

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION**

**TENTATIVE ORDER NO. R9-2022-0094  
ASSESSING ADMINISTRATIVE CIVIL LIABILITY**

**and In the Matter of  
Baldwin & Sons, Inc. et al.  
Portola Center South Construction Site  
  
City of Lake Forest  
County of Orange**

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board or board), having held a public hearing on January 10, 12, and 13, 2022, to hear evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R9-2020-0006, and having considered and deliberated on the evidence received in the public hearing and in the record, and having evaluated such evidence using the board's experience, technical competence, and specialized knowledge, and having considered all comments received, orders Baldwin & Sons, Inc.; Sunranch Capital Partners, LLC; Sunrise Pacific Construction, Inc.; SRC-PH Investments, LLC; Baldwin & Sons, LLC; Shawn M. Baldwin; Randall G. Bone, and Jose Capati (collectively, "Dischargers"<sup>1</sup>) to pay civil liability in the amount of \$6,660,503 and finds as follows:

**BACKGROUND**

1. The Portola Center South Construction Site (Site) is an approximately 95-acre residential construction project located just south of the intersection of Glenn Ranch Road and Saddleback Ranch Road in the City of Lake Forest (City), County of Orange, California. The Site comprises approximately 95 acres of the 195-acre Portola Center Project. At completion of construction, the Site was planned to include 313 detached single-family residences, 256 multi-family residences, 57 affordable housing units, a public park, and two private parks. (See Prosecution Team Exhibit (PT Ex.) 354, ch. 1.) Aliso Creek, the unnamed tributaries flowing from the Site to Aliso Creek, and certain wetlands, are waters of the United States and of the state for purposes of this Order. (PT Ex. 334.)
2. On September 2, 2009, the State Water Resources Control Board (State Water Board) adopted Order No. 2009-0009-DWQ, National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (Construction

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<sup>1</sup> The term "Dischargers" as used in this Order refers to the entities and individuals that are found liable for the violations herein.

Storm Water Permit). (PT Ex. 4.) The Construction Storm Water Permit became effective on July 1, 2010, and was amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ. The Construction Storm Water Permit authorizes discharges of stormwater associated with construction activity so long as the dischargers comply with all requirements, provisions, limitations, and prohibitions in the permit. Pursuant to federal statutes and regulations, Construction Storm Water Permit section V.A.2 requires the implementation of the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to reduce or eliminate pollutants in stormwater runoff and imposes additional requirements necessary to implement applicable water quality standards. (PT Ex. 4, p. 82.)

3. Entities that have obtained coverage under the Construction Storm Water Permit (dischargers) are required to implement controls, structures, and management practices<sup>2</sup> (a.k.a. Best Management Practices or BMPs) to comply with the Construction Storm Water Permit's requirements. Based upon each site's sediment transport and receiving water risk level (Risk Level) the Construction Storm Water Permit requires different BMPs, and monitoring and reporting to achieve and demonstrate BAT and BCT. As described below, the Site was subject to Risk Level 2 requirements.
4. The Construction Storm Water Permit includes Numeric Action Levels (NALs) for pH and turbidity, which help evaluate BMP effectiveness and provide information about construction activities and water quality impacts. (PT Ex. 4, pp. 21, 82-83.<sup>3</sup>) Whenever monitoring results from a storm event daily average exceeds a NAL, the discharger must evaluate the site, including run-on; immediately implement necessary corrective action; and document the evaluation in the SWPPP. (*Id.*, p. 82, § V.B.3, 4; see also, *id.*, p. 63, ¶ 54.) Compliance with the turbidity NAL does not necessarily mean a discharger is in compliance with BAT/BCT requirements or receiving water limitations. (*Id.*, p. 17.) Exceedance of the NAL does not itself constitute a violation of BAT/BCT requirements, but failure to take corrective actions in response to NAL exceedances can be a violation. (*Id.*, p. 21.) For Risk Level 2 sites, the Construction Storm Water Permit requires monitoring at all discharge points for pH and turbidity based on samples representative of flow and discharge characteristics, except during dangerous weather conditions or

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<sup>2</sup> Best Management Practices are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 C.F.R. § 122.2.)

<sup>3</sup> References to page numbers in exhibits refer to the pdf page number in the footer of Prosecution Team exhibits or the Bates number in Discharger exhibits.

- outside scheduled site business hours. (*Id.*, pp. 176-181.) Discharge flow and flowrates are not required to be monitored. Risk Level 2 dischargers must monitor and report site run-on that may contribute to an exceedance of NALs. (*Id.*, p. 177, § I.5.d.) In this case, the Dischargers only monitored two of the ten outfalls from the Site for turbidity and pH on September 15-16 and December 22, 2015, and three on January 5, 2016. (PT Ex. 367, pp. 3, 6, 9; PT Ex. 370-372.)
5. Dischargers identify the appropriate Risk Level and must have a site-specific Storm Water Pollution Prevention Plan (SWPPP) prepared by a State-certified Qualified SWPPP Developer (QSD) prior to construction (PT Ex. 4, pp. 86, 91, §§ VII.B.1, XIV, A.). The Construction Storm Water Permit requires Qualified SWPPP Practitioners (QSPs) to implement BMPs required by the Construction Storm Water Permit. (PT Ex. 4, p. 87, § VII.B.3.)
  6. Sites identified as a “Risk Level 2” must implement heightened requirements under the Construction Storm Water Permit due to an increased risk to water quality. (See PT Ex. 4, pp. 88, 165 et seq., § X and Attachment D).
  7. Risk Level 2 sites that fail to implement one or more of the requirements contained in Construction Storm Water Permit Attachment D are not in compliance with BAT and BCT requirements. Discharges of stormwater or non-stormwater from sites where BMPs have not been implemented to achieve BAT and BCT, as required by the Construction Storm Water Permit, are unauthorized discharges.
  8. The Construction Storm Water Permit prohibits discharges that violate any discharge prohibitions contained in applicable basin plans. (PT Ex. 4, p. 74.) The Water Quality Control Plan for the San Diego Basin (Basin Plan) prohibits any unauthorized discharge to a MS4 that is not comprised entirely of stormwater, and any discharge of “sand, silt, clay, or other earthen materials” from land grading and construction activity “in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses.” (Basin Plan, p. 4-19, Waste Discharge Prohibitions (8), (14).)

### **CHRONOLOGY**

9. On June 5, 2013, the Dischargers filed an application for Clean Water Act section 401 certification for the Portola Center. The application stated that construction would take place outside of the rainy season (October 1 through March 14). (PT Ex. 334, p. 16.) The 401 Certification for the Project made compliance with this water quality protection measure a condition of certification. (PT Ex. 335, p. 8, ¶ D; PT Ex. 336, p. 14, ¶ D.) The application also estimated that grading would commence in November 2013 and construction would be completed in December 2016. (PT Ex. 334, p. 13.)

10. On October 2, 2014, Sunranch Capital Partners, LLC (Sunranch) filed a Notice of Intent (NOI) to comply with the Construction Storm Water Permit as a Risk Level 2 discharger and was issued Waste Discharge Identification (WDID) No. 930C371181 for the Site. Gary Berger, who certified the NOI, was listed as the contact person. (PT Ex. 6.) The NOI stated the total size of the construction area and the total area to be disturbed were both 15.1 acres. The NOI stated that construction activities would begin on December 1, 2014, grading would be complete on January 16, 2015, and final stabilization would be completed on March 31, 2015. Site clearing and grubbing activities began on or about February 5, 2015. (PT Ex. 7, City Photographs, Feb. 5, 2015.)
11. The original SWPPP, dated September 30, 2014, identified the Project as a 15.1 acre, Risk Level 2 project based, in part, upon a construction schedule that estimated construction would take place during the rainy season (December 1, 2014 through March 31, 2015). (PT Ex. 5, pp. 16, 17.) Appendix F of the original SWPPP (PT Ex. 5, p. 93) estimated that clearing and grubbing was to take place on December 1, 2014, and grading was to occur from December 8, 2014, through January 16, 2015.
12. On or about June 22, 2015, the City of Lake Forest issued Grading Permit No. GRAD-06-15-15878 to Sunranch for the Portola South project. (Dischargers Exhibits (Disch. Ex.) 7-8.) Rough grading construction activities on the Site commenced in or about June 2015. (PT Ex. 11, City Photographs, June 29, 2015.)
13. Amendment No. 1 to the SWPPP, dated March 6, 2015, added three acres of disturbance area for offsite mitigation. (PT Ex. 154, pp. 2, 4.) The construction completion date was also extended to August 31, 2015. (*Id.*, pp. 2, 8.)
14. On July 15, 2015, Amendment No. 2 to the SWPPP was completed. (PT Ex. 326.) Among other things, the SWPPP expanded the project acreage to 95.1 acres. (*Id.*, pp. 5-8.) The construction completion date was also extended to June 1, 2017. (*Id.*, pp. 5, 9.) Amended Appendix F estimated that clearing and grubbing would take place on July 15, 2015, grading would take place between July 20 and December 1, 2015, and final stabilization would take place by September 15, 2016. (*Id.*, pp. 30-31.)
15. Sunranch transferred ownership of the Site to SRC-PH Investments, LLC (SRC-PH) in July of 2015. The Grant Deed states that “Grantors & Grantees are comprised of the same parties who continue to hold the same proportionate interest in the property.” (PT Ex. 184, Grant Deed.) SRC-PH owned the property until November 12, 2015. (PT Ex. 185, Grant Deed.) Although no longer the owner of the Site, Sunranch filed a new NOI on February 17, 2016, replacing Berger with Jose Capati as the contact person. The NOI lists the total size of the

construction area as 95.1 acres and the total area to be disturbed as 11.6 acres. Grading was to be completed by January 31, 2017, with final stabilization by December 15, 2017. Capati certified the NOI. (PT Ex. 189.)

16. On the afternoon of September 14, 2015, the day before the first alleged unauthorized stormwater discharge event, John Dela Cruz, a City inspector, performed a “pre-storm event” inspection of the Site and prepared an inspection report based upon that inspection. The inspection report indicated that erosion and sediment controls had been implemented and installed; the site entrances and exits had been adequately protected; containers for construction waste and debris were being utilized and were adequate; there were “no potential water quality problems” identified on site; and there were no “discharges or spills of oil or toxic/hazardous materials.” (PT Ex. 92, pp. 39-40.) The inspection report noted that the QSP had notified the inspector that earthen berms would be installed in Canyon “D” fill areas “which slope down towards existing creek to slow down & hold back sediment to remain on site. This is in preparation of forecasted rain event.” (*Id.*, p. 39.) Another berm was to be placed at the bottom of [illegible]. (*Ibid.*) The inspector checked “not applicable” regarding actions to correct previously noted deficiencies. (*Id.*, p. 40.)
17. Although the September 14 inspection report did not note fuel leaks, City photographs document fuel leaks on August 20, August 31, 2015, and September 17, 2015, and Dela Cruz stated on January 19, 2016 that fuel leaks from poorly maintained equipment had been occurring throughout the grading period. (PT Ex. 101, p. 11; see also, PT Ex. 92, pp. 59-60, 51-52 [open oil containers observed on August 20, 2015, corrected by August 24, 2015].)<sup>4</sup> An oily sheen was also visible on September 16, one day after the rain event. (PT Ex. 367, p. 9.)
18. Section 4.2 of the SWPPP provided that Rain Event Action Plans (REAPs) would be used by the QSP as a planning tool to “protect exposed portions of project sites and to ensure that the discharger has adequate materials, staff, and time to implement erosion and sediment control measures.” (PT Ex. 5, p. 34.) The Construction Storm Water Permit requires the discharger to ensure the QSP develops a REAP 48 hours before a rain event, and begins implementation and makes the REAP available onsite no later than 24 hours before a rain event. (PT Ex. 4, pp. 171, 173, §§ H.1, H.6.) The REAP should be designed so that when implemented it protects all exposed portions of the site within 48 hours prior to any likely precipitation event. (*Id.*, p. 33, § J.1.i; see also, p. 263 [defining REAP].) Because rain events can occur at any time of the year in California, a REAP is necessary for Risk Level 2 sites to ensure that active construction sites have adequate erosion and sediment controls implemented before the onset of a

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<sup>4</sup> Even if hearsay, this statement is cited only to corroborate the photographs.

- storm, even if construction is planned only during the dry season. (*Id.*, p. 62, ¶ 49.) Site conditions throughout the violation period precluded development and implementation of an adequate REAP on 48 hours' notice. (Prosecution Team Rebuttal Exhibit (Rebuttal Ex.) 4, ¶¶ 13-14; PT Ex. 101, pp. 20-21, ¶ 17; Tom Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 99-101.) Varner Construction, Inc. (Varner Construction or Varner), the interior BMP contractor, could not or did not always fully implement the REAPs. (PT Ex. 367, pp. 4, 10.)
19. The Project QSP, Cameron Mann, issued a REAP on September 14, 2015, for a forecasted rain event on September 15, 2015. (PT Ex. 229, pp. 43-46.) The REAP included providing adequate capacity in sediment basins and traps, noting "Varner's responsibility" and "must construct pre-storm." (*Id.*, p. 44.) The REAP did not explicitly specify or include Risk Level 2 erosion and sediment control BMPs to be implemented.
  20. Mann conducted an inspection on the morning of September 15, 2015, just before the predicted rain event started, estimating approximately 60 acres were exposed during the mass grading construction stage. Mann noted, "Varner has not made a solid effort to prep for rain" and "Earth berm was not constructed by Varner before end of day." (PT Ex. 367, pp. 10,11.)
  21. The first of the four unauthorized stormwater discharge events took place on September 15, 2015. (See PT Ex. 30, 347.)
  22. On September 23, 2015, SRC-PH Investments, LLC, and Landsea Holding Corporation, an unrelated entity, entered into a Purchase and Sale Agreement for the majority of the Site. Landsea Holding Corporation assigned the Purchase Agreement to LS-OC Portola, LLC (Landsea) at the close of escrow. SRC-PH Investments, LLC did not file a Change of Information (COI), which would have been required if it had enrolled under the Construction Storm Water Permit. Landsea and Sunrise Pacific Construction, Inc. entered into a General Contractor Agreement, Guaranteed Maximum Price Contract (GMAX Contract), whereby Sunrise Pacific Construction, Inc. would act as general contractor on the Site. (PT Ex. 195.) The GMAX Contract and the grant deed were effective when the sale was completed, and the grant deed was recorded on November 12, 2015. (PT Ex. 195.)
  23. The City issued Notice of Violation (NOV)/Citation (No. 2221) to "Baldwin & Sons" on October 6, 2015, for failure/refusal to implement BMPs required by City Ordinance, which are similar to but not the same as the Construction Storm Water Permit BMP requirements. The "conditions observed" in Citation No. 2221 were described as "a lack of BMP implementation for a forecasted rain event on September 14 and September 15, 2015, which resulted in a significant discharge of sediment laden water off site." This citation imposed a fine of \$1,000 and required correction of the violations by October 6, 2015. (PT Ex. 30.)

24. The inspection report dated October 6, 2015, noted approximately 50 percent of the approximately 95-acre site was disturbed, erosion and sediment discharges observed, no erosion control BMPs in inactive or active areas, no sediment controls in active and not active disturbed areas, and no cleanup efforts from the September 15, 2015, rain event. (PT Ex. 92, pp. 27-28.) The October 12, 19, and 26, 2015 inspection reports noted the disturbed area increased to approximately 70 percent of the approximately 95-acre site, no erosion control BMPs in inactive or active areas, no sediment controls in disturbed areas, no cleanup efforts from September 15, 2015, rain event, and increasing trash and debris. (PT Ex. 92, pp. 29-34.)
25. During this intensive period of mass grading activities, the City inspector first stated his concern regarding the presence of oil/leaking fluids under equipment in soil on October 6, 2015. (PT Ex. 92, p. 28; Deposition of John Dela Cruz (Cruz Depo.), Vol. 2 (Oct. 27, 2020), pp. 325:23-326:18.) Although the October 12, 2015 inspection report did not document oil leaks (PT Ex. 92.), Sunranch and SRC-PH admit multiple subsequent violations occurred through February 8, 2016.
26. Despite the issuance of NOV/Citation No. 2221, the Dischargers failed to bring the Site into compliance and on October 9, 2015, the City issued another NOV/Citation (No. 2240) for continued BMP violations at the Site to “Sunranch Capital Partners, LLC / Baldwin and Sons.” Citation No. 2240 was issued for failure/refusal to implement BMPs at the Site on October 7, 2015. Among the “conditions observed” were “lack of erosion control BMPs on disturbed areas and stockpiles” and “equipment drips and leaks, drips and leaks at the above ground fuel storage tank, improper storage of hazardous materials including oil, coolant and oil filters.” This citation imposed a fine of \$500 and required the violations to be corrected by October 16, 2015. (PT Ex. 34.)
27. The City of Lake Forest did not produce written inspection reports for the period of October 27, 2015 through December 17, 2015. The City inspectors continued to inspect the Site and take photographs during that period, and provided the photographs to San Diego Water Board staff. (PT Exs. 43, 44, 47, 49, 52-54, 56, 58, 59, 61, 63-66, 69, 71, 72.)
28. The City contacted the San Diego Water Board for assistance multiple times beginning on December 10, 2015 because the City had been unable to compel compliance at the Site. (PT Ex. 190.)
29. By December 22, 2015, approximately 90 acres of the site was graded. (PT Ex. 92, pp. 16, 18; PT Ex. 171; PT Ex. 367, p. 6.)

30. The second alleged unauthorized discharge event took place on December 22, 2015. Dela Cruz, the City inspector, was unable to get on site during the rain event, but noted “no controls on inactive or active disturbed grading areas,” sediment controls at the perimeter but none in grading areas, and observed sediment discharging from the Site. The inspection report noted that it was the “13<sup>th</sup> Notice” of violation, and that actions had not been taken to correct previously noted deficiencies. (PT Ex. 92, pp. 16-17; PT Ex. 170.)
31. The “post-storm” follow-up inspection report prepared by Dela Cruz on December 28, following the December 22-23, 2015, rain event, noted that there was no observation of a sediment discharge on December 28, 2015, but sediment discharge was an “outstanding item” since October 19, 2015, and “new evidence of discharge” was observed. (PT Ex. 92, p. 15.) The inspection report noted no “water quality problems” and no “discharges or spills” of oil or other hazardous material. (PT Ex. 92, p. 15.) However, the report noted major and minor erosion in false slopes in grading areas and the absence of erosion and sediment controls other than perimeter erosion controls. (PT Ex. 92, p. 14.) Finally, the report noted that no actions had been taken to correct previously noted deficiencies. (PT Ex. 92, p. 15.)
32. In a letter dated December 29, 2015 to Baldwin and Sons, Inc., the City requested revised drawings of a temporary detention basin that was constructed without following approved plans, so City staff could evaluate whether the proposed changes would make the basin conform to water quality requirements. (PT Ex. 223, pp. 1, 3.)
33. Another follow-up inspection report on December 31, 2015, prepared by Dela Cruz, noted erosion and sediment controls were not being implemented in accordance with the Erosion and Sediment Control Plans. The December 31, 2015 inspection report also noted that sediment discharge was observed with a comment that this was an “outstanding item” since October 19, 2015, and no actions had been taken to correct previously noted deficiencies. (PT Ex. 92, pp. 12-13.)
34. The City conducted a “pre-storm” inspection on January 4, 2016. (PT Ex. 92, pp. 10-11.) The inspection report did not document spills or leaks of fluids, oils or toxins from any equipment on to soil. (*Ibid.*) The inspection report noted that “BMPs were upgraded and maintenance along the perimeter of the site in preparation for the forecasted rain event,” but again noted the absence of erosion or sediment controls within the Site and the failure to correct previously noted deficiencies. (*Ibid.*)



35. The third and fourth alleged unauthorized discharge events took place on January 5 and 6, 2016. (PT Exs. 170-171; PT Ex. 367, pp. 2-4.)
36. During the post-storm inspection on January 7, 2016, the City inspector again noted the absence of erosion and sediment controls, and major and minor erosion throughout the Site. The absence of sediment controls in grading areas “caused storm water to flow down to mitigation ponds carrying sediment & over flow across bike path.” The inspection report also notes subcontractor representatives from Tom Bistline were observed on the Project site “repairing/installing/maintaining BMPs.” (PT Ex. 92, pp. 8-9.) In addition, these efforts by Bistline helped “stabilize the area” and mitigate “the blow out area at the bike path” after the storm event. (Dela Cruz Depo., Vol. 2 (Oct. 27, 2020), p. 359:6-13.) These efforts by Bistline to repair various perimeter control BMPs proved inadequate, as discussed below.
37. The ongoing erosion and sediment control BMP violations and failure to implement actions to correct previously noted deficiencies dating back to October 19, 2015 were noted again in the January 11, 2016 inspection report. (PT Ex. 92, pp. 6-7.)
38. San Diego Water Board staff inspected the Site on January 19, 2016, and documented violations of the Construction Storm Water Permit. (PT Ex. 101.) Upon completion of the inspection, the San Diego Water Board inspector concluded that the noncompliance was due to poor planning and a failure to implement effective BMPs. A “majority of the site had been completely graded,” there was “a lack of Site construction scheduling” and discharges had significant impacts on the downstream mitigation area. (*Id.*, p. 6.) San Diego Water Board staff conducted stormwater inspections and drive-by visual inspections of the Site on March 14, 2016, and March 21, 2016.
39. Based upon the Construction Storm Water Permit violations documented during the San Diego Water Board inspections, San Diego Water Board staff issued Notice of Violation No. R9-2016-0124 to Capati, Baldwin & Sons, and Sunranch Capital Partners, LLC on May 23, 2016. (PT Ex. 169a-b.) The NOV identified numerous violations of the Construction Storm Water Permit and warned the Dischargers that a liability of up to \$10,000 could be imposed for each day of violation.
40. The City issued NOV/Citation No. 2258 and Stop Work Order No. 2257-2258 to “Sunranch Capital Partners, LLC/Baldwin & Sons” on January 21, 2016, for failure to implement an effective combination of erosion and sediment control BMPs that resulted in an unauthorized discharge of sediment and sediment laden stormwater runoff from the Site into Aliso Creek on January 5, 2016. (PT Ex. 92, p. 5; PT Ex. 106.) Citation No. 2258 included a list of corrective actions to be completed by February 8, 2016, or prior to a predicted rain event. (PT Ex. 105, pp. 2-5.)

41. On January 21, 2016, Sunrise Pacific Construction, Inc. notified Varner Construction that it was in breach of its contract due to BMP violations. (PT Ex. 216, pp. 3-4.)
42. In the January/February 2016 time frame, the City inspector observed some corrective work being performed by Varner and Bistline. (Dela Cruz Depo., Vol. 1 (Mar. 11, 2020), p. 139:6-21.) More specifically, Varner Construction was moving ponded water around, trying to “heal up” saturated soil, and building berms. (*Id.*, pp. 139:22-140:6.) During this period, the inspector also observed Bistline pumping water, installing silt fence, and installing waddles. (*Id.*, p. 140:7-11.) Inspector John Dela Cruz personally observed the corrective work being performed over two to three months, and he noted that “there were people working on the site every day. They were making progress every day.” (*Id.*, pp.146:7-19,149:9-150:6.) These efforts again proved inadequate, as evidenced by the subsequent NOVs, and the City’s Cease and Desist Order and Stop Work Order.
43. On February 2, 2016, Dudek personnel observed intentional, illegal dewatering discharges to a water of the United States. (PT Ex. 358, p. 130.) The San Diego Water Board has not assessed liability for this violation because it was not cited in the Administrative Civil Liability (ACL) Complaint.
44. The City issued NOV/Citation No. 2247 to “Baldwin & Sons” on February 5, 2016 for continued failure to implement BMPs and failure to timely comply with Citation No. 2258/Stop Work Order No. 2257-2258, and conducting construction activities in violation of an active Stop Work Order. (PT Ex. 125.)
45. On February 10, 2016, the City issued a Cease and Desist Order and Notice to Abate Nuisances to Baldwin & Sons, LLC for failure to correct violations by the deadlines provided in Citation No. 2258/Stop Work Order No. 2257-2258. (PT Ex. 131.) Violations were required to cease and desist by February 17, 2016, or prior to the next rain event, whichever occurs first. On March 3, 2016, Capati, as Vice President of Site Development for “Baldwin & Sons,” terminated Varner’s contract at the Site and Portola Northwest. (PT Ex. 222.)
46. The City issued Stop Work Order No. 170316 on March 17, 2016, which halted grading activities based on the “[dischargers’] failure/refusal to implement appropriate BMPs, and failure/refusal to implement an effective combination of erosion and sediment control BMPs.” The Stop Work Order included a list of corrective actions required to be completed by March 31, 2016, or prior to a predicted rain event. (PT Ex. 155.) The City did not lift the stop Work Order until April 14, 2016. Even then, only certain activities were allowed to proceed, mostly related to BMPs and corrective action work. (Disch. Ex. 148.)

47. On January 10, 2020, the San Diego Water Board Prosecution Team issued ACL Complaint No. R9-2020-0006 (Complaint) in the amount of \$9,085,932.
48. Pursuant to a stipulation entered by the Parties and an order issued by the Executive Officer on May 5, 2021, ASSR Pacific Investments, LLC; USA Portola Properties, LLC; USA Portola West, LLC; USA Portola East, LLC; Portola Project, LLC; William G. Bone, both individually and dba Sunrise Company; Alfred Baldwin; and Gary Berger were dismissed from the Complaint. Without admitting liability, the Remaining Dischargers (Baldwin & Sons, Inc.; Baldwin & Sons, LLC; Sunranch Capital Partners, LLC; Sunrise Pacific Construction, Inc.; SRC-PH Investments, LLC; Jose Capati; Shawn M. Baldwin; and Randall G. Bone) affirmed their collective ability to pay the proposed liability and waived their right to raise an ability to pay defense to that amount, and acknowledged that the San Diego Water Board does not apportion liability.

### **SURFACE WATER BENEFICIAL USES**

49. The Site lies within the Aliso Creek Hydrologic Subarea (HSA) (901.13) of the San Juan Hydrologic Unit. Storm water discharges from the Site flow directly into Aliso Creek and into wetlands and other unnamed tributaries to Aliso Creek, which are waters of the United States for purposes of this Order and waters of the State.
50. The Basin Plan designates the following existing and potential beneficial uses for Aliso Creek and its tributaries, including wetlands (Basin Plan, p. 2-16, Table 2-2 and footnote 2):
  - a. Agricultural Supply (AGR) - Includes uses of water for farming, horticulture, or ranching including, but not limited to, irrigation, stock watering, or support of vegetation for range grazing;
  - b. Contact Water Recreation (REC-1) - Includes uses of water for recreational activities involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, swimming, wading, water-skiing, skin and SCUBA diving, surfing, white water activities, fishing, or use of natural hot springs;
  - c. Non-contact Water Recreation (REC-2) - Includes the uses of water for recreational activities involving proximity to water, but not normally involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, picnicking, sunbathing, hiking, beachcombing, camping, boating, tidepool and marine life study, hunting, sightseeing, or aesthetic enjoyment in conjunction with the above activities;

- d. Warm Freshwater Habitat (WARM) - Includes uses of water that support warm water ecosystems including, but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish or wildlife, including invertebrates; and
  - e. Wildlife Habitat (WILD) - Includes uses of water that support terrestrial ecosystems including, but not limited to, preservation and enhancement of terrestrial habitats, vegetation, wildlife (e.g., mammals, birds, reptiles, amphibians, invertebrates), or wildlife water and food sources.
51. Urbanization has severely degraded aquatic and riparian habitat along Aliso Creek. (Disch. Ex 1, *Rincon Consultants, Inc. ACLC Technical Support, Portola South* (Dec. 22, 2020) (Rincon ACLC Report), p. viii.) Aliso Creek is designated as impaired for Benthic Community Effects, Indicator Bacteria, Malathion, Nitrogen, Phosphorus, Selenium, and Toxicity pursuant to Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. § 1251 et seq.) section 303(d) (33 U.S.C. § 1313). (Order on Req. for Official Notice (Dec. 8, 2021), ¶ 21; 303(d) List, p. 206.)

#### DISCHARGERS

52. **Legally Responsible Persons.** Section 301(a) of the Clean Water Act prohibits “the discharge of any pollutant by any person” unless in compliance with a permit.<sup>5</sup> (33 U.S.C. § 1311(a).) The State Water Board adopted the Construction Storm Water Permit, which authorizes discharges of stormwater associated with construction activity so long as the dischargers comply with all requirements, provisions, limitations, and prohibitions in the permit. (See above, ¶ 2.) The Construction Storm Water Permit imposes requirements on “Dischargers,” which is defined as the “Legally Responsible Person” or entity subject to the permit. (PT Ex. 4, pp. 260-261.) The Legally Responsible Person is typically the project proponent and may also be a “person, company, agency, or other entity that possesses a real property interest ... in the land upon which construction or land disturbance activities will occur for the regulated site.” (PT Ex. 4, pp. 260-261.) The Construction Storm Water Permit requires the appropriate Legally Responsible Person for construction activities to obtain coverage under the permit. (PT Ex. 4, p. 69.)
53. **Sunranch** is liable for the violations as a Legally Responsible Person. Sunranch filed NOIs seeking coverage under the Construction Storm Water Permit and identified itself as the Legally Responsible Person during the violation period. (PT

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<sup>5</sup> The Clean Water Act provides that the “term ‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” (33 U.S.C. § 1362.)

Ex. 6; PT Ex. 189; see above, ¶¶ 10, 15; see also Dischargers' Confidential Brief, 20:13-25.) While Sunranch conveyed ownership of the Site to SRC-PH, Sunranch "continue[d] to hold the same proportionate interest in the property." (PT Ex. 184; see above, ¶ 15.) Thus, Sunranch remained an owner of the Site and continued to serve as the Legally Responsible Person, even after conveying the Site to SRC-PH. (PT Ex. 184; PT Ex. 189; Dischargers' Confidential Brief, 20:13-25.) As a Legally Responsible Person during the violation period, Sunranch was responsible for compliance with the requirements, provisions, limitations, and prohibitions in the Construction Storm Water Permit. Thus, Sunranch is liable for the violations.

54. **Site Owners.** While the primary responsibility to comply with the Construction Storm Water Permit may lie with the Legally Responsible Person, the ultimate responsibility for the condition of the land is with its owner. Even if a landowner does not take an active role in the discharge, the landowner is in a position to prevent the discharge and knew or should have known that the discharge was taking place. (State Water Board Order No. WQ 87-5 (*USDA Forest Service*), p. 3.)
55. **SRC-PH** is liable for the violations as a Site owner and Site operator. SRC-PH acquired the Site from Sunranch in July 2015. (PT Ex. 184; see above ¶ 15.) SRC-PH conveyed its ownership interest in the Site to Landsea in November 2015. (PT Ex. 185.) When a Legally Responsible Person with permit coverage transfers its Legally Responsible Person status to another entity, the new entity must submit permit registration documents in accordance with the permit's requirements to continue the construction activity on the site. (PT Ex. 4, p. 72.) When SRC-PH acquired the Site, it should have submitted an NOI naming itself as the Legally Responsible Person at the Site and obtain coverage under the Construction Storm Water Permit. However, SRC-PH never submitted an NOI during the violation period. As the Site owner during the violation period, SRC-PH did not have coverage under the Construction Storm Water Permit and was prohibited from discharging pollutants from the Site. Thus, SRC-PH was responsible for the violations that occurred at the Site. (See 33 U.S.C. § 1311(a).) However, SRC-PH was more than just a passive Site owner during the violation period.

SRC-PH was also a Site Operator during the violation period. (See below, ¶ 57.) SRC-PH entered into several change order authorizations for Varner Construction, the interior stormwater BMP subcontractor. (PT Exs. 237-241.) Thus, SRC-PH was also a Site operator during the violation period because it managed: (1) operations at the Site related to SWPPP BMP implementation which resulted in the violations and (2) decisions about compliance with the Construction Storm Water Permit. Further, SRC-PH had control over the

implementation of SWPPP BMPs because it authorized additional contract amounts of the interior stormwater BMP subcontractor. As the Site owner during a portion of the violation period, SRC-PH could have also corrected the violations itself.

56. The Dischargers also admit that Sunranch and SRC-PH are Legally Responsible Persons and dischargers within the meaning of Water Code section 13385 during the violation period (August 20, 2015 through March 31, 2016). (Dischargers' Confidential Brief, pp. 1, 18-21.)
57. **Site Operators.** A site operator may be directly liable for its own actions where it manages, directs, or conducts operations specifically related to pollution or decisions about compliance with environmental regulations. (*U.S. v. Bestfoods* (*Bestfoods*) (1998) 524 U.S. 51, 66-67.) While *Bestfoods* considered liability in the parent-subsidary context, the existence of a parent-subsidary relationship is not necessary to find operator liability. (*PPG Industries Inc. v. United States* (3d Cir. 2020) 957 F.3d 395, 402, citing *Litgo New Jersey Inc. v. Commissioner New Jersey Dept. of Environmental Protection* (3d Cir. 2013) 725 F.3d 369, 382; *United States v. Nature's Way Marine, L.L.C.* (5th Cir. 2018) 904 F.3d 416, 421) "The [Clean Water Act] imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work. [Citation.] Further, the [Clean Water Act] imposes strict liability. The 'no discharge' prohibition of Section 301 was 'written without regard to intentionality ... making the person responsible for the discharge of any pollutant strictly liable.'" (*U.S. v. Lambert* (S.D.W. Va. 1996) 915 F.Supp. 797, 802.) The Clean Water Act's imposition of liability on "any person" is "broad enough to cover permittees and non-permittees alike." (*U.S. v. Cooper* (9th Cir. 1999) 173 F.3d 1192, 1201; see also *Assategue Coastkeeper v. Alan and Kristin Hudson Farm* (D. Md. 2010) 727 F.Supp.2d 433, 442; *United States v. Smithfield Foods, Inc.* (E.D.Vir. 1997) 965 F.Supp. 769.)
58. **Baldwin & Sons, Inc.** is liable for the violations as a Site operator. Baldwin & Sons, Inc. entered into subcontractor agreements with Tom Bistline Construction, Inc. for perimeter erosion control and BMP work and with Varner Construction for interior grading and BMP work.<sup>6</sup> (PT Ex. 217; PT Ex. 218; Bistline testimony,

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<sup>6</sup> While Baldwin & Sons, Inc. initially entered into the subcontractor agreements with Tom Bistline Construction, Inc. on June 16, 2015 and Varner Construction on July 21, 2015, it was later discovered that Baldwin & Sons, Inc. was "inaccurate[ly]" named in the agreements. (PT Ex. 282.) For Tom Bistline Construction, Inc., a second, replacement subcontractor agreement was entered into by Sunrise Pacific Construction, Inc., dated February 11, 2015, and signed by Capati on October 29, 2015. (PT Ex. 310.) Sunrise Pacific Construction, Inc. and Tom Bistline Construction, Inc. entered into a

Hearing Transcript, Jan. 10, 2022, pp. 98-99.) Baldwin & Sons, Inc., through its employees, including Capati (see below, ¶ 62.a), directed Site subcontractors on issues related to SWPPP BMP implementation and compliance. Baldwin & Sons, Inc., regularly directed the BMP subcontractors regarding scheduling and compliance issues at the Site. (PT Ex. 216<sup>7</sup>; PT Ex. 219; PT Ex. 222.)<sup>8</sup> Baldwin & Sons, Inc. also responded to City NOVs and correspondence regarding compliance issues at the Site on January 11, 25, 27, and February 1, 2016. (PT Exs. 223-226.) Its correspondence to the City described the corrective actions taken to remedy any deficiencies and stated on January 25, 2016: “Baldwin and Sons[, Inc.] is committed to take immediate corrective action of all alleged deficiencies and the implementation of long-term corrective action in compliance with standards set by the City, as well as State regulations.” (PT Ex. 224; see also PT Exs. 225-226.) After several months of deficient implementation of the SWPPP BMPs, Baldwin & Sons, Inc. terminated Varner Construction’s subcontractor agreement March 3, 2016. (PT Ex. 222.) Thus, Baldwin & Sons, Inc. was a Site operator during the violation period because it managed and directed: (1) operations at the Site related to SWPPP BMP implementation which resulted in the violations and (2) decisions about compliance with the

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third subcontractor agreement, dated January 29, 2016, and signed by Capati on February 2, 2016. (PT Ex. 308.) For Varner Construction, a second, replacement subcontractor agreement was entered into by Sunrise Pacific Construction, Inc., dated July 21, 2015, and signed by Capati on November 24, 2015. (PT Ex. 282.)

<sup>7</sup> Prosecution Team Exhibit 216 includes an email from Capati, as the Vice President of Site Development for “Baldwin & Sons,” to Varner Construction, dated January 27, 2016. (See below, fn. 8 [regarding references to “Baldwin & Sons”].) Notably, by this time, the subcontractor agreement between Baldwin & Sons, Inc. and Varner Construction had been terminated and replaced with a subcontractor agreement between Sunrise Pacific Construction, Inc. and Varner Construction. (PT Ex. 282; see also above, fn. 6.) Despite no longer being listed as the “contractor” in the agreements, Baldwin & Sons, Inc. continued to manage, direct, and control the SWPPP BMP subcontractors at the Site.

<sup>8</sup> Several emails from Capati include a signature block with Capati as the Vice President of Site Development for “Baldwin & Sons,” without specifying Baldwin & Sons, Inc. or Baldwin & Sons, LLC. Evidence in the record supports a conclusion that Capati was only an employee for Baldwin & Sons, Inc. during the violation period. (See PT Ex. 217 [subcontractor agreement entered into by Baldwin & Sons, Inc. and signed by Capati (while there is no printed name in the signature block, the wet signature resembles Capati’s wet signature in other documents (compare PT Ex. 217, p. 10, with PT Ex. 224))]; PT Exs. 224-226 [letters signed by Capati on “Baldwin & Sons” letter head, referring to “Baldwin & Sons, Inc.” in the text]); see also Dischargers’ Confidential Ex. 12, Minutes, Exhibit A, p. 12:011.) There seems to be no evidence in the record that Capati was an employee of or had the authority to represent Baldwin & Sons, LLC during the violation period.

Construction Storm Water Permit. Further, Baldwin & Sons, Inc. had control over the implementation of SWPPP BMPs because it directed the Site's BMP subcontractors and could have corrected the violations. Baldwin & Sons, Inc.'s actions exhibit an eccentric level of control over the Site for an entity with no ownership interest of the Site. (Dischargers' Confidential Brief, 12:17-23; *Bestfoods*, *supra*, 524 U.S. at p. 72; *Atlantic Richfield Co. v. Central Valley Regional Water Quality Control Board* (2019) 41 Cal.App.5th 91, 97, citing *Bestfoods*.)

59. **Baldwin & Sons, LLC** is liable for the violations as a Site operator. Cameron Mann was an employee of Baldwin & Sons, LLC during the violation period.<sup>9</sup> Mann was the Site Safety and BMP Compliance Officer, QSP for the Site. (Bistline testimony, Hearing Transcript, Jan. 10, 2022, p. 90; PT Exs. 227-234.) Acting as a Site representative and Baldwin & Sons, LLC employee, Mann also communicated with San Diego Water Board staff regarding Construction Storm Water Permit compliance, proper BMP implementation, SWPPP amendments, monitoring data, REAPs, and stormwater runoff estimates. (PT Exs. 101, 344, 351, 361; Erica Ryan testimony, Hearing Transcript, Jan. 10, 2022, pp. 133-134.) Baldwin & Sons, LLC regularly managed and directed subcontractors Tom Bistline Construction, Inc. and Varner Construction regarding SWPPP compliance issues and by distributing REAPs in preparation of forecasted rain events. (PT Exs. 227-234; see also Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 89-90; Rebuttal Ex. 4, ¶ 14.) For example, Baldwin & Sons, LLC sent Varner an email on November 23, 2015, stating that "Varner is out of compliance with SWPPP requirements" and included several directives to Varner, such as "[n]eed to keep all open oil containers/containments free of oil," "[m]ust cover all open oil containers," and "must utilize containments under all leaking equipment." (PT Ex. 234; see also PT Ex. 229, pp. 22, 28.) These failures relate to Violation Nos. 3 and 7. (See below ¶¶ 94, 98.) Later the same day, Baldwin & Sons, LLC sent another email to Varner and Tom Bistline Construction, Inc., again informing them that the Site was "out of compliance with the SWPPP and enviro. laws," and directing them to "fix the silt fence area/base

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<sup>9</sup> Several emails from Mann include a signature block with Mann as the "Site Safety & BMP Compliance Officer, QSP" for "Baldwin & Sons, LLC." (PT Exs. 227-234.) In REAPs, under "Site Stormwater Manager Information," Mann listed: "Cameron Mann, Baldwin & Sons, 7606850895." (PT Ex. 229.) Mann's email signature block also contains the same phone number—(760) 682-0895. (Compare PT Ex. 229 with PT Exs. 227-234.) Mann affirmed that was an employee of "Baldwin" to board staff. (PT Ex. 101, p. 11-12.) However, at the hearing, Tom Bistline testified that Mann was a representative of Sunrise Pacific Construction Inc. (Bistline testimony, Hearing Transcript, Jan. 10, 2022, p. 89.) At a minimum, the evidence in the record supports a conclusion that Mann was an employee of Baldwin & Sons, LLC.



in order to reinstall it properly.” (PT Ex. 232; see also PT Ex. 227.) These failures to relate to Violation No. 6. (See below, ¶ 97.) Thus, Baldwin & Sons, LLC was a Site operator during the violation period because it managed and directed: (1) operations at the Site related to SWPPP compliance which resulted in the violations and (2) decisions about compliance with the Construction Storm Water Permit. Further, Baldwin & Sons, LLC had control over the implementation of SWPPP BMPs because it directed the Site’s BMP subcontractors and could have corrected the violations. Baldwin & Sons, LLC’s actions exhibit an eccentric level of control over the Site for an entity with no ownership interest of the Site. (Bone testimony, Hearing Transcript, Jan. 13, 2022, pp. 24-25; Dischargers’ Confidential Brief, 15:1-8; *Bestfoods*, *supra*, 524 U.S. at p. 72; *Atlantic Richfield Co. v. Central Valley Regional Water Quality Control Board* (2019) 41 Cal.App.5th 91, 97, citing *Bestfoods*.)

60. **Sunrise Pacific Construction, Inc.** is liable for the violations as a Site operator. Sunrise Pacific Construction, Inc. was the general contractor at the Site during the violation period. (Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 7<sup>10</sup>; PT Ex. 195; Dischargers’ Confidential Brief, 11:8-11.) Sunrise Pacific Construction, Inc. was responsible for compliance with all applicable environmental laws, including, but not limited to, the Clean Water Act, the Construction Storm Water Permit, and the SWPPP. (PT Ex. 195, pp. 18-19.) As the general contractor for the Site, Sunrise Pacific Construction, Inc. subcontracted some of its obligations to subcontractors. (Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 8.) Sunrise Pacific Construction, Inc. was responsible for ensuring that its subcontractors comply with all applicable obligations under the GMAX Contract and applicable law. (PT Ex. 195, p. 34; see also Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 8.) Specifically, Sunrise Pacific Construction entered into subcontractor agreements with Tom Bistline Construction, Inc. for perimeter erosion control and BMP work and with Varner Construction for interior grading and BMP work.<sup>11</sup> (PT Exs. 217, 282; Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 98-99.) Sunrise Pacific Construction, Inc. managed and directed its BMP subcontractors by directly communicating with them (PT Exs. 216, 244; Disch. Ex. 25; Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 89, 90), issuing change order authorizations to increase contract amounts (PT Exs. 245-251; Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 22), and terminating subcontractors for

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<sup>10</sup> The Hearing Transcript for January 13, 2022, includes a typographical error: “Now from that Summer 2025 [sic] time from forward into 2016, do you recall who the general contractor was for the construction activities that occurred on the project?” (Bone testimony, p. 7.) The reference to “Summer 2025” obviously refers to summer 2015, going forward into 2016.

<sup>11</sup> See above, fn. 6.

deficient implementation of BMPs (Disch. Ex. 25; PT Ex. 244; Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 23). Thus, Sunrise Pacific Construction, Inc. was a Site operator during the violation period because it managed and directed: (1) operations at the Site related to BMP implementation which resulted in the violations and (2) decisions about compliance with the Construction Storm Water Permit. Further, Sunrise Pacific Construction, Inc. was responsible for and had control over the implementation of BMPs that lead to the violations and could have corrected the violations itself.

61. **Responsible Corporate Officers.** “Individuals can be liable for violations of the [Clean Water Act] where they participate in or were responsible for the violations, even when the individual purports to act through a corporate entity.” (*U.S. v. Gulf Park Water Co., Inc.* (S.D. Miss. 1997) 972 F.Supp. 1056, 1063; *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1207 [limited liability companies]; see also State Water Board Order No. WQO 2002-0001 (*Mr. Kelly Engineer/All Star Gas*), p. 5.) “[A]n affirmative duty is properly placed on corporate officers by strict liability statutes regulating the public welfare. ‘[I]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. [Citation.]’ ” (*People v. Matthews* (1992) 7 Cal.App.4th 1052, 1062 (*Matthews*), citing *U.S. v. Dotterweich* (1943) 320 U.S. 277, 281; *U.S. v. Lambert* (S.D. W. Va. 1996) 915 F.Supp. 797 [“the [Clean Water Act] imposes strict liability”].) “[P]ersons holding significant shares of corporate responsibility and power are subject to prosecution and conviction for strict liability crimes unless they have exercised their responsibilities and power so as to have undertaken all objectively possible means to discover, prevent and remedy any and all violations of such laws.” (*Matthews, supra*, 7 Cal.App.4th at p. 1062.) “Three essential elements must be satisfied before liability will be imposed upon a corporate officer under the responsible corporate officer doctrine: (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual’s position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual’s actions or inactions facilitated the violations.’ ” (*People v. Roscoe* (2008) 169 Cal.App.4th 829, 839.)
62. **Jose Capati** is liable for the violations pursuant to the Responsible Corporate Officer doctrine.
- a. **Position of Responsibility Which Allows the Person to Influence Corporate Policies or Activities.** Capati held positions at multiple entities which are also dischargers (see above) during the violation period. Capati

is the Vice President of Site Development for Sunranch and SRC-PH,<sup>12</sup> Sunrise Pacific Construction, Inc., and Baldwin & Sons, Inc. (PT Exs. 189, 216, 223, 289; see also Dischargers' Confidential Ex. 12, Minutes, Exhibit A, p. 12:011.) Capati was on the construction team for Sunrise Pacific Construction, Inc. and eventually led the construction team. (Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 13.) Capati certified Sunranch's February 17, 2016 NOI, which listed Capati as the contact person. (PT Ex. 189; Dischargers' Confidential Brief, 17:1-10; see above, ¶ 15.) During the violation period, Capati had substantial authority to enter into contracts and act on behalf of Baldwin & Sons, Inc. (Dischargers' Confidential Ex. 12, Minutes, Exhibit A, p. 12:011.) Thus, Capati held positions of responsibility at Sunranch, Sunrise Pacific Construction, Inc. and Baldwin & Sons, Inc. which allowed him to influence corporate policies and activities at the Site.

- b. **Nexus Between the Individual's Position and the Violation.** Capati acted on behalf of Sunranch, Sunrise Pacific Construction, Inc., and Baldwin & Sons, Inc. on issues related to the grading and implementation of BMPs at the Site. On behalf of Baldwin & Sons, Inc. and Sunrise Pacific Construction, Inc., Capati signed a subcontractor agreement with Tom Bistline Construction Inc. for perimeter BMPs at the Site.<sup>13</sup> (PT Exs. 217, 208, 310; Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 98-99.) On behalf of Sunrise Pacific Construction, Inc., Capati signed a subcontractor agreement with Varner Construction for interior BMPs at the Site.<sup>14</sup> (PT Ex. 282; Bistline testimony, Hearing Transcript, Jan. 10, 2022, p. 99.) Capati also signed several change order authorizations for BMP subcontractors which increased their contract amount. (PT Exs. 237-241 [on behalf of SRC-PH/Sunranch<sup>15</sup> for Varner]; PT Exs. 245-251 [on behalf of Sunrise Pacific Construction, Inc. for Varner]; PT Exs. 309, 311, 312 [on behalf of Sunrise Pacific Construction, Inc. and Sunranch for Tom Bistline Construction, Inc.].) On behalf of "Baldwin & Sons"<sup>16</sup> and Sunrise Pacific Construction, Inc., Capati directed Varner Construction on grading issues at Portola South. (PT Exs. 216, 219, 222.) Capati also met, discussed, and corresponded with Landsea representatives on stormwater compliance deficiencies at the Site. (See PT Ex. 324, Ex. 2, Frame

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<sup>12</sup> Sunranch and SRC-PH are the same parties. (See PT Ex. 184; Dischargers' Confidential Brief, 20:13-25.)

<sup>13</sup> See above, fn. 6.

<sup>14</sup> See above, fn. 6.

<sup>15</sup> Sunranch and SRC-PH are the same parties. (See PT Ex. 184; Dischargers' Confidential Brief, 20:13-25.)

<sup>16</sup> See above, fn. 8.

Declaration, ¶¶ 7, 21, 23; *id.* at p. 624; see generally *id.*, Attachment B.) Capati also represented to City officials that he had control over the violations by responding to and paying fines for City NOVs on behalf of Baldwin & Sons, Inc. (PT Exs. 224-226.) Capati's responses to the City's NOVs included lists of corrective actions taken to remedy any alleged deficiencies. (PT Exs. 224- 226.) After several months of deficient BMP implementation and on behalf of Baldwin & Sons, Inc., Capati terminated the subcontractor agreement with Varner Construction on March 3, 2016. (PT Ex. 222; see also above, fn. 8 [regarding Capati's "Baldwin & Sons" email signature block].) Capati's positions with Sunranch, Sunrise Pacific Construction, Inc., and Baldwin & Sons, Inc. gave him authority and responsibility over stormwater BMP implementation issues at the Site that resulted in the violations.

- c. **Actions or Inactions Facilitated the Violations.** As the Vice President for Site Development for Sunranch, Sunrise Pacific Construction, Inc., and Baldwin & Sons, Inc., Capati had authority and responsibility over stormwater BMP implementation at the Site. Capati was aware of the deficient BMP implementation at the Site, directed Varner Construction to correct those deficiencies, signed contracts regarding BMP implementation, and responded to City NOVs. However, only after several months of deficient BMP implementation, multiple discharge events, and numerous Construction Storm Water Permit violations, Capati, on behalf of Baldwin & Sons, Inc., terminated Varner Construction's subcontractor agreement. Capati facilitated the violations by allowing Varner to continue implementing deficient BMPs at the Site, failing to terminate Varner earlier, failing to replace Varner with other competent contractors, and failing to take other actions to prevent or eliminate discharges and Construction Storm Water Permit violations, including appropriate scheduling. (See generally Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 94-95, 99-100; Clemente testimony, Hearing Transcript, Jan. 10, 2022, pp. 153, 157, 162; Melbourn testimony, Hearing Transcript, Jan. 10, 2022, pp. 207-221, 215-217, 221-222, 234-235, 265-268, 280, 290; Bone testimony, Hearing Transcript, Jan. 13, pp. 8-9; PT Ex. 5; PT Ex. 195, Ex. L; PT Ex. 324, Ex. 2, Frame Declaration, ¶¶ 7, 11, 13, 16, 17; PT Ex. 344, p. 2.) Given Capati's authority at and on behalf of Sunranch, Sunrise Pacific Construction, Inc., and Baldwin & Sons, Inc., he could have taken additional actions to prevent and mitigate the violations.

63. **Shawn Baldwin** is liable for the violations pursuant to the Responsible Corporate Officer doctrine.

- a. **Position of Responsibility Which Allows the Person to Influence Corporate Policies or Activities.** Shawn Baldwin held positions at multiple entities which are also dischargers (see above) during the violation period. Shawn Baldwin was a Director for Baldwin & Sons, Inc. and the Chief Executive Officer, President, and Responsible Managing Officer for Sunrise Pacific Construction, Inc. (PT Exs. 265, 270, 224, 195; Dischargers' Confidential Brief, 16:13-17; Declaration of Shawn Baldwin to Dischargers' Confidential Brief, ¶ 5.) Shawn Baldwin also managed day-to-day operations at Sunrise Pacific Construction, Inc. (Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 15.) For Sunrise Pacific Construction, Inc., Capati reported to Shawn Baldwin. (Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 15.) During the violation period, Shawn Baldwin had significant authority to enter into contracts and act on behalf of Baldwin & Sons, Inc. (Dischargers' Confidential Ex. 12, Minutes, Exhibit A, P. 12:011.) Shawn Baldwin held positions of responsibility at Sunrise Pacific Construction, Inc. and Baldwin & Sons, Inc. which allowed him to influence corporate policies and activities at the Site.
  
- b. **Nexus Between the Individual's Position and the Violation.** Shawn Baldwin acted on behalf of Sunrise Pacific Construction, Inc. on issues related to the grading and implementation of BMPs at the Site. Shawn Baldwin signed the GMAX Contract, whereby Sunrise Pacific Construction, Inc. would act as general contractor on the Site. (PT Ex. 195.) Pursuant to the GMAX Contract, Sunrise Pacific Construction, Inc. was responsible for compliance with all applicable environmental laws, including, but not limited to, the Clean Water Act, the Construction Storm Water Permit, and the SWPPP and BMPs set forth in the SWPPP. (PT Ex. 195, pp. 18-19.) Shawn Baldwin also met and discussed with Landsea representatives on stormwater compliance deficiencies at the Site. (PT Ex. 324, Ex. 2, Frame Declaration, ¶ 7; *id.* at p. 624; see generally *id.*, Attachment B.) After several months of deficient BMP implementation, Shawn Baldwin terminated Varner's subcontractor agreement on March 24, 2016. (Disch. Ex. 25.) On April 26, 2016, Shawn Baldwin sent Varner Construction another letter requesting the removal of Varner's equipment from the Site. (PT Ex. 244) Shawn Baldwin was the Chief Executive Officer, President, and Responsible Managing Officer for the general contractor for the Site, Sunrise Pacific Construction, Inc., which had the responsibility to comply with the Construction Storm Water Permit and implement the BMPs required by the SWPPP. Thus, Shawn Baldwin had the authority and responsibility over stormwater BMP implementation issues at the Site that resulted in the violations.

- c. **Actions or Inactions Facilitated the Violations.** As the Chief Executive Officer, President, and Responsible Managing Officer for Sunrise Pacific Construction, Inc., Shawn Baldwin had authority and responsibility over stormwater BMP implementation at the Site. However, only after several months of deficient BMP implementation, multiple discharge events, and numerous Construction Storm Water Permit violations, Shawn Baldwin, on behalf of Sunrise Pacific Construction, Inc., terminated Varner Construction's subcontractor agreement. Shawn Baldwin facilitated the violations by allowing Varner to continue implementing deficient BMPs at the Site, failing to terminate Varner earlier, failing to replace Varner with other competent contractors, and failing to take other actions to prevent or eliminate discharges and Construction Storm Water Permit violations, including appropriate scheduling. (See generally Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 94-95, 99-100; Clemente testimony, Hearing Transcript, Jan. 10, 2022, pp. 153, 157, 162; Melbourn testimony, Hearing Transcript, Jan. 10, 2022, pp. 207-221, 215-217, 221-222, 234-235, 265-268, 280, 290; Bone testimony, Hearing Transcript, Jan. 13, pp. 8-9; PT Ex. 5; PT Ex. 195, Ex. L; PT Ex. 324, Ex. 2, Frame Declaration, ¶¶ 7, 11, 13, 16, 17; PT Ex. 344, p. 2.) Given Shawn Baldwin's authority at and on behalf of Sunrise Pacific Construction, Inc. and Baldwin & Sons, Inc., he could have taken additional actions to prevent and mitigate the violations.
64. **Randall G. Bone** is liable for the violations pursuant to the Responsible Corporate Officer doctrine.
- a. **Position of Responsibility Which Allows the Person to Influence Corporate Policies or Activities.** Bone held positions at multiple entities which are also dischargers (see above) during the violation. Bone was the Chief Executive Officer for SRC-PH; the Chief Executive Officer for Sunranch; a 50 percent owner, Director, and Vice President for Sunrise Pacific Construction, Inc.; and the Chief Executive Officer and sole manager of ASSR Pacific Investments, LLC.<sup>17</sup> (PT Exs. 268-270, 323; Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 7.) While Bone was not on the construction team for Sunrise Pacific Construction, Inc. (Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 10), Bone had regular meetings with the construction team in his role as part owner of Sunrise Pacific Construction, Inc. (*Id.*, pp. 15-16). During the violation period, Bone had significant authority to enter into contracts and act on behalf of

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<sup>17</sup> ASSR Pacific Investments, LLC is the sole manager of Sunranch and SRC-PH. (PT Ex. 269; Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 5; see PT Ex. 184; Dischargers' Confidential Brief, 20:13-25 [Sunranch and SRC-PH are the same parties].)

Baldwin & Sons, Inc. (Dischargers' Confidential Ex. 12, Minutes, Exhibit A, P. 12:011.) Bone held positions of responsibility at SRC-PH, Sunranch, and Sunrise Pacific Construction, Inc. which allowed him to influence corporate policies and activities at the Site.

- b. **Nexus Between the Individual's Position and the Violation.** Bone acted on behalf of Sunrise Pacific Construction, Inc. on issues related to the grading and implementation of BMPs at the Site. Bone became aware of the stormwater BMP issues in late 2015 during a team meeting. (Bone testimony, Hearing Transcript, Jan. 13, 2022, pp. 21-22.) During these team meetings, Bone, as part owner of Sunrise Pacific Construction, Inc., discussed budgeting requests and authorized allocating significant additional resources into BMP implementation and stormwater management issues. (Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 22; see also PT Exs. 245-251.) Eventually, Sunrise Pacific Construction, Inc. terminated Varner Construction's subcontractor agreement for failure to properly implement BMPs. (Disch. Ex. 25; PT Ex. 244; Bone testimony, Hearing Transcript, Jan. 13, 2022, p. 23.) As a 50 percent owner, Director, and Vice President of Sunrise Pacific Construction, Inc. and the Chief Executive Officer for SRC-PH and Sunranch, Bone had the authority and responsibility over stormwater BMP implementation issues at the Site that resulted in the violations.
- c. **Actions or Inactions Facilitated the Violations.** As a part owner, Director, and Vice President for Sunrise Pacific Construction, Inc. and the Chief Executive Officer for SRC-PH and Sunranch, Bone had authority over stormwater BMP implementation at the Site. However, only after several months of deficient BMP implementation, multiple discharge events, and numerous Construction Storm Water Permit violations, Sunrise Pacific Construction, Inc. terminated Varner Construction's subcontractor agreement. Bone facilitated the violations by allowing Varner to continue implementing deficient BMPs at the Site, failing to terminate Varner earlier, failing to replace Varner with other competent contractors, and failing to take other actions to prevent or eliminate discharges and Construction Storm Water Permit violations, including appropriate scheduling. (See generally Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 94-95, 99-100; Clemente testimony, Hearing Transcript, Jan. 10, 2022, pp. 153, 157, 162; Melbourn testimony, Hearing Transcript, Jan. 10, 2022, pp. 207-221, 215-217, 221-222, 234-235, 265-268, 280, 290; Bone testimony, Hearing Transcript, Jan. 13, pp. 8-9; PT Ex. 5; PT Ex. 195, Ex. L; PT Ex. 324, Ex. 2, Frame Declaration, ¶¶ 7, 11, 13, 16, 17; PT Ex. 344, p. 2.) Given Bone's authority at Sunrise Pacific Construction, Inc., he could have taken additional actions to prevent and mitigate the violations.

**PROCEDURAL AND EVIDENTIARY ISSUES**

65. The San Diego Water Board held a hearing on January 10, 12 and 13, 2022. The Discharger's evidence includes expert reports; deposition testimony of San Diego Water Board staff, City employees and contractors; declarations of Dischargers' employees, contractors, and legal counsel; QSP reports; testimony at the hearing; and records of other Water Board enforcement complaints, settlements, and orders.
66. The parties submitted evidentiary and procedural objections, requests for extensions of time, and other prehearing motions. The Chair, acting as the presiding officer, issued various prehearing rulings; and a written ruling during the hearing (January 11, 2022) regarding the Prosecution Team's requests for official notice. The Chair, as presiding officer, made additional rulings at the hearing, as follows:
- a. The City photographs are adequately reliable and therefore are admitted into the record. The Dischargers' objections are noted and will be considered as part of the board's determination of whether the photos support the alleged violations and whether the board can determine, without additional testimony, that the descriptions of the photos in the Prosecution Team's written submissions are accurate. Additional findings regarding the board's consideration of the City photographs are set forth below.
  - b. The declarations of Tom Bistline (Rebuttal Ex. 4) and Brian Frame (PT Ex. 324, exclusive of attachments) are not hearsay. The Chair did not rule on the hearsay nature of any attachments except as stated in prior written rulings.
  - c. The objection that Julie Macedo's last question addressed to Mr. Bistline was convoluted is noted, and will be considered if the board relies on the answer to that question in its final order.
  - d. Laurie Walsh's declaration (Rebuttal Ex. 2) is not hearsay.
  - e. The foundational/reliability objections to Prosecution Team exhibits 171, 172, 173 and 344 are overruled.
  - f. The notice of violation and inspection reports prepared by San Diego Water Board staff are official records.
67. The San Diego Water Board hereby modifies the above ruling on Brian Frame's declaration as follows: *All statements in the declaration of Brian Frame (PT Ex. 324, exclusive of attachments) based on Frame's personal knowledge, including all statements authenticating attachments to the declaration, are not hearsay.*



The board affirms all other prehearing rulings and written and oral rulings made during the hearing by the Chair, including the ruling admitting all of the City photographs into the administrative record.

68. All of the City photographs cited in this Order depict the Site. This finding is based on the metadata; Frank Melbourn's testimony about how he received the photographs from the City and his process of reviewing and sorting the photographs based on the metadata and his personal knowledge of how the Site and vicinity looked in late 2016; the City's official records; deposition testimony and exhibits of City personnel that supplement this evidence; and comparisons with undisputed photographs that depict the same location.
69. The board determined the dates of the City photographs based on the metadata, as corroborated or explained by the City's inspection reports and other official records, deposition testimony of City personnel and exhibits to the depositions, and Devin Slaven's declaration. (PT Ex. 23.)
- a. One camera, a Fujifilm FinePix AX650, had obvious metadata errors. However, City inspectors verified the dates of photographs when they uploaded them to dated folders on the City server. (PT Ex. 23, p. 6; Dela Cruz Depo., Vol. I (Mar. 11, 2020), pp. 19-20, 87-93.) At most, metadata was one day off. (Dela Cruz Depo., Vol. I (Mar. 11, 2020), p. 92.) During their depositions Dela Cruz and Slaven confirmed the date of many of the photographs and that the photographs depicted the Site, including some photographs that had obvious date or time errors in the metadata. The table in Attachment 2 to this Order correlates numerous photographs from their deposition exhibits to the City's photo identification numbers. For Violations 2 through 8, the table includes only violation dates where the Dischargers dispute the violation and the Prosecution Team cited City photographs to support the violation. In addition to what appears in the table, Dela Cruz corroborated the dates of many other photographs, some of which depict violations that are not disputed. These include photographs he took on January 11, January 14, January 19, January 25, and March 21. (Dela Cruz Depo., Vol. I (Mar. 11, 2020), Ex. 2, pp. 210-214, 221-222, 229, 231-232, 337, 436, 546.)
- b. There is no evidence that metadata from any of the other cameras used by City personnel, or from any cell phone, was inaccurate. Metadata demonstrates that many of the photographs were taken by iPhones.<sup>18</sup>

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<sup>18</sup> Some additional photographs were taken by a device identified in the metadata by the model number "SM-G900V." This was apparently a Samsung Galaxy S5.  
<https://www.samsung.com/us/mobile/phones/galaxy-s/samsung-galaxy-s5-verizon->

Meier took inspection photographs with his personal cellphone, which provided an accurate date stamp. (Deposition of Peter Meier (Meier Depo.), Vol. I (Mar. 9, 2020), pp. 66-68.) The San Diego Water Board also takes official notice that “smartphones,” including iPhones, automatically set the date and time that photographs are taken.

- c. Deposition of Devin Slaven (Salven Depo.) Exhibit 11 misidentifies some photographs as taken on January 5, 2016, that were actually taken on January 6, 2016. (Compare Slaven Depo. (Feb. 19, 2020), Ex. 11, pp. 9, 10, 12, 13, 19, and 20 with Portola8AUG0009111.JPG, Portola8AUG0009112.JPG, Portola8AUG0009114.JPG, Portola8AUG0009115.JPG, Portola8AUG0009120.JPG, Portola8AUG0009121.JPG, and Portola8AUG0009122.JPG, respectively.) All of these photographs were taken with an iPhone. The January 6 date is corroborated through the metadata and similar photographs the Dischargers provided for the same day.
70. The board has not assessed liability for violation days that are supported only by photographs taken with the FinePix camera where the date is not corroborated by other evidence specific to that date. The following violations were not assessed (9 violations): Violation 4, Inactive Areas Erosion Control: January 29, 2016, and February 17, 2016; Violation 5, Active Areas Erosion Control, February 17, 2016; Violation 6, Linear Sediment Controls: January 29, 2016, January 30, 2016, February 2, 2016, February 4, 2016, February 8, 2016, and February 17, 2016. In addition, two alleged stockpile violations (March 24 and 29, 2016) have not been assessed because they are supported only by drone photos, apparently taken by Cameron Mann, with date stamps that do not match the metadata. The only other photographs on those dates are from the FinePix camera, with obvious metadata errors on March 24. On other days, e.g., February 26, 2016, the drone photos’ date stamp matches the metadata or there is no “date taken” metadata, and other photographs from the same date document the violation.
71. Similarly, the board has not assessed liability for violations that are supported only by City photographs from a single camera (other than an iPhone camera) unless there is other evidence specific to that date that depicts the violation or corroborates or explains the metadata. The board has not assessed violations for

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[charcoal-black-sm-g900vzkavzw/,  
https://downloadcenter.samsung.com/content/UM/201606/20160616233455955/VZW  
SM-G900V\\_GalaxyS5\\_EN\\_PSW\\_MM\\_6.0\\_FINAL.pdf,  
https://www.samsung.com/us/mobile/phones/galaxy-s/samsung-galaxy-s5-verizon-  
charcoal-black-sm-g900vzkavzw/#specs](https://downloadcenter.samsung.com/content/UM/201606/20160616233455955/VZW_SM-G900V_GalaxyS5_EN_PSW_MM_6.0_FINAL.pdf) (accessed April 12, 2022). The dates of all  
cited photographs from this device are corroborated by other evidence.

the following 12 violations, which are documented only by the Motorola XT 1080 camera: Violation 2: November 5, 2015, December 8, 2015; Violation 4: October 1, 2015, October 9, 2015, December 1, 2015, December 7, 2015, and December 8, 2015; Violation 6: October 1, 2015, October 9, 2015, December 1, 2015, December 7, 2015, and December 8, 2015.

72. In all other cases, the metadata in City photographs is from an iPhone, there are photographs from more than one device,<sup>19</sup> or testimony and/or inspection reports corroborate the date. For example, inspection reports for January 4 and 7, 2016, state that photographs were taken, document the absence of adequate erosion or sediment controls, and state that the weather was cloudy. (PT Ex. 92, pp. 8-11.) The inspection reports and the absence of any evidence whatsoever that the metadata for this device (a Motorola XT 1080) was inaccurate, corroborate that the metadata on those two days is correct. Similarly, on January 6, 2016, Dela Cruz, Slaven, and Meier were all onsite and photos were taken. (Dela Cruz Depo., Vol. 1 (Mar. 11, 2020), Ex. 2, p. 192.) City photographs from multiple devices on that day depict the same subject matter at the same time. As another example, photo 8AUG00004674.JPG, with metadata stating it was taken by the Motorola XT 1080 at 12:24 p.m. on January 8, 2016, is almost identical to 8AUG00007701.JPG, which has metadata stating it was taken by the FinePix AX650 at 12:25 a.m. on January 8, 2016. The Prosecution Team cited both photographs for Violation 2 but only the FinePix photograph for Violations 4 and 6. In addition to providing independent evidence of all three violations, the Motorola photograph serves to corroborate (along with Dela Cruz's deposition testimony) that the FinePix photograph, and others with metadata stating they were taken between 12:23 a.m. and 12:25 a.m. on January 8, were actually taken twelve hours later. Two of the photographs the Prosecution Team listed in "Revised Attachment B: Amended Prosecution Team Rebuttal Exhibit 1 – Violation Evidence List" (Sept. 3, 2021) as having incorrect metadata (Portola8AUG0007706.JPG and Portola8AUG0007707.JPG) were actually taken with a Motorola XT 1080 and have no apparent metadata errors. Dela Cruz took photographs on January 8. (Dela Cruz Depo., Vol. 1 (Mar. 11, 2020), Ex. 2, p. 196.) Two Dudek photos on January 8 (IMG\_7744.JPG and IMG\_7745.JPG) also support Violations 4 and 6. As a final example, photographs Portola8AUG0005267.JPG and Portola8AUG0005452.JPG from March 3 are almost identical. The metadata states they were taken by a SM-G900V at 8:27 a.m. and a FinePix at 8:29 p.m., respectively.

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<sup>19</sup> It is unlikely that two photographs of the same thing on the same day would be taken by two different devices with identical metadata errors. It is also worth noting that the Dischargers' own consultants found the City photographs to be reliable enough to base opinions on them. (See, e.g., Tory Walker testimony, Hearing Transcript, Jan. 12, 2022, p. 156 et seq., and slides 17-21, 25, 27-34.)

73. In summary, the board finds the Prosecution Team’s descriptions of the subject matter, location, and date of the City photographs cited in this Order are accurate. This includes the descriptions in “Attachment PT.E1: City of Lake Forest Photographs” (Chart) (Sept. 3, 2021). The board nevertheless has not assessed liability for 23 alleged violations that are supported only by photographs from a single camera other than a cellular phone where there is no evidence specific to that day that corroborates the date set forth in the metadata.
74. The San Diego Water Board rules as follows on outstanding evidentiary objections:
- a. Prosecution Team Exhibit 188 is a Stipulation for Entry of Judgement between Faith A Devine and certain defendants, filed November 18, 2016 in the Los Angeles Superior Court (Case No. BC620901). The Dischargers objected to this exhibit on the grounds that it lacks relevance, constitutes hearsay, and lacks foundation. The relevance is still unclear and this objection is therefore sustained.
  - b. Prosecution Team Exhibit 259 is an invoice and check no. 2441 from USA Portola Properties, LLC. The Dischargers objected to this exhibit on the grounds that it is not relevant. The relevance is still unclear and this objection is therefore sustained.
  - c. Prosecution Team Exhibit 277 is a Westlaw PeopleMap report for Shawn M. Baldwin. Prosecution Team Exhibit 278 is a Westlaw PeopleMap report for Randall Bone. The Dischargers objected to these exhibits on the grounds that they are not relevant, lack foundation, constitute hearsay, and infringe on privacy rights. The Prosecution Team submitted a declaration which explains how the Westlaw PeopleMap report for Shawn Baldwin and Bone were retrieved. (Declaration of Naomi Rubin regarding Prosecution Team Exhibits 277, 278, and 285 (Rubin Declaration), ¶ 5.) The Dischargers’ foundation/reliability objections are overruled. The Prosecution Team subsequently provided a redacted version of Prosecution Team Exhibits 277 and 278, which they stated excluded any irrelevant or personal information, on September 3, 2022. Some irrelevant and personal information remains in the exhibits. The Dischargers’ privacy rights objections are sustained. Prosecution Team Exhibits 277 and 278 are stricken from the record. Any relevant information in Prosecution Team Exhibits 277 and 278 can be found elsewhere in the record.
  - d. Prosecution Team Exhibit 280 is a Portola Northwest change order authorization for Varner Construction, signed by Berger for USA Portola West, LLC. The Dischargers objected to this exhibit on the grounds that it is not relevant because it pertains to Portola Northwest. This change order

authorization does not involve any Dischargers named in this Order. The Dischargers' relevance objection to Prosecution Team Exhibit 280 is sustained.

- e. Prosecution Team Exhibit 281 is a subcontractor agreement between Baldwin & Sons, Inc. and Varner Construction, Inc., dated March 3, 2015. The Dischargers objected to this exhibit on the grounds that it is not relevant because it pertains to Portola Northwest. The Prosecution Team argues that the change order authorization is relevant to show Baldwin & Sons, Inc.'s pattern and practice of involvement in stormwater management at the Portola sites and its role as an operator and discharger. How Baldwin & Sons, Inc. conducted itself at other Portola sites is not relevant to whether and how it conducted itself at Portola South. The Dischargers' relevance objection to Prosecution Team Exhibit 281 is sustained.
- f. Prosecution Team Exhibit 283 is an invoice and check no. 3065 from USA Portola Properties, LLC for the payment of plan check fees. The Dischargers objected to this exhibit on the grounds that it is not relevant because it pertains to Portola Northwest. The Prosecution Team argues that the change order authorization is relevant to show Baldwin & Sons, Inc.'s pattern and practice of involvement in stormwater management at the Portola sites and its role as an operator and discharger. Baldwin & Sons, Inc. is not mentioned in Prosecution Team Exhibit 283. The Dischargers' relevance objection to Prosecution Team Exhibit 283 is sustained.
- g. Prosecution Team Exhibit 285 is a Westlaw Company Investigator Report for Baldwin & Sons, Inc. The Dischargers objected to this exhibit on the grounds that it lacked relevance, lacked foundation, and constitutes hearsay. The Prosecution Team submitted a declaration which explains how the Westlaw PeopleMap report for Westlaw Company Investigator Report for Baldwin & Sons, Inc. was retrieved. (Rubin Declaration, ¶ 5.) The Dischargers' foundation/reliability objection are overruled. The Prosecution Team argues that the exhibit is relevant to show Capati's and Shawn Baldwin's affiliation with Baldwin & Sons, Inc. Their status as corporate officers is relevant to the Responsible Corporate Officer doctrine. The Dischargers' relevant objection to Prosecution Team Exhibit 285 is overruled. As stated in the August 4, 2021 ruling, Prosecution Team Exhibit 285 is hearsay admissible for the purposes of supplementing or explaining other evidence but is not sufficient in itself to support a finding.

- h. Prosecution Team Exhibit 292 is a Portola Northwest change order authorization for Varner Construction, signed by Capati, for Baldwin & Sons, Inc. The Dischargers object to this exhibit as not relevant. The Prosecution Team argues that the exhibit shows Capati's authority to modify contracts on behalf of Baldwin & Sons, Inc. How Capati and Baldwin & Sons, Inc. conducted themselves at other Portola sites is not relevant to whether and how they conducted themselves at Portola South. The Dischargers' relevance objection to Prosecution Team Exhibit 292 is sustained.
- i. Prosecution Team Exhibit 307 is a notice of default from Landsea's counsel to SRC-PH and Baldwin & Sons, Inc. pursuant to the GMAX Contract. The Dischargers objected to this exhibit on the grounds that it lacked relevance, lacked foundation, and constitutes hearsay. The August 4, 2021 ruling overruled the relevance and foundation/reliability objections. Regarding the hearsay objection, the Prosecution Team argues that the letter is a business record and thus non-hearsay. The Prosecution Team has not established the business record exception to the hearsay rule. The Dischargers' hearsay objection to Prosecution Team Exhibit 307 is sustained. Prosecution Team Exhibit 307 is hearsay admissible for the purposes of supplementing or explaining other evidence but is not sufficient in itself to support a finding. However, this Order does not cite Exhibit 307 for any finding. The same notice of default is also included in Frame's declaration. (See PT Ex. 324, p. 678; see above, ¶ 67 [regarding Frame's Declaration].)
- j. Prosecution Team Exhibit 324 is a letter from Landsea's counsel to the San Diego Water Board in response to Investigative Order No. R9-2016-0212, dated December 22, 2016. The letter includes several exhibits, including a Technical Report from Geosyntec, the Frame Declaration, NOV No. R9-2016-0124 issued by the San Diego Water Board, and Site photos. The Dischargers objected to this exhibit on the grounds that it lacks relevance, constitutes hearsay, and lacks foundation. The Dischargers further object to the Geosyntec report on the grounds that it lacks relevance, lacks foundation, and constitutes hearsay. The August 4, 2021 ruling overruled the relevance and foundation/reliability objections. Regarding hearsay, the Prosecution Team argues the letter is a business record. However, the Prosecution Team has not presented testimony regarding the letter's identity and mode of preparation. During the hearing, Frame testified to the identity and mode of preparation of his declaration (Frame testimony, Hearing Transcript, Jan. 10, 2022, pp105-106), but not the December 22, 2016 letter. (See also above, ¶ 67 [regarding Frame's Declaration].) Without limitation of the Chair's prior rulings on Prosecution

Team Exhibit 324, any hearsay statements in Prosecution Team Exhibit 324 are admissible for the purposes of supplementing or explaining other evidence but not sufficient to support a finding.

- k. Prosecution Team Exhibit 448 is a complaint filed by Baldwin & Sons, Inc. against Varner Construction, dated June 14, 2016. The Dischargers objected to this exhibit on the grounds that it lacked relevance. The relevance is still unclear and the Dischargers' relevance objection to Prosecution Team Exhibit 448 is sustained.
75. The San Diego Water Board rules as follows on the Dischargers' objections stated but not ruled upon during the hearing:
- a. Dischargers' counsel Stephen Tee objected to re-direct examination of Frame as being beyond the scope of direct examination. Tee was allowed to ask follow-up questions following re-direct. The objection is overruled. (Gov. Code, § 11513, subd. (b), (c).) Tee's objections that Frame's testimony about Landsea's right to access to the property called for a legal opinion and that Geosyntec was hired after the Violation Period are overruled. (Gov. Code, § 11513, subd. (c).) However, the record includes ample written evidence related to these issues and the board has not relied on this testimony to support any findings.
  - b. The technical evidentiary objection to Chiara Clemente's testimony that the Dischargers prioritized profit over environmental protection was inflammatory and lacked foundation is overruled. (Gov. Code, §11513, subd. (c).) However, the San Diego Water Board recognizes that Clemente's testimony about the Dischargers' motives has no evidentiary value. It is not necessary to draw inferences about the Dischargers' motives to support the board's findings or conclusions in this matter, nor is it remarkable that a commercial developer would be motivated by profit.
  - c. The technical evidentiary objection (nonresponsive) to Clemente's answer to one of Tee's questions about beneficial uses is overruled. (Gov. Code, §11513, subd. (c).) The testimony was responsive to his questions.
  - d. The technical evidentiary objections (leading, calls for speculation, contrary to evidence) to questions during Bryan Elder's re-direct testimony regarding Exhibit 18 to his deposition are overruled. (Gov. Code, §11513, subd. (c).) The record shows that Elder may have built the spreadsheet in question but did not create the inputs and does not recall where he got that data.

- e. The technical evidentiary objection that a question during Elder’s re-direct testimony mischaracterized a statement on page 6 of Elder’s December 2019 report (Complaint, Attachment 4 (Elder 2019 Report)) is overruled. (Gov. Code, §11513, subd. (c).) The report refers to professionally engineered and “unintentional” (depression storage) stormwater retention features. Elder testified that he considered BMPs required by the SWPPP as well as “informal” on-site retention reflected in site photographs in preparing the report. Thus, “unintentional” features (as that term was used in the December 2019 report) would include sediment traps that appeared in photographs as surface depressions, even if they were intentionally constructed.
- f. The Dischargers made the following objections to Laurie Walsh’s testimony:
  - i. Walsh’s testimony about Landsea’s ability to access the property is contrary to the record.
  - ii. Walsh’s entire presentation was argument and not evidence.
  - iii. Walsh’s inferences about the Dischargers’ intent are contrary to evidence.
  - iv. Walsh’s statements that corrective actions were not taken are contrary to the evidence.
  - v. Walsh’s statements about the Dischargers’ motives lack foundation.

The technical evidentiary objections to Walsh’s testimony are overruled. (Gov. Code, §11513, subd. (c).) In addition, Walsh’s reference to Landsea gaining control of the property was to identify an approximate date that Site BMPs came into compliance with the Construction Storm Water Permit and not to testify about Site access; and the board has not relied on Walsh’s statements about the Dischargers’ intent or motives (items (3) and (5)). Walsh’s testimony included facts, conclusions well within the scope of her expertise, and policy arguments (item 2). The opinions of Walsh, the stormwater program director, regarding the policy implications of the board’s decision are admissible. The objection to the entirety of her presentation is overbroad and is also overruled on that basis.

### **WATERS OF THE UNITED STATES**

- 76. The San Diego Water Board has not considered the delineation of waters of the United States in Rincon’s *Waters of the United States Assessment for the Portola South Construction Site* (Disch. Ex. 2) because it relies on the definition of “waters of the United States” in the Navigable Waters Protection Rule (2020



Rule). The 2020 Rule was not retroactive to the Violation Period. (*United States v. Lucero* (9th Cir. 2021) 989 F.3d 1088, 1104; *followed by United States v. Mashni* (D.S.C., July 1, 2021, No. 2:18-CV-2288-DCN) 2021 WL 2719247 [referring to centuries-old presumption against retroactivity].)<sup>20</sup> The Clean Water Rule (2015) took effect on August 28, 2015, and applies to the September 2015 discharge event. The 2015 Rule was stayed from October 9, 2015 to February 28, 2018.<sup>21</sup> The pre-2015 regulatory regime therefore applied before August 28, 2015 and during the remaining three discharge events and during the Dischargers' subsequent efforts to bring the Site into compliance. The Prosecution Team relied on Dudek's 2011 *Jurisdictional Delineation Report for the Portola Center* (PT Ex. 334 (401 Certification Application), p. 100 et seq.) to delineate the extent of waters of the United States at the Site. (Prosecution Team's Technical Analysis, p. 5; Prosecution Team's Rebuttal Brief, pp. 12-13.) An Army Corps of Engineers representative agreed with Dudek's delineation after walking the site. (PT Ex. 334, pp. 7, 51, 80.) The 2011 *Jurisdictional Delineation Report* therefore defines the extent of waters of the United States for all purposes of this Order.

#### **VIOLATIONS OF CONSTRUCTION STORM WATER PERMIT**

77. As noted in the following sections, the Rincon ACLC Report concluded that most of the alleged violations were supported by photographic or documentary evidence. The Dischargers dispute a subset of the agreed-upon violations based solely on their foundational objections to the City's photographs. All of the following violations are supported by the record.

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<sup>20</sup> The 2020 Rule was vacated by three federal district courts, including the Northern District of California. (*Pascua Yaqui Tribe v. United States Environmental Protection Agency* (D. Ariz., Aug. 30, 2021, No. CV-20-00266-TUC-RM) 2021 WL 3855977; *Navajo Nation v. Regan* (D.N.M., Sept. 27, 2021, No. 20-CV-602-MV/GJF) 2021 WL 4430466; *In re Clean Water Act Rulemaking* (N.D. Cal., Oct. 21, 2021, No. C 20-04636 WHA) 2021 WL 4924844.) The Supreme Court stayed the Northern District vacatur in *Louisiana v. American Rivers* (Apr. 6, 2022) 596 US \_\_\_, 2022 WL 1019417. The 2020 Rule is, presumably, again in effect, but probably not for long. ([Proposed] Revised Definition of "Waters of the United States", 86 FR 69372-01 (Dec. 7, 2021).)

<sup>21</sup> *In re E.P.A.* (6th Cir. 2015) 803 F.3d 804, 809, vacated sub nom. *In re United States Department of Defense* (6th Cir. 2018) 713 Fed.Appx. 489. The Supreme Court later ruled that the Sixth Circuit lacked jurisdiction to issue the stay (*National Ass'n of Mfrs. v. Department of Defense* (2018) 138 S.Ct. 617), which was vacated on February 28, 2018. (*In re United States Department of Defense* (6th Cir. 2018) 713 Fed.Appx. 489.)

**Violation No. 1**

78. The Dischargers violated Construction Storm Water Permit Discharge Prohibitions III.A. and III.B., section V.A.2. and Attachment D section A.1.b; Basin Plan Waste Discharge Prohibition No. 8; and Clean Water Act section 301 (33 U.S.C. § 1311) by discharging sediment laden stormwater from the Site into Aliso Creek and tributaries to Aliso Creek on September 15, 2015; December 22, 2015; January 5, 2016; and January 6, 2016. The discharges were unauthorized and a violation of Construction Storm Water Permit section III.B. because the Dischargers failed to reduce or eliminate the pollutants in the stormwater runoff prior to discharge (i.e., to implement BMPs that achieve BAT and BCT). This finding is based on the evidence in the record, including but not limited to Elder's discharge volume calculation reports (Elder 2019 Report and PT Rebuttal Ex. 5 (2021 Report)); on photographs in Prosecution Team Exhibits 22, 347, 25, 77, 78, 368, 80, 86, 359, 89, 88, and 95; on videos in Prosecution Team Exhibit 346; references to metals in construction materials in the Construction Storm Water Permit and the Discharger's SWPPP (PT Exs. 5, 154 [Amendment 1], 326 [Amendment 2]); deposition testimony of San Diego Water Board staff; City Citation Nos. 2221 (PT Ex. 30) and 2258 (PT Ex. 105); Dischargers' volume calculation (PT Ex. 171); Dischargers' field inspection reports (PT Ex. 367); NOAA Rainfall Record, Mission Viejo 3.9 NNE, CA US US1CAOR0035 (MV 3.9) (PT Ex. 170); Dischargers' reported rainfall from their onsite gauge (PT Ex. 177); San Diego Water Board NOV (PT Ex. 169); and testimony at the hearing.
79. The Dischargers admit that violations occurred on these four days but dispute the volume of discharge and the penalty calculation. The San Diego Water Board finds that the discharge volumes of the four storm events were 667,760, 1,584,406, 2,553,232, and 1,511,822 gallons, as stated in Elder's 2021 Report, for the reasons stated in Elder's 2019 and 2021 Reports and his hearing testimony, and as further described in the following sections.

*Calculation of Discharge Volume Using NRCS TR55 Method*

80. Approximately 14 million gallons of precipitation fell during the four storm events. (Elder testimony, Hearing Transcript, Jan. 12, 2022, p. 39; PT Rebuttal Ex. 5, Appendix 3, NOAA Station - MV 3.9 NNE totals.) Of that 14 million gallons, the volume of runoff can be determined by calculating the amount of rainfall captured onsite from the availability of onsite detention storage from sediment basins, sediment traps, ponds, and depression features, infiltration to the subsurface based on soil type and slopes, and interception storage and evapotranspiration based on soil cover and vegetation. The purpose of the National Resource Conservation Service (NRCS) Technical Release 55 (TR55) method, U.S. EPA Storm Water Management Model (SWMM), and other runoff models is to estimate precipitation loss that results from these factors.

81. The NRCS method is appropriate for use in this Order. (Elder 2019 Report; 2021 Report.) The mere fact that the NRCS method is simpler than SWMM does not mean that it a bad method. (Disch. Ex. 3 (Ponce article), pp. 3:327-3:328.) The Dischargers argue that the NRCS method overestimates runoff volume when modeling runoff from a storm that has already occurred (“historic storm”). Elder used certain conservative assumptions to avoid overestimating runoff volume, as follows:
- a. Elder did not consider site run-on even though Dischargers’ Hydraulic Analysis identified the runoff from the existing residential community, Portola Hills, as being significant, accounting “for approximately 72% of the total runoff” from the above drainage and therefore would need to be factored into the design of the Site’s stormwater conveyance system and BMPs to protect the environment during construction. (PT Ex. 341, Hydraulic Analysis, p. 10; PT Ex. 340, Hydrology Analysis for Portola Center, p. 7). The Portola Northwest site also discharged significant stormwater to the Site (PT Ex. 341, Hydraulic Analysis, p. 10; Bistline testimony, Hearing Transcript, Jan. 10, 2022, pp. 100-101.)
  - b. Elder only considered four discharge days, although discharges may have occurred on additional days, including December 23, 2015 (PT Ex. 171; PT Ex. 367, p. 5), October 5, 2015 (PT Ex. 171), and November 2, 2015 (*Ibid.*);
  - c. Elder did not adjust the abstraction ratio to increase run-off, as some literature recommends (2021 Report, p. 15);
  - d. Elder considered an ideal hydrograph even though high intensity rainfall causes more runoff than the NRCS method predicts (Deposition of Bryan Elder (Elder Depo.), Vol. 1 (Oct. 9, 2020), pp. 178-180; Theodore Hromadka testimony, Hearing Transcript, Jan. 12, 2022, p. 113) and three of the four storm events (all except December 22) included high intensity rainfall (Disch. Ex. 3, pp. 3:213-3:214, 3:295-3:296; Disch. Ex. 4, pp. 4:098-4:102);
  - e. Elder assumed that all runoff flowed through some type of detention facility before potentially discharging from the site, which overestimates the rainfall that would be captured onsite; and
  - f. Elder may have underestimated total rainfall amounts. Elder assumed that there was 1.36 inches of rainfall on September 15-16, 2015, 1.37 inches on December 22-23, 2015, and 2.62 inches on January 5-7, 2016, based on 24-hour totals from NOAA gauge Mission Viejo 3.9 NNE (“MV 3.9”). (2021 Report, pp. 3, 23.) These amounts are significantly lower than the Dischargers’ onsite rain gauge, which recorded 2.3 inches of rainfall on

September 15, 2015, 1.62 inches on December 22, 2015, and 3.2 inches for January 5 and 6, 2016. (PT Exs. 171, 177, 351; 2021 Report, pp. 3, 23.)

82. Elder used NRCS guidance and definitions of antecedent moisture conditions or antecedent rainfall conditions (ARC). ARC I is for dry conditions, ARC II is for average conditions, and ARC III is for wetter conditions. (Elder Depo., Vol. 2 (Oct. 12, 2020), Ex. 12, p. 10-5.) Prior to each of the unauthorized discharge days, there had been measurable rainfall within the previous week, so the predominantly clayey soils of the Site would already have some moisture. The unauthorized discharge days had multiple days of rainfall, which would rapidly saturate the predominantly clayey soils of the Site. (Elder testimony, Hearing Transcript, Jan. 12, 2022, p. 56.) Based on NRCS guidance, ARC values of II or III are appropriate based on the information available about the Site conditions before the storm events.

*Calculation of Discharge Volume Using SWMM Model*

83. The Dischargers submitted a hydrologic analysis by Tory R. Walker Engineering (Disch. Ex. 5) calculating discharge volumes using the SWMM model. The SWMM model does not disprove the accuracy of Elder's conclusions because it was based on numerous faulty, unsupported, or unstated assumptions, as stated in the 2021 Report (pp. 3-13), and based on the San Diego Water Board's independent review of the Site photographs between September 2015 and January 6, 2016. The San Diego Water Board cannot verify the assumptions used for SWMM model inputs or evaluate the accuracy of the Dischargers' volumetric discharge model without more site- and time-specific information about the following: spatial delineation of disturbed areas for each storm event; spatial segregation based on topography and drainage for each storm event; soil characteristics related to surface roughness, depression storage, or infiltration storage; infiltration parameters; design and/or construction details for basins/ponds onsite during each storm event; accurate short-duration rainfall data; and routing from and to sub-catchments, basins, and discharge points. (2021 Report, pp. 3-4, 12-13; Elder testimony, Hearing Transcript, Jan. 12, 2022, pp. 32-39.) Walker also assumed that basins had controlled spillways, which is not consistent with Bistline's testimony or site photographs. (Rebuttal Ex. 4, ¶ 20.) Walker's "best estimate" (Model #4) assumes that the only discharges on September 15 occurred at Outfall 3 (Area D) and 7.5 miscellaneous graded acres. This is inconsistent with photographs documenting discharges at Area B (Outlet 4) and Area E (Outfall 2). (See evidence cited in Rebuttal Ex. 6.)
84. The SWMM model requires short-duration rainfall data, meaning rainfall measurements taken during 1-hour or shorter time intervals. Disch. Exhibit 4 (Precipitation Assessment Report) was a precipitation model, not a "fabrication"

as the Prosecution Team argued. Considering Dr. Hromadka's testimony and his responses to the San Diego Water Board members' questions, however, the precipitation model results were unreliable for the reasons stated in the Elder 2021 Report (pp. 2-3), in particular the very small sample size used to correlate data from multiple rain gauges.

85. The estimates of onsite storage capacity available in sediment basins or ponds caused the most significant difference between the NRCS and SWMM model results. Elder considered all available onsite storage capacity at the time of each storm event, as demonstrated by his testimony, his written reports, and the photographic evidence cited at pages 7-8 of his 2021 Report. The SWPPP identified sediment basins but not sediment traps as a sediment-control BMP. (PT Ex. 5, p. 25; PT Ex. 154, p. 12.) Elder nevertheless included "informal" or "unintentional" detention areas such as sediment traps in his calculation of available impoundment capacity where there was evidence that the impoundments did or could have impounded stormwater. (2021 Report, pp. 6-11, 23; Elder testimony, Hearing Transcript, Jan. 12, 2022, pp. 59-60, 74-75.) The initial abstraction of the NRCS curve number (CN) method also accounts for surface depression storage before runoff begins, which is in addition to storage available from the sediment basin ponds or ponded areas that Elder considered. (Disch. Ex. 3, pp. 3:327, 3:332.)
86. Walker estimated the onsite storage capacity to be 3,711,576 gallons as part of the calculations for the recommended estimated volume discharged from the site. (Disch. Ex. 5, Table 1 [total Pond Storage Volume (cu ft) converted to gallons (1 cubic foot = 7.48 gallons)].) This estimated onsite storage capacity was based on a review of an aerial site photograph taken on February 2, 2016 to estimate surface area and depth of available sediment basins or ponds; site photographs taken between January 5 and February 4, 2016; and a single photograph of ponding on September 15, 2015. (Disch. Ex. 5, pp. 5:001-5:005<sup>22</sup>; see also Rebuttal Ex. 4.) The aerial photograph taken on February 2, 2016 shows significant storage capacity that was constructed after the January 5-6, 2016 rain event. (2021 Report; Rebuttal Ex. 4, ¶¶ 12, 14, 19; Site photos [see the specific photographs cited for the violation days, below, and in pages 7-8 of the 2021 Report].) Walker cited other photographs in his hearing testimony but the photographs do not support the conclusions in the report. (See, e.g., Walker testimony, Hearing Transcript, Jan. 12, 2022, pp. 158-159; slide 23 [depicting Site conditions on December 22, 2015].) The photo in the Walker presentation shows a surface depression containing some water; the photo does not show a pond with 41,000 square feet surface area and 2.5 feet depth with a capacity of

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<sup>22</sup> Table 1, p. 5:005, estimates pond storage in cubic feet. One cubic foot equals 7.48052 gallons.

766,700 gallons (more capacity than an Olympic-sized swimming pool) as estimated for Pond 6 in the SWMM model calculations. The City inspectors did not describe sediment traps in their inspection reports and only testified at their depositions about one temporary basin (Basin 3), and a preexisting basin intended to capture run-on from existing development (Basin 1). Walker also assumed that the sediment basins were properly constructed and had controlled spillways, which is not consistent with site photographs from the days of alleged unauthorized discharges or Bistline's declaration. (Rebuttal Ex. 4, ¶ 20; 2021 Report, pp. 7-8.) Two of the ponds failed during the January storm event. (PT Ex. 89, p. 2; PT Ex. 90, p. 51; PT Ex. 346; PT Ex. 359, p. 14; 2021 Report, p. 8.) Rather than capturing and storing storm water runoff and providing downstream areas protection from erosion and sedimentation, failed sediment basins and traps can cause and contribute to increased and additional downstream erosion and sedimentation; for example, sediment from collapsed berms used to create the temporary sediment basins or traps becomes entrained in stormwater runoff, and catastrophic failure of the berms for these temporary sediment basins and traps increases runoff velocity and downcutting of rills and gullies on slopes, as well as channel beds. (See, e.g., PT Ex. 359, pp. 6, 10, 14 [Bistline photos]; PT Ex. 4, p. 153 [velocity control].) The evidence in the record does not support Walker's estimated onsite storage capacity.

87. Simple mathematical calculations demonstrate the significance of this discrepancy. Using the Elder estimated rainfall, the 1.36 inches of rainfall on September 15-16, 2015 on an approximately 95-acre site would generate approximately 3,508,296 gallons (1.36 inch x 95 acres x 27,154 gallons/acre-inch), the 1.37 inches of rainfall on December 22-23, 2015 would generate approximately 3,534,093 gallons, and the 2.62 inches of rainfall on January 5-7, 2016 would generate approximately 6,758,631 gallons. Using the Walker estimates for onsite storage capacity and the Elder 2021 NRCS runoff volume calculation method, more than 3,711,576 gallons of rainfall would be required to fill the sediment basins before there could be a discharge, and this is before considering the depression and infiltration storage available on the Site. Using the 2021 Report NRCS runoff volume calculation method, the September 15-16, 2015 and December 22-23, 2015 storm events would have been fully captured onsite by the Walker estimated storage capacity regardless of the depression and infiltration storage on the rest of the site. This is inconsistent with the evidence from observed and documented discharges on those days. The January 5-7, 2016 storm event would discharge less than a million gallons after accounting for the depression and infiltration storage on the rest of the Site, which would be less than the Walker recommended estimate for all four discharge days.

88. The two models also used different assumptions about how much of the Site was graded on September 15, 2015. Walker assumed 28.5 acres was graded based on photos from September 15, 2015 that did not show the entire site (see Disch. Ex. 5, p. 5:006) and City inspection reports, while Elder relied on the Dischargers' admission that 51.3 acres had been graded before the September 2015 discharge event. (PT Ex. 171.) The calculations in Prosecution Team Exhibit 171 were prepared by Tommy Hsu, the Dischargers' QSD, and Cameron Mann, the QSP. (PT Ex. 345.) This was in response to a January 28, 2016, request from the San Diego Water Board staff for stormwater calculations. The request was sent to various Discharger representatives, including Capati, Hsu, and Mann. (PT Ex. 361; PT Ex. 229, pp. 43-46; PT Ex. 351.) Mann's field logs estimated a slightly larger area—60 acres—was disturbed ("exposed") by September 15, 2015. (PT Ex. 367, pp. 8-10.) Mann inspected the Site three times that week. (*Ibid.*) Walker, who was not on site, assumes Mann meant "cleared and grubbed" and not "graded" (Walker testimony, Hearing Transcript, Jan. 12, 2022 pp. 156-161, 173, 177), but that is inconsistent with the runoff calculation that Mann helped prepare shortly after the discharge events. Tom Bistline, one of the Dischargers' BMP contractors who was on site on September 15, also testified the site was more than 50% graded by that date. (Rebuttal Ex. 4, ¶¶ 9-10.) On the other hand, City inspector John Dela Cruz estimated that only 15% of the Site had been graded before the September storm event. (PT Ex. 92.) Although Dela Cruz could not access the site on September 15, his September 14 and 16 inspection reports included the same estimate. The reason for this discrepancy is unclear, except that it is undisputed that the graded acreage was expanding very rapidly during this period of time. Elder's assumption that 51.3 acres were disturbed on September 15, 2015, is reasonable based on Bistline's testimony and the admissions by the Dischargers' other consultants.
89. The total site acreage was reduced in the SWMM model and thereby significantly underestimated total rainfall on the Site. It is undisputed that the Site acreage was approximately 95 acres. The first three SWMM models run by Walker (Model #1 - with Walker estimated pond storage capacity, Model #2 - no ponds, Model #3 - with Elder estimated pond storage capacity) included only 76.4 acres in the calculations. The Walker recommended estimated discharge volume (Model #4, shown in Table 5) included 83.9 acres by taking the discharge volume results of the SWMM model with the estimated pond storage capacity from 76.4 acres, replacing the discharge volume from September 15, 2015 with the discharge volume for 21 acres without ponds, and adding an estimated discharge volume from another 7.5 miscellaneous disturbed areas without ponds. (Disch. Ex. 5, pp. 5:005-5:006; 5:026, 5:6226, 5:12421, 5:18621 ("Area").)

90. The San Diego Water Board recognizes Hromadka’s and Walker’s impressive credentials. However, the board is not persuaded by Walker’s recommended discharge volume estimate calculated from the SWMM model because of the unstated, unsupported, or inaccurate estimates, assumptions, and model inputs discussed above. (*DeLisi v. Lam* (2019) 39 Cal.App.5th 663, 683, *rev. den.* Nov. 26, 2019; *People ex rel. Dept. of Transp. v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1086 [citations omitted].)
91. Elder stated in deposition testimony that he didn’t know whether his estimate could be off by 70% in light of his use of historic rainfall data. (Elder Depo., Vol. 1 (Oct. 9, 2020), p. 180.) It is unclear what Elder meant by this since counsel did not ask him to elaborate. The meaning inferred by the Dischargers—that Elder’s model could have overestimated discharge volume by 70%—is inconsistent with all of Elder’s other testimony and both of his written reports. At any rate, even if the actual runoff volume was only 30% of Elder’s calculation or if the record supported the Hromadka/Walker estimate of 1,937,147 gallons—and both conclusions are contrary to the record in this case—the maximum statutory per-gallon penalty would be about \$19,000,000,<sup>23</sup> an amount three and one-half times the per-gallon penalty assessed. In actuality, the per-gallon penalty is only about 8.3% of the statutory maximum based on Elder’s volumetric analysis.

*Summary of Evidence in Support of Violation No. 1*

92. September 15, 2015: Photographs document sediment-laden stormwater discharges to Aliso Creek on September 15, 2015. Photographs Portola8AUG0008982.JPG, Portola8AUG0008983.JPG, Portola8AUG0008986.JPG, Portola8AUG0008987.JPG, and Portola8AUG0008988.JPG look to the south from the bikeway at the culvert to Aliso Creek and show sediment-laden runoff from the Site discharging into Aliso Creek via the culvert. (PT Ex. 22, pp. 26-27, 30-32.) Photograph IMG\_3630.JPG shows the brown sediment laden stormwater runoff from (IMG\_3629.JPG) flowing over the top of the orange silt fence and into an unnamed tributary to Aliso Creek. (PT Ex. 347, pp. 1-2.) The stormwater discharged from the Site “was above the NTU limit.” (PT Ex. 367, p. 9; PT Exs. 171, 351.) Stormwater effluent samples exceeded the Numeric Action Levels (NALs) for turbidity for this storm event. (PT Ex. 367; PT Ex. 370.) The City issued Citation No. 2221 on October 6, 2015, for violations observed on September 15, 2015, stating that City staff “[o]bserved a lack of best management practice (BMP) implementation for a forecasted rain event on 9/14/2015 & 9/15/2015, which resulted in a significant discharge of sediment-laden water off site.” (PT Ex. 30.)

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<sup>23</sup> First hypothetical:  $((6,317,219 \text{ gallons} \times 0.3) - 4000) \times \$10 = \$18,911,657$ . Second hypothetical:  $(1,937,147 \text{ gallons} - 4000) \times \$10 = \$19,331,470$ .



93. The Dischargers or their consultants (see Disch. Ex. 1) argue that no sediment discharges occurred on September 15, 2015, in part because inspector Dela Cruz did not observe them. In fact, Dela Cruz stated that he did not observe the sediment discharges that likely occurred at the southwest portion of the Site only because it was too dangerous to get to a location where he could observe the outfall. (Dela Cruz Depo., Vol. 2 (Oct. 27, 2020), pp. 310-133.) Peter Meier also testified it was likely that a significant sediment discharge from the Site would have occurred on September 15, even had it been only 15% graded. (Meier Depo., Vol. II (Oct. 29, 2020), pp. 53-54.)<sup>24</sup> The City documented the post storm event site conditions with photographs taken on September 17, 2015. Photographs Portola8AUG0007494.JPG, Portola8AUG0007495.JPG, Portola8AUG0007496.JPG, Portola8AUG0007507.JPG, Portola8AUG0007509.JPG, Portola8AUG0007510.JPG, and Portola8AUG0009066.JPG show sediment discharges from the Site that overwhelmed the perimeter controls, covered habitat, and filled unnamed tributaries to Aliso Creek. (PT Exs. 25, 79-80, 91, 93-94, 180.) In addition to the photographic evidence and testimony, the high turbidity readings at the Area B and Area E drainages are evidence of sediment laden stormwater discharges. (PT Ex. 367, p. 9; Rebuttal Ex. 4, ¶ 15.)
94. December 22, 2015: The Dischargers inspected the Site the day after the storm event and reported that there was “major erosion causing sediment discharge into offsite canyon area.” (PT Ex. 367, p. 5.) Dischargers’ photograph IMG\_0735.JPG looks to the south from the Site at the two outfalls, demonstrating the tremendous amount of energy and volume of the discharges and the lack of erosion and sediment control BMPs on the surrounding slopes. (PT Ex. 78, p. 15.) On December 28, 2015, the City inspected the Site and reported “new evidence of discharge” under the “Sediment discharge observed?” section. (PT Ex. 92, p. 15.) Dischargers’ photograph IMG\_0773.JPG taken on December 28, 2015 shows evidence of sediment discharged from the site. (PT Ex. 80, p. 1.)
95. January 5, 2016: Photographs and videos taken on January 5, 2016 document sediment-laden stormwater discharges from the Site. Photographs Portola8AUG0009129.JPG, Portola8AUG0009130.JPG, Portola8AUG0009131.JPG, Portola8AUG0009132.JPG, Portola8AUG0009133.JPG, and Portola8AUG0009134.JPG are from the bikeway next to Aliso Creek. Brown highly turbid sediment-laden stormwater runoff from the mitigation basin can be seen flowing across the bikeway and into

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<sup>24</sup> The site went from 15% graded on September 8 to over 50% graded on September 15. Given the City’s focus on the discharge from Portola Northwest and Meier’s inability to access the Site on September 15, it is unsurprising that he recalled that the 15% grading estimate sounded approximately correct.

a culvert that drains into Aliso Creek. (PT Ex. 86, pp. 8-13.) Two videos show sediment laden runoff causing damage and erosion to the Site. IMG\_3964.MOV depicts a brown sediment laden runoff flowing off a 60-foot-tall retaining wall into an unnamed tributary to Aliso Creek in the southwest portion of the Site. The video pans to the right showing runoff cutting a channel through an earthen berm. The video continues to pan to the right and shows exposed and eroded slopes. Another video, IMG\_3969.MOV, is taken from the south of the Site and shows a brown waterfall of sediment laden runoff flowing through an earthen berm and into an open trench for a newly constructed segment of the Site's stormwater conveyance system. The runoff flows through the trench, overwhelms an orange silt fence and discharges into an unnamed tributary to Aliso Creek. (PT Ex. 346.) "San Diego Water Board Inspectors observed on January 19, 2016, evidence that the Discharger[s] failed to take all reasonable steps to minimize, or prevent, the sediment and sediment-laden stormwater discharges that occurred during the January 4, 2016, rain event which resulted in adverse impacts to Aliso Creek, and offsite mitigation areas regulated under Clean Water Act section 401 Water Quality Certification No. R9-2013- 0113 (401 Certification)." (PT Ex. 169a, p. 3.) Stormwater effluent samples exceeded the NALs for turbidity for this storm event. (PT Exs. 367, 372.) The City issued Citation No. 2258 on January 21, 2016, for violations observed on January 5, 2016, stating that there was a "[f]ailure to protect downstream mitigation areas from construction site discharges resulting in significant erosion and deposition of sediment." (PT Ex. 105, p. 5.)

96. January 6, 2016: Evidence of sediment discharges from the Site are documented in photographs taken on January 6, 2016. Dischargers' photograph IMG\_0948.JPG looks to the southwest down the bikeway and depicts residual sediment on the bikeway from the stormwater runoff flows from the basins that discharged into Aliso Creek. (PT Ex. 89, p. 1.) City photographs Portola8AUG0008285.JPG, Portola8AUG0008286.JPG, Portola8AUG0009121.JPG, and Portola8AUG0009122.JPG look to the southeast and were taken from the south of the Site. Here a sediment discharge from the Site into an unnamed tributary of Aliso Creek was caused by hillside erosion from the steep slope and the high velocity discharges from the outfall overwhelmed the perimeter gravel bags. (PT Ex. 88, pp. 28-29, 40-41.) The Dischargers' January 7, 2016 inspection report notes, "Break from excess sediment/water on per[imeter] controls" and "Bistline/Empire - working on perimeters to fix breach issues" as a result of sediment and sediment-laden stormwater discharges from the Site.

**Violation No. 2**

97. Section B.1.b. of Attachment D of the Construction Storm Water Permit requires Risk Level 2 dischargers, at a minimum, to “[c]over and berm loose stockpiled construction materials that are not actively being used (i.e., soil, spoils, aggregate, fly ash, stucco, hydrated lime, etc.)” Unless materials are being moved onto or off of a material stockpile, a stockpile should be covered and bermed. This requirement applies even when rain or high wind is not forecast. “Actively being used” is different than “inactive areas of construction.” (PT Ex. 4, p. 169, fns. 1, 2.) When evaluating stockpile photographs, the board considered evidence that a stockpile was “actively” being used, such as the pushing aside of plastic tarps/coverings and straw waddles, and the presence of heavy equipment or laborers standing next to the stockpile. The board also considered whether each photograph depicted a stockpile as opposed to a detention berm or other feature.

The Dischargers violated this requirement by failing to implement material stockpile BMPs at the Site on the following **23 days**: August 20, 2015; September 15, 2015; September 17, 2015; October 7, 2015; December 18, 2015; December 22, 2015; December 23, 2015; January 5, 2016; January 8, 2016; January 19, 2016; January 20, 2016; January 22, 2016; January 25, 2016; February 4, 2016; March 3, 2016; March 11, 2016; March 14, 2016; March 21, 2016; March 25, 2016; March 26, 2016; March 28, 2016; March 30, 2016; and March 31, 2016. These findings are based on the evidence in the record, including but not limited to the evidence identified in this Order, the City’s enforcement documents, San Diego Water Board staff observations, and photographs in Prosecution Team Exhibits 16, 22, 25, 31, 49, 65, 73, 78, 79, 86, 91, 102, 104, 109, 111, 112, 124, 144, 149, 150, 159, 162, 163, 164, 165, 166, 167 and 168.

The Rincon ACLC Report concluded that evidence in the record, including the City’s photographs, supported a finding that the violation occurred on all days alleged, other than December 8, 2015 and January 5, 2016. The photos for those two days, as well as various other photographs Rincon rejected (p. 1:061), depict at least one stockpile without any obvious and readily available and implementable cover or berms as required by the Construction Storm Water Permit (PT Ex. 4, p. 165, § B.1.b) as described below. For example, Rincon states the stockpiles in photo Portola8AUG0009107.JPG taken on January 8, 2016 are “berms” along a roadway, but the “berms” are loose, uncompacted soil and unprotected from potential erosion, and there is also an unprotected stockpile that can be seen in the background by the construction equipment. Furthermore, Rincon does not dispute the “berms” seen in photo

Portola8AUG0004872.JPG taken on January 25, 2016 are a stockpile. These are the same as the “berms” in photo Portola8AUG0009107.JPG taken on January 8, 2016.

August 20, 2015: City photographs Portola8AUG0004381.JPG and Portola8AUG0004381.JPG shows several uncovered and unbermed material (soil) stockpiles to the right of a green portable toilet. (PT Ex. 16, p. 11)

September 15, 2015: City photographs Portola8AUG0008967.JPG and Portola8AUG0008968.JPG each show an uncovered and unbermed material (soil) stockpile during a storm event. (PT Ex. 22, pp. 11-12.)

September 17, 2015: Photograph Portola8AUG0004505.JPG shows three uncovered and unbermed material (soil) stockpiles to the upper left of the white water truck spraying water that appears in the center of the photograph. (PT Ex. 25, p. 46.)

October 7, 2015: The City issued Citation No. 2240 for Dischargers’ “lack of erosion control BMPs on disturbed areas and stockpiles.” (PT Ex. 34.) City photograph Portola8AUG0009278.JPG shows an uncovered and unbermed material (soil) stockpile can be seen in the upper left of the photograph just below the two people by the white pickup truck. (PT Ex. 31, p. 21.)

December 18, 2015: Dischargers photograph IMG\_0671.JPG shows three to four material stockpiles that are uncovered and unbermed. (PT Ex. 73, p. 1.)

December 22, 2015: Dischargers photographs IMG\_0707.JPG, ING\_713.JPG, and IMG\_0715.JPG show material (soil) stockpiles that are uncovered and unbermed during a storm event. (PT Ex. 78, p. 5, 10, 11.)

December 23, 2015: City photograph Portola8AUG0008038.JPG shows an uncovered and unbermed material (soil) stockpile. (PT Ex. 79, p. 12.)

January 5, 2016: The City issued Citation No. 2258 noting that “[f]ield observations made during inspections completed over several months reveal that stockpiles are not being inspected, managed and protected with an effective combination of erosion and sediment control BMPs.” (PT Ex. 105, p. 3.) City photograph Portola8AUG0009107.JPG shows three uncovered and unbermed material (soil) stockpiles in the center and upper center right of the photograph during a storm event. (PT Ex. 86, p. 4.)

January 8, 2016: City photographs Portola8AUG0004673.JPG, Portola8AUG0004674.JPG, Portola8AUG0007698.JPG, Portola8AUG0007699.JPG, Portola8AUG0007701.JPG, Portola8AUG0007703.JPG, Portola8AUG0007706.JPG, Portola8AUG0007707.JPG show an uncovered and unbermed material (soil) stockpile. (PT Ex. 91, pp. 2-5, 7, 9, 12-13.) These photographs show the same uncovered and unbermed stockpile photographed on December 23, 2015.

January 19, 2016: San Diego Water Board inspection report stated that “San Diego Water Board inspectors observed several stockpiles of loose construction

materials with inadequate or missing containment such as silt fence, berms, or effective soil stabilizers” for both the Portola Center South and the Portola Center Northwest sites. (PT Ex. 101, p. 16.) San Diego Water Board photographs 20160119-125327.JPG, 20160119-125424.JPG, 20160119-125330.JPG, and 0160119-130842.JPG show numerous material stockpiles that are uncovered and unbermed. (PT Ex. 102, pp. 81-82, 84, 111.)

January 20, 2016: Dischargers photographs DJI\_0022.JPG and DJI\_0023.JPG display an uncovered and unbermed material (soil) stockpile by the perimeter control silt fence. (PT Ex. 104, pp. 4-5.)

January 22, 2016: City photographs Portola8AUG0004817.JPG, Portola8AUG0004818.JPG, Portola8AUG0004819.JPG, Portola8AUG0007933.JPG, Portola8AUG0007935.JPG, Portola8AUG0007936.JPG, Portola8AUG0007939.JPG, Portola8AUG0007941.JPG, Portola8AUG0007943.JPG, and Portola8AUG0007944.JPG show several uncovered and unbermed material stockpiles around the Site. (PT Ex. 109, pp. 19-21, 46, 48-49, 52, 54, 56-57; see Portola8AUG0007933.JPG, Portola8AUG0007935.JPG, Portola8AUG0007936.JPG, Portola8AUG0007939.JPG, Portola8AUG0007941.JPG, Portola8AUG0007943.JPG, and Portola8AUG0007944.JPG are duplicates of Portola8AUG0004803.JPG, Portola8AUG0004805.JPG, Portola8AUG0004806.JPG, Portola8AUG0004809.JPG, Portola8AUG0004811.JPG, Portola8AUG0004813.JPG, and Portola8AUG0004814.JPG, respectively.)

January 25, 2016: Dischargers photograph DJI-0066.JPG displays a long unbermed material (soil) stockpile that crosses the photograph and another stockpile is in the far-right center. (PT Ex. 112, p. 1.) City photograph Portola8AUG0004872.JPG shows a material stockpile located to the left of the center of the photograph that is uncovered and unbermed. (PT Ex. 111, p. 14.)

February 4, 2016: City photographs Portola8AUG009102.JPG and Portola8AUG009103.JPG show several dark material stockpiles that are uncovered and unbermed in the center of the photographs. (PT Ex. 124, pp. 19-20.)

March 3, 2016: City photograph Portola8AUG005452.JPG shows a large material stockpile that is uncovered and unbermed just to the left center of the photograph. (PT Ex. 144, p. 27.) City photograph Portola8AUG0005267.JPG shows an unprotected soil stockpile in the center left of photo. In addition to the photos cited by the Prosecution Team, Portola8AUG0005262.JPG shows an unprotected soil stockpile in the center right of photo. (PT Ex. 124.)

March 11, 2016: City photographs Portola8AUG005584.JPG and Portola8AUG005585.JPG show a dark material stockpile that can be seen uncovered and unbermed to the right of a metal roll-off container. (PT Ex. 149, pp. 1-2.) City photograph Portola8AUG005593.JPG and

Portola8AUG005585.JPG show a large material (soil) stockpile that is uncovered, with a silt fence that does not surround the entire stockpile. (PT Ex. 149, p. 10.)

March 14, 2016: San Diego Water Board NOV No. R9-2016-0124 states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed stockpiles of construction materials without adequate berm or containment.” (PT Ex. 169, pp. 4-5.) San Diego Water Board photographs 20160314\_123209.JPG, 20160314\_123304.JPG, 20160314\_123328.JPG, 20160314\_124150.JPG and 20160314\_124353.JPG show several uncovered and unbermed material (soil) stockpiles. (PT Ex. 150, pp. 40, 42-43, 51, 55.)

March 21, 2016: San Diego Water Board NOV No. R9-2016-0124 states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed stockpiles of construction materials without adequate berm or containment.” (PT Ex. 169, pp. 4-5.) San Diego Water Board photograph 20160321\_120144.JPG shows two large uncovered and unbermed material (soil) stockpiles in the far right of the photograph. Several small uncovered and unbermed material (soil) stockpiles can be seen to the far left of the photograph. Photographs 20160321\_120245.JPG, 20160321\_120342.JPG, 20160321\_120508.JPG, 20160321\_120510.JPG and 20160321\_121635.JPG show uncovered and unbermed material (soil) stockpiles. (PT Ex. 159, pp. 95-99, 104.)

March 25, 2016: City photograph Portola8AUG005825.JPG shows several dirt stockpiles next to a gravel stockpile that are uncovered and unbermed in the center and left of center of the photograph. (PT Ex. 163, p. 6.)

March 26, 2016: City photograph Portola8AUG005841.JPG shows several dirt stockpiles next to a gravel stockpile that are uncovered and unbermed in the center and left of center of the photograph. (PT Ex. 164, p. 6.)

March 28, 2016: City photograph Portola8AUG005845.JPG shows several dirt stockpiles next to a gravel stockpile that are uncovered and unbermed in the center and left of center of the photograph. (PT Ex. 165, p. 4.)

March 30, 2016: City photograph Portola8AUG005857.JPG shows two material stockpiles that are uncovered and unbermed in the right of the photograph. (PT Ex. 167, p. 5.)

March 31, 2016: City photographs Portola8AUG009342.JPG and Portola8AUG009364.JPG show several uncovered and unbermed material stockpiles. (PT Ex. 168, pp. 81, 103.)

**Violation No. 3**

98. Section B.3.a. of Attachment D of the Construction Storm Water Permit requires dischargers in Risk Level 2 to “[p]revent oil, grease, or fuel to leak into the ground, storm drains or surface waters.” Additionally, vehicle fluid leaks must be cleaned up immediately and leaked fluids and cleanup materials must be disposed of properly pursuant to section B.3.c. in Attachment D to the Construction Storm Water Permit. The Dischargers violated this requirement by failing to implement vehicle fluid leak BMPs at the Site on the following **14 days**: August 20, 2015; August 31, 2015; September 17, 2015; October 7, 2015; October 8, 2015; November 3, 2015; November 23, 2015; November 30, 2015; December 9, 2015; December 10, 2015; January 5, 2016; January 7, 2016; January 19, 2016; and February 8, 2016. This finding is based on evidence in the record, including but not limited to evidence identified in this Order, City inspection and enforcement documents, Dischargers’ submissions, and on photographs in Prosecution Team Exhibits 16, 18, 25, 31, 32, 46, 60, 62, 67, 68, and 102.

The Rincon ACLC Report concluded that evidence in the record, including the City’s photographs, supported a finding that the violation occurred on all days alleged.

August 20, 2015: City photographs Portola8AUG004372.JPG, Portola8AUG004373.JPG, Portola8AUG004374.JPG, Portola8AUG004375.JPG, Portola8AUG004376.JPG, and Portola8AUG004380.JPG show areas where vehicle fluid leaks to the ground occurred and the Dischargers failed to implement BMPs during vehicle storage and maintenance to prevent vehicle fluids from discharging to the ground. (PT Ex. 16, pp. 2-6, 10.)

August 31, 2015: City photographs Portola8AUG004390.JPG and Portola8AUG004391.JPG show vehicle fluid leaks to the ground from construction equipment. (PT Ex. 18, pp. 7-8.)

September 17, 2015: City photographs Portola8AUG009005.JPG, Portola8AUG009007.JPG, and Portola8AUG009014.JPG show a piece of heavy equipment being repaired without protecting the ground from vehicle fluids leaks. Photographs Portola8AUG009019.JPG, Portola8AUG009020.JPG, Portola8AUG009026.JPG, Portola8AUG009027.JPG, Portola8AUG009031.JPG, Portola8AUG009033.JPG, Portola8AUG009034.JPG, and Portola8AUG009036.JPG show various damaged and leaking plastic pools being used as drip pans with holes and cracks that can no longer contain vehicle fluids. (PT Ex. 25, pp. 119, 121, 128, 133-134, 140-141, 145, 147-148, 150.)

October 7, 2015: The City issued Citation No. 2240 to the Dischargers on October 9, 2015, for violations observed on October 7, 2015, stating that City

staff observed a “lack of BMPs controlling adequately equipment drips and leaks.” (PT Ex. 34.) City photograph Portola8AUG0009270.JPG shows a ten- to twelve-thousand-gallon diesel fuel tank without protection from stormwater run-on or runoff. (PT Ex. 31, p. 13.) Additionally, the Dischargers failed to identify the fueling area and its associated BMPs in the Site’s SWPPP.

October 8, 2015: Dischargers photograph IMG\_1761.JPG shows a large vehicle fluid leak (approximately 3 feet in diameter) underneath a parked scraper. (PT Ex. 32, p. 1.)

November 3, 2015: Discharger photographs IMG\_2177.JPG and IMG\_2178.JPG show oil flowing across the soil from underneath an earth grader. Construction Storm Water Permit, Attachment D, B.3.c. requires that vehicle fluid leaks are to be cleaned immediately and that leaked materials are to be properly disposed. (PT Ex. 46, pp. 1-2.)

November 23, 2015: Dischargers photograph IMG\_0166.JPG shows dark stained soil (approximately 6’ by 12’) next to seven 55-gallon drums and several darkly stained five-gallon buckets indicating a discharge of vehicle fluids to the ground. (PT Ex. 60, p. 2.)

November 30, 2015: Dischargers photograph IMG\_0349.JPG shows dark stained soil (approximately 6’ by 12’) in front of eight 55-gallon drums, two five-gallon buckets, and a cardboard box full of oily rags and plastic bottles (note the oil staining on the lower 2/3 of the box) indicating a discharge of vehicle fluids to the ground. (PT Ex. 62, p. 1.) This photograph shows the same location as the November 23, 2015 photograph one week later without any evidence actions were taken to clean soil and improve storage of disposed vehicle fluids.

December 9, 2015: Dischargers photograph IMG\_0524.JPG shows ponding red diesel fuel on the ground (approximately 2’ by 7’). (PT Ex. 67, p. 2.)

December 10, 2015: Dischargers photograph IMG\_0549.JPG shows several dark stained soil spots in front of several 55-gallon drums indicating a discharge of vehicle fluids to the ground. (PT Ex. 68, p. 3.)

January 5, 2016: On January 21, 2016, the City issued NOV/Administrative Compliance Order Citation No. 2258 for violations observed on January 5, 2016. Section 5.d. of the Citation noted that “[s]everal vehicles or pieces of equipment were observed to be out of order, leaking, and under repair.” The Citation also included details of the violations observed. (PT Ex. 105, p. 4.)

January 7, 2016: The Dischargers reported during a visual inspection of the Site on January 7, 2016, that “puddles in Varner yard has sheen.” (PT Ex. 367, p. 2.)

January 19, 2016: City photographs 20160119\_125854.JPG, 20160119\_125857.JPG, and 20160119\_125927.JPG show a spare motor sitting next to a scraper, and the motor stand with oil drip stains does not have secondary containment. Photographs 20160119\_131243.JPG, 20160119\_131259.JPG, 20160119\_131301.JPG, and 20160119\_131314.JPG show the poor physical condition of the plastic pool been used as drip pans (with



cracks and holes in them). (PT Ex. 102, pp. 88-89, 91, 114-118.)

February 8, 2016: On February 10, 2016, the City issued Dischargers a Cease and Desist Order and Notice to Abate Nuisances, including a matrix of violations and their status. Corrective Action 5S noted that on February 8, 2016, “some of the drip pans were the older ones that were previously observed to have been run over by the equipment/vehicles and were cracked and leaking. So, while the drip pans were capturing oil and vehicle fluids, the oil and vehicle fluids were leaking out of the drip pans onto the soil. In addition, it was observed that there were not enough drip pans to effectively capture/contain all of the leaks from the equipment/vehicles.” (PT Ex. 131, p. 4.)

#### **Violation No. 4**

99. Section D.2 of Attachment D of the Construction Storm Water Permit requires dischargers in Risk Level 2 to “provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.” The Dischargers violated this requirement by failing to implement erosion control BMPs in inactive areas at the Site on the following **28 days**: September 17, 2015; October 6, 2015; October 7, 2015; October 12, 2015; October 13, 2015; October 19, 2015; October 20, 2015; October 23, 2015; October 26, 2015; November 12, 2015; November 19, 2015; December 21, 2015; December 23, 2015; December 29, 2015; January 4, 2016; January 7, 2016, January 8, 2016; January 12, 2016, January 13, 2016, January 14, 2016; January 19, 2016, January 20, 2016; January 21, 2016, January 22, 2016; January 26, 2016; January 27, 2016; March 14, 2016; and March 21, 2016. This finding is based on evidence in the record, including but not limited to evidence identified in this Order, City enforcement documents, Dischargers’ submissions, San Diego Water Board staff observations, and on photographs in Prosecution Team Exhibits 25, 27, 35, 37, 40, 42, 52, 58, 63, 64, 65, 75, 79, 81, 85, 90, 91, 95, 96, 97, 102, 103, 104, 108, 109, 114, 115, 117, 118, 137, 150, 159, and 160. Some photographs depict vegetative growth in graded soil. The presence of vegetative growth indicates that the soil had not been disturbed in over 14 days and is therefore, an “inactive” area requiring effective soil cover (i.e., erosion control BMPs). Other photos show inactive areas with slopes that have significant, but not uniform, amounts of vegetative cover; however, parts of the same slopes had no vegetative cover, appeared recently disturbed, and/or lacked erosion controls. Partial vegetative cover is not effective soil cover for an entire inactive area. Storm water erosion control BMPs have implementation, inspection, and maintenance guidance to ensure effectiveness. (PT Ex. 3, pp. 47-134.) Even bonded fiber matrix (BFM), which can be sprayed in methods that might protect in ways similar to vegetative growth, needs to be reapplied and applied to a certain industry standard. (*Id.*, pp. 63-69.) This lack of storm water pollution prevention planning and BMP implementation was pervasive throughout the Site.

The Rincon ACLC Report concluded that evidence in the record, including the City's photographs, supported a finding that the violation occurred on all days alleged, other than September 17, October 1, October 9, October 13, October 20, November 19, December 8, and December 23, 2015, and January 4, January 13, January 14, January 20, January 21, January 26, and January 29, 2016. The report rejected any photo if Rincon concluded the photo showed an area that qualified as inactive or that depicted undisturbed slopes with preserved native vegetation, thereby eliminating these 15 violation days. (Disch. Ex. 1, pp. 1:071, 1:076-077.) The board finds the 30 contested photos all depict inactive areas and previously disturbed but inactive slopes without effective soil cover, as described below. (PT Ex. 4, p. 169.)

September 17, 2015: City photographs Portola8AUG0004461.JPG, Portola8AUG0004497.JPG, and Portola8AUG0004510.JPG show the uncovered inactive slopes below the haul road near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road, as well as the inactive slopes that have vegetative cover that is insufficient to be effective soil cover. (PT Ex. 25, pp. 3, 39, 51.)

October 6, 2015: The City inspected the Site and reported "no BMPs in inactive or active areas." (PT Ex. 92, p. 27.)

October 7, 2015: City Citation No. 2240 issued for violations at the Site stated "lack of erosion control BMPs on disturbed areas & stockpiles for 14 days or more." (PT Ex. 34.)

October 12, 2015: The City inspected the Site and reported "no BMPs in inactive or active areas." (PT Ex 92, p. 29.)

October 13, 2015: City photograph Portola8AUG0004548.JPG shows the uncovered inactive slopes beneath the haul road near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 37, p. 1.)

October 19, 2015: The City inspected the Site and reported "no BMPs in inactive or active areas." (PT Exhibit 92, p. 33.)

October 20, 2015: Dischargers photographs IMG\_1895.JPG and IMG\_1896.JPG show uncovered inactive slopes. (PT Ex. 40)

October 23, 2015: City photographs Portola8AUG0004550.JPG and Portola8AUG0004553.JPG show uncovered inactive slopes. (PT Ex. 42)

October 26, 2015: The City inspected the Site and reported "no BMPs in inactive or active areas." (PT Ex. 92, p. 31.)

November 12, 2015: City photograph Portola8AUG0004560.JPG shows an uncovered inactive slope. (PT Ex. 52, p. 1.)

November 19, 2015: City photograph Portola8AUG0004569.JPG shows uncovered inactive slopes near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 58, p. 1.)

December 21, 2015: City photograph Portola8AUG0004610.JPG shows uncovered

inactive slopes below the upper haul road near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 75, p. 1.)

December 23, 2015: City photographs Portola8AUG0008030.JPG and Portola8AUG0008038.JPG from the upper left to the upper right of center show uncovered inactive slopes. (PT Ex. 79, pp. 4, 12.)

December 29, 2015: City photographs Portola8AUG0007622.JPG (center of the photograph), Portola8AUG0007623.JPG (far left of the photograph), and Portola8AUG0007624.JPG (center of the photograph) show inactive slopes. (PT Ex. 81, pp. 1-3.)

January 4, 2016: The City inspected the Site on January 4, 2016, and reported that erosion controls were not being implemented and maintained on inactive and active disturbed soil areas. (PT Ex. 92, p. 31.) City photograph

Portola8AUG0004614.JPG shows uncovered inactive slopes and inactive slopes with vegetative cover that is insufficient to be effective soil cover. (PT Ex. 85, p. 1.)

January 7, 2016: City photograph Portola8AUG0004657.JPG shows an uncovered inactive slope after a storm event. Erosion rills can be seen across the entire slope and a large gully occurred in the center indicating that there was ineffective erosion control. (PT Ex. 90, p. 35.)

January 8, 2016: City photographs Portola8AUG00004674.JPG and Portola8AUG0007703.JPG show the uncovered inactive slopes beneath the haul road near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 91, p. 13.) Dudek photographs IMG\_7744 and IMG\_7745 also show uncovered inactive slopes.

January 12, 2016: City photographs Portola8AUG0004700.JPG (center of photograph) and Portola8AUG0004708.JPG (far left) show uncovered inactive slopes below the upper haul road. City photographs Portola8AUG0008381.JPG, Portola8AUG0008382.JPG, and Portola8AUG0008383.JPG show inactive slopes without effective erosion control as demonstrated by the erosion and erosion rills across the entire slope. (PT Ex. 95, pp. 4, 11, 183-185.)

January 13, 2016: City photograph IMG\_1033.JPG shows uncovered inactive slopes near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 96, p. 3.)

January 14, 2016: City photograph Portola8AUG0004751.JPG shows uncovered inactive slopes near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 97, p. 3.)

January 19, 2016: San Diego Water Board NOV No. R9-2016-0124 at section 8.b. states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed many areas throughout the site that appeared inactive, or could have been scheduled to be inactive, without effective soil cover or other BMPs to prevent erosion. Evidence of erosion and sediment transport due to inadequate or ineffective erosion control measures for inactive areas was observed throughout the site during the inspections.” (PT

Ex.169a, p. 5.) San Diego Water Board photographs 20160119\_121556.JPG, 20160119\_130311.JPG, 20160119\_130608.JPG, and 20160119\_130851.JPG show uncovered inactive slopes. (PT Ex. 102, pp. 59, 99, 107, 112.) City photograph Portola8AUG0004798.JPG shows uncovered inactive slopes near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 103, p. 1.)

January 20, 2016: Dischargers aerial photographs DJI\_0028.JPG and DJI\_0029.JPG show uncovered inactive slopes. (PT Ex. 104, pp. 9-10.)

January 21, 2016: Dischargers aerial photograph IMG\_0003.JPG shows uncovered inactive slopes near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 108, p. 2.)

January 22, 2016: City photographs Portola8AUG0004802.JPG (upper half [left and center] photograph) and Portola8AUG0004807.JPG show uncovered inactive slopes. (PT Ex. 109, pp. 4, 9.)

January 26, 2016: Dischargers aerial photograph DJI\_0086.JPG shows an uncovered inactive slope near the Site Entrance at Saddleback Ranch Road & Glenn Ranch Road. (PT Ex. 114, p. 5.)

January 27, 2016: City photographs Portola8AUG0004901.JPG, Portola8AUG0004903.JPG and Portola8AUG0004918.JPG show uncovered inactive slopes. (PT Ex. 115, pp. 1-3.)

March 14, 2016: San Diego Water Board NOV No. R9-2016-0124 at section 8.b. states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed many areas throughout the site that appeared inactive, or could have been scheduled to be inactive, without effective soil cover or other BMPs to prevent erosion. Evidence of erosion and sediment transport due to inadequate or ineffective erosion control measures for inactive areas was observed throughout the site during the inspections.” (PT Ex. 169a, p. 5.) San Diego Water Board photographs 20160314\_121056.JPG, 20160314\_121121.JPG, 20160314\_121147.JPG, 20160314\_123804.JPG, 20160314\_160405.JPG, 20160314\_160800.JPG, and 20160314\_160803.JPG show inactive slopes without effective soil cover. (PT Ex. 150, pp. 4-6, 45, 79, 80-81.)

March 21, 2016: San Diego Water Board NOV No. R9-2016-0124 at section 8.b. states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed many areas throughout the site that appeared inactive, or could have been scheduled to be inactive, without effective soil cover or other BMPs to prevent erosion. Evidence of erosion and sediment transport due to inadequate or ineffective erosion control measures for inactive areas was observed throughout the site during the inspections.” (PT Ex. 169a, p. 5.) San Diego Water Board photographs 20160321\_111811.JPG, 20160321\_115011.JPG, and 20160321\_115355.JPG show uncovered inactive slopes. The slope in photographs 20160321\_115011.JPG and

20160321\_115355.JPG does appear to have been sprayed with a soil binder at some point in the past; however, it is no longer effective as evidenced by the erosion rills and sloughing off of patches of the slope. (PT Ex. 159, pp. 24, 76, 81.) City photograph Portola8AUG0005760.JPG shows an inactive slope with vegetative growth that is insufficient to be effective soil cover. (PT Ex. 160, p. 6.)

### Violation No. 5

100. Section E.3 of Attachment D of the Construction Storm Water Permit requires Risk Level 2 dischargers to “implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.” This requires dischargers to have a plan in place during dry weather, to be prepared to deploy BMPs should rain materialize, and to actually deploy BMPs in active areas of construction in the event of a forecasted rain event.<sup>25</sup> The Dischargers violated this requirement by failing to implement erosion control BMPs in active areas prior to a forecasted rain event at the Site on the following **11 days**: September 14, 2015; September 15, 2015; October 6, 2015; October 12, 2015; October 19, 2015; October 26, 2015; December 10, 2015; December 22, 2015; January 7, 2016; February 8, 2016; and March 14, 2016. This finding is based on evidence in the record, including but not limited to evidence identified in this Order, City inspection and enforcement documents, Dischargers’ submissions, testimony of Board staff, San Diego Water Board staff observations, and photographs in Prosecution Team Exhibits 21, 22, 68, 78, 90, 137, and 150.

The Rincon ACLC Report concluded that evidence in the record, including the City’s photographs, supported a finding that the violation occurred on all days alleged, other than September 14, 2015, January 7, 2016 and February 17, 2016. The report concluded 19 of the cited photos showed linear perimeter controls or a detention basin downslope and thus did not violate the permit. (Disch. Ex. 1, p. 1:080.) However, the requirements of Section E.3 in Attachment D to the Construction Storm Water Permit, an additional requirement for Risk Level 2 sites, requires appropriate erosion control BMPs (runoff control and soil stabilization) for areas under active construction (PT Ex. 4, p. 169.) Perimeter controls and detention basins are sediment control BMPs and not erosion control

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<sup>25</sup> The Construction Storm Water Permit recognizes that rain events can occur at any time of year and requires a Rain Event Action Plan (REAP) “to ensure that active construction sites have adequate erosion and sediment controls *implemented* prior to the onset of a storm event, even if construction is planned only during the dry season.” (PT Ex. 4, p. 62, ¶ 49 (emphasis added); see also PT Ex. 4, p. 33 [explaining that the REAP requirement is also to ensure a discharger has adequate materials, staff and time to timely implement erosion and sediment controls].)

BMPs. While they can act as runoff control for a site or drainage area, they do not provide the “first line of defense” runoff control and soil stabilization needed to minimize the erosion from a specific active area of a site to prevent sediment from being transported to those “last line of defense” perimeter controls and detention basins. The cited photographs depict permit violations as described below. These days of violation represent single days where photographic evidence indicates an active area that was not properly protected pursuant to Construction Storm Water Permit requirements *and during which a rain event occurred*. This represents a conservative penalty approach.

September 14, 2015: Dischargers photographs IMG\_1372.JPG, IMG\_1375.JPG and IMG\_1378.JPG show active areas that were not protected by erosion control BMPs prior to the September 15, 2015 storm event. (PT Ex. 21, pp. 1, 4-5.)

September 15, 2015: The City issued Citation No. 2221 on October 6, 2015, for violations observed on September 15, 2015, stating that City staff “[o]bserved a lack of best management practice (BMP) implementation for a forecasted rain event on 9/14/2015 & 9/15/2015, which resulted in a significant discharge of sediment laden water off site.” (PT Ex. 30.) City photographs

Portola8AUG0008967.JPG and Portola8AUG0008968.JPG show large graded and exposed active areas that have no erosion control and sediment control protection during the storm event. Photographs Portola8AUG0008970.JPG, Portola8AUG0008974.JPG, and Portola8AUG0008975.JPG show an unprotected steep dirt road (active area). (PT Ex. 22, pp. 11-12, 14, 18-19.)

October 6, 12, 19 and 26, 2015: The City inspected the Site on each of these days and reported for each of these days that there were “no BMPs in inactive or active areas.” (PT Ex. 92, pp. 27, 29, 31, 33.)

December 10, 2015: Dischargers photographs IMG\_0548.JPG and IMG\_0549.JPG show the refueling/maintenance and parking area (active areas) that were not protected by erosion control BMPs prior to the December 11, 2015, storm event. Additionally, in the background of photograph IMG\_0549.JPG one can see graded slopes and access roads that do not have erosion or sediment control protection. (PT Ex. 68, pp. 2-3.)

December 22, 2015: Dischargers photographs IMG\_0707.JPG, IMG\_0708.JPG, IMG\_0709.JPG, IMG\_0710.JPG, IMG\_0711.JPG, IMG\_0713.JPG, and IMG\_0715.JPG show active areas that were not protected by erosion control BMPs prior to the December 22, 2015 storm event. (PT Ex. 78, pp. 5-11.) The City inspected the Site and reported “no controls on inactive or active disturbed grading areas.” (PT Ex. 92, p. 16.)

January 7, 2016: City photographs Portola8AUG0004662.JPG and Portola8AUG0007665.JPG show steep muddy erosion-rilled roadways (active areas) with no erosion or sediment control BMPs. (PT Ex. 90, pp. 40, 43.)

February 8, 2016: On February 10, 2016, the City issued a Cease and Desist

Order and Notice to Abate Nuisances that detailed violations for active and inactive areas and their status. Corrective Action 1S noted that remaining deficiencies on February 8, 2016, included “[d]isturbed slope(s) above the v-ditch and MSE [Mechanically Stabilized Earth] wall on southwestern area of property needs to be stabilized. Newly disturbed areas on and adjacent to the temporary sediment basin #3 needs to be stabilized. The mitigation areas need to be repaired and stabilized.” (PT Ex. 131, p. 3.)

March 14, 2016: San Diego Water Board photographs 20160314\_121439.JPG, 20160314\_121512.JPG, 20160314\_121513.JPG, and 20160314\_121525.JPG show a steep haul road (active area) that does not have any erosion control BMPs. Photograph 20160314\_123328.JPG shows active areas where vehicles and materials were stored that were not protected by erosion control BMPs. These areas should have been protected with erosion control BMPs prior to the March 11 and 14, 2016 storm events. (PT Ex. 150, pp. 10-13, 43.)

### Violation No. 6

101. Section E.4 of Attachment D of the Construction Storm Water Permit requires Risk Level 2 dischargers to “apply linear sediment controls along toe of slope, face of the slope, and at the grade breaks of exposed slopes to comply with the sheet flow lengths in accordance with Table 1.” The Dischargers violated this requirement by failing to apply linear sediment controls at the Site on the following **42 days**: September 16, 2015, September 17, 2015, October 13, 2015; October 20, 2015; October 23, 2015; November 12, 2015; November 19, 2015; November 24, 2015; December 9, 2015; December 10, 2015, December 16, 2015, December 18, 2015; December 21, 2015; December 22, 2015; December 23, 2015; December 29, 2015; January 4, 2016; January 5, 2016; January 6, 2016; January 7, 2016; January 8, 2016; January 11, 2016; January 12, 2016; January 13, 2016; January 14, 2016, January 15, 2016; January 19, 2016; January 20, 2016, January 21, 2016; January 22, 2016, January 23, 2016; January 25, 2016; January 26, 2016, January 27, 2016; February 1, 2016; February 3, 2016; February 26, 2016; March 4, 2016; March 7, 2016; March 10, 2016; March 11, 2016; and March 14, 2016. This finding is based on evidence in the record, including but not limited to evidence identified in this Order, City inspection and enforcement documents, Dischargers submissions, testimony of Board staff, San Diego Water Board staff observations, and photographs in Prosecution Team Exhibits 24, 25, 27, 35, 37, 40, 42, 52, 58, 61, 63, 64, 65, 66, 68, 71, 74, 75, 78, 79, 81, 85, 86, 87, 88, 90, 91, 93, 95, 96, 97, 98, 99, 102, 103, 104, 107, 108, 109, 110, 111, 113, 114, 115, 117, 118, 120, 121, 122, 123, 124, 129, 137, 139, 145, 146, 148, 149, and 150. Some photographs depict slopes with fiber rolls at the toe of the slope but not across the face of a slope that was greater than 10 feet. This is a violation of the linear sediment control requirement. (PT Ex. 4, pp. 169-170.)

Linear controls provide erosion control by reducing slope length or steepness, as well as sediment control by capturing eroded sediment. (PT Ex. 3, p. 43.) Without the installation of the fiber roll across the face of the slope, the slope lengths have not been reduced, and storm water runoff has more distance to accelerate down the slope, increases potential erosion and sediment mobilization, and has a higher likelihood of overcoming the fiber roll at the toe of the slope. Some photographs depict orange-colored silt fences, another linear sediment control, that were improperly installed down the slope instead of horizontally across the contour of the slope. Instead of intercepting sheet flow runoff and mobilized sediment along the contour of a slope and reducing slope length, the silt fence effectively directs flow down the slope, concentrates the runoff in the direction of the silt fence, and increases the potential for erosion and sediment mobilization. (PT Ex. 5, p. 201.)

The Rincon ACLC Report concluded that evidence in the record, including the City's photographs, supported a finding that the violation occurred on all days alleged, other than September 16, October 13, October 20, November 19, and December 18, 2015, and January 4, January 20, January 27, January 29, January 30, February 17, February 26, March 4, March 7, and March 10, 2016. For those days, the report concluded either that the cited photos did not show slopes, or that the photos depicted "largely undisturbed" slopes for which linear sediment controls were not required. (Disch. Ex. 1, pp. 1:088-1:089; 1:090, 1:095-1:097.) The board finds that, as described below, photos for each of the days listed below depict slopes with evidence of previous disturbance without the linear sediment controls that should have been implemented after disturbance and exposure of erodible soils as required by the Construction Storm Water Permit. (PT Ex. 4, p. 170.)

September 16, 2015: City photograph Portola8AUG0004441.JPG shows slopes (near the Saddleback Ranch Road and Glenn Ranch Road entrance to the Site) without linear sediment controls. (PT Ex. 24, p. 1.)

September 17, 2015: City photographs Portola8AUG0004461.JPG, Portola8AUG0004464.JPG, Portola8AUG0004508.JPG, Portola8AUG0004509.JPG, and Portola8AUG0004510.JPG show slopes in the northwest portion of the Site without linear sediment controls. (PT Ex. 25, p. 3, 6, 49-51.)

October 13, 2015: City photograph Portola8AUG0004548.JPG shows the slopes (near the Saddleback Ranch Road and Glenn Ranch Road entrance to the Site) without linear sediment controls. (PT Ex. 37, p. 1.)

October 20, 2015: Dischargers photographs IMG\_1895.JPG and IMG\_1896.JPG show a slope in the upper right of the photograph without linear sediment controls. (PT Ex. 40, pp. 1-2.)

October 23, 2015: City photographs Portola8AUG0004550.JPG and



Portola8AUG0004553.JPG show a slope without linear sediment controls. (PT Ex. 42, pp. 1, 4.)

November 12, 2015: City photograph Portola8AUG0004560.JPG shows slopes on the right half of the photograph without linear sediment controls. (PT Ex. 52, p. 1.)

November 19, 2015: City photograph Portola8AUG0004569.JPG shows the slopes (near the Saddleback Ranch Road and Glenn Ranch Road entrance to the Site) in the lower left and center of the photograph without linear sediment controls. (PT Ex. 58, p. 1.)

November 24, 2015: City photograph Portola8AUG0004571.JPG show slopes on the Site without linear sediment controls. (PT Ex. 61.)

December 9, 2015: City photograph Portola8AUG0004601.JPG shows slopes without linear sediment controls. (PT Ex. 66, p. 5.) In addition to the photos cited by the Prosecution Team, Discharger photo IMG\_0526.JPG depicts the same location on the same date. (PT Ex. 79, pp. 4, 5, 12.)

December 10, 2015: Dischargers photograph IMG\_0546.JPG shows slopes without linear sediment controls. (PT Ex. 68, p. 1.)

December 16, 2015: City photograph Portola8AUG0004607.JPG shows slopes without linear sediment controls. (PT Ex. 71, p. 1.)

December 18, 2015: The City inspected the Site and reported that sediment controls were not being implemented and maintained on all significant slopes. (PT Ex. 92, p. 18.) City photograph Portola8AUG0004609.JPG shows a slope with erosion rills without linear sediment controls. (PT Ex. 74, p.1 .)

December 21, 2015: City photograph Portola8AUG0004610.JPG shows a multitude of slopes without linear sediment controls. (PT Ex. 75, p. 1.)

December 22, 2015: The City inspected the Site and reported that sediment controls were not being implemented and maintained on all significant slopes. (PT Ex. 92, p. 16.) Dischargers photograph IMG\_0713.JPG shows several slopes without linear sediment controls. Photograph IMG\_0715.JPG shows a slope in the center of the photograph without linear sediment controls. (PT Ex. 78, pp. 10-11.)

December 23, 2015: City photographs Portola8AUG0008030.JPG, Portola8AUG0008031.JPG, and Portola8AUG0008038.JPG show several slopes without linear sediment controls. (PT Ex. 79, pp. 4-5, 10.)

December 29, 2015: City photographs Portola8AUG0007622.JPG, Portola8AUG0007623.JPG, and Portola8AUG0007624.JPG show slopes in the center and right of the photograph without linear sediment controls. (PT Ex. 81, pp. 1-3.)

January 4, 2016: The City inspected the Site and reported that sediment controls were not being implemented and maintained on all significant slopes. (PT Ex. 92.) City photograph Portola8AUG0004614.JPG shows slopes (near the Saddleback Ranch Road and Glenn Ranch Road entrance to the Site) without linear sediment controls. (PT Ex. 85, p. 1.)

January 5, 2016: On January 21, 2016, the City issued NOV/Administrative

Compliance Order Citation No. 2258 to the Dischargers for violations observed during the storm event on January 5, 2016. Section 1 of the Citation noted a “[f]ailure to implement and/or inadequate implementation of erosion and sediment control (“Best Management Practices”) BMPs throughout the construction site including all slopes, pads, inactive areas, and all disturbed areas exposed to potential erosion from wind/rain.” Additionally, as section 1.b. of the Citation stated, “[s]ediment controls such as gravel bags, fiber rolls, silt fences, etc. must be implemented in accordance with the specification in the appropriate BMP Fact Sheet. For example, fiber rolls and gravel bag berms must be installed in accordance with the maximum spacing specified for certain slopes.” (PT Ex. 105, pp. 1-2.) Discharger photographs IMG\_1931.JPG and IMG\_1932.JPG show slopes without linear sediment controls. (PT Ex. 87, pp. 4-5.) City photographs Portola8AUG0009104.JPG, Portola8AUG0009105.JPG, Portola8AUG0009106.JPG, and Portola8AUG0009107.JPG show various slopes without linear sediment controls. (PT Ex. 86, pp. 1-4.)

January 6, 2016: City photographs Portola8AUG0004166.JPG and Portola8AUG0004167.JPG show various slopes without linear sediment controls after a rain event. (PT Ex. 88, pp. 1-2.) In addition to the photos cited by the Prosecution Team, Discharger photos IMG\_0953.JPG and IMG\_0976.JPG also show slopes without linear sediment controls. (PT Ex. 89, pp. 35-36.) IMG\_0976.JPG was taken several hours later than the two City photographs and at the same location. City photograph Portola8AUG0009119.JPG was taken at the same time as Portola 8AGU0004167.JPG with a different device, and depicts the same subject matter.

January 7, 2016: City photograph Portola8AUG0004657.JPG shows a slope without linear sediment controls. Photograph Portola8AUG0004658.JPG shows multiple slopes in the upper left half of the photograph without linear sediment controls. Photographs Portola8AUG0004660.JPG, Portola8AUG0004661.JPG, Portola8AUG0004662.JPG, Portola8AUG0004666.JPG, and Portola8AUG0004667.JPG show various slopes without linear sediment controls. Photograph Portola8AUG0004664.JPG shows a slope on the lower half of the photograph without linear sediment controls that discharges off-site into an unnamed tributary to Aliso Creek. (PT Ex. 90, pp. 35-36, 37-40, 42, 44-45.)

January 8, 2016: City photographs Portola8AUG0004674.JPG, Portola8AUG0007699.JPG, Portola8AUG0007700.JPG, Portola8AUG0007701.JPG and Portola8AUG0007703 show several slopes without linear sediment controls. (PT Ex. 91, pp. 5-7, 9.) In addition, Dudek photos IMG\_7744 (left side of photograph) and IMG\_7745 (left side of photograph) show slopes without linear sediment controls. (PT Ex. 425.)

January 11, 2016: The City inspected the Site and reported that sediment controls were not being implemented and maintained on all significant slopes. (PT Ex. 92, p. 6.) City photographs Portola8AUG0004676.JPG, Portola8AUG0004678.JPG,

Portola8AUG0004679.JPG, Portola8AUG0004680.JPG, Portola8AUG0004685.JPG, Portola8AUG0004686.JPG, Portola8AUG0007708.JPG, Portola8AUG0007710.JPG, Portola8AUG0007711.JPG, Portola8AUG0007744.JPG, Portola8AUG0007745.JPG, Portola8AUG0007746.JPG, Portola8AUG0007761.JPG, Portola8AUG0007762.JPG, Portola8AUG0007767.JPG, Portola8AUG0007768.JPG, Portola8AUG0007772.JPG, Portola8AUG0007774.JPG, and Portola8AUG0007775.JPG show various slopes without linear sediment controls.

(PT Ex. 93, pp. 4-8, 13-14, 20-23, 56-58, 73-74, 79-80, 84-87.)

January 12, 2016: City photographs Portola8AUG0004049.JPG,

Portola8AUG0004699.JPG, Portola8AUG0004700.JPG, Portola8AUG0004701.JPG, Portola8AUG0004703.JPG, Portola8AUG0004704.JPG, Portola8AUG0004705.JPG, Portola8AUG0004706.JPG, Portola8AUG0004707.JPG, Portola8AUG0004708.JPG, Portola8AUG0004709.JPG, Portola8AUG0004719.JPG, Portola8AUG0004729.JPG, Portola8AUG0004733.JPG, Portola8AUG0004734.JPG, Portola8AUG0008303.JPG, Portola8AUG0008306.JPG, Portola8AUG0008307.JPG, Portola8AUG0008309.JPG, Portola8AUG0008313.JPG, Portola8AUG0008316.JPG, Portola8AUG0008401.JPG, Portola8AUG0008402.JPG, Portola8AUG0008403.JPG, Portola8AUG0008404.JPG, Portola8AUG0008405.JPG, Portola8AUG0008406.JPG, Portola8AUG0008407.JPG, Portola8AUG0008408.JPG, Portola8AUG0008409.JPG, Portola8AUG0008410.JPG, and Portola8AUG0008429.JPG show various slopes without linear sediment controls.

(PT Ex. 95, pp. 3-12, 22, 32, 36-37, 105, 108-111, 115, 118, 203-212, 231.)

January 13, 2016: Dischargers photographs IMG\_1031.JPG and IMG\_1033.JPG show slopes without linear sediment controls. (PT Ex. 96, pp. 2-3.)

January 14, 2016: Dischargers photograph IMG\_1049.JPG shows several slopes in the upper left corner of the photograph without linear sediment controls. (PT Ex. 98, p. 1.) City photographs Portola8AUG0004750.JPG and Portola8AUG0004751.JPG show various slopes without linear sediment controls. (PT Ex. 97, pp 2-3.)

January 15, 2016: City photographs Portola8AUG0004754.JPG,

Portola8AUG0004755.JPG, Portola8AUG0004756.JPG, Portola8AUG0004757.JPG, Portola8AUG0004758.JPG, Portola8AUG0004759.JPG, Portola8AUG0004761.JPG, Portola8AUG0004765.JPG, Portola8AUG0004768.JPG, Portola8AUG0004769.JPG, Portola8AUG0004770.JPG, Portola8AUG0004771.JPG, Portola8AUG0004772.JPG,

Portola8AUG0004773.JPG, Portola8AUG0004776.JPG, Portola8AUG0004785.JPG, and Portola8AUG0004786.JPG show various slopes without linear sediment controls. Photograph Portola8AUG0004787.JPG shows a slope with a linear sediment control (straw waddle) installed at the toe of the slope; however, there are no linear sediment controls on the face of the slope as required by the Construction Storm Water Permit. (PT Ex. 99, pp. 1-6, 8, 12, 15-20, 23, 32-34.)

January 19, 2016: San Diego Water Board photographs 20160119\_115809.JPG, 20160119\_130311.JPG, 20160119\_130606.JPG, 20160119\_130608.JPG, and 20160119\_130851.JPG show slopes without linear sediment controls. Photographs 20160119\_130057.JPG and 20160119\_130102.JPG show a slope with a linear sediment control (straw waddle) installed at the toe of the slope; however, there are no linear sediment controls on the face of the slope as required by the Construction Storm Water Permit. Photograph 20160119\_130202.JPG shows a slope in the center of the photograph without linear sediment controls. (PT Ex. 102, pp. 41, 93-95, 99, 108-109, 112.) City photographs Portola8AUG0004789.JPG and Portola8AUG0004798 show slopes without linear sediment controls. (PT Ex. 103, pp. 1, 3.)

January 20, 2016: Dischargers photographs DJI\_0028.JPG (lower right half of the photograph) and DJI\_0029.JPG (center and lower left of the photograph) show slopes without linear sediment controls. (PT Ex. 104, pp. 9-10.)

January 21, 2016: Dischargers photographs IMG\_0002.JPG, IMG\_0003.JPG, and IMG\_0004.JPG show slopes without linear sediment controls. (PT Ex. 108, pp. 1-3.) City photograph Portola8AUG0004154.JPG shows a slope without linear sediment controls. (PT Ex. 107, p. 1.)

January 22, 2016: City photograph Portola8AUG0004800.JPG shows a slope with a linear sediment control (straw waddle) installed at the toe of the slope; however, there are no linear sediment controls on the face of the slope as required by the Construction Storm Water Permit. Photographs Portola8AUG0004801.JPG, Portola8AUG0004802.JPG, Portola8AUG0004806.JPG, Portola8AUG0004807.JPG, Portola8AUG0004809.JPG, Portola8AUG0004811.JPG, Portola8AUG0004819.JPG, and Portola8AUG0004838.JPG show various slopes without linear sediment controls. (PT Ex. 109, pp. 2-4, 8-11, 13, 21, 40.)

January 23, 2016: City photographs Portola8AUG0004051.JPG, Portola8AUG0004053.JPG, Portola8AUG0004054.JPG, Portola8AUG0004863.JPG, Portola8AUG0004864.JPG, and Portola8AUG0004867.JPG show various slopes without linear sediment controls. (PT Ex. 110, 1, 3-4, 28-29, 32.)

January 25, 2016: City photographs Portola8AUG0004195.JPG, Portola8AUG0004199.JPG, and Portola8AUG0004200.JPG show various slopes without linear sediment controls. (PT Ex. 111, pp. 6, 10-11.)

January 26, 2016: Dischargers photographs DJI\_0083.JPG and DJI\_0086.JPG show slopes without linear sediment controls. (PT Ex. 114, pp. 3, 5.) City photographs Portola8AUG0004877.JPG, Portola8AUG0004878.JPG, Portola8AUG0004889.JPG, and Portola8AUG0004890.JPG show various slopes without linear sediment controls. (PT Ex. 113, pp. 3-4, 10-11.)

January 27, 2016: City photographs Portola8AUG0004901.JPG, Portola8AUG0004903.JPG, Portola8AUG0004918.JPG, and Portola8AUG0008484.JPG show slopes without linear sediment controls except some orange silt fencing along the roadway. (PT Ex. 115, pp. 1-4.)

February 1, 2016: City photographs Portola8AUG0004979.JPG, Portola8AUG0004980.JPG, Portola8AUG0004983.JPG, Portola8AUG0004990.JPG, Portola8AUG0004993.JPG, Portola8AUG00008752, and Portola8AUG00008753 show various slopes without linear sediment controls, except for the orange silt fencing at the top of the slope. There should be additional linear sediment controls at the toe of the slope and at intervals pursuant to the Construction Storm Water Permit dependent upon slope length. (PT Ex. 120, pp. 1-2, 5, 12, 14.) City photograph Portola8AUG00008752 (iPhone 6, February 1, 12:02 p.m.) shows the same location as Portola8AUG00004983 (FinePix, February 1, 12:03 a.m.)

February 3, 2016: Dischargers photograph IMG\_1198.JPG shows various slopes without linear sediment controls. (PT Ex. 123, p. 3.) City photographs Portola8AUG0005016.JPG, Portola8AUG0005018.JPG, Portola8AUG0005019.JPG, and Portola8AUG0005020.JPG show various slopes without linear sediment controls. (PT Ex. 122, pp. 1, 3-5.)

February 26, 2016: City photographs Portola8AUG0005169.JPG, Portola8AUG0005170.JPG, Portola8AUG0005171.JPG, Portola8AUG0014633.JPG (device type FC300S; metadata and label both state 2/26/2016) shows various slopes without linear sediment controls. A few slopes have linear sediment controls in the form of orange silt fencing; however, they are insufficient because alone they fail to satisfy the requirements of the Construction Storm Water Permit's Table 1 of Attachment D. (PT Ex. 139, pp. 1-3, 14-15.)

March 4, 2016: City photographs Portola8AUG0005283.JPG, Portola8AUG0005294.JPG, and Portola8AUG0005295.JPG show various slopes without linear sediment controls. Again, some slopes have orange silt fencing, a linear sediment control; however, they are not in compliance with the Construction Storm Water Permit's Table 1 of Attachment D. (PT Ex. 145, pp. 7, 18-19.) In addition to the photos cited by the Prosecution Team, Portola8AUG0008717.JPG (taken in the same area as Portola8AUG0005294.JPG and Portola8AUG0005295.JPG, several hours later with a different camera), and Portola8AUG0008722.JPG through Portola8AUG0008725.JPG also show slopes without linear sediment controls (PT Ex. 145, pp. 51, 54-57); Portola8AUG0005467.JPG, taken by a FinePix camera with metadata stating it

was taken at 8:04 p.m., depicts the same subject matter as Portola8AUG0005283.JPG, taken by a SM-G900V with metadata stating that it was taken at 8:05 a.m.

March 7, 2016: City photographs Portola8AUG0005298.JPG, Portola8AUG0005299.JPG, Portola8AUG0005502.JPG, Portola8AUG0005512.JPG, Portola8AUG0008730.JPG, and Portola8AUG0008732.JPG show various slopes without linear sediment controls. Again, some slopes have orange silt fencing, a linear sediment control; however, they are not in compliance with the Construction Storm Water Permit's Table 1 of Attachment D. (PT Ex. 146, pp. 1-2, 7, 17, 22-24.)

March 10, 2016: City photographs Portola8AUG0005577.JPG, Portola8AUG0005579.JPG, Portola8AUG0005580.JPG, Portola8AUG0005581.JPG, and Portola8AUG0005583.JPG show various slopes without linear sediment controls. Again, some slopes have orange silt fencing, a linear sediment control; however, they are not in compliance with the Construction Storm Water Permit's Table 1 of Attachment D. (PT Ex. 148, pp. 1-7.)

March 11, 2016: City photographs Portola8AUG0005587.JPG, Portola8AUG0005589.JPG, Portola8AUG0005592.JPG, Portola8AUG0005597.JPG, Portola8AUG0005603.JPG, Portola8AUG0005606.JPG, and Portola8AUG0005625.JPG show various slopes without linear sediment controls. Photographs Portola8AUG0005619.JPG and Portola8AUG0005620.JPG show various slopes with linear sediment controls at the toe of the slope (orange silt fence) but no linear sediment controls on the face of the slope. Photograph Portola8AUG0005628.JPG shows slopes above the wall with linear sediment controls (orange silt fence) but no linear sediment controls on the face of the slope, while the slope below the wall (just the upper right of the center of the photograph) have no linear sediment controls. Photograph Portola8AUG0005629.JPG shows a slope on the left with linear sediment controls (orange silt fence) at the toe of the slope but no linear sediment controls on the face of the slope. Additionally, the slope below the wall (right of the photograph) has no linear sediment controls. Photograph Portola8AUG0005631.JPG shows slopes above the wall with linear sediment controls (orange silt fence) but no linear sediment controls on the face of the slope, while the slope below the wall (on the left of the photograph) has no linear sediment controls. Photograph Portola8AUG0005633.JPG shows various slopes (on the right of the photograph) without linear sediment controls. (PT Ex. 149, pp. 4, 6-9, 14, 20, 23, 36-37, 42, 45-51.)

March 14, 2016: San Diego Water Board photograph 20160314\_111958.JPG shows slopes without linear sediment controls. The large hill depicted in the photograph has exposed areas that require linear sediment controls by the Construction Storm Water Permit. Photographs 20160314\_121439.JPG, 20160314\_121724.JPG, and 20160314\_121919.JPG show slopes without linear

sediment controls. Photograph 20160314\_122714.JPG shows some slopes without linear sediment controls. Photograph 20160314\_122716.JPG shows slopes on the far left without linear sediment controls. Photographs 20160314\_123328.JPG, 20160314\_123613.JPG and 20160314\_123804.JPG show various slopes without linear sediment controls. Photographs 20160314\_123901.JPG and 20160314\_123928.JPG show slopes without linear sediment controls except for orange silt fencing at the toe of the slopes; however, there are no linear sediment controls on the face of the slope. Photographs 20160314\_124150.JPG, 20160314\_124320.JPG, 20160314\_125051.JPG, 20160314\_125104.JPG, and 20160314\_160800.JPG show various slopes without linear sediment controls. (PT Ex. 150, pp. 1, 10, 16, 21, 35-36, 43-45, 47-48, 51-52, 61-62, 80.)

### Violation No. 7

102. Section B.1.c. of Attachment D of the Construction Storm Water Permit requires Risk Level 2 dischargers to “[s]tore chemicals in watertight containers (with appropriate secondary containment to prevent any spillage or leakage) or in a storage shed (completely enclosed).” The Dischargers violated this requirement on the following **9 days**: August 20, 2015; October 7, 2015; November 3, 2015; November 23, 2015; November 30, 2015; December 10, 2015; January 19, 2016; March 14, 2016; and March 21, 2016. This finding is based on evidence in the record, including but not limited to evidence identified in this Order, City enforcement documents, Dischargers submissions, testimony of San Diego Water Board staff, and photographs in Prosecution Team Exhibits 16, 31, 46, 60, 62, 68, and 150.

The Rincon ACLC Report concluded that evidence in the record, including the City’s photographs, supported a finding that the violation occurred on all days alleged.

August 20, 2015: City photographs Portola8AUG0004372.JPG (oil in 18 gallon bucket without watertight lid and secondary containment, oily rag on ground without watertight container and secondary containment, there are oil drops on the ground, and vehicle coolant containers without secondary containment), Portola8AUG0004373.JPG (drip pan with oil does not have a watertight lid or secondary containment, and there are oil spills to the ground), Portola8AUG0004375.JPG (oily rag on the ground without watertight container and secondary containment), Portola8AUG0004376.JPG (oil in five gallon bucket without watertight lid and secondary containment, and there are oil drips on the ground), Portola8AUG0004377.JPG (six one-gallon watertight containers in an oil stained cardboard box without secondary containment),

Portola8AUG0004378.JPG (two 55-gallon drums without secondary containment, and there are oil drips on the ground and oil staining on wood pallet), and Portola8AUG0004379.JPG (five 55-gallon drums, two of which are exposed because their lids are not latched, fail to have secondary containment, there are oil drips on the ground, a box full of oily rags, containers, and trash that does not have a watertight container and secondary containment) display a failure to store chemicals in watertight containers with secondary containment. (PT Ex. 16, pp. 2-3, 5-9.)

October 7, 2015: The City issued Citation No. 2240 on October 9, 2015, for violations observed on October 7, 2015, stating that City staff observed a “lack of BMPs controlling adequately...drips and leaks and containment at the above ground DS [diesel] fuel storage tank, improper storage of hazardous materials, including oil, coolant and oil filters.” (PT Ex. 34.) City photographs Portola8AUG0009266.JPG (eight 55-gallon drums, two of which have open lids, without secondary containment), Portola8AUG0009267.JPG (close up of drums in Portola8AUG0009266.JPG), Portola8AUG0009268.JPG (55-gallon drum of antifreeze without secondary containment), and Portola8AUG0009269.JPG (close up of 55-gallon drum of antifreeze without secondary containment). (PT Ex. 31, pp. 9-12.)

November 3, 2015: Dischargers photograph IMG\_2180.JPG shows eight 55-gallon drums without secondary containment, three of which are not covered. Additionally, there is an oil stained cardboard box of oily rags without a watertight container and secondary containment. (PT Ex. 46, p. 3.)

November 23, 2015: Dischargers photograph IMG\_0164.JPG shows seven 55-gallon drums without secondary containment, six five-gallon buckets without watertight lids and secondary containment, an oil stained cardboard box, and two kiddy-pool drip pans. Photograph IMG\_0166.JPG shows another view of the items seen in photograph IMG\_0164.JPG. (PT Ex. 60, pp. 1-2.)

November 30, 2015: Dischargers photograph IMG\_0349.JPG shows eight 55-gallon drums, two of which are uncovered, without secondary containment; five five-gallon buckets without watertight lids and secondary containment; and an oil-stained cardboard box full of oily rags and containers without a watertight container and secondary containment. (PT Ex. 62, p. 1.) This photograph shows the same location as the November 23, 2015 photographs one week later without any evidence actions were taken to improve storage of chemicals.

December 10, 2015: Dischargers photograph IMG\_0549.JPG shows 11 55-gallon drums without secondary containment (three of which do not have lids); several oil stains on the ground, and oil-stained kiddy pools. (PT Ex. 68, p. 3.)

January 19, 2016: San Diego Water Board NOV No. R9-2016-0124 section 7.c. states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed unmaintained construction equipment and hazardous waste stored without secondary



containment on the site.” (PT Ex. 169a, p. 5.)

March 14, 2016: San Diego Water Board NOV No. R9-2016-0124 section 7.c. states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed unmaintained construction equipment and hazardous waste stored without secondary containment on the site.” (PT Ex. 169a, p. 5.) San Diego Water Board photograph 20160314\_125419.JPG shows two 55-gallon drums without secondary containment. Photograph 20160314\_125422.JPG shows seven 55-gallon drums and a larger yellow drum without secondary containment. (PT Ex. 150, pp. 68-69.)

March 21, 2016: San Diego Water Board NOV No. R9-2016-0124 section 7.c. states that “[d]uring the January 19, 2016, March 14, 2016, and March 21, 2016, inspections San Diego Water Board inspectors observed unmaintained construction equipment and hazardous waste stored without secondary containment on the site.” (PT Ex. 169a, p. 5.)

#### **Violation No. 8**

103. Section B.2.i. of Attachment D of the Construction Storm Water Permit requires Risk Level 2 dischargers to “[e]nsure the containment of concrete washout areas and other washout areas that may contain additional pollutants so there is no discharge into the underlying soil and onto the surrounding areas.” The Dischargers violated this requirement on the following **five days**: January 5, 2016; February 8, 2016; March 21, 2016; March 30, 2016 and March 31, 2016. This finding is based on evidence in the record, including but not limited to evidence identified in this Order, City enforcement documents, Dischargers’ submissions, testimony of San Diego Water Board staff, and photographs in Prosecution Team Exhibits 159, 167, and 168.

The Rincon ACLC Report concluded that evidence in the record, including the City’s photographs, supported a finding that the violation occurred on all days alleged.

January 5, 2016: On January 21, 2016, the City issued NOV/Administrative Compliance Order Citation No. 2258 to the Dischargers for violations observed on January 5, 2016. Citation section 3 noted that “[t]emporary concrete washout facilities are implemented improperly, are not being inspected, managed, and maintained appropriately to prevent prohibited discharges. Temporary concrete washout facilities were observed to be constructed inappropriately to contain waste materials and prevent discharges.” (PT Ex. 105, p. 3.)

February 8, 2016: On February 10, 2016, the City issued a Cease and Desist Order and Notice to Abate Nuisances, which included a matrix of violations and

their status. Corrective Action 3S noted that on February 8, 2016, “[a] discharge of concrete waste/washout material was observed on the soil directly adjacent to the concrete washout bin.” (PT Ex. 131, p. 4.)

March 21, 2016: San Diego Water Board photographs 20160321\_112940.JPG, 20160321\_113018.JPG, 20160321\_113020.JPG, 20160321\_113032.JPG, and 20160321\_113103.JPG show dried concrete washout waste on the ground as a result of inadequate containment at the concrete washout area. (PT Ex. 159)

March 30, 2016: City photograph Portola8AUG0005853.JPG shows a large discharge of waste concrete to the ground in violation of the Construction Storm Water Permit. (PT Ex. 167, p. 1.)

March 31, 2016: City photograph Portola8AUG0009292.JPG shows a large discharge of waste concrete to the ground in violation of the Construction Storm Water Permit. (PT Ex. 168, p. 1.)

104. With regard to the violations identified above, the San Diego Water Board independently evaluated the evidence in the record and finds that substantial evidence in the record supports each violation assessed in this Order.

#### **LIABILITIES UNDER WATER CODE SECTION 13385**

105. Water Code section 13385 states in relevant part:
- (a) Any person who violates any of the following shall be liable civilly in accordance with this section:
    - (1) A waste discharge requirement . . . issued pursuant to this chapter . . .
    - (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.
106. The Construction Storm Water Permit was adopted by the State Water Resources Control Board on September 2, 2009, pursuant to Clean Water Act sections 201, 208(b), 302, 303(b), 304, 306, 307, 402, and 403. Section IV(A)(1) of the Construction Storm Water Permit states in part: “Any permit noncompliance constitutes a violation of the CWA and Porter-Cologne Water Quality Control Act and is grounds for enforcement action and/or removal from [Permit] coverage.”
107. The Dischargers’ failure to implement the elements of the Construction Storm Water Permit described above violates the Construction Storm Water Permit and therefore violates the Clean Water Act and the Water Code. Water Code section 13385 authorizes the imposition of administrative civil liability for such violations.
108. Water Code section 13385, states in relevant part:

- (a) 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.
109. The Dischargers violated provisions of law for which the San Diego Water Board may impose civil liability pursuant to section 13385 of the Water Code. The maximum liability that the San Diego Water Board may assess pursuant to Water Code section 13385, subdivision (c), for all the violations established is \$64,492,200.
110. Water Code section 13385, subdivision (e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. As described in Attachment 1, the penalty amount exceeds the economic benefit or savings from the violations by at least 10%. The minimum liability in this matter is between zero and \$821,983. The total assessed liability would be the same using either the Dischargers' or the Prosecution Team's calculation of estimated benefit or savings.
111. Water Code section 13385, subdivision (e), specifies the factors that the San Diego Water Board is required to consider in establishing the amount of discretionary liability for the violations. The Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and with respect to the violator, the ability to pay, the effect on the Dischargers' ability to continue in business, any voluntary cleanup efforts undertaken, prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
112. The 2010 Enforcement Policy establishes a methodology for assessing administrative civil liability use of which is intended to create an enforcement program that is "fair, firm, and consistent in taking enforcement actions throughout the State, while recognizing the unique facts of each case." (PT Ex. 175, p. 7.) The use of this methodology addresses the factors that are required to

be considered when a regional water board imposes a civil liability as outlined in Water Code section 13385, subdivision (e). The civil liability ordered in this matter was derived from the use of the liability calculation methodology, as explained in detail in Attachment 1, including tables 1 and 2.

113. The liability calculation methodology analysis described in Attachment 1 and incorporated in full in this Order is consistent with the evidence and the circumstances<sup>26</sup> of this case, as independently evaluated by the San Diego Water Board, and supports administrative civil liability in the amount of \$6,660,503, including staff costs. Considering the record as a whole in light of the factors set forth in Water Code section 13385, subdivision (e), a \$5,280,204 penalty for the discharge violations and a \$1,283,705 penalty for the non-discharge violations is appropriate in light of the egregious nature of these violations and the Dischargers' conduct, as reflected by the numerous and escalating enforcement actions the City and board needed to issue over several months of the rainy season before the Dischargers were compelled to implement the corrective actions necessary to bring the site into compliance. A further downward adjustment from the statutory maximum is not warranted. (*State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 531-532.)

### **REGULATORY CONSIDERATIONS**

114. Notwithstanding issuance of this Order, the San Diego Water Board retains the authority to assess additional liabilities for violations of the requirements of the Construction Storm Water Permit for which liabilities have not yet been assessed or for violations that may subsequently occur.
115. This is an action to enforce the laws and regulations administered by the San Diego Water Board. The method of compliance with this enforcement action consists entirely of payment of an administrative liability. Issuance of this Order is not subject to the provisions of the California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq.) as it will not result in a direct or reasonably foreseeable indirect physical change in the environment, and it is not considered a "project" (Pub. Resources Code, §§ 21065, 21080(a); Cal. Code Regs., tit. 14, §§ 15060(c)(2), (3); 15378(a)). Issuance of this Order is also exempt from the

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<sup>26</sup> "Circumstances" refers to those set forth in Water Code section 13385, i.e., "the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require."

provisions of CEQA in accordance with section 15061(b)(3) because it can be seen with certainty that the project will not have a significant effect on the environment and in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations as an enforcement action by a regulatory agency and there are no exceptions that would preclude the use of this exemption.

116. Any person aggrieved by this action may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: [http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitions/water_quality) or will be provided upon request.
117. Fulfillment of Dischargers' obligations under this Order constitutes full and final satisfaction of Administrative Civil Liability Complaint No. R9-2020-0006.
118. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for collection or other enforcement if Dischargers fail to comply with payment of the administrative civil liability.

**IT IS HEREBY ORDERED**, pursuant to Water Code section 13385, that civil liability be imposed upon Dischargers in the amount of \$6,660,503 for the above violations of the Construction Storm Water Permit. Dischargers shall pay the total administrative civil liability amount within thirty (30) days of adoption of this Order by the San Diego Water Board. Payment shall be made by check to the “State Water Board Cleanup and Abatement Account” and a copy e-mailed to Prosecution Team contact Frank Melbourn at [frank.melbourn@waterboards.ca.gov](mailto:frank.melbourn@waterboards.ca.gov). Dischargers shall include the number of this Order (R9-2022-0094) on the check and send it to:

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

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an order imposing civil liability issued by the California Regional Water Quality Control Board, San Diego Region on June 8, 2022.

**TENTATIVE**

DAVID W. GIBSON  
Executive Officer

Attachments:

1. Liability Methodology Decisions for Order No. R9-2022-0094, including Table 1 and Table 2
2. Photo Comparison