

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**

**SAN DIEGO REGION**

**ORDER NO. [REDACTED].**

**ADMINISTRATIVE CIVIL LIABILITY ORDER**

**IN THE MATTER OF**

**BALDWIN & SONS, INC. ET AL.**

**PORTOLA SOUTH CONSTRUCTION SITE**

This Order is issued to Sunranch Capital Partners, LLC and SRC-PH Investments, LLC (Dischargers) pursuant to Water Code section 13385, which authorizes imposition of Administrative Civil Liability. The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board or Board), having held a public hearing on November 9 and 10, 2021, and again on February 9, 2022, to hear evidence and comments on the allegations contained in Complaint No. R9-2020-0006, and having considered and deliberated on the evidence received in the public hearing, in briefing, and in the record, and having considered all comments received, orders Dischargers to pay civil liability in the amount of **\$247,074.82** and finds as follows:

**BACKGROUND**

1. On September 2, 2009, the Board adopted the Construction General Storm Water Permit (Permit). This Permit became effective July 1, 2010, and was amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ. This 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.” (Permit, § 1.A.2.) The Permit requires implementation of best management practices (BMPs) that achieve Best Available Technology Economically Achievable (BAT) and/or Best Conventional Pollutant Control Technology (BCT).
2. The Portola South project site (Portola South or Project) is also known as tentative tract no. 15353. The Project was considered a Risk Level 2 project. This determination was based on factors including project duration, location, proximity to impaired receiving water bodies, soil conditions, and the scheduled construction taking place during the rainy season. (PT Ex. 5, pp. 16-17.)
3. The Project is within the upper Aliso Creek Watershed of the San Juan Hydrologic Unit. Runoff from the Site discharges into Aliso Creek. (Dischargers’ Ex. 1, p. ix.)
4. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for Aliso Creek and its tributaries:
  1. Agricultural Supply (AGR);
  2. Contact Water Recreation (REC-1);
  3. Non-Contact Water Recreation (REC-2);
  4. Warm Freshwater Habitat (WARM); and

5. Wildlife Habitat (WILD).

5. The Project consists of an approximately 95-acre residential construction project located at the intersection of Glenn Ranch Road and Saddleback Ranch Road in the City of Lake Forest, County of Orange, California. (Opposition Br., p. 11.)
6. Sunranch Capital Partners, LLC (Sunranch) acquired the Portola South property in or about July 2010. (PT Ex. 182; Declaration of Randall Bone, ¶¶ 4-6.)
7. Sunranch continued to maintain sole ownership of the Portola South property until on or about July 29, 2015, when Sunranch conveyed ownership of the Portola South property to its wholly-owned subsidiary, SRC-PH Investments, LLC. (PT Ex. 184; Declaration of Randall Bone, ¶¶ 7-8.)
8. On or about November 12, 2015, SRC-PH Investments conveyed ownership of approximately 95.3 acres of the Project to a third-party purchaser – LS-OC Portola, LLC. (PT Ex. 185; Declaration of Randall Bone, ¶ 9.) On or about March 11, 2016, SRC-PH Investments transferred its ownership interest in a 5-acre park on the Project site to the City of Lake Forest. (Declaration of Randall Bone, ¶ 10.) After these transfers, SRC-PH Investments’ ownership interest in the Portola South property was limited to approximately 3 acres. (Declaration of Randall Bone, ¶ 10.)
9. Sunrise Pacific Construction, Inc. (Sunrise Pacific) served as the general contractor for the construction and grading activities on the Project from the commencement of grading activities in July 2015 until on or about August 12, 2016. (Declaration of Shawn Baldwin, ¶ 4.)
10. A Project BMP Manual was attached to subcontractor contracts and addressed the identities and contact information for the site superintendent and BMP Compliance Officer, included a section devoted exclusively to the topic of “Daily Inspection and over site [sic] to assure project BMP Compliance,” which explained the respective duties and responsibilities of the Project QSP (Mr. Cameron Mann), as well as the established procedures for inspection and site monitoring, including monitoring requirements related to the following: weekly inspections, pre-rain inspections (including the use of Rain Event Action Plans [“REAPs”]), extended rain event inspections, post-rain inspections, and quarterly inspections. (Dischargers’ Ex. 9, pp. 9, 36-47.) Further, the Project BMP Manual provided a detailed explanation regarding the purpose and use of REAPs in relation to the preparations for forecasted rain events. (Dischargers’ Ex. 9, p. 43.)
11. Varner Construction, Inc. (Varner) was the subcontractor which contracted to perform grading of the site, as well as all related BMP and erosion control work as specified on the grading plans. (Dischargers’ Ex. 9, pp. 11-12.) The Varner Contract included the Project BMP Manual, and required that Varner perform “[a]ll BMP & erosion control as stated on the rough grading plan related to your scope of work.” (Dischargers’ Ex. 9, pp. 11-12.) Varner’s scope of work was attached to the Varner Contract and included specifically delineated tasks related to “Temporary Erosion Control” and also included specific budgeted amounts for “Erosion Control During Rough Grading” and “Erosion Control Maintenance During Rough Grading.” (Dischargers’ Ex. 9, p. 32.)
12. Tom Bistline Construction, Inc. (Bistline) contracted to perform all other erosion control and BMP work. Bistline entered into Subcontract Agreement No. S-117 with Sunrise Pacific as

the Portola South general contractor, with a detailed scope work to “Perform all Portola South – Erosion Control and BMP work.” (Dischargers’ Ex. 12.) After change order authorizations, Bistline was paid in excess of \$600,000 to perform erosion control and BMP work on the Project site. (Dischargers’ Exs. 13-17.)

### CHRONOLOGY

13. On or about October 2, 2014, Sunranch, as the property owner of the Portola South Project, submitted a Notice of Intent for the Project. (PT Ex. 6.)
14. On or about June 22, 2015, the City of Lake Forest issued Grading Permit No. GRAD-06-15-158678 to Sunranch for the Portola South project. (Dischargers’ Ex. 7.) Construction activities on site commenced in or about July 2015.
15. On July 15, 2015, Amendment No. 2 to the Project’s Stormwater Pollution Prevention Plan (SWPPP), originally dated September 20, 2014, was completed. (PT Ex. 326.) The Project’s SWPPP identifies the Project as a Risk Level 2 project based, in part, upon an estimated construction schedule that specified construction taking place during the rainy season (December 1 through March 31). (PT Ex. 5, p. 17.)
16. The Project Qualified SWPPP Practitioner (QSP), Cameron Mann, issued a REAP on September 14, 2015, for a forecasted rain event on September 15, 2015. (PT Ex. No. 229, pp. 43-46.)
17. On September 14, 2015, the day before the first rain event, Mr. Dela Cruz, the City’s designated inspector performed a “pre-storm” inspection of the Project site and prepared a Water Quality Program Construction Site Inspection Form (“Inspection Report”) based upon that inspection. The Inspection Report stated that erosion and sediment controls had been implemented and installed; the site entrances and exits had been adequately protected; containers for construction waste and debris were being utilized and were adequate; there were “no potential water quality problems” identified on site; and there were no “discharges or spills of oil or toxic/hazardous materials.” (PT Ex. 92, pp.39-40.) Further, the Inspection Report noted there were no outstanding noted deficiencies in the site. (PT Ex. 92, p. 40.)
18. The first of four rain events took place on September 15, 2015. (See PT Ex. 347.)
19. At the time of the initial rainfall event on September 15, 2015, the Project site was approximately 15% graded, and the balance of the site was undisturbed by construction activities. (PT Ex. 92, p. 39; Transcript of Deposition of John Dela Cruz (Dela Cruz), Vol. 2, p. 303:7-18.)
20. On September 15, 2015, Mr. Dela Cruz visited the site during rainfall. (PT Ex. 92, p. 37.) In the Inspection Report he prepared on September 15, Mr. Dela Cruz noted that he did not take photographs during the September 15 visit, but he did note that both erosion and sediment controls had been implemented and maintained, and that no potential water quality issues were identified on the site. (PT Ex. 92, pp. 37-38.) Mr. Dela Cruz testified that he recalled this September storm event, and that he did not observe any sediment discharge from the Project site as a result of this rain event. (Dela Cruz, Vol. 1, p. 178:17-22; Dela Cruz, Vol. 2, p. 311:5-14.)

21. By October 6, 2015, the percentage of the Project site disturbed by grading activities increased from approximately 15% to 50%. (Dela Cruz, Vol. 2, pp. 320:13-321:10.) Further, between October 6, 2015, and October 12, 2015, the percentage of the site disturbed by grading activities increased from 50% to 70%. (Dela Cruz, Vol 2, pp. 328:25-329:13.)
22. It was during this intensive period of mass grading activities on the Project site that the City inspector noted for the first time, on October 6, 2015, a concern regarding the presence of oil/leaking fluids under equipment in soil. (Dela Cruz, Vol. 2, pp. 325:23-326:18.) One week later, the City inspector's follow-up Inspection Report, dated October 12, 2015, noted the fluid leaks under equipment had been cleaned up and no further concern was noted. (Dela Cruz, Vol. 2, pp. 331:18-332:18.) According to Mr. Dela Cruz, the October 6, 2015, Inspection Report was the one and only Inspection Report in which he noted any observations of leaking vehicle fluids from the Summer of 2015 through the end of December 2015. (Dela Cruz, Vol. 2, pp. 348:19-349:1.)
23. On October 6, 2015, the City of Lake Forest through its representative Peter Meier issued Citation No. 2221 for the Portola South project imposing a \$1,000.00 fine for alleged violations on during the September 15, 2015 rainfall event. Citation No. 2221 was issued for a failure to implement BMPs at the Project site on September 14 and September 15, 2015. (PT Ex. No. 30.) However, as described in Paragraph 17 above, Mr. Dela Cruz had not identified a single concern regarding stormwater management issues in his "pre-storm" inspection of September 14, 2015, and he noted no sediment discharge from the site as a result of his post-storm inspection on September 16, 2015. Further, Mr. Meier, who issued the citation, gave conflicting deposition testimony regarding whether this Citation related to adjacent Portola Northwest project rather than the Portola South. (Transcript of Deposition of Peter Meier (Meier), Vol. 1, pp. 81:23-82:2.)
24. Three days after the initial Citation was issued, on October 9, 2015, the City of Lake Forest issued Citation No. 2240 for the Portola South project imposing a fine of \$500.00. Citation No. 2240 was issued for BMP violations at the Project site on October 7, 2015. (PT Ex. 34.) Among the "conditions observed" were "equipment drips and leaks, drips and leaks at the above ground fuel storage tank, improper storage of hazardous materials including oil, coolant and oil filters." (PT Ex. 34.) This citation imposed a fine of \$500 and required the violations must be corrected by October 16, 2015.
25. The City inspector – Mr. Dela Cruz – conducted a follow-up inspection October 12, 2015 and noted the fluid leaks under equipment had been cleaned up and no further concern was noted. (Dela Cruz, Vol. 2, pp. 331:18-332:18.) Further, as confirmed by Mr. Dela Cruz, following this October 2015 observation regarding vehicle fluids, there were no subsequent observations of similar conditions through December 2015. (Dela Cruz, Vol. 2, pp. 348:19-349:1.)
26. The City of Lake Forest did not produce any Water Quality Inspection Reports for the period of October 26, 2015 through December 18, 2015. The second rain event took place on December 22, 2015. (PT Ex. No. 170.)
27. The "post-storm" inspection report prepared by Mr. Dela Cruz on December 28, following the December 22-23, 2015, rain event, specifically noted there was no evidence of "sediment discharge" in Item 4 of the Inspection Report. (PT Ex. 92, p. 15.) The Inspection Report also noted no "water quality problems" and no "discharges" of oil or other hazardous material as a

result of the rain. (PT Ex. 92, p. 15.) In addition, the only erosion noted was erosion on-site in grading areas. (PT Ex. 92, p. 14.) Finally, none of the photos available from this period depict any evidence of discharge of sediment off site as a result of this rain event. (See PT Exs. 77-84.)

28. On December 31, 2015, Mr. Cameron Mann (Project QSP) sent an email to Varner informing Varner of the forecasted rain event for the upcoming week and requesting the following: “[p]lease utilize the BMP map (given to you and Steve V. on 12/30/15 at 11 a.m.) and all the necessary earth berms and other BMP’s drawn for rain water management practices to manage rain runoff. In addition, make sure you use your best judgment for adding any other BMP’s to protect the grading ops work.” (PT Ex. 229, p. 16.) In addition, a REAP was issued by Mr. Mann on January 4, 2016. (PT Ex. 229, pp. 12-15.) The REAP specifically identified actions to be taken before the expected rain event, which is noted as a 100% chance of rain on January 5, 2016 (PT Ex. 229, p. 12.) The REAP was signed by Mr. Mann on January 4, 2016, and was distributed by Mr. Mann to Bistline, Varner, and other involved subcontractors on the same date. (PT Ex. 229, p. 15.)
29. Mr. Dela Cruz performed a “pre-storm” inspection and prepared an Inspection Report on January 4, 2016 because of the rain event forecasted for January 5, 2016. (PT Ex. 92, pp. 10-11; Dela Cruz, Vol 2, p. 350:21-24.) During this “pre-storm” event, Mr. Dela Cruz specifically noted no observations of spills or leaks of fluids, oils or toxins from any equipment on to soil. (Dela Cruz, Vol. 2, p. 351:7-13.) Mr. Dela Cruz also noted in his Inspection Report that “BMPs were upgraded and maintenance along the perimeter of the site in preparation for the forecasted rain event.” (*Id.*, pp. 351:14-353:17.)
30. The third and fourth rain events took place on January 5 and 6, 2016. (PT Ex. No. 170.)
31. Immediately following the January 5-6, 2016, storm, the City inspector – John Dela Cruz – observed subcontractor representatives from Bistline on the Project site “repairing, installing and maintaining BMPs after the storm events.” (PT Ex. 92, pp. 8-9; Dela Cruz, Vol. 2, p. 358:14-24.) In addition, Mr. Dela Cruz noted that these efforts helped “stabilize the area” immediately following the storm event. (Dela Cruz, Vol 2, p. 359:6-13.)
32. Regional Board staff visited the Project site for the first time on January 19, 2016. (Deposition Transcript of Erica Ryan, Vol. 2, pp. 27:19-25, 28:1-7.)
33. On January 21, 2016, the City issued Citation No. 2258 to the Project, noting BMP violations that took place on January 5, 2016. (PT Ex. 92, p. 5.) The City also issued a Stop Work Order. (PT Ex. 106.)
34. In the January/February 2016 time frame, Mr. Dela Cruz observed further corrective measure work being performed by Varner and Bistline. (Dela Cruz, Vol. 1, p. 139:6-21.) More specifically, Mr. Dela Cruz observed Varner moving ponded water around, trying to “heal up” saturated soil, and building berms. (Dela Cruz, Vol. 1, pp. 139:22-140:6.) During this period, Mr. Dela Cruz also observed Bistline pumping water, installing silt fence, and installing waddles. (Dela Cruz, Vol. 1, p. 140:7-11.) Mr. Dela Cruz personally observed the corrective measure work being performed over 2-3 months, and he noted that “there were people working on the site every day. They were making progress every day.” (Dela Cruz, Vol. 1, pp.146:7-19; and 149:9-150:6.)

35. In efforts to improve stormwater management, changes were made to the Portola South construction team, including terminating the superintendent at the time of the violations and terminating the subcontractor responsible for stormwater BMP implementation and grading (Varner). In addition, Dischargers hired a new grading subcontractor, increased Bistline's scope of work significantly to perform additional erosion control work, and hired an additional subcontractor, So. Cal Sandbags, to perform erosion control and BMP implementation. (Dischargers' Exs. 24, 25, 18-22; Jose Capati Declaration, ¶¶ 6, 9.)
36. On or about April 14, 2016, the City conditionally lifted the Stop Work Order, permitting the commencement of certain grading activities. (Dischargers' Ex. No. 148; PT Ex. 199.)
37. On May 23, 2016, the Regional Water Board issued Notice of Violation (NOV) No. R9-2016-0124 to Sunranch and "Baldwin & Sons" regarding the Portola South project.
38. On January 10, 2020, the Regional Water Board issued its Administrative Civil Liability Complaint, imposing a \$9,115,932 penalty for violations of the General Permit and Clean Water Act.

#### **PROCEDURAL AND EVIDENTIARY ISSUES**

39. In preparation for the hearing, Parties exchanged evidence, submitted legal argument, rebuttal evidence and argument, and procedural and evidentiary objections and responses. The Board ruled on these evidentiary objections in its "Revised Rulings, Preliminary Rulings, and Order on Evidentiary Objections" dated August 4, 2021 (Revised September 3, 2021) (Evidentiary Ruling). Final rulings on pending evidentiary objections and other objections are addressed herein.
40. Except as noted herein, the Board affirms its prehearing rulings. The Prosecution Team had raised evidentiary objections related to Dischargers' expert reports (Dischargers' Exs. 1, 2, 5.) The Board overruled these objections in its Evidentiary Ruling. Thus, these exhibits, and all of Dischargers' remaining exhibits, are in evidence and may be relied upon in this Order.
41. Dischargers submitted objections to the ACL Technical Analysis on numerous grounds. In response, the Prosecution Team conceded "the Technical Analysis is not evidence" and the Board has ruled the ACL Technical Analysis is not in evidence. (Evidentiary Ruling, p. 11.) Therefore, the ACL Technical Analysis is not considered as an evidentiary document, and it does not provide any evidentiary basis for this Order.
42. The Board sustains the Discharger's objections to Prosecution Team Exhibit Nos. 7- 20, 22, 24-25, 27-28, 31, 33, 35, 37, 41-44, 47, 49, 52-54, 56, 58-59, 61, 63-66, 69, 71-72, 74-75, 77, 79, 81-82, 85-86, 88, 90-91, 93, 95, 97, 99, 103, 107, 109-111, 113, 115-122, 124, 126-130, 132-149, 151-153, 156-158, and 160-168 (City of Lake Forest photographs) on the grounds that the Prosecution Team has failed to provide adequate foundation. Accordingly, these exhibits do not provide any evidentiary support for this Order, and the Penalty Calculation and Total Final Liability *does not* include any violation days that were solely supported by City of Lake Forest photographs.<sup>1</sup>

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<sup>1</sup> The Board's evidentiary ruling regarding the inadmissibility of the City of Lake Forest Photographs resulted in fewer violation days than originally alleged, and thus this Order reflects

43. The Board also sustains the Discharger's objections to Prosecution Team Exhibit Nos. 171, 172, 173, 188, 253, 259, 277, 278, 280, 281, 283, 285, 292, 307, 324, 325, and 448.
44. The Board rules that testimony provided by Water Board staff members, Frank Melbourn and Chiara Clemente is not expert testimony. To the extent Frank Melbourn and Chiara Clemente offered opinion in place of expert opinion, such testimony is stricken from the record.
45. The Board rules that Brian Elder lacks the requisite experience and qualifications to qualify as an expert relating to stormwater discharge calculations. Even if Mr. Elder were considered an expert, the Board determined that evidence submitted by Dischargers related to stormwater discharges (Dischargers' Ex. 5, the Tory Walker Report) from the Project to be the best available expert evidence based upon the superior methodologies utilized.
46. The Board has also considered the Dischargers' criticisms relative to Mr. Elder's Economic Benefit Analysis. Specifically, the analysis fails to identify any evidentiary support for its assumptions, fails to consider all relevant evidence, and contains erroneous assumptions unsupported by the evidence. For these reasons, the PT has failed to prove any economic benefit accrued to the Dischargers as a result of any of the Violations.

#### VIOLATIONS

47. **Violation No. 1:** Dischargers 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 Prohibitions; and the Clean Water Act, section 1311 by discharging sediment-laden stormwater from the Project site into Aliso Creek on four days: September 15, 2015, December 22, 2015, January 5, 2016, and January 6, 2015. Evidence of an unauthorized discharge on September 15, 2015, is based on Bistline Photographs from September 15, 2015 (PT Ex. No. 347). Evidence of an unauthorized discharge on December 22, 2015, is based on NOAA Weather Station rainfall reports (PT Ex. No. 170), post-rain event reporting (PT Ex. No. 367, p. 5), water sampling results (PT Ex. No. 371), Sunranch photographs (PT Ex. No. 78), and Bistline Photographs (PT Ex. No. 368). Evidence of an unauthorized discharge on January 5, 2016, is based on NOAA Weather Station rainfall reports (PT Ex. No. 170), Dischargers' visual inspection field log sheet (PT Ex. No. 367, p. 3), and Bistline Photographs (PT Ex. Nos. 346 and 359). Evidence of an unauthorized discharge on January 6, 2015, is based on NOAA Weather Station rainfall reports (PT Ex. No. 170) and Discharger Photographs (PT Ex. No. 89). The total combined amount of stormwater discharged from the Project during the four rain events is determined to be 1,937,147 gallons. This is based on Dischargers' Exhibit No. 5, which is an expert-prepared report prepared by Tory Walker of Tory Walker Engineering. The Prosecution Team presented its own discharge volume calculation, prepared by Mr. Brian Elder, which concluded over 7,000,000 gallons were discharged from the Project site during the four discharge events. Dischargers submitted evidence including expert reports, expert testimony, and briefing explaining the significant flaws in Mr. Elder's analysis, and offered their expert reports and testimony in support of their more reliable and technically sound approach to estimating the discharge volumes from the four rain events. The Prosecution Team

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even fewer violation days than identified on the Dischargers' previously submitted Penalty Calculation (Dischargers' Ex. 149).

has failed to adequately rebut and respond to Discharger's criticisms and has failed to demonstrate why the expert-evidence presented by Dischargers should not control.

48. **Violation No. 2:** Section B.1.b. in Attachment D of the General Permit requires dischargers to “cover and berm loose stockpiled construction materials that are not actively being used (i.e. soil, spoils, aggregate, fly-ash, stucco, hydrated lime, etc.).” The Prosecution Team claims the Dischargers violated this requirement on 53 days. However, expert evidence submitted by Dischargers demonstrates evidence submitted by the Water Board for 3 of those days *does not* reflect evidence any violation. (Dischargers’ Ex. No. 1, pp. 52-53.) In addition, any alleged violation day which the Prosecution Team relied solely on City Photographs lacks any evidentiary basis and is therefore not supported by the evidence. Dischargers violated this requirement on the following 7 days: December 18, 2015 (Dischargers’ Photographs, PT Ex. No. 73); December 22, 2015 (Dischargers’ Photographs, PT Ex. No. 78); January 19, 2016 (Water Board Photographs, PT Ex. No. 102); January 20, 2016 (Dischargers’ Photographs, PT Ex. No. 104); January 25, 2016 (Dischargers’ Photographs, PT Ex. No. 112); March 14, 2016 (Water Board Photographs, PT Ex. No. 150); March 21, 2016 (Water Board Photographs, PT Ex. No. 159).
49. **Violation No. 3:** Section B.3.a. in Attachment D of the General Permit requires dischargers “[p]revent oil, grease, or fuel to leak in to the ground, storm drains or surface waters” and “[c]lean leaks immediately and dispos[e] of leaked materials properly.” The Prosecution Team argues the Dischargers violated this requirement on the following 15 days: August 20, 2015; August 31, 2015; September 17, 2015; October 7, 2015; October 8, 2015; November 3, 2015; November 23, 2015; November 30, 2015; December 9, 2015; December 10, 2015; January 5, 2016; January 7, 2016; January 19, 2016; February 8, 2016, and March 2, 2016. To the extent the Prosecution Team relies on City Photographs as evidence of a violation, those alleged violations lack any evidentiary support. Accordingly, Dischargers violated this requirement by failing to prevent oil, grease, or fuel to leak into the ground on the following 10 days: October 8, 2015 (Dischargers Photographs, PT Ex. No. 32); November 3, 2015 (Dischargers Photographs, PT Ex. No. 46); November 23, 2015 (Dischargers Photographs, PT Ex. No. 60); November 30, 2015 (Dischargers Photographs, PT Ex. No. 62); December 9, 2015 (Dischargers Photographs, PT Ex. No. 67, p. 2); December 10, 2015 (Dischargers Photographs, PT Ex. No. 68, p. 3); January 5, 2016 (Dischargers’ Ex. 1, Rincon Report); January 7, 2016 (Visual Inspection Field Log Sheet, PT Ex. No. 367); January 19, 2016 (Water Board Photographs, PT Ex. No. 102, p. 117 [*photograph 20160119\_131301 only*]); and February 8, 2016 (Dischargers’ Ex. 1, Rincon Report).
50. **Violation No. 4:** Section D.2. in Attachment D to the General Permit requires dischargers to “provide effective soil cover for inactive [footnote omitted] areas and all finished slopes, open space, utility backfill, and completed lots.” “Inactive areas of construction are areas of construction activity that has been disturbed and are not scheduled to be re-disturbed for at least 14 days.” (Permit, § D.2.) The Prosecution Team alleges Dischargers violated this requirement on 35 days. Evidence demonstrates the construction area was active on the following three days: October 1, 2015; October 9, 2015; and October 20, 2015. (Dischargers Ex. No. 1, p. 62.) Evidence demonstrates the construction area did not constitute a “disturbed” area on the following 12 days: September 17, 2015; October 13, 2015; November 19, 2015; December 8, 2015; December 23, 2015; January 4, 2016; January 13, 2016; January 14, 2016;

January 20, 2016; January 21, 2016; January 26, 2016; and January 29, 2016. (Dischargers Ex. No. 1, p. 62.) Further, based on this Board's ruling that the Prosecution Team failed to provide a sufficient evidentiary basis to rely on photographs produced by the City of Lake Forest, the evidence demonstrates Dischargers violated this requirement by failing to implement soil cover for inactive areas on the following 8 days: October 6, 2015 (City Inspection Report, PT Ex. No. 92, p. 27); October 7, 2015 (Dischargers' Ex. 1, Rincon Report); October 12, 2015 (City Inspection Report, PT Ex. No. 92, p. 29); October 19, 2015 (City Inspection Report, PT Ex. No. 92, p. 33); October 26, 2015 (City Inspection Report, PT Ex. No. 92, p. 31); January 19, 2016 (Dischargers' Ex. 1, Rincon Report); March 14, 2016 (Dischargers' Ex. 1, Rincon Report); and March 21, 2016 (Dischargers' Ex. 1, Rincon Report).

51. **Violation No. 5:** Section E.3. in Attachment D to the General Permit requires dischargers to “implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active [footnote omitted] construction.” “Active areas of construction are areas undergoing land surface disturbance. This includes construction activity during the preliminary stage, mass grading stage, streets and utilities stage and the vertical construction stage.” The Prosecution Team claims the Dischargers violated this requirement on 12 days. However, expert evidence submitted by Dischargers demonstrates sediment controls *were* in place for 3 of those 12 days. (Dischargers' Ex. No. 1, pp. 69-70.) In addition, any alleged violation day which the Prosecution Team relied solely on City Photographs lacks any evidentiary basis and support. Therefore, the Dischargers violated this requirement on the following 8 days: September 15, 2015 (Dischargers' Ex. 1, Rincon Report); October 6, 2015 (Construction Site Inspection Form, PT Ex. No. 92, p. 27); October 12, 2015 (Construction Site Inspection Form, PT Ex. No. 92, p. 29); October 19, 2015 (Construction Site Inspection Form, PT Ex. No. 92, p. 33); October 26, 2015 (Construction Site Inspection Form, PT Ex. No. 92, p. 31); December 10, 2015 (Dischargers Photographs, PT Ex. No. 68); December 22, 2015 (Dischargers Photographs, PT Ex. No. 78); and March 14, 2016 (Water Board Photographs, PT Ex. No. 150).
52. **Violation No. 6:** Section E.4. in Attachment D to the General Permit requires dischargers to “apply linear sediment controls along the toe of the slope, face of the slope, and at the grade breaks of exposed slopes to comply with sheet flow lengths [footnote] in accordance with Table 1.” The Prosecution Team claims the Dischargers violated this requirement on 53 days. However, expert evidence submitted by Dischargers demonstrates evidence submitted by the Water Board for 15 of those days *do not* evidence any violation. (Dischargers' Ex. No. 1, pp. 81-82.) In addition, any alleged violation day which the Prosecution Team relied solely on City Photographs lacks any evidentiary basis and support. Therefore, the Dischargers violated this requirement on the following 11 days: December 10, 2015 (Dischargers Photographs, PT Ex. No. 68); December 22, 2015 (Construction Site Inspection Form, PT Ex. No. 92, p. 16; Dischargers Photographs, PT Ex. No. 78); January 5, 2016 (Dischargers' Ex. 1, Rincon Report); January 11, 2016 (Construction Site Inspection Form, PT Ex. No. 92, p. 6); January 13, 2016 (Dischargers Photographs, PT Ex. No. 96); January 14, 2016 (Dischargers Photographs, PT Ex. No. 98); January 20, 2016 (Dischargers Photographs, PT Ex. No. 104); January 21, 2016 (Dischargers Photographs, PT Ex. No. 108); January 26, 2016 (Dischargers Photographs, PT Ex. No. 114); February 3, 2016 (Dischargers Photographs, PT Ex. No. 123); and March 14, 2016 (Water Board Photographs, PT Ex. No. 150).

53. **Violation No. 7:** Section B.1.c. in Attachment D to the General Permit requires 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).” Any alleged violation day which the Prosecution Team relied solely on City Photographs lacks any evidentiary basis and support. Therefore, based on evidence in the record, Dischargers were in violation of this requirement on the following 8 days: October 7, 2015 (Dischargers’ Ex. 1, Rincon Report ); November 3, 2015 (Dischargers Photographs, PT Ex. No. 46); November 23, 2015 (Dischargers Photographs, PT Ex. No. 60); November 30, 2015 (Dischargers Photographs, PT Ex. No. 62); December 10, 2015 (Dischargers Photographs, PT Ex. No. 68); January 19, 2016 (Dischargers’ Ex. 1, Rincon Report ); March 14, 2016 (Dischargers’ Ex. 1, Rincon Report); and March 21, 2016 (Dischargers’ Ex. 1, Rincon Report).
54. **Violation No. 8:** Section B.2.i in Attachment D to the General Permit requires 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.” Any alleged violation day which the Prosecution Team relied solely on City Photographs lacks any evidentiary basis and support. Therefore, based on evidence in the record, Dischargers were in violation of this requirement on the following 3 days: January 5, 2016 (Dischargers’ Ex. 1, Rincon Report); February 8, 2016 (City Cease and Desist Order, PT Ex. No. 131 p. 4); and March 21, 2016 (Water Board Photographs, PT Ex. No. 159, pp. 43-47).

#### **DISCHARGER LIABILITY**

55. The ACL Complaint names the following 8 entities and individuals as Dischargers: Baldwin & Sons, Inc; Sunranch Capital Partners, LLC; Sunrise Pacific Construction, Inc.; SRC-PH Investments, LLC; Baldwin & Sons, LLC; Shawn M. Baldwin; Randall G. Bone; and Jose Capati. For the reasons discussed below, the Board imposes this Order’s Total Liability Amount against Sunranch Capital Partners, LLC and SRC-PH Investments, LLC only.
56. The Complaint also originally named Rancho Portola Investments, LLC; ASSR Pacific Investments, LLC; USA Portola Properties, LLC; USA Portola West, LLC; USA Portola East, LLC; Portola Project, LLC; William G. Bone, both individually and dba Sunrise Company; Alfred Baldwin; James P. Baldwin; and Gary Berger. However, these parties have been dismissed pursuant to Stipulations and Order entered into by the Parties. Therefore, liability is not imposed on any of these dismissed entities and individuals.
57. Sunranch Capital Partners, LLC and SRC-PH Investments LLC are the properly designated Legally Responsible Persons (LRP) for the Project under the General Permit. (See General Permit, Appendix 5.) Sunranch Capital Partners, LLC acquired ownership of the Portola South property in or about July 2010. On or about July 29, 2015, Sunranch conveyed ownership of the Portola South property to its wholly-owned subsidiary, SRC-PH Investments, LLC. Thus, both Sunranch Capital Partners, LLC and SRC-PH Investments, LLC were owners of the Project. Sunranch Capital Partners, LLC was identified as the LRP in the pertinent Notice of Intent filings. (PT Ex. Nos. 6, 189.) Sunranch Capital Partners, LLC remained the named LRP for the Project until March 21, 2016, when a new Notice of Intent was filed by a third-party company. (PT Ex. 197.) Because the General Permit and Water Code impose liability on the

LRP and/or Project owner, Sunranch Capital Partners, LLC and SRC-PH Investments, LLC are liable for the civil liability imposed by this Order.

58. The Prosecution Team sought to impose liability on Baldwin & Sons, Inc; Baldwin & Sons, LLC; and Sunrise Pacific Construction, Inc. under the theory that these entities are agents of Sunranch Capital Partners, LLC. (Prosecution Team Entity Br. at ¶¶ 3-10.)
59. The Prosecution Team sought to impose liability on Shawn M. Baldwin; Randall G. Bone; and Jose Capati under the responsible corporate officer doctrine. (Prosecution Team Entity Br. at ¶¶ 34-30.)
60. Baldwin & Sons, Inc. is not named as a Discharger in this Order, and accordingly, is not liable for the civil penalty issued under this Order. First, the 2010 Enforcement Policy, applicable to this ACL action, does not provide that liability may be imposed on any parties except the designated LRP. Second, the Water Code does not provide a basis for imposing liability on any party except the designated LRP. (Water Code, §§ 13323, 13385.) Third, the Prosecution Team has failed to establish that the evidence supports that Baldwin & Sons, Inc. should be liable to the Water Board under any of the limited scenarios that existing under California agency law. (Cal. Civ. Code, § 2343.) Fourth, Baldwin & Sons, Inc. is not the manager of Sunranch Capital Partners, LLC or SRC-PH Investments, LLC and the responsible corporate officer doctrine applies only to managers of limited liability companies. (Randall Bone Declaration, ¶13; Dischargers' Confidential Brief Exs. 1-6; *People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1213.)
61. Baldwin & Sons, LLC is not named as a Discharger, and accordingly, is not liable for the civil penalty issued under this Order. First, the 2010 Enforcement Policy, applicable to this ACL action, does not provide that liability may be imposed on any parties except the designated LRP. Second, the Water Code does not provide a basis for imposing liability on any party except the designated LRP. (Water Code, §§ 13323, 13385.) Third, the Prosecution Team has failed to establish that the evidence demonstrates that Baldwin & Sons, LLC should be liable to the Water Board under any of the limited scenarios that existing under California agency law. (Cal. Civ. Code, § 2343.) Fourth, Baldwin & Sons, LLC is not the manager of Sunranch Capital Partners, LLC or SRC-PH Investments, LLC and the responsible corporate officer doctrine applies only to managers of limited liability companies. (Randall Bone Declaration, ¶13; Dischargers' Confidential Brief Exs. 1-6; *People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1213.)
62. Sunrise Pacific Construction, Inc. is not named as a Discharger, and accordingly, is not liable for the civil penalty issued under this Order. First, the 2010 Enforcement Policy, applicable to this ACL action, does not provide that liability may be imposed on any parties except the designated LRP. Second, the Water Code does not provide a basis for imposing liability on any party except the designated LRP. (Water Code, §§ 13323, 13385.) Third, the Prosecution Team has failed to establish that the evidence demonstrates that Sunrise Pacific Construction, Inc. should be liable to the Water Board under any of the limited scenarios that existing under California agency law. (Cal. Civ. Code, § 2343.) Fourth, Sunrise Pacific Construction, Inc. is not the manager of Sunranch Capital Partners, LLC or SRC-PH Investments, LLC and the responsible corporate officer doctrine applies only to managers of limited liability companies.

(Randall Bone Declaration, ¶13; Dischargers' Confidential Brief Exs. 1-6; *People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1213.)

63. Shawn M. Baldwin is not named as a Discharger, and accordingly, is not liable for the civil penalty issued under this Order because the evidence demonstrates that Shawn Baldwin is not a "responsible corporate officer" of either of the liable parties in this action. (Shawn Baldwin Declaration, ¶ 5.) The two liable parties -- Sunranch Capital Partners, LLC and SRC-PH Investments LLC, which are both limited liability companies, do not have any corporate officers as corporate officers are not required for limited liability companies. In addition, Shawn Baldwin is not a corporate officer for Baldwin & Sons, LLC (which does not have any corporate officers). Although Shawn Baldwin is a corporate officer for Sunrise Pacific Construction, Inc. and Baldwin & Sons, Inc., neither of these entities is a liable party for the reasons described in paragraphs 61 and 62 above; therefore, Mr. Baldwin's status as a corporate officer for these entities cannot give rise to any liability. Finally, Mr. Baldwin is not the manager of either Sunranch Capital Partners, LLC or SRC-PH Investments, LLC.
64. Randall G. Bone is not named as a Discharger, and accordingly, is not liable for the civil penalty issued under this Order because the evidence demonstrates that Randall Bone is not a "responsible corporate officer" of any liable party in this action. (Declaration of Randall Bone, ¶ 14.) The two liable parties -- Sunranch Capital Partners, LLC and SRC-PH Investments LLC, which are both limited liability companies, do not have any corporate officers as corporate officers are not required for limited liability companies. Although Randall Bone is a corporate officer for Sunrise Pacific Construction, Inc, that entity is not a liable party for the reasons described in paragraph 62 above; therefore, Mr. Bone's status as a corporate officer for that entity does not give rise to any liability. Finally, Mr. Bone is not a corporate officer for either Baldwin & Sons, LLC or Baldwin & Sons, Inc., and Mr. Bone is not the manager of either Sunranch Capital Partners, LLC or SRC-PH Investments, LLC.
65. Jose Capati is not named as a Discharger, and accordingly, is not liable for the civil penalty issued under this Order because the evidence demonstrates that Jose Capati is not a "responsible corporate officer" of any liable entity in this action. (Declaration of Jose Capati, ¶¶4-7.) Mr. Capati has never been a corporate officer for any of the entities included in the ACLC, but has only served as an employee with titles that have included "vice president." Since Mr. Capati has never been a corporate officer, he cannot have liability under the Responsible Corporate Officer doctrine as a matter of law. Further, Mr. Capati is not and never has been the manager of Sunranch Capital Partners, LLC or SRC-PH Investments, LLC or any other entity identified as an Alleged Discharger in the ACL Complaint.

#### **PENALTIES UNDER WATER CODE SECTION 13385**

66. Water Code section 13385 provides this Board with authority to impose civil liability on a person who violates particular "waste discharge requirements."
67. The Dischargers' failure to implement elements of the Permit, as described above, violates the Permit and therefore violates the Clean Water Act and Water Code. Water Code section 13385 authorizes the imposition of administrative civil liability for such violations.
68. Water Code Section 13385(c)(1)-(2) provides a maximum liability amount: "Ten thousand dollars (\$10,000) for each day in which the violation occurs" and "Where there is a discharge,

any portion of which is not susceptible to cleanup, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollar (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.” However, the 2010 Enforcement Policy recognizes that “releases of stormwater from construction sites and municipalities can be very large ... [so] a maximum amount of \$2.00 per gallon should be used.” (2010 Enforcement Policy, p. 19.) Under direction from the 2010 Enforcement Policy, the Prosecution Team used a maximum of \$2 per gallon, instead of \$10. (Technical Analysis, p. 116.)

69. In accordance with the 2010 Enforcement Policy, the maximum liability the Water Board may assess pursuant to Water Code section 13385(c) and the 2010 Enforcement Policy, for all of the violations for which there is admissible evidentiary support is \$4,464,294 (the sum of the maximum liability for Violation No. 1 using the \$2 maximum and the maximum liabilities for Violation Nos. 2-8, as calculated in Attachment 1, at pages 18-19, 21, 23, 25, 27, 29, 31, 34, below).
70. Water Code section 13385(e) states that, “[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.” The Prosecution Team failed to present a sound economic benefit analysis supported by substantial evidence; therefore, no minimum liability amount has been established.
71. Water Code sections 13327 and 13385(e) specify factors that the 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 violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require.”
72. The 2010 Enforcement Policy, the applicable Policy in this case, establishes a methodology for assessing administrative civil liability. The civil liability ordered in this matter was derived from the use of the penalty calculation methodology, as explained in detail in Attachment 1.
73. The penalty calculation methodology analysis included in Attachment 1 and incorporated in full in this Order is consistent with the evidence received and the circumstances of this case, as independently evaluated by the Board, and supports the administrative civil liability in the amount of **\$247,074.82** imposed against the Dischargers.

**IT IS HEREBY ORDERED**, pursuant to Water Code section 13385, that civil liability be imposed upon Sunranch Capital Partners, LLC and SRC-PH Investments, LLC in the amount of **\$247,074.82** for the above violations of the Permit.

**ATTACHMENT 1**

**ORDER NO. \_\_\_\_\_**

**PENALTY METHODOLOGY DECISIONS**

The State Water Board's 2010 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 ten-step methodology used to calculate the penalty for each of the eight violations at the Portola South site is discussed below, as is the basis for assessing each score, and the total administrative civil liability of **\$247,074.82** against Sunranch Capital Partners, LLC and SRC-PH Investments, LLC (Dischargers). The individual and total liabilities are summarized in **Table No. 1**, Total Assessed Liability. The final total liability and scores for each violation are summarized in **Table No. 2**, Penalty Calculator.

**VIOLATION NO. 1:**

**DISCHARGE OF SEDIMENT (4 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 various scores are:

0 = Negligible - no actual or potential harm to beneficial uses.

1 = Minor - low threat to beneficial uses (i.e., no observed impacts but potential impacts to beneficial uses with no appreciable harm).

2 = Below moderate – less than moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected, harm to beneficial uses is minor).

3 = Moderate - moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).

4 = Above moderate – more than moderate threat to beneficial uses (i.e., impacts are observed or likely substantial, temporary restrictions on beneficial uses (e.g., less than 5 days), and human or ecological health concerns).

5 = Major - high threat to beneficial uses (i.e., significant impacts to aquatic life or human health, long term restrictions on beneficial uses (e.g., more than five days), high potential for chronic effects to human or ecological health).

The "ACLC Technical Assessment" Report prepared by expert, Rincon & Associates, determined the potential for harm to beneficial uses by analyzing the potential contaminant source, release

mechanism(s), transport pathway(s), and exposure route to a receptor. (Def. Ex. No. 1, pp. 22-32, 36-41.) Dischargers are assigned a **score of 0 and 1 (Negligible and Minor)** because the impacts or likely impacts associated with discharges from the Site presented no actual or potential harm or a low threat to beneficial uses (i.e., no observed impacts but potential impacts to beneficial uses with no appreciable harm). Most sediment discharged from the Site during the four discharge events did not reach Aliso Creek; the sediment that did reach Aliso Creek was diluted; the Site contributed a minor fraction of Aliso Creek's typical sediment yield; and discharges from the Site did not contribute to an exceedance of water quality objectives. Specifically, the minimal contribution of sediment to Aliso Creek is not likely to have impacted any AGR uses; the contribution of sediment has no known potential harms to REC-1 uses; accumulation of eroded sediments does not inhibit any REC-2 beneficial uses; potential sediment discharges have potential minor impacts to WARM beneficial uses, but these are minor considering Aliso Creek no longer supports fish species and fish species habitat is located 10 miles downstream of the Site; and finally, potential harm to WILD beneficial uses were minor because the sediment-laden stormwater runoff did not contribute to a significant loss in habitat, although there was a minor potential for harm for localized habitat for bird and plant species. (Def. Ex. No. 1, pp. 36-41.) Overall, a score of 0 is assigned for the September discharge event because there was a limited area of exposed soil and the onsite inspector did not observe any sediment discharge. (Dischargers' Ex. 1, pp. 39, 40-41.) A score of 1 is assigned for the December and January discharge events because of the larger scale of grading activities and potential for release of small amounts of vehicle-related contaminants. (Dischargers' Ex. 1, pp. 39, 40-41.)

#### Factor 2: Physical, Chemical, Biological, or Thermal Characteristics of 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 **0 and 1 (Negligible and Minor Risk)** because the discharged material poses a negligible or minor 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. Here, the evidence does not show the site discharges violated any water quality objectives and sediment transport through Aliso Creek is a naturally-occurring process. (Dischargers' Ex. 1, p. 41.) Because of the lack of reported sediment discharge during the September discharge event, this factor is scored as 0 for this violation. Because grading activities were much more extensive during the December and January violations, this factor is scored as 1 for those rain events. (Dischargers' Ex. 1, p. 41.)

#### 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 **0**. Sediment that has not reached a water body is susceptible to cleanup. The evidence indicates the majority of the sediment did not reach Aliso Creek. (Dischargers' Ex. 1, pp. 41-42.)

#### 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 **0** was calculated for the September discharge event and **2** (1+1+0) was calculated for the December and January discharge events.

## **STEP 2: Assessments for Discharge Violations (Violation No. 1)**

### **Per Gallon Assessments for Discharge Violations**

Where there is a discharge, the Water Boards shall determine an initial liability amount on a per gallon basis using on the Potential for Harm score and the extent of Deviation from Requirement of the violation. Using these factors and Table 1 in the Enforcement Policy, a Per Gallon Factor for the discharge is obtained. The Per Gallon Factor is multiplied by the number of gallons subject to the penalty and then multiplied by the maximum per gallon penalty amount allowed under the Water Code.

#### **Deviation from Requirement**

The deviation from requirement is determined based on the extent to which the violation deviates from the intended effectiveness of the requirement (effluent limitation, prohibition, monitoring requirement, construction deadline, etc.). The deviation from requirement is scored as minor (the intended effectiveness remains generally intact), moderate (the intended effectiveness has been partially compromised), or major (the intended effectiveness has been rendered ineffective). The deviation from requirement is **moderate** because turbidity data indicates at least partial effectiveness of the BMPs, some BMPs were installed in preparation of rain events, and discharge water quality data also indicate the BMPs were not rendered completely ineffective.

Using Table 1 in the Enforcement Policy, the per gallon assessment for a Moderate deviation from requirement and a Potential for Harm score of 0 for the September discharge event is **0**. The per day assessment for a Moderate deviation from requirement and a Potential for Harm score of 2 for the December and January discharge events is **0.01**.

### **Per Day Assessments for Discharge Violations**

Where there is a discharge, the Water Board shall determine an initial liability amount on a per day basis using the Potential for Harm score and the Deviation from Requirement score. Using these factors and Table 2 in the Enforcement Policy, a Per Day Factor for the discharge is obtained. The Per Day Factor is multiplied by the maximum per day penalty amount allowed under the Water Code.

#### **Deviation from Requirement**

The deviation from requirement is determined based on the extent to which the violation deviates from the intended effectiveness of the requirement (effluent limitation, prohibition, monitoring requirement, construction deadline, etc.). The deviation from requirement is scored as minor (the intended effectiveness remains generally intact), moderate (the intended effectiveness has been partially compromised), or major (the intended effectiveness has been rendered ineffective). The deviation from requirement is **moderate** because turbidity data indicates at least partial effectiveness of the BMPs, some BMPs were installed in preparation of rain events, and discharge water quality data also indicate the BMPs were not rendered completely ineffective.

Using Table 2 in the Enforcement Policy, the per day assessment for a Moderate deviation from requirement and a Potential for Harm score of 0 for the September discharge event is **0**. The per day assessment for a Moderate deviation from requirement and a Potential for Harm score of 2 for the December and January discharge events is **0.01**.

**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 should be considered for modification of the amount of the initial liability: discharger’s culpability, discharger’s efforts to cleanup and cooperate with the regulatory authorities after the violation, and the discharger’s compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers are scored a **1.1** for the violation because evidence indicates the Dischargers prepared for rain events as a reasonable and prudent person would have done and some immediate actions to repair BMPs damaged from stormwater discharges were also taken. (See PT Ex. 92, pp. 9, 11; PT Ex. 105; Dischargers’ Ex. No. 1, pp. 84-85. See also, *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. Dischargers are given a **1.1** for this factor. Evidence indicates significant efforts were taken to address stormwater concerns, including repairing and installing BMPs after storm events and other corrective measures taken every day over the course of 2-3 months to address stormwater issues. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

History

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. A score of **1** is given to this factor because there is no history of construction storm water violations prior to the ACL.

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

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

Gallons Discharged Assessment

$$\begin{aligned} & \text{Adjusted Gallons Discharged} \times \text{Per Gallon Factor} \times \text{Statutory Max} \times \text{Culpability} \\ & \text{Multiplier} \times \text{Cleanup and Cooperation Multiplier} \times \text{History of Violations} \\ & \text{Multiplier} = \text{Total Base Liability} \\ & \text{September 15, 2015 Violation} \\ & 335,586 \times 0 \times \$2 \times 1.1 \times 1.1 \times 1.0 = \mathbf{\$0} \\ & \text{December 22, 2015 Violation} \end{aligned}$$

$$313,418 \times 0.01 \times \$2 \times 1.1 \times 1.1 \times 1.0 = \$7,584.72$$

January 5, 2016 Violation

$$1,028,552 \times 0.01 \times \$2 \times 1.1 \times 1.1 \times 1.0 = \$24,890$$

January 6, 2016 Violation

$$259,591 \times 0.01 \times \$2 \times 1.1 \times 1.1 \times 1.0 = \$6,282.10$$

Total = **\$38,756.82**

Days Discharged Assessment

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

September 15, 2015 Violation

$$1 \times 0 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \$0$$

December 22, 2015 Violation

$$1 \times 0.01 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \$121.00$$

January 5, 2016 Violation

$$1 \times 0.01 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \$121.00$$

January 6, 2016 Violation

$$1 \times 0.01 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \$121.00$$

Total = **\$363.00**

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

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

This factor is not considered in this analysis.

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

The Prosecution Team submitted an Economic Benefit Analysis prepared by Mr. Bryan Elder, which calculated that Dischargers enjoyed a total economic benefit of \$747,258. Mr. Elder did not calculate the economic benefit associated with each individual violation. Dischargers submitted evidence challenging this analysis, specifically, the analysis lacked evidentiary support, failed to consider relevant evidence, relied on inconsistent assumptions, and failed to support assumptions utilized in the analysis. The Prosecution Team has failed to meet its burden and prove an economic benefit obtained by the Dischargers. Accordingly, no economic benefit has been shown in this case.

**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 Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation and ten dollars (\$10) for every gallon discharged, over one thousand gallons discharged, that was not cleaned up. However,

under direction from the 2010 Enforcement Policy, the Prosecution Team used a maximum of \$2 per gallon, instead of \$10. (Technical Analysis, p. 116.) Specifically, the 2010 Enforcement Policy recognizes that “releases of stormwater from construction sites and municipalities can be very large ... [so] a maximum amount of \$2.00 per gallon should be used.” (2010 Enforcement Policy, p. 19.) Using the \$2 statutory maximum, the maximum liability that could be assessed is \$3,914,294 (the sum of \$40,000 for four days of discharge and \$3,874,294 for the discharge of 1,937,147 gallons of discharge).

#### 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, because no economic benefit has been shown, the minimum liability is \$0.

#### **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 **\$39,119.82**.

### **VIOLATION NO. 2: FAILURE TO IMPLEMENT MATERIAL STOCKPILE BMPS (7 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 for 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

Potential for harm can be scored as minor, moderate, or major, depending on whether the characteristics of the violation present a minor, substantial, or particular egregious threat to beneficial uses. Potential for harm is scored as **minor** because evidence demonstrates actual sediment discharges from the site during the rainfall events were minimal if not undetectable, and the potential for harm was very low in the context of the mass of sediment transported down Aliso Creek annually as a result of natural erosion in the upper watershed and in-stream erosion processes occurring in the lower reaches of Aliso Creek. (Dischargers’ Ex. 1, p. 42.)

#### Deviation from Requirement

The deviation from requirement is scored as minor, moderate, or major, depending on whether the effectiveness of the requirement remains generally intact, has been partially compromised, or has been rendered ineffective. The deviation from requirement is **moderate** because at evidence demonstrates at least four days where BMPs were partially compromised during rain events. (Dischargers’ Ex. 1, pp. 45-54.)

### Calculating the Per Day Factor

Using Table 3-Per Day Factor from the Enforcement Policy, the per day factor for a minor potential for harm and moderate deviation from requirement is **0.25**.

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

Three additional factors are considered to modify the liability amount: the violator's culpability, the violator's efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator's compliance history.

#### Culpability

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers' culpability for this factor is **1.1** because of the low erosional risk presented by the material stockpiles at the site and because actions at the site are consistent with standard industry practices that a reasonable and prudent QSP would recommend during a comparable mass grading operation. (Dischargers' Ex. 1, pp. 45-46.)

#### Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. The Dischargers are assigned a score of **1.1** for the same reasons as discussed under Violation No. 1, above. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

#### History of Violations

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. History of violations is given a **1.0** because Dischargers do not have a history of construction stormwater violations.

### **STEP 5: Determination of Total Base Liability Amount (Violation No. 2)**

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:

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

$$\begin{aligned} & \text{November 2015 through March 2016 Violations} \\ & 7 \times 0.25 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \mathbf{\$21,175} \end{aligned}$$

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

**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 Water Code 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. There is no evidence of any economic benefit in this case.

**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 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 7 days of 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, because no economic benefit has been shown, the minimum liability is \$0.

**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 **\$21,175**.

**VIOLATION NO. 3:**

**FAILURE TO IMPLEMENT VEHICLE FLUID LEAK BMPS (10 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 for 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

Potential for harm can be scored as minor, moderate, or major, depending on whether the characteristics of the violation present a minor, substantial, or particular egregious threat to beneficial uses. Potential for harm is determined to be **minor** because the amount of fluid leak discharges are small compared to the size of the site, the proximity of the leaks to an offsite discharge location, and distance to Aliso Creek present a minor potential for harm to beneficial uses of Aliso Creek. (Dischargers’ Ex. 1, pp. 42-43.)

### Deviation from Requirement

The deviation from requirement is scored as minor, moderate, or major, depending on whether the effectiveness of the requirement remains generally intact, has been partially compromised, or has been rendered ineffective. The deviation from requirement is **major** because the drip pans had cracks and were rendered ineffective as evidenced through vehicle fluid stains on the ground.

### Calculating the Per Day Factor

The Per Day Factor for a potential for harm of minor and deviation from requirement of major is **0.35**.

### **STEP 4: Adjustment Factors (Violation No. 3)**

Three additional factors are considered to modify the liability amount: the violator's culpability, the violator's efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator's compliance history.

#### Culpability

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers' culpability is **1.3** because Dischargers negligently failed to implement proper vehicle storage and maintenance requirements despite various warnings of such violations.

#### Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. Dischargers' are scored a **1.1** for cleanup and cooperation for the same reasons as discussed under Violation No. 1, above. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.).

#### History of Violations

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. History of violations is **1.0** because the Dischargers do not have a history of construction storm water violations.

### **STEP 5: Determination of Total Base Liability Amount (Violation No. 3)**

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:

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

October 8, 2015 through March 2016 Violations  
 $10 \times 0.35 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$50,050$

**Total = \$50,050**

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

**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 Water Code 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. There is no evidence of any economic benefit in this case.

**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.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the 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 10 days of 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, because no economic benefit has been shown, the minimum liability is \$0.

**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 **\$50,050**.

**VIOLATION NO. 4:  
FAILURE TO IMPLEMENT EROSION CONTROL BMPS IN INACTIVE AREAS  
(8 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 for 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

Potential for harm can be scored as minor, moderate, or major, depending on whether the characteristics of the violation present a minor, substantial, or particular egregious threat to beneficial uses. Potential for harm is scored as **minor** because evidence demonstrates actual sediment discharges from the site during the rainfall events were minimal if not undetectable, and the potential for harm was very low in the context of the mass of sediment transported down Aliso Creek annually as a result of natural erosion in the upper watershed and in-stream erosion processes occurring in the lower reaches of Aliso Creek. (Dischargers’ Ex. 1, p. 42.)

#### Deviation from Requirement

The deviation from requirement is scored as minor, moderate, or major, depending on whether the effectiveness of the requirement remains generally intact, has been partially compromised, or has been rendered ineffective. The deviation from requirement is **moderate** because evidence demonstrates the BMPs were not rendered ineffective, but rather, the BMPs may have been partially compromised on some of the violation days. (Dischargers’ Ex. 1, pp. 55-64.)

#### Calculating the Per Day Factor

The Per Day Factor for a potential for harm score of minor and deviation from requirement score of moderate is **0.25**.

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

Three additional factors are considered to modify the liability amount: the violator’s culpability, the violator’s efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator’s compliance history.

#### Culpability

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers’ culpability is scored at **1.1** because of the low erosional risk presented by disturbed soils and because the actions taken at the Project site are consistent with standard industry practices that a reasonable and prudent QSP would recommend during a comparable mass grading operation. (Dischargers’ Ex. 1, pp. 55-56.)

#### Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent.

Dischargers' cleanup and cooperation is **1.1** for the same reasons as discussed under Violation No. 1, above. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

#### History of Violations

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. History of violations is **1.0** because Dischargers do not have a history of construction storm water violations.

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

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:

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

October 6, 2015 through March 21, 2016 Violations

$$8 \times 0.25 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \mathbf{\$24,200}$$

$$\mathbf{\text{Total} = \$24,200}$$

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

#### **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 Water Code 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. There is no evidence of any economic benefit in this case.

#### **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 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 8 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, because no economic benefit has been shown, the minimum liability is \$0.

**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 **\$24,200**.

**VIOLATION NO. 5:**

**FAILURE TO IMPLEMENT EROSION CONTROL BMPS IN ACTIVE AREAS (8 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 for 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**

Potential for harm can be scored as minor, moderate, or major, depending on whether the characteristics of the violation present a minor, substantial, or particular egregious threat to beneficial uses. Potential for harm is scored as **minor** because evidence demonstrates actual sediment discharges from the site during the rainfall events were minimal if not undetectable, and the potential for harm was very low in the context of the mass of sediment transported down Aliso Creek annually as a result of natural erosion in the upper watershed and in-stream erosion processes occurring in the lower reaches of Aliso Creek. (Dischargers’ Ex. 1, p. 42.)

**Deviation from Requirement**

The deviation from requirement is scored as minor, moderate, or major, depending on whether the effectiveness of the requirement remains generally intact, has been partially compromised, or has been rendered ineffective. The deviation from requirement is **moderate** because evidence demonstrates the BMPs were not rendered ineffective but may have been partially compromised on certain violation days. (Dischargers’ Ex. 1, pp. 65-71.)

**Calculating the Per Day Factor**

The Per Day Factor for potential for harm of minor and deviation from requirement of moderate is **0.25**.

**STEP 4: Adjustment Factors (Violation No. 5)**

Three additional factors are considered to modify the liability amount: the violator’s culpability, the violator’s efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator’s compliance history.

**Culpability**

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence,

prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers' culpability is **1.1** because of the low erosional risk presented by disturbed soils and because the actions taken at the Project site are consistent with standard industry practices that a reasonable and prudent QSP would recommend during a comparable mass grading operation. (Dischargers' Ex. 1, pp. 65-71.)

#### Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. Dischargers' cleanup and cooperation is **1.1** for the same reasons as discussed under Violation No. 1, above. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

#### History of Violations

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. History of violations is **1.0** because Dischargers do not have a history of construction storm water violations.

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

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:

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

September 15, 2015 through March 14, 2016 Violations

$$8 \times 0.25 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \mathbf{\$24,200}$$

$$\text{Total} = \mathbf{\$24,200}$$

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

#### **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 Water Code 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. There is no evidence of any economic benefit in this case.

#### **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 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 8 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, because no economic benefit has been shown, the minimum liability is \$0.

#### **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 **\$24,200**.

### **VIOLATION NO. 6: FAILURE TO APPLY LINEAR SEDIMENT CONTROLS (11 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 for 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

Potential for harm can be scored as minor, moderate, or major, depending on whether the characteristics of the violation present a minor, substantial, or particularly egregious threat to beneficial uses. Potential for harm is scored as **minor** because evidence demonstrates actual sediment discharges from the site during the rainfall events were minimal if not undetectable, and the potential for harm was very low in the context of the mass of sediment transported down Aliso Creek annually as a result of natural erosion in the upper watershed and in-stream erosion processes occurring in the lower reaches of Aliso Creek. (Dischargers’ Ex. 1, p. 42.)

#### Deviation from Requirement

The deviation from requirement is scored as minor, moderate, or major, depending on whether the effectiveness of the requirement remains generally intact, has been partially compromised, or has been rendered ineffective. The deviation from requirement is **moderate** because evidence demonstrates the BMPs were not rendered ineffective, rather the BMPs were partially compromised on certain violation days. (Dischargers’ Ex. 1, pp. 72-83.)

### Calculating the Per Day Factor

The Per Day Factor for potential for harm of minor and deviation from requirement of moderate is **0.25**.

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

Three additional factors are considered to modify the liability amount: the violator's culpability, the violator's efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator's compliance history.

#### Culpability

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers' culpability is **1.1** because the lack of linear sediment controls at the site was consistent with standard industry practices that a reasonable and prudent QSP would recommend during a comparable mass grading operation. (Dischargers' Ex. 1, pp. 72-83.)

#### Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. Dischargers' cleanup and cooperation is **1.1** for the same reasons as discussed under Violation No. 1, above. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

#### History of Violations

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. History of violations is **1.0** because Dischargers do not have a history of construction storm water violations.

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

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:

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

$$\begin{aligned} & \underline{\text{December 2015 through March 14, 2016 Violations}} \\ & 11 \times 0.25 \times \$10,000 \times 1.1 \times 1.1 \times 1.0 = \mathbf{\$33,275} \end{aligned}$$

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

**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 Water Code 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. There is no evidence of any economic benefit in this case.

**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 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 11 days of violation is **\$110,000**.

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, because no economic benefit has been shown, the minimum liability is \$0.

**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 **\$33,275**.

**VIOLATION NO. 7:  
FAILURE TO PROPERLY STORE CHEMICALS (8 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 for 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

Potential for harm can be scored as minor, moderate, or major, depending on whether the characteristics of the violation present a minor, substantial, or particular egregious threat to beneficial uses. The potential for harm for this violation is **minor** because the chemical storage at the site did not pose a significant threat to the beneficial uses of Aliso Creek given the proximity of the improper storage to an offsite discharge location and distance to Aliso Creek and lack of evidence that chemical storage resulted in any spills. (Dischargers’ Ex. 1, p. 43.)

### Deviation from Requirement

The deviation from requirement is scored as minor, moderate, or major, depending on whether the effectiveness of the requirement remains generally intact, has been partially compromised, or has been rendered ineffective. The deviation from requirement is **major** because the lack of secondary containment rendered the requirement for such ineffective.

### Calculating the Per Day Factor

The Per Day Factor for a potential for harm of minor and deviation from requirement as major is **0.35**.

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

Three additional factors are considered to modify the liability amount: the violator's culpability, the violator's efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator's compliance history.

#### Culpability

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers' culpability is **1.3** because of negligent care taken to implement chemical storage containment after the second NOV was issued on October 9, 2015.

#### Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. Dischargers' cleanup and cooperation is **1.1** for the same reasons as discussed under Violation No. 1, above. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

#### History of Violations

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. History of violations is **1.0** because Dischargers do not have a history of construction storm water violations.

### **STEP 5: Determination of Total Base Liability Amount (Violation No. 7)**

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:

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

October 7, 2015 through March 21, 2016 Violations

$$8 \times 0.35 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \$40,040$$

Total: **\$40,040**

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

**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 Water Code 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. There is no evidence of any economic benefit in this case.

**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 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 8 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, because no economic benefit has been shown, the minimum liability is \$0.

**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 **\$40,040**.

**VIOLATION NO. 8:**

**FAILURE TO PREVENT DISCHARGE OF CONCRETE WASTE TO THE GROUND  
(3 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 for 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

Potential for harm can be scored as minor, moderate, or major, depending on whether the characteristics of the violation present a minor, substantial, or particular egregious threat to beneficial uses. The potential for harm for this factor is **minor** because alkaline materials were not seen in the pH data collected runoff from the site, the amount of rainfall needed to mobilize the concrete material would quickly dilute the concentration to negligible levels before reaching Aliso Creek. (Dischargers’ Ex. 1, pp. 43-44.)

#### Deviation from Requirement

The deviation from requirement is scored as minor, moderate, or major, depending on whether the effectiveness of the requirement remains generally intact, has been partially compromised, or has been rendered ineffective. The deviation from requirement is **major** because evidence demonstrates concrete washout on the ground and therefore the BMPs were rendered ineffective.

#### Calculating the Per Day Factor

The per day factor for a potential for harm of **minor** and deviation from requirement of **major** is **0.35**.

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

Three additional factors are considered to modify the liability amount: the violator’s culpability, the violator’s efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator’s compliance history.

#### Culpability

Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.5 to 1.5**, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. Dischargers’ culpability is **1.3** because through negligence the Dischargers’ failed to implement effective BMPs to prevent concrete washout from the ground.

#### Cleanup and Cooperation

This factor is based on the extent the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between **0.75 to 1.5**, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. Dischargers’ cleanup and cooperation is **1.1** for the same reasons as discussed under Violation No. 1, above. (See *supra*, ¶¶ 17, 22, 25, 27-31, 34-36.)

#### History of Violations

This factor considers prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. History of violations is **1.0** because Dischargers do not have a history of construction storm water violations.

**STEP 5: Determination of Total Base Liability Amount (Violation No. 8)**

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:

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

$$\begin{aligned} &\text{January 3, 2016 through March 2016 Violations} \\ &3 \times 0.35 \times \$10,000 \times 1.3 \times 1.1 \times 1.0 = \mathbf{\$15,015} \end{aligned}$$

$$\text{Total} = \mathbf{\$15,015}$$

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

In this ACLC, Dischargers do not assert any ability to pay defense. Therefore, this factor is not considered in this analysis.

**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 Water Code 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. There is no evidence of any economic benefit in this case.

**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 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 3 days of violation is **\$30,000**.

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, because no economic benefit has been shown, the minimum liability is \$0.

**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 **\$15,015**.

**TOTAL ASSESSED LIABILITY**

The total assessed liability for all violations under ACL Order No. [REDACTED] is **\$247,074.82** as shown in Table No. 1.

**Table No. 1  
Total Assessed Liability**

<b>Viol No</b>	<b>Violation</b>	<b>Liability Per Gallon of Violation</b>	<b>Days of Violation Assessed</b>	<b>Liability Amount</b>	<b>Total Liability Per Violation</b>
1	Discharges of sediment	\$0	1	\$0	
		\$7,584.72	1	\$7,584.72	
		\$24,890	1	\$24,890	
		\$6,282.10	1	\$6,282.10	
	<b>Total Violation 1</b>		<b>4</b>		<b>\$38,756.82</b>
<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 Violation</b>
1	Discharges of sediment	\$0	1	\$0	
		\$121	3	\$363	
	<b>Total Violation 1</b>		<b>4</b>		<b>\$363</b>
2	Failure to implement material stockpiles	\$3,025	7	\$21,175	
	<b>Total Violation 2</b>		<b>7</b>		<b>\$21,175</b>
3	Failure to implement vehicle fluid leak BMPs	\$5,005	10	\$50,050	
	<b>Total Violation 3</b>		<b>10</b>		<b>\$50,050</b>
4	Failure to implement erosion controls in inactive areas	\$3,025	8	\$24,200	
	<b>Total Violation 4</b>		<b>8</b>		<b>\$24,200</b>
5	Failure to implement erosion controls in active areas	\$3,025	8	\$24,200	
	<b>Total Violation 5</b>		<b>8</b>		<b>\$24,200</b>
6	Failure to apply linear sediment controls	\$3,025	11	\$33,275	
	<b>Total Violation 6</b>		<b>11</b>		<b>\$33,275</b>
7	Failure to properly store chemicals	\$5,005	8	\$40,040	
	<b>Total Violation 7</b>		<b>8</b>		<b>\$40,040</b>
8	Failure to prevent discharge of concrete waste	\$5,005	3	\$15,015	
	<b>Total Violation 8</b>		<b>3</b>		<b>\$15,015</b>
<b>Total Assessed Liability</b>					
<b>\$247,074.82</b>					