

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:)	
)	
BRENT ALAN VANDERKAM)	Order R5-2016-0510
)	
Administrative Civil Liability)	Settlement Agreement and Stipulation for
Complaint R5-2015-0522)	Entry of Administrative Civil Liability
)	Order; Order
)	

Introduction

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulation") is entered into by and between the Central Valley Regional Water Quality Control Board Prosecution Staff ("Prosecution Team") and Mr. Brent Alan Vanderkam ("Settling Respondent") (collectively "Parties") and is presented to the Central Valley Regional Water Quality Control Board ("Central Valley Water Board") for adoption as an Order, by settlement, pursuant to Government Code section 11415.60.

Recitals

1. The Settling Respondent is the owner of 11550 Buggy Road, Shasta County, California, Assessor Parcel Number (APN) 099-120-035-000 (the "Property"). The Property intersects and discharges to an unnamed ephemeral tributary to Clover Creek, a Class I anadromous tributary of Cow Creek, and thence the Sacramento River ("Unnamed Tributary"). The Settling Respondent or his lessee developed the Property to support a large scale marijuana growing operation. Development of the Property included approximately 2.24 acres of disturbed land which included approximately 68 linear yards of disturbed streambed within the Unnamed Tributary. As owner of the Property, the Settling Discharger is ultimately responsible for the condition of the Property and discharges of wastes emanating from the Property. The Property is subject to the requirements set forth in federal Clean Water Act sections 301, 401, and 404 (33 U.S.C. §§ 1311, 1341, and 1344), California Water Code section 13376, and waste discharge prohibitions specified by the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* ("Basin Plan"). Section 301 of the Clean Water Act (33 U.S.C. § 1311) prohibits the discharge of any pollutant by any person except in compliance with the law.

2. Administrative Civil Liability Complaint R5-2015-0522 ("Complaint") recommends imposing an administrative civil liability totaling \$201,400 for alleged storm water discharge violations associated with the unpermitted grading of approximately 2.24 acres of land ("Violation 1"); and (2) unauthorized discharge of fill material directly into the Unnamed Tributary to construct two large earthen berms presumably to block the

view of the cannabis cultivation ("Violation 2"). The Complaint details these alleged violations, and the facts and legal authority supporting these violations. The Central Valley Water Board is authorized to impose administrative civil liability for these violations pursuant to Water Code sections 13385 or 13350.

3. Violation 1 of the Complaint alleges that the Settling Respondent violated section 301 of the Clean Water Act, Water Code section 13376, and Basin Plan prohibitions by discharging at least 754,901 gallons of sediment laden storm water.

4. Violation 2 of the Complaint alleges that the Settling Respondent violated section 301 of the Clean Water Act, and Basin Plan prohibitions by discharging fill material directly to the Unnamed Tributary.

5. The liability amount proposed in the Complaint was determined using a factors analysis consistent with Water Code sections 13327, 13351 and 13385 and the State Water Resources Control Board Water Quality Enforcement Policy (May 2010) ("Enforcement Policy"). The Prosecution Team's consideration of these factors and its application of the methodology set forth in the Enforcement Policy at the time the Complaint was issued is shown in Attachment A of the Complaint, which is attached and incorporated in full herein by reference.

6. To resolve by consent and without further administrative proceedings certain alleged violations of the California Water Code, set forth in the Complaint, the Parties have agreed to the imposition of civil liability totaling \$100,000 against the Settling Respondent, in accordance with the payment plan provided below in Paragraph 8 and secured with a voluntary deed of trust against the Property. The amount of administrative civil liability imposed pursuant to this Stipulation and Order is less than the amount initially calculated by the Prosecution Team using the State Water Board's Enforcement Policy as set forth in Attachment A. It is, however, over and above the estimated economic benefit of non-compliance. The reduction in liability is justified pursuant to Enforcement Policy Section V.I.B (Settlement Considerations) in consideration of hearing and litigation risks, costs associated with proceeding to hearing, financial documentation submitted by the Settling Respondent asserting an inability to pay the full liability amount of \$201,400, and a determination that an expeditious settlement of this matter at the amount proposed will provide for recovery of liability by the Central Valley Water Board and the California Department of Fish and Wildlife (CDFW) while the Settling Respondent conducts the work necessary to bring the Property into compliance. Accordingly, the Prosecution Team contends that the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the specific violations alleged in the Complaint except as provided in this Stipulation and that this Stipulation is in the best interest of the public.

7. The Parties have engaged in settlement negotiations and agree to settle the matter without administrative or civil litigation and by presenting this Stipulation to the Central Valley Water Board for adoption as an Order pursuant to Government Code section 11415.60.

Stipulations

The Parties stipulate to the following:

8. **Administrative Civil Liability:** The Settling Respondent hereby agrees to pay the administrative civil liability totaling \$100,000 in six payments over the next 5 years. Recovery of this liability amount includes distribution of some liability to CDFW for a portion of the costs incurred by CDFW to jointly inspect the Property and investigate the violations alleged in the Complaint. The Settling Respondent agrees to the allocation of liability and payment as follows:

- a. **California Department of Fish and Wildlife:** A total of \$30,000 shall be paid to the *Department of Fish and Wildlife*, made out to "*Fish and Game Preservation Fund*" on or before January 15, 2018 in two payments. The first payment of \$15,000 is due on or before January 15, 2017 and the second payment of \$15,000 due on or before January 15, 2018. Settling Respondent shall send the original signed checks to Department of Fish and Wildlife, Attn: Kim Karcher, 1416 9th Street, 12th floor, Sacramento California 95814. A copy fo the checks shall be sent to Ann Malcolm, Assistant Chief Counsel, CDFW, 1416 9th Street, 12th floor, Sacramento California 95814. A copy of the checks shall be sent to Clint Snyder, Assistant Executive Officer, Central Valley Water Quality Control Board, 364 Knollcest Drive, Suite 205, Redding, California 96002.
- b. **Central Valley Water Board:** A total of \$ 70,000 payable to the State Water Board Pollution Cleanup and Abatement Account (\$65,000) and the Waste Discharge Permit Fund (\$5,000) is due no later than 30 days following the Central Valley Water Board executing an Order approving his settlement agreement. The Settling Respondent shall indicate on the check the number of this Order. The Settling Respondent shall send the original signed checks to the Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento California 95812-1888. A copy of the checks shall be sent to Clint Snyder, Assistant Executive Officer, Central Valley Water Quality Control Board, 364 Knollcest Drive, Suite 205, Redding, California 96002.

9. **Voluntary Deed of Trust:** The Settling Respondent agrees to execute and record a voluntary deed of trust which shall name the Central Valley Water Board as the beneficiary against the Property to secure the entire liability amount of \$100,000. Settling Respondent advises that this deed of trust shall be in a second position to the

deed of trust that secures the purchase note for the Property. Should Settling Respondent sale the Property to a bona fide third party, which does not result in sufficient proceeds to pay off the balance due under this Order ("Sale Proceeds"), Central Valley Water Board agrees to reconvey the deed of trust in consideration for the Sale Proceeds. The reconveyance of the deed of trust shall not relieve Settling Respondent from paying the balance due under this Order, rather the remaining balance due shall simply be unsecured.

10. **Verification of Facts:** The Settling Respondent, as a condition of this settlement, has agreed to provide the following:

- a. A declaration verifying the accuracy and completeness of the financial information provided; and
- b. A written estimate of remediation costs from SHN consulting Engineers and Geologists, Inc. verifying the anticipated clean-up costs for the Property.

11. **Compliance with Applicable Laws:** The Settling Respondent understands that payment of administrative civil liability in accordance with the terms of this Order and compliance with the terms of this Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in the Complaint may subject them to further enforcement, including additional administrative civil liability.

12. **Party Contacts for Communications related to Stipulation/Order:**

For the Central Valley Water Board:

Clint Snyder, Assistant Executive Officer
Central Valley Water Board
364 Knollcrest Drive, Suite 205,
Redding, CA 96002
Clint.Snyder@waterboards.ca.gov

Yvonne West, Senior Staff Counsel
State Water Resources Control Board
Office of Enforcement
P.O. Box 100
Sacramento, CA 95812
Yvonne.West@waterboards.ca.gov

For the Settling Respondent:

Brent Alan Vanderkam
230 W. Tazwell St. #102
Norfolk, VA 23510
brentvanderkam@hotmail.com

Tyler Maize Lalaguna, Esq.
Wells Small Fleharty & Weil
P.O. Box 991828
Redding, CA 96099
TLalaguna@wsfwlaw.com

13. **Bankruptcy:** Should the Settling Respondent enter into bankruptcy proceedings before all payments are paid in full, the Settling Respondent agrees to not seek to discharge any of these penalties in bankruptcy proceedings.
14. **Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
15. **Matters Addressed by Stipulation:** Upon adoption by the Central Valley Water Board as an Order, this Stipulation represents a final and binding resolution and settlement of all claims, violations or causes of action alleged in the Complaint ("Covered Matters"). The provisions of this Paragraph are expressly conditioned on the full payment of the administrative civil liability by the deadlines specified in Paragraph 8 and the Settling Respondents full satisfaction of the obligations described in Paragraphs 9 and 10.
16. **Public Notice:** The Settling Respondent understands that this Stipulation and Order will be noticed for a 30-day public review and comment period prior to consideration by the Central Valley Water Board or its delegate. If significant new information is received that reasonably affects the propriety of presenting this Stipulation and Order to the Central Valley Water Board, or its delegate, for adoption, the Prosecution Team may unilaterally declare this Stipulation and Order void and decide not to present it to the Central Valley Water Board or its delegate. The Settling Respondent agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulation and Order.
17. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for adopting the Order by the Central Valley Water Board and review of this Stipulation by the public is lawful and adequate. In the event procedural objections are raised prior to the Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
18. **Interpretation:** This Stipulation and Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Settling Respondent is represented by counsel in this matter.

19. **Modification:** This Stipulation and Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties and approved the Central Valley Water Board.

20. **If Order Does Not Take Effect:** In the event that this Order does not take effect because it is not approved by the Central Valley Water Board, or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Central Valley Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:

- a. Objections related to prejudice or bias of any of the Central Valley Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Central Valley Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the Complaint in this matter; or
- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

21. **Waiver of Hearing:** The Settling Respondent has been informed of the rights provided by Water Code section 13323, subdivision (b), and hereby waives its right to a hearing before the Central Valley Water Board prior to the adoption of the Order.

22. **Waiver of Right to Petition or Appeal:** The Settling Respondent hereby waives its right to petition the Central Valley Water Board's adoption of the Order for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court. This explicit waiver of rights includes potential future decisions by the Central Valley Water Board or its delegate related to this Order, including, but not limited to time extensions and other terms contained in this Order.

23. **Settling Respondent's Covenant Not to Sue:** The Settling Respondent covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter.

24. **Necessity for Written Approvals:** All approvals and decisions of the Central Valley Water Board under the terms of this Order shall be communicated to the Settling Respondent in writing. No oral advice, guidance, suggestions or comments by employees or officials of the Central Valley Water Board regarding submissions or notices shall be construed to relieve the Settling Respondent of its obligation to obtain any final written approval required by this Order.

25. **Authority to Bind:** Each person executing this Stipulation in a representative capacity represents and warrants that he or she is authorized to execute this Stipulation on behalf of and to bind the entity on whose behalf he or she executes the Stipulation.

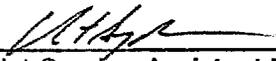
26. **Effective Date:** The obligations under Paragraphs 8-10 of this Stipulation are effective and binding on the Parties only upon the entry of an Order by the Central Valley Water Board which incorporates the terms of this Stipulation.

27. **Severability:** This Stipulation and Order are severable; should any provision be found invalid the remainder shall remain in full force and effect.

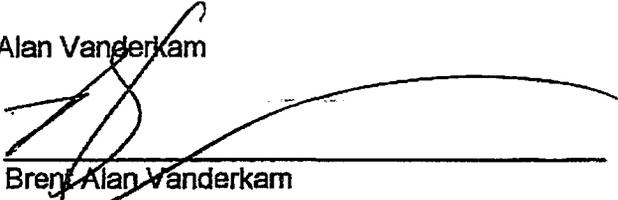
28. **Counterpart Signatures:** This Stipulation may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

IT IS SO STIPULATED.

Central Valley Water Board Prosecution Team

By: 
Clint Snyder, Assistant Executive Officer

Date: January 20, 2016

Brent Alan Vanderkam
By: 
Brent Alan Vanderkam

Date: 20 JAN 15

HAVING CONSIDERED THE PARTIES STIPULATIONS, THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD FINDS:

1. This Order incorporates the foregoing Stipulation.
2. In accepting the foregoing Stipulation, the Central Valley Water Board has considered, where applicable, each of the factors prescribed in Water Code sections 13327, 13351, or 13385(e). The Central Valley Water Board's consideration of these factors is based upon information obtained by the Central Valley Water Board's staff in investigating the allegations in the Complaint or otherwise provided to the Central Valley Water Board.
3. The Central Valley Water Board finds that issuance of this Order is not subject to the provisions of the California Environmental Quality Act (CEQA) as compliance with this Order will consist entirely of paying administrative civil liability, and will therefore not result in a direct or reasonably foreseeable indirect physical change in the environment. (Cal. Code Regs., tit. 14, § 15060, subd. (c).) This action may also be considered categorically exempt from the provisions of CEQA as an action by a regulatory agency to enforce water quality standards administered by the Central Valley Water Board, and there are no exceptions that would preclude the use of this exemption. (Cal. Code Regs., tit. 14, § 15321.)

IT IS HEREBY ORDERED that, pursuant to Water Code section 13323 and Government Code section 11415.60, Brent Alan Vanderkam shall be assessed administrative civil liability in accordance with the terms of a stipulation entered into between Brent Alan Vanderkam and Clint Snyder, Assistant Executive Officer and lead of the Central Valley Water Board's Prosecution Team, on 20 January 2016.

This Order is issued under authority delegated to the Executive Officer by the Central Valley Water Board pursuant to Resolution R5-2009-0027 and is effective upon signature.



Pamela C. Credon
Pamela C. Credon
Executive Officer

March 15, 2016
Date

Attachment A: Enforcement Policy Methodology Analysis

Attachment A – ACL Complaint No. R5-2015-0522
Specific Factors Considered for Administrative Civil Liability
Brent Alan Vanderkam Assessor Parcel Number 099-120-035-000, Shasta County

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

http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

VIOLATION 1 – STORM WATER DISCHARGES TO UNNAMED TRIBUTARY OF CLOVER CREEK

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5).

Clover Creek is tributary to Cow Creek and hence the Sacramento River. Existing and potential beneficial uses for Cow Creek that could be impacted from unauthorized discharge include the following: Municipal & Domestic Supply (MUN); Agricultural Supply (AGR); Industrial Power (POW); Water Contact (REC-1) & Other Non-contact Recreation (REC-2); Cold (COLD) Freshwater Habitat; Migration of Cold Freshwater Aquatic Organisms (MIGR); Spawning of Warm & Cold Freshwater Aquatic Organisms (SPWN); and Wildlife Habitat (WILD). Storm water from 11550 Buggy Road, Millville (hereafter referred to as the Site) discharged to an unnamed class II tributary of Clover Creek (Unnamed Tributary). Beneficial uses of any specifically identified water body generally apply to all of its tributaries. Spawning, warm, and cold freshwater habitats were the beneficial uses most obviously affected by storm water discharges from the Site.

On at least 20 days, but likely more, during the period between 1 July 2014 and 6 February 2015, nutrient and sediment-laden storm water discharged to the Unnamed Tributary. During the 21 November 2014 inspection, turbidity violations exceeding background levels were observed downstream from the site discharge in the Unnamed Tributary, and samples collected upstream, downstream, and from site runoff, were analyzed and revealed elevated levels of nutrients in downstream samples. Evidence of algal blooms and sediment plumes were also observed and photographed at the Site.

A drive-by of the property conducted on 19 February 2015 and inspection of the culvert through which the Unnamed Tributary passed under Buggy Road, indicated continuing

sediment deposition in the streambed and along rocks as well as nutrient content based on the presence of algal growth. Views from the road indicated no change in site conditions and/or cleanup at that time.

The observed harm to beneficial uses was determined to be "Moderate" which is defined as "moderate threat to beneficial uses (i.e., no observed impacts but potential impacts to beneficial uses with no appreciable acute or chronic effects)." A score of 3 is assigned for this factor.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways.

Clover Creek is listed on the State's Clean Water Act (CWA) 303d list of impaired water bodies for fecal coliform and may be sensitive to contaminants such as: additional coliforms, nutrients, and low dissolved oxygen resulting from nutrient load and organic content. Discharge from the Site to the Unnamed Tributary caused elevation of nutrient concentrations in excess of background levels and exceeded the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (Basin Plan) objectives for turbidity. The current site conditions present a continuing threat of discharge and have shown continued sediment deposition. Discharges from the Site are deleterious to aquatic life and may cause a chronic impact due to habitat degradation.

The discharged material posed a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection). A score of 2 was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger.

Less than 50% of the discharge from the Site was susceptible to cleanup or abatement, as the discharges entered the Unnamed Tributary to Clover Creek and are no longer on Site. Therefore, a factor of 1 is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a final score of 6 was calculated. The total score is then used in Step 2, below.

1. Per Gallon Assessments for Discharge Violations

When there is a discharge, the Board is to determine an initial liability amount on a per gallon basis, using the Potential for Harm score and the extent of Deviation from Requirement of the violation. The Potential for Harm Score was determined above, and is 6.

The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, etc.) that was violated. For this discharge, the Deviation from Requirement is considered "**Major**" because the Discharger did not comply with the Water Code requirement to apply for a permit before discharging, or allowing his lessee to discharge, pollutants to waters of the U.S.

Table 1 of the Enforcement Policy (p. 14) is used to determine a "per gallon factor" based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is **0.22**. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

For the penalty calculation, Staff used a highly conservative estimate of 734,901 gallons for the volume of discharge. The following paragraphs describe how the volume was determined.

Using the USDA Natural Resources Conservation Service - Conservation Engineering Division Technical Release 55 Method (USDA TR-55 Method) and based on characteristics of the site (Newly graded area with no vegetation, Hydrologic Soil Group D) Staff calculated that precipitation events greater than 0.13 inches of rain over 24 hours would generate runoff from the Site. Although Staff believes 0.13 inches of rainfall would generate storm water runoff as the calculations suggest, staff confirmed during the 21 November inspection that 0.38 inches of rainfall in a 24 hour period generates storm water runoff given site specific characteristics. Therefore, although highly conservative, 0.38 inches of rainfall in a 24 hour period was used for the purposes of identifying storm water discharge events at this Site. Staff obtained precipitation data from a Department of Water Resources/Flood Management gauging station (WHT CalFire Station; Latitude 40.6194; Longitude -121.8994) located approximately 5.8 miles west of the Site. Using this data, Staff identified twenty (20) days with 0.38 inches of precipitation or greater over a 24 hour period, between 30 May 2014 through February 2015.

Even using storm events with greater than 0.38 inches of precipitation, although conservative considering the soil type and runoff potential, Staff recognizes there are still considerations including percolation/infiltration of ponding water and alternate drainage that may affect volume totals. Therefore, Staff have concluded to take an highly conservative approach in calculating storm water discharge to the Unnamed Tributary and calculate storm water in excess of 0.38 inches to mitigate other factors. Table 1 below summarizes qualifying storm events, calculated gallons of runoff generated, and volume subject to penalties for both cases. For purposes of penalty calculations, Staff are considering the most conservative storm water runoff calculations.

During the 21 November 2014 inspection Staff identified one major source of storm water runoff at the convergence of the Site and the Unnamed Tributary to the

northwest corner of the graded area. The just over two-acre portion of disturbed soil was cleared and void of vegetation, with the exception of 93 grow bags that remained in the center of the graded area. This disturbed land includes two large, steep-sloped berms flanking the western and southern sides of the graded area. The Site was devoid of any erosion control measures/implementation of Storm water Best Management Practices.

The first of 20 storm events in which storm water runoff was generated and discharged from the Site occurred on 25 September 2014. A total of 1.42 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 52,617 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The second storm event where storm water runoff discharged from the Site occurred on 20 October 2014 where 0.87 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 24,277 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The third storm event where storm water runoff discharged from the Site occurred on 23 October 2014. A total of 0.54 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 9,843 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The fourth storm event where storm water runoff discharged from the Site occurred on 25 October 2014. A total of 1.11 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 36,217 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The fifth storm event where storm water runoff discharged from the Site occurred on 31 October 2014. A total of 1.25 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 43,516 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The sixth storm event where storm water runoff discharged from the Site occurred on 19 November 2014. A total of 0.41 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 5,267 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The seventh storm event where storm water runoff discharged from the Site occurred on 20 November 2014. A total of 0.38 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method,

Staff calculated that 4,349 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The eighth storm event where storm water runoff discharged from the Site occurred on 21 November 2014. A total of 0.45 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 6,579 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The ninth storm event where storm water runoff discharged from the Site occurred on 29 November 2014. A total of 1.02 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 31,642 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The tenth storm event where storm water runoff discharged from the Site occurred on 30 November 2014. A total of 0.56 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 10,619 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The eleventh storm event where storm water runoff discharged from the Site occurred on 3 December 2014. A total of 2.63 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 212,267 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The twelfth storm event where storm water runoff discharged from the Site occurred on 5 December 2014. A total of 0.75 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 18,687 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The thirteenth storm event where storm water runoff discharged from the Site occurred on 6 December 2014. A total of 0.58 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 11,411 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The fourteenth storm event where storm water runoff discharged from the Site occurred on 10 December 2014. A total of 1.87 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 77,561 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The fifteenth storm event where storm water runoff discharged from the Site occurred on 11 December 2014. A total of 3.43 inches of precipitation were

recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 168,324 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The sixteenth storm event where storm water runoff discharged from the Site occurred on 12 December 2014. A total of 0.55 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 10,229 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The seventeenth storm event where storm water runoff discharged from the Site occurred on 15 December 2014. A total of 0.69 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 16,020 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The eighteenth storm event where storm water runoff discharged from the Site occurred on 19 December 2014. A total of 0.72 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 17,341 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The nineteenth storm event where storm water runoff discharged from the Site occurred on 2 February 2015. A total of 0.57 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 11,013 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

The last of the 20 precipitation events where storm water runoff discharged from the Site occurred on 6 February 2015. A total of 1.88 inches of precipitation were recorded at the WHT CalFire Station on this date. Using the USDA TR-55 method, Staff calculated that 78,125 gallons of storm water were discharged from the graded/disturbed area to the Unnamed Tributary.

For the purposes of the penalty calculation, Staff are using a discharge volume of 754,901 gallons (of this amount, 734,901 gallons are subject to penalties as described below). The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon discharged. The Per Gallon Assessment is calculated as (0.22 factor from Table 1) x (734,901 gallons) x (\$10 per gallon). The value is \$1,616,782.

Discharge Event	Date	Total Precipitation			Days of Violation Subject to Penalties
		Precipitation (inches)	Runoff Volume (gallons)	Total Subject to Penalties (Volume - 1000 gallons)	
#1	25-Sep-2014	1.42	52,617	51,617	1
#2	20-Oct-2014	0.87	24,277	23,277	1
#3	23-Oct-2014	0.54	9,843	8,843	1
#4	25-Oct-2014	1.11	36,217	35,217	1

#5	31-Oct-2014	1.25	43,516	42,516	1
#6	19-Nov-2014	0.41	5,267	4,267	1
#7	20-Nov-2014	0.38	4,349	3,349	1
#8	21-Nov-2014	0.45	6,579	5,579	1
#9	29-Nov-2014	1.02	31,642	30,642	1
#10	30-Nov-2014	0.56	10,619	9,619	1
#11	3-Dec-2014	2.63	121,267	120,267	1
#12	5-Dec-2014	0.75	18,687	17,687	1
#13	6-Dec-2014	0.58	11,411	10,411	1
#14	10-Dec-2014	1.87	77,561	76,561	1
#15	11-Dec-2014	3.43	168,324	167,324	1
#16	12-Dec-2014	0.55	10,229	9,229	1
#17	15-Dec-2014	0.69	16,020	15,020	1
#18	19-Dec-2014	0.72	17,341	16,341	1
#19	2-Feb-2015	0.57	11,013	10,013	1
#20	6-Feb-2015	1.88	78,125	77,125	1
Total Discharge Volume			754,901		20
Total Subject to Penalties				734,901	

2. Per Day Assessments for Discharge Volumes

When there is a discharge, the Water Board is to determine an initial liability amount on a per day basis using the same Potential for Harm factor score (6) and the extent of Deviation from Requirement (Major) that were used in the per-gallon analysis. The "per day" factor (determined from Table 2 of the Enforcement Policy) is **0.22**.

The discharges that are the subject of this enforcement action occurred on at least seven different days. Therefore, the Per Day Assessment is calculated as (0.22 factor from Table 2) x (20 days) x (\$10,000 per day). The value is \$44,000.

Initial Liability Amount: The value is determined by adding together the per gallon assessment and the per day assessment. For this case, the total is \$1,616,782+ \$44,000 for a total initial liability amount of **\$1,660,782**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violations are related to the discharge from the Site, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of 1 because the Discharger did not comply with the Water Code requirement to apply for a permit before discharging, or allowing his lessee to discharge, pollutants to waters of the U.S. and was aware that some type of permitting was necessary to conduct excavation activities but failed to apply for such permits.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger has been willing to cooperate with cleanup actions and has hired an engineering consultant to comply with orders as outlined in the Draft Cleanup and Abatement Order. Therefore, the Discharger was given a multiplier value of 0.75.

History of Violation

When there is a history of repeat violations, the Enforcement Policy indicates a minimum multiplier of 1.1 to be used. The Discharger does not have a history of violations with the Central Valley Water Board. Therefore, the History of Violation factor is 1.0.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

Total Base Liability Amount: This value is calculated as the Initial Liability Amount (\$1,660,782) x Adjustment Factors (1) (0.75) (1) and is equal to **\$1,245,587**.

VIOLATION 2 – DISCHARGES OF FILL MATERIAL TO UNNAMED TRIBUTARY OF CLOVER CREEK

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5).

Clover Creek is tributary to Cow Creek and hence the Sacramento River. Existing and potential beneficial uses for Cow Creek that could be impacted from unauthorized discharge include the following: Municipal & Domestic Supply (MUN); Agricultural Supply (AGR);

Industrial Power (POW); Water Contact (REC-1) & Other Non-contact Recreation (REC-2); Cold (COLD) Freshwater Habitat; Migration of Cold Freshwater Aquatic Organisms (MIGR); Spawning of Warm & Cold Freshwater Aquatic Organisms (SPWN); and Wildlife Habitat (WILD). Storm water from 11550 Buggy Road, Millville (hereafter referred to as the "Site") discharged to an unnamed class II tributary of Clover Creek (Unnamed Tributary). Beneficial uses of any specifically identified water body generally apply to all of its tributaries. Staff calculated more than 427 cubic yards of fill within the Unnamed Tributary diverting natural flow. The aforementioned drive-by of the property on 19 February 2015 indicated no change in site conditions and/or cleanup of the fill placed in the Unnamed Tributary streambed.

The observed harm to beneficial uses was determined to be "Moderate" which is defined as "moderate threat to beneficial uses (i.e., no observed impacts but potential impacts to beneficial uses with no appreciable acute or chronic effects)." A score of 3 is assigned for this factor.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways.

The Unnamed Tributary where fill material was discharged was significantly affected in its downstream reaches by increased siltation, turbidity, and fines in the stream substrate. Discharges from the Site are deleterious to aquatic life and may cause a chronic impact due to habitat degradation and continued stream diversion.

The discharged material posed a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection). A score of 2 was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger.

More than 50% of the discharged fill material on the Site is susceptible to cleanup or abatement. Therefore, a factor of 0 is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a final score of 5 was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses administrative civil liabilities for the spills based on both a per-gallon and a per-day basis.

1. Per Gallon Assessments for Discharge Violations

When there is a discharge, the Board is to determine an initial liability amount on a per gallon basis, using the Potential for Harm score and the extent of Deviation from Requirement of the violation. The Potential for Harm Score was determined above, and is 5.

The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, etc.) that was violated. For this discharge, the Deviation from Requirement is considered "Major" because the Discharger did not comply with the Water Code requirement to apply for a permit before discharging, or allowing his lessee to discharge, pollutants to waters of the U.S.

Table 1 of the Enforcement Policy (p. 14) is used to determine a "per gallon factor" based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is 0.15. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below. For the penalty calculation, Staff used a conservative estimate of 85,242 gallons for the volume of fill material discharged.

For the purposes of the penalty calculation, Staff is using a discharge volume of 86,242 gallons (of this amount, 85,242 gallons are subject to penalties as described below). The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon discharged. The Per Gallon Assessment is calculated as (0.15 factor from Table 1) x (85,242 gallons) x (\$10 per gallon). The value is **\$127,863**.

The Discharger and/or a third party with Discharger's consent discharged approximately 427 cubic yards of fill material into waters of the United States on the Site during construction of a berm. Each cubic yard of fill is equal to approximately 202 gallons. Accordingly, Staff conservatively estimates the discharge volume of 86,242 gallons of fill material directly to the Unnamed Tributary.

2. Per Day Assessments for Discharge Volumes

When there is a discharge, the Water Board is to determine an initial liability amount on a per day basis using the same Potential for Harm factor score (5) and the extent of Deviation from Requirement (Major) that were used in the per-gallon analysis. The "per day" factor (determined from Table 2 of the Enforcement Policy) is 0.15.

The discharge of the fill material into the streambed to construct the berm could have occurred in a single day. Therefore, to remain conservative for the purposes of this enforcement action, the discharges are assumed to have occurred on a single day. The Per Day Assessment is calculated as (0.15 factor from Table 2) x (1 day) x (\$10,000 per day). The value is **\$1,500**.

Initial Liability Amount: The value is determined by adding together the per gallon assessment and the per day assessment. For this case, the total is \$127,863 + \$1,500 for a total initial liability amount of **\$129,363**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violations are related to the discharge from the Site, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of 1 because the Discharger did not comply with the Water Code requirement to apply for a permit before discharging, or allowing his lessee to discharge, pollutants to waters of the U.S. and was aware that some type of permitting was necessary to conduct excavation activities but failed to apply for such permits.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger has been willing to cooperate with cleanup actions and has hired an engineering consultant to comply with orders as outlined in the Draft Cleanup and Abatement Order. Therefore, the Discharger was given a multiplier value of 0.75.

History of Violation

When there is a history of repeat violations, the Enforcement Policy indicates a minimum multiplier of 1.1 to be used. The Discharger does not have a history of violations with the Central Valley Water Board. Therefore, the History of Violation factor is 1.0.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

Total Base Liability Amount: This value is calculated as the Initial Liability Amount (\$129,363) x Adjustment Factors (1) (0.75) (1) and is equal to **\$97,022**.

COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS

The combined Total Base Liability Amount for both violations is **\$1,342,609** (\$1,245,587 + \$97,022 = \$1,342,609).

The following factors apply to the combined Total Base Liability Amounts for all of the violations discussed above.

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

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. Mr. Vanderkam has the ability to pay some of the total base liability amount proposed based on the fact that over the past two years he has purchased and owns over \$500,000 in real property in California and Virginia. Both properties have mortgages, however, it is not known at this time the extent to which those mortgages have been paid-off. It is also not known what other sources of income and/or assets are available to Mr. Vanderkam. Based on currently available information alone, it is unlikely that Mr. Vanderkam has the ability to pay the entire Total Base Liability Amount \$1,342,609. Mr. Vanderkam does however have significant real property assets and a source of income sufficient to obtain financing for those purchases. Accordingly, Staff used a multiplier of 0.15 to adjust the total base liability amount down to \$201,400 based on the Discharger's ability to pay.

Step 7 – Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for "other factors as justice may require," but only if express findings are made to justify this.

Step 8 – Economic Benefit

Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The Dischargers benefited economically by not enrolling and complying with the State of California's NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities Order No. 2009-0009-DWQ (NPDES No. CAS000002) and for not obtaining a Clean Water Act Section 404 Permit or 401 Water Quality Certification for dredged and fill materials.

To comply with the General Construction Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities order the Discharger would have had to pay an annual Construction Storm Water Program fee, hired a Qualified Storm Water Pollution Prevention Plan (SWPPP) Developer (QSD) to develop a SWPPP for construction and land disturbance activities on the Site, implement erosion and sediment control best management practices (BMPs) in accordance with the SWPPP, and hired a Qualified SWPPP Practitioner (QSP) to inspect those BMPs, monitor the Site and storm water discharges from the Site, take corrective actions when needed, and write and submit monitoring reports to the Central Valley Water Board. To obtain a Clean Water Act Section 401 Water Quality Certification the Discharger would have had to submit an application and application fee.

The annual Construction Storm Water Program fee for fiscal year 2014-15 for the construction and land disturbance activities the dischargers conducted on the Site is \$606. This is considered an avoided cost because the Discharger cannot retroactively enroll in the Construction Storm Water Program. The estimated cost to have a QSD develop a SWPPP for the Site and to have a QSP to inspect and monitor the site as needed to comply with the

SWPPP and the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities during fiscal year 2014-15 is \$9,350. This is considered an avoided cost as the Discharger cannot retroactively have a SWPPP developed, inspected, or monitored. The estimated minimum cost to implement erosion and sediment control BMPs for the construction and land disturbance activities conducted by the Discharger in 2014 is \$17,140. This is considered a delayed cost as the Discharger will have to implement erosion and sediment control BMPs in compliance with Cleanup and Abatement Order R5-2015-0702. The cost to obtain a Section 401 Water Quality Certification in 2014 is \$3,335.

The Discharger's economic benefit for noncompliance with the Construction Storm Water General Permit and failure to obtain a section 404 permit and section 401 Water Quality Certification is calculated from the delayed and avoided costs listed above using the USEPA's BEN computer program, and is equal to the present value of the avoided costs plus the "interest" on delayed costs. This calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid the instance of noncompliance. The total Benefit of Noncompliance to the Discharger in regards to these violations is calculated to be \$8,078.

The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations." Therefore, the economic benefit plus 10% is estimated to be **\$8,886**, which becomes the minimum civil liability which must be assessed pursuant to section 13385 and the Enforcement Policy.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Complaint, and the values are repeated here.

Maximum Liability Amount: \$8,411,430

Minimum Liability Amount: \$8,886

Step 10 – Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement policy, the final liability amount proposed for both violations is **\$201,400**.



