

Santa Ana Regional Water Quality Control Board

State of California
California Regional Water Quality Control Board
Santa Ana Region

In the matter of:

California Department of Transportation)
(Caltrans))
464 W. 4th Street)
San Bernardino, CA 92401)
and)
Atkinson Contractors LP)
18201 Von Karman, Suite 800)
Irvine, CA 92612)

Order No. R8-2017-0051
Settlement Agreement and
Stipulation for Entry of Order; Order

Section I: Introduction

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (“Stipulated Order” or “Order”) is entered into by and between the Executive Officer of The Regional Water Quality Control Board, Santa Ana Region (“Regional Water Board”), on behalf of the Regional Board Prosecution Team (“Prosecution Team”), and the California Department of Transportation (“Caltrans”) and Atkinson Contractors LP (“Atkinson”) (Caltrans and Atkinson collectively are referred to as the “Settling Respondents”; the Settling Respondents and the Prosecution Team are collectively referred to as the “Parties”), and is presented by the Parties to the Regional Water Board, or its delegee, for adoption as an Order, by settlement, pursuant to Government Code section 11415.60.

Section II: Recitals

Background

1. Settling Respondents, Caltrans, and its contractor Atkinson, conducted construction activities related to the Devore Interchange Improvements Project (WDID 8 36C366933) (“Project”).
2. Caltrans is a Legally Responsible Party and signatory to this Settlement Agreement because it is the Permittee under the MS4 Permit and the General Permit, as defined below in No. 4.

3. Atkinson is also a Legally Responsible Party and signatory to this Settlement Agreement because as Caltrans' contractor, it was responsible for installing and maintaining BMPs and otherwise complying with the terms of the General Permit.
4. As described in Attachment A (Specific Factors Reached Via Settlement) the Prosecution Team alleged that Caltrans failed to comply with State Water Resources Control Board ("State Board") Order No. 2012-0011-DWQ, NPDES Permit No. CAS000003, Waste Discharge Requirements for the State of California Department of Transportation (MS4 Permit) and the State Board Order No. 2009-0009-DWQ, NPDES Permit No. CAS000002, General Permit for Storm Water Dischargers Associated with Construction and Land Disturbance Activities ("General Permit").
5. The Prosecution Team specifically alleged two violations in a draft administrative civil liability complaint ("ACLC") that was provided in draft form to the Settling Respondents to initiate settlement: (1) Failure to implement an effective combination of erosion and sediment controls (2) Discharge of sediment-laden and debris-laden storm water to Cajon Creek, Lytle Creek, and Santa Ana River Reach 5.
6. A rain event was forecasted by the National Weather Service for February 26, 2014 through March 2, 2014. In response, the Settling Respondents prepared a Rain Event Action Plan ("REAP"). The Settling Respondents submitted two Notice of Discharge ("NOD") reports after the rain event on March 4, 2014. The NOD for the "Drainage System at SB Kenwood Off Ramp" location indicated that certain Best Management Practices ("BMPs") were in place and that additional BMPs would be implemented at the discharge location. The second NOD for the "Drainage System 90 Outlet along SB 15 S. of Kenwood" location also indicated that certain BMPs were in place and noted additional BMPs to be installed. The second NOD also included storm water sample analysis for the location that indicated a NAL exceedance for turbidity.
7. Regional Water Board staff conducted a follow up inspection on March 21, 2014 to determine whether additional BMPs identified in the NODs had been implemented. Regional Water Board staff observed that additional BMPs had not been fully implemented and that some damaged BMPs had not been repaired. Additionally, sediment had accumulated at the drain inlets but had not been removed.
8. The Regional Water Board invited Caltrans and Atkinson to participate in settlement discussions via a communication dated August 31, 2016. This confidential communication was an alternative to formal enforcement via issuance of the draft ACLC in final form with accompanying hearing procedures. The Parties have engaged in settlement negotiations and have reached an agreement regarding the violations alleged in the NOV.
9. As described herein and in Attachment A, to resolve by consent and without further administrative proceedings, the Parties have reached an agreement as to a final liability amount using the factors enumerated in 13385(e) and the Enforcement Policy. The agreed-upon liability amount is Four Hundred Eighty Eight Thousand Nine Hundred Nine Dollars (\$488,909), which amount will be deposited into the Cleanup and Abatement Account.

Legal Authority

10. The Federal Clean Water Act and California Water Code (“Water Code”) section 13376 prohibit the discharge of pollutants to waters of the United States, unless authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit.
11. Sections E.3 and E.6 of Attachment D of the General Permit require the Legally Responsible Party to implement appropriate erosion control BMPs in conjunction with sediment control BMPs for areas under construction. The Legally Responsible Party is also required to ensure that all storm drain inlets, perimeter controls, and runoff control BMPs, are maintained and protected from activities that reduce their effectiveness.
12. Section E of the General Permit, Discharge Prohibition, establishes that storm water discharges are only authorized when all conditions of the General Permit are satisfied. Section F of the General Permit, Effluent Standards for All Types of Discharges, establishes turbidity levels for storm water discharges.

Alleged Violations

13. The Settling Respondents are alleged to have violated the MS4 Permit and the General Permit by not implementing an effective combination of sediment and erosion controls and discharging sediment laden storm water runoff to receiving waters.
14. These violations are subject to penalties under Water Code section 13385.
15. During settlement, the Settling Respondents provided additional information related to steps they took to maintain and implement BMPs at the Project, which led to an adjustment of some of the Enforcement Policy factors.
16. The Parties agree to settle the matter without administrative or civil litigation and by presenting this Stipulated Order to the Regional Water Board or its delegee for adoption as an Order pursuant to Government Code section 11415.60. The Prosecution Team believes that the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the specific violations alleged in Attachment A except as provided in this Stipulated Order and that this Stipulated Order is in the best interest of the public.

Section III: Stipulations

The Parties stipulate to the following:

17. This Stipulated Order is entered into by the Parties to resolve by consent and without further administrative proceeding the two (2) alleged violations of draft ACLC R8-2016-0050. ACL R8-2015-0050 was not publicly issued because the Parties engaged in settlement negotiations that ultimately proved successful.
18. **Administrative Civil Liability:** Within thirty (30) days of adoption of this Stipulated Order, the Settling Respondents shall remit, by check the total amount of **\$488,909**, payable to the *State Water Resources Control Board Cleanup and Abatement Account*, indicating Order No. R8-2017-0051 on the check. For the avoidance of doubt, it is acknowledged that Settling Respondents may pay the liability amount in a single check or by separate

checks in amounts to be agreed between the Settling Respondents. The check should be mailed to:

State Water Resources Control Board
Division of Administrative Services
ATTN: Accounting
1001 "I" Street, 18th Floor
Sacramento, CA 95814

A copy of the check shall also be mailed to the following address:

Michelle Beckwith
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

19. **Joint and Several Liability:** Both Caltrans and Atkinson shall be held jointly and severally liable for the liability and will remain liable until full payment is received.

20. **Party Contacts for Communications related to the Stipulated Order:**

For the Regional Water Board:

Julie Macedo
State Water Resources Control Board, Office of Enforcement
801 K Street, Suite 2300
Sacramento, CA 95814
Julie.Macedo@waterboards.ca.gov

For Caltrans:

Julie DelRivo
100 S. Main Street, Suite 1300
Los Angeles, CA 90012
julie.delrivo@dot.ca.gov

For Atkinson:

Jeffrey Knight
Pillsbury Winthrop Shaw Pittman, LLP
1200 Seventeenth Street, NW
Washington, DC 20036
jeffrey.knight@pillsburylaw.com

21. **Waiver of Hearing:** Settling Respondents have been informed of the rights provided by Water Code section 13323, subdivision (b), and hereby waive their right to a hearing before the Regional Water Board prior to the adoption of the Stipulated Order.

22. **Jurisdiction:** The Parties agree that the Regional Water Board has subject matter jurisdiction over the matters alleged in this action and personal jurisdiction over the Parties to this Stipulated Order.

23. **Scope of Order:** Upon adoption by the Regional Water Board, or its delegee, this Stipulated Order represents a final and binding resolution and settlement of all claims, violations, or causes of action alleged in this Order or which could have been asserted on the two (2) violations that are subject to penalties alleged in Attachment A of this Order against the **Settling Respondents** as of the effective date of this Order. The provisions of this Paragraph are expressly conditioned on the **Settling Respondents'** full payment of the administrative civil liability by the specified deadlines.
24. **Timely Payment:** **Settling Respondents** must submit payment for the full amount of \$488,909 within 30 days of the adoption of this Order.
25. **Denial of Liability:** Caltrans and Atkinson each agree to be bound by the terms of this Stipulated Order and to pay the sum agreed to herein, in order to avoid the expense and inconvenience of defending against the contested violations alleged by the Prosecution Team. Neither this Stipulated Order, nor any payment pursuant to the Order, shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgement of any fact, law, or liability, nor shall it be construed as an admission of violation of any law, rule, or regulation. However, this Order and/or any actions of payment pursuant to the Order may constitute evidence in actions seeking compliance with this Order. This Order may be used as evidence of a prior enforcement action in future actions by the Regional Water Board, against either **Settling Respondent**, consistent with Water Code section 13385(e) and the Enforcement Policy.
26. **Covenant not to Sue:** Upon the effective date of this Stipulated Order, the **Settling Respondents** shall and do release, discharge, and covenant not to sue or pursue any civil or administrative claims against the Regional Water Board, including its officers, agents, directors, employees, contractors, subcontractors, attorneys, representatives, predecessors-in-interest, and successors and assigns for any and all claims or causes of action, of every kind and nature whatsoever, in law and equity, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, which arise out of or are related to this action.
27. **Public Notice:** The Parties agree that the proposed Stipulated Order, as signed by the Parties, will be noticed for a 30-day public comment period prior to being presented to the Regional Water Board, or its delegee, for adoption. In the event objections are raised during the public review and comment period, the Regional Water Board, or its delegee, may, under certain circumstances, require a public hearing regarding the Stipulation and Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the proposed Order as necessary or advisable under the circumstances. Except in such event, the **Settling Respondents** agree that they may not rescind or otherwise withdraw their approval of this proposed Stipulated Order.
28. **Procedure:** The Parties agree that the procedure that has been adopted for the approval of the settlement by the Parties and review by the public, as reflected in this Order, will be adequate. In the event procedural objections are raised prior to this Stipulated Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.

29. **Waivers:** In the event that this Stipulated Order does not take effect because it is not approved by the Regional Water Board or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that the Prosecution Team may proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liability for the underlying alleged violations, or may continue to pursue settlement. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in any subsequent administrative or judicial proceeding or hearing. The Parties also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to:
- a. Objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections to the extent that they are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions, and therefore may have formed impressions or conclusions, prior to conducting any contested evidentiary hearing in this matter; or
 - b. Laches or delay or other equitable defenses based on the time period that the order or decision by settlement may be subject to administrative or judicial review.
 - c. Regional Water Board sometimes delegate their authority, or act through, their Executive Officer. In this instance, the current Regional Water Board Executive Officer is Hope Smythe, who at the time of the settlement negotiations was the Assistant Executive Officer. The Assistant Executive Officer is the head of the Prosecution Team. Ms. Smythe is therefore disqualified from advising the Board in this instance due to the separation of function. Should the Regional Water Board exercise its authority, after public notice and due consideration of this agreement and evidence, the Parties agree that Ms. Smythe may sign this agreement as part of her new duties. In the alternative, the Board Chair may sign the agreement. If the matter proceeds to a contested hearing, the Parties do not object to Ms. Smythe participating in a prosecutorial role, nor object to an independent staff member, such as the new Assistant Executive Officer, being designated to assist in advising the Regional Water Board.
30. **Appeals:** The Settling Respondents hereby waive their right to appeal this Stipulated Order to the State Water Resources Control Board, or to California Superior Court and/or any California appellate level court.
31. **Effect of Stipulated Order:** Except as expressly provided in this Stipulated Order, nothing in this Stipulated Order is intended nor shall it be construed to preclude the Prosecution Team or any state agency, department, board or entity or any local agency from exercising its authority under any law, statute, or regulation.
32. **Water Boards not Liable:** Neither the Regional Water Board members nor the Regional Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from the negligent or intentional acts or omissions by the Respondent or its respective directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Order, nor shall the Regional Water Board, its members, or staff be held as parties to or guarantors of any contract entered into by Respondent, or its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Order.

33. **No Waiver of Right to Enforce:** The failure of the Prosecution Staff or Regional Water Board to enforce any provision of this Stipulated Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of this Stipulated Order. The failure of the Prosecution Staff or Regional Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order. No oral advice, guidance, suggestions or comments by employees or officials of any Party regarding matters covered under this Stipulated Order shall be construed to relieve any Party regarding matters covered in this Stipulated Order.
34. **Regulatory Changes:** Nothing in this Stipulated Order shall excuse the Settling Respondents from meeting any more stringent requirements which may be imposed hereafter by changes in applicable and legally binding legislation or regulations.
35. **Authority to Enter Stipulated Order:** Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Order on behalf of and to bind the entity on whose behalf he or she executes the Order.¹
36. **Integration:** This Stipulated Order and attachments constitute the entire agreement between the Parties and may not be amended or supplemented except as provided for in this Stipulated Order.
37. **Modification:** This Order shall not be modified by any of the Parties by oral representation whether made before or after the execution of this Order. All modifications must be made in writing and approved by Respondent and the Regional Water Board or its delegee.
38. **Interpretation:** This Stipulated Order shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared it and any uncertainty and ambiguity shall not be interpreted against any one party.
39. **Effective Date:** The effective date of this Order shall be the date on which it is adopted by the Regional Board or its delegee.
40. **Counterpart Signatures:** This Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.
41. **Incorporated Attachments:**

Attachment A (Specific Factors Reached Via Settlement)
Attachment B (Penalty Methodology Spreadsheet)

¹ Hope Smythe will sign the Order on behalf of the Prosecution Team. Ms. Smythe was a member of the Prosecution Team prior to entering her role as Executive Officer of the Regional Board. The signatory of the final Stipulated Order, if agreed upon by the Regional Water Board, will be determined by the Board. Ms. Smythe will not act in an advisory capacity to the Regional Water Board in this matter.

IT IS SO STIPULATED:



Hope A. Smythe, Executive Officer
For the Regional Water Board Prosecution Team

11/6/17

Date

John Bulinski, District 8 Director
For Caltrans

Date



Tim Stroud, Vice President
For Atkinson

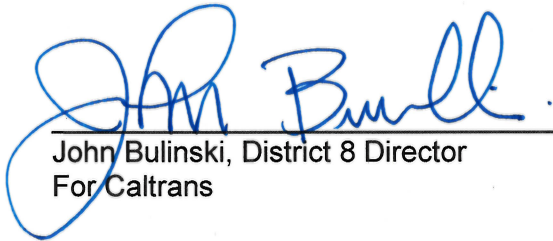
11-2-17

Date

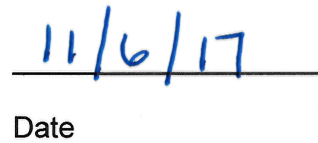
IT IS SO STIPULATED:

Hope A. Smythe, Executive Officer
For the Regional Water Board Prosecution Team

Date



John Bulinski, District 8 Director
For Caltrans



Date

Tim Stroud, Vice President
For Atkinson

Date

ATTACHMENT A

Administrative Civil Liability Complaint No. R8-2017-0051

Enforcement Penalty Methodology Factors Reached via Settlement

California Department of Transportation and Atkinson Contractors LP

This document provides details to support the proposed Settlement Agreement and Stipulation for Entry of Order (Order) against the California Department of Transportation (“Caltrans”) and Atkinson Contractors LP (collectively “Settling Respondents”) in response to alleged violations for failing to comply with the State Water Resources Control Board (“State Board”) Order No. 2012-0011-DWQ, NPDES Permit No. CAS000003, Waste Discharge Requirements for State of California Department of Transportation (“MS4 Permit”) and the State Board Order No. 2009-0009-DWQ, NPDES Permit No. CAS000002, General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (“General Permit”).

The State Board’s Water Quality Enforcement Policy (2009) (“Enforcement Policy”) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code (“CWC”) section 13385(e). Each factor of a nine-step approach is discussed below, as is the basis of assessing the corresponding score according to the Enforcement Policy.

Settling Respondents are alleged to have failed to comply with Section X, Section E.3 and E.6 of Attachment D of the General Permit as it relates to the Devore Interchange Improvements (WDID 8 36C366933). These alleged violations and the corresponding score for the one non-discharge violation and the one discharge violation alleged in the draft ACLC are presented below.

This document reflects factors agreed to by the Prosecution Team and Settling Respondents after engaging in settlement negotiations.

VIOLATION 1: FAILURE TO IMPLEMENT AN EFFECTIVE COMBINATION OF EROSION AND SEDIMENT CONTROLS

Step 1 and 2 – Potential for Harm and Assessments for Discharge Violations

These steps are not applicable to Violation 1 because it is a non-discharge violation. These steps have been applied to Violation 2 as described below.

Step 3 – Per Day Factor for Non-Discharge Violations

Step 3 of the Enforcement Policy’s penalty calculation methodology directs the Regional Board to calculate a per day factor for non-discharge violations by considering the Potential for Harm and the Extent of Deviation from the applicable requirements.

Potential for Harm: Moderate

The Enforcement Policy requires a determination of whether the characteristics of the violation resulted in a minor, moderate, or major potential for harm or threat to beneficial uses. The

beneficial uses applicable to Cajon Creek are Municipal and Domestic, Groundwater Recharge, Water Contact and Non-Contact Water Recreation, Cold Freshwater Habitat, Wildlife Habitat, and Rare, Threatened, or Endangered Species. Cajon Creek is tributary to Lytle Creek. The beneficial uses applicable to Lytle Creek are Municipal and Domestic, Agricultural, Industrial Service, Industrial Process, Groundwater Recharge, Hydropower Generation, Water Contact and Non-Contact Water Recreation, Cold Freshwater Habitat, and Wildlife Habitat. Lytle Creek is tributary to the Santa Ana River, Reach 5. The beneficial uses applicable to the Santa Ana River, Reach 5 are Municipal and Domestic, Agricultural, Groundwater Recharge, Water Contact and Non-Contact Water Recreation, Warm Freshwater Habitat, Wildlife Habitat, and Rare, Threatened, or Endangered Species.

Settling Respondents are alleged to have failed to implement and maintain adequate pollution prevention controls and structures to minimize or prevent sediment and debris in storm water discharges. Settling Respondents failed to implement Best Management Practices (BMPs) for perimeter protection and drainage system protection in the areas noted in the February 25, 2014 REAP. By not implementing an effective combination of sediment and erosion controls, as noted in Violation 1, Settling Respondents failed to reduce the level of turbidity in sediment-laden storm water runoff to receiving waters.

Excessive concentration of sediment in storm water runoff affects the beneficial uses of the receiving waters. Increased sedimentation and siltation in streams can result in the destruction of aquatic life habitat and limit or eliminate recreational activity. Had an effective combination of erosion and sediment controls been fully implemented, it could have significantly reduced most of the pollutants from entering the receiving waters. Because the pollutants posed a moderate risk to beneficial uses, the potential for harm for this violation is moderate.

Deviation from Requirement: Moderate

Sections E.3 and E.6 of Attachment D of the General Permit require Settling Respondents to implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under construction. Settling Respondents are also required to ensure that all storm drain inlets, perimeter controls, and runoff control BMPs...are maintained and protected from activities that reduce their effectiveness. The February 25, 2014 REAP identified areas of the site that required additional BMPs necessary to prevent or limit the amount of erosion and sediment-laden storm water discharge into Cajon Creek. Cajon Creek is a tributary to the Santa Ana River. Plastic cover and other BMPs were prescribed in preparation for the forecasted storm event. Several incidents of sediment-laden storm water discharges from the project site exceeded the NAL for turbidity. Dischargers failed to implement all of the BMPs prescribed in the REAP.

However, Settling Respondents provided information during settlement negotiations related to their attempts to comply with the General Permit and with the installation, maintenance, and replacement of BMPs for the project. Therefore, an appropriate score for this factor is moderate.

Per Day Factor: 0.35

Applying a Potential for Harm of moderate and an Extent of Deviation of moderate results in a factor of 0.35 for Violation 1. (Table 3, page 16 of the Enforcement Policy)

Days of Violation: 25 days

Circumstances indicate that Settling Respondents were made aware of BMP deficiencies on February 25, 2014, the date of the REAP. The observations made by Regional Board staff during an inspection on March 21, 2014 indicate the BMPs required for the forecasted storm event, were not fully implemented. Settling Respondents were in violation from February 25, 2014 to March 21, 2014 for a total of 25 days.

The Prosecution Team and Settling Respondents agreed to the days calculation as originally presented by the Prosecution Team.

Violation 1 – Initial Liability Amount

The initial liability amounts for the violation calculated on a per-day basis are as follows:

Violation 1: 25 days x \$10,000 x 0.35

Total Initial Liability = **\$87,500**

Step 4 – Adjustment Factors

Three additional factors to be considered for modification of the amount of initial liability are the violators' culpability, efforts to clean up or cooperate with regulatory authority, and the violators' compliance history.

Culpability: 1.4

For culpability, the Enforcement Policy suggests an adjustment resulting in a multiplier between 0.5 to 1.5, with the lower multiplier for accidental incidents, and the higher multiplier for intentional or negligent behavior.

Settling Respondents did not comply with the General Permit by failing to act on recommendations and requirements described in the REAP and evidence observed by the Regional Board inspection on March 21, 2014. The absence of required BMPs necessary to prevent or reduce sediment in storm water discharges to protect the beneficial uses of the receiving water falls below the due standard of care. While the selection of a 1.4 is significant and increases the penalty, it was not the maximum that could have been selected for this factor. The Settling Respondents provided information related to their efforts to correct deficient BMPs and thereby prevent additional violations. Therefore, a factor of 1.4 is appropriate for Violation 1.

Cleanup and Cooperation: 1.4

This factor ranges from 0.75 to 1.5, and reflects the extent to which a discharger voluntarily cooperates in returning to compliance and repairing environmental damage. A high multiplier indicates a lack of cleanup and cooperation. Observations made by Regional Board staff during the March 21, 2014 inspection revealed that Settling Respondents did not implement BMPs prescribed in the REAP, nor did they remove sediment that accumulated at the drain inlets. A

value of 1.4 was determined based on Dischargers' disregard for REAP guidance and lack of post-storm cleanup efforts.

Again, in the Prosecution Team's view, this factor needed to be significant to provide specific and generalized deterrence, but was not the most punitive selection available.

History of Violations: 1.0

Dischargers do not have a history of violations that have been formally adjudicated. Therefore a factor of 1.0 is applied.

Step 5 – Determination of Total Base Liability Amount

The Total Base Liability for Violation 1 is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation 1 – Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

Violation 1: \$87,500 x 1.4 x 1.4 x 1.0

Total Base Liability = **\$171,500**

Steps 6 through 10 are applied to the Combined Total Base Liability Amount for Violation 1 and will be discussed after the Total Base Liability amount has been determined for Violation 2.

VIOLATION 2: DISCHARGE OF SEDIMENT-LADEN AND DEBRIS-LADEN STORM WATER TO CAJON CREEK, LYTLE CREEK, AND SANTA ANA RIVER REACH 5

Step 1 – Potential for Harm for Discharge Violations

The potential for harm to the environment associated with the discharge of storm water runoff where pollutants were not minimized or prevented through the use of controls, structures, and management practices that achieve best available technology for toxic and non-conventional pollutants, and best conventional technology for conventional pollutants is 5. This is determined by the sum of the factors below:

Potential for Harm to Beneficial Uses: 2

The Enforcement Policy requires an evaluation of the potential for harm to beneficial uses that may result from exposure to the pollutants or contaminants in the illegal discharge. Storm water discharges from the Project occurred on February 28, 2014 during a reported storm event.

Settling Respondents failed to appropriately implement BMPs which led to the discharge of sediment from several slope cuts during a reported rain event on February 28, 2014. Evidence of the discharge was presented from photos taken by Settling Respondents at the various discharge locations on February 28, 2014. The photo evidence of eroded slopes, visible sediment deposits around drain inlets, sediment and gravel rock deposits on the SB Kenwood off-ramp, and turbid runoff into Cajon Creek indicate that the significant amount of sediment discharged from the site.

These discharges flowed directly into Cajon Creek, a tributary to the Santa Ana River, Reach 5. The beneficial uses applicable to the Santa Ana River, Reach 5 and the Cajon Creek are collectively, Municipal and Domestic, Agricultural, Groundwater Recharge, Water Contact and Non-Contact Water Recreation, Cold Freshwater Habitat, Warm Freshwater Habitat, Wildlife Habitat, and Rare, Threatened, or Endangered Species.

While this factor could have been assessed higher, the Settling Respondents presented evidence that not all of the water discharged from the Project Site exceeded turbidity requirements. After consideration of all the evidence related to the potential for construction related pollutants to have a negative impact on beneficial uses, and the type of materials discharged, assessed below, the Parties agreed upon a potential for harm for this violation of below moderate.

Physical, Chemical, Biological, or Thermal Characteristics: 2

The discharges on February 28, 2014 contained sediment, construction related materials, trash, debris, and other pollutants. The reported turbidity for the discharges described above were; Glen Helen Road Under Crossing, 619 NTU; Cajon Creek Bridge, 1,000 NTU; Drainage System 90, 265 NTU. The quantities of these pollutants would have been significantly less if the discharger had employed the requisite BMPs. Considering the relatively large quantities of sediment-laden storm water discharges from the project area, the risk or threat of the discharges to potential receptors is moderate.

Susceptibility to Cleanup or Abatement: 1

The discharge of storm water runoff on February 28, 2014 was not susceptible to cleanup activities. Once commingled with the discharges from the larger watershed, cleanup activities would have been infeasible. Therefore, a score of 1 is assigned because less than 50% of the discharge was susceptible to cleanup.

Step 2 – Assessment for Discharge Violations

Based on the estimated volume of the February 28, 2014 discharge, liability is proposed to be assessed on a daily basis and a per gallon basis, as shown below:

Deviation from the Requirement: Major

The deviation reflects the extent to which the General Permit discharge prohibition was violated. Settling Respondents failed to implement pollution prevention controls as described in Violation 1, therefore allowing a discharge to occur. Therefore, the violation represents a major deviation from the requirements of the Permit.

Per Day Factor: 0.15

Applying a Potential for Harm factor of 2 and an Extent of Deviation of major results in a factor of 0.15 for Violation 2. (Table 2, page 15 of the Enforcement Policy)

Days of Violation: 1

Evidence was found of a discharge occurring during a reported storm event on February 28, 2014.

Violation 2 – Initial Liability Amount

The initial liability amount for the violation calculated on a per-day basis is as follows:

Violation 2: 1 day x \$10,000 x 0.15

Initial Liability = \$1,500

Per Gallon Factor: 0.15

Gallons Discharged: 109,399

Table 1, page 14 of the Enforcement Policy describes the per gallon factor for discharge violations. Based on a Potential for Harm factor of 2 and a major deviation from requirements, the Per Gallon Factor is 0.15.

On August 26, 2014, Atkinson submitted estimated discharge volumes to Caltrans. The discharge locations for the volume calculations were; the Glen Helen Road UC, the Cajon Creek Bridge, and Drainage System 90. The volume calculations were based on a 60 minute discharge event for each location. The discharge volumes were as follows; Glen Helen Rd. UC was 1,683 gallons; Cajon Creek Bridge was 4,488 gallons; and Drainage System 90 was 2,244 gallons. The total estimated volume for one hour of storm water discharge was 8,415 gallons. Historical weather reports for the Devore area for February 28, 2014, indicate that rain, and heavy rain at times, occurred over at least a six hour period. Caltrans staff also indicated they observed runoff from various locations over a six hour period from 7am to 1pm on February 28, 2014.

Subsequent follow-up and limited investigations were conducted by the Regional Board and the State Water Resource Control Board's Office of Enforcement (OE), related to the volume of sediment-laden storm water that was discharged from the project, as estimated by the contractor, at the various locations. The follow-up and investigations by OE revealed that the photos attached to the NOD report for discharges to Cajon Creek did not support a discharge estimate of 8,415 gallons as provided by Caltrans. Based on the accounts of the forecasted storm event from the National Weather Service, photographic evidence and narrations provided in the NOD reports for February 28, 2014, OE proceeded to perform a precipitation-runoff modeling exercise. OE used the Hydrologic Engineering Center-Hydrologic Modeling System (HEC-HMS) for the modeling procedure. The HEC-HMS is designed to simulate precipitation-runoff processes for a wide range of drainage basin watersheds and geographic areas. In addition to the NOD reports, other assumptions used in the HEC-HMS model were based on terrain and site features visible

in Google Earth imagery.

Although sediment-laden runoff was observed and reported across the project area, the most significant discharges were documented at the Kenwood Avenue interchange. Therefore, the Regional Board and OE have focused discharge estimates on this particular area encompassing approximately 13.4 acres, or approximately 22% of the total project area. Based on rainfall estimates derived from two weather stations near the project location, it is estimated that the Kenwood Avenue interchange received approximately 1.48 million gallons of rainfall from February 27 to March 2, 2014. Using HEC-HMS, specific assumptions were made to account for interception and infiltration. As a result, a conservative estimate for runoff from disturbed soil areas related to the project was calculated to be approximately 109,399 gallons, or approximately 7% of the total precipitation.

The California Water Code, Section 13385(c)(2), allows for an additional liability of \$10 per gallon for discharges that exceed 1,000 gallons. Therefore, the violation on a per gallon is based on 108,399 gallons.

As a result of settlement discussions, the Parties agreed to use the volume calculation as described above.

Violation 2 – Initial Liability Amount

The initial liability amount for the violation calculated on a per-gallon basis is as follows:

$$\text{Violation 2: } 108,399 \text{ gal} \times \$10 \times 0.15$$

$$\text{Initial Liability} = \mathbf{\$162,598.50}$$

Step 3 – Per Day Factor for Non-Discharge Violations

This step is not applicable as Violation 2 is a discharge violation.

Step 4 – Adjustment Factors

Culpability: 1.4

As the Legally Responsible Party submitting the Notice of Intent (NOI) to comply with the General Permit, Caltrans is fully responsible for compliance with the conditions and provisions of the General Permit. As the permittee, Caltrans has, or should have, knowledge of the requirement to minimize or prevent pollutants in storm water discharges through the use of BMPs. Caltrans' repeated failure to employ BMPs to minimize the discharge demonstrates a high level of negligence. In addition, Atkinson is a Legally Responsible Party because it is responsible for on the ground implementation of the permit requirements. In its role as contractor for Caltrans, Atkinson should have been fully aware of the requirements of the permits. As such, a culpability factor of 1.4 has been applied.

The Prosecution Team recognizes that the Settling Respondents took action to correct the

shortcomings in BMPs once those issues were identified by Regional Board staff, and therefore did not pursue the maximum culpability factor available.

Cleanup and Cooperation: 1.3

Observations made by Regional Board staff during the inspection on March 21, 2014, indicated that the Settling Respondents had not implemented the BMPs as prescribed in the REAP. This factor also reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. The sediment that accumulated at the drain inlets had not been removed as observed during the March 21, 2014 inspection. A multiplier between 0.75 and 1.5 is to be used depending on the degree to which Dischargers corrected the deficiencies. A high multiplier indicates a lack of cleanup and cooperation. A value of 1.3 was agreed upon to reflect the proper balance between the Settling Respondents' actions after the rain event and throughout settlement negotiations, responding to information requests from the Prosecution Team.

History of Violations: 1

Settling Respondents have no history of violations that have been fully adjudicated. Therefore a factor of 1.0 is applied.

Step 5 – Determination of Total Base Liability Amount

The Total Base Liability for Violation 2 is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

<p><u>Violation 2 – Total Base Liability Amount</u></p> <p>Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability</p> <p>Violation 2: \$164,098.50 x 1.4 x 1.3 x 1</p> <p style="text-align: right;">Total Base Liability = \$298,659.27</p>

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

Ability to Pay Factor: 1

According to the Legislative Analyst's Office, the Governor's budget, for Fiscal Year 2016-2017, for the California Department of Transportation will decrease 3.9% from Fiscal Year 2015-2016 to \$10.5 billion. The Special Funds will increase approximately 20% and the Local Funds will increase by approximately 10.5% from Fiscal Year 2015-2016. The General Fund has remained constant at \$84 million since 2014.

Atkinson is a national company, with many projects in Southern California and throughout the state.

As a result of reaching a settlement, this argument is considered waived based on the settlement amount.

Step 7 – Other Factors as Justice May Require

Pursuant to the Enforcement Policy, staff costs should be added to settlement agreements for the efforts staff expends to bring dischargers into compliance. In this matter, staff costs have been calculated prior to the issuance of the draft ACLC, and the Prosecution Team has agreed to that amount. Staff costs are \$18,750 (125 hours at \$150/hour since September 15, 2014).

Step 8 – Economic Benefit

Estimated Economic Benefit: \$101,522

Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute a violation. The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit of noncompliance. To determine the economic benefit, the Prosecution Team determined the compliance actions that should have undertaken to maintain compliance. The Settling Respondents failed to adequately install and maintain appropriate erosion and sediment control BMPs in order to prevent sediment discharge to surface water. As a result, the Settling Respondents realized a significant economic benefit as summarized below:

Proper BMP implementation was estimated based on photographs and observations included in inspections conducted by Caltrans staff prior to the storm event beginning February 27, 2014, the Notice of Discharge, and an inspection conducted by Regional Board staff on March 22, 2014. It is estimated that a minimum of 13.42 acres of disturbed soil area in the vicinity of Kenwood Avenue contributed to the unauthorized sediment discharges to Cajon Creek. In both pre- and post-storm event photographs, it is evident that soil stabilization had either not occurred, or required complete reapplication on these areas prior to the rain event. Based on the contractor's use of BFM as a soil stabilization BMP, it is estimated that avoiding the BFM application resulted in an economic benefit of approximately \$78,120. In addition, fiber rolls and silt fencing on two finished slopes were observed to be in poor condition, rendering them ineffective for erosion control. It is estimated that approximately 10,250 feet of fiber roll required replacement based on the appropriate spacing of approximately 10 feet (3 meters), which resulted in an economic benefit of approximately \$17,900. Finally, silt fencing along the perimeter of at least three separate areas was identified in pre-storm inspections to be deficient. It is estimated that the total length of silt fencing requiring replacement was approximately 3,150 feet, resulting in an economic benefit of approximately \$5,501.

For computational purposes, the penalty payment date was established as the ACLC issuance date, or September 12, 2016. Changes to this date will affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately \$101,522.

Step 9 – Maximum and Minimum Liability Amounts

The Enforcement Policy directs the Regional Board to consider the maximum and minimum liability amounts for the alleged violations.

Maximum Liability Amount: \$1,343,990.00

The Enforcement Policy states (page 21) that the total liability shall be at least 10% higher than the economic benefit, “so that liabilities are not construed as the cost of doing business and the assessed liability provides meaningful deterrent to future violations.” Therefore the minimum total liability associated with the economic benefit is approximately \$111,674.20.

Minimum Liability Amount: \$111,374.20

Step 10 – Final Proposed Liability Amount

Final Proposed Liability Amount: \$488,909