

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

TECHNICAL ANALYSIS

**Order No. R9-2014-0044
Settlement Agreement and Stipulation for Entry of
Administrative Civil Liability Order
Scripps Mesa Developers, LLC,**

Noncompliance with

**State Water Resources Control Board
Order No. 2009-0009-DWQ
*National Pollutant Discharge Elimination System (NPDES)
General Permit for Storm Water Discharges Associated with
Construction and Land Disturbance Activities***

**Water Code section 13376
and
Clean Water Act section 301**

**Prepared
by**

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December 12, 2014

A. Introduction

This technical analysis provides a summary of factual and analytical evidence that support the findings in Order No. R9-2014-0044, Settlement Agreement and Stipulation for Entry of Order (Stipulated Order) assessing civil liability in the amount of **\$286,324** against Scripps Mesa Developers, LLC (Discharger) for violations of California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, [as Amended by Order No. 2010-0014-DWQ] National Pollutant Discharge Elimination System, General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction and Land Disturbance Activities (Construction Storm Water Permit or CSWP). See Exhibit 1, Construction Storm Water Permit, and federal Clean Water Act section 301.

The Stipulated Order was entered into because the Discharger failed to comply with the terms and conditions of the Construction Storm Water Permit during the ongoing construction of the 2,200 unit apartment community, referred to as *Casa Mira View* (Casa Mira View or Project or Site) located on 41.31 acres within the City of San Diego's Mira Mesa community. The Site lies within the Miramar Reservoir Hydrologic Area (HA) (906.10) of the Peñasquitos Hydrologic Unit. Storm water discharges from the Site drain to an unnamed tributary to Los Peñasquitos Creek. See Figure 1. Site Location Map.

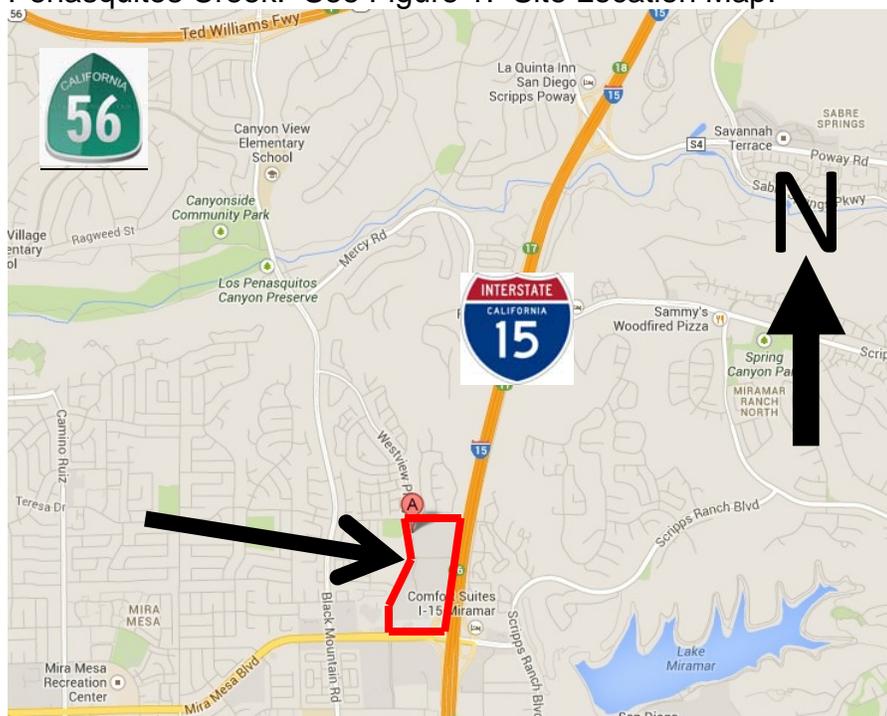


Figure 1. Site Location Map. Location of Casa Mira View Construction site (outlined in red) at 11241, 11267, and 11285 Westview Parkway, San Diego, California 92126.

The Project developer is Garden Communities. Scripps Mesa Developers, LLC (Phase 2 and 3) and Scripps Mesa Developers II, LLC (Phase 1) own the properties that make up the Project, and all three entities are owned by the same parent company. Stuart Posnock is the contact for all three entities. See Exhibit 2, March 31, 2014, Sheppard Mullin letter. On October 1, 2008, Stuart Posnock, acting as the property owners' and developer's representative, filed a Notice of Intent (NOI) to comply with the waste discharge requirements of *Order No. 99-08-DWQ, National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002, Waste Discharge Requirements (WDRs) for Discharges of Storm Water Runoff Associated with Construction Activity (Order No. 99-08-DWQ)* for the Project with the State Water Board. The NOI stated that construction activities would begin in November 2008. On October 7, 2008, the State Water Board processed the NOI and assigned Waste Discharge Identification (WDID) No. 9 37C353628 to the Project.

On June 30, 2010, Stuart Posnock, the approved signatory of Scripps Mesa Developers, LLC, the Legally Responsible Person (LRP) for the Project, certified the Project under the Construction Storm Water Permit. See Exhibit 3, NOI. In addition, he characterized the Project as being "Risk Level 3." Pursuant to Construction Storm Water Permit section VIII, dischargers "calculate the site's sediment risk and receiving water risk during periods of soil exposure (i.e. grading and site stabilization)." "Risk Level 3" is assigned to "projects with high receiving water risk and high sediment risk." (CSWP Rationale § J.1.a.) Mr. Posnock certified his "Yes" response to the NOI question of whether the Site's disturbed areas discharge directly or indirectly into a 303(d) listed water body impaired by sediment, or that the Site's disturbed areas are located within a sub-watershed draining into a 303(d) listed water body impaired by sediment.

B. Construction Storm Water Permit

The Construction Storm Water Permit authorizes discharges of storm water associated with construction activity as long as the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) are implemented to reduce or eliminate pollutants in storm water runoff. BAT/BCT technologies include passive systems such as erosion and sediment control best management practices (BMPs¹) as well as structural controls, as necessary, to achieve compliance with water quality standards. The Construction Storm Water Permit identifies effective erosion control measures such as preserving existing vegetation where feasible, limiting disturbance, and stabilizing and re-vegetating disturbed areas as soon as possible after grading or construction activities.

The Construction Storm Water Permit further identifies erosion control BMPs as the primary means of preventing storm water contamination. The Construction Storm Water Permit identifies sediment controls as the secondary means of preventing storm water contamination. The Construction Storm Water Permit further states that when erosion control techniques are ineffective, sediment control techniques should be used to capture any soil that becomes eroded.

C. Alleged Violations

The following allegations against the Discharger are the basis for assessing administrative civil liability pursuant to Water Code section 13385, and also appear in the Stipulated Order:

1. Discharge of sediment laden storm water runoff into storm drain;
2. Failure to monitor storm water effluent;
3. Failure to implement erosion control BMPs;
4. Failure to implement sediment control BMPs;
5. Failure to implement housekeeping BMPs; and
6. Failure to complete inspection checklist.

¹ Best management practices (BMPs) “means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ‘waters of the United States.’ BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 CFR § 122.2)

D. October 25, 2010, Inspection

While inspecting the Site with a Garden Communities employee, San Diego Water Board inspector Christina Arias observed the pumping of highly turbid sediment laden water from the Site into an off-site Caltrans storm drain. She immediately ordered that the discharge be stopped, and she confirmed that it was stopped. She further documented finished slopes without erosion control BMPs, and inadequate perimeter and site entrance sediment control BMPs. The later resulted in observed sediment discharges to the street. On November 3, 2010, the San Diego Water Board issued Notice of Violation (NOV) No. R9-2010-0146 to the Discharger. See Exhibit 4, NOV No. R9-2010-0146.²

On November 16, 2010, Ground Service Technology, Inc., Discharger's Qualified Storm Water Pollution Prevention Plan (SWPPP) Practitioner (QSP) submitted a report documenting the actions taken onsite to correct the violations noted in the San Diego Water Board's inspection report and Notice of Violation No. R9-2010-0146.

E. November 22, 2010, Inspection

On November 22, 2010, Christina Arias inspected the Site and confirmed the corrections. See Exhibit 5, November 22, 2010, Inspection Entry.

F. January 9 and 14, 2014, Inspections

Christina Arias inspected the Site on January 9, 2014. She noted numerous violations of the Construction Storm Water Permit; specifically that trash was strewn throughout the Site, stockpiles were exposed, slopes were unprotected, chemical containers were without secondary containment, and concrete washout bins were leaking. These violations were consistently unaddressed as evidenced by unsigned QSP site inspection reports between October 2013 through December 2013 (See section G below.) and repetition of the same violations.

A follow-up inspection was conducted by Christina Arias on January 14, 2014. She noted that some of the deficiencies had been corrected, but that sediment control BMPs were missing at a construction site entrance and that inadequate sediment BMPs were observed along a paved roadway.

The noted violations from both inspections were written up in inspection reports attached to NOV No. R9-2014-0018 issued to Garden Communities on February 18, 2014. See Exhibit 6, NOV No. R9-2014-0018.

² The NOV transmittal includes a copy of the October 25, 2010, San Diego Water Board inspection report.

G. QSP Site Inspection Reports

Ground Service Technology, Inc. conducted weekly site inspections for the Discharger. These reports documented the failure of the Discharger to implement effective erosion and sediment control BMPs, as well as Housekeeping BMPs. See Exhibit 7, March 7, 2014, Sheppard Mullin letter.

H. September 30, 2014, Inspection

Christina Arias inspected the Site on September 30, 2014, and she found the Site to generally be in compliance with the Construction Storm Water Permit. Ms. Arias advised the Discharger to add additional erosion and sediment control BMPs to the northwest corner of the Site.

I. Beneficial Uses of Affected Waters

The Basin Plan designates beneficial uses for all surface and ground waters in the San Diego Region. These beneficial uses "form the cornerstone of water quality protection under the Basin Plan" (Basin Plan, Chapter 2). Beneficial uses are defined in the Basin Plan as "the uses of the water necessary for the survival or well-being of man, plants and wildlife."

The Basin Plan also designates water quality objectives to protect the designated beneficial uses. Water Code section 13350(h) defines "water quality objectives" as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."

The Basin Plan designates the following beneficial uses for the "unnamed tributary 6.10" to Los Peñasquitos Creek:

1. Agricultural Supply (AGR);
2. Industrial Service Supply (IND);
3. Contact Water Recreation (REC-1);
4. Non-contact Water Recreation (REC-2);
5. Warm Freshwater Habitat (WARM);
6. Wildlife Habitat (WILD); and
7. Rare, Threatened, or Endangered Species (RARE).

J. Determination of Administration Civil Liability

An administrative civil liability may be imposed pursuant to the procedures in Water Code section 13323. The Stipulated Order alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability, and the proposed civil liability. Pursuant to the relevant portions of Water Code section 13385(a)

Any person who violates any of the following shall be liable civilly in accordance with this section:

1. Section 13375 or 13376.
2. Any waste discharge requirements or dredged and fill material permit.
3. Any requirements established pursuant to section 13383.

Furthermore, Water Code section 13385 (c) provides that

Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

1. Ten thousand dollars (\$10,000) for each day in which the violation occurs.
2. Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

Water Code section 13385(e) requires the consideration of several factors when determining the amount of civil liability to impose. These factors include: “[T]he nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, 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 culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”

K. Alleged Violations

Dischargers are required to ensure that the Project is in compliance with the requirements of the Construction Storm Water Permit. The Stipulated Order alleges the following violations:

1. Discharge of Sediment Laden Water (1 day)

All discharges except for storm water and non-storm water discharges specifically authorized by the Construction Storm Water Permit are prohibited. (CSWP § III.B.) Furthermore “Dischargers shall not violate any discharge prohibitions contained in applicable Basin Plans or statewide water quality control plans.” (CSWP § III.A) San Diego Water Board Basin Plan Prohibition No. 8 prohibits discharges to the storm water conveyance system that are not composed entirely of storm water. “Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.” (CSWP §§ J.58. and V.A.2.)

While touring the Site on October 25, 2010, Christina Arias and Garden Communities employee Rod Fink observed the pumping of sediment laden water from the Site into a Caltrans storm drain inlet. The Caltrans storm drain inlet is connected and discharges to an unnamed tributary of Los Peñasquitos Creek. Upon closer observation, Ms. Arias documented that storm water runoff ponded on the Site was being pumped directly into the storm water conveyance system via a water pump in the scoop of a front loader. Photographs from the inspection report show the sediment laden water covered an area about the size of a football field with a depth that covered a three inch diameter hose. Therefore at the time of the photograph there was at least 100,000 gallons of ponded sediment laden water. Ms. Arias did not observe any BMPs being implemented to remove or reduce sediment or other pollutants from the ponded storm water. Furthermore, the Caltrans storm drain inlet was not identified in the SWPPP by the Discharger as a discharge location.

Characterization of the ponded sediment laden storm water runoff was required prior to discharge. (CSWP Att. E. § I.4.d.) Mr. Fink discontinued the discharge at Ms. Arias’ direction. See Exhibit 4, NOV No. R9-2010-0146. Discharger’s action resulted in one (1) day of violation on October 25, 2010.

2. Failure to Monitor Storm Water Effluent (1 day)
Sampling and analysis of collected storm water runoff is required to characterize the effluent prior to discharge. "Risk Level 3 dischargers shall collect effluent samples at all discharge points where storm water is discharged off-site." (CSWP Att. E. § I.5.b.) Furthermore, if required samples are not collected, an explanation is to be included in the SWPPP and Annual Report. (CSWP Att. E. § I.6.b.) After a review of the Discharger's submitted materials in the Storm Water Multiple Application and Report Tracking System (SMARTS) and Electronic Content Management (ECM) databases, San Diego Water Board staff failed to locate any sample results related to the October 25, 2010, discharge or to locate a written explanation as to why a sample was not collected. Therefore Discharger is in violation for one (1) day, October 25, 2010, of Construction Storm Water Permit Attachment E. sections I.5.b. and I.6.b.
3. Failure to Implement Erosion Control BMPs (2 days)
"Risk Level 3 dischargers shall provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots." (CSWP Att. E. § D.2.) During Ms. Arias' Site inspection of October 25, 2010, she observed numerous finished slopes without erosion control BMPs (i.e., hydroseeding, soil binders, mulch, or covers, etc.). See Exhibit 4, NOV No. R9-2010-0146. The Discharger corrected the violation on October 27, 2010. Therefore Discharger is in violation for two (2) days; October 25, and 26, 2010.
4. Failure to Implement Sediment Control BMPs (3 days)
"Risk Level 3 dischargers shall establish and maintain effective perimeter controls and stabilize all construction entrances and exits to sufficiently control erosion and sediment discharges from the site." (CSWP Att. E. § E.1.) During Ms. Arias' inspection of October 25, 2010, she noted the discharge of sediment onto the street and sidewalk as a result of inadequate sediment control BMPs. The Site perimeter was not protected with gravel bags and/or fiber rolls, thus allowing sediment to be deposited onto the sidewalk and street. Also, sediment was tracked onto the street at the construction entrance because the gravel entrance was not maintained. See Exhibit 4, NOV No. R9-2010-0146. Discharger corrected the violation on October 28, 2010. Therefore Discharger is in violation for three (3) days; October 25, 26, and 27, 2010.

5. Failure to Implement Erosion Control BMPs (11 days)
“Risk Level 3 dischargers shall provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.” (CSWP Att. E. § D.2.) Discharger’s QSP conducted weekly storm water inspection reports. The San Diego Water Board requested, received, and reviewed the October 2013 through January 2014 reports. See Exhibit 7, March 7, 2014, Sheppard Mullin letter. These reports documented Site erosion control BMP violations on January 2, 2014 (exterior slopes without erosion control). On January 9, 2014, Christina Arias inspected the Site and noted that the same finished external graded slopes still had no erosion control BMPs. See Exhibit 6, NOV No. R9-2014-0018. The Discharger corrected the violation on January 13, 2014. Therefore Discharger is in violation for eleven (11) days; January 2 through 12, 2014.

6. Failure to Maintain Sediment Control BMPs (14 days)
“Risk Level 3 dischargers shall establish and maintain effective perimeter controls and stabilize all construction entrances and exits to sufficiently control erosion and sediment discharges from the site.” (CSWP Att. E. § E.1.) “Risk Level 3 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.” (CSWP Att. E. § E.3.) “Risk Level 3 dischargers shall ensure that all storm drain inlets and perimeter controls, runoff control BMPs, and pollutant controls at entrances and exits (e.g. tire washoff locations) are maintained and protected from activities that reduce their effectiveness).” (CSWP Att. E. § E.6.)

The QSP’s weekly storm water reports documented Site sediment control BMP violations on October 7 (downed silt fence) and 24 (downed silt fence), 2013; November 5 (downed silt fence), 12 (downed silt fence), 19 (downed silt fence) and 25 (downed silt fence), 2013; December 3 (downed silt fence), 9 (downed silt fence, maintenance of inlet protection, and replacement of fiber rolls), 18 (downed silt fence) and 26 (downed silt fence), 2013; January 2 (downed silt fence), and 8, 2014 (maintenance of inlet protection). See Exhibit 7, March 7, 2014, Sheppard Mullin letter. Ms. Arias documented broken and failing perimeter silt fences, and dirt tracked in the street around the Site entrance on January 9, and 14, 2014. See Exhibit 6, NOV No. R9-2014-0018. Therefore, Discharger was in violation of Construction Storm Water Permit Attachment E. sections E.1., E.3., and E.6. for fourteen (14) days.

7. Failure to Implement Housekeeping BMPs (16 days)
“Risk Level 3 dischargers shall implement good site management (i.e., ‘housekeeping’) measures for construction materials that could potentially be a threat to water quality if discharged.” (CSWP Att. E. § B.1.)
“Implement BMPs to prevent the off-site tracking of loose construction and landscape materials.” (CSWP Att. E. § B.1.e.) “Cover waste disposal containers at the end of every business day and during a rain event.” (CSWP Att. E. § B.2.d.) “Ensure the containment of concrete washout areas and other washout areas that may contain additional pollutants so there is no discharge into the underlying soil and onto the surrounding areas.” (CSWP Att. E. § B.2.i.)

The QSP’s weekly storm water reports documented housekeeping BMP violations on October 7 (debris, uncovered dumpsters, and street dirt tracking), 15 (debris, uncovered dumpsters, and street dirt tracking), 24 (debris, uncovered dumpsters, and street dirt tracking), and 29 (debris) 2013; November 5 (debris, uncovered dumpsters, and street dirt tracking), 12 (debris, uncovered dumpsters, street dirt tracking, and maintain concrete washout bins), 19 (debris, uncovered dumpsters, street dirt tracking, and maintain concrete washout bins), 22 (debris and street dirt tracking), and 25 (debris and street dirt tracking), 2013; December 3 (debris and street dirt tracking), 9 (debris and street dirt tracking), 18 (debris, uncovered dumpsters, street dirt tracking, and maintain concrete washout bins), and 26 (debris and street dirt tracking), 2013; and January 2 (debris, uncovered dumpsters, and street dirt tracking) and 8, 2014 (debris). See Exhibit 7, March 7, 2014, Sheppard Mullin letter. Ms. Arias documented trash and construction debris strewn throughout the Site on January 9, 2014. See Exhibit 6, NOV No. R9-2014-0018.

8. Failure to Complete Inspection Checklist (12 days)
The Construction Storm Water Permit requires Risk Level 3 dischargers to perform weekly inspections and observations and to record a checklist of information. (CSWP Att. E. § G.2 and 4) “Risk Level 3 dischargers shall ensure that checklists shall remain onsite with the SWPPP and at a minimum, shall include: ... g. Any corrective actions required, including any necessary changes to the SWPPP and the associated implementation dates.” (CSWP Att. E. § G.5.g.)

The submitted inspection reports on the following dates did not include “implementation dates:” October 7, 15, and 24, 2013; November 5, 12, 19, and 25, 2013; December 3, 9, 18, and 26, 2013; and January 2, 2014. Therefore it is unclear whether the recommended corrective actions for noted “failures or other shortcomings” were completed. See Exhibit 7, March 7, 2014, Sheppard Mullin letter. Failure to correct BMP deficiencies increases the likelihood of a sediment discharge and decreases the pollutant removal effectiveness of the Site’s BMPs.

L. Penalty Calculation

The State Water Board’s Water Quality Enforcement Policy (Enforcement Policy) provides a penalty calculation methodology for the State Water Board and the nine Regional Water Quality Control Boards (collectively Water Boards) to use in administrative civil liability cases. The penalty calculation methodology enables the Water Boards to fairly and consistently implement liability provisions of the Water Code for maximum enforcement impact to address, correct, and deter water quality violations. The penalty calculation methodology provides a consistent approach and analysis of factors to determine liability based on the applicable Water Code section.

Pursuant to the Enforcement Policy, when there is a discharge, Water Boards shall determine an initial liability factor based on the Potential for Harm score and the extent of Deviation from Requirements for the violation. Water Boards shall calculate the Potential for Harm by determining the actual or threatened impact to beneficial uses caused by the violation using a three-factor scoring system to quantify: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge’s susceptibility to cleanup or abatement. These factors will be used to determine a per day factor using the matrix set forth in the Enforcement Policy that is multiplied by the maximum per day amount allowed under the Water Code. If applicable, the Water Board shall also determine an initial liability amount on a per gallon basis using the Potential for Harm score and the extent of Deviation of Requirement of the violation.

For each non-discharge violation, the Water Boards shall calculate an initial liability factor, considering the Potential for Harm and extent of Deviation from Requirements. Water Boards shall use the matrix set forth in the Enforcement Policy that corresponds to the appropriate Potential for Harm and the Deviation from Requirement categories.

Pursuant to the Enforcement Policy, Water Boards shall use three adjustment factors for modification of the initial liability amount. These factors include: culpability; cleanup and cooperation; and history of violations. The initial liability amount can be increased or decreased based on these adjustment factors. Additional adjustments may be used regarding multiple violations resulting from the same incident and multiple day violations.

Violation No. 1: Discharge of Sediment Laden Water (1 day) October 25, 2010

Step 1 – Potential for Harm for Discharge Violations

Factor 1: Harm or Potential for Harm to Beneficial Uses

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 (negligible) and 5 (major) is assigned in accordance with the statutory factors of the nature, circumstances, extent and gravity of the violation.

The San Diego Water Board Prosecution Team (Prosecution Team) assigns a score of **3 (Moderate)** out of 5 for Factor 1 of the penalty calculation. The Enforcement Policy defines “Moderate” as “moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects). A score of 3 (Moderate) is selected because:

1. Sediment was directly discharged during dry weather into the MS4 connected to the unnamed tributary to Los Peñasquitos Creek, which is being considered for federal Clean Water Act section 303(d) listing as an impaired water body for turbidity;
2. Impacts to the unnamed tributary were likely, due to the high turbidity and large volume of the discharge; resulting in temporary restrictions on beneficial uses;
3. Los Peñasquitos Creek discharges into Los Peñasquitos Lagoon, which is a federal Clean Water Act section 303(d) listed impaired water body for sedimentation/silt, and a designated Natural Preserve by the State Park and Recreation Commission.
4. Sediment discharges negatively impact Contact Water Recreation (REC-1), Warm Freshwater Habitat (WARM), Wildlife Habitat (WILD), and Rare, Threatened, or Endangered Species (RARE) beneficial uses.

Factor 2: 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 health exposure pathways. In this matter, the Prosecution Team assigns the discharge of sediment to receiving waters a score of **2**. The Enforcement Policy defines a score of 2 as "[d]ischarged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection." A score of 2 is selected because:

1. Sediment discharges diminish the physical quality of in-stream waterways by altering or obstructing flows and affecting existing riparian functions.
2. Sediment acts as a binding carrier to other toxic constituents like metals and organic contaminants (i.e. pesticides and PCBs).
3. Sediment discharges affect the quality of receiving waters and the ability to support habitat related beneficial uses by reducing visibility and impacting biotic feeding and reproduction. Sediment discharges can increase receiving water turbidity levels.
4. Sediment discharges cause acute effects on the invertebrate aquatic community.

Factor 3: Susceptibility to Cleanup and Abatement

Pursuant to the Enforcement Policy a score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned to this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement. Less than 50 percent of the discharge was susceptible to cleanup or abatement. Accordingly, the Prosecution team assigns a score of **1 (one)** to the penalty calculation for Factor 3.

Final Score - "Potential for Harm"

Based on the above determinations, the Potential for Harm final score for this discharge violation is **6 (six)**.

Step 2 - Assessments for Discharge Violations

Water Code section 13385 states that a Regional Water Board may impose civil liability on a daily basis, a per gallon basis, or both. Due to the difficulty in accurately determining the volume of sediment discharged during the discharge event, civil liability was only calculated on a per day basis for the violation.

Per Day Assessments for Discharge Violations

The Water Boards shall calculate an initial liability factor for each discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements.

Deviation from Requirement

The Prosecution Team assigns a Deviation from Requirement score of **Major** because Order No. 2009-0009-DWQ prohibits all discharges other than storm water from construction sites to waters of the United States unless otherwise authorized by an NPDES permit. Pollutants were discharged to waters of the United States from the Project without NPDES Permit authorization. The Enforcement Policy defines major for discharge violations as: The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of 6 and "Deviation from Requirement" factor of "Major," the "Per Day Factor" for discharging sediment from the Project to the MS4/unnamed tributary to Los Peñasquitos Creek, Los Peñasquitos Creek and Los Peñasquitos Lagoon is **0.220** in Table 2 of the Enforcement Policy. Pursuant to Water Code section 13385 the maximum civil liability for these violations is ten thousand dollars (\$10,000) per day of violation (per violation). Calculating the Per Day Assessment is achieved by multiplying:

$$(\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) = (0.220) \times (\$10,000) = \$2,200$$

Step 3 - Per Day Assessments for Non-Discharge Violations

Step 3 does not apply to discharge violations.

Step 4 -Adjustment Factors

Culpability

The Prosecution Team assigns a culpability multiplier of **1.5** out of a range from 0.5 to 1.5 for these violations for the following reasons:

1. Discharger intentionally discharged sediment laden storm water runoff into a Caltrans storm drain inlet connected to a tributary of Los Peñasquitos Lagoon, a CWA section 303(d) listed impaired water body for sedimentation/silt;

2. Discharger failed to implement BMPs to reduce the sediment in the storm water runoff; and
3. Discharger failed to report the discharge to the San Diego Water Board.
4. Discharger knew the requirements of the Construction Storm Water Permit and agreed to comply with the requirements as evidenced by its certified NOI.

Cleanup and Cooperation

The Prosecution Team assigns a cleanup and cooperation multiplier of **1.0** from a range of .75 to 1.5 for this violation because the Discharger's conduct was reasonable. Discharger ceased discharge upon direction of San Diego Water Board staff.

History of Violation

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the "Per Day Assessment" by the "Days of Violation" to determine the "Initial Amount of Liability" and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$2,200) \times (1) \times (1.5) \times (1.0) \times (1.0) = \$3,300$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

The Discharger derived a negligible economic benefit by not pumping the ponded storm water runoff to an onsite sediment basin to settle out the sediment. The benefit was negligible because the Discharger pumped to the storm drain inlet when they should have pumped to the sedimentation basin.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation); and (b) ten dollars (\$10) for every gallon discharged, over one thousand (1,000) gallons discharged, that was not cleaned up. In this instance, the Prosecution Team is only proposing the assessment of civil liability for the discharge of sediment to waters of the United States on a per day basis based on information currently available. Sediment was known to be discharged to waters of the United States on October 25, 2010; therefore, the maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore there is no minimum liability because the economic benefit was negligible.

Step 10 - Proposed Civil Liability for Violation No. 1

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for discharging sediment to waters of the United States in violation of the Construction Storm Water Permit and the Basin Plan for one day is three thousand three hundred dollars (\$3,300) plus staff costs. The proposed liability is within the minimum and maximum liability range.

**Violation No. 2: Failure to Monitor Storm Water Effluent (1 day)
October 25, 2010**

Step 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team selected Moderate because sampling is a necessary tool to determine whether a discharge can meet discharge requirements. See also the Potential for Harm analysis for Violation No. 1.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Major** deviation from the requirement. The Enforcement Policy defines a Major “Deviation from Requirement” as “[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).” Major was selected because the Construction Storm Water Permit requires sampling of the discharge and no sampling was done.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Moderate" and "Deviation from Requirement" factor of "Major," the "Per Day Factor" for failing to monitor storm water effluent in Table 3 of the Enforcement Policy is **0.55**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.55) \times (\$10,000) = \$5,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.5** for this violation because there was no attempt by the Discharger to monitor the discharge. Also the Discharger knew the requirements of the Construction Storm Water Permit, and it agreed to comply with the requirements as evidenced by its certified NOI.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger has promised in writing to pump future ponded water to sediment basins, and to sample and report results as required by the Construction Storm Water Permit.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the "Per Day Assessment" by the "Days of Violation" to determine the "Initial Amount of Liability" and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$5,500) \times (1) \times (1.5) \times (1.0) \times (1.0) = \$8,250$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$2,433 by failing to monitor and analyze the storm water discharge. Sampling and analyzing storm water runoff in the San Diego area costs approximately \$2,000 per sample. Using the U.S. EPA BEN computer model and the date of violation, results in an economic benefit of \$2,433. See Exhibit No. 8, Economic Benefit Calculation Violation No. 2.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation). Water Code section 13385(d) requires that when pursuing civil liability under Water Code section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to monitor and analyze the storm water runoff discharge for one day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore the minimum liability is $(1.1) \times (\$2,433) = \$2,676$.

Step 10 - Proposed Civil Liability for Violation No. 2

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to monitor and analyze the storm water discharge for one day in violation of the Construction Storm Water Permit is eight thousand two hundred fifty dollars (\$8,250) plus staff costs. The proposed liability is within the minimum and maximum liability range.

Violation No. 3: Failure to Implement Erosion Control BMPs (2 days) October 25 and 26, 2010

Step 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team selected Moderate for the following reasons:

1. The Site, over 40 acres, characterized as “Risk Level 3,” the highest threat, much of which was graded, poses a substantial threat to discharge sediment given its large sediment load;
2. The ultimate receiving water is a sensitive water body listed as impaired under section 303(d) of the federal Clean Water Act for sedimentation/silt;
3. Sediment is a pollutant that when discharged can be lethal when it smothers benthic communities. Furthermore, sediment can transport toxic materials (e.g., metals and synthetic organics) from the Site and into receiving waters.
4. Unprotected long running slopes have a great potential for erosion.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** deviation from the requirement. The Enforcement Policy defines a Moderate “Deviation from Requirement” as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” Moderate was selected because numerous, although not all interior and exterior slopes throughout the Site were without erosion control BMPs. Erosion control BMPs are the first and most valuable BMPs used at a construction site because they prevent erosion from happening in the first place (i.e., it prevents storm water runoff from being polluted with sediment). Furthermore, track walking slopes³ (a.k.a. roughening) “is not intended to be used as a stand-alone BMP.” (EC-15, California Stormwater Construction BMP Handbook)

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Moderate" and "Deviation from Requirement" factor of "Moderate," the "Per Day Factor" for failing to implement effective erosion controls in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the failure to use erosion control BMPs on finished interior and exterior slopes throughout the Site during the rainy season was at a minimum negligent implementation of the Construction Storm Water Permit by the Discharger.

³ The October 16, 2010, Garden Communities response to NOV No. R9-2010-0146, identified “track walking” as the soil stabilization BMP used on slopes.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger did not fix the violation until instructed to do so by the San Diego Water Board.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the “Per Day Assessment” by the “Days of Violation” to determine the “Initial Amount of Liability” and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (2) \times (1.3) \times (1.0) \times (1.0) = \$9,100$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$185 by delaying the application of an erosion control BMP (e.g. spraying of bonded fiber matrix) on the finished slopes. The Discharger sprayed bonded fiber matrix on the slopes on October 27, 2010. Bonded fiber matrix costs approximately \$3,901⁴ per acre to install. Assuming that there were eight acres of exposed slopes the cost would be \$31,208. The savings of delaying the spraying from October 1, 2010, to October 27, 2010, is \$185. See Exhibit No. 9, Economic Benefit Calculation Violation No. 3.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation). Water Code section 13385(d) requires that when pursuing civil liability under Water Code section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement erosion control BMPs for two days. The maximum civil liability that could be assessed for this violation is twenty thousand dollars (\$20,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore the minimum liability is $(1.1) \times (\$185) = \204 .

Step 10 - Proposed Civil Liability for Violation No. 3

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to implement erosion control BMPs for two days in violation of the Construction Storm Water Permit is nine thousand one hundred dollars (\$9,100) plus staff costs. The proposed liability is within the minimum and maximum liability range.

⁴ *Soil Stabilization BMP Research for Erosion and Sediment Controls, Cost Survey Technical Memorandum*, July 2007, Caltrans, Table 3-1, page 7.

Violation No. 4: Failure to Implement Sediment Control BMPs (3 days) October 25 - 27, 2010

Step 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team selected Moderate because this is a large site (more than 40 acres), it is a Risk Level 3 site, and it discharges into a sensitive water body.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** deviation from the requirement. The Enforcement Policy defines a Moderate “Deviation from Requirement” as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” Moderate was selected because although the Discharger implemented sediment control BMPs, it failed to maintain or augment some of the sediment control BMPs which resulted in the discharge of sediment into streets and gutters.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Moderate" and "Deviation from Requirement" factor of "Moderate," the "Per Day Factor" for failing to implement effective sediment controls in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the Discharger was not maintaining BMPs and also failed to replace or increase the size of ineffective BMPs.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger did not fix the violation until instructed to do so by the San Diego Water Board.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the "Per Day Assessment" by the "Days of Violation" to determine the "Initial Amount of Liability" and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (3) \times (1.3) \times (1.0) \times (1.0) = \$13,650$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$1,304 by delaying the maintenance of sediment control BMPs, the replacement of ineffective sediment control BMPs, and the installation of sediment control BMPs. Discharger swept the construction entrance after the San Diego Water Board inspection at the end of the work day. The graveled construction entrance was lengthened and additional rock was added. Discharger stated that it added 112 cubic yards of gravel. Gravel of that size weighs approximately 1.2 tons per cubic yard and costs \$30.50 per ton. Therefore, 112 cubic yards costs approximately \$4,099. Using the U.S. EPA BEN computer model the economic benefit of delaying compliance was \$24. Approximately 1,000 feet of slope perimeter was not protected. A 25 foot long 8 inch diameter fiber roll costs \$25. Fiber rolls are installed with a one foot overlap on each side. Therefore 48 25 foot long fibers rolls were needed and would have cost \$1,050. Using the U.S. EPA BEN computer model, Discharger experienced an economic benefit of \$1,280. Combining the two calculated economic benefits results in a total economic benefit of \$1,304. See Exhibit No. 10, Economic Benefit Calculation Violation No. 4.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement sediment control BMPs for three days. The maximum civil liability that could be assessed for this violation is thirty thousand dollars (\$30,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore the minimum liability is $(1.1) \times (\$1,304) = \$1,434$.

Step 10 - Proposed Civil Liability for Violation No. 4

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to implement sediment control BMPs for three days in violation of the Construction Storm Water Permit is thirteen thousand six hundred fifty dollars (\$13,650) plus staff costs. The proposed liability is within the minimum and maximum liability range.

Violation No. 5: Failure to Implement Erosion Control BMPs (11 days) January 2 - 12, 2014

Step 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team selected Moderate for the following reasons:

1. The Site, over 40 acres, characterized as “Risk Level 3,” the highest threat, much of which was graded, poses a substantial threat to discharge sediment given its large sediment load;
2. The ultimate receiving water is a sensitive water body listed as impaired under section 303(d) of the federal Clean Water Act for sedimentation/silt;
3. Sediment is a pollutant that when discharged can be lethal when it smothers benthic communities. Furthermore, sediment can transport toxic materials (e.g., metals and synthetic organics) from the Site and into receiving waters;
4. Unprotected long running slopes have a great potential for erosion;
5. Documentation showed two different exterior slopes were exposed without erosion control BMPs. Exterior slopes have the potential to quickly contribute large amounts of sediment into the storm water conveyance system and ultimately into receiving waters; and
6. January is historically the second wettest month of the year. Therefore the threat of a discharge is great in January.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** deviation from the requirement. The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." The Discharger implemented erosion control BMPs, however some types of BMPs were not being addressed appropriately. Many of the violation notations were for stockpiles. Although stockpiles can be uncovered when actively used during the workday, they should be covered nightly and when not in use to protect from precipitation and wind. It is clear from the January 9, 2014, inspection photograph that stockpiles did not have plastic sheeting nearby to cover them when not in use or for nightly covering, nor did they have berms around them. As to the exterior slopes, they should be sprayed with an erosion control BMP as soon as they are finished.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Moderate" and "Deviation from Requirement" factor of "Moderate," the "Per Day Factor" for failing to implement effective erosion controls in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed. Also the Discharger failed to correct the deficiencies after repeated notifications by its QSP.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the “Per Day Assessment” by the “Days of Violation” to determine the “Initial Amount of Liability” and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (11) \times (1.3) \times (1.0) \times (1.0) = \$50,050$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$19 by delaying the application of erosion control BMPs (e.g. spraying bonded fiber matrix) by eleven days (January 2, 2014 to January 12, 2014). It is estimated that 2.3 acres of slopes were exposed, and that the estimated cost to spray bonded fiber matrix is \$3,901⁵ per acre. Therefore the cost to spray the exposed slopes is estimated to be \$9,200. See Exhibit No. 11, Economic Benefit Calculation Violation No. 5.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation). Water Code section 13385(d) requires that when pursuing civil liability under Water Code section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement erosion control BMPs for eleven days. The maximum civil liability that could be assessed for this violation is one hundred ten thousand dollars (\$110,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore the minimum liability is $(1.1) \times (\$19) = \21 .

Step 10 - Proposed Civil Liability for Violation No. 5

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to implement erosion control BMPs for eleven (11) days in violation of the Construction Storm Water Permit is fifty thousand fifty dollars (\$50,050) plus staff costs. The proposed liability is within the minimum and maximum liability range.

⁵ *Soil Stabilization BMP Research for Erosion and Sediment Controls, Cost Survey Technical Memorandum*, July 2007, Caltrans, Table 3-1, page 7.

Violation No. 6: Failure to Maintain Sediment Control BMPs (14 days) October 7, and 24, 2013; November 5, 12, 19, and 25; December 3, 9, 18, and 26, 2013; January 2, 8, 9, and 14, 2014.

Step 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team selected Moderate because this is a large site (more than 40 acres), it is a Risk Level 3 site, and it discharges into a sensitive water body.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** deviation from the requirement. The Enforcement Policy defines a Moderate “Deviation from Requirement” as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” Although the Discharger implemented sediment control BMPs, there was a consistent theme amongst the violations; failure to maintain/repair damaged sediment control BMPs. The majority of the noted violations were for failure to maintain/repair downed silt fencing. There were also notations for failure to maintain fiber rolls and storm drain inlet protection at the Site.

Silt fences are designed to slow down storm water runoff and retain sediment behind the fence. If the fence is lying down it is ineffective. There were eleven notations of a downed silt fence in need of repair. From the submitted photographs it was clear that it took several weeks for a down silt fence to be repaired and often the condition continued from one week to the next.

Fiber rolls operate in the same manner as silt fencing. If the fiber rolls are not in contact with the slope surface or are no longer running along slope contours, they will not be effective. Furthermore failure to maintain storm drain inlet protection can result in sediment discharges into the storm water conveyance system and ultimately receiving waters.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Moderate" and "Deviation from Requirement" factor of "Moderate," the "Per Day Factor" for failing to maintain effective erosion and sediment controls in Table 3 of the Enforcement Policy is **0.35**.

Per Day Assessment = (Per Day Factor) x (Statutory Maximum Liability)

Per Day Assessment = (0.35) x (\$10,000) = \$3,500

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed. Also the Discharger failed to correct the deficiencies after repeated notifications by its QSP.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the "Per Day Assessment" by the "Days of Violation" to determine the "Initial Amount of Liability" and then applying the adjustment factors as follows:

$$\text{Total Base Liability} = \text{Per Day Assessment} \times \text{No. of Days} \times \text{Culpability} \times \text{Cleanup \& Cooperation} \times \text{History of Violations}$$

$$\text{Total Base Liability} = (\$3,500) \times (14) \times (1.3) \times (1.0) \times (1.0) = \$63,700$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$9 by failing to maintain sediment control BMPs (e.g. restaking downed silt fence, restaking fiber rolls, replacing the inlet protection, and installing entrance BMPs). See Exhibit No. 12, Economic Benefit Calculation Violation No. 6.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation). Water Code section 13385(d) requires that when pursuing civil liability under Water Code section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to maintain erosion control BMPs for fourteen (14) days. The maximum civil liability that could be assessed for this violation is one hundred and twenty thousand dollars (\$140,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore the minimum liability is $(1.1) \times (\$9) = \10 .

Step 10 - Proposed Civil Liability for Violation No. 6

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to maintain sediment control BMPs for fourteen (14) days in violation of the Construction Storm Water Permit is sixty-three thousand seven hundred dollars (\$63,700) plus staff costs. The proposed liability is within the minimum and maximum liability range.

Violation No. 7: Failure to Implement Housekeeping BMPs (16 days) October 7, 15, 24, and 29, 2013; November 5, 12, 19, 22, and 25, 2013; December 3, 9, 18, and 26, 2013; January 2, 8, and 9, 2014.

Step 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team selected Moderate for the following reasons:

1. The great majority (88 percent) of the QSP's noted housekeeping violations were for the existence of debris and waste throughout the Site. There were also notations for failure to cover waste dumpsters and improper use of concrete washouts.

2. The failure to manage the debris and waste created a threatened discharge from the Site during storm events, and daily due to wind;
3. Construction trash and debris can destroy habitat, harm wildlife, spread contagion, create obstructions and pose swimming hazards for humans and wildlife; and
4. Construction trash and debris interferes with the aesthetic enjoyment of hiking and picnicking along the tributary.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** deviation from the requirement. The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." Although the Discharger implemented housekeeping BMPS, there was a consistent theme amongst the violations; failure to collect trash/debris and keep the construction Site clean. There was a clear failure to have enough waste receptacles throughout the Site. Furthermore, there was a failure to educate subcontractors on the proper disposal of trash/debris and the Discharger's expectation that the Site would remain clean and orderly.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Moderate" and "Deviation from Requirement" factor of "Moderate," the "Per Day Factor" for failing to maintain effective erosion and sediment controls in Table 3 of the Enforcement Policy is **0.35**.

Per Day Assessment = (Per Day Factor) x (Statutory Maximum Liability)

Per Day Assessment = (0.35) x (\$10,000) = \$3,500

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed. Also the Discharger failed to correct the deficiencies after repeated notifications by its QSP.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the “Per Day Assessment” by the “Days of Violation” to determine the “Initial Amount of Liability” and then applying the adjustment factors as follows:

$$\text{Total Base Liability} = \text{Per Day Assessment} \times \text{No. of Days} \times \text{Culpability} \times \text{Cleanup \& Cooperation} \times \text{History of Violations}$$

$$\text{Total Base Liability} = (\$3,500) \times (16) \times (1.3) \times (1.0) \times (1.0) = \$72,800$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$440 by delaying the collection of trash and debris, street sweeping, and concrete washout bins. See Exhibit No. 13, Economic Benefit Calculation Violation No. 7.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation). Water Code section 13385(d) requires that when pursuing civil liability under Water Code section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement housekeeping BMPs for sixteen (16) days. The maximum civil liability that could be assessed for this violation is one hundred sixty thousand dollars (\$160,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore the minimum liability is $(1.1) \times (\$440) = \484 .

Step 10 - Proposed Civil Liability for Violation No. 7

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to implement housekeeping BMPs for sixteen (16) days in violation of the Construction Storm Water Permit is seventy-two thousand eight hundred dollars (\$72,800) plus staff costs. The proposed liability is within the minimum and maximum liability range.

Violation No. 8: Failure to Complete Inspection Checklist (12 Weekly Reports) October 7 and 24, 2013; November 5, 12, 19, and 25, 2013; December 3, 9, 18, and 26, 2013; and January 2 and 8, 2014.

Step 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team selected Moderate because failing to complete the inspection checklist allowed problem areas to remain unaddressed and therefore to threaten beneficial uses.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** deviation from the requirement. The Enforcement Policy defines a Moderate “Deviation from Requirement” as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” The Discharger employed a QSP that weekly inspected the Site and forwarded a checklist indicating what BMPs were acceptable, missing, or required repair. The Discharger received the checklist; however it failed to fill in the following critical components of the checklist to demonstrate that problem areas had been addressed:

1. Assign the corrective work to someone;
2. Indicate the date that the corrective work was completed;
3. Sign the checklist to indicate the chain of custody/responsibility for the corrective work; and
4. Indicate the date the checklist was received.

Based upon the checklist there is no record whether the deficient and missing BMPs were rectified. Here the Discharger failed to act on a key component of the Construction Storm Water Permit. Weekly inspections can identify vulnerable areas of the site, provide feedback as to the effectiveness of the BMPs, and indicate where use of a different BMP may be called for.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Moderate" and "Deviation from Requirement" factor of "Moderate," the "Per Day Factor" for failing to maintain effective erosion and sediment controls in Table 3 of the Enforcement Policy is **0.35**.

Per Day Assessment = (Per Day Factor) x (Statutory Maximum Liability)

Per Day Assessment = (0.35) x (\$10,000) = \$3,500

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the QSP identified problems during the weekly inspections and the Discharger did not document or follow-up. Based upon the QSP's photographs, some BMP problems occurred over several weeks, or that the same type of pollution problem (e.g., debris) occurred over several weeks.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger's conduct was reasonable. Discharger hired a new QSP, and is now implementing the form.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of construction storm water violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the "Per Day Assessment" by the "Days of Violation" to determine the "Initial Amount of Liability" and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (12) \times (1.3) \times (1.0) \times (1.0) = \$54,600$$

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

See Section M. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section N. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$1,238 by failing to implement the checklist. See Exhibit No. 14, Economic Benefit Calculation Violation No. 8.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation). Water Code section 13385(d) requires that when pursuing civil liability under Water Code section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement housekeeping BMPs for twelve (12) days. The maximum civil liability that could be assessed for this violation is one hundred twenty thousand dollars (\$120,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore the minimum liability is $(1.1 \times \$1,238) = \$1,362$.

Step 10 - Proposed Civil Liability for Violation No. 8

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to complete inspection checklists for twelve (12) days in violation of the Construction Storm Water Permit is fifty-four thousand six hundred dollars (\$54,600) plus staff costs. The proposed liability is within the minimum and maximum liability range.

M. Ability to Pay and Ability to Continue In Business

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. To do so, however, the San Diego Water Board must have sufficient financial information necessary to assess the violator's ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business. In this matter the San Diego Water Board has no information that the Discharger is unable to pay the proposed liability amount.

N. Other Factors as Justice May Require

The Enforcement Policy provides that if the San Diego Water Board believes that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express findings are made. Examples of circumstances warranting an adjustment under this step are:

1. The discharger has provided, or Water Board staff has identified, other pertinent information not previously considered that indicates a higher or lower amount is justified.
2. A consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular disadvantaged group.
3. The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the Enforcement Policy.

The circumstances in this matter do not warrant an adjustment under this step.

The Enforcement Policy also provides under the “Other Factors as Justice May Require” that the cost of investigation and enforcement should be added to the liability amount. Over the course of trying to resolve this matter with the Discharger, the San Diego Water Board invested 152.5 hours to investigate, prepare enforcement documents, and consider this action. The total investment of the San Diego Water Board to date is \$10,874. A summary of the staff costs incurred to date is provided in Exhibit No. 15, Staff Cost Summary.

O. Total Proposed Liability Amount

The total proposed liability amount for the violations in ACL Complaint No. R9-2014-0044 is \$275,450 plus staff costs of \$10,874 for a total of \$286,324. A summary of the methodology used by the Prosecution Team to calculate the proposed civil liability is provided in Exhibit No.16, Penalty Methodology Summary. Below is a tabular summary of the total proposed liability, Table No. 1. Penalty Summary.

Table 1. Penalty Summary

Alleged Violation	Days of Violation	Liability Per Day of Violation	Liability Amount
1. Discharge of Sediment Laden Water, October 25, 2010	1	\$3,300	\$3,300
2. Failure to Monitor Storm Water Effluent, October 25, 2010	1	\$8,250	\$8,250
3. Failure to Implement Erosion Control BMPs, October 25 and 26, 2010	2	\$4,550	\$9,100
4. Failure to Implement Sediment Control BMPs, October 25, 26, and 27, 2010	3	\$4,550	\$13,650
5. Failure to Implement Erosion Control BMPs, October 24, 2013; November 5, and 19, 2013; January 2 - 12, 2014.	11	\$4,550	\$50,050
6. Failure to Maintain Sediment Control BMPs, October 7, and 24, 2013; November 5, 12, 19, and 25, 2013; December 3, 9, 18, and 26, 2013; January 2, 8, 9, and 14, 2014.	14	\$4,550	\$63,700
7. Failure to Implement Housekeeping BMPs, October 7, 15, 24, and 29, 2013; November 5, 12, 19, 22, and 25, 2013; December 3, 9, 18, and 26, 2013; January 2, 8, and 9, 2014.	16	\$4,550	\$72,800
8. Failure to Complete Inspection Checklist (12 Weekly Reports), October 7, 2013, through January 2, 2014.	12	\$4,550	\$54,600
Total Base Liability Amount			\$275,450
Staff Costs to Date			\$10,874
Total Proposed Liability			\$286,324

**Technical Analysis for
Settlement Agreement and Stipulation for
Entry of ACL Order No. R9-2014-0044
Casa Mira View**

December 12, 2014

Exhibits

1. Construction Storm Water Permit.
2. March 31, 2014, Sheppard Mullin letter.
3. NOI
4. NOV No. R9-2010-0146
5. November 22, 2010, Inspection Entry
6. NOV No. R9-2014-0018
7. March 7, 2014, Sheppard Mullin letter
8. Economic Benefit Calculation Violation No. 2.
9. Economic Benefit Calculation Violation No. 3.
10. Economic Benefit Calculation Violation No. 4.
11. Economic Benefit Calculation Violation No. 5.
12. Economic Benefit Calculation Violation No. 6.
13. Economic Benefit Calculation Violation No. 7.
14. Economic Benefit Calculation Violation No. 8.
15. Staff Cost Summary
16. Penalty Methodology Summary