

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

TECHNICAL REPORT

Administrative Civil Liability

Proposed in  
Complaint No. R9-2008-0021  
North County Transit District  
Sprinter Rail Project  
San Diego County

Noncompliance with  
Order No. 99-08-DWQ  
National Pollutant Discharge Elimination System (NPDES)  
General Permit for  
Storm Water Discharges Associated With  
Construction Activity

March 4, 2008

By

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## 1. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence supporting assessment of civil liability in the amount of \$685,000 against North County Transit District (NCTD) pursuant to California Water Code (CWC) section 13385 for violations of CWC section 13376, and California State Water Resources Control Board (State Board) Order No. 99-08-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity (Permit)* as alleged in Complaint No. R9-2008-0021.

## 2. BACKGROUND

On August 7, 2003, NCTD filed a Notice of Intent (NOI) to comply with the terms of the Permit for the construction project known as the Sprinter Rail Project. The State Board issued the project WDID # 9 37C322900. The project is a 22 mile linear rail corridor originating from the west at the Coast Highway in the City of Oceanside and terminating east at the City of Escondido's Transit Center. The disturbed area includes one to three hundred feet wide of rail right of way, 15 new commuter stations, and five storage/staging areas used during the construction. The project's total disturbed acreage is approximately 280 acres.

The project transects the jurisdictions of the Cities of Oceanside, Vista, San Marcos, and Escondido, and the County of San Diego. However, the NCTD, as a Transit District, is not subject to local municipality jurisdiction, and, therefore, the transportation projects are not subject to the same degree of municipal oversight that other construction projects would be, including regular inspections by the municipality. See Figure 1: Map of the Sprinter Rail project.

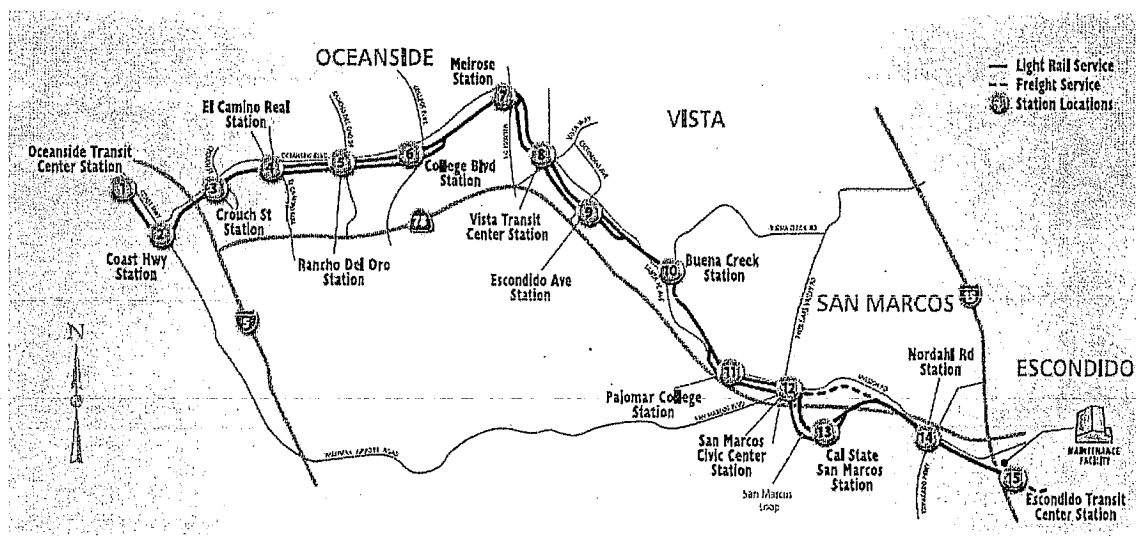


Figure 1: Map of the Sprinter Rail project.

The project consists of the replacement of existing rail line with a new double track rail, construction of a new rail line referred to as the San Marcos loop, and construction of 15 new rail stations along the route. The railway tracks and right-of-way cross several hydrologic areas within the Carlsbad watershed, and storm water runoff from the project discharges into several creeks, including: Loma Alta Creek, Buena Vista Creek, Buena Creek, San Marcos Creek, and Escondido Creek. Downstream receiving waters include Buena Vista Lagoon, Agua Hedionda Lagoon, Lake San Marcos, and San Dieguito Lagoon.

Agua Hedionda Lagoon and Buena Vista Lagoon are identified in Clean Water Act Section 303(d)<sup>1</sup> as water quality limited due to sediment impairment. This means that the water bodies do not meet water quality standards, even after point sources of pollution have installed the minimum required levels of pollution control technology. Figure 2 shows the Sprinter Rail route in relation to the surrounding watersheds.

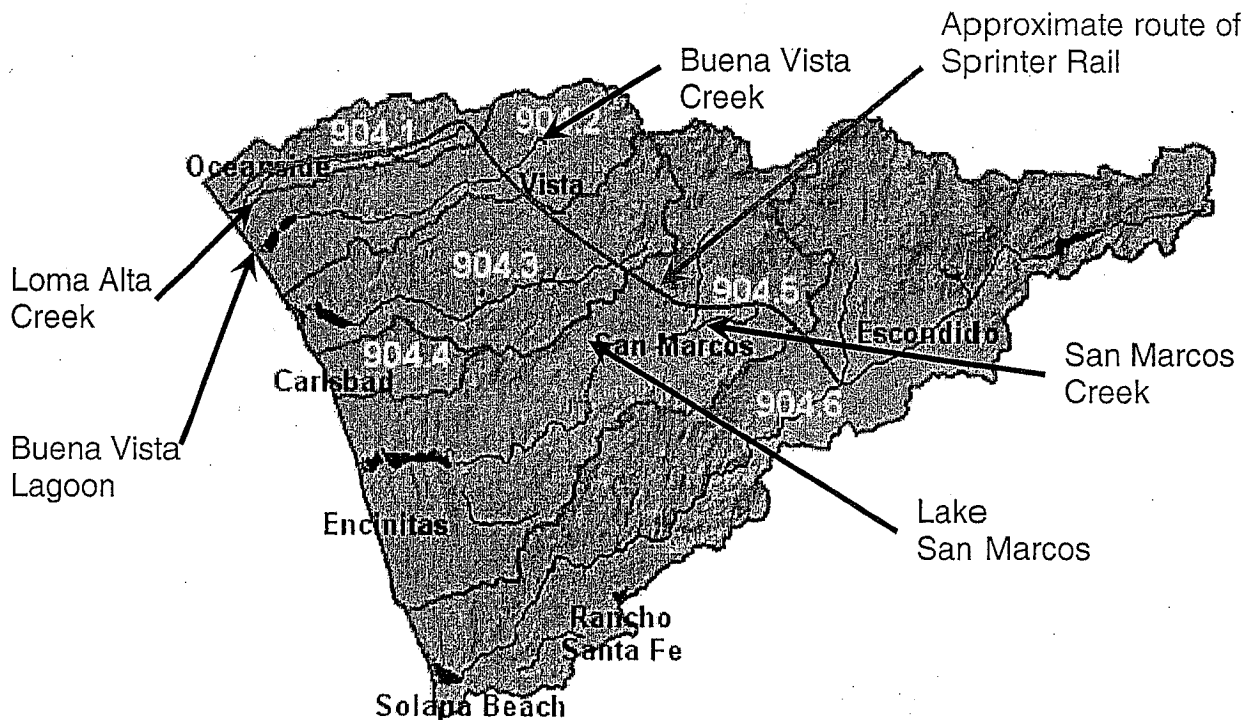


Figure 2: Route of the Sprinter Rail project in relation to the receiving water bodies within the Carlsbad Watershed.

<sup>1</sup> The federal Clean Water Act requires that the State of California establish priority rankings for water bodies on the 303 (d) list and develop action plans, also known as Total Maximum Daily Loads (TMDL), to improve water quality.

Beginning October 5, 2007 and ending on January 25, 2008, Regional Board conducted ten compliance inspections of various portions of the project. These compliance inspections revealed chronic non-compliance with implementation of Best Management Practices (BMP) at numerous locations along the entire length of the project. Based upon the well documented observation of failed BMPs, poorly maintained BMPs, and the total lack of BMPs, and the threatened impacts to the beneficial uses documented during the first six of the compliance inspections, Cleanup and Abatement Order No. R9-2007-0226 (CAO) was issued on December 31, 2007. The CAO cites the following violations of the Permit, all of which occurred during the 2007/08 rainfall season:

- a. Inadequate BMPs to control erosion on graded slopes and within construction staging sites;
- b. Inadequate BMPs to control sediment along the perimeter of the project site and numerous storm drain inlets;
- c. Sediment tracking onto numerous paved areas due to inadequate BMPs;
- d. Inadequate BMPs to minimize or eliminate the exposure of storm water to construction waste, trash, and materials;
- e. Unprotected and unlined storm water conveyance channels at numerous locations adjacent to the railway track exhibited evidence of erosion and sediment discharge;
- f. Completed construction areas lacked post-construction soil stabilization; and
- g. Numerous discharges of sediment throughout the length of the project site into storm drain inlets or directly into receiving waters.

The CAO required NCTD to implement measures to comply with the Permit immediately, and report to the Regional Board when compliance is achieved. The CAO also required NCTD to prepare a prioritized schedule to attain compliance with the Permit, and to document the status of compliance through the submittal of status reports on measures taken to comply with that schedule. The Regional Board contemplated that NCTD, recognizing that the site was severely out of compliance in the middle of a rainfall season, would act quickly and increase efforts to implement adequate BMPs.

Four additional Regional Board inspections conducted after the preparation of the CAO revealed the continued existence of the violations that warranted the issuance of the CAO. While these inspections revealed marginally better BMP compliance, erosion controls were frequently found to be either completely lacking or inadequate and a number of sediment

control violations were observed as well. In status reports required by the CAO, NCTD provided documentation stating they will not be able to certify compliance with the Permit until May 1, 2008.

### 3. ALLEGATIONS

The following violations are the basis for assessing administrative civil liability pursuant to CWC section 13385 against NCTD.

#### 3.1.1 NCTD Failed to Implement Best Management Practices in Violation of the Permit § C.2, A.1.c

Special Provision C.2 of the Permit states:

*All dischargers shall develop and implement a Storm Water Pollution Prevention Plan (SWPPP) in accordance with Section A: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard.*

Section A.1.c. of the Permit states:

*The SWPPP shall be developed and amended or revised, when necessary, to meet the following objectives:... c. Identify, construct, implement, in accordance with a time schedule, and maintain Best Management Practices (BMPs) to reduce or eliminate pollutants in storm water discharges and authorized nonstorm water discharges from the construction site during construction,...*

NCTD failed to implement BMPs in accordance with its SWPPP in violation of the Permit section C.2. for a continuous period of 112 days, from October 5, 2007 through January 25, 2008. As of this writing many of the BMP violations continue and potential liability continues to accrue. These violations were observed and documented during ten Regional Board inspections of the site on the following days: October 5, 2008; November 27, 2007; November 30, 2007; December 3, 2007; December 7, 2007; December 19, 2007; December 28, 2007; January 7, 2008; January 22, 2008; and January 25, 2008.

The inspection reports are included as Attachments 1 through 10. These reports document: (1) widespread lack of any BMPs when BMPs were essential as a sediment discharge preventative measure; (2) widespread lack of BMP maintenance or inadequate BMPs; and (3) numerous locations where discharges to storm drains and directly to receiving waters occurred as the direct result of either no BMPs or inadequate BMPs being in place. The inspection reports provide photo-documentation of the direct connection between inadequate BMPs and sediment discharges

that result. These inadequate BMPs include: inadequately planned BMPs such as gravel bags not being stacked high enough to prevent sediment discharges from overtopping them; inadequately installed BMPs such as fiber rolls not being trenched in, leading to rills forming below the fiber rolls and sediment-laden water flowing through the rills; complete lack of erosion controls resulting in gullies on steep slopes and sediment-laden sheet flow into drains during storm events; and inadequately maintained BMPs such as dislodged fiber rolls and silt fences being left in disrepair. Lack of sediment controls was exemplified by numerous storm drain inlets encountered during the inspection period that were without any protection whatsoever.

### **Nature, Extent, Circumstances, and Gravity of Violations**

The Permit requires the development of a SWPPP (or Plan). The intent of this plan is to prevent storm water pollution and to reduce the pollution to the Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology (BAT/BCT)<sup>2</sup> performance standard. The goal is accomplished by implementing effective erosion control and sediment control BMPs. Erosion control BMPs seek to stop or reduce erosion and include replanted slopes, and the use of geotextiles and mats on slopes. Sediment control BMPs seek to stop sediment discharges or reduce the amount of sediment discharged into receiving waters. Examples of Sediment Control BMPs include gravel bags around storm drain inlets and sediment detention basins. On a project of this scale and length (22 miles), which crosses numerous streams, watercourses and stormwater conveyance systems, the implementation of BMPs is critical in preventing pollution.

The following is a detailed description of observations of each inspection during the Oct 07 through Jan 08 period.

- a. October 5, 2007, Ben Neill, Peter Peuron and Lee Schenk of the Regional Board inspected the site on a day in which skies were cloudy and light rain fell during the morning. A total of six transit stations and two storage yards were visited in the cities of Escondido, San Marcos, Vista and Oceanside. NCTD failed to implement and maintain adequate BMPs as noted in Attachment No. 1, Facility Inspection Report dated October 5, 2007.
- b. November 27, 2007, Ben Neill and Peter Peuron inspected the project site. The National Weather Service predicted no chance of rain on this date, but rain was expected later in the week. A total of 11 separate locations including transit stations and storage yards

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<sup>2</sup> BAT/BCT as defined in sections 301 and 402 of the federal Clean Water Act.

were inspected. NCTD again failed to implement and maintain adequate BMPs as noted in Attachment No. 2, Facility Inspection Report dated November 27, 2007.

- c. November 30, 2007, Ben Neill, Peter Peuron and Chris Means of the Regional Board inspected 16 separate locations along the project site. According to the National Weather Service, 0.91 inches of rain fell on this date. Rain was falling and storm water runoff was observed during the inspection. This made it possible to assess the actual performance of BMPs (i.e., their effectiveness at preventing discharges). Numerous BMP violations were observed along with 19 discharge violations. See Attachment 3, Facility Inspection Report dated November 30, 2007, for details of each violation.
- d. December 3, 2007, Ben Neill, Frank Melbourn, Chiara Clemente and Mark Alpert of the Regional Board, inspected the Mar Vista storage yard where a very significant uncontrolled discharge had been observed on November 30<sup>th</sup>. There was no rainfall or visible runoff on this date. Continued BMP violations are documented in a Facility Inspection Report of the same date (Attachment 4).
- e. December 7, 2007, Ben Neill and Peter Peuron inspected 11 Sprinter Rail construction areas within the project site. Although rain was falling in the morning of this inspection, it dissipated by the time that the inspectors reached the first site and storm water runoff was not observed during the day. The Facility Inspection Report documents numerous BMP violations and one discharge violation (Attachment 5).
- f. On December 19, 2007, Peter Peuron and Lee Schenk of the Regional Board inspected seven locations along the Sprinter Rail. Once again, rain was falling on the morning of the inspection, but had stopped before the first site was visited and storm water runoff was not observed during the day. Numerous BMP violations and one discharge violation are documented in the Facility Inspection Report (Attachment 6).
- g. December 28, 2007, Ben Neill, Chris Means, Chad Loflen and Ben James of the Regional Board inspected approximately 13 locations during the inaugural running of the commuter train. A significant number of BMP violations are documented in the Facility Inspection Report (Attachment 7).

- h. January 7, 2007, Ben Neill, Chad Loflen and Ben James inspected six areas along the Sprinter Rail and noted numerous BMP violations and a total of seven discharge violations (Attachment 8). There was only light rain during the day, however during the previous two days, about 1.68 inches had fallen in the Oceanside area.
- i. January 22, 2008, Ben Neill, Peter Peuron and Jeremy Haas inspected nine locations along the Sprinter Rail and observed improvement in the implementation of inlet protection and sediment controls. There was only slight improvement in erosion controls with many areas left either unstabilized or only partially stabilized (Attachment 9). There was light rain during the previous day and on this date, but no apparent runoff.
- j. January 25, 2008, Ben Neill and Peter Peuron inspected four locations along the Sprinter Rail, including two areas along the track that had not been inspected before. Although it had rained on the previous day, there was neither rain nor runoff visible on this date. The sites continued to exhibit a general lack of adequate sediment controls and erosion controls (Attachment 10).

A summary of the number of BMP violations found during each inspection is given on Page 8 (Table 1). Note that for the purposes of this table, an individual violation is counted for every separate discharge location (i.e., each individual area where there is a potential for impacts from erosion and sedimentation to discharge to a storm drain inlet or to receiving waters) where the individual BMP violation type was found. For example, two slopes lacking erosion controls which drain to the same inlet are counted as one violation type. But, multiple violation types can be associated with this single discharge point if there is a lack of erosion controls, a lack of inlet controls, improperly maintained sediment controls, etc..

It is important to note that nearly half of the 233 violations found consisted of either a complete lack of erosion controls or complete lack of sediment controls, as opposed to inadequate controls. This consideration tends to heighten the gravity of these violations, because it reflects a disregard for BMP implementation, as opposed to a "mere" lack of vigilance in implementing or maintaining BMPs.

Failure to employ BMPs and/or to implement and maintain adequate BMPs are serious violations because they resulted in the discharge of sediment into creeks and streams and receiving waters that are crossed along the rails route. Evidence of negligent disregard for implementation



**Table 1 - BMP Violation Types at Individual Discharge Points**

Inspection Date	Sites Visited	No Erosion Controls	No Sediment Controls	Inadequate Erosion Controls	Inadequate Sediment Controls	Improper Source/Trash Controls	Total BMP Violations
10/5/2007	8	9	9	-	20	5	43
11/27/2007	11	14	11	-	16	8	49
11/30/2007	14	9	4	5	14	1	33
12/3/2007	1	1	-	-	1	-	2
12/7/2007	11	13	3	1	6	-	23
12/19/2007	7	6	2	1	3	-	12
12/28/2007	13	8	-	5	4	3	20
1/7/2008	8	6	7	2	8	1	24
1/22/2008	9	7	-	4	7	1	19
1/25/2008	4	1	2	2	3	-	8
<b>Totals</b>	<b>86</b>	<b>74</b>	<b>38</b>	<b>20</b>	<b>82</b>	<b>19</b>	<b>233</b>

of adequate erosion controls includes numerous pictures of exposed soil on slopes, many exhibiting erosion rills, and exposed dirt fields without any groundcover or means of stabilization. Disregard of the need for sediment controls is exemplified by numerous photographs of unprotected storm drain inlets. Evidence of inadequate BMPs includes documentation of failing inlet protection and improperly installed perimeter controls.

The inspections provide ample evidence that both the failure to implement any BMPs when BMPs should have been implemented and the failure to implement or maintain adequate BMPs directly resulted in at least 25 separate instances of discharges of sediment to storm drains, or to waters of the United States, or to both. Hence, the gravity associated with these violations is severe.

### **3.1.2 Prior History of Violation**

#### Third Party Complaints

The Sprinter Rail project has been the subject of numerous complaints from local residents and municipalities.

In March 2006, the City of Vista reported sediment tracking violations at a rail crossing. This was the earliest complaint found in the Regional Board's records regarding the site.

On April 24, 2007, the Regional Board received a complaint from a resident who indicated that, "Up and down the line there are hundreds of instances of erosion and sediment entering the creek – particularly in the stretch between Rancho Del Oro and College Avenue." (Attachment 11).

From April 6, 2007 until January 29, 2008, Paul Cline, a former resident of San Marcos, reported BMP violations to the Regional Board at numerous locations along the Sprinter Rail. At that time, Mr. Cline provided more than 100 photographs of alleged BMP violations. Attachments 12 and 13 are compilations of some of the photographs that have been submitted. To vouch for his photographs, Mr. Cline has signed the documentation that has been provided to the Regional Board.

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#### Prior ACL and Issuance of Cleanup and Abatement Order

An inspection in February of 2007 resulted in the identification of numerous BMP violations and discharge violations. On March 19, 2007, a Notice of Violation (NOV No. R9-2007- 0050) was issued (Attachment 13). Numerous BMP violations and discharges were again observed during an

inspection on March 21, 2007 and a second NOV (NOV No. R9-2007-0219) was issued on April 3, 2007 (Attachment 14).

On December 12, 2007, the Regional Board adopted Administrative Civil Liability (ACL) Order No. R9-2007-0219 assessing a \$160,000 liability against NCTD for violations of the Permit. The ACL was issued for failure to implement BMPs, failure to conduct adequate site inspections and discharges of sediment into Waters of the United States.

The imposition of a \$160,000 liability represents a significant punitive action that did not appear to significantly alter NCTD's behavior with regard to BMP implementation as shown by the inspections conducted during the 2007/08 rainy season. CAO No. R9-2007-0226 was issued on December 31, 2007 in response to continued non-compliance with the Permit and threatened impacts to beneficial uses.

### **3.1.3 Culpability**

The NCTD has a high degree of culpability for failure to implement an adequate SWPPP. NCTD is a public board created in 1975 to plan, construct and operate public transit systems in northern San Diego County. As such, they have constructed numerous bus and rail projects over their 32 year history and should have the experience and expertise necessary to comply with applicable government regulations related to such projects, including storm water regulations. Linear transportation projects have unique difficulties associated with them such as narrow but long swaths of disturbed soil and potentially many storm water discharge points that make them more complex than typical construction projects. NCTD had the staff or contractors available with the necessary knowledge and expertise to appropriately achieve compliance with applicable stormwater requirements, and yet neglected to employ them. With an estimated budget of \$460 million, the Sprinter Rail construction project should have adequate resources to properly comply with the Permit.

According to documents submitted by NCTD, its staff was responsible for, and knowledgeable of, the construction storm water requirements. NCTD was negligent by not overseeing its contract with West Coast Rail Constructors, the project's general contractor, to ensure that compliance with the Permit was continually achieved. In accordance with the Permit requirements, NCTD developed a site specific SWPPP. During the early phases of the project, the Cities of Oceanside, Vista and San Marcos each notified NCTD and their contractor regarding a lack of BMPs at the project site. Three Regional Board inspectors performed a total of four inspections during the 2005/06 and 2006/07 rainfall seasons to assist NCTD staff to understand the Regional Boards' expectations for Permit compliance.

Culpability is further increased by NCTD's failure to take appropriate actions after issuance of the first ACL Complaint in the Spring of 2007 for the same types of violations (BMP and sediment discharges). Lack of appropriate action in the face of enforcement actions demonstrates intentional and/or negligent disregard for regulatory requirements.

NCTD's failure to take appropriate corrective actions also occurred against a backdrop of numerous complaints by citizens along the project site and municipalities that were trying to protect their MS4s. The substance of the complaints has been, for the most part, corroborated by Regional Board inspections. Lack of response to the community concerns reflects, once again, intentional and/or negligent disregard that heightens overall culpability.

#### **3.1.4 Susceptibility to Cleanup and Abatement**

This factor does not apply to this violation.

#### **3.1.5 Degree of Toxicity of the Discharge**

This factor does not apply to this violation.

#### **3.1.6 Ability to Pay and Continue in Business**

At this time, the Regional Board has no information to indicate that NCTD is unable to pay the proposed administrative civil liability (ACL) or that the penalty would affect the ability of NCTD to continue operations. The Sprinter Rail project has an estimated budget of \$460 million. The proposed liability of \$685,000 is less than 0.15% of the project's estimated budget.

#### **3.1.7 Voluntary Cleanup Efforts Undertaken**

The Regional Board observed and documented the failure to implement and maintain adequate BMPs at the Sprinter Rail project on at least ten occasions (October 5, 2007, November 27, 2007, November 30, 2007, December 3, 2007, December 7, 2007, December 19, 2007, December 28, 2007, January 7, January 22, 2008, and January 25, 2008). Copies of each of these inspection reports were provided to NCTD and its consultants. During the inspections on November 27, 2007, November 30, 2007, December 7, 2007, December 28, 2007, January 7, 2008, and January 22, 28 photographs of adequate BMP implementation including corrections of prior BMP violations were taken. The photographs included 20 instances in which gravel bags were properly employed as inlet protection. At one location a photograph shows a combination of plastic sheeting, gravel bags, and fiber rolls in an area where these BMPs had been lacking. The other seven photographs of proper BMP implementation included three locations in which materials or trash

requiring coverage were adequately covered, one case in which sediment tracking was properly implemented, one case in which a fiber roll was properly installed, appropriate use of a coconut blanket for slope stabilization, and lining of an earthen channel with plastic (as an erosion control).

### **3.1.8 Economic Benefit Resulting from the Violation**

NCTD was required to be in compliance with the Permit at the time construction activity began (i.e., to develop and implement a site specific SWPPP). Regional Board staff estimate that adequate sediment and erosion control BMPs cost roughly \$5,000 per acre per year. This estimate incorporates the unusual conditions that must be dealt with on this site, including the earthen channels that run typically along both sides of the tracks and steep slopes that adjoin the channels. Both of these features require erosion controls in the form of hydromulching, hydroseeding, or installation of geotextiles, all of which are expensive technologies.

The need for sediment controls such as gravel bags or silt fences along many miles of track similarly constitutes a significant expense given the linear nature of this project. At 280 acres, the cost associated with implementing adequate BMPs at the NCTD site is estimated to be \$1,400,000 per year. NCTD's goal to complete the Sprinter Rail project by a firm date, may have been a significant factor in NCTD's lack of action in achieving compliance with the Permit. The NCTD's contractor had incentive in the form of a bonus of \$3.3 million to complete the project by the ceremonial opening date of December 28, 2007 (Attachment 16). BMPs were not installed by the time of the system's Grand Opening in late December 2007.

On January 3, 2008, NCTD staff recommended that the NCTD Board release approximately \$5 million in money that was held in retention from West Coast Rail Constructors (WCRC), their general contractor. Retention money is held in order to pay for unforeseen liabilities incurred by the contractor for failure to perform work adequately, potential disputes or other potential costs that NCTD may need to recover.

NCTD staff in its recommendation stated that:

*WCRC has been performing well and making good progress despite numerous changes in the design and field conditions and has expended considerable resources in acceleration and changed work, some of which is pending final pricing agreement. There are currently no significant issues in dispute and contract change orders are within industry averages. The major factors typically evaluated in the reduction of retainage are: (1) work progress and*

*schedule, (2) potential disputes, and (3) quality of work. WCRC has been performing well on all three of these criteria, and continues to work toward their goal of finishing on schedule with no claims (Attachment 17).*

In recommending the release of the retainage money, the NCTD staff found that, "satisfactory progress is being made". It is noteworthy that these findings and the proposal to reduce the retainage were presented to the NCTD Board on January 3, 2008, approximately three weeks after the Regional Board had agreed to accept NCTD's settlement of \$160,000 for Construction Permit violations.

At the time, the NCTD was well aware that their construction site was far from achieving compliance with the stormwater requirements of the Permit. In addition, inspections at the time of this Board action continued to demonstrate numerous, widespread Permit violations. The recommendation to reduce retainage demonstrates that NCTD staff failed to acknowledge their contractor's failure to comply with the Construction Permit.

### **3.1.9 Other Matters as Justice May Require**

The Regional Board has incurred specific expenses relating to the investigation of the violations alleged in this report as well as the preparation of enforcement documents associated with this enforcement action. To date, the Regional Board's total expenditures are no less than \$50,000. Such expenditures will continue until NCTD fully complies with the storm water requirements.

### **3.2 NCTD Discharged Sediment to a Storm Drain System and "Waters of the United States" in Violation of CWC §13376 and the Permit Discharge Prohibition A.2.**

The Permit's Discharge Prohibition A.2 states:

Discharges of material other than storm water which are not otherwise authorized by an NPDES permit to a separate storm sewer system (MS4) or waters of the nation are prohibited, except as allowed in Special Provisions for Construction Activity, C.3.

NCTD discharged sediment to a MS4 tributary to navigable waters of the United States without submitting a report of waste discharge in violation of CWC section 13376 and in violation the Permit section A.2. A total of 25 discharges were observed during 4 inspections that were performed during rainy weather. Figure 3 shows the locations of the observed discharges. A brief listing of each discharge is provided below. Photo numbers from the respective inspection reports are included for reference.

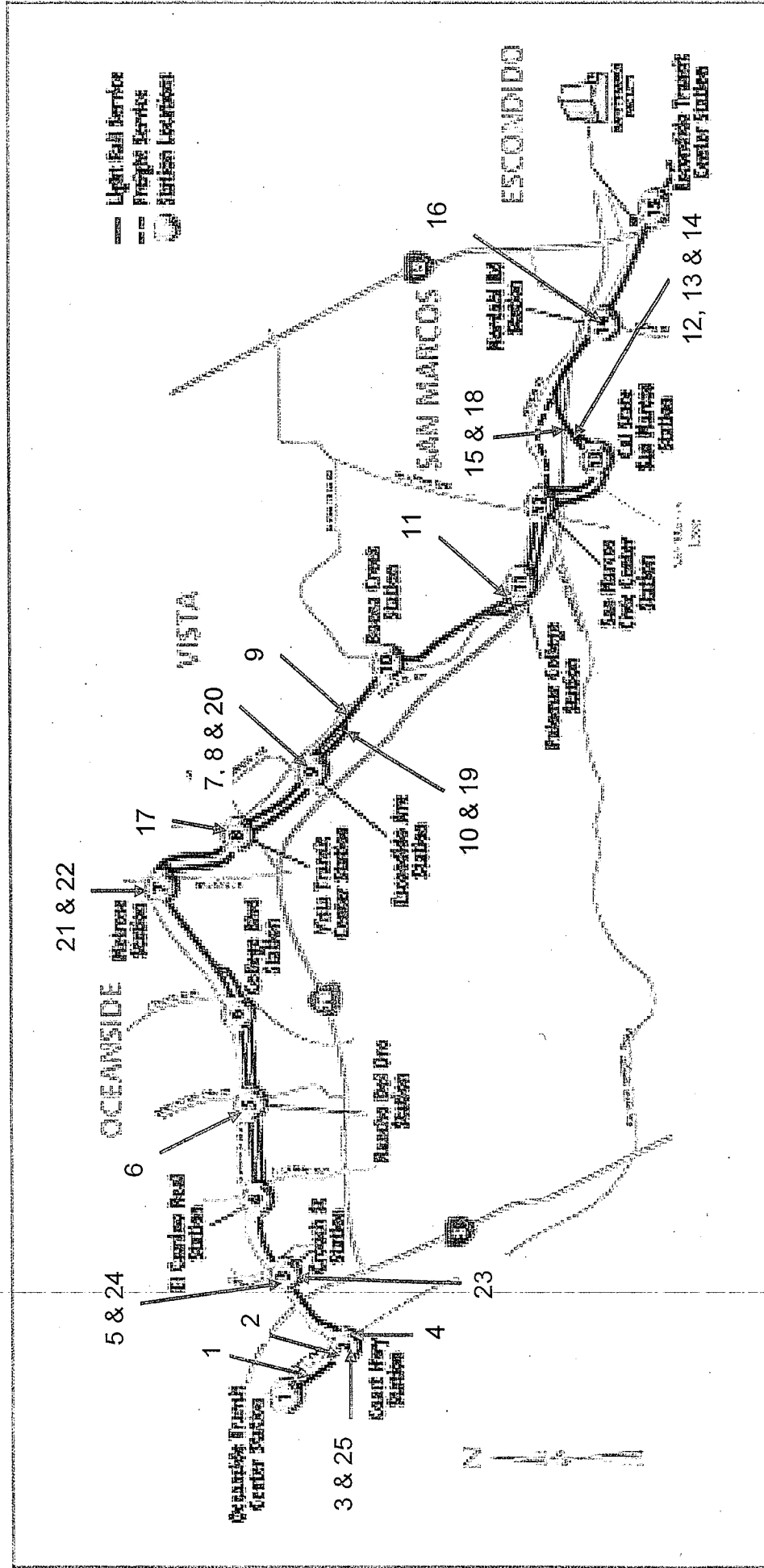


Figure 3 - Locations of Observed Discharges Along the Sprinter Rail Between November 30, 2007 & January 7, 2008

On November 30, 2007 (photos in Attachment 3):

1. Into storm drain inlet along the east side of the tracks that parallel Tremont Street near the Oceanside Transit Center Station in the City of Oceanside. Drainage from this inlet discharges into Loma Alta Creek (Photo No. 670).
2. Into storm drain inlet in drainage channel along the east side of tracks near the Coast Highway Station in Oceanside. This drainage discharges into Loma Alta Creek (Photo No. 679).
3. Into storm drain inlet in drainage channel across from the Coast Highway Station in Oceanside. Drainage from this inlet discharges into Loma Alta Creek (Photo No. 685).
4. Into storm drain inlet along the south side of the tracks east of the Coast Highway Station in Oceanside. This drainage discharges into Loma Alta Creek (Photo No. 692).
5. Directly into Loma Alta Creek, near the Crouch Street Station in Oceanside (Photo No. 697).
6. Into storm drain inlet near Rancho Del Oro Station in Oceanside. This drainage discharges into Loma Alta Creek which traverses through this site (Photo No. 709).
7. Into storm drain inlet in the parking lot of the Escondido Avenue Station in Vista. This storm drain discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon (Photo No. 733)
8. Into storm drain inlet at the Escondido Avenue Station in Vista. This storm drain discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon (Photo No. 736).
9. Into storm drain inlet near the north boundary of the Mar Vista storage yard. This drainage discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon (Photo No. 740).
10. Into storm drain inlet at the northwestern corner of the Mar Vista storage yard. This storm drain discharges into Buena Vista Creek and downstream into Buena Vista Lagoon (Photo No. 746).
11. Into drainage channel along the south side of Palomar Station in San Marcos. This drainage discharges into a storm drain and then into San Marcos Creek and further downstream to Lake San Marcos (Photo No. 754).
12. Into storm drain inlet near the tracks at Barham Lane in San Marcos. The storm drain discharges into San Marcos Creek and further downstream to Lake San Marcos (Photo No. 757).
13. Into drainage channel along the south side of Barham Lane tracks. This drainage discharges into San Marcos Creek and further downstream to Lake San Marcos (Photo No. 760).



14. Into storm drain inlet near the Barham Lane construction area (again discharging to San Marcos Creek and further downstream to Lake San Marcos) See Photo No. 761.
15. Into storm drain inlet near Shelley Circle in San Marcos. The storm drain discharges to San Marcos Creek and further downstream to Lake San Marcos (Photo No. 762).
16. From Nordahl Road discharging to an unprotected MS4 inlet in Escondido. Discharge is to San Marcos Creek and further downstream to Lake San Marcos (Photo No. 764).

On December 7, 2007 (photos in Attachment 5):

17. Into storm drain inlet on the northeast corner of the Vista Transit Center Station. Drainage discharges into Buena Vista Creek (Photo No. 18).

On December 19, 2007 (photos in Attachment 6):

18. Into storm drain inlet near Shelley Circle in San Marcos and further downstream to Lake San Marcos. The drainage discharges into San Marcos Creek. This is the same inlet where discharges were observed on November 30, 2007 (listed as No. 14, above). See Photo No. 3.

On January 7, 2008 (photos in Attachment 8):

19. Into storm drain inlet in the northwest corner of the Mar Vista storage yard. This storm drain discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon (Photo No. 5).
20. Into storm drain inlet at the Escondido Avenue Station in Vista. This drainage discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon (Photo No. 13).
21. Into drainage channel at Melrose Station in Vista that discharges into Loma Alta Creek (Photo No. 16).
22. Directly into Loma Alta Creek at Melrose Station in Vista (Photo Nos. 18, 19 and 21).
23. Directly into Loma Alta Creek on the north bank at Crouch Street Station in Oceanside (Photo No. 26).
24. Directly into Loma Alta Creek on the south bank at Crouch Street Station in Oceanside (Photo No. 30).
25. Into a storm drain inlet on the north side of the tracks at the Coast Highway Station in Oceanside. The storm drain discharges into Loma Alta Creek (Photo No. 32).

### 3.2.1 Nature, Extent, Circumstances, and Gravity of Violations

Discharges of turbid water and sediment to the storm drain system and Loma Alta Creek, were observed and photographed by Regional Board staff during the following inspections: November 30, 2007; December 7, 2007; December 19, 2007; and January 7, 2008. The rainfall amounts on each of these days were 0.9 inches on November 30, 2007 when 16 sediment discharges were observed; 0.7 inches on December 7, 2007 when one sediment discharge was observed; 0.5 inches on December 19, 2007 when one sediment discharge was observed and 2.7 inches of rain on January 7, 2008 when seven sediment discharges were observed. These 25 sediment discharges are violations of Discharge Prohibition A.2 of the Permit.

Sediment was discharged from the NCTD Sprinter Rail project directly into Loma Alta Creek and indirectly (i.e., via the MS4) into the Pacific Ocean, Buena Vista Creek and downstream to Buena Vista Lagoon, Agua Hedionda Lagoon, San Marcos Creek and Lake San Marcos. Buena Vista Lagoon and Agua Hedionda Lagoon are Clean Water Act section 303(d) listed water bodies impaired by sedimentation/siltation. Continued NCTD sediment discharges in violation of state law and permits will exacerbate the impairment of these lagoons. Sediment discharges were observed in the following watersheds:

1. Loma Alta Hydrologic Area (904.1). The Beneficial Uses are:
  - a. Contact Water Recreation (REC1) – Potential
  - b. Non-Contact Water Recreation (REC2)
  - c. Warm Freshwater Habitat (WARM)
  - d. Wildlife Habitat (WILD)
  
2. Vista Hydrologic Subarea (904.22). The Beneficial Uses are:
  - a. Agricultural Supply (AGR)
  - b. Industrial Process Supply (IND)
  - c. Contact Water Recreation (REC1)
  - d. Non-Contact Water Recreation (REC2)
  - e. Warm Freshwater Habitat (WARM)
  - f. Wildlife Habitat (WILD)
  
3. Buena Hydrologic Subarea(904.32). The Beneficial are:
  - a. Municipal Supply (MUN)
  - b. Agricultural Supply (AGR)
  - c. Industrial Process Supply (IND)
  - d. Contact Water Recreation (REC1)
  - e. Non-Contact Water Recreation (REC2)
  - f. Warm Freshwater Habitat (WARM)
  - g. Wildlife Habitat (WILD)

4. Escondido Hydrologic Subarea (904.62). The Beneficial Uses are:
  - a. Municipal Supply (MUN)
  - b. Agricultural Supply (AGR)
  - c. Contact Water Recreation (REC1)
  - d. Non-Contact Water Recreation (REC2)
  - e. Warm Freshwater Habitat (WARM)
  - f. Cold Freshwater Habitat (COLD)
  - g. Wildlife Habitat (WILD)
  
5. Richland Hydrologic Subarea. (904.52). The Beneficial Uses are:
  - a. Agricultural Supply (AGR)
  - b. Contact Water Recreation (REC1)
  - c. Non-Contact Water Recreation (REC2)
  - d. Warm Freshwater Habitat (WARM)
  - e. Wildlife Habitat (WILD)

Discharges of suspended sediment to receiving waters constitute direct impacts to the environment. Suspended sediment in surface waters can cause harm to aquatic organisms by abrasion of surface membranes, interference with respiration and sensory perception in aquatic fauna. Suspended sediment can reduce photosynthesis in and survival of aquatic flora by limiting the transmittance of light. The Water Quality Control Plan for the San Diego Basin (9) (Basin Plan), contains a narrative water quality objective for sediment which concludes that the suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses. In addition, the Basin Plan specifies a numerical water quality objective of 20 nephelometric turbidity units (NTUs) for the Carlsbad Hydrologic Unit. This standard corresponds to a transparency of one foot meaning that visible light can penetrate water with a turbidity of 20 NTUs to a depth of one foot. In each case in which photographs of turbid discharges were obtained during Regional Board inspections, the turbidity appeared to be significantly above the 20 NTU standard as the water was essentially opaque (e.g., photos 670, 679, 685, 692, 697, 709, 733, 740, 746, 754, 757, 760, 761, 762, and 764).

### **3.2.2 Culpability**

Please see section 3.1.3 for culpability.

### **3.2.3 Susceptibility to Cleanup and Abatement**

The pollutant deposition caused by discharges of sediment and suspended sediments from rainfall events would be difficult to remove because the deposited materials would be spread widely along the bottoms on streams. Cleanup would cause widespread disturbance of

native flora and fauna. Water quality benefits of a cleanup would need to be weighed against potential impacts resulting from cleanup action. It may be possible to find locations between sediment-impacted MS4 conveyances and receiving waters where detention basins can be constructed to intercept sediment before it reaches receiving waters. Such a possibility should be evaluated in NCTD's future analysis of cleanup and abatement options.

**3.2.4 Degree of Toxicity of the Discharge**

This factor does not apply to this violation.

**3.2.5 Ability to Pay and Continue in Business**

See section 3.1.5 above.

**3.2.6 Voluntary Cleanup Efforts Undertaken**

NCTD has cleaned up a section of the Loma Alta Creek channel in the City of Oceanside. This action was taken voluntarily and not as a requirement of any permit. About 1,400 cubic yards of sediment was removed from the south bank of Loma Alta Creek. It should however, be noted that this action was taken after several businesses in the area were flooded when Loma Alta Creek overflowed, apparently as the result of hydromodification related to construction of the Sprinter Rail. (Attachment18).

**3.2.7 Prior History of Violation**

See section 3.1.2 above.

**3.2.8 Economic Benefit Resulting from the Violation**

See section 3.1.8 above.

**3.2.9 Other Matters as Justice May Require**

See section 3.1.9 above.

**4. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY**

Pursuant to CWC section 13385 (a),

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

1. Section 13375 or 13376.
2. Any waste discharge requirements or dredged and fill material permit.

Furthermore, CWC section 13385 (c) provides that

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

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

California Water Code section 13385 (e) requires the Regional Board to consider several factors when determining the amount of civil liability to impose. These factors include: "...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 the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

Significant liability is justified because of the chronic nature of the violations, for their repeated failure to address violations, and for the multiple sediment discharges into already sediment impaired waters. NCTD clearly had ample opportunity prior to the rainy season to address these violations, which were repeatedly brought to their attention during the meetings and discussions in fall of 2007.

Marginal improvement in installation of BMPs was achieved by January 25, 2008. The drive to complete rail construction by December 28, 2007 appears to have played a significant role in NCTD's failure to address BMP requirements.

Significant liability is justified by the sheer extent of noncompliance on a project of this size and the large extent of the construction site that adversely affected multiple waterbodies. When noncompliance occurs over an area of 280 acres, it can be expected that the environmental impacts will be proportionately greater than the impacts that occur at typical sites that are much smaller. The seriousness of the violations is therefore greater, and it is appropriate to invoke a proportionately greater penalty (within the constraints of the Water Code). The widespread occurrence of sediment discharges and the documented severity of the discharges support the conclusion that consistent failure to implement appropriate BMPs directly resulted in large-scale environmental impacts.

Based on consideration of the factors discussed above in section 3, civil liability should be imposed on NCTD in the amount of no less than \$685,000 for all violations, as follows:

1. The discharger failed to implement adequate BMPs on at least 112 days based on inspections performed by the Regional Board. The maximum liability for failure to implement and maintain effective BMPs is \$10,000 per day. Civil liability should be imposed at a rate of \$5,000 per day for a total of \$560,000.
2. The 25 instances of discharge of sediment into storm drains and waters of the United States were observed between Nov 30, 2007 and Jan 7, 2008. Pursuant to Water Code Section 13385, the maximum liability that can be administratively imposed by the Regional Board is \$10,000 per violation per day per violation plus up to \$10 per gallon discharged. Civil liability for the 25 documented discharges should be imposed at \$5,000 per violation for a total of \$125,000.

#### **LIST OF ATTACHMENTS**

1. Attachment No. 1 – Facility Inspection Report dated October 5, 2007
2. Attachment No. 2 – Facility Inspection Report dated November 27, 2007
3. Attachment No. 3 – Facility Inspection Report dated November 30, 2007
4. Attachment No. 4 – Facility Inspection Report dated December 3, 2007
5. Attachment No. 5 – Facility Inspection Report dated December 7, 2007
6. Attachment No. 6 – Facility Inspection Report dated December 19, 2007
7. Attachment No. 7 – Facility Inspection Report dated December 28, 2007
8. Attachment No. 8 – Facility Inspection Report dated January 7, 2008
9. Attachment No. 9 – Facility Inspection Report dated January 22, 2008
10. Attachment No. 10 – Facility Inspection Report dated January 25, 2008
11. Attachment No. 11 - E-mail from Nadine L. Scott, dated April 24, 2007
12. Attachment No. 12 - Submittal by Paul Cline, dated January 16, 2008
13. Attachment No. 13 - Submittal by Paul Cline, dated January 22, 2008
14. Attachment No. 14 - NOV No. R9-2007-0063, dated April 3, 2007
15. Attachment No. 15 - NOV No. R9-2007-0208, dated October 26, 2007
16. Attachment No. 16 - Minutes of NCTD Board Meeting on May 17, 2007
17. Attachment No. 17 - Agenda Item 13 from NCTD Board Meeting on December 20, 2007
18. Attachment No. 18 - Article from the North County Times, dated January 15, 2008