

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**

**SAN DIEGO REGION**

**TENTATIVE ORDER NO. R9-2016-0064  
ASSESSING ADMINISTRATIVE CIVIL LIABILITY  
AGAINST SAN ALTOS-LEMON GROVE, LLC**

**In the Matter of  
San Altos-Lemon Grove, LLC  
Valencia Hills Construction Project**

**San Diego County**

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board or Board), having held a public hearing on March 9, 2016, to hear evidence and comments on the allegations contained in Complaint No. R9-2015-0110, and having considered and deliberated on the evidence received in the public hearing, in the Discharger's post-hearing response, and in the record, orders San Altos-Lemon Grove, LLC (Discharger) to pay civil liability in the amount of \$603,232 and finds as follows:

**Background**

1. On September 2, 2009, the State Water Resources Control Board (State Water Board) adopted the Construction General Storm Water Permit (Permit). This Permit became effective on July 1, 2010 and was amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ. The Permit authorizes discharges of storm water associated with construction activity so long as the dischargers comply with all requirements, provisions, limitations and prohibitions in the permit. Pursuant to federal statutes and regulations, the Permit requires the implementation of the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to reduce or eliminate pollutants in storm water runoff, and imposes additional requirements necessary to implement applicable water quality standards.
2. Entities that have obtained coverage under the Permit (dischargers) are required to implement controls, structures, and management practices<sup>1</sup> (a.k.a. Best Management Practices or BMPs) to comply with the Permit's requirements. Based upon each site's sediment transport and receiving water risk level (Risk Level) the

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<sup>1</sup> Best Management Practices are "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 C.F.R. § 122.2.)

Permit requires different BMPs, monitoring and reporting to achieve and demonstrate BAT and BCT.

3. Dischargers identify the appropriate Risk Level and are required to have a State-certified Qualified SWPPP Developer (QSD) prepare a site-specific Storm Water Pollution Prevention Plan (SWPPP) prior to construction (Permit, Sections VIII and XIV, A.). The Permit requires Qualified SWPPP Practitioners (QSPs) to implement BMPs required by the Permit. (Permit, Section VII, B.3.)
4. Sites identified as a “Risk Level 2” or “Risk Level 3” must implement heightened requirements under the Permit due to an increased risk to water quality. (See Permit, Attachments D and E).
5. Sites that fail to implement one or more of the requirements contained in Attachments C, D or E, as applicable, are not in compliance with BAT and BCT requirements. Discharges of storm water or non-storm water from sites where BMPs have not been implemented to achieve BAT and BCT, as required by the Permit, are unauthorized discharges.
6. The Valencia Hills Construction Site (Site) is an 18.26 acre site located at 1350 San Altos Place in Lemon Grove, California. The Discharger constructed a 73-home residential subdivision on the Site. The Site is within the Chollas Hydrologic Subarea (HAS 902.22) of the Pueblo San Diego Hydrologic Unit. Runoff from the Site discharges into Encanto Channel, which runs parallel to Akins Avenue along the southeastern edge of the Site. Encanto Channel discharges into Chollas Creek, which discharges into San Diego Bay.
7. The Discharger is the property owner of the Site. The primary contacts and “Legally Responsible Persons” for the Discharger are as follows: Ben C. Anderson from February 21, 2014, through November 15, 2015; Scott Sandstrom from November 16, 2015, through November 22, 2015; and Brian Fuller from November 23, 2015 to the present.
8. On March 6, 2014, Ben C. Anderson, on behalf of the Discharger, filed a Notice of Intent (NOI) to comply with the Permit. Construction was expected to begin at the Site on March 1, 2014, and end on December 31, 2015. The NOI stated that construction activities would disturb all 18.26 acres of the Site. The NOI also identified the Site as a “Risk Level 2” construction site.
9. On March 12, 2014, the State Water Board processed the NOI and assigned Waste Discharge Identification (WDID) No. 9 37C369143 to the Site.

### CHRONOLOGY

10. On December 2, 2014, the City of Lemon Grove (City) issued a Stop Work Notice/Notice of Violation to the Discharger for failing to implement adequate erosion controls and BMPs required under the City's Grading Ordinance and the NPDES storm water program. The Stop Work Notice required the Discharger to "[s]top all other work until erosion control/NDPES deficiencies [] are corrected." (Prosecution Team (PT) Ex. 2).<sup>2</sup> The City warned the Discharger that without adequate BMPs, a "discharge is imminent."
11. Despite this warning, the Discharger failed to implement required erosion controls and BMPs in advance of the forecasted storm events (PT Ex. 2) and on December 4, 2014, there was an unauthorized discharge of sediment and sediment laden storm water runoff from the Site into Encanto Channel. On December 4, 2014, the City issued a second Stop Work Notice/Notice of Violation to the Discharger for failing to control an illegal discharge. (PT Ex. 3). Under the City's Stop Work Orders, the only work permitted to take place on the Site is to correct deficiencies and install appropriate BMPs.
12. On December 8, 2014, the City conducted a pre-storm inspection prior to another forecasted rain event for Friday, December 12. (PT Ex. 4). The inspector noted ongoing BMP deficiencies in soil stabilization, perimeter protection, sediment control, and material and equipment management. However, the Discharger again failed to implement required BMPs and the City issued a Correct Work Notice on December 9, 2014, citing failure to remove sediment from roads (PT Ex. 4) and an Administrative Warning on December 11, 2014 (PT Ex. 6).
13. On December 12, 2014, the City documented another unauthorized discharge, and issued another Administrative Citation on December 15, 2014. (PT Ex. 7). After inspecting the Site at least five times, resulting in two stop work notices, an administrative warning, and one correct work notice in less than two weeks, the City requested the San Diego Water Board's assistance in obtaining regulatory compliance on December 12, 2014.
14. San Diego Water Board staff inspected the Site on December 15, 2014 and noted violations of the Permit. (PT Ex. 8) Based upon the results of the inspection and previous inspections by the City, the San Diego Water Board staff issued Notice of Violation No. R9-2014-0153 on December 19, 2014 to the Discharger. (PT Ex. 11). The Notice of Violation identified numerous different and distinct violations of the

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<sup>2</sup> The San Diego Water Board Prosecution Team submitted evidence organized as Exhibits numbered 1-41. For convenience, most references to Prosecution Team evidence are to their Exhibit numbers and denoted with PT. References to the Reporter's hearing transcript are denoted by RT. References to deposition transcripts are denoted with DT.

Permit and warned the Discharger a penalty of up to \$10,000 could be imposed for each day of violation.

15. The San Diego Water Board staff requested a written response to the Notice of Violation demonstrating that the violations were corrected. The Discharger provided a written response on January 1, 2015. (PT Ex. 36).
16. From December 15, 2014 to January 20, 2015, the City also inspected the Site at least another 6 times. The City documented ongoing deficiencies and issued two administrative citations on December 15 and 16, 2014 (PT Ex. 9) and again documented evidence of sediment discharges on December 17 and 31, 2014. (PT Ex. 10 and PT Ex. 12).
17. The December 2 and 4, 2014, Stop Work Orders were not lifted until January 22, 2015, after the Discharger had corrected the bulk of the earlier violations.
18. In March 2015, the City inspected the site twice and again documented BMP violations. On March 27, 2015, the San Diego Water Board staff inspected the Site and found that the Discharger had implemented corrective actions largely addressing the violations in Notice of Violation No. R9-2014-0153. However, the San Diego Water Board staff warned the Discharger that a rain event would likely result in another sediment discharge. The City noted additional violations in April 2015.
19. In May 2015, the San Diego Water Board staff inspected the Site three times. At each inspection, the Discharger demonstrated continued and repeated failure to comply with the Permit despite approaching storm events. The San Diego Water Board staff stressed the inadequacy of the BMPs at the Site.
20. On the morning of May 8, 2015, San Diego Water Board staff advised the Discharger that it was considering administrative civil liability. On the evening of May 8, 2015, the San Diego Water Board staff documented a sediment discharge from the Site into Encanto Channel, as well as other BMP violations. (PT Ex. 18).
21. On May 12, 2015, the San Diego Water Board provided the Site Superintendent with the May 8, 2015, inspection report. On May 13, 2015, the San Diego Water Board documented additional BMP violations. (PT Ex. 19).
22. On May 14, 2015, San Diego Water Board staff spoke by telephone with the Site Superintendent about the approaching storm event, the inadequacy of existing Site BMPs, the strong likelihood of administrative civil liability and that Board staff would inspect the Site again the next day. On May 15, 2015, after a storm event, the San Diego Water Board staff documented additional BMP violations at the Site. (PT Ex. 20).

23. In September 2015, the City characterized the Site as “High Priority” and initiated biweekly inspections. On September 15, 2015, the City identified unauthorized discharge of sediment to Encanto Channel. (PT Ex. 21). The City found BMP deficiencies in every inspection and issued additional Administrative Citations on September 22, 2015 and October 5, 2015.
24. On October 19, 2015, the San Diego Water Board Prosecution Team issued ACL Complaint No. R9-2015-0110 in the amount of \$848,374 (inclusive of \$15,763 identified for recovery of staff investigatory costs) for violations of the Permit, Water Code Section 13376, the Water Quality Control Plan for the San Diego Basin, and Clean Water Act Section 301.

### **Procedural and Evidentiary Issues**

25. The Complaint for Administrative Civil Liability was issued October 19, 2015. The Evidentiary Hearing was conducted on March 9, 2016. In preparation for the hearing, Parties exchanged evidence, submitted legal argument, rebuttal evidence and argument, procedural and evidentiary objections and responses. The evidence submitted by the Prosecution Team to support the alleged violations consists largely of City inspection reports (including City contractor reports), City enforcement actions, San Diego Water Board staff inspection reports and notice of violations, and corresponding photographs. The San Diego Water Board staff serving as Prosecution Team also testified at the hearing and in depositions initiated by the Discharger.
26. The Discharger’s evidence consisted largely of deposition testimony of San Diego Water Board staff, City employees and contractors, declarations of discharger employees, contractors, and legal counsel, QSP reports, testimony at the hearing and records of other San Diego Water Board enforcement complaints and orders. The Discharger also submitted new post-hearing evidence with its response to the Prosecution Team’s Amended Technical Analysis.
27. The Discharger made procedural due process arguments and numerous objections to evidence submitted by the Prosecution Team on multiple grounds. Prehearing rulings on evidentiary and related due process arguments were issued prior to the hearing. Additional rulings were made by the San Diego Water Board Presiding Officer at the hearing. Except as noted herein, the Board affirms the prehearing rulings and rulings made during the hearing by the Presiding Officer. Final rulings on pending evidentiary and other objections and on the admissibility of the Discharger’s post-hearing evidence are addressed herein.

#### *Due Process*

28. *Due Process Objections.* Many of the Discharger’s objections to the procedures and evidence were based on alleged violation of its due process rights. As noted in

prehearing rulings, the procedures instituted by the San Diego Water Board in this proceeding were fully consistent with the rights identified in Government Code section 11425.10. Through adherence to Government Code section 11513, the procedures afforded more than the minimum process and public interest requirements due by also providing the opportunity to present written testimony and introduce exhibits, the ability to impeach witnesses called by either party, and the opportunity to cross-examine witnesses on any matter relevant to the issues. The procedures also allowed for unlimited prehearing discovery.

29. *Objections to Prosecution Team's Supplemental Evidence.* The Discharger objected on numerous grounds to the Prosecution Team's supplemental evidence (PT Exs. 32 through 41) submitted on February 4, 2016. The Board affirms the prehearing determination overruling the Discharger's objections made on the grounds that submittal after the deadline set in the governing hearing procedures constituted "surprise" evidence within the meaning of the applicable regulations (Cal. Code Regs, tit. 23, § 647 et seq.). The Prosecution Team's supplemental evidence was submitted more than four weeks before the hearing and the Discharger had two prehearing opportunities and a post-hearing opportunity to address the evidence in writing. The record shows that the Discharger already had in its possession all but the San Diego Water Board photographs in Exhibit 33 prior to the supplemental evidence being submitted. Under these circumstances, the evidence was not "surprise" evidence under applicable regulations and its acceptance neither prejudiced the Discharger nor violated its due process rights.

#### *Evidentiary Rulings*

30. *Prosecution Team Exhibit 40 (City of Lemon Grove Images Obtained During Discovery).* With three exceptions noted below, the Board affirms the prehearing ruling admitting City photographs/images obtained by the Prosecution Team as a result of Discharger-initiated discovery. In its rebuttal evidence, the Discharger submitted an email from the City to San Diego Water Board staff dated September 24, 2015, transmitting three City photographs dated September 15, 2015, that the Prosecution Team subsequently included in Exhibit 40. The primary basis for the prehearing ruling admitting photographs in Exhibit 40 was that the Prosecution Team had obtained the photographs for the first time through Discharger-initiated discovery. Because the record demonstrates the Prosecution Team received City images 6842, 6866 and 6883 before issuing the Complaint and did not rely on the photographs for proper rebuttal purposes, they are excluded from the record. The Prosecution Team used image 6842 and referred to it during the Prosecution Team's hearing presentation. The image is removed from the record and portions of the transcript referring to it are stricken from the record. (See Attachment 2 to this Order.) The Board did not consider any of these three photographs in arriving at the findings in this Order. See discussion in Findings 33 and 34, *infra*, regarding the Discharger's separate objections based on authentication of City photographs in supplemental evidence and the official records exception to the hearsay rule.

31. *Prosecution Team Exhibit 33 (San Diego Water Board Images Newly Submitted February 4, 2016)*. Prosecution Team supplemental evidence consisting of additional San Diego Water Board photographs in Exhibit 33 were excluded by prehearing rulings pending their use by the Prosecution Team for proper rebuttal purposes at the hearing. The Prosecution Team used photographs from Exhibit 33 in their hearing presentation and as part of their Amended Technical Analysis. However, these photographs consisted of new or cumulative evidence and were not submitted for proper rebuttal purposes. Therefore, Prosecution Team Exhibit 33 is excluded from the record and was not considered by the Board in arriving at the findings in this Order. Transcript references to Exhibit 33 images in the Prosecution Team's hearing presentation and the images themselves are stricken from the record as set forth in Attachment 2.
32. *Remaining Prosecution Team Supplemental Evidence*. The Presiding Officer's prehearing ruling provisionally admitted other supplemental evidence pending Prosecution Team use for proper rebuttal purposes at the hearing. Of this evidence, one QSP report dated December 5, 2014 (PT Ex. 37 D) and the Discharger's own SWPPP (PT Ex. 35) were used for proper rebuttal purposes at the hearing and are included in the record. The Prosecution Team's remaining provisionally accepted supplemental evidence (PT Ex. 34 (weather data), PT Ex. 37A-C and E-F (QSP Reports), PT Ex. 38 (Discharger photographs) and one document in PT Ex. 41 (Letter from City of Lemon Grove (Leon Firsh) to Ben Anderson, dated December 16, 2014) are excluded from the record. Transcript excerpts referring to this excluded evidence are stricken from the record as set forth in Attachment 2 and were not considered by the Board in arriving at the findings in this Order.
33. *Admissibility of City of Lemon Grove Photographs in Prosecution Team Exhibit 40*. The Discharger argued that evidence of violations of the municipal storm water ordinance enforced by the City of Lemon Grove is inadmissible to show that a violation of the Permit occurred because the inspector/photographer was not inspecting for such permit violations. The San Diego Water Board is not persuaded by the Discharger's argument that the purpose for which a photograph was taken affects its admissibility and notes that if a photograph depicts a violation of the Permit, it is no less probative because the photograph was taken for a different purpose. The photographs are relevant and are the type of evidence on which "responsible persons are accustomed to rely in the conduct of serious affairs." (See Gov. Code § 11513, subd. (c).) The Board is capable of determining what weight, if any, to assign to such evidence. The City of Lemon Grove photographs in Prosecution Team Exhibit 40 are admissible evidence. The Discharger also argues in its post-hearing brief that the Board should discount City photographs in Exhibit 40 as evidence of unauthorized discharges (Violation 1) because if the City inspector believed the photographs supported finding a discharge, they necessarily would have attached the photographs to their report. The Board is not persuaded by the Discharger's argument. Based on the City reports in the record, it appears the City

frequently relied on documentation by personal observation rather than photograph to find the Discharger violated the City's requirements. This manner of documentation does not undermine the probative value of the City's photographs for the Board's purposes. See also Finding No. 36, *infra*.

34. *Authentication of City of Lemon Grove Photographs in Prosecution Team Exhibit 40.* City of Lemon Grove photographs were obtained by the Prosecution Team through the discovery process initiated by the Discharger. The Discharger nonetheless objected to their inclusion in the record on the basis of lack of foundation. Most photographs from Exhibit 40 were authenticated at the hearing by City staff and are therefore admissible. The Discharger's objections as to those photographs are overruled. A smaller number of photographs from December 17, 2014, April 1, May 13 and May 15, 2015 were not clearly authenticated at the hearing. While this latter group of City of Lemon Grove photographs may be admissible as hearsay evidence and used consistent with Government Code section 11513, subdivision (d), it is not necessary to reach this ruling because the Board excludes these unauthenticated photographs from the record and did not consider them in arriving at the findings in this Order.

35. *Applicability of Official Records Exception to City Contractors' Reports.* The Discharger objects to application of the official records exception to the hearsay rule to inspection reports (including photographs) authored by City contractors. The Board affirms its ruling that reports authored on behalf of the City or by City contractors, including the April 1, 2015, City report by former City employee Tamara O'Neal together with its photographs, are official records under Evidence Code section 1280 because agents are public employees for purposes of this law (Evid. Code § 195 (definition of public employee)). The Discharger's objection on this basis is overruled.

36. *Applicability of Official Records Exception Based on Public Official Scope of Duty.* The Discharger objects to application of the official records exception to the hearsay rule to City and City contractor reports on the basis that inspections by these individuals were not made within the scope of the public employees' duties because they were not inspecting the Site for violations of the Permit. The record shows that the City was generally inspecting the Site to determine compliance or non-compliance with the City's municipal storm water ordinance or other storm water requirements, well within their scope of duty. The Board is capable of considering the purposes for which inspections may have been performed in determining what weight to give to the City's reports and photographs in evaluating the evidence in the record. The Discharger's objection on this basis is overruled. See also Finding 33, *supra*.

37. *Objections to Amended Technical Analysis.* By email dated March 11, 2016, the Board directed the Prosecution Team to submit an Amended Technical Analysis identifying the specific pieces of evidence in the record on which the Prosecution



Team based its allegations and allowed the Discharger ten days to submit comments on this amendment. The Prosecution Team was directed not to submit any new evidence, argument or other commentary. The Prosecution Team complied with the Board's directives and did not submit any new evidence, argument or commentary. The Discharger responded on March 30, 2016 and objected to the Amended Technical Analysis on the grounds that the Prosecution Team was permitted to submit new evidence. The Amended Technical Analysis does not include new evidence. The objection is overruled.

38. *Admissibility of Discharger's Post-Hearing Evidence.* The evidentiary hearing closed on March 9, 2016. Nevertheless the Discharger included significant amounts of new evidence with its March 30 response (post-hearing evidence). Although the evidence was submitted post-hearing, it was available to the San Diego Water Board prior to completing its deliberations on the evidence received in this matter. Because the new evidence creates a more complete record and does not prejudice the Prosecution Team or the Board, it is included in the record.

39. *Discharger QSP Reports.* Some QSP reports prepared for the Discharger were submitted as evidence by the Prosecution Team.<sup>3</sup> The only QSP report submitted exclusively by the Prosecution Team that is included in the record is the post-storm event QSP report of December 5, 2014 (see Finding 32, *supra*, regarding PT Ex. 37D.) The Discharger submitted numerous QSP reports with its prehearing and post-hearing evidence. The Discharger's QSP is identified in reports as Whitson CM with reports signed by Donald Sturgeon. No deposition transcript of Mr. Sturgeon was submitted as evidence. Mr. Sturgeon was not called as a witness at the hearing. The Board did not have the ability to evaluate Mr. Sturgeon's credibility. Several of the San Diego Water Board staff inspection reports over the course of six months noted that there was evidence either that the QSP was not adequately identifying and recommending implementation of various appropriate BMPs, or the owner/developer was not directing the implementation of QSP-recommended BMPs at the Site. Additionally, the Board also notes that many of the conclusions concerning compliance in the QSP reports appear to be inadequately supported. (See, e.g., QSP reports submitted with post-hearing evidence attached to declaration of Ben Anderson, concluding that no BMP corrections were needed but documenting such conclusion with a single photograph, which was not representative of the 18-acre Site.) For these reasons, although a number of the Discharger's QSP reports are admitted into the record, the Board finds the Discharger's QSP reports in the record to have little probative value.

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<sup>3</sup> The Prosecution Team included with its supplemental evidence one QSP report (December 18, 2014 and separate related notes dated January 19, 2015, both of which had already been submitted by the Discharger.

Objections to Testimony of Prosecution Staff Chiara Clemente

40. The Discharger objected to Ms. Clemente's hearing testimony both as surprise testimony and on due process grounds because Ms. Clemente refused during her deposition to answer questions aimed at eliciting testimony on what, if any, unique facts the Prosecution Team considered in developing different Administrative Civil Liability complaints. [RT, 57:19-25.] During the hearing, Ms. Clemente did not testify as to unique facts about the circumstances of the complaint leading to this Order as compared to other complaints/ACL Orders for other Dischargers. Ms. Clemente testified to the existence general information about pending complaints and resolved complaints that are publically available and/or in the record. In any case, neither the statutes authorizing imposition of administrative civil liability in this case nor Water Quality Enforcement Policy (Enforcement Policy)<sup>4</sup> require that a complaint for administrative civil liability identify unique facts to distinguish one administrative civil liability matter from others; nor do they require the Board make findings regarding unique facts or consistency with other orders imposing administrative civil liability. The Water Boards consider "unique facts" and strive for consistent results by applying the Enforcement Policy's penalty calculator methodology to the specific facts in each case. The Board finds there was no prejudice to the Discharger as a result of Ms. Clemente's refusal to answer questions during her deposition on the basis of attorney-client privilege and allowing her subsequent hearing testimony in the record. The Discharger's objections are overruled.

**Surface Water Beneficial Uses**

41. The Site lies within the Chollas Hydrologic Subarea (HSA) (908.22) of the Pueblo San Diego Hydrologic Unit. Storm water discharges from the Site flow directly into Encanto Channel and thence Chollas Creek.
42. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for Chollas Creek and its tributaries:
1. Contact Water Recreation (REC-1);
  2. Non-contact Water Recreation (REC-2);
  3. Warm Freshwater Habitat (WARM); and
  4. Wildlife Habitat (WILD).
43. Chollas Creek is designated as impaired for diazinon, dissolved metals (copper, lead, and zinc), indicator bacteria, nutrients (phosphorus and nitrogen), and trash pursuant to Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. § 1251 et seq.) section 303(d) (33 U.S.C. § 1313).

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<sup>4</sup> The State Water Board amended the Enforcement Policy in November 2009. It became effective May 20, 2010.

### Violations of the Permit

44. **Violation No. 1:** The Discharger violated Water Code section 13376; Permit Discharge Prohibitions III.A. and III.B., section V.A.2. and Attachment D section A.1.b; Basin Plan Waste Discharge Prohibition No. 8; and Clean Water Act section 301 (33 U.S.C. § 1311) by discharging sediment laden storm water from the Site into Encanto Channel and thence Chollas Creek on the following six days: December 4, 2014; December 12, 2014; December 17, 2014; December 31, 2014; May 8, 2015, and September 15, 2015. The discharges into Encanto Channel and Chollas Creek were unauthorized and a violation of the Permit, section III.B., because the Discharger failed to reduce or eliminate the pollutants in the storm water runoff prior to discharge (i.e., to implement BMPs that achieve BAT and BCT). This finding is based on the evidence in the record, including but not limited to evidence identified in the Technical Analysis for the Complaint, on photographs in PT Exhibits<sup>5</sup> 32, 39, and 40, references to metals in construction materials in the Permit and the Discharger's SWPPP (PT Ex. 35), deposition testimony of San Diego Water Board staff, and the Discharger's January 1, 2015, response to the NOV. On December 4, 2014 the Stop Work/Notice of Violation the City' staff identified an illegal discharge and runoff from the site (PT Ex. 3). Photographic evidence depicting large volumes of sediment in the streets outside of the site corroborates this conclusion. On December 12, 2014, the City's contractor collected and analyzed runoff from the site as well as background conditions. The samples from the Site contained significantly more sediment than natural background levels (between 427-513 NTUs versus 18.73 NTUs). (PT Ex. 7) Photographic evidence on this day also shows a discharge of brown turbid stormwater from the Site into Encanto Channel (PT Exs. 39 and 40). On December 17, 2014, the City's contractors again observed evidence of a discharge. Numerous photos show sediment accumulation on top of gravel bags on the perimeter of the Site and in the gutter along Akins Avenue. (PT Ex. 10). The City's contractor also observed the Discharger apparently trying to powerwash sediment in the street. The Discharger argues that the San Diego Water Board cannot assume that powerwashing is indicative of a discharge; however, this argument is unpersuasive given that there was a storm earlier that morning. Moreover, the City's contractor personally observed a discharge of powerwashing wastewater into the storm drain, which in and of itself is a violation of the Permit. On December 31, 2014, the City's contractor personally observed and photographed pooled water at entrance to the Site on Akins Avenue and in the gutter along Akins Avenue following a rain storm. (PT Ex. 12; PT Ex 39 (images 0727, and 0728); PT Ex 40 (image 0724)). The Discharger argues that there is no evidence to support a discharge on this day because the City's contractor, Mr. Quenzer, did not see the discharge as it was occurring. However, photos in the inspection report show the sediment-laden discharge leaving the construction site, flowing downgradient along Akins Avenue and directly to a storm water inlet. These photos document the path of

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<sup>5</sup> References to Exhibits in this Violations section are to Exhibits or specific pieces of evidence within Exhibits submitted by the Prosecution Team and admitted into the record.

a discharge, which in light of the weather conditions that day provide circumstantial evidence of a discharge. On May 8, 2015, the San Diego Water Board's staff personally observed and photographed a discharge of sediment laden runoff into a tributary to Chollas Creek (PT Ex. 18; PT. Ex. 32 (images 191734, 191955 and 191716)). On September 15, 2015, the City documented an illegal discharge, noting that there was "significant sediment" in the gutter on Akins Avenue and "some sediment in road and gutter near SE corner." (PT Ex. 21; PT Ex. 22). At the hearing, Scot Sandstrom testified on behalf of the Discharger that the sediment in the street that day originated off-site (RT, 88:17-89:22). However, the inspection report noted "significant sediment on streets within project" and "evidence of erosion throughout site" and existence of unprotected sediment piles. (PT Ex. 22). Even if some of the sediment on Akins Avenue came from offsite, considering the totality of the evidence, the Board finds that an unauthorized discharge from the Site occurred on September 15, 2015.

- 45. Violation No. 2:** Section B.1.b. of Attachment D of the Permit requires Risk Level 2 dischargers to "[c]over and berm loose stockpiled construction materials that are not actively being used (i.e., soil, spoils, aggregate, fly ash, stucco, hydrated lime, etc.)." The Discharger violated this requirement by failing to implement material stockpile BMPs at the Site on the following 8 days: December 2 through 8, 2014 and September 15, 2015. These findings are based on the evidence in the record, including but not limited to the evidence identified in the Technical Analysis for the Complaint, the existence of a stop work order for the Site from December 2, 2014 through January 22, 2015, photographs in PT Exhibits 32, 40 and Exhibit 36, the Discharger's response to the Board Staff's Notice of Violation. Specifically, on December 2, 2014, the City's inspector noted that some material stockpiles were covered and "some are not". (PT Ex. 2). Photographs from multiple locations around the Site capture uncovered piles of loose sediment and a Stop Work/Notice of Violation was issued that same day. The Discharger did not adequately cover stockpiles and two days later, a second Stop Work/Notice of Violation was issued on December 4, again citing and photographing deficiencies for uncovered stockpiles. (PT Ex. 3). On December 8, 2014, the City's inspector warned the Discharger for a third time of the "need to cover stock piles" (PT Ex. 4). The Board also finds that the Discharger violated this requirement on December 3, and December 5 through 8, 2014, on the basis of inference supported by the totality of evidence in the record. On December 2, 2014, the City noted that the Discharger did not have sufficient plastic onsite to cover stockpiles. On December 2, 4, and, 8, 2014 the City repeatedly documented uncovered or partially covered stockpiles throughout the Site despite the fact that the Discharger's only task during this period was to implement and correct BMPs (PT Ex. 2 page 5 of photos, top-middle and bottom-right photos; page 6 of photos, middle-right and bottom-left photos; page 7 of photos, top-middle and bottom-left photos; PT Ex 3 page 4 of photos, top-right and bottom-right photos, page 5 of photos, top-left and bottom-left photos; PT Ex. 4, top-left photo. The Discharger argues that the Board cannot know there was a violation when no inspections were conducted. However, given the size of the site and the

lack of plastic onsite, the Board finds that it is reasonable to conclude that there was an ongoing violation between December 2 and 8, 2014. The Discharger also argues that the Prosecution Team based this violation on an incorrect interpretation of the Permit. This argument is without merit. Section B.1.b of Attachment D applies to materials stockpiles that “are not actively being used.” Neither “active” nor “actively being used” are defined in the Permit. However, the meaning of the Permit condition is plain—unless materials are being moved onto or off of a materials stockpile, it should be covered and bermed. Nevertheless, the Discharger points to the definitions of “Active Areas of Construction”<sup>6</sup> and “Inactive Areas of Construction”<sup>7</sup> in the Permit as well as the CASQA Manual to suggest that the only stockpiles that should be covered are those that had not been disturbed and were not scheduled to be disturbed for 14 days. This contention is flawed. Section B.1.b of Attachment D is applicable to all Risk 2 Dischargers irrespective of the phase of construction. (Compare with section E.3 of Attachment D specifically differentiating BMP requirements for active areas of construction.) The fact that the CASQA manual also erroneously imports the incorrect definition does not overcome the plain language of the Permit to absolve the Discharger of a violation. On September 15, 2015, the City inspection report concluded that the materials stockpile BMPs were not effective because some sediment piles “are not protected” (PT Ex. 22). The Prosecution also alleged two violations on December 15, 2014 and on May 13, 2015. The Board finds there is insufficient evidence to support the additional days of violations alleged in the Complaint because there is nothing in the record establishing that the stockpiles in question were materials stockpiles.

**46. Violation No. 3:** Section B.3.a. of Attachment D of the Permit requires dischargers in Risk Level 2 to “[p]revent oil, grease, or fuel to leak into the ground, storm drains or surface waters.” The Discharger violated this requirement by failing to implement vehicle fluid leak BMPs at the Site on the following two days: December 15, 2014; and May 13, 2015. This finding is based on evidence in the record, including but not limited to evidence identified in the Technical Analysis for the Complaint, and on photographs in Exhibits 32. On December 15, 2014, San Diego Water Board staff inspecting the site documented through photographs construction equipment without vehicle fluid leak protection and noted that construction equipment and most vehicles observed during the inspection lacked appropriate BMPs such as drip pans. (PT Ex. 8.) On May 13, 2015, San Diego Water Board staff inspecting the Site documented through photographs construction equipment without vehicle fluid leak protection and noted that construction equipment and vehicles on site were observed without appropriate BMPs such as drip pans. (PT Ex. 19.) While the

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<sup>6</sup> The Permit defines “Active Areas of Construction” as “[a]ll areas subject to land surface disturbance activities related to the project including, but not limited to, project staging areas, immediate access areas and storage areas. All previously active areas are still considered active areas until final stabilization is complete.” (Supporting Document No. 9p, Appendix 5, page 1)

<sup>7</sup> The Permit defines “Inactive Areas of Construction” as “areas of construction activity that are not active and those that have been active and are not scheduled to be re-disturbed for at least 14 days.” (Supporting Document No. 9p, Appendix 5, page 5)

Discharger presented evidence showing other instances when drip pans were placed under vehicles, the evidence identified above clearly supports violations on these two days. The Board also notes that San Diego Water Board staff identified multiple additional instances of the absence of drip pans but these were not alleged as violations in the complaint and penalties have not been assessed. (See RT, 52:9-18.)

- 47. Violation No. 4:** Section D.2 of Attachment D of the Permit requires dischargers in Risk Level 2 to “provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.” The Discharger violated this requirement by failing to implement erosion control BMPs in inactive areas at the Site on the following 22 days: December 1 through 9, 2014; December 15 through 16, 2014; January 6, 2015; January 14, 2015; May 8 through 15, 2015; and September 15, 2015. These findings are based on the evidence in the record, including but not limited to, evidence identified in the Technical Analysis in support of the Complaint, such as photos, deposition testimony provided by San Diego Water Board staff, and a City of Lemon Grove stop work order issued on December 2, 2014. On December 1, 2, and 4, the City inspected the Site and photographed several inactive areas without adequate erosion control BMPs. (PT Ex. 2, page 1 of photos upper-left photo, page 5 of photos, top-left photo; PT Ex. 3, page 2 of photos, upper-left photo; Melbourn DT, 75:11-25, 76:1-11, 86:8-25, 87:1-25, 88:1-10.) On December 8, 2014, the City inspected the Site and photographed inactive areas without adequate erosion control BMPs (except for access roads used to implement BMPs, the entire site should have been inactive because a Stop Work Notice had been issued 6 days prior). (PT Ex. 4, middle-row photos.) On December 9, 2014, a City inspector noted “Add erosion control to road segment (e.g. northern segment) that are not in use. Can be hydroseeded or stabilized with gravel.” (PT Ex. 6.) A City contractor inspection report including a photo date-stamped December 9, 2014, showed a finished lot without any erosion controls. (PT Ex. 23, photo 1). The Board also finds that the Discharger violated this requirement on December 3 and December 5-7, 2014 on the basis of inference supported by the totality of the evidence. Photographs from City inspection reports and enforcement documents dated December 1, 2, 4, 8 and 9, 2014, deposition testimony of San Diego Water Board staff describing the circumstances in the photographs, and the fact that the Site was under a Stop Work Notice from December 2 through January 22, 2015, support the Board’s finding that it is reasonable to conclude that there were ongoing violations on the intervening days of December 3, 5, 6 and 7, 2014. During the December 15, 2014, inspection, San Diego Water Board staff noted “[s]everal completed building pads and several inactive slopes . . . lacked any effective soil cover for erosion control.” (PT Ex. 8.) On December 16, 2014, the City inspected the site and noted “Some pads and slopes still unstabilized” with a recommended corrective action to “Add erosion controls to stabilize remaining pads, slopes at edges of pads....” (PT Ex. 9). The City also photodocumented inactive areas without adequate erosion control BMPs (PT Ex. 40 (images 9528, 9529, 9536, 11\_0074)). On January 6, 2015, a City inspector instructed the site to “Fully stabilize

the area. Utilize other erosion control BMPs (e.g. visqueen or erosion control blankets) if hydroseed growth is not sufficient.” This statement was in reference to a finished-graded sloped area near a construction entrance (PT Ex. 24). Further, a City contractor issued a memo on January 16, 2015, that documented findings from multiple inspections, including one occurring on January 6, 2015. The memo included a photo showing a sidewall without adequate erosion controls (PT Ex. 23, photo 5). On January 14, 2015, a City inspector instructed the Site to “[s]tabilize remaining areas that lack full hydroseed or visqueen cover” and to “[I]nstall erosion controls on remaining sidewalls.” (PT Ex. 25) On May 8, 2015, San Diego Water Board staff personally observed lack of effective erosion control BMPs on inactive areas, noting, “the sediment came off of graded housing pads with ineffective or non-existent erosion and sediment control BMPs” and “several areas were observed to be inactive, or could be scheduled to be inactive, without effective soil cover to control erosion.” (PT Ex. 18 and Ex. 32 (image 20150508\_192214).) Testimony of San Diego Water Board staff corroborates the conclusion that areas lacking erosion control BMPs were inactive, noting a particular area had not changed significantly in several months. (Melbourn DT, 115:4-17). On May 13, 2015, San Diego Water Board staff inspected the Site “to determine if the site was implementing BMPs in preparation for a rain event forecasted for the following day.” (PT Ex. 19). During their inspection, staff personally observed and photographed inactive areas lacking adequate erosion control BMPs. Staff observed “[s]everal completed building pads and several inactive slopes . . . lacked any effective soil cover for erosion control.” (PT Ex. 19, Ex. 32 (images 5751, 5763 and 5770)). On May 15, 2015, San Diego Water Board staff personally observed and photographed lack of erosion control BMPs in inactive areas. Staff noted “[m]any flat graded areas have no erosion or sediment control measures in violation of the Permit (Attachment D §§ D.2. and E.3.) Tim assured me during the walk through that next week he will spray the areas with a soil stabilizer.” (PT Ex. 20) Photographs depicting lack of erosion control measures in inactive areas include PT Ex. 32, images 0350, 0354, 0356 and 0359. The Board also finds violations on May 9-12 and May 14, 2015, on the basis of inference supported by the totality of the evidence in the record. Photographs and San Diego Water Board staff inspection reports supporting violations on May 8, May 13 and May 15, 2015, the fact that many photographs depicted the same locations over time without erosion controls and the fact that San Diego Water Board staff report of its meeting with the new site superintendent on May 15 (“we walked the 19-acre site together and stopped at various points along the way to discuss the effectiveness of installed BMPs, identify areas that were out of compliance, and to discuss options for employing BMPs to come into compliance with the Permit. Tim [Anderson] stated that he had been on site since 6 a.m. and that he and his work crews had been adjusting BMPs throughout the day to improve their effectiveness during the storm event.” (PT Ex. 20, p. 2).) collectively support the Board’s finding that it is reasonable to conclude that there were ongoing violations on intervening days of May 9-12 and 14, 2015. On September 15, 2015, City inspectors noted “significant areas lack erosion control. Evidence of erosion throughout the site” and recommended “utilize erosion controls on all disturbed areas prior to rain events, or

when they are inactive, whichever comes first.” (PT Ex. 22). City of Lemon Grove images document lack of erosion control measures in inactive areas on this day. (PT Ex. 41, images 6840, 6841 and 6885.) The Discharger argues that San Diego Water Board cannot find violations of this permit requirement if staff did not explicitly confirm with San-Altos staff whether an area was active or inactive and because the definition of active areas of construction in the Permit differs from the definition in the municipal storm water ordinance. For purposes of establishing the violations of this requirement in this Order, it is not necessary for staff to have confirmed active or inactive areas of construction with San Altos personnel and the difference in definitions of “active areas” in the Permit and the City’s ordinance is not dispositive. San Diego Water Board staff concluded certain areas of the site were inactive based on professional experience and judgement and familiarity with sequencing during construction projects. Many of the photographs depict areas of the Site that had been substantially completed, awaiting final finishing work which was expected to occur after vertical construction throughout is the Site was completed. In addition, the specific permit provision requires that a Discharger have effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots. Several photos referenced above show areas where rough grading had been completed, such as slopes, housing pads, and sidewalk areas. However, these areas were not in the final configuration (i.e. paved or landscaped) and therefore in need of erosion control BMPs. This is supported by the repeated findings by the City of Lemon Grove and the San Diego Water Board inspectors that additional erosion controls were needed in areas that had been disturbed, were not yet ready for pavement or landscaping and therefore susceptible to erosion, and in need of erosion control BMPs.

48. **Violation No. 5:** Section E.1 of Attachment D of the Permit requires Risk Level 2 dischargers to “establish and maintain effective perimeter controls and stabilize all construction entrances and exits to sufficiently control erosion and sediment discharges from the site.” The Discharger violated this requirement by failing to implement perimeter sediment control BMPs at the Site on the following 4 days: December 4, 2014, December 15, 2014, May 8, 2015 and May 13, 2015. These findings are based on evidence in the record including but not limited to evidence identified in the Technical Analysis supporting the Complaint, photographs in Exhibits 32 and 40 and deposition testimony of San Diego Water Board staff. On December 4, 2014, the City documented by photograph areas of the site depicting lack of adequate perimeter controls (PT, Ex. 3, Melbourn DT, 155:9-25). On December 15, 2014, May 8 and May 13, 2015, San Diego Water Board staff personally observed and photographed “[l]ack of effective perimeter sediment controls” contributing to unauthorized sediment discharges from the site. (PT Ex. 8 and associated Ex 32 images 5042, 5043, 5051, 5052, 5054, and 5056, Ex. 18 and associated Ex. 32 image 20150508\_192234) and Ex. 19 and associated Ex. 32 images 5726 and 5712) The Board finds there is insufficient evidence in the record to support the inferences that violations occurred on the other nine days as alleged in the Complaint. See also discussion of single base liability for substantially similar



BMPs regarding December 15, 2014, violation 8, failure to implement run off/run on controls.

49. **Violation No. 6:** Section E.3 of Attachment D of the Permit requires Risk Level 2 dischargers to “implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.” The Board’s expectation of dischargers to meet this requirement during dry weather is to have a plan in place, to be prepared to deploy BMPs should rain materialize, and to *actually* deploy BMPs in active areas of construction in the event of a forecasted rain event.<sup>8</sup> The Discharger violated this requirement by failing to implement erosion control BMPs in active areas prior to a forecasted rain event at the Site on the following 12 days: December 1 through 4, 2014; December 8, 2014, December 15 and 16, 2014; May 8, 2015, May 13 through 15, 2015; and September 15, 2015. The record documents violations on December 1, 2, 4, 8, 15, and 16, 2014 and May 8, 13 and 15, and September 15, 2015. These findings are based on the evidence in the record, including but not limited to evidence identified in the Technical Analysis in support of the Complaint, deposition testimony of Board staff, and photographs in Exhibits 32 and 40. City photographs from December 1, 2 and 4 and 8, 2014 (PT Ex. 2, photo page 1, bottom-right photo, photo page 3, top-right and bottom-right photos, photo page 5, top-middle photo, photo page 6, bottom-right photo, photo page 7, top-left photo, middle photo; PT Ex. 3 photo page 3, middle and right column photos (6 total) and PT Ex. 4, bottom-left and bottom-right photos) document violations of this requirement because they show that appropriate erosion control BMPs had not been implemented on active areas prior to the onset of rain. The Board finds that the totality of the evidence in the record and on surrounding days supports the inference that violations of the Permit requirement continued on December 3, 2014. On December 15, 2014, San Diego Water Board staff personally observed active areas of the Site lacking adequate erosion control BMPs, noting “[a]ctive areas were observed to lack appropriate erosion control BMPs (runoff control and soil stabilization) to prevent erosion during storm events.” (PT Ex. 8) and photographed a dirt road with the statement “lacking erosion control measures during storm events.” (Ex. 32, image 5057.) On December 16, 2014, following a rain event, City staff observed lack of erosion control BMPs in active areas recommending the Discharger “complete roadway stabilization” (PT Ex. 9) and documented lack of erosion control in active roadways in numerous photographs (PT Ex. 40 images 9526, 9565, 9566, 9524, 9543 and 9549.) On May 8, 2015, following a rain event, San Diego Water Board staff personally observed and photographed lack of erosion control BMPs in active areas. (PT Ex. 18 and PT Ex. 32, image 20150508\_192214.) On May 13, 2015, San Diego Water Board staff

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<sup>8</sup> This expectation is supported by the Permit requirement recognizing that rain events can occur at any time of year and requiring a Rain Event Action Plan (REAP) “to ensure that active construction sites have adequate erosion and sediment controls *implemented* prior to the onset of a storm event, even if construction is planned only during the dry season.” (Permit, Finding 49 (emphasis added).) See also Permit Fact Sheet, p. 31, explaining that the REAP requirement is also to ensure a discharger has adequate materials, staff and time to timely implement erosion and sediment controls.

personally observed and photographed active areas on the site lacking adequate erosion control BMPs. Staff noted “[a]ctive areas were observed to lack appropriate erosion control BMPs (runoff control and soil stabilization) to prevent erosion during storm events” and noted that “a rain event [is] forecasted for the following day.” (PT Ex. 19.) Photographic evidence of the violation on May 13 includes numerous images. (PT Ex. 32, images 5712, 5715, 5738, 5745, 5750, 5758.) On May 15, 2015, following a rain event, San Diego Water Board staff again personally observed and photographed active areas on the site lacking adequate erosion control BMPs and documented the findings in Exhibit 20. Photographic evidence includes images 0354 and 0366 in PT Exhibit 32. The Board finds the totality of the evidence in the record and on surrounding days supports the inference of continued violation on May 14, 2015. The inference is further supported by San Diego Water Board staff’s record of its meeting with the new Site superintendent on May 15 (“we walked the 19-acre site together and stopped at various points along the way to discuss the effectiveness of installed BMPs, identify areas that were out of compliance, and to discuss options for employing BMPs to come into compliance with the Permit. Tim [Anderson] stated that he had been on site since 6 a.m. and that he and his work crews had been adjusting BMPs throughout the day to improve their effectiveness during the storm event.” (PT Ex. 20, p. 2).) On September 15, 2015, following a rain event, the City noted significant areas throughout the Site lacking adequate erosion control BMPs. (PT Ex. 22.) City photographs document no erosion controls for disturbed soil surrounding areas that were undergoing vertical construction, and therefore a violation of this requirement on this day. (PT Ex. 40, images 6837 and 6865.) The Discharger argued that the Board staff was unable to establish whether an area of the Site was active for purposes of establishing violations of this permit requirement. The Board is not persuaded by the Discharger’s argument. Several photographs documenting violations depict access roads supporting the conclusion these were active areas as defined in the Permit. Even during the time period during which the Discharger was under a Stop Work Notice, roads could have been used for the sole purpose of implementing BMPs throughout the Site, the only activity the Discharger was authorized to do. Therefore these roads are considered “active” for purposes of the erosion control requirement for active areas under the Permit. The Board finds there is insufficient evidence in the record to support the other days of violations of this requirement alleged in the Complaint because there was no rain in the forecast for those days.

50. **Violation No. 7:** Section E.4 of Attachment D of the Permit requires Risk Level 2 dischargers to “apply linear sediment controls along toe of slope, face of the slope, and at the grade breaks of exposed slopes to comply with the sheet flow lengths in accordance with Table 1.” The Discharger violated this requirement by failing to apply linear sediment controls at the Site on the following five days: December 15 and 16, 2014; May 8 and 13, 2015, and September 15, 2015. These findings are based on evidence in the record including but not limited to evidence identified in the Technical Analysis supporting the Complaint and photographs in Exhibits 32 and 40. On December 15, 2014, San Diego Water Board staff personally observed and

photographed violations of this requirement, noting “[s]everal slopes throughout the site were observed to lack linear sediment controls along the toe and grade breaks of exposed slopes” and “linear sediment controls were not adequately implemented for several exposed slopes contributing to slope erosion and discharges of sediment from the site . . . .” (PT Ex. 8). San Diego Water Board photographs taken December 15 document lack of effective linear sediment controls. (PT Ex. 32, images 5039, 5061, 5063 and 5066.) On December 16, 2014, the City identified continued deficiencies in implementation of erosion control prevention and sediment control BMPs and in supporting documentation, noting “[a]dditional perimeter and slope protection still needed on west side,” “add erosion controls to stabilize remaining pads, slopes at edges of pads and area near entrance on Akins,” and recommending as corrective action that the Discharger “add fiber rolls on slopes on western edge.” (PT Ex. 9.) City photographs document these findings. (PT Ex. 40, images 9525, 9528, 9529, 9536, 9552, and 9553.) On May 8 and May 13, 2015, San Diego Water Board staff personally observed and photographed violations of this requirement, noting “[s]everal slopes throughout the site were observed to lack linear sediment controls along the toe and grade breaks of exposed slopes” and “linear sediment controls were not adequately implemented for several exposed slopes contributing to slope erosion and discharges of sediment from the site . . . .” (PT Ex. 18 and PT Ex. 19.) San Diego Water Board staff photographs on May 8 and 13, 2015, document lack of linear sediment controls on these days. (PT Ex. 32, image 20150508\_191955; PT Ex. 32, images e.g., 5715, 5727, 5763, and 5770.) On September 15, 2015, the City inspector identified “significant areas lack erosion control; evidence of erosion throughout the site,” the need to “add/improve perimeter controls” and “utilize erosion controls on all disturbed areas prior to rain events or when they are inactive, whichever comes first.” (PT, Ex. 22.) Photographs attached to the City’s report depict lack of linear sediment controls along toe and face of slopes and at grade breaks. (PT Ex. 40, images 6839, 6841, 6882 and 6885.) The Board finds there is insufficient evidence in the record to support the inference that violations of this requirement also occurred May 9-12, 2015 as alleged in the Complaint.

51. **Violation No. 8:** Section F of Attachment D of the Permit requires Risk Level 2 dischargers to “effectively manage all run-on, all runoff within the site and all runoff that discharges off the site. Run-on from run off site shall be directed away from all disturbed areas or shall collectively be in compliance with the effluent limitations in [the Permit].” The Discharger violated this requirement by failing to effectively manage run-on and runoff at the Site on May 8, 2015 and May 13, 2015. These findings are based on the evidence in the record including but not limited to evidence identified in the Technical Analysis supporting the Complaint. On May 8, 2015, San Diego Water Board staff personally observed and photographed lack of effective BMPs to manage run-on and runoff. Board staff documented “[l]ack of effective run-on and runoff controls observed within and around the site which contributed to sediment discharges from the site.” (PT Ex. 18.) San Diego Water Board photographs document the violation on this day. (PT Ex. 32, images

20150508\_191716, \_191734 and \_191955.) On May 13, 2015, San Diego Water Board staff personally observed and photographed lack of effective BMPs to manage run-on and runoff at the Site. Board staff again documented “[l]ack of effective run-on and runoff controls observed within and around the site.” (PT Ex. 19.) San Diego Water Board photographs also document the violation of this requirement on May 13, 2015. (PT Ex. 32, images 5712, 5715, 5738, 5745, 5750, and 5758.) The Board further finds that the evidence referenced in the Technical Analysis and Exhibit 32 (image 5042) supports a finding that the Discharger violated this requirement on December 15, 2014. The Board found the Discharger violated Section E.1 of Attachment D (see Finding 16, Violation No. 5, failure to implement perimeter sediment controls) on December 15, 2014. On this day, San Diego Water Board image 5042 (PT Ex. 32) establishes a violation of both the perimeter control requirement (Violation no. 5) and the run-on/runoff requirement. Implementation of the same types of BMPs at the location shown in image 5042 could have prevented both permit violations in this instance. Therefore, as allowed by the Enforcement Policy (and reflected in the Penalty Calculation discussion in Attachment 1), the Board in its discretion does not impose a separate penalty for Violation No. 8 for December 15, 2014. The Board finds there is insufficient evidence in the record to support the inference that violations of this requirement also occurred on May 9-12, 2015, as alleged in the Complaint.

52. **Violation No. 9:** Section E.7. of Attachment D of the Permit requires Risk Level 2 dischargers to “at a minimum daily (when necessary) and prior to any rain event, [] remove any sediment or other construction activity-related materials that are deposited on the roads (by vacuuming or sweeping).” The Discharger violated this requirement by failing to remove sediment or other construction materials from roads at the Site on the following 10 days: December 2 through 8, 2014; December 16, 2014; and September 15, 2015. These findings are supported by evidence in the record, including but not limited to, evidence referenced in the Technical Analysis in support of the Complaint and photographs in Exhibit 40. On December 2, 2014, the City issued a Stop Work Notice and inspection report to the Discharger, noting “entrance needs to be cleaned and swept. Also need street swept.” (PT Ex. 3.) The City’s December 4, 2014 noted runoff was occurring from Site on December 4 and documented runoff in numerous City photographs (PT Ex. 3, page 1 of photos, bottom left image time stamped 3:32 p.m.; page 3 of photos, bottom left, timestamped 9:03 a.m. and middle left, timestamped 9:01 a.m.), and page 5, middle image (white truck) and bottom right, timestamped 8:41 a.m.) On December 8, 2014, the City inspected the Site and noted that “the entrance is being rebuilt” and “street sweeping to occur this week” and also noted the Discharger was still cleaning discharge locations. (PT Ex. 4.) On December 9, 2014, the City inspected the Site and noted that the northeast entrance lacked stabilization, “roadways within the project are unstabilized and show signs of erosion,” and documented a “large amount of sediment on roadway SE of site” and recommended the Discharger “sweep road outside of construction entrance” to remove sediment. (PT Ex. 6.) City photographs document this violation on December 9, 2014. (PT Ex. 40, image

9481.) The evidence shows the Discharger was still not in compliance on December 9 despite lack of rain since December 4. In addition, a December 16, 2014 letter from the City to the Discharger concluded a follow-up inspection was performed and found the “site is still not in compliance. The deficiencies include failure to effectively implement erosion prevention and sediment control BMPs.” The totality of the evidence in the record, also including strong photographic evidence on surrounding days supports the Board’s finding that it is reasonable to infer that violations of this requirement were ongoing on December 3, 5, 6 and 7, 2014. On December 16, 2014, the City performed an additional Site inspection which formed the basis for issuance of a third administrative citation. The December 16 inspector observed “still significant sediment on Akins” and “Roadway stabilization/check dams incomplete.” (PT Ex. 9.) City photographs document a violation of this requirement on December 16. (PT Ex. 40, image 9568.) On September 15, 2015, the City inspected the Site and documented “significant sedimentation in street within project [and] in gutter on Akins” and “some sediment in road and gutter near SE corner.” (PT Ex. 22.) City photographs document a violation of this requirement on September 15, 2015. (PT Ex. 40, image 6852.) Evidence in the record shows a violation of this requirement on December 11, 2014. However, because a violation on this date was not alleged, no penalty is assessed for a violation of this requirement on this date.

**53. Violation No. 10:** Section E.6. of Attachment D of the Permit requires that Risk Level 2 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.” The Discharger violated this requirement by failing to protect storm drain inlets at the Site on the following two days: December 8, 2014 and September 15, 2015. These findings are based on the evidence in the record including but not limited to the evidence identified in the Technical Analysis in support of the Complaint and on photographs in Exhibit 40. On December 8, 2014, the City inspected the Site and documented that the storm drain inlet needed to be cleaned. (PT Ex. 4). On September 15, 2015, the City inspected the Site and documented “no inlet protection on drain near SE corner” and recommended installation of inlet protection.” (PT Ex. 22.) The record contains conflicting evidence concerning whether the storm drain inlet at issue in the alleged May 13, 2015, violation was connected to the municipal storm sewer at the time of the inspection. Based on the evidence in the record, the Board finds there is insufficient evidence to establish that a violation of this requirement occurred on May 13, 2015, as alleged in the Complaint.

**54. Violation No. 11:** Section B.2.f. of Attachment D of the Permit requires Risk Level 2 dischargers to “[c]ontain and securely protect stockpiled waste material from wind and rain at all times unless actively being used.” The Discharger violated this requirement on January 14, 2015. This finding is supported by evidence in the record, including but not limited to evidence identified in the Technical Analysis in support of the Complaint and Exhibit 40 photographs. On January 14, 2015, the City

inspected the Site and documented that “wood/scrap pile should be removed or protected.” (PT Ex. 25.) There is insufficient evidence in the record to establish that violation occurred on January 6, 2015, or to support the inference that violations of this requirement occurred on January 7-13, 2015. The Board notes that evidence in the record appears to support violations of this Permit requirement on May 13, 2015 and possibly additional days. However, because the violations were not alleged, no penalties are assessed for a violation on May 13 or other non-alleged dates.

**55. Violation No. 12:** Section B.1.c. of Attachment D of the Permit requires Risk Level 2 dischargers to “[s]tore chemicals in watertight containers (with appropriate secondary containment to prevent any spillage or leakage) or in a storage shed (completely enclosed).” The Discharger violated this requirement on March 18 through 24, 2015. The evidence in the record, including but not limited to the evidence identified in the Technical Analysis in support of the Complaint and Exhibit 40, establishes that violations occurred on each of March 18 and 24, 2015. On March 18, 2015, the City inspector noted “some liquids stored without secondary containment” and recommends that the Discharger “provide secondary containment for liquid storage.” (PT Ex. 13.) On March 24, 2016, the City issued another correct work notice identified deficient waste/materials storage, documenting: “Secondary containment: stack of 5 gallon drums of asphaltic material is exposed at southwest area. New placement of two 55 gallon drums of diesel fuel with pump at Avalon/Tangelos Pl. needs to have secondary containment.” (PT Ex. 15.) Photographs dated March 18, 23 and 24, 2015 document violations of this requirement. (PT Ex. 40, image 9631 (March 18, 2015); PT Ex. 15, City photograph timestamped 08:42 (March 23, 2015) and Figure 12 in Technical Analysis (City photograph dated March 24, 2015).) The March 18 and 24 images depict the same location and largely the same containers. The Discharger suggests that the Board should discount the evidence in support of these violations because “Mr. Melbourn admitted that he didn’t know what was in the drums[fn] and because there was no rain imminent for any of the days alleged.” (Discharger’s rebuttal brief, 39:16-17.) The Board is wholly unpersuaded by the Discharger’s argument. The permit requirement is not triggered by forecasted rain, as chemicals that leak or spill to the ground can infiltrate into soil and groundwater (if present) and be dispersed during rain events. Moreover, it is unnecessary and unreasonable to expect that an inspector visually identifying drums of the sort typically used to store potentially harmful liquids is required to open each drum, determine and if necessary test its contents, before determining that a violation has occurred. The totality of the evidence support the Board’s finding that it is reasonable to infer that violations also occurred on each of the intervening days.

**56. Violation No. 13:** Section B.2.i. of Attachment D of the Permit requires Risk Level 2 dischargers to “[e]nsure 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.” The Discharger violated this requirement on March 18, 2015. This finding is supported by evidence in the record,

including but not limited to, evidence identified in the Technical Analysis supporting the Complaint and in Exhibits 39 and 40. On March 19, 2015, the City issued an administrative citation to the Discharger including photographs documenting violations of this requirement on March 18, 2015. (PT Ex. 14, Exh. 39, images 6131, 6133 and 6134.) There is evidence that cementitious materials were discharged to the ground on the other days for which violations were alleged. These discharges may have supported findings that the Discharger violated other applicable permit requirements but do not support a finding that the Discharger violated Section B.2.i. on any of these additional days.

57. With regard to the violations identified Findings 43 through 56, *supra*, the San Diego Water Board finds that substantial evidence in the record support each and every violation established by this Order.

### **Penalties Under Water Code Section 13385**

58. Water Code section 13385 states in relevant part:

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

(2) A waste discharge requirement . . . issued pursuant to this chapter . . .

(5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.”

59. The Permit was adopted by the State Water Resources Control Board on September 2, 2009, pursuant to Clean Water Act sections 201, 208(b), 302, 303(b), 304, 306, 307, 402, and 403. Section IV(A)(1) of the Permit states in part: “Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and Porter-Cologne Water Quality Control Act and is grounds for enforcement action and/or removal from [Permit] coverage.”

60. The Discharger’s failure to implement the elements of the Permit described above violates the permit and therefore violates the Clean Water Act and the Water Code. Water Code section 13385 authorizes the imposition of administrative civil liability for such violations.

61. Water Code section 13385, states in relevant part:

(c) 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.

62. The Discharger violated provisions of law for which the San Diego Water Board may impose civil liability pursuant to section 13385 of the Water Code. The maximum liability that the San Diego Water Board may assess pursuant to Water Code section 13385, subdivision (c), for all of the violations established is \$820,000.
63. Water Code section 13385, subdivision (e) requires that when pursuing civil liability under 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." 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 that the San Diego Water Board shall assess pursuant to Water Code section 13385 subdivision (e) for all of the violations established is \$31,604.
64. Water Code sections 13327 and 13385, subdivision (e), specify the factors that the San Diego Water Board is required to consider in establishing the amount of discretionary liability for the violations. The Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and with respect to the violator, the ability to pay, the effect on the Discharger's ability to continue in business, any voluntary cleanup efforts undertaken, prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
65. The Enforcement Policy establishes a methodology for assessing administrative civil liability use of which is intended to "create a fair and consistent statewide approach to liability assessment." (Enforcement Policy, p. 1.) The use of this methodology addresses the factors that are required to be considered when a regional water board imposes a civil liability as outlined in Water Code section 13385, subdivision (e). The civil liability ordered in this matter was derived from the use of the penalty calculation methodology, as explained in detail in Attachment 1.
66. In arriving at the penalty assessment, the San Diego Water Board considered the Discharger's arguments that the Board should have addressed multiple violations with a single base liability (as single incidents) and should have reduced the number of days of violations by treating them as multiple day violations exceeding thirty days. As set forth in Finding No. 51, *supra*, the Board determined it was appropriate to apply a single base liability for violations of the perimeter control and run-on/runoff erosion control requirements (Violations 5 and 8) on December 15, 2015. None of the violations alleged in this matter went on for more than thirty days. Moreover, the



evidence could not otherwise support the express findings required to reduce the penalties for multiple day violations.

67. The penalty calculation methodology analysis described Attachment 1 and incorporated in full in this Order is consistent with the evidence received and the circumstances of this case and supports the administrative civil liability in the amount of \$603,232 imposed against Discharger.
68. The proposed penalty set forth in the Complaint included \$15,763 to recover staff costs. Subsequently, the Prosecution Team proposed that staff costs be assessed at through February 23, 2016 at \$55,008.11 and anticipated an additional \$19,690.67 in staff costs through the public hearing. While staff time and costs in this matter are certainly substantial, the penalty the Discharger is ordered to pay more than recovers the documented staff costs and the anticipated additional costs through hearing. No staff costs are added to the penalty imposed against the Discharger by this Order.

### **Regulatory Considerations**

69. Notwithstanding issuance of this Order, the San Diego Water Board retains the authority to assess additional penalties for violations of the requirements of the Permit for which penalties have not yet been assessed or for violations that may subsequently occur.
70. This is an action to enforce the laws and regulations administered by the San Diego Water Board. The method of compliance with this enforcement action consists entirely of payment of an administrative penalty. The San Diego Water Board finds that issuance of this Order is not considered subject to the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.) as it will not result in a direct or reasonably foreseeable indirect physical change in the environment, and it is not considered a "project" (Public Resources Code 21065, 21080(a); 15060(c)(2),(3); 15378(a), Title 14, of the California Code of Regulations), The San Diego Water Board finds that issuance of this Order is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) because it can be seen with certainty that the project will not have a significant effect on the environment and in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations as an enforcement action by a regulatory agency and there are no exceptions that would preclude the use of this exemption.
71. Any person aggrieved by this action may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the

next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: [http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitions/water_quality) or will be provided upon request.

72. Fulfillment of San Altos-Lemon Grove, LLC's obligations under this Order constitutes full and final satisfaction of Administrative Civil Liability Complaint No. R9-2015-0110.
73. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for collection or other enforcement if San Altos-Lemon Grove, LLC fails to comply with payment of the liability as detailed in paragraph 1.

**IT IS HEREBY ORDERED**, pursuant to Water Code section 13385, that civil liability be imposed upon San Altos-Lemon Grove, LLC in the amount of \$603,232 for the above violations of the Permit. San Altos-Lemon Grove, LLC shall pay the total administrative civil liability amount within thirty (30) days of adoption of this Order executed by the San Diego Water Board. Payment shall be made by check to the "State Water Board Cleanup and Abatement Account" and a copy e-mailed to San Diego Water Board contact Frank Melbourn at [frank.melbourn@waterboards.ca.gov](mailto:frank.melbourn@waterboards.ca.gov). San Altos-Lemon Grove, LLC shall include the number of this Order (R9-2016-0064) on the check and send it to:

State Water Resources Control Board  
Accounting Office  
Attn: ACL Payment  
P.O. Box 1888  
Sacramento, California 95812-1888

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region on August 10, 2016.

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DAVID W. GIBSON  
Executive Officer

Attachments:

1. Penalty Methodology Decisions for ACL Order No. R9-2016-0064
2. List of Evidence and Transcript References Stricken from the Record

**ATTACHMENT 1**  
**Penalty Methodology Decisions**  
**ACL Order No. R9-2016-0064**

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy) establishes a ten-step methodology for determining administrative civil liability by addressing all of the factors that are required to be considered under California Water Code (CWC) section 13385(e). The Enforcement Policy can be found at: [http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_final111709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf).

The ten-step methodology used to calculate the penalty for each of the 13 violations at the Valencia Hills Construction site (Site) is discussed below, as is the basis for assessing the corresponding score, and the total administrative civil liability of **\$603,232** against San Altos-Lemon Grove, LLC (Discharger). The individual and total liabilities are summarized in **Table No.1**, Total Liability Amount Summary. The scores for each violation are summarized in **Table No. 2**, Penalty Calculator.

**VIOLATION NO. 1:**  
**UNAUTHORIZED DISCHARGE OF SEDIMENT (6 DAYS)**

**STEP 1 - Potential for Harm for Discharge Violations (Violation No. 1)**

The Potential for Harm for Discharge Violations in Step 1 is determined using a three-factor scoring system to quantify: (1) *the potential for harm to beneficial uses*; (2) *the characteristics of the discharge or degree of toxicity*; and (3) *the discharge's susceptibility to cleanup or abatement*.

**Factor 1: Harm or Potential Harm to Beneficial Uses**

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). The Discharger was assigned a score of **4 (Above Moderate)** because the impacts or likely impacts are substantial, temporary restrictions on beneficial uses, and human or ecological health concerns. Under the Construction General Storm Water Permit (Permit), Risk Levels 2 sites are required to take additional measures to prevent erosion and to control sediment transport offsite because these sites represent an increased risk to water quality. The Discharger consistently disregarded these requirements when large portions of the site were exposed and rain was expected, thereby creating a substantial threat of sediment discharges and at least six days of actual discharges. Additionally, Chollas Creek is designated as an impaired water body for dissolved metals (copper, lead, and zinc) pursuant to Clean Water Act section 303(d). Storm water runoff containing sediment from the Site has the potential to transport other pollutants, such as metals, potentially further degrading the already impaired waters of Chollas Creek. Although potentially significant, impacts from sediment typically attenuate within a short period.

Factor 2: The Physical, Chemical, Biological, 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. The Discharger was assigned a score of **2 (Moderate Risk)** because the discharged 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). The primary storm water pollutant at construction sites is excess sediment. Sediment discharges can physically and chemically cause harmful effects to beneficial uses because sediment in receiving waters can reduce the sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, and transport construction related pollutants such as nutrients, metals, oils, and grease.

Factor 3: Susceptibility to Cleanup and Abatement

A score of 0 is assigned if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement. The Discharger was assigned a score of **1**. Clean-up of sediment is generally not possible or effective because most sediment will be carried downstream with creek flows.

Calculating the Final Potential for Harm

The Final Potential for Harm score is the sum of Factors 1, 2, and 3. Based on the above, a score of **7** (4 + 2 + 1) was calculated.

**STEP 2 – Assessment for Discharge Violations (Violation No. 1)**

Discharge violations may be assessed on a “per gallon” basis, “per day” basis, or both. Due to the difficulty in accurately determining the volume of the discharges from the Site, liability was calculated on a per day basis. The “per day” factor is calculated for each discharge violation considering the 1) the extent of the deviation from the applicable requirements and 2) the potential for harm score.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Major** because the Permit prohibits all discharges except for storm water and non-storm water discharges specifically authorized by the Permit. Only discharges that have been controlled with BMPs that achieve BAT and BCT are authorized. Because the Discharger did not implement BMPs that achieve BAT and BCT, the requirements of the Permit were rendered wholly ineffective.

Calculating the Per Day Assessment

Using Table 1 in the Enforcement Policy, the per day assessment for a **Major**

Deviation from Requirement and a Potential for Harm score of 7 is **0.31**.

**STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 1)**

Step 3 does not apply to Discharge Violations.

**STEP 4 – Adjustment Factors (Violation No. 1)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations.

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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.3** for this violation because the Discharger either intentionally, or due to negligence, did not implement BMPs that achieve BAT and BCT, resulting in unauthorized discharges from the Site despite ample notice that a discharge was likely. The City's Dec 2, 2014 Stop Work Notice warned that a "discharge is imminent" because the BMPs in place were inadequate and rain was forecasted. Despite an actual discharge and numerous subsequent verbal and written orders from the City and the San Diego Water Board, the Discharger failed to install the erosion and sediment controls required to prevent discharges. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Permit.

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. For the December 2014 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.1** because the Discharger in many cases ignored the BMP recommendations or took longer than 72 hours to correct BMP deficiencies resulting in unauthorized discharges during rain events. For the discharge violations occurring in 2015, the Cleanup and Cooperation multiplier was increased to a score of **1.5** because of the Discharger's repeated and persistent failure to implement the necessary BMPs despite repeated warnings from the City and the San Diego Water Board.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 1)**

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the

adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability  
Multiplier x Cleanup and Cooperation Multiplier x History of Violations  
Multiplier = Total Base Liability

December 2014 Violations

$4 \times 0.31 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$17,732$

May and September 2015 Violations

$2 \times 0.31 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$12,090$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 1)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 1)**

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

**STEP 8 – Economic Benefit (Violation No. 1)**

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 Discharger derived an economic benefit by not properly implementing the erosion and sediment controls at a Risk Level 2 site. The estimated cost to implement these controls is **\$13,550** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$9,476**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 1)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore the maximum liability amount for six days of violation is **\$60,000**.

### Minimum Liability Amount

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  $(1.1 \times \$9,476) = \mathbf{\$10,424}$

The proposed liability falls within these maximum and minimum liability amounts.

### **STEP 10 – Final Liability Amount (Violation No. 1)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$29,822**.

## **VIOLATION NO. 2: FAILURE TO IMPLEMENT MATERIAL STOCKPILE BMPS (8 DAYS)**

### **STEP 1 - Potential for Harm for Discharge Violations (Violation No. 2)**

Step 1 does not apply to Non-Discharge Violations.

### **STEP 2 – Assessment for Discharge Violations (Violation No. 2)**

Step 2 does not apply to Non-Discharge Violations.

### **STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 2)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

#### Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The failure to implement adequate stockpile management BMPs poses a substantial potential for harm if there is storm water or non-storm water runoff that flows through and transports sediment from the Site to receiving waters. Sediment in receiving waters can reduce the sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, and transport construction related pollutants such as nutrients, metals, oils, and grease.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Moderate** because the Discharger covered only some of the material stockpiles, thus rendering the requirement only partially effective.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Moderate** Deviation from Requirement is 0.3 to 0.4. The middle of the range (**0.35**) was used for the Per Day Factor.

#### **STEP 4 – Adjustment Factors (Violation No. 2)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations.

##### 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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.3** for this violation. In December 2014, the City issued a Stop Work/Notice of Violation that warned the Discharger that stockpiles needed to be covered. Despite this warning and despite an impending rain storm, the Discharger, either intentionally or due to negligence, did not cover the materials stockpiles and lacked sufficient plastic onsite to do so. In September 2015, the Discharger again failed to keep sufficient materials onsite to cover stockpiles despite forecasted rain. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Permit.

##### 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. For the December 2014 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.1** because the Discharger failed to correct the violation within 72 hours of being notified or ignored recommended BMPs. For the September 2015 violation, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.5** because the Discharger did not adequately implement the additional Risk Level 2 BMPs for stockpile management over the course of several months despite repeated warnings from the San Diego Water Board and the City.

##### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 2)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:



Days of Violation x Per Day Factor x Statutory Max x Culpability  
Multiplier x Cleanup and Cooperation Multiplier x History of Violations  
Multiplier = Total Base Liability

December 2014 Violations  
 $7 \times 0.35 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$35,035$

September 2015 Violation  
 $1 \times 0.35 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$6,825$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 2)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 2)**

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

**STEP 8 – Economic Benefit (Violation No. 2)**

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 Discharger derived an economic benefit by not properly implementing the stockpile management BMPs that are required for all construction sites. At a minimum, the Discharger should have properly covered and contained stockpiles on the Site before the predicted storm events. The estimated cost to properly cover and contain the stockpiles is **\$1,550** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$1,088**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 2)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore the maximum liability amount for ten days of

violation is **\$80,000**.

Minimum Liability Amount

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  $(1.1 \times \$1,088) = \mathbf{\$1,197}$ .

The proposed liability falls within these maximum and minimum liability amounts.

**STEP 10 – Final Liability Amount (Violation No. 2)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$41,860**.

**VIOLATION NO. 3:  
FAILURE TO IMPLEMENT VEHICLE FLUID LEAK BMPS (2 DAYS)**

**STEP 1 - Potential for Harm for Discharge Violations (Violation No. 3)**

Step 1 does not apply to Non-Discharge Violations.

**STEP 2 – Assessment for Discharge Violations (Violation No. 3)**

Step 2 does not apply to Non-Discharge Violations.

**STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 3)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Minor**. Although oil, grease, or fuel in storm water can pose a threat to receiving waters, under these circumstances, the volume of a potential discharge would have been minimal given the number of days of violation.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Major** because the Discharger failed to provide drip pans, thus rendering the requirement ineffective.

Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of factors for a **Minor** potential for harm and a **Major** Deviation from Requirement determination is 0.3 to 0.4. The middle of the range (**0.35**) was used for the Per Day Factor.

**STEP 4 – Adjustment Factors (Violation No. 3)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.0** for this violation because there was no evidence in the record suggesting that this violation was intentional or negligent.

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. For December 15, 2014, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.0** because the Discharger corrected the violations within 72 hours of being notified. For May 13, 2015, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.5** because the Discharger failed to comply with this requirement at least twice over the course of several months.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 3)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

$$\begin{aligned} &\text{Days of Violation} \times \text{Per Day Factor} \times \text{Statutory Max} \times \text{Culpability} \\ &\text{Multiplier} \times \text{Cleanup and Cooperation Multiplier} \times \text{History of Violations} \\ &\text{Multiplier} = \text{Total Base Liability} \end{aligned}$$

December 2014 Violation

$$1 \times 0.35 \times \$10,000 \times 1.0 \times 1.0 \times 1.0 = \$3,500$$

May 2015 Violation

$$1 \times 0.35 \times \$10,000 \times 1.0 \times 1.5 \times 1.0 = \$5,250$$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 3)**

The Total Base Liability Amount may be adjusted to address the violator’s ability to pay or continue in business. The circumstances in this matter do not warrant an

adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 3)**

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

**STEP 8 – Economic Benefit (Violation No. 3)**

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 Discharger derived an economic benefit by not properly implementing the vehicle storage and maintenance BMPs that are required. At a minimum, the Discharger should have provided drip pans for construction equipment stored on the Site. The estimated cost to provide drip pans for construction vehicles on the Site is **\$1,286** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$823**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 3)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore the maximum liability amount is **\$20,000**.

Minimum Liability Amount

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  $(1.1 \times \$823) = \mathbf{\$905}$ .

The proposed liability falls within these maximum and minimum liability amounts.

**STEP 10 – Final Liability Amount (Violation No. 3)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$8,750**.

## **VIOLATION NO. 4: FAILURE TO IMPLEMENT EROSION CONTROL BMPS IN INACTIVE AREAS (22 DAYS)**

### **STEP 1 - Potential for Harm for Discharge Violations (Violation No. 4)**

Step 1 does not apply to Non-Discharge Violations.

### **STEP 2 – Assessment for Discharge Violations (Violation No. 4)**

Step 2 does not apply to Non-Discharge Violations.

### **STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 4)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

#### **Potential for Harm**

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The failure to implement the erosion and sediment control requirements for a Risk Level 2 construction site in inactive areas, finished slopes, open space, utility backfill, and completed lots poses a substantial potential for harm because there is a higher risk of erosion which leads to additional sediment in storm water runoff to receiving waters. Sediment in receiving waters can reduce the sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, and transport construction related pollutants such as nutrients, metals, oils, and grease.

#### **Deviation from Requirement**

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Major** because San Diego Water Board and City inspectors consistently found inactive areas without erosion control BMPs, thus rendering the requirement wholly ineffective.

#### **Calculating the Per Day Factor**

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Major** Deviation from Requirement is 0.4 to 0.7. The middle of the range (0.55) was used for the Per Day Factor.

### **STEP 4 – Adjustment Factors (Violation No. 4)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

### 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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.3** for this violation. In December of 2014, the City had issued a Stop Work/Notice of Violation warning the Discharger that a discharge was “imminent” if the Discharger failed to implement adequate sediment and erosion controls. Yet, either intentionally or due to negligence, the Discharger did not adequately implement the additional Risk Level 2 erosion and sediment control requirements for inactive areas, finished slopes, sidewalls, and completed lots. In May 2015, the Discharger again failed to install sediment and erosion controls in inactive areas despite rainy weather and warnings from the San Diego Water Board staff that the site erosion and sediment controls in inactive areas were inadequate. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Permit.

### 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. For December 2014 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.1** because the Discharger failed to correct the violations within 72 hours of being notified or ignored recommended BMPs. For January 2015 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.3** because Discharger did not adequately implement the additional Risk Level 2 sediment control BMPs in inactive areas despite being under Stop Work Notice/Notice of Violation for over a month. For May and September 2015 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.5** because the Discharger did not adequately implement the additional Risk Level 2 sediment control BMPs in inactive areas over the course of several months despite repeated warnings from the San Diego Water Board and the City.

### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

### **STEP 5 – Determination of Total Base Liability Amount (Violation No. 4)**

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability  
Multiplier x Cleanup and Cooperation Multiplier x History of Violations  
Multiplier = Total Base Liability

December 2014 Violations

$11 \times 0.55 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$86,515$

January 2015 Violations

$2 \times 0.55 \times \$10,000 \times 1.3 \times 1.3 \times 1.0 = \$18,590$

May and September 2015 Violations

$9 \times 0.55 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$96,525$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 4)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 4)**

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

**STEP 8 – Economic Benefit (Violation No. 4)**

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 Discharger derived an economic benefit by not properly implementing the erosion control BMPs that are required for inactive areas. At a minimum, the Discharger should have provided effective soil cover for all inactive areas on the Site. The estimated cost to provide effective soil cover for all inactive areas on the Site is **\$8,500** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$5,966**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 4)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego

Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$220,000**.

#### Minimum Liability Amount

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  $(1.1 \times \$5,966) = \mathbf{\$6,563}$ .

The total base liability for the period between May 8-May 15, 2015 and September 15, 2015 exceeds the statutory daily maximum of \$10,000/per day of violation and is therefore reduced to \$10,000 for that day. The total proposed liability falls within the maximum and minimum liability amounts.

#### **STEP 10 – Final Liability Amount (Violation No. 4)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$195,105**.

### **VIOLATION NO. 5: FAILURE TO IMPLEMENT PERIMETER SEDIMENT CONTROL BMPS (4 DAYS)**

#### **STEP 1 - Potential for Harm for Discharge Violations (Violation No. 5)**

Step 1 does not apply to Non-Discharge Violations.

#### **STEP 2 – Assessment for Discharge Violations (Violation No. 5)**

Step 2 does not apply to Non-Discharge Violations.

#### **STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 5)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

#### Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The failure to implement adequate perimeter sediment control BMPs poses a substantial potential for harm because it allows loose or eroded sediment from the Site to be transported through storm water or non-storm water runoff to receiving waters.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Moderate** because there was evidence that the



Discharger had attempted to implement perimeter sediment control BMPs; however gaps in perimeter protection, and unmaintained BMPs compromised the efficacy of these controls.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Moderate** Deviation from Requirement is 0.3 to 0.4. The middle of the range (0.35) was used for the Per Day Factor.

#### **STEP 4 – Adjustment Factors (Violation No. 5)**

There are three additional factors considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's Cleanup and Cooperation after the violation, and the Discharger's History of Violations.

#### 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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.3** for this violation because in December of 2014, the City had issued a Stop Work/Notice of Violation warning the Discharger that a discharge was "imminent" if the Discharger failed to implement adequate sediment and erosion controls. A reasonably prudent person would have heeded this warning and implemented BMPs to achieve BAT and BCT as required by the Permit. Yet, either intentionally or due to negligence, the Discharger did not adequately implement and maintain the additional Risk Level 2 requirements for perimeter control.

#### 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 was assigned a Cleanup and Cooperation multiplier of **1.5** because the Discharger, implemented, but did not adequately maintain the additional Risk Level 2 BMPs for perimeter controls over the course of several months.

#### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 5)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability  
Multiplier x Cleanup and Cooperation Multiplier x History of Violations  
Multiplier = Total Base Liability

December 2014 Violations

$$2 \times 0.35 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$10,010$$

May 2015 Violations

$$2 \times 0.35 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$13,650$$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 5)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 5)**

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

**STEP 8 – Economic Benefit (Violation No. 5)**

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 Discharger derived an economic benefit by not properly implementing the perimeter sediment control BMPs that are required. At a minimum, the Discharger should have maintained or repaired gaps in perimeter sediment control BMPs when identified. The estimated cost to maintain or repair gaps in perimeter sediment control BMPs is **\$3,100** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$2,175**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 5)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$40,000**.

#### Minimum Liability Amount

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  $(1.1 \times \$2,175) = \mathbf{\$2,393}$ .

The proposed liability falls within these maximum and minimum liability amounts.

#### **STEP 10 – Final Liability Amount (Violation No. 5)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$23,660**.

### **VIOLATION NO. 6: FAILURE TO IMPLEMENT EROSION CONTROL BMPS IN ACTIVE AREAS (12 DAYS)**

#### **STEP 1 - Potential for Harm for Discharge Violations (Violation No. 6)**

Step 1 does not apply to Non-Discharge Violations.

#### **STEP 2 – Assessment for Discharge Violations (Violation No. 6)**

Step 2 does not apply to Non-Discharge Violations.

#### **STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 6)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

#### Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The failure to implement the erosion and sediment control requirements for a Risk Level 2 construction site in active areas poses a substantial potential for harm because there is a higher risk of erosion which leads to additional sediment in storm water runoff to receiving waters. Sediment in receiving waters can reduce the sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, and transport construction related pollutants such as nutrients, metals, oils, and grease.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Major** because there was no evidence that the Discharger had adequately implemented, or was prepared to implement erosion control BMPs for active areas, thus rendering the requirement wholly ineffective.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Major** Deviation from Requirement is 0.4 to 0.7. The middle of the range (0.55) was used for the Per Day Factor.

#### **STEP 4 – Adjustment Factors (Violation No. 6)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations.

#### 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 intentional or negligent behavior. In December of 2014, the City had issued a Stop Work/Notice of Violation warning the Discharger that a discharge was "imminent" if the Discharger failed to implement adequate sediment and erosion controls. Yet, either intentionally or due to negligence, the Discharger did not adequately implement the additional Risk Level 2 erosion and sediment control requirements for active areas (such as roads, entrances and exits). In May 2015, the Discharger again failed to install sediment and erosion controls in active areas despite rainy weather and warnings from the San Diego Water Board staff that the site erosion and sediment controls in active areas were inadequate. A reasonably prudent person would have heeded numerous warnings and implemented BMPs to achieve BAT and BCT as required by the Permit.

#### 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. For the December 2014 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.1** because the Discharger failed to correct the violation within 72 hours of being notified or ignored recommended BMPs. For May 8, 2015, May 13-15, 2015, and September 15, 2015, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.5** because the Discharger did not adequately implement the additional Risk Level 2 sediment control BMPs in active areas over the course of several months despite repeated warnings from the San Diego Water Board and the City.

#### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 6)**

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

$$\begin{aligned} &\text{Days of Violation} \times \text{Per Day Factor} \times \text{Statutory Max} \times \text{Culpability} \\ &\text{Multiplier} \times \text{Cleanup and Cooperation Multiplier} \times \text{History of Violations} \\ &\text{Multiplier} = \text{Total Base Liability} \end{aligned}$$

December 2014 Violations

$$7 \times 0.55 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$55,055$$

May and September 2015 Violations

$$5 \times 0.55 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$53,625$$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 6)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 6)**

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

**STEP 8 – Economic Benefit (Violation No. 6)**

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 Discharger derived an economic benefit by not properly implementing the additional erosion control BMPs that are required on active areas for Risk Level 2 construction sites. At a minimum, the Discharger should have applied erosion control BMPs on active areas of the Site prior to the predicted storm events, and have BMPs available on site for deployment. The estimated cost to have materials available on site and provide erosion control BMPs for active areas on the Site is **\$8,500** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$5,966**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 6)**

The maximum and minimum amounts for each violation must be determined for

comparison to the amounts being proposed.

#### Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$120,000**.

#### Minimum Liability Amount

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  $(1.1 \times \$5,966) = \mathbf{\$6,563}$ .

The total base liability for May 8, 2015, May 13-15, 2015, and September 15, 2015 exceeds the statutory daily maximum of \$10,000/per day of violation and is therefore reduced to \$10,000 for these days. The total proposed liability falls within the maximum and minimum liability amounts.

#### **STEP 10 – Final Liability Amount (Violation No. 6)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$105,055**.

#### **Violation No. 7:**

#### **Failure to Apply Linear Sediment Controls (5 days)**

#### **STEP 1 - Potential for Harm for Discharge Violations (Violation No. 7)**

Step 1 does not apply to Non-Discharge Violations.

#### **STEP 2 – Assessment for Discharge Violations (Violation No. 7)**

Step 2 does not apply to Non-Discharge Violations.

#### **STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 7)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

#### Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The failure to implement the linear sediment control requirements for a Risk Level 2 construction site poses a substantial potential for harm because there is a higher risk of discharges of additional sediment from exposed slopes to receiving waters. Sediment in receiving waters can reduce the sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, and transport construction related pollutants

such as nutrients, metals, oils, and grease.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Major** because substantial discharges of sediment and sediment laden storm water indicate that the sediment control BMPs on slopes were rendered ineffective.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Major** Deviation from Requirement is 0.4 to 0.7. The middle of the range (0.55) was used for the Per Day Factor.

#### **STEP 4 – Adjustment Factors (Violation No. 7)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

#### 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 intentional or negligent behavior. The Discharger was given a multiplier value of a Culpability multiplier of **1.3** for this violation. In December of 2014, the City had issued a Stop Work/Notice of Violation warning the Discharger that a discharge was “imminent” if the Discharger failed to implement adequate sediment controls. Yet, either intentionally or due to negligence, the Discharger did not adequately implement the additional Risk Level 2 linear sediment control requirements for exposed slopes on the Site. In May 2015, the Discharger again failed to install sediment controls on exposed slopes despite rainy weather and warnings from the San Diego Water Board staff that the site lacked the appropriate linear sediment controls. A reasonably prudent person would have heeded numerous warnings and implemented BMPs to achieve BAT and BCT as required by the Permit.

#### 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. For December 15, 2014 and December 16, 2014, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.1** because the Discharger failed to correct the violation within 72 hours of being notified or ignored recommended BMPs. For May 8, 2015, May 13, 2015, and September 15, 2015, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.5** because

the Discharger did not adequately implement the additional Risk Level 2 sediment control BMPs for exposed slopes over the course of several months despite repeated warnings from the San Diego Water Board and the City.

#### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 7)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability  
Multiplier x Cleanup and Cooperation Multiplier x History of Violations  
Multiplier = Total Base Liability

December 2014 Violations  
 $2 \times 0.55 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$15,730$

May and September 2015 Violations  
 $3 \times 0.55 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$32,175$

#### **STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 7)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmi25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

#### **STEP 7 – Other Factors as Justice May Require (Violation No. 7)**

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

#### **STEP 8 – Economic Benefit (Violation No. 7)**

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 Discharger derived an economic benefit by not properly implementing the additional sediment control BMPs that are required on exposed slopes for Risk Level 2 construction sites. At a minimum, the



Discharger should have applied linear sediment control BMPs on exposed areas of the Site prior to the predicted storm events. The estimated cost to implement linear sediment control BMPs for exposed slopes on the Site is **\$1,000** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$700**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 7)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$50,000**.

Minimum Liability Amount

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  $(1.1 \times \$700) = \mathbf{\$770}$ .

The total base liability for May 8, 2015, May 13, 2015, and September 15, 2015 exceeds the statutory daily maximum of \$10,000/per day of violation and is therefore reduced to \$10,000 for these days. The total proposed liability falls within the maximum and minimum liability amounts.

**STEP 10 – Final Liability Amount (Violation No. 7)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is \$45,730.

**VIOLATION NO. 8:  
FAILURE TO MANAGE RUN-ON AND RUNOFF (2 days)**

**STEP 1 - Potential for Harm for Discharge Violations (Violation No. 8)**

Step 1 does not apply to Non-Discharge Violations.

**STEP 2 – Assessment for Discharge Violations (Violation No. 8)**

Step 2 does not apply to Non-Discharge Violations.

**STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 8)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

#### Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The failure to adequately control run-on, runoff within the Site, and runoff that discharged from the Site poses a substantial potential for harm because of the additional sediment that is potentially discharged into receiving waters. Sediment in receiving waters can reduce the sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, and transport construction related pollutants such as nutrients, metals, oils, and grease.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Major**. There is evidence that the Discharger’s run-on and run-off controls were rendered completely ineffective due to the large volume of sediment on paved roadways within and around the Site.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Major** Deviation from Requirement is 0.4 to 0.7. The middle of the range (0.55) was used for the Per Day Factor.

#### **STEP 4 – Adjustment Factors (Violation No. 8)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

#### 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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.3** for this violation because the City inspector notified the Discharger as early as December 2015 that BMPs were needed to manage runoff and runoff control. However, the Discharger, either intentionally or due to negligence, did not implement the run-on and runoff control requirements on the Site as evidenced by the repeated sediment discharges within and around the Site. A reasonably prudent person would have heeded numerous warnings and implemented BMPs to achieve BAT and BCT as required by the Permit.

#### 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 was assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to correct the violation within 72 hours of being notified or ignored recommended BMPs.

#### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 8)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

$$\text{Days of Violation} \times \text{Per Day Factor} \times \text{Statutory Max} \times \text{Culpability Multiplier} \\ \times \text{Cleanup and Cooperation Multiplier} \times \text{History of Violations Multiplier} = \\ \text{Total Base Liability}$$

#### May 2015 Violations

$$2 \times 0.55 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$15,730$$

#### **STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 8)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

#### **STEP 7 – Other Factors as Justice May Require (Violation No. 8)**

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

#### **STEP 8 – Economic Benefit (Violation No. 8)**

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 Discharger derived an economic benefit by not properly implementing the run-on and runoff control requirements. At a minimum, the Discharger should have implemented runoff controls within the Site in addition to implementing adequate perimeter sediment controls. The estimated cost to implement runoff controls within the Site is **\$600** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger

enjoyed an economic benefit of **\$420**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 8)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$20,000**.

Minimum Liability Amount

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  $(1.1 \times \$420) = \mathbf{\$462}$ .

The proposed liability falls within these maximum and minimum liability amounts.

**STEP 10 – Final Liability Amount (Violation No. 8)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$15,730**.

**VIOLATION NO. 9: FAILURE TO REMOVE SEDIMENT OR  
OTHER CONSTRUCTION MATERIALS FROM ROADS (10 days)**

**STEP 1 - Potential for Harm for Discharge Violations (Violation No. 9)**

Step 1 does not apply to Non-Discharge Violations.

**STEP 2 – Assessment for Discharge Violations (Violation No. 9)**

Step 2 does not apply to Non-Discharge Violations.

**STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 9)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The existence of sediment and/or construction materials and waste in the streets poses a substantial threat to receiving water beneficial uses when there are storm events because discharges of sediment to receiving waters can reduce the sunlight for aquatic plants, clog

fish gills, smother aquatic habitat and breeding areas, and transport construction related pollutants such as nutrients, metals, oils, and grease.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Major** because the large amount of sediment on the street indicates that the Discharger completely disregarded this requirement.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Major** Deviation from Requirement is 0.4 to 0.7. The middle of the range (0.55) was used for the Per Day Factor.

#### **STEP 4 – Adjustment Factors (Violation No. 9)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

#### 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 intentional or negligent behavior. The Discharger was given a Culpability multiplier of **1.3** for this violation because the City inspector notified the Discharger that street sweeping was required. However, the Discharger, either intentionally or due to negligence, did not sweep the streets. A reasonably prudent person would have heeded this warning and implemented BMPs to achieve BAT and BCT as required by the Permit.

#### 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. For the December 2014 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger did not sweep the sediment and construction materials within 72 hours after repeated notifications to do so despite warnings of an imminent rain storms and being put under Stop Work Notice. For the September 15, 2015 violations, the Discharger was assigned a Cleanup and Cooperation multiplier of **1.5** on September 15, 2015 because the Discharger had received repeated warnings about sediment in the streets from the San Diego Water Board and the City in the form of on-site verbal warnings, inspection reports, Stop Work Notices, Correct Work Notice, Notices of Violation, and Administrative Citations.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 9)**

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

$$\begin{aligned} &\text{Days of Violation} \times \text{Per Day Factor} \times \text{Statutory Max} \times \text{Culpability} \\ &\text{Multiplier} \times \text{Cleanup and Cooperation Multiplier} \times \text{History of Violations} \\ &\text{Multiplier} = \text{Total Base Liability} \end{aligned}$$

December 2014 Violations

$$9 \times 0.55 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$70,785$$

September 2015 Violations

$$1 \times 0.55 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$10,725$$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 9)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 9)**

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

**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 Discharger derived an economic benefit by removing the sediment and construction materials from the roadways. At a minimum, the Discharger should have swept the roadways. The estimated cost to implement the BMPs on the Site is **\$300** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$211**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 9)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$100,000**.

Minimum Liability Amount

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  $(1.1 \times \$1,985) =$  Therefore, the minimum liability is  $(1.1 \times \$211) =$  **\$232**.

The total base liability for September 15, 2015 exceeds the statutory daily maximum of \$10,000/per day of violation and is therefore reduced to \$10,000 for that day. The total proposed liability falls within the maximum and minimum liability amounts.

**STEP 10 – Final Liability Amount (Violation No. 9)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$80,785**.

**VIOLATION NO. 10:  
FAILURE TO PROTECT STORM DRAIN INLETS (2 days)**

**STEP 1 - Potential for Harm for Discharge Violations (Violation No. 10)**

Step 1 does not apply to Non-Discharge Violations.

**STEP 2 – Assessment for Discharge Violations (Violation No. 10)**

Step 2 does not apply to Non-Discharge Violations.

**STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 10)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. The failure to implement adequate storm drain inlet protections (such as sediment traps or gravel bags) poses a substantial potential for harm because pollutants in storm water and non-storm water discharges can flow unabated into the receiving water.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from requirement on December 8, 2014 is **Moderate** because the inlet was not being properly maintained as it needed to be cleaned. The deviation from the requirement on September 15, 2015 is **Major** because there was no storm drain inlet protection.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Moderate** Deviation from Requirement is 0.3 to 0.4. The middle of the range (0.35) was used for the Per Day Factor for December 8, 2014. The range of penalty factors for a **Moderate** Potential for Harm and a **Major** Deviation from Requirement is 0.4 to 0.7. The middle of the range (0.55) was used for the Per Day Factor on September 15, 2015.

#### **STEP 4 – Adjustment Factors (Violation No. 10)**

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

#### 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 intentional or negligent behavior. The Discharger was given a multiplier of **1.3** for this violation because the Discharger, either intentionally or due to negligence, did not protect and maintain some of the storm drain inlets on the Site. A reasonably prudent person would have implemented BMPs to achieve BAT and BCT as required by the Permit.

#### 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 was assigned a Cleanup and Cooperation multiplier of **1.0** for this violation on December 8, 2014 because the Discharger corrected the violations within 72 hours of being notified. The Discharger was assigned a Cleanup and Cooperation multiplier of **1.5** on September 15, 2015 because the Discharger had received repeated warnings from the San Diego Water Board over the course of several months.

#### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should



be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 10)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability  
Multiplier x Cleanup and Cooperation Multiplier x History of Violations  
Multiplier = Total Base Liability

December 2014 Violation

$1 \times 0.35 \times \$10,000 \times 1.3 \times 1.0 \times 1.0 = \$4,550$

September 2015 Violation

$1 \times 0.55 \times \$10,000 \times 1.3 \times 1.5 \times 1.0 = \$10,725$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 10)**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmi25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 10)**

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

**STEP 8 – Economic Benefit (Violation No. 10)**

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 Discharger derived an economic benefit by not protecting storm drain inlets as required. At a minimum, the Discharger should have installed storm drain inlet inserts to protect the storm drain inlets. The estimated cost to install storm drain inserts into the storm drain inlets is **\$600** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$420**. See Exhibit No. 28.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 10)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$20,000**.

Minimum Liability Amount

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  $(1.1 \times \$420) = \mathbf{\$462}$ .

The total base liability for September 15, 2015 exceeds the statutory daily maximum of \$10,000/per day of violation and is therefore reduced to \$10,000 for that day. The total proposed liability falls within the maximum and minimum liability amounts.

**STEP 10 – Final Liability Amount (Violation No. 10)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$14,550**.

**VIOLATION NO. 11:  
FAILURE TO CONTAIN AND SECURELY PROTECT  
STOCKPILED WASTE MATERIAL FROM WIND AND RAIN (1 day)**

**STEP 1 - Potential for Harm for Discharge Violations (Violation No. 11)**

Step 1 does not apply to Non-Discharge Violations.

**STEP 2 – Assessment for Discharge Violations (Violation No. 11)**

Step 2 does not apply to Non-Discharge Violations.

**STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 11)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Minor**. The stockpile that the Discharger failed to cover contained scrap lumber which poses a minor threat to beneficial uses because wood is less susceptible to discharges of pollutants.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Moderate** because there is evidence that the Discharger had attempted to cover other waste stockpiles at the Site.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of factors for a **Minor** potential for harm and a **Moderate** Deviation from Requirement determination is 0.2 to 0.3. The middle of the range (0.25) was used for the Per Day Factor.

#### **STEP 4 – Adjustment Factors (Violation No. 11)**

There are three additional factors that are considered for modification of the amount of the total base liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

#### 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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.3** for this violation because the Discharger had been warned by the San Diego Water Board on Dec. 15, 2014 that waste stockpiles must be securely protected at all times unless actively being used. Nevertheless, the Discharger, either intentionally or due to negligence, continued to leave waste stockpiles unprotected. A reasonably prudent person would have heeded this warning and implemented BMPs to achieve BAT and BCT as required by the Permit.

#### 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 was assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to correct the violation within 72 hours of being notified or ignored recommended BMPs.

#### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 11)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by

multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

$$\begin{aligned} & \text{Days of Violation} \times \text{Per Day Factor} \times \text{Statutory Max} \times \text{Culpability} \\ & \text{Multiplier} \times \text{Cleanup and Cooperation Multiplier} \times \text{History of Violations} \\ & \text{Multiplier} = \text{Total Base Liability} \end{aligned}$$

$$\begin{aligned} & \text{January 2015 Violation} \\ & 1 \times 0.25 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$3,575 \end{aligned}$$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 11)**

The Total Base Liability Amount may be adjusted to address the violator’s ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 11)**

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

**STEP 8 – Economic Benefit (Violation No. 11)**

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 Discharger derived an economic benefit by not properly protecting waste stockpiles as required. At a minimum, the Discharger should have covered and bermed the waste stockpiles. The estimated cost to cover and berm the waste stockpiles is **\$455** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$315**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 11)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$10,000**.

Minimum Liability Amount

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  $(1.1 \times \$315) = \$347$ .

The proposed liability falls within these maximum and minimum liability amounts.

**STEP 11 – Final Liability Amount (Violation No. 11)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$3,575**.

**VIOLATION NO. 12:  
FAILURE TO PROPERLY STORE CHEMICALS (7 days)**

**STEP 1 - Potential for Harm for Discharge Violations (Violation No. 12)**

Step 1 does not apply to Non-Discharge Violations.

**STEP 2 – Assessment for Discharge Violations (Violation No. 12)**

Step 2 does not apply to Non-Discharge Violations.

**STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 12)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is considered **Moderate**. Under the circumstances, the failure to have secondary containment of chemicals posed a substantial threat to beneficial uses of the receiving waters because of the nature of chemicals (asphaltic materials and diesel fuel) as well as the size of the containers (5 gallon drums).

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The deviation from the requirement is **Moderate** because the Discharger partially complied with the CGP by storing chemicals in water tight containers, thereby reducing the risk of a discharge.

Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a **Moderate** Potential for Harm and a **Moderate** Deviation from Requirement is 0.3 to

0.4. The middle of the range (0.35) was used for the Per Day Factor.

**STEP 4 – Adjustment Factors (Violation No. 12)**

There are three additional factors that are considered for modification of the amount of the total base liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

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 intentional or negligent behavior. The Discharger was given a multiplier value of **1.3** for this violation because the City inspector notified the Discharger that some chemicals lacked secondary containment on March 18, 2015. However, the Discharger, either intentionally or due to negligence, still had not provided secondary containment for the same stack of chemicals by March 24, 2015. A reasonably prudent person would have heeded this warning and implemented BMPs to achieve BAT and BCT as required by the Permit.

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 was assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to correct the violation within 72 hours of being notified.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 12)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

<p>Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability</p> <p><u>March 2015 Violations</u></p> <p>7 x 0.35 x \$10,000 x 1.3 x 1.1 x 1.0 = \$35,035</p>
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**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 12)**

The Total Base Liability Amount may be adjusted to address the violator’s ability to

pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 12)**

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

**STEP 8 – Economic Benefit (Violation No. 12)**

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 Discharger derived an economic benefit by not providing secondary containment as required. At a minimum, the Discharger should have installed secondary containment structures. The estimated cost to protect the chemicals and fuels is **\$3,213** based up costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **\$1,985**.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 12)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$70,000**.

Minimum Liability Amount

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  $(1.1 \times \$1,985) = \mathbf{\$2,184}$ .

The proposed liability falls within these maximum and minimum liability amounts.

**STEP 10 – Final Liability Amount (Violation No. 12)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$35,035**.

**VIOLATION NO. 13: FAILURE TO PREVENT DISCHARGE OF**

## CONCRETE WASTE TO THE GROUND (1 day)

### **STEP 1 - Potential for Harm for Discharge Violations (Violation No. 13)**

Step 1 does not apply to Non-Discharge Violations.

### **STEP 2 – Assessment for Discharge Violations (Violation No. 13)**

Step 2 does not apply to Non-Discharge Violations.

### **STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 13)**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

#### Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The potential for harm is considered to be **Minor**. While failure to ensure proper containment of the concrete washout area resulted in some discharge of cementitious material to the ground, in this case the discharge appears to be less than five gallons, and did not reach a storm drain or Encanto Channel.

#### Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). Here, the Deviation from Requirement is **Moderate**. Although the concrete washout area is covered with a plastic tarp, the soil surface in the immediate vicinity of the concrete washout is covered with dry cement indicates the requirement was partially compromised.

#### Calculating the Per Day Factor

Using Table 3 in the Enforcement Policy, the range of penalty factors for a Minor Potential for Harm and a Minor Deviation from Requirement is 0.2 to 0.3. The middle of the range (0.25) was used for the Per Day Factor.

### **STEP 4 – Adjustment Factors (Violation No. 13)**

There are three additional factors that are considered for modification of the amount of the total base liability: the Discharger’s Culpability, the Discharger’s efforts for Cleanup and Cooperation after the violation, and the Discharger’s History of Violations.

#### 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 intentional or negligent behavior. The Discharger was given a



multiplier value of **1.3** because the discharge did not appear to be accidental. The Discharger had received multiple violations from the City for cementitious discharges. Additionally, the tarp covering the concrete washout area is relatively clean and does not appear to be ripped, which suggests that the tarp may have been installed after the cementitious discharge. A reasonably prudent person would have properly implemented BMPs to achieve BAT and BCT as required by the Permit.

#### 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 was assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to correct the violation with 72 hours of being notified.

#### History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used. The Discharger was assigned a History of Violations multiplier of **1.0** because there is no history of construction storm water violations prior to this ACL.

**STEP 5 – Determination of Total Base Liability Amount (Violation No. 13)** The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

$$\begin{aligned} &\text{Days of Violation} \times \text{Per Day Factor} \times \text{Statutory Max} \times \text{Culpability} \\ &\text{Multiplier} \times \text{Cleanup and Cooperation Multiplier} \times \text{History of Violations} \\ &\text{Multiplier} = \text{Total Base Liability} \end{aligned}$$

$$\begin{aligned} &\text{March 2015 Violation} \\ &1 \times 0.25 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$3,575 \end{aligned}$$

**STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 13)** The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The circumstances in this matter do not warrant an adjustment under this step.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (<http://www.manta.com/c/mmj25wg/bca-development-inc>), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is \$10 to \$20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

**STEP 7 – Other Factors as Justice May Require (Violation No. 13)**

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

**STEP 8 – Economic Benefit (Violation No. 13)**

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 Discharger derived an economic benefit by not properly disposing of the concrete waste as required. The estimated of the Discharger's economic benefit is **\$378** based upon costs estimated by the San Diego Water Board.

**STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 13)**

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

**Maximum Liability Amount**

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **\$10,000**.

**Minimum Liability Amount**

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  $(1.1 \times \$378) = \mathbf{\$416}$ .

The proposed liability falls within these maximum and minimum liability amounts.

**STEP 11 – Final Liability Amount (Violation No. 13)**

Based on this analysis, the facts in the record, and consistent with the Enforcement Policy, the final liability amount is **\$3,575**.

**TOTAL ASSESSED LIABILITY**

The total assessed liability for all violations under ACL Order No. R9-2016-0064 is **\$603,232** as shown on the next page in Table No. 1.

**Table No. 1. Total Assessed Liability**

<b>Viol No.</b>	<b>Violation</b>	<b>Liability Per Day of Violation</b>	<b>Days of Violation Assessed</b>	<b>Liability Amount</b>	<b>Total Liability Per</b>
1	Discharges of sediment	\$4,433	4	\$17,732	
		\$6,045	2	\$12,090	
	<b>Total Violation 1</b>		<b>6</b>		<b>\$29,822</b>
2	Failure to protect material stockpiles.	\$5,005	7	\$35,035	
		\$6,825	1	\$ 6,825	
	<b>Total Violation 2</b>		<b>8</b>		<b>\$41,860</b>
3	Failure to protect against vehicle leaks.	\$3,500	1	\$3,550	
		\$5,250	1	\$5,250	
	<b>Total Violation 3</b>		<b>2</b>		<b>\$8,750</b>
4	Failure to protect against Erosion in inactive areas.	\$7,865	11	\$86,515	
		\$9,295	2	\$18,590	
	<i>(Liability per day is \$10,725; but Maximum is \$10,000 per day)</i>	\$10,000	9	\$90,000	
	<b>Total Violation 4</b>		<b>22</b>		<b>\$195,105</b>
5	Failure to implement adequate perimeter sediment controls.	\$5,005	2	\$10,010	
		\$6,825	2	\$13,650	
	<b>Total Violation 5</b>		<b>4</b>		<b>\$23,660</b>
6	Failure to protect against Erosion in active areas.	\$7,865	7	\$55,055	
	<i>(Liability per day is \$10,725; but Maximum is \$10,000 per day)</i>	\$10,000	5	\$50,000	
	<b>Total Violation 6</b>		<b>12</b>		<b>\$105,055</b>
7	Failure to implement adequate linear sediment controls.	\$7,865	2	\$15,730	
	<i>(Liability per day is \$10,725; but Maximum is \$10,000 per day)</i>	\$10,000	3	\$30,000	
	<b>Total Violation 7</b>		<b>5</b>		<b>\$45,730</b>
8	Failure to implement adequate run-on/runoff controls.	\$7,865	2	\$15,730	
	<b>Total Violation 8</b>		<b>2</b>		<b>\$15,730</b>
9	Failure to remove sediment from roadways.	\$7,865	9	\$70,785	
		\$10,000	1	\$10,000	
	<b>Total Violation 9</b>		<b>10</b>		<b>\$80,785</b>
10	Failure to protect storm drain inlets.	\$4,550	1	\$4,500	
	<i>(Liability per day is \$10,725; but Maximum is \$10,000 per day)</i>	\$10,000	1	\$10,000	
	<b>Total Violation 10</b>		<b>2</b>		<b>\$14,550</b>
11	Failure to protect waste stockpiles.	\$3,575	1	\$3,575	
	<b>Total Violation 11</b>		<b>1</b>		<b>\$3,575</b>
12	Failure to adequately store chemicals.	\$5,005	7	\$35,035	
	<b>Total Violation 12</b>		<b>7</b>		<b>\$35,035</b>
13	Failure to prevent concrete discharges to the ground.	\$3,575	1	\$3,575	
	<b>Total Violation 13</b>		<b>1</b>		<b>\$3,575</b>
<b>Total Assessed Liability</b>					<b>\$603,232</b>

**Table No. 2 (to Attachment 1)  
PENALTY CALCULATOR  
Tentative Order No. R9-2016-0064**

**Discharge Violation: Potential for Harm**

Violations	Harm/Potential Harm to Beneficial Uses [0 - 5]	Physical, Chemical, Biological or Thermal Characteristics [0 - 4]	Susceptibility to Cleanup or Abatement [0 or 1]	Total Potential for Harm [0 - 10]
<b>Violation 1 - Unauthorized Discharge of Sediment</b>				
	4	2	1	7

**Discharge Violation**

**Violation 1 - Unauthorized Discharge of Sediment**

	Total Potential for Harm [0 - 10]	Deviation from Requirement [minor, moderate, major]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/4/2014	7	major	0.31	1	\$10,000	1.3	1.1	1.0	\$4,433	\$4,433
12/12/2014	7	major	0.31	1	\$10,000	1.3	1.1	1.0	\$4,433	\$4,433
12/17/2014	7	major	0.31	1	\$10,000	1.3	1.1	1.0	\$4,433	\$4,433
12/31/2014	7	major	0.31	1	\$10,000	1.3	1.1	1.0	\$4,433	\$4,433
5/8/2015	7	major	0.31	1	\$10,000	1.3	1.5	1.0	\$6,045	\$6,045
9/15/2015	7	major	0.31	1	\$10,000	1.3	1.5	1.0	\$6,045	\$6,045
				<b>6</b>					<b>\$29,822</b>	<b>\$29,822</b>

**Non-Discharge Violations**

**Violation 2 - Failure to Implement Construction Material Stockpile BMPs**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/2/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
12/3/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
12/4/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
12/5/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
12/6/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
12/7/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
12/8/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
9/15/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.5	1.0	\$6,825	\$6,825
				<b>8</b>					<b>\$41,860</b>	<b>\$41,860</b>

Table 2 Penalty Calculator

**Violation 3 - Failure to Implement Vehicle Fluid Leak BMPs**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/15/2014	minor	major	0.35	1	\$10,000	1.0	1.0	1.0	\$3,500	\$3,500
5/13/2015	minor	major	0.35	1	\$10,000	1.0	1.5	1.0	\$5,250	\$5,250
				2					\$8,750	\$8,750

**Violation 4 - Failure to Implement Erosion Control BMPs in Inactive Areas**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/1/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/2/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/3/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/4/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/5/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/6/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/7/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/8/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/9/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/15/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/16/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
1/6/2015	moderate	major	0.55	1	\$10,000	1.3	1.3	1.0	\$9,295	\$9,295
1/14/2015	moderate	major	0.55	1	\$10,000	1.3	1.3	1.0	\$9,295	\$9,295
5/8/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/9/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/10/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/11/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/12/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/13/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/14/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/15/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
9/15/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
				22					\$201,630	\$195,105

**Violation 5 - Failure to Implement Perimeter Sediment Control BMPs**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/4/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
12/15/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
5/8/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.5	1.0	\$6,825	\$6,825
5/13/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.5	1.0	\$6,825	\$6,825
				4					\$23,660	\$23,660

Table 2 Penalty Calculator

Table 2 Penalty Calculator

**Violation 6 - Failure to Implement Erosion Control BMPs in Active Areas**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/1/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/2/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/3/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/4/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/8/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/15/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/16/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
5/8/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/13/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/14/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/15/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
9/15/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
				12					\$108,680	\$105,055

**Violation 7 - Failure to Apply Linear Sediment Controls**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/15/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/16/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
5/8/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
5/13/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
9/15/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
				5					\$47,905	\$45,730

**Violation 8 - Failure to Manage Run-on and Runoff**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
5/8/2015	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
5/13/2015	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
				2					\$15,730	\$15,730

Table 2 Penalty Calculator

Table 2 Penalty Calculator

**Violation 9 - Failure to Remove Sediment from Roads**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/2/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/3/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/4/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/5/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/6/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/7/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/8/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/9/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
12/16/2014	moderate	major	0.55	1	\$10,000	1.3	1.1	1.0	\$7,865	\$7,865
9/15/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
				10					\$81,510	\$80,785

**Violation 10 - Failure to Protect Storm Drain Inlets**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
12/8/2014	moderate	moderate	0.35	1	\$10,000	1.3	1.0	1.0	\$4,550	\$4,550
9/15/2015	moderate	major	0.55	1	\$10,000	1.3	1.5	1.0	\$10,725	\$10,000
				2					\$15,275	\$14,550

**Violation 11- Failure to Contain and Securely Protect Stockpiled Waste**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
1/14/2015	minor	moderate	0.25	1	\$10,000	1.3	1.1	1.0	\$3,575	\$3,575
				1					\$3,575	\$3,575

**Violation 12 - Failure to Properly Store Chemicals**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
3/18/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
3/19/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
3/20/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
3/21/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
3/22/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
3/23/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
3/24/2015	moderate	moderate	0.35	1	\$10,000	1.3	1.1	1.0	\$5,005	\$5,005
				7					\$35,035	\$35,035

Table 2 Penalty Calculator

**Violation 13 - Failure to Prevent Discharge of Concrete Waste to Ground**

	Potential for Harm minor, moderate, major	Deviation from Requirement [ minor, moderate, major ]	Total per Day	Days of Violation	Statutory Max per [WC § 13385]	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Liability Amount	Final Liability Amount
3/18/2015	minor	moderate	0.25	1	\$10,000	1.3	1.1	1.0	\$3,575	\$3,575
				1					\$3,575	\$3,575

Ability to Pay & Continue in Business	
[Yes, No, Partly, Unknown]	Other
Yes	N/A

Other Factors as Justice May Require	
Costs of Investigation & Enforcement	Other
N/A	N/A

Total Liability (Before Reduction for Statutory Max)	Final Total Liability
\$617,007	\$603,232

Total Liability (All liabilities plus staff costs)
N/A

Total Violation Days
82



## ATTACHMENT 2

### **EVIDENCE EXCLUDED AND TRANSCRIPT EXCERPTS STRICKEN FROM THE RECORD FOR ORDER NO. R9-2016-0064, ASSESSING ADMINISTRATIVE CIVIL LIABILITY AGAINST SAN ALTOS-LEMON GROVE, LLC,**

#### Photographs to be Removed from Prosecution Team's Hearing Presentation

Prosecution Team Exhibit 33, San Diego Water Board photographs, and specified Exhibit 40, City of Lemon Grove photographs, used in the Prosecution Team's hearing presentation, are excluded from the record for the reasons stated in the referenced finding numbers as follows:

- Exh. 33.D.2 IMG\_0362.jpg (Finding 31)
- Exh. 33.C.3 IMG\_0272.jpg (Finding 31)
- Exh. 33.C.5 IMG\_0274.jpg (Finding 31)
- Exh. 33.C.7 IMG\_5724.jpg (Finding 31)
- Exh. 33 IMG\_271.jpg (Finding 31) Two photos marked with same image number
- Exh. 40.F.5 IMG\_6842.jpg (Finding 30)
- Exh. 40.K.6 IMG\_6434.jpg (Finding 34)
- Exh. 40.D.2 IMG\_0252.jpg (Finding 34)
- Exh. 40.D.3 IMG\_0257.jpg (Finding 34)
- Exh. 40.D.4 IMG\_0260.jpg (Finding 34)
- Exh. 40.J.1 IMG\_6183.jpg (Finding 34)

The Prosecution Team is directed to remove the above excluded photographs from its March 9, 2016, hearing presentation and resubmit an electronic version of the presentation for the record within ten days of adoption of this Order.

#### Hearing Testimony/Discussion Excerpts Stricken from the Record

The following hearing testimony/discussion concerning the excluded photographs is stricken from the record; references are to the Reporter's Transcript (RT):

RT, 23:4-25 – 24:1; 32:9-19; 33:10-25 – 34:1-4; 35:16-23 37: 4-24; 45:10-25 – 46:1-16; 47: 4-13; and 78:15-25 – 79:1-9.