

SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of:
**San Bernardino International Airport
Authority**

ORDER R8-2019-0072 (Proposed)
SETTLEMENT AGREEMENT AND
STIPULATION FOR ENTRY OF
ADMINISTRATIVE CIVIL LIABILITY
ORDER; ORDER (PROPOSED)

I. Introduction

1. This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order or Order) is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board, Santa Ana Region (Regional Board), on behalf of the Regional Board Prosecution Team (Prosecution Team), and San Bernardino International Airport Authority (Discharger) (collectively known as the Parties) and is presented to the Regional Board, or its delegee, for adoption as an order by settlement, pursuant to Water Code section 13323 and Government Code section 11415.60.

II. Recitals

2. During January and February of 2018, the Discharger hired a contractor LA Construction that was to begin demolition of trapezoidal concrete side panels and remove sediment that accumulated over the years within City Creek Bypass Channel, a water of the United States. The Discharger allowed the contractor to work within the channel as well as stockpile concrete debris within the channel.
3. On January 24, 2018, LA Construction began work within the Channel. On January 25, 2018, U.S. Army Corps of Engineers observed work being performed in the channel and informed Regional Board staff. According to the scope of work provided to Regional Board staff by SBIAA, the work was to involve demolition of trapezoidal concrete side panels and removal of sediment in approximately 5280 ft of channel.
4. As alleged in Attachment A, hereby incorporated by reference, SBIAA violated Water Code section 13376 and Clean Water Act section 301 by discharging sediment and concrete debris into waters of the United States without first filing a report of waste discharge or obtaining a Clean Water Act section 404 permit. The discharge of sediment and concrete debris occurred on January 24, 25, 31, 2018 and February 1, 2, 5, 6, 7, 8, and 9, 2018.

5. Pursuant to Water Code section 13376, "The discharge of pollutants ... except as authorized by waste discharge requirements or dredge or fill material permits, is prohibited."
6. Under Clean Water Act section 301, it is unlawful for any person to discharge any pollutant into waters of the United States without authorization under specific provisions of the Clean Water Act, including those for NPDES and dredged and fill permits. (33 U.S.C. § 1311.)
7. Water Code section 13385, subdivision (a) states, in relevant part:

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

(1) Section 13375 or 13376...

(5) A requirement of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the federal Clean Water Act (33 U.S.C. Sec. 1311, 1312, 1316, 1317, 1318, 1341, or 1345), as amended.

8. Water Code section 13385, subdivision (c) states, in relevant part:

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

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

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

9. Pursuant to Water Code section 13385, subdivision (e), in determining the amount of civil liability, the Regional Board shall take into consideration 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 the ability to continue in 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 as justice may require.

10. The Parties have engaged in confidential settlement negotiations and agree to fully settle the violations alleged in this Stipulated Order without administrative or civil litigation and by presenting this Stipulation to the Regional Board, or its delegee, for adoption as an Order by settlement, pursuant to Water Code section 13323 and Government Code section 11415.60.
11. To resolve the violations by consent and without further administrative or civil proceedings, the Parties have agreed to the imposition of an administrative civil liability against the Discharger in the amount of sixteen thousand five hundred dollars (\$16,500). 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 violations alleged herein, and that this Stipulated Order is in the best interest of the public.

III. Stipulations

The Parties stipulate to the following:

12. **Jurisdiction:** The Parties agree that the Regional Board has subject matter jurisdiction over the matters alleged in this action and personal jurisdiction of the Parties to this Stipulation.
13. **Administrative Civil Liability:** The Discharger hereby agrees to the imposition of an administrative civil liability in the amount of **sixteen thousand five hundred dollars (\$16,500)** to the Regional Board to resolve the violations specifically alleged in this Stipulated Order. No later than 30 days after the Regional Board, or its delegee, signs this Order, the Discharger shall submit a check for **sixteen thousand five hundred dollars (\$16,500)** made payable to the "State Water Pollution Cleanup and Abatement Account," reference the Order number on page one of this Order, and mail it to:

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

The Discharger shall provide a copy of the check via email to the State Water Resources Control Board, Office of Enforcement (Kailyn.Ellison@waterboards.ca.gov) and the Regional Board (Chuck.Griffin@waterboards.ca.gov).

14. Compliance with Applicable Laws and Regulatory Changes: The Discharger understands that payment of an administrative civil liability in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that additional violations of the type alleged may subject it to further enforcement, including additional administrative civil liabilities. Nothing in this Stipulated Order shall excuse the Discharger from meeting any more stringent requirements which may be imposed hereafter by changes in applicable and legally binding legislation or regulations.

15. Party Contacts for Communications Related to Stipulated Order:

For the Regional Board:

Chuck Griffin, PE
Senior WRCE, Enforcement Coordinator
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501
(951) 782-4996
Chuck.Griffin@waterboards.ca.gov

For the Discharger:

James Harris
Manager of Capital Projects
San Bernardino International Airport Authority
1601 E. 3rd Street, Suite 100
San Bernardino, CA 92408
(909) 382-4100, ext. 152
jharris@sbdairport.com

16. Attorneys' Fees and Costs: Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

17. Public Notice: The Discharger understands that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the Regional Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Regional Board, or its delegee, for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the Regional Board, or its delegee. The Discharger agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

18. **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.
19. **No Waiver of Right to Enforce:** The failure of the Prosecution Team or Regional 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 Team or Regional 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. The Regional Board reserves all rights to take additional enforcement actions, including without limitation, the issuance of administrative civil liability complaints or orders for violations other than those addressed by this Order.
20. **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 Regional Board or any state agency, department, board or entity or any local agency from exercising its authority under any law, statute, or regulation.
21. **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.
22. **Modification:** This Stipulated 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 the Regional Board or its delegee.
23. **Integration:** This Stipulated Order constitutes the entire agreement between the Parties and may not be amended or supplemented except as provided for in this Stipulated Order.
24. **If Order Does Not Take Effect:** The Discharger's obligations under this Stipulated Order are contingent upon the entry of the Order of the Regional Board as proposed. In the event that this Stipulated Order does not take effect because it is not approved by the Regional Board, or its delegee, or is vacated in whole or in part by the State Board or a court, the Parties acknowledge that the Prosecution Team may proceed to a contested evidentiary hearing before the Regional Board to determine whether to assess an 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 and will be fully protected by California Evidence Code sections 1152 and 1154; California Government Code section 11415.60; Rule 408, Federal Rules of Evidence; and any other applicable privilege under federal and/or state law. 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 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 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.
25. **Waiver of Hearing:** The Discharger has been informed of the rights provided by Water Code section 13323, subdivision (b), and, if the settlement is adopted by the Regional Board, hereby waives its right to a hearing before the Regional Board prior to the Stipulated Order's adoption. However, should the settlement not be adopted, and should the matter proceed to the Regional Board or State Board for hearing, the Discharger does not waive the right to a hearing before an order is imposed.
26. **Waiver of Right to Petition:** Except in the instance where the settlement is not adopted by the Regional Board, the Discharger hereby waives the right to petition the Regional Board's adoption of the Stipulated Order as written for review by the State Board, and further waives the right, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
27. **Covenant Not to Sue:** The Discharger covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by this Stipulation and Order.
28. **Authority to Bind:** Each person executing this Stipulated Order in a representative capacity represents and warrants that they are authorized to execute this Order on behalf of and to bind the entity on whose behalf the Order is executed.

29. **Necessity for Written Approvals:** All approvals and decisions of the Regional Board under the terms of this Stipulated Order shall be communicated to the Discharger in writing. No oral advice, guidance, suggestions, or comments by employees or officials of the Regional Board regarding submissions or notices shall be construed to relieve the Discharger of its obligation to obtain any final written approval required by this Stipulated Order.
30. **No Third Party Beneficiaries:** This Stipulated Order is not intended to confer any rights or obligation on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.
31. **Severability:** This Stipulated Order is severable; should any provision be found invalid, the remainder shall remain in full force and effect.
32. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Regional Board, or its delegee, enters the Order incorporating the terms of this Stipulated Order.
33. **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. Further, this Stipulated Order may be executed by facsimile or electronic signature, and any such facsimile or electronic signature by any Party hereto shall be deemed to be an original signature and shall be binding on such Party to the same extent as if such facsimile or electronic signature were an original signature.

Stipulated ACLO R8-2019-0072
San Bernardino International Airport Authority

IT IS SO STIPULATED.

California Regional Water Quality Control Board, Santa Ana Region Prosecution Team

By: Original Signed by Jayne Joy
Jayne Joy
Assistant Executive Officer

Date

Stipulated ACLO R8-2019-0072
San Bernardino International Airport Authority
San Bernardino International Airport Authority

By: Original Signed by Michael Burrows _____

Michael Burrows
Executive Director

Date

HAVING CONSIDERED THE PARTIES STIPULATIONS, THE SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD FINDS THAT:

1. The foregoing Stipulation is fully incorporated herein and made part of this Order.
2. This is an action to enforce the laws and regulations administered by the Regional Board. The Regional Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations.
3. The Executive Officer of the Regional Board is authorized to refer this matter directly to the Attorney General for enforcement if the Discharger fails to perform any of its obligations under this Order.

Pursuant to Water Code section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** on behalf of the California Regional Water Quality Control Board, Los Angeles Region.

Hope Smythe
Executive Officer
Santa Ana Regional Water Quality Control Board

Date

Attachment A: Specific Factors Considered

Attachment A
Specific Factors Considered for Administrative Civil Liability
San Bernardino International Airport Authority

The State Water Board's 2017 *Water Quality Enforcement Policy* (2017 Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13385, subdivision (e). Each factor of the ten-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf.

Violation 1: Unauthorized discharge of sediment and concrete debris in violation of Water Code section 13376 and Clean Water Act section 301

During January and February of 2018, the San Bernardino International Airport Authority (Discharger or SBIAA) hired a contractor LA Construction that was to begin demolition of trapezoidal concrete side panels and remove sediment that accumulated over the years within City Creek Bypass Channel, a water of the United States. The Discharger allowed the contractor to work within the channel as well as stockpile concrete debris within the channel.

On January 24, 2018, LA Construction began work within the Channel. On January 25, 2018, U.S. Army Corps of Engineers observed work being performed in the channel and informed Regional Board staff. According to the scope of work provided to Regional Board staff by SBIAA, the work was to involve demolition of trapezoidal concrete side panels and removal of sediment in approximately 5280 ft of channel.

SBIAA violated both Water Code section 13376 and Clean Water Act section 301 by discharging sediment and concrete debris into waters of the United States without first filing a report of waste discharge or obtaining a Clean Water Act section 404 permit. The discharge of sediment and concrete debris occurred on January 24, 25, 31, 2018 and February 1, 2, 5, 6, 7, 8, and 9, 2018.

Step 1 –Potential for Harm for Discharge Violations

The "potential harm to beneficial uses" factor considers the harm to beneficial uses that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the degree of toxicity; (2) the actual or potential for harm to beneficial uses; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: The Physical, Chemical, Biological, or Thermal Characteristics of the Discharge

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. In this case, a score of **2** was assigned. A score of 2 is defined as the chemical and/or physical characteristics of the "*Discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection).*" Discharge of broken concrete debris poses a threat by raising the pH of downstream waters. The discharge of sediment poses a threat to potential downstream receptors by filling downstream water features needed to support aquatic habitat. Therefore, a score of 2 is appropriate.

Factor 2: Harm or Potential Harm to Beneficial Uses

This factor evaluates direct or indirect harm or potential for harm from the violation. 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). In this case the potential harm to beneficial uses was determined to be **moderate** (i.e., a score of **3**), which is defined as a “*moderate harm or potential harm to beneficial uses. A score of moderate is typified by observed or reasonably expected potential impacts, but harm or potential harm to beneficial uses is moderate and likely to attenuate without appreciable medium or long term acute or chronic effects.*”

The *Water Quality Control Plan for the Santa Ana River Basin, with updates from February 2008, June 2011, February 2016, and June 2019* (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Water Resources Control Board. City Creek is tributary to Reach 5 of the Santa Ana River. City Creek Bypass Channel is a tributary to City Creek.

According to the Basin Plan, the existing and potential designated beneficial uses of Reach 5 of the Santa Ana River (and all tributaries not specifically excluded in the Basin Plan), are agriculture, industrial, groundwater recharge, water contact recreation; non-contact water recreation; warm freshwater habitat, rare and wildlife habitat.

Discharge of concrete debris and excavation and discharge of sediment poses a threat by collapsing or covering on-site habitat for fossorial rare species and general wildlife. Additionally, discharge and excavation of sediment in waters alters downstream sediment dynamics. Therefore, a score of 3 is appropriate.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement, or if 50% or more of the discharge is susceptible to cleanup or abatement, but the discharger failed to clean up 50% or more of the discharge within a reasonable time. In this case, the discharged sediment and concrete debris were susceptible to cleanup and were cleaned-up by the Discharger, as documented by the SBIAA construction monitoring report on February 9, 2018. Clean up was confirmed by Regional Board staff on February 23, 2018. Therefore, a factor of **0** is assigned.

Final Score – “Potential for Harm”

The scores of the three factors are added to provide a Potential for Harm score for each violation. In this case, a final score of **5** was calculated. The total score is then used in Step 2 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties based on both a per-gallon and a per-day basis for discharge violations. Water Code section 13385, subdivision (c) allows for the imposition of an administrative civil liability of ten thousand dollars (\$10,000) for each day of violation plus ten dollars (\$10) per gallons for the volume discharged but not cleaned up that exceeds 1,000 gallons. Board staff cannot credibly approximate the volume of the discharge in excess of 1,000 gallons and therefore, only assessed an administrative civil liability on a per-day basis.

Deviation from Requirement

When there is a discharge, the Santa Water Board is to determine the initial liability amount on a per day basis using the Potential for Harm score from Step 1 (a score of 5 was determined) and the extent of Deviation from Requirement of the violation.

The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, etc.) that was violated. For this discharge, the Deviation from Requirement is considered “**Major**” because the Discharger did not comply with the requirement not to discharge waste and pollutants to waters of the United States without a permit, thereby rendering the requirement ineffective in its essential function of protecting water quality and beneficial uses.

Per Day Assessments for Discharge Violations

When there is a discharge, the Board is to determine an initial liability amount on a per day basis using the same Potential for Harm factor score (5) and the extent of Deviation from Requirement (Major). The “per day” factor (determined from Table 2 of the Enforcement Policy) is 0.15.

The discharge of sediment and concrete debris occurred on January 24, 25, 31, 2018 and February 1, 2, 5, 6, 7, 8, and 9, 2018, for a total of ten days of violation. Therefore, the Per Day Assessment is calculated as (0.15 factor from Table 2) x (10 days) x (\$10,000 per day) = \$15,000.

Initial Liability Amount: The value is determined by the per day assessment for a total initial liability amount of **\$15,000**.

Step 3 – Per Day Assessment for Non-Discharge Violations

The Enforcement Policy states that the Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all the violations are related to the discharge of sediment and concrete debris, and the liability was determined in Step 2.

Step 4: Adjustment Factors

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Discharger was assigned a multiplier value of **1.1**.

The Prosecution team alleges that although the Discharger was given inaccurate advise from it environmental consultant that they did not require a report of waste discharge for the discharges, the Discharger should have known a report of waste discharge was required since it received a 401 Certification and regulatory coverage under Clean Water section 404 for work in the same channel in previous years. The deposition of sediment and concrete debris within the creek during the rainy season threatens the beneficial uses of the creek and Santa Ana River. The Discharger should have been aware of the potential for sediment and concrete debris to be pushed down stream during a rain event. Therefore, a multiplier of 1.1 is justified.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1, with higher values as appropriate. When there is no history of repeat violations, a neutral factor of 1.0 is used. Board staff is unaware of prior similar violations and therefore, a neutral multiplier of **1.0** is appropriate.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperates in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation.

SBIAA has been cooperative and responsive since the violation was identified. Assessment and cleanup has been completed in a timely manner with coordination between Water Board, California Department of Fish and Wildlife, and U.S. Army Corps of Engineers staff. SBIAA has been cooperative and responsive since the violation was identified. SBIAA hosted a meeting with the U.S. Army Corps of Engineers, California Department of Fish and Wildlife, and Regional Board staff on January 7, 2018 regarding the project. It was determined that SBIAA should apply for a 401 Water Quality Certification for the excavation and discharge of fill for project activities moving forward. SBIAA filed an application for Certification on February 15, 2018. Regional Board staff found the application to be incomplete on March 15, 2018. SBIAA submitted additional information on April 20, 2018. SBIAA conducted surveys for the Federally Endangered San Bernardino Kangaroo Rat and the State Species of Special Concern Burrowing Owl. The final survey report was submitted to Regional Board staff on November 20, 2018. SBIAA submitted a check for \$720.00 for the application fee with the initial application materials and a second check for \$780.00 was submitted with the additional information on April 20, 2018. On February 14, 2019, an intense rainstorm damaged City Creek Bypass Channel. On February 26, 2019, SBIAA delivered a Notice of Intent to preform Emergency Repairs under the U.S. Army Corps of Engineers' Regional General Permit 63 in City Creek Bypass Channel. The work proposed included the excavation and discharge of fill as described in the 401 Water Quality Certification Application and additional materials. Regional Board staff issued a Notice of Applicability for the General Certification for Regional General Permit 63 on February 22, 2019. Therefore, a multiplier of **1.0** is appropriate.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount.

<u>Total Base Liability Amount</u>
Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability
$\$15,000 \times 1.1 \times 1.0 \times 1.0 = \$16,500$
Total Base Liability = \$16,500

Step 6 – Ability to Pay and Continue in Business

The ability to pay and to continue in business must be considered when assessing administrative civil liability. The ability of a discharger to pay an administrative civil liability is determined by its income (revenues minus expenses) and net worth (assets minus liabilities). According to the Discharger's Financial Statement and Independent Auditor's Report for the

Fiscal Year Ended June 30, 2018, the Discharger has the ability to pay the proposed administrative civil liability despite having more expenses than revenue because it has significantly more assets than liabilities for a net worth of approximately \$338,000,000. Given this, the Discharger has the ability to pay the penalty and remain in business.

Step 7 – Other Factors as Justice May Require

If the Santa Ana Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require” but only if express findings are made to justify this. The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. While this amount could be considered a factor in assessing the penalty, the Prosecution Team, in its discretion, is not increasing the penalty amount based on this factor.

Step 8 – Economic Benefit

Pursuant to Water Code section 13385, subdivision (e), administrative 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 U.S. Environmental Protection Agency was used to compute the total economic benefit of noncompliance, which includes corrections to delayed and avoided costs for such factors as time value and tax deductibility. These factors may increase or decrease the actual delayed or avoided cost.

For this case, the economic benefit was calculated based two compliance actions: 1) if SBIAA has obtained the Regional General Permit 63 for Emergency Repair work in 2014 when the emergency occurred, and 2) preparation of the corresponding Notice of Intent package. Had SBIAA obtained the Regional General Permit 63 for Emergency Repair work in 2014 when the emergency occurred, it would have been required to submit a \$200 application fee. No other fees would have been required. The cost of preparing the Notice of Intent package is assumed to be 8 hours for an ecologist to fill out the form, attach supporting documentation, obtain signatures, produce the document, and mail it. Ecologists earn approximately \$24 per hour not including benefits, overhead, and profit. Assuming a billing multiplier of 2.5 for contract or consulting, the hourly rate billed would be $\$24/\text{hour} \times 2.5 = \$60/\text{hour}$. Thus, the total cost for preparing the Notice of Intent package is \$480. For computational purposes, the penalty payment date was established as November 22, 2019. Using the BEN financial model, SBIAA received an economic benefit of \$759 for these activities.

Step 9 – Maximum and Minimum Liability Amounts

Minimum Liability Amount: Economic benefit plus 10% or **\$835**.

The Enforcement Policy states 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 \$835.

Maximum Liability Amount: \$10,000/day and 10 days = **\$100,000**

Step 10 – Final Liability Amount

Stipulated ACLO R8-2019-0072
Attachment A
San Bernardino International Airport Authority

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Based on the foregoing analysis, and consistent with the Enforcement Policy, the final proposed Administrative Civil Liability is **\$16,500**.