC applied the
8 variables in a constitutionally vague manner, which violated SLR substantive due process rights.
9 To put it simply – the CLC ignores clear definitions of what constitutes turbidity and instead
10 used an arbitrary definition to determine both the DOT and AH factors.

11 The discussion of the errors begins with an analysis of whether the Water Code allows
12 the Water Board to consider both factors simultaneously, and then move to a discussion of the
13 overlapping nature of the CLC's assessment and whether there is any standard that supports the
14 Water Board's assessment.

15 **1. The application of the DOT and AH factors in the CLC is redundant**
16 **and leads to increasing penalties for the same conduct.**

17 How DOT and AH are assessed is explained in the State Board's 2017 Water Quality
18 Enforcement Policy ("Enforcement Policy"). The Enforcement Policy treats DOT and AH as
19 separate factors, which can independently increase a penalty assessment. However, the enabling
20 statute delineates the factors that can be used and AH is not one of them.

21 How penalties are to be assessed is delineated in subsection e of section 13885 of the
22 Water Code. It states:

23 In determining the amount of any liability imposed under this section, the regional
24 board. . . **shall take into account** the nature, circumstances, extent, and gravity of
25 the violation or violations, whether the discharge is susceptible to cleanup or
26 abatement, **the degree of toxicity** of the discharge, and, **with respect to the**
violation, the ability to pay, the effect on its ability to continue its business, any
voluntary cleanup efforts undertaken, any prior history of violations, the degree of

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1 culpability, economic benefit or savings, if any, resulting from the violation, and
2 other matters that justice may require. At a minimum, liability shall be assessed at
3 a level that recovers the economic benefits, if any, derived from the acts that
constitute the violation.

4 (Emphasis added)

5 While the enabling statute does not mention AH as an appropriate factor to consider, the
6 CLC's use of AH uses the same facts as to support AH as it does for DOT. Here, increasing a
7 fine for both violates "fundamental fairness" which lies at the heart of constitutional due process
8 because the Board effectively is punishing SLR twice for the same discharge.

9 "A defendant has a due process right to be protected against unlimited multiple
10 punishment for the same act." *Troensegaard*, 175 Cal. App. 3d at 227. A review of the criteria
11 used in the Enforcement Policy demonstrates that there is no meaningful difference between its
12 definition of DOT and AH. The Enforcement Policy describes the DOT criteria as follows:

13 The evaluation of the degree of toxicity considers the physical, chemical,
14 biological, and/or thermal characteristics of the discharge, waste, fill, or material
15 involved in the violation or violations and the risk of damage the discharge could
16 cause to the receptors or beneficial uses. . . . Factor 2 [AH] (below) is focused on
17 impacts or the threat of impacts to beneficial uses in specific receiving waters;
18 whereas Factor 1 [DOT] is focused on the nature and characteristics, or toxicity of
the material discharged in the context of potential impacts to beneficial uses more
generally.

19 (Enforcement Policy, at p. 11-2)

20 The Enforcement Policy describes the AH criteria as follows:

21 The evaluation of the actual harm or the potential harm to beneficial uses factor
22 considers the harm to beneficial uses in the affected receiving water body that may
23 result from exposure to the pollutants or contaminants in the discharge, consistent
24 with the statutory factors of the nature, circumstances, extent, and gravity of the
25 violation(s). The Water Boards may consider actual harm or potential harm to
26 human health, in addition to harm to beneficial uses. . . . Potential harm should be
27 evaluated in the context of the specific characteristics of the waste discharged and
the specific beneficial uses of the impacted waters.

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1 *Id.*

2 There is no discernable difference between the two. DOT requires an analysis of the
3 “physical, chemical, biological, and/or thermal characteristics of the discharge” AH the
4 “the specific characteristics of the waste discharged” DOT requires a consideration of “the
5 risk of damage the discharge could cause” AH the “the potential harm” DOT
6 requires a consideration of the harm the discharge “could cause to the receptors or beneficial
7 uses.” AH does the same. It is impossible to conceive of a discharge that does not increase the
8 DOT and at the same time increase the AH. The reverse is also true.

	DOT	AH
Discharge Characteristics	the “physical, chemical, biological, and/or thermal characteristics of the discharge”	“the specific characteristics of the waste discharged”
Potential Risk	“the risk of damage the discharge could cause”	“the potential harm”
Risk of Harm	a consideration of the harm the discharge could cause to the receptors or beneficial uses.	a consideration of the harm the discharge could cause to the receptors or beneficial uses.

21 The Enforcement Policy does try to distinguish the two by explaining that “Factor 2 [AH]
22 (below) is focused on impacts or the threat of impacts to beneficial uses in specific receiving
23 waters; whereas Factor 1 [DOT] is focused on the nature and characteristics, or toxicity of the
24 material discharged in the context of potential impacts to beneficial uses more generally.” The
25 apparent distinction is that DOT focuses on potential impacts to beneficial uses and AH on the
26 actual impacts. However, this explanation does not reflect the rest of the Enforcement Policy or

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1 how it was applied in the CLC. The DOT requires an analysis of what could happen and what
2 could potential happen under the AH. This is an exercise in semantics, there is no difference at
3 all.

4 Moreover, the manner in which the CLC applied the two criteria here demonstrates the
5 overlap. For DOT the Water Board evaluated “the risk of damage the discharge could cause to
6 the receptors or beneficial uses.” It looked to what was actually discharged, the amount of the
7 discharge and where it was discharged. The Water Board concluded that the discharges “can
8 affect overall physiological health” of the fish. *Methodology A*, at 94

9 For AH Methodology A evaluated “the actual or potential harm to beneficial uses in the
10 affected receiving water body that may result from exposure to the pollutants or contaminants in
11 the discharge” (Id. at 95) consistent with the statutory factors of the nature, circumstances,
12 extent, and gravity of the violation(s). Methodology A also discussed what was actually
13 discharged, the amount of the discharge and where it was discharged. For the harm that turbidity
14 can cause the Water Board referred to the DOT section. Both the DOT and AH sections
15 discussed the potential impacts of the discharges on fish. (Id.)

16 The CLC considered the same facts and circumstances in determining DOT and AH. This
17 violates the substantive due process rights of SLR.

18 a. **The Water Board’s Application of its Enforcement Policy**
19 **Conflicts With Due Process Vagueness Protections.**

20 The CLC’s application of the Enforcement Policy is unconstitutionally void-for-
21 vagueness because it fails to provide a standard to determine when turbidity serves as a factor in
22 determining the degree of toxicity and also is part of an inconsistent definition for what
23 constitutes a violation for turbidity.⁵

24
25
26 ⁵ SLR asserts that the Enforcement Policy is unconstitutionally vague both on its face and as
27 applied.
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1 The void for vagueness doctrine, which derives from the due process concept of fair
2 warning, bars the government from enforcing a provision that “forbids or requires the doing of
3 an act in terms so vague” that people of “common intelligence must necessarily guess at its
4 meaning and differ as to its application.” *Connally v. General Constr. Co.* 269 U.S. 385, 391
5 (1926). The doctrine also applies if a statute is arbitrarily applied. *Kolender v. Lawson*, 461 U.S.
6 352, 356–357 (1983). And, when a statute leaves the trier of fact free to decide, without any
7 legally fixed standards, what is prohibited and what is not prohibited in particular cases. *Giaccio*
8 *v. State of Pa.*, 382 U.S. 399, 402 (1966).

9 To determine if the CLC’s methodology for assessing penalties is unconstitutionally
10 void-for-vagueness, parties must evaluate whether a reasonable and practical construction of the
11 regulation, as applied to SLR’s conduct, gives fair notice of the practice to be avoided and
12 provides reasonably adequate standards to guide enforcement.

13 As applied to SLR is void for vagueness since:

- 14 • It fails to give SLR fair notice of what conduct constitutes a violation.
- 15 • The Enforcement Policy does not provide any basis to guide the Water Board’s
16 enforcement.

17 The CLC, the Water Board’s Enforcement Policy, combined with the CGP, and the Basin
18 Plan fails to give Sonoma fair notice of the proscribed conduct. Specifically, none of the Water
19 Board’s regulations provide fair warning of what level of turbidity constitutes a discharge
20 violation and under what conditions turbidity serves as a factor when calculating degree of
21 toxicity. Both rules and "statutes must be sufficiently clear as to give a fair warning of the
22 conduct prohibited." *Morrison v. State Board of Education*, 1 Cal. 3d 214, 231 (1969).

23 First, the application of the Enforcement Policy in this case, and the way it inconsistently
24 defines turbidity and toxicity in both the Basin Plan and the CGP, does not provide SLR with
25 the ability to determine when it was or was not in compliance with the discharge requirements
26

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1 for turbidity. The CLC alleges fines based on turbidity levels that SLR was not required to
2 report under the CGP's conditions.

3 The Enforcement Policy, the Basin Plan and the CGP all contain a different definition of
4 when turbidity is a violation. Each is described below:

- 5 • **Basin Plan:** The Basin Plan states that turbidity “shall not be increased more than
6 20 percent above naturally occurring background levels. . . .”
- 7 • **CGP:** The CGP states “[Best Professional Judgement] was used to develop [a
8 Numeric Action Level] that can be used as a learning tool to help dischargers
9 improve their site controls, and to provide meaningful information on the
10 effectiveness of storm water controls. A statewide turbidity NAL has been set at
11 250 NTU.” The CGP neither mentions any other standard besides 250 NTUs for
12 turbidity levels nor references any other document describing standards for when
13 levels of turbidity constitute a violation.
- 14 • **Enforcement Policy:** The Enforcement Policy states that “[d]ischarges causing
15 in-stream turbidity in excess of 100 nephelometric turbidity units (NTU) in inland
16 surface waters with beneficial uses of COLD, WARM, and/or WILD, except
17 during storm events” constitute a Class A priority violation. (Enforcement Policy,
18 at 5-6)

19 The overwhelming majority of the samples did not exceed the limit proscribed in the
20 CGP. The Water Board effectively assessed a fine against SLR based on turbidity levels that
21 SLR was not required to report pursuant to the CGP conditions. Nor under Attachment E, §F was
22 SLR required to redirect or mitigate off site runoff below 250 NTUs.

23 Even if the Water Board based turbidity violations on the more stringent 100 NTU limit
24 referenced in the Enforcement Policy, there are only seven samples that exceed 100 NTUs.
25 Moreover, neither the 100 NTU standard nor the twenty percent standard should apply because
26

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1 the alleged violations are violations of CGP conditions, not Enforcement Policy or Basin Plan
2 conditions.

3 Since there are three different and ambiguous standards for what conditions constitute a
4 violation for turbidity levels, the regulations are vague as applied to SLR's conduct in light of the
5 specific facts of the case. The three regulations when viewed as one policy are inconsistent and
6 not sufficiently clear to give fair warning of the prohibited conduct. The regulations, both on
7 their face and as applied, forces SLR to guess at what standard should apply despite the fact that
8 each is incompatible with the other.

9 For example, even if SLR complied with the CGP and Enforcement Policy standard, it
10 could violate the Basin Plan standard. Alternatively, SLR could have violated either the CGP or
11 the Enforcement Policy standard and complied with the Basin Plan turbidity standard.
12 Therefore, the Water Board failed to give SLR fair notice of the proscribed level of turbidity at
13 which it intended to assess a violation.

14 Second, SLR was not given fair notice of when turbidity becomes a factor for
15 determining degree of toxicity. Specifically, the regulations lack reasonable certainty as to what
16 level of turbidity constitutes toxicity and how to calculate degree of toxicity from a specific
17 turbidity level. The three regulations neglect to include clear language or a defined standard for
18 what level of turbidity is toxic and whether higher levels of turbidity linearly correspond to a
19 higher degree of toxicity. This lack of certainty leaves dischargers unable to determine whether
20 or not they are in compliance and unable to estimate their potential liability. Therefore, the
21 regulations fail to give fair notice regarding turbidity levels and how they relate to degree of
22 toxicity.

23 Moreover, specific interpretations, including the apparent methodology the CLC utilized,
24 leads to absurd results. If the Water Board only considers the Basin Plan standard, dischargers
25 could face fines for minimal changes in turbidity levels that do not exceed the standards outlined
26 in the Enforcement Policy or the CGP. For example, if background levels are 1 NTU and

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1 downstream measurements are 2 NTU or higher, there would be more than a 20% increase
2 “above naturally occurring background levels.” Similarly, concerning degree of toxicity, the
3 Water Board could assess the same penalty for toxicity against one business for a sample with
4 500 NTU and another business for a sample with 50 NTU if the percentage increase is the same.
5 While one business exceeded the levels described in both the CGP and the Enforcement Policy,
6 the other did not. The percentage increase above background levels only makes sense if there is a
7 baseline level for the amount of turbidity that can increase in terms of NTUs. And, there must be
8 an objective standard for what levels constitute toxicity because it is absurd to argue that an
9 increase from 1 NTU to 2 NTU represents a toxic discharge even though it is more than a 20%
10 increase above background levels. Thus, the Water Board’s apparent interpretation as applied to
11 Sonoma would lead to absurd results and is not a reasonable and practical construction that
12 encompasses SLR’s conduct.

13 In sum, there is no reasonable and practical construction of the Water Board’s
14 Enforcement Policy, CGP, and the Basin Plan that is consistent with the legislative intent,
15 encompasses Sonoma’s conduct, and avoids absurd results, which would give Sonoma fair notice
16 of what level of turbidity constitutes a discharge violation and under what conditions turbidity
17 serves as a factor when calculating degree of toxicity.

18 **b. The Enforcement Policy, as applied and on its face, does not**
19 **provide any basis to guide the Water Board’s enforcement.**

20 There is no reasonable basis for the Water to establish reasonably adequate standards to
21 guide enforcement. Regulations must provide reasonably adequate standards to guide
22 enforcement. Government regulation must be sufficiently clear so that it is understandable and
23 does not encourage arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408
24 U.S. 104, 108 (1972).

25 The CLC details its basis and methodology for assessing fines against SLR in
26 Methodology a. Violations 1 through 36 refer to different violations of various CGP conditions.

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1 Violation 38 is not a separate violation, but rather a per gallon enhancement to Violations 1
2 through 36. These per gallon enhancements are based on CGP violations, which expressly state
3 the maximum level of turbidity is 250 NTUs. Violation 37 is the only action based on the
4 requirements described in the Basin Plan, which prohibits increases in turbidity levels to no more
5 than 20 percent above naturally occurring background levels.

6 Here, the methodology, as applied to SLR, allows the Water Board to conclude that
7 practically anything is toxic and to arbitrarily determine whether something exceeds turbidity
8 standards because neither the statute nor the regulations provide “reasonably adequate standards
9 to guide enforcement.” The most egregious example in the present case is that the majority of
10 SLR’s water samples were within the turbidity levels the CGP and the Enforcement Policy
11 defined, yet the Board determined SLR still violated turbidity standards and that turbidity levels
12 increased the degree of toxicity.

13 Moreover, the per gallon enhancements for Violation 38 are based on CGP conditions
14 that arguably SLR never violated. It would be absurd if permissible conduct, specifically a
15 discharge that did not increase turbidity beyond levels specified in the permit, could serve as the
16 bases of an enhancement. Undoubtedly, the Water Board cannot enhance a penalty against SLR
17 for turbidity levels that did not constitute a violation. Therefore, the inconsistencies demonstrate
18 a failure to establish reasonably adequate standards to guide enforcement.

19 As applied in the CLC, there is no reasonably adequate standard to guide enforcement.
20 The failure to develop concrete and clearly defined methodological standards allow it to employ
21 unfettered discretion when assessing fines for discharges. Therefore, the application of the
22 regulations leaves it without any legally fixed standards by which to decide what was and was
23 not prohibited conduct as applied to SLR.

24 In sum, the Water Board’s interpretation and application of the regulations as applied to
25 SLR are unconstitutionally void for vagueness because on their face and as applied fail to give
26 fair notice and do not provide reasonably adequate standards to guide enforcement.

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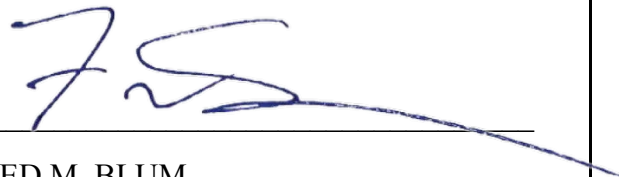
1 **IV. CONCLUSION**

2 The CLC substantially overcharges the violations against SLP. While SLR is not arguing
3 that it has not violated any of the alleged BMP's, the majority of the allegations in the CLC
4 should be dismissed.

5
6 Date: November 23, 2020

BASSI, EDLIN, HUIE & BLUM LLP

7
8
9 By: _____



10 FRED M. BLUM
11 MICHAEL E. GALLAGHER
12 EARL L. HAGSTRÖM
13 Attorneys for SLR
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EXHIBIT A

Violations 1-5, October 3, 2018

	Date(s) of Violation	Violation	Supported by Evidence	Overlap	Penalty	% Reduction	Proper Penalty
1.	10/3/18	Failure to implement BMPs that are effective in reducing or preventing pollutants in storm water discharges (CGP Att. E, section B.5.e)		2,3,4	\$6050	0 (Based on lack of proof for other violations)	\$6050
2.	10.3.18	Failure to implement effective soil cover on slopes and inactive areas (CGP Att. E, section D.2).	N (Applies to inactive construction sites for 14 days)		\$6050	100	0
3.	1/3/18	Failure to implement effective perimeter controls (CGP Att. E, section E.1)	N (The CGP requires "sufficient controls" and not controls that eliminate all erosion or discharges)		\$6050	100	0
4.	10/3/18	Failure to implement effective linear sediment controls at toes, breaks, and bases of slopes (CGP Att. E, section E.4.)	N (Violation is not based on effect but on having sheets in compliance with Table 1)		\$6050	100	0
5.	10/3/18	Failure to implement effective run-on and runoff controls (CGP Att. E, section F)	N (Requires compliance with effluent limitations and		\$6050	100	0

			no evidence there was violation)				
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TOTAL	\$6,050
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Violations 6-14, NOVEMBER 29 THROUGH DECEMBER 4, 2018

	Date(s) of Violation	Kind of Violation	Supported by Evidence	Overlap	Penalty	% Reduction	Proper Penalty
6	11.29.18-12.4.18	Failure to cover stockpiles (CGP, Att. E, B1b)	N (Only pictures for the 29th. attachment A. Picture from 12.4 not contain same stockpiles)		(6 days) \$50,400	83% (Evidence only supports a single day)	\$8,568
7	11.29.18	Failure to cover waste container (CGP, Att. E, B2d)	Y		(6 days) \$50,400	83% (Evidence only supports a single day)	\$8,568
8	11.29.18	Failure to properly store chemicals (CGP, Att. E, B1c)	N (Applies to storage of chemicals and not active use)		(6 days) \$50,400	83% (Evidence only supports a single day)	\$8,568
9	11.29.18-12.4.18	Failure to have BMPs effective in preventing discharges (CGP, Att. E, B5e)		Y 6-8, 10-14	(6 days) \$60,000	100%	0
10	11.29.18-12.4.18	Failure to implement soil controls and inactive controls (CGP, Att. E, D2)	N (Applies to inactive construction sites for 14 days)		(6 days) \$60,400	100%	0
11	11.29.18-12.4.18	Failure to Implement Effective Perimeter Controls (CGP, Att. E, E1)	N (The CGP requires "sufficient controls" and not controls that eliminate all erosion or discharges)		(6 days) \$60,000	0%	\$60,000
12	11.29.18-12.4.18	Failure to implement erosion controls in active construction areas (CGP, Att. E, E3)	Y		(6 days) \$60,000	0	\$60,000

13	11.29.18-12.4.18	Failure to implement linear controls (CGP, Att. E, E4)	N (Violation is not based on effect but on having sheets in compliance with Table 1.)		(6 days) \$60,000	100%	0
14	11.29.18-12.4.18	Failure to implement run on and run off controls (CGP, Att. E, F)	N (Requires compliance with effluent limitations and no evidence there was violation)	Y13	(6 days) \$60,000	100%	0

TOTAL	\$135,704
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Violations 15-16, JANUARY 7, 2019

	Date(s) of Violation	Kind of Violation	Supported by Evidence	Overlap	Penalty	% Reduction	Proper Penalty
15	1.7.19	Failure to implement BMPs (CGP, Att. E, B5e)	Y		\$7,150	0	\$7,150
16	1.7.19	Failure to implement controls on inactive areas (CGP, Att. E, D2)	N (Applies to inactive construction sites for 14 days)	Y 15	\$7,150	100%	0

TOTAL	\$7,150
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Violations 17-22, JANUARY 18, 2019

	Date(s) of Violation	Kind of Violation	Supported by Evidence	Overlap	Penalty	% Reduction	Proper Penalty
17	1.18.19	Failure to contain stockpiles (CGP, Att. E, B1b)	N (Limited to piles that are not in active use)		\$9,800	100%	0
18	1.18.19	Failure to implement BMP controls (CGP, Att. E, B5e)	Y	Y 17, 19, 20, 21, 22	\$9,800	0	\$9,800
19	1.18.19	Failure to implement controls in inactive area (CGP, Att. E, D2)	N (Applies to inactive construction sites for 14 days)		\$9,800	100%	0
20	1.18.19	Failure to implement effective barrier controls (CGP, Att. E, E1)	N (The CGP requires "sufficient controls" and not controls that eliminate all erosion or discharges)		\$9,800	0	\$9,800
21	1.18.19	Failure to implement effective linear controls at toes (CGP, Att. E, E4)	N (Violation is not based on effect but on having sheets in compliance with Table 1.)		\$9,800	100	0
22	1.18.19	Failure to implement runoff and run-on controls (CGP, Att. E, F)	N (Requires compliance with effluent limitations)		\$9,800	100	0

			and no evidence there was violation)				
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TOTAL	\$19,600
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Violations 23-30, February 1, 2019

	Date(s) of Violation	Kind of Violation	Supported by Evidence	Overlap	Penalty	% Reduction	Proper Penalty
23	2.1.19	Failure to contain stockpiles (CGP, Att. E, B1b)	N (Limited to piles that are not in active use)		\$10,000	100 %	0
24	2.1.19	Failure to cover waste container (CGP, Att. E, B2d)	Y		\$10,000	0	\$10,000
25	2.1.19	Failure to implement BMPs (CGP, Att. E, B5e)	Y	Y 23.24, 26-30	\$10,000	100%	0
26	2.1.19	Failure to implement controls in inactive area (CGP, Att. E, D2)	N (Applies to inactive construction sites for 14 days)		\$10,000	100%	0
27	2.1.19	Failure to implement effective perimeter controls (CGP, Att. E, E1)	N (The CGP requires "sufficient controls" and not controls that eliminate all erosion or discharges)		\$10,000	0	\$10,000
28	2.1.19	Failure to implement controls in active construction site (CGP, Att. E, E3)	Y		\$10,000	0	\$10,000
29	2.1.19	Failure to implement effective linear controls at toes (CGP, Att. E, E4)	N (Violation is not based on effect but on having sheets in compliance with Table 1.)		\$10,000	100%	0

30	2.1.19	Failure to implement runoff and run-on controls (CGP, Att. E, F)	N (Requires compliance with effluent limitations and no evidence there was violation)		\$10,000	100%	0
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TOTAL	\$30,000
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Violations 31-36, February 4, 2019

	Date(s) of Violation	Kind of Violation	Supported by Evidence	Overlap	Penalty	% Reduction	Proper Penalty
31	2.4.19	Failure to implement BMPs (CGP, Att. E, B5e)	Y	Y 32-36	\$10,000	100%	0
32	2.4.19	Failure to implement controls in inactive area (CGP, Att. E, D2)	N (Applies to inactive construction sites for 14 days)		\$10,000	100 %	0
33	2.4.19	Failure to implement effective perimeter controls (CGP, Att. E, E1)	Y		\$10,000	0	\$10,000
34	2.4.19	Failure to implement controls in active construction site (CGP, Att. E, E3)	Y		\$10,000	0	\$10,000
35	2.4.19	Failure to implement effective linear controls at toes (CGP, Att. E, E4)	N (Violation is not based on effect but on having sheets in compliance with Table 1. (Fig 41 shows that tarp laid))		\$10,000	100%	0
36	2.4.19	Failure to implement runoff and run-on controls (CGP, Att. E, F)	N (Requires compliance with effluent limitations and no evidence there was violation)		\$10,000	100%	0

TOTAL	\$20,000
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TOTAL FOR 1 - 36	\$218,540
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