

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

In the matter of: )  
)  
**City of San Diego** )  
) **Order No. R9-2013-0032 (Proposed)**  
)  
)  
) **Settlement Agreement and Stipulation**  
) **for Entry of Order; Order (Proposed)**  
)  
)  
**PERTAINING TO THE** )  
**DISCHARGE OF UNTREATED** )  
**SEWAGE TO LOS PENA-** )  
**SQUITOS CREEK, LOS** )  
**PENASQUITOS LAGOON, AND** )  
**THE PACIFIC OCEAN ON SEPT.)**  
**8, 2011, CAUSED BY LOSS OF** )  
**POWER AT PUMP STATION 64** )

**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 Assistant Executive Officer of the Regional Water Quality Control Board, San Diego Region (San Diego Water Board), on behalf of the San Diego Water Board Prosecution Staff (Prosecution Staff), and the City of San Diego (Respondent) (collectively the Parties) and is presented to the San Diego Water Board, or its delegate, for adoption as an order by settlement, pursuant to Government Code section 11415.60.

**Section II: RECITALS**

1. Respondent owns and operates its sewage collection system. The system is comprised of approximately 3,002 miles of gravity sewer lines and 145 miles of forced mains and other pressure systems, and it serves approximately 2,140,000 people. Respondent's sewage collection system is regulated (WDID No. 9SSO10658) by State Water Board Order No. 2006-003-DWQ, *Statewide Waste Discharge Requirements for Sanitary Sewer Systems*, and San Diego Water Board Order No. R9-2007-0005, *Waste Discharge Requirements for Sewage Collection Agencies in the San Diego Region*.

2. Respondent reported that Pump Station No. 64 failed and approximately 2.4 million gallons of untreated sewage spilled from manholes into storm water conveyance systems that discharge directly to Los Penasquitos Creek. The point of discharge to Los Penasquitos Creek is a water of the State and United States, and is approximately 3.5 miles from the Pacific Ocean. Respondent further reported that approximately 931,550 gallons of sewage was recovered from Los Penasquitos Lagoon and returned to the sewage collection system. Reports of the sewage spill are contained in California Emergency Management Agency (CalEMA) Hazardous Materials Spill Report No. 11-5348 and in California Integrated Water Quality System (CIWQS) Event Report No. 770901.

3. The CalEMA report included an estimated spill rate of 3,500 gallons per minute. The final certified CIWQS spill report submitted on October 17, 2011 estimates the spill volume at 2,431,550 gallons at a spill rate of 8,051.49 gallons per minute. On its CIWQS report, Respondent estimates that spill began at 5:50 pm on September 8, 2011 and ended at 10:52 pm that evening.

4. Respondent reported that a regional power outage on September 8, 2011 caused Pump Station 64 to not operate, which caused a backup in the collection infrastructure leading to the Pump Station, which ultimately led to the overflow at upgradient manhole locations. In addition, a discharge from Pump Station 1 of 193,120 gallons occurred into the Sweetwater River and San Diego Bay and is described in CIWQS Event Report No. 770903. This sanitary sewer overflow also resulted from the regional power outage.

5. The discharges of raw sewage described above and in greater detail in Attachment A are violations of Prohibition C.1 of State Water Board Order No. 2006-0003-DWQ, which prohibits the discharge of untreated or partially treated wastewater to waters of the United States and/or State and Prohibition C.2 which prohibits the discharge of untreated or partially treated wastewater that creates a nuisance as defined in California Water Code (CWC) section 13050(m). The discharges were also in violation of San Diego Water Board Order No. R9-2007-0005, *Waste Discharge Requirements for Sewage Collection Agencies in the San Diego Region*, Section 301 of the Clean Water Act and CWC section 13376, and the Water Quality Control Plan for the San Diego Basin (9) Waste Discharge Prohibitions Nos. 1 and 9.

6. On September 28, 2011, the Assistant Executive Officer of the San Diego Water Board issued Investigative Order No. R9-2011-0070 (Investigative Order) to Respondent. The Parties thereafter engaged in settlement negotiations and have agreed to settle the matter without administrative or civil litigation and by presenting this Stipulated Order to the San Diego Water Board, or its delegate, for adoption as an order by settlement pursuant to Government Code section 11415.60. Prosecution Staff 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 in the Investigative Order and that this Stipulated Order is in the best interest of the public.

7. To resolve the September 2011 violations without formal administrative proceedings, the Parties have agreed to the final imposition of \$1,245,414 in liability against Respondent. Prosecution Staff calculated liability pursuant to the Water Quality Enforcement Policy (Enforcement Policy) as outlined in Attachment A to this Order. During settlement negotiations, the Prosecution Staff agreed to adjust the liability down from a larger amount, in consideration of mitigating circumstances also described in Attachment A to this Order. Further, consistent with the Enforcement Policy, up to 50 percent of that amount can be dedicated toward an Enhanced Compliance Action (ECA). Therefore, the Parties have agreed that \$622,707 of the total liability (50 percent) will be allocated to an ECA, described below. Respondent shall pay a total of \$622,707 to the State Water Resources Control Board Cleanup and Abatement Account, consisting of approximately \$25,900 in staff costs and the balance in stipulated penalties. The remainder of the penalty amount shall be suspended, and dismissed upon completion of the ECA as described below and in Attachment B.

### **Section III: STIPULATIONS**

The Parties stipulate to the following:

- 1. Administrative Civil Liability:** Respondent hereby agrees to the imposition of an administrative civil liability totaling \$1,245,414 as set forth in Paragraph 7 of Section II herein. Within thirty (30) days of the effective date of this Order, Respondent agrees to remit, by check, SIX HUNDRED TWENTY TWO THOUSAND SEVEN HUNDRED SEVEN DOLLARS (\$622,707), payable to the *State Water Pollution Cleanup and Abatement Account*, and shall indicate on the check the number of this Order. Respondent shall send the original signed check to James Smith, Regional Water Quality Control Board, San Diego Region 9174 Sky Park Court, Suite 100, San Diego, CA 92123, and shall send a copy to Julie Macedo, State Water Resources Control Board, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812.
- 2. ECA Description:** The Parties agree that this Stipulation includes the performance of an ECA that will prevent future loss of power to portions of Respondent's collection system for which the local utility company identified it would be unable to guarantee electricity in the event of a blackout, with the purchase and installation of backup generators for six locations throughout its service area including Pump Stations 1 and 64. Respondent maintains that the purchase and installation of the backup generators is not otherwise required by law. Respondent further indicates that the total budget for the purchase and installation of the backup generators is \$17,746,000, including contingency for construction and Air Pollution Control District (APCD) permit requirements, if required. The estimated cost without construction and APCD contingencies is \$12,783,000, with a margin of error of no more than 10 percent. The suspended liability, therefore, is approximately 5.4 percent of the total (non-contingent) project costs, with allowance for said margin of error.

**3. Agreement of Discharger to Construct, Report, and Guarantee**

**Implementation of ECA:** Respondent represents that: (1) it will construct the ECA described in this Stipulation; (2) it will provide certifications and written reports to the San Diego Water Board consistent with the terms of this Stipulation detailing the implementation of the ECA; and (3) Respondent will guarantee timely implementation of the ECA by remaining liable for the entire cost of the administrative liability until the ECA is completed and accepted by the San Diego Water Board in accordance with the terms of this Stipulation. Respondent agrees that the San Diego Water Board has the right to require an audit of the funds expended by it to implement the ECA.

**4. Oversight of ECA:** Respondent is solely responsible for paying for all oversight costs incurred by the San Diego Water Board to oversee the ECA. The ECA oversight costs are in addition to the total administrative civil liability imposed against Respondent and are not credited toward Respondent's obligation to fund the ECA. Reasonable oversight tasks include, but are not limited to, updating regulatory databases, reviewing and evaluating ECA progress, reviewing progress and final reports, verifying ECA completion with a site inspection and auditing appropriate expenditures of funds. Oversight costs shall be payable within 30 days of receipt of an invoice from the San Diego Water Board or State Water Board.

**5. ECA Progress Reports:** Respondent shall provide quarterly reports of progress to the designated San Diego Water Board representative, and the State Water Resources Control Board's Division of Financial Assistance, commencing 90 days after this Stipulation becomes final and continuing through submittal of the final reports described below in Paragraph 7. If no activity occurred during a particular quarter, a quarterly report so stating shall be submitted. Quarterly reports must be submitted in accordance with the following schedule:

Reporting Period	Due Date
January - March	April 30
April- June	July 31
July – September	October 31
October - December	January 31

**6. ECA Completion Date:** The ECA shall be completed in its entirety no later than June 30, 2015. If other circumstances beyond the reasonable control of Respondent prevent completion of the ECA by that date, the San Diego Water Board staff may extend the ECA Completion Period by up to one (1) year, to June 30, 2016. Respondent must send its request for an extension in writing with necessary justification to the Designated San Diego Water Board representative no later than May 31, 2015.

**7. Certification of Completion of ECA and Final Reports:** On or before June 30, 2015, Respondent shall submit a certified statement of completion of the ECA (Certification of Completion). The Certification of Completion shall be submitted under penalty of perjury, to the designated San Diego Water Board representative and the State Water Resources Control Board's Division of Financial Assistance, by a responsible corporate official representing Respondent. The Certification of Completion shall include the following:

- a. Certification that the ECA has been completed in accordance with the terms of this Stipulation. Such documentation should include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the San Diego Water Board to evaluate the completion of the ECA and the costs incurred by the Respondent.
- b. Certification documenting the expenditures by Respondent during the completion period for the ECA. Expenditures may be external payments to outside vendors or contractors performing the ECA. In making such certification, the official may rely upon normal company project tracking systems that capture employee time expenditures and external payments to outside vendors such as environmental and information technology contractors or consultants. The certification need not address any costs incurred by the San Diego Water Board for oversight. Respondent shall provide any additional information requested by the San Diego Water Board staff which is reasonably necessary to verify ECA expenditures.
- c. Certification that Respondent followed all applicable environmental laws and regulations in the implementation of the ECA including but not limited to the California Environmental Quality Act (CEQA), the federal Clean Water Act, and the Porter-Cologne Act. To ensure compliance with CEQA where necessary, Respondent shall provide the San Diego Water Board with the following documents from the lead agency prior to commencing ECA construction:
  - i. Categorical or statutory exemptions relied upon;
  - ii. Negative declaration if there are no potentially "significant" impacts;
  - iii. Mitigated negative declaration if there are potentially "significant" impacts but revisions to the project have been made or may be made to avoid or mitigate those potentially significant impacts; or
  - iv. Environmental Impact Report (EIR)

**8. Third Party Financial Audit:** In addition to the certification, upon completion of the ECA and at the written request of the San Diego Water Board, Respondent, at its sole cost, shall submit a report prepared by an independent third party(ies) acceptable to the San Diego Water Board staff, or its designated representative, providing such party's(ies') professional opinion that the Respondent and/or an implementing party (where applicable) have expended money in the amounts claimed by Respondent. The audit report shall be provided to the San Diego Water Board staff within three months of notice from San Diego Water Board to Respondent of the need for an independent third party financial audit. The audit need not address any costs incurred by the San Diego Water Board for oversight.

**9. San Diego Water Board Acceptance of Completed ECA:** Upon Respondent's satisfaction of its ECA obligations under this Stipulation and completion of the ECA and any audit requested by the San Diego Water Board, San Diego Water Board staff shall send Respondent a letter recognizing satisfactory completion of its ECA obligations under this Stipulation. This letter shall terminate any further ECA obligations of Respondent.

**10. Failure to Expend all Suspended Administrative Liability Funds on the approved ECA:** In the event that Respondent is not able to demonstrate to the reasonable satisfaction of the San Diego Water Board staff that the entire ECA has been completed as described herein, Respondent shall pay the difference between \$622,707 and five and four tenths of a percent (5.4 percent) of the amount Respondent can demonstrate was actually spent on the ECA. Respondent shall pay the additional administrative civil liability within 30 days of its receipt of notice of the San Diego Water Board's determination that Respondent has failed to demonstrate that the entire ECA amount has been spent to complete the ECA components.

**11. Publicity:** Should Respondent or its agents or subcontractors publicize one or more elements of the ECA, they shall state in a prominent manner that the project is being partially funded as part of the settlement of an enforcement action by the San Diego Water Board against Respondent.

**12. Compliance with Applicable Laws:** Respondent understands that payment of 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 continuing violations of the type alleged in the Complaint may subject it to further enforcement, including additional administrative civil liability.

**13. Designated Representatives for Communications related to Stipulated Order:**

**For the San Diego Water Board:**

Rebecca Stewart  
Regional Water Quality Control Board  
San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123

**For Respondent:**

Ann Sasaki  
City of San Diego, Public Utilities Department  
9192 Topaz Way  
San Diego, CA 92123

**14. Attorney's 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.

**15. Matters Addressed by Stipulation:** Upon the San Diego Water Board's adoption of this Stipulated Order, this Order represents a final and binding resolution and settlement of the violations alleged in the Investigative Order, and all claims, violations or causes of action that could have been asserted against Respondent as of the effective date of this Stipulated Order based on Respondent's actions or inaction that led to the discharges on September 8, 2011 ("Covered Matters"). The provisions of this Paragraph are expressly conditioned on the full payment of the administrative civil liability and the completion of the ECA, in accordance with Paragraph 7 of Section II herein. The Covered Matters, specifically, are the discharges that occurred from Respondent's Pump Stations 1 and 64. In accordance with the Enforcement Policy adopted by the State Water Resources Control Board and effective on May 20, 2010 (see for example, p. 22) and as described in greater detail in Attachment A, as a result of settlement considerations, the San Diego Water Board may not have chosen to pursue enforcement for the Pump Station 1 discharges, but will resolve such discharges as part of this settlement agreement as a known liability by Respondent.

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

**17. Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for the San Diego Water Board's adoption of the settlement by the Parties and review by the public, as reflected in this Stipulated Order, will be adequate. In the event procedural objections are raised prior to the 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.

**18. No Waiver of Right to Enforce:** The failure of the Prosecution Staff or San Diego 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 the Order. The failure of the Prosecution Staff or San Diego Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order.

**19. Interpretation:** This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.

**20. Modification:** This Stipulated Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the San Diego Water Board.

**21. If Order Does Not Take Effect:** In the event that this Stipulated Order does not take effect because it is not approved by the San Diego Water Board, or its delegate, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the San Diego Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. 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 the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:

- a. Objections related to prejudice or bias of any of the San Diego Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the San Diego Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the Complaint in this matter; or
- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.



**22. No Admission of Liability:** In settling this matter, Respondent does not admit to any of the findings in the Investigative Order, this Stipulated Order, or that it has been or is in violation of the Water Code, or any other federal, state, or local law or ordinance; however, Respondent recognizes that this Stipulated Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327.

**23. Waiver of Hearing:** Respondent has been informed of the rights provided by CWC section 13323(b), and hereby waives its right to a hearing before the San Diego Water Board prior to the adoption of the Stipulated Order.

**24. Waiver of Right to Petition:** Respondent hereby waives its right to petition the San Diego Water Board's adoption of the Stipulated Order as written for review by the State Water Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

**25. Covenant Not to Sue:** Respondent covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, its officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter.

**26. San Diego Water Board is Not Liable:** Neither the San Diego Water Board members nor the San Diego Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by Respondent, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order.

**27. Authority to Bind:** Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of and to bind the entity on whose behalf he or she executes the Order.


**28. No Third Party Beneficiaries.** This Stipulated Order is not intended to confer any rights or obligations 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.

**29. Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the San Diego Water Board, or its delegate, enters the Order.

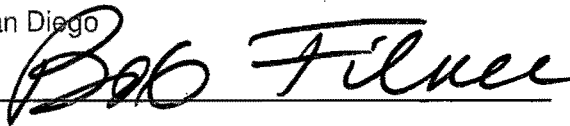
**30. Counterpart Signatures:** This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

**IT IS SO STIPULATED.**

California Regional Water Quality Control Board Prosecution Staff  
San Diego Region

By:   
James Smith  
Assistant Executive Officer

Date: 8 Feb 2013

City of San Diego  
By:   
Date: 3/6/13

**Order of the San Diego Water Board**

1. In adopting this Stipulated Order, the San Diego Water Board or its delegate has considered, where applicable, each of the factors prescribed in CWC sections 13327 and 13385(e). The consideration of these factors is based upon information and comments obtained by the San Diego Water Board's staff in investigating the allegations in the Complaint or otherwise provided to the San Diego Water Board or its delegate by the Parties and members of the public. In addition to these factors, this settlement recovers the costs incurred by the staff of the San Diego Water Board for this matter.
2. This is an action to enforce the laws and regulations administered by the San Diego Water Board. The San Diego Water 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(a)(2), Title 14, of the California Code of Regulations.
3. The terms of the foregoing Stipulation are fully incorporated herein and made part of this Order of the San Diego Water Board.

Pursuant to CWC section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** by the California Regional Water Quality Control Board, San Diego Region.

I, David Gibson, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on May 8, 2013.

\_\_\_\_\_  
DAVID W. GIBSON  
Executive Officer

Date: \_\_\_\_\_

ATTACHMENTS

Attachment A. Analysis of Enforcement Policy Penalty Methodology for Covered Matters

Attachment B. Description of Enhanced Compliance Action (ECA)

## ATTACHMENT A

### Analysis of Enforcement Policy Penalty Methodology for Covered Matters

The discharge of untreated sewage to waters of the United States is a violation of the following requirements. Violations of these requirements are the basis for assessing administrative civil liability pursuant to California Water Code (CWC) section 13385.

1. San Diego Water Board Order No. R9-2007-0005, *Waste Discharge Requirements for Sewage Collection Agencies in the San Diego Region*;
2. Section 301 of the Clean Water Act and CWC section 13376;
3. State Water Board Order No. 2006-003-DWQ, *Statewide Waste Discharge Requirements for Sanitary Sewer Systems (WDRs)*; and
4. Water Quality Control Plan for the San Diego Basin (9) Waste Discharge Prohibitions Nos. 1 and 9.

1. San Diego Water Board Order No. R9-2007-0005

Respondent violated Discharge Prohibition B.1 which states, "The discharge of sewage from a sanitary sewer system at any point upstream of a sewage treatment plant is prohibited."

2. Clean Water Act (33 U.S.C. § 1311) and CWC section 13376

Respondent violated section 301 of the Clean Water Act (33 U.S.C. § 1311) and CWC section 13376 which prohibit the discharge of pollutants to waters of the United States (and/or state) except in compliance with an NPDES permit. The Respondent does not have an NPDES permit to discharge untreated sewage to waters of the United States (and/or state).

3. State Water Board Order No. 2006-003-DWQ

Respondent violated Prohibition C.1 of Order No. 2006-003-DWQ, which states, "Any SSO that results in the discharge of untreated or partially treated wastewater to waters of the United States is prohibited."

Respondent violated Prohibition C.2 of Order No. 2006-003-DWQ, which states, "Any SSO that results in a discharge of untreated or partially treated wastewater that creates a nuisance as defined in CWC section 13050(m) is prohibited."

#### 4. Water Quality Control Plan for the San Diego Basin (9)

Respondent violated Water Quality Control Plan for the San Diego Basin (9) Waste Discharge Prohibition No. 1, which states, "The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code Section 13050, is prohibited."

Respondent violated Water Quality Control Plan for the San Diego Basin (9) Waste Discharge Prohibition No. 9, which states, "The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited."

#### **A. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY**

An ACL complaint may be imposed pursuant to the procedures described in CWC section 13323. The ACL complaint alleges that the Discharger's act (or the failure to act) constitutes a violation of law, and describes the provision of law authorizing civil liability to be imposed, and the proposed civil liability.

Pursuant to CWC section 13385(a), any person who violates CWC section 13376, a prohibition issued pursuant to CWC section 13243, or any requirements of section 301 of the Clean Water Act is subject to administrative civil liability pursuant to CWC section 13385(c), in an amount not to exceed the sum of both the following: (1) ten thousand dollars (\$10,000) for each day in which the violation occurs; and (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.

CWC sections 13327 and 13385(e) require the State Water Board and Regional Water Boards to consider several factors when determining the amount of civil liability to impose. These factors include in part: "...the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup and abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on 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."

On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability and enables Water Board staff to fairly and consistently implement liability provisions of the CWC. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in CWC sections 13327. The entire Enforcement Policy can be found at: [http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_final11179.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11179.pdf).

**Covered Matters:**

For clarity, the Covered Matters that are resolved by the Settlement Agreement and analyzed pursuant to CWC section 13385(e) factors and the State Water Resources Control Board's Enforcement Policy penalty methodology calculation are:

- a. Pump Station 1 Discharge [Discharge Violation]

While the Pump Station 1 is a Covered Matter, the San Diego Water Board Prosecution Staff does not recommend pursuing separate enforcement for this violation. The total proposed settlement properly addresses the full range of considerations against Respondent for the Covered Matters and its response for the September 8, 2011 discharges. It is common practice to resolve for known liabilities in a settlement document, and assigning no liability for this particular discharge is appropriate considering that the two discharges occurred due to the same underlying cause, the proposed ECA addresses the underlying cause in both locations, and the penalty methodology assesses the most egregious violation.

- b. Pump Station 64 Discharge [Discharge Violation]  
Described below.

**Pump Station 64 Discharge**

**Step #1: Potential For Harm of Untreated Sewage Discharge**

Pursuant to the Enforcement Policy, Water Board staff shall calculate actual or threatened impacts to beneficial uses using a three-factor scoring system to determine a final score for harm potential. The three factors include: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharges' susceptibility to cleanup or abatement for any violation or group of violations. The sum of these factors would be the final score for potential for harm.

Based on the recommended range of scores for harm to the environment, risk to potential receptors and susceptibility to cleanup, a score of 8.0 (eight) is assigned to Step #1 of the civil liability calculation as summarized below:

**Summary Liability Factors (Step #1)**

Factor #1	Potential Harm to Beneficial Uses	Score of 5.0
Factor #2	Characteristics of Discharge	Score of 3.0
Factor #3	Susceptibility to Cleanup or Abatement	Score of 0.0
	Total Score	8.0

The following provides details on how Prosecution Staff arrived at the final score in Step #1.

Factor #1 - Harm and Nature, Circumstances, and Gravity of Violations

The evaluation of the potential harm to beneficial uses factor considers the harm that may result from exposure to the pollutants or contaminants in the illegal discharge, in light of the statutory factors of the nature, circumstances, extent and gravity of the violation or violations. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm is negligible (0), minor (1), below moderate (2), moderate (3), above moderate (4), or major (5).

Respondent estimated the volume of sewage discharged from Pump Station 64 on September 8, 2011 to be 2,431,550 gallons. This volume was based on simulated pump station operations run through a dynamic hydraulic model using flow hydraulics at the pump station before, during and after the power outage.

Respondent also estimated that 15,183,000 gallons of creek water mixed with sewage was recovered and discharged back to the sanitary sewer system. Of that amount, Respondent estimates that 931,550 gallons of sewage was recovered.

The Potential for Harm to beneficial uses from this sanitary sewer overflow is Major. The Enforcement Policy defines Major as follows:

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

### *Environmental Monitoring after the Sewer Overflow Event*

Respondent conducted water quality monitoring at 17 beach and lagoon sites between September 9 and 13, 2011 at the direction of the San Diego County Department of Environmental Health. Water samples were analyzed for the presence of total coliform, fecal coliform and enterococcus. Of the 65 water samples collected along San Diego County beaches during that period, 23 contained elevated bacteria levels. By September 13, 2011 all bacterial levels were back in compliance with water contact standards and the beaches were reopened to the public on September 14, 2011.

The City began water quality monitoring in Los Penasquitos Creek on September 13, 2011. The number of sites surveyed each day ranged from three to seven, with six sites consistently surveyed from September 16 through September 26, 2011. The City was able to determine that by September 26, 2011, data for most parameters were below action limits and/or Basin Plan water quality objectives.

### *Beneficial Uses of Affected Waters*

The Water Quality Control Plan for the San Diego Basin (9) (Basin Plan) is the San Diego Water Board's master water quality control planning document. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. It also includes programs of implementation to achieve water quality objectives.

1. **Beneficial Uses of Impacted Surface Waters:** The Basin Plan designates the following beneficial uses for surface waters at and downstream of the sewage spill discharge location:



Basin Plan Beneficial Uses	Los Penasquitos Creek	Los Penasquitos Lagoon	Pacific Ocean
Agricultural Supply	X		
Industrial Service Supply	X		X
Contact Recreation	X (potential)	X	X
Non-contact Recreation	X	X	X
Warm Fresh Water Habitat	X		
Cold Fresh Water Habitat	X		
Wildlife Habitat	X	X	X
Preservation of Biological Habitats of Special Significance		X	X
Estuarine Habitat		X	
Rare, Threatened, or Endangered Species		X	X
Marine Habitat		X	X
Migration of Aquatic Organisms		X	X
Shellfish Harvesting		X	X
Navigation			X
Commercial and Sport Fishing			X
Marine Habitat			X
Spawning, Reproduction, and/or Early Development			X

Recreational beneficial uses of ocean waters five miles north and south of the mouth of Los Penasquitos Lagoon were impacted for seven days (September 8, 2011 through September 14, 2011). Impacts to beneficial uses in Los Penasquitos Creek were impacted for eighteen days (September 8, 2011 through September 26, 2011). In addition, the suppression of dissolved oxygen levels from the discharge of 2,431,550 gallons of raw sewage to Los Penasquitos Creek and Los Penasquitos Lagoon resulted in a fish kill immediately following the sanitary sewer overflow. The restrictions on beneficial uses described above supports a finding that the Potential for Harm to beneficial uses from this sanitary sewer overflow is Major, which results in a score of 5 (five) for Factor #1.

## Factor #2 - Physical, Chemical, Biological/Thermal Characteristics of Discharge

Untreated sewage is composed of, but not limited to, high concentrations of pathogenic bacteria, biochemical oxygen demand due to organic and inorganic materials, nutrients, ammonia, heavy metals, emulsions and other toxins. These pollutants adversely affect the quality of water needed to support and sustain the beneficial uses of the impacted surface waters. Specifically, the untreated sewage discharge may impact the quality of fresh water and seawater aquatic life beneficial uses and limit contact and non-contact recreation. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material where (0) poses a negligible risk or threat and (4) poses a significant risk or threat.

The characteristics of the discharged material posed an above-moderate risk or threat to potential receptors. The Enforcement Policy defines above-moderate as:

Discharged material poses an above-moderate risk or direct threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material exceed known risk factors and/or there is substantial concern regarding receptor protection).

The degree of toxicity in untreated sewage poses a direct threat to human and ecological receptors. Accordingly, a score of 3 (three) is assigned to Factor #2.

## Factor #3 - Susceptibility to Cleanup or Abatement

Pursuant to the Enforcement Policy, a score of 0 is assigned to this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned for this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement.

According to Respondent, an estimated 15,183,000 gallons of water mixed with sewage was removed from Los Penasquitos Creek. While Respondent reports that approximately 931,550 gallons of sewage was recovered, more than 50 percent could have been recovered had pumping operations begun immediately after the sanitary sewer overflow began. Since more than 50 percent may have been susceptible to cleanup or abatement, a score of zero (0) was assigned to the penalty calculation methodology.

The Enforcement Policy requires establishing a base liability for calculating discretionary penalties under CWC section 13385(h)(1) and (2). In this case, this step considers both per gallon and per day assessments because of the large nature of the spill or release.

The initial liability amount is calculated on a per gallon and per day basis using the scores for harm potential as discussed above and the extent of Deviation from Requirement of the violation. The Deviation from Requirement reflects the extent to which the violation deviates from applicable discharge requirements. The following definitions, contained in the Enforcement Policy, determine the score for Deviation from Requirement:

Minor - the intended effectiveness of the requirement remains generally intact (e.g., while the requirement was not met, there is a general intent by the Discharger to follow the requirement).

Moderate - the intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is partially achieved).

Major - the requirement has been rendered ineffective (e.g., the Discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

The discharge of 2,431,550 gallons of untreated sewage from Pump Station 64 to Los Penasquitos Creek is a major deviation from required standards (Discharge Prohibitions) and is expressly prohibited under the Clean Water Act and Water Code. Based on the potential harm score of 8 (eight) and a "Major" Deviation from Requirement (see Table 1 of the Enforcement Policy, page 14), the score for the "per gallon factor" in Step #2 is 0.6.

### **Step #2-3: Per Gallon and Per Day Assessment for Discharge Violations**

The Enforcement Policy requires the Water Boards to apply the "per gallon factor" to the maximum per gallon amounts allowed under statute. Since this violation involves a high volume discharge of sewage, the San Diego Water Board had the discretion, pursuant to the Enforcement Policy, to lower the statutory maximum of \$10.00/gallon to \$2.00/gallon, and staff chose to do so. In addition, because Respondent cleaned up 931,550 gallons of sewage, the number of gallons discharged, for penalty calculation purposes is 1,499,000 (2,431,550 – 931,550 = 1,500,000 – 1,000 = 1,499,000).

Calculating the initial per gallon base amount is achieved by multiplying:

$$\text{(Per Gallon Factor)} \times \text{(Gallons)} \times \text{(Adjusted Maximum per Gallon)} = \text{(Initial Per Gallon ACL Amount)}$$

$$(0.6) \times (1,499,000) \times (\$2.00) = \$1,798,800$$

The Enforcement Policy also requires the Water Boards to apply the “per day factor” based on the Potential for Harm score of 8 (eight) and a “Major” Deviation from Requirement (see Table 2 of the Enforcement Policy, page 15). The score for the “per day factor” in Step #2 is 0.6. This factor is then applied to the statutory maximum of \$10,000/day of violation.

Calculating the initial per day base amount is achieved by multiplying:

$$\begin{aligned} & (\text{Per Day Factor}) \times (\text{Days of Violation}) \times (\text{Statutory Maximum per Day}) = \\ & \quad (\text{Initial Per Day ACL Amount}) \\ & (0.6) \times (1) \times (\$10,000) = \$6,000 \end{aligned}$$

Calculating the Initial Liability Amount is achieved by adding:

$$\begin{aligned} & (\text{Initial Per Gallon ACL Amount}) + (\text{Initial Per Day ACL Amount}) = \\ & \quad (\text{Total Initial Liability Amount}) \\ & (\$1,798,800) + (\$6,000) = \$1,804,800 \end{aligned}$$

#### **Step #4: Adjustment Factors**

The Enforcement Policy describes three factors related to the violator’s conduct that should be considered for modification of the amount of the initial liability. The three factors are: Respondent’s culpability, Respondent’s efforts to clean up or cooperate with regulatory authorities after the violation, and Respondent’s compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

#### **Adjustment for Culpability**

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. In this case, a culpability multiplier of 1.1 has been selected because Respondent failed to obtain a highly reliable form of emergency backup power such as on-site generators rather than continuing the use of redundant power sources from the local utility company.

Respondent’s culpability increased after the local utility company informed Respondent that it could not guarantee backup power in the event of a large power outage and Respondent failed to initiate the acquisition and installation of backup generators.

### Adjustment for Cleanup and Cooperation

For cleanup and cooperation, the Enforcement Policy suggests an adjustment should result in a multiplier between 0.75 to 1.5, with the lower multiplier where there is a high degree of cleanup and cooperation. In this case, a cleanup and cooperation multiplier of 1.1 has been selected because, although Respondent worked in a cooperative manner during and after the sanitary sewer overflow and constantly kept the San Diego Water Board apprised of its activities, Respondent failed to implement an effective Sewer Overflow Response Plan. Specifically, on more than one occasion Respondent failed to identify and remove raw sewage remaining in receiving waters until instructed to do so by San Diego Water Board staff.

### Adjustment for History of Violations

The Enforcement Policy suggests that where there is a history of repeat violations, a minimum multiplier of 1.1 is recommended for this factor. In the 1980s, the San Diego Water Board issued several enforcement actions against Respondent relating to discharges of sewage from Pump Station No. 64. These include Cease and Desist Order No. 86-69 and Administrative Civil Liability ("ACL") Orders No. 87-05 and No. 87-93. In 1993, the San Diego Water Board issued an additional ACL Order No. 93-98 to Respondent for failing to adequately report sewage overflows from Pump Station 64. Due to the extensive violation history associated with Respondent and Pump Station 64, although not recent, an adjustment factor for history of violations of 1.1 is warranted.

### **Step #5: Determination of Total Base Liability Amount**

The Total Base Liability amount of \$2,402,189 is determined by adjusting the initial liability amount by the adjustment factors as follows:

$$\begin{aligned} & (\text{Initial Liability}) \times (\text{Culpability}) \times (\text{History of Violations}) \times (\text{Cleanup}) = \\ & \$1,804,800 \times (1.1) \times (1.1) \times (1.1) = \$2,402,189 \end{aligned}$$

### **Step #6: Ability to Pay and Ability to Continue in Business**

The Enforcement Policy states that if the State and/or Regional Water Boards have sufficient financial information to assess the Respondent's ability to pay the Total Base Liability or to assess the effect of the Total Base Liability on the Respondent's ability to continue in business, then the Total Base Liability amount may be adjusted downward. Conversely, if the Respondent's ability to pay is greater than similarly situated Dischargers, it may justify an increase in the proposed amount to provide a sufficient deterrent effect.

It is anticipated that the Respondent would be able to pay the proposed liability, and as ability to pay is an affirmative defense, this defense would be waived if the Settlement Agreement is approved.

### **Step #7: Other Factors as Justice May Require**

The Enforcement Policy requires that if the State and/or Regional Water Boards believes that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express findings are made to justify this. In addition, the costs of investigation should be added to the liability amount according to the Enforcement Policy.

The total cost of the Water Board staff investigation to date is \$25,900. As a result, the liability amount is adjusted upward by \$25,900 bringing the total liability to \$2,428,089.

No other factors are being considered in the determination of the liability amount.

Respondent has reported that it will be installing backup power generators at six key facilities as a result of these sanitary sewer overflows that resulted from the power outage. The total expenditure by Respondent for the backup power generator project is estimated to be \$12,783,000. The Prosecution Team considers this to be an appropriate Enhanced Compliance Action in that it will assure that future sanitary sewer overflows due to power outages will not occur at these key facilities.

### **Step #8: Economic Benefit**

The Enforcement Policy requires that State and/or Regional Water Boards determine any economic benefit of the violations based on the best available information, and suggests that the amount of the civil liability should exceed this amount whether or not economic benefit is a statutory minimum.

Economic benefit was calculated based on the cost to install two 2,000 kW generators at Pump Station 64, and using a "Feasibility Study for Standby Electrical Power Generation Systems at Pump Stations 2, 64, 65, East Mission Gorge, Penasquitos" dated June 28, 2002 from HDR Engineering, Inc. for San Diego Gas & Electric. The EPA BEN model was utilized using June 1, 2002 as the date of noncompliance and December 31, 2012 as the date of compliance. The penalty payment date, assuming that the settlement agreement was entered and approved by the San Diego Water Board after public comment and then paid by Respondent 30 days after issuance was April 12, 2013. Utilizing the BEN model, the benefit of non-compliance was \$160,772.

### **Step #9: Maximum and Minimum Liability Amounts**

The maximum liability that the San Diego Water Board may assess pursuant to CWC section 13385(c) is ten dollars (\$10) per gallon discharged but not cleaned up minus the first 1,000 gallons plus ten thousand dollars (\$10,000) for one day of violation. Therefore the maximum liability that the San Diego Water Board may assess is \$15,000,000.

CWC section 13385(e) establishes the derived economic benefit as a minimum liability. Further, the Enforcement Policy requires that:

*"The adjusted Total Base Liability shall be at least 10 percent higher than the Economic Benefit amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations."*

Therefore, the minimum liability amount the San Diego Water Board may assess is \$176,849 (see economic benefit computation above, plus 10 percent as required by the Enforcement Policy). The recommended liability falls within the allowable statutory range for minimum and maximum amounts.

#### **Step #10: Final Liability Amount**

The total calculated civil liability in this matter, including staff costs, is \$2,428,089.

The calculated amount of civil liability attributed to the discharge of 1,500,000 gallons of untreated sewage at Pump Station 64 [2,431,550 gallons less 1,000 gallons, less 931,550 gallons cleaned up] pursuant to CWC section 13385(c)(2)] was determined by taking into consideration the factors required in CWC section 13385(e) and the penalty calculation methodology described in the Enforcement Policy.

#### **B. SETTLEMENT CONSIDERATIONS**

Section VI.B of the Enforcement Policy (Settlement Considerations) states that the calculated liability may be adjusted as a result of settlement negotiations with a violator in consideration of certain hearing and/or litigation risks including: equitable factors, mitigating circumstances, evidentiary issues or other weaknesses. These factors shall be generally identified in any settlement of an administrative civil liability. As such, Prosecution Staff has agreed to reduce the final liability amount for the sanitary sewer overflow at Pump Station 64 on September 8, 2011 to **\$1,245,414** as part of this settlement action for the following reasons:

1. Respondent has agreed to install backup generators to ensure that future sanitary sewer overflows do not occur from power outages not only at Pump Stations 64 and 1, but also four additional sites throughout its service area.
2. Respondent did remove nearly 40 percent of the sewage discharged through aggressive pumping activities over 260 hours thereby reducing the long term effects of the discharge.

3. Throughout previous enforcement actions by the San Diego Water Board regarding sanitary sewer overflows at Pump Station 64, the use of redundant power grids to the station as a means to provide backup power was endorsed by the San Diego Water Board.
4. Respondent has revised its Sewer Overflow Response Plan taking into account its failure to identify areas of standing sewage hindering prompt removal and lessening of potential effects to beneficial uses. The Respondent requires the field crew responding to a spill incident to determine the final destination of the sewer overflow. They do this by walking the entire length of the spill path until they find the final point of discharge. The requirement, while not specifically written in the SSMP, is that a supervisory level employee will walk the spill route. The point of walking the spill route is to identify all spill points. The Respondent also trains all field employees annually.
5. Respondent has made significant progress in its program to reduce sanitary sewer overflows. Since 2000, the Respondent has reduced overflows by approximately 90 percent from 365 per year to 40 in calendar year 2012. The Respondent is currently well below the State averages for "Spill Rate Incidence" (# spills/100 miles/year) and "Net Volume Spills Incidence" (net volume in gallons/1,000 capita/year).
6. Additionally, between Fiscal Year 2002 to Fiscal Year 2012, the Respondent invested over \$930 million in infrastructure improvements to its sewage treatment facilities, pump stations and pipelines, including replacing or rehabilitating over 476 miles of sewer pipeline.



Attachment B: Respondent's Description of Enhanced Compliance Action

Enhanced Compliance Activity: San Diego Backup Generators

The City of San Diego, Public Utilities Department added a project to the Capital Improvement Program (CIP) in Fiscal Year 2012 to install emergency backup generators. This project, S12036 Backup Generators at Sewer Pump Stations, Treatment Plant and Environmental Monitoring and Technical Services Laboratory, funded in the amount of \$17,746,000, will provide backup generators at facilities that rely on dual SDG&E electrical feeds for redundancy.

The project includes the installation of diesel backup generators at four sewer pump stations: Sewer Pump Stations 1, 64, 65 and Penasquitos. The Department is also installing a generator at the North City Water Reclamation Plant and upgrading the generator at the Environmental Monitoring and Technical Services Laboratory. The generator at the Laboratory will be upgraded to ensure important biological specimens are not at risk of being lost during future extended outages.

In order to expedite the installation of the generators the Department purchased seven (7) identical 2,000 kW. These generators were delivered to the following locations in July 2012:

Pump Station 1	Two 2,000 kW diesel generators
Pump Station 64	Two 2,000 kW diesel generators
Pump Station 65	One 2,000 kW diesel generator
Penasquitos Pump Station	One 2,000 kW diesel generator
North City Water Reclamation Plant	One 2,000 kW diesel generator

The generators are currently available for use with temporary manual hookups. The wastewater pump station staff has prepared standard operating procedures for the temporary hookups. Staff is continuing to make improvements at the pump station sites to streamline the manual process.

Under a separate procurement the Department is in the process of selecting a design build contractor to perform site work and install conduits and cables, an electrical power automatic transfer system and a larger fuel storage system to provide for the permanent installation and connection of the generators to the pump stations. The new 500 kW generator for the laboratory will also be procured under this contract.

Proposed Schedule

Activity	Description	Schedule
Procurement of Generators	Council Approval to purchase seven 2,000 kW diesel generators	May 7, 2012
Delivery of Generators	Delivery of the generators to the pump station and treatment plant sites	July 2012
Startup and Testing of Generator	Generators available for use with manual connection	August 2012
Request for Proposal (RFP) for Permanent Installation	Issue RFP for Design Build contract for permanent installation	December 2012
Notice to Proceed	Issue Notice to Proceed	Spring 2013
Design and Construction	Final design and construction of the permanent installation	24 months from issuance of notice to proceed

Project Budget

	Total	Sub-Total
Generators	\$6,837,000	\$10,950,000
Contingency	\$342,000	
Contingency for APCD requirements, if required	\$3,771,000	
Design Build Contract	\$5,662,000	\$6,796,000
Construction Contingency	\$850,000	
Construction Management	\$284,000	
<b>Total Project Budget</b>	<b>\$17,746,000</b>	<b>\$17,746,000</b>
<b>Estimated Budget, less contingencies and APCD requirements</b>	<b>\$12,783,000</b>	