ATTACHMENT 1
Tentative Order No. R9-2022-0094
Liability Methodology Decisions

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy) establishes a ten-step methodology for determining administrative civil liability (ACL) by addressing all of the factors that are required to be considered under California Water Code (Water Code) section 13385, subdivision (e). Since the violations occurred prior to the State Water Board's most recent amendments to the Enforcement Policy, which became effective on October 5, 2017, the 2010 version of the Enforcement Policy was in effect on the dates of the violation at issue and, therefore, is the applicable policy. (See Prosecution Team Exhibit (PT Ex.) 175, 2010 Enforcement Policy.) Amendments in the 2017 Enforcement Policy (PT Ex. 176) that are mere clarifications may be used to assist in interpreting the 2010 Enforcement Policy.[1]

The ten-step methodology used to calculate the liability for each of the eight violations at the Portola Center South Construction site (Site) is discussed below, as is the basis for assessing each score, and the total ACL of **$6,660,503** against the Dischargers. The individual and total liabilities are summarized in **Table 1**, Total Assessed Liability. The final total liability and scores for each violation are summarized in **Table 2,** Liability Calculator.

[1] The Prosecution Team's rebuttal brief cited the Initial Statement of Reasons for the 2017 Enforcement Policy update but did not include it in the record.

I. FINDINGS APPLICABLE TO ALL VIOLATIONS

This section includes findings applicable to all violations, and addresses why the San Diego Water Board found unpersuasive some of the conclusions in Dischargers' Exhibit 1, *Rincon Consultants, Inc. ACLC Technical Support, Portola South* (Dec. 22, 2020) (Rincon ACLC Report).[2]

POTENTIAL FOR HARM
(Violation No. 1: Step 1, Factor 1; Non-discharge Violation Nos. 2-8: Step 3)

Most non-discharge violations present a moderate potential for harm. (PT Ex. 175, p. 21.)

For discharge violations, the harm or potential harm to beneficial uses "is focused on impacts or the threat of impacts to beneficial uses in specific receiving waters …," that is, "harm to beneficial uses in the affected receiving water body that may result from exposure to the pollutants or contaminant in the discharge … ." (PT Ex. 176, p. 17.[3]) The board can consider actual or potential harm for discharge violations (Step 1, Factor 1) because data are often lacking, and in order to remove any disincentive to monitoring. (PT Ex. 176, p. 16; Chiara Clemente testimony, Hearing Transcript, Jan. 10, 2022, p. 172.)

The Clean Water Act and state law require protection of any uses designated in the Water Quality Control Plan for the San Diego Basin (Basin Plan), even where a waterbody is modified or severely degraded or is used to convey urban stormwater. (33 U.S.C.A. § 1313(d); 40 C.F.R. §§ 130.3, 131.3(i); *see*, *Natural Resources Defense Council, Inc. v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1200.) Beneficial uses may include probable or potential uses. (See generally *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, as modified on denial of reh'g (Jan. 20, 2011).) De-designating a Clean Water Act use requires a rigorous regulatory process of determining the use has not existed since November 28, 1975, or water quality has not supported the use since that time. (40 C.F.R. Part 130.) The State Water Board and U.S. EPA must approve the de-designation. (*Ibid.*; Wat. Code, § 13245.) Disregarding the designated uses of Aliso Creek and its tributaries in determining the potential for harm is inconsistent with these principles.

---

[2] The Rincon ACLC Report purported to use a numerical analysis as part of the review of photographs cited to support alleged violations. (*Id,* pp. 1:060, 1:070, 1:080, 1:087.) The report recommends finding that no violation occurred on days for which Rincon concluded that none of the photographs depict a permit violation. Rincon did not draw any conclusions from the percentage of total photographs that did show a violation (the numerical analysis) and we cannot determine why those percentages were calculated or stated in the report.

[3] Provisions of the 2017 Enforcement Policy that merely clarify prior language are relevant to interpreting the language of the 2010 Enforcement Policy.

Under the Construction General Storm Water Permit, Risk Level 2 sites are required to take additional measures to prevent erosion and to control sediment transport off site because these sites represent an increased risk to water quality. The absence of adequate erosion and sediment control BMPs when the majority of the Site was exposed and rain was expected created a substantial threat of sediment discharges and at least four days of actual sediment discharges.

Aliso Creek is designated as an impaired water body for Benthic Community Effects, Indicator Bacteria, Malathion, Nitrogen, Phosphorus, Selenium and Toxicity pursuant to Clean Water Act section 303(d), suggesting it lacks assimilative capacity for these pollutants or for stressors or pollutants that have deleterious impacts on benthic organisms. Aliso Creek is severely degraded. Sediment in receiving waters can reduce sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, and transport construction-related pollutants such as nutrients, metals, oils, and grease. (Ruling on Second Req. for Official Notice (Jan. 11, 2022), ¶¶ 1(f), 1(h) [findings 39, 43], 1(j), 2(a) and 2(b).) In this case, large volumes of sediment and sediment-laden stormwater discharged from the Site. Fine sediments associated with construction stormwater discharges "do not settle easily using conventional measures for sediment control (i.e., sediment basins). Given their long settling time, dislodging these soils results in a significant risk that fine particles will be released into surface waters and cause unacceptable downstream impacts." (*Id.*, ¶ 1(j).) Storm water runoff containing sediment from the Site had the potential to transport other pollutants, such as nutrients (phosphorus and nitrogen), pesticides, metals, and oil and grease, potentially further degrading the already impaired waters of Aliso Creek. Many of these constituents can be toxic to aquatic life in minute amounts. (PT Ex. 3, pp. 12, 14; PT Ex. 5, pp. 18, 94-98; Basin Plan, pp. 3-33 [40 C.F.R. §§ 131.36, 131.38 establish water quality objectives]; see also PT Ex. 4 (Construction Storm Water Permit).)

Site photographs document offsite discharges of sediment-laden storm water and sediment loads that have the potential to smother benthic organisms as well as aquatic habitat, and transport other pollutants that were bound to sediment downstream. (Clemente testimony, Hearing Transcript, Jan. 10, 2022, pp. 173-174; PT Ex. 22, pp. 13-32; PT. Ex. 25, pp. 78-80, 91, 93-94, 180; PT. Ex. 80, p. 1; PT Ex. 86, pp. 6-26; PT Ex. 88, pp. 29-39; PT Ex. 95, p. 38, 41, 213-219, 313, 320-324; PT Ex. 313, pp. 23, 29, 30; PT Ex. 347, pp. 1-4; PT Ex. 423, pp. 4-5.) Photographs supporting Violation No. 3 document fluid leaks as early as August 20 and August 31, 2015.

In addition:

(a) **Potential for Harm: Violation Nos. 1, 2, 4, 5, and 6**. Rincon's conclusion that the Potential for Harm to Beneficial Uses was negligible to minor is unpersuasive. Among other things:

(1) The Rincon ACLC Report concludes that most of the sediment discharged from the Site did not reach a water of the United States. (Dischargers' Exhibit

(Disch. Ex.) 1, pp. 1:048-1:049.) The report considered the beneficial uses of Aliso Creek, and downplayed the potential for harm to beneficial uses of other waters, including the unnamed tributaries and the mitigation project ponds, wetlands, and waters that were created or enhanced to mitigate for impacts caused by the Site to beneficial uses of waters of the United States. The mitigation areas include compensatory wetlands constructed on the SCE Vallejo property and enhancement of existing jurisdictional waters of the United States. (PT Ex. 313, pp. 15-17, 27-31; PT Ex. 339.) These are waters of the state, and waters of the United States under the pre-2015 regulatory regime and the 2015 Rule. In addition, the report disregarded discharges from Areas A, B, and C through the municipal separate storm sewer system (MS4) (Ryan Thacher testimony, Hearing Transcript, Jan. 12, 2022, pp. 200-202, 208), even though these were point source discharges to impaired waters of the United States.[4] Rincon also disregarded all discharges from Area D (*Ibid.*), and thus the potential for discharges from this area, despite evidence that actual discharges occurred there on January 5, 2015. (See PT Ex. 105 (City Citation 2258), p. 5; PT Ex. 346 (IMG-3964.MOV); Ex. 359 (Tom Bistline photos), p. 9.)

(2) The Rincon ACLC Report considered only Drainage Area E because it was "the only discharge location known to have contributed sediment to Aliso Creek." (Disch. Ex. 1, pp. 1:038, 1:046 ["sensitive receptors" were limited to "beneficial uses of Aliso Creek."].) Even putting aside potential harm to the wetlands and unnamed tributaries, the report apparently assumes that the large sediment deposits in other drainages remained in place during subsequent rain or wind events or lacked the potential to discharge downstream. This is inconsistent with documented sediment accumulation downstream of the Site boundary as a result of the discharge events, and aerial photographs of Drainage Areas E and G showing reduced footprints of accumulated sediment by June 2018. (Disch. Ex. 1, p. 1:045.) The reduced footprints indicate accumulated sediment was likely re-mobilized and discharged downstream to Aliso Creek in subsequent storm events.

(3) Soil loss was calculated in the report using the Revised Universal Soil Loss Equation (RUSLE) to determine if Site discharges caused or contributed to harm to beneficial uses in Aliso Creek, but only for Drainage Area E, which comprises 20.2 acres (Disch. Ex. 1, p. 1:038), or 21% of the approximately

[4] Like Aliso Creek, Serrano Creek is listed for Benthic Community Effects and Toxicity, among other things. (Ruling on Req. for Official Notice (Dec. 8, 2021), ¶ 21 (p. 1 of 303(d) listing).

95-acre Site.[5] To determine the values of the factors used in the RUSLE, the report used February 2016 aerial imagery for the December and January events and March 2015 aerials for the September event. As a result, the calculations both overestimated sediment detention pond area for December and January and underestimated the disturbed area for September. (Disch. Ex. 1, pp. 1:039, 1:053; see, e.g., PT Ex. 229, p. 5 [noting six new sediment traps on January 28, 2016]; Prosecution Team Rebuttal Exhibit (Rebuttal Ex.) 4, ¶ 12 [new desilters installed on October 4, 2015 and mid-January 2016].) The cover-management (C) and support practice (P) factors used in the RUSLE were lowered to less than 1 based on assumed vegetative cover and BMP effectiveness, resulting in a reduction in the estimated soil loss. Even based on these faulty assumptions, the report concluded that there was 388 tons of soil loss during the four storm events from Drainage Area E versus 125 tons of soil loss from a pre-graded Drainage Area E, for a difference between pre- and post-graded soil loss of 263 tons, or 13 tons per acre. (Disch. Ex. 1, p. 1:041.) For the approximately 95-acre site, the difference between pre- and post-graded soil loss would be over 1,200 tons of additional soil loss from the four unauthorized discharge days.

(4) The report calculated the peak discharge from the Site and peak flows within Aliso Creek from upstream of the Site to estimate the capacity of Aliso Creek to dilute the discharges that reached Aliso Creek. (Disch. Ex. 1, p. 1:041.) The reliance on dilution ignores the significant effects of sediment impacts in all areas above the point where the calculated dilution occurs. The focus on the Site's contribution to the overall sediment load from the upper watershed also ignores potential impacts of significant sediment slugs on downstream locations (Frank Melbourn testimony, Hearing Transcript, Jan. 10, 2022, p. 213), and from the potential remobilization of the augmented sediment loads deposited above the point where the calculated dilution occurs.

(5) Discharges above the Construction Storm Water Permit's 250 NTU numeric action level is evidence that erosion and sediment control practices failed to meet the BAT/BCT standard. (PT Ex. 4, pp. 17-21.) The Rincon ACLC Report downplays significant turbidity exceedances at the Stream 6 Pond discharge (261 NTU daily average, which was reduced to 40 NTU the next day after BMP reinforcement at Old Aliso Road). (Disch. Ex. 1, p. 1:044, Table 16.) These exceedances occurred because perimeter control BMPs failed due to the absence of interior erosion and sediment control BMPs. Turbidity measurements during the January 5 storm were as high as 352 NTU at the restoration pond, and 1,007 NTU to 1,305 NTU at Drainage Area E. (Disch.

[5] Rincon apparently assumed the Site was only 83 acres in size. (See Disch. Ex. 1, p. 1:039.)

Ex. 1, p. 1:045, Table 18.) The water quality objective is 20 NTU, not to be exceeded more than 10% of the time. The State Water Board found it obvious that "a discharge up to, but not exceeding, the turbidity receiving water monitoring trigger of 500 NTU may still cause or contribute to the exceedance of the 20 NTU standard." (PT Ex. 4, pp. 17-18.) The turbidity objectives protect WARM and WILD uses. The rationale for the objectives includes the following statement: "By interfering with the penetration of light, turbidity can adversely affect photosynthesis which aquatic organisms depend upon for survival. High concentrations of particulate matter that produce turbidity can be directly lethal to aquatic life." (Basin Plan, p. 3-34.)

(6) Based on the turbidity data review, the Rincon ACLC Report concluded that the mitigation ponds and drainage topography, combined, were effective in reducing the sediment loading to Aliso Creek. (Disch. Ex. 1, p. 1:044) The report did not estimate how much sediment was retained versus discharged from the Site. The apparent conclusion of the report is that the reduction in sediment loading equates to a significant reduction in actual or potential harm to beneficial uses of Aliso Creek without adequately considering the potential harm to the beneficial uses of the mitigation ponds or "drainage topography" (i.e., tributaries to Aliso Creek), or the potential harm to beneficial uses of Aliso Creek caused by the sediment laden stormwater and sediment discharges that did reach Aliso Creek. (See PT Ex. 22, pp. 26-27, 30-32; PT Ex. 86, pp. 8-13.)

(7) Finally, the Rincon ACLC Report concludes that the potential for harm was very low in the context of the mass of sediment transported down Aliso Creek on an annual basis. (Disch. Ex. 1, p. 1:056.) Based on this conclusion, the report also concluded the potential for harm from Violations 2, 4, 5, and 6 should also be considered minor. However, the Enforcement Policy also requires consideration of acute or short-term impacts.

(b) **Potential for Harm: Violation Nos. 3, 7, and 8.** Rincon's conclusion that the Potential for Harm to Beneficial Uses (Factor 1, Step 1) was minor is unpersuasive. Among other things:

(1) The Rincon ACLC Report downplayed the potential for harm related to management and storage of construction-related hazardous materials by limiting the analysis to whether or not the photographs were taken within 48 hours of a predicted rain event (Disch. Ex. 1, pp. 1:056-1:058), implicitly assuming that it was possible to develop and implement a REAP within 48 hours before any rain event. The permit requirements apply at all times because the potential for rain always exists. (PT Ex. 4, p. 62.) The mass-graded condition of the Site did not allow time before a rain event to prepare and adequately implement a REAP. (See Bistline testimony, Hearing

Transcript, Jan. 10, 2022, pp. 99-100.) In addition to addressing ongoing vehicle and container leaks, preventing spills, and storing hazardous materials properly, the Dischargers would have had to prevent stained soils from coming into contact with stormwater before each rain event to prevent the release of hazardous chemicals in stormwater runoff.

(2) The report downplayed the potential for harm to beneficial uses from the hazardous materials that may have been released from the Site under the assumption that hazardous materials would be rapidly diluted in stormwater runoff. (Disch. Ex. 1, pp. 1:056-1:058.) The hazardous materials the Dischargers anticipated using at the Site, as listed in Appendix G of the original SWPPP, contain chemicals such as heavy metals, pesticides, petroleum hydrocarbons, volatile organic compounds (VOCs), and semi-volatile organic compounds (SVOCs) including polycyclic aromatic hydrocarbons (PAHs). As stated above, these chemicals can have toxic effects on sensitive receptors in minute concentrations. In addition, rain is not the only transport mechanism for the offsite discharge of hazardous materials; this argument ignores the many citations for failure to prevent vehicles from tracking sediment offsite. (PT Ex. 92 [numerous references to track out onto Glenn Ranch Road].[6])

(3) Finally, the Rincon ACLC Report limited the analysis of potential for harm to the beneficial uses of Aliso Creek (Disch. Ex. 1, pp. 1:056-1:058.) without adequately considering beneficial uses in other waters of the United States.

DEVIATION FROM REQUIREMENT

The Rincon ACLC Report conflates Deviation from Requirement with Culpability. Culpability, discussed below, considers whether violations were excusable, accidental, negligent, or intentional. Deviation from Requirement considers the extent to which the discharger achieved the purpose of a given requirement in fact, without regard to whether or not the discharger acted reasonably or what similarly situated dischargers might do or whether the discharger was trying in good faith to comply. Where a permit requirement applies at all times, a discharger does not achieve the purpose of that requirement merely because it happens not to rain or there is no wind advisory on a given day. BMPs that are inadequately sized, not properly maintained, or implemented ineffectively may reduce erosion, sedimentation, or runoff to some extent, thereby reducing the Deviation from Requirement score. Improperly constructed BMPs may instead increase the score when they fail. Perimeter controls should be secondary to erosion controls, and are intended to capture eroded soils when erosion controls are ineffective. (PT Ex. 4, pp. 32-33.) Relying on perimeter control BMPs alone does not

[6] Although not cited in the Complaint, off-site tracking violates Attachment D, section 1.e of the Construction Storm Water Permit.

minimize the deviation from interior control requirements where, as here, the lack of interior erosion and sediment control BMPs is so pervasive that stormwater runoff overwhelms properly planned and constructed perimeter control BMPs. (See, e.g., PT Ex. 216, p. 3; see also Rebuttal Ex. 4.)

For Violations 1, 2, 4, 5, and 6, the Rincon ACLC Report concludes that Deviation from Requirement and Culpability scores should be lowered because of the generally low erosional risk from the Site, in some cases citing runoff control, stabilization, and perimeter controls. The extensive documentation of the inadequacy of such controls to meet City or Water Board requirements, the observed sediment discharges, the rapid increase in exposed areas without concomitant BMP implementation, the exceedance of turbidity NALs, the sediment discharges to the mitigation area, and the consultants' inability to prepare or implement adequate REAPs within 24-48 hours, all outweigh Rincon's conclusions.

While the Construction Storm Water Permit and City grading permit did not explicitly prohibit mass grading during the rainy season, they required all grading to comply with applicable municipal ordinances, permit conditions, and other legal requirements to control runoff. The Dischargers did not comply with those requirements.

CULPABILITY

"The first step [in assessing culpability] is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances." (PT Ex. 175, p. 22) The Construction Storm Water Permit sets the applicable performance standards in this case, including the general BAT/BCT standard and the specific requirements of Attachment D related to erosion and sediment control, vehicle fluid BMPs, materials storage, and construction debris. For erosion control, the SWPPP listed Scheduling (EC-1), Preservation of Existing Vegetation (EC-2), Hydraulic Mulch (EC-3), Hydroseeding (EC-4), Soil Binder (EC-5), Geotextile Mats (EC-7), Wood Mulching (EC-8), Earth Dikes and Drainage Swales (EC-9), Velocity Dissipation Device (EC-10), and Slope Drains (EC-11) as the BMPs that would be implemented during grading. (PT Ex. 5, pp. 5, 21-23, 100-123, 128-161.) For sediment control, the SWPPP listed Silt Fence (SE-1), Sediment Basin (SE-2), Check Dams (SE-4), Fiber Rolls (SE-5), Gravel Bag Berms (SE-6), Street Sweeping and Vacuuming (SE-7), and Storm Drain Inlet Protection (SE-10) as the BMPs that would be implemented during grading. (PT Ex. 5, 24-26, 167-221.)

Scheduling (EC-1) is the development of a written plan that includes sequencing of construction activities and the implementation of BMPs such as erosion control and sediment control while taking local climate (rainfall, wind, etc.) into consideration. The purpose of the scheduling BMP is to reduce the amount and duration of soil exposed to erosion by wind, rain, runoff, and vehicle tracking. (PT Ex. 5, p. 100.) The EC-1 Fact Sheet states that proper sequencing of construction activities to reduce erosion

potential should be incorporated into the schedule of every construction project especially during the rainy season; construction activities should avoid the rainy season and schedule major grading operations during dry months when practical, and allow enough time before rainfall begins to stabilize the soil or install sediment traps; and the construction schedule should be adjusted when rainfall is predicted, to allow the implementation of soil stabilization and sediment treatment controls on all disturbed areas prior to the onset of rain. (*Id.,* pp. 100-101.)

The Dischargers should have known that extensive interior BMP work would be necessary because of the Site's size, slope, highly erosive soils, proximity to Aliso Creek, and the significant run-on from upgradient areas. (Melbourn testimony, Hearing Transcript, Jan. 10, 2022, p. 203; Laurie Walsh testimony, Hearing Transcript, Jan. 10, 2022, pp. 82-86.) The Dischargers' failure to meet the standard of care is demonstrated by actions and failures to act leading up to the violations, and actions and failures to act after the violations were cited by the City and San Diego Water Board staff. Reasonable and prudent persons do not violate permit requirements simply because rain or wind is not in the forecast, where the requirement is not contingent on weather; or where material storage areas are not in riparian areas; or because the project schedule or top-to-bottom design made stormwater controls impracticable or difficult. In this case, the Dischargers continued to violate the permit for many months after exceedances of turbidity numeric action levels and daily or weekly citations and violation notices from the public agency charged with overseeing compliance. BMPs were not installed properly even after inadequate BMPs caused four high-volume, sediment-laden discharges. The Dischargers' actions were not consistent with prevailing industry standards as observed by San Diego Water Board staff, City staff, Tom Bistline, and even their own QSP and general contractor. (See "Chronology" in the Order; Melbourn testimony, Hearing Transcript, Jan. 10, 2022, pp. 220-244, 211; Walsh testimony, Hearing Transcript, Jan. 10, 2022, pp. 82-83, 87-88.[7]) Even if the Dischargers' conduct were the prevailing industry standard, such evidence would underscore the need for the Water Boards to step up the enforcement program in order to deter permit violations, not to reduce the liability in this case.

The Culpability analysis in the Rincon ACLC Report was based on whether rain or wind were predicted or actually occurred, whether similarly situated dischargers would consider weather conditions to excuse permit compliance, and whether alternate BMPs or other Site conditions served a similar function as the BMPs in question. The first two factors are inconsistent with the Enforcement Policy for Violation Nos. 2 and 4, and the third addresses Deviation from Requirement, not Culpability. Rincon's approach would also allow dischargers to mass-grade a site in a manner that makes timely implementation of erosion and sediment control BMPs impracticable and then point to

[7] Even if hearsay, Walsh's recitation of Ryan's impressions corroborate other evidence in the record.

that very impracticability as the basis to minimize the discharger's culpability. This approach is inconsistent with the Construction Storm Water Permit and the purpose of the Enforcement Policy.

The Dischargers' attempts to portray themselves or their general contractor as inexperienced builders at the mercy of a rogue grading contractor or QSP are not persuasive. "Baldwin & Sons" and Sunrise Pacific Construction, Inc. hold themselves out as having generations of experience building residential subdivisions. (See, e.g., PT Ex. 315[8]-316.) Randall Bone, Gary Berger, and Jose Capati have extensive experience in the construction industry. (Randall Bone testimony, Hearing Transcript, Jan. 13, 2022, pp. 3-5, 13-14.)

The repeated violations of the permit, City requirements, and City Stop Work Orders and the magnitude of those violations makes this Site unique in this board's experience. The Prosecution Team alleged that the Dischargers intentionally violated the Construction Storm Water Permit and never intended to comply with it, and rushed the grading schedule to meet the GMAX contract requirements. The board makes no findings about why the Dischargers made the decisions they did. The facts of this case support high Culpability scores without drawing such inferences.

CLEANUP AND COOPERATION

The Enforcement Policy's "cleanup and cooperation" factor relates to returning the site to compliance and correcting environmental damage. The litigation related to the Prosecution Team's investigative subpoenas is not evidence of a lack of cleanup and cooperation. The unusual level of oversight and enforcement by the City and San Diego Water Board staff, the high incidence of repeat violations despite written and verbal warnings, and the length of time it took the Dischargers to correct violations, are evidence of a lack of cleanup and cooperation. (In addition to the photographs of violations during the Violation Period, see Walsh testimony, Hearing Transcript, Jan. 12, 2022, p. 97 [erosion and sediment control BMPs completed after Landsea "took control of the site" later in 2016]; PT Ex. 324 [Landsea "took control" on August 12, 2016][9]; Rebuttal Ex. 4, ¶¶ 9, 11, 12, 14, 17; PT Ex. 324, pp. 651-661 [hearsay statements of Geosyntec corroborating that BMPs still missing or in a state of disrepair months after the Violation Period]; PT Ex. 101, pp. 11-17, 18-21; PT Ex. 169a, pp. 1-7.)[10]

---

[8] This screenshot was taken in 2018, after Landsea acquired Portola South. "The Oaks at Portola Hills" apparently refers to Portola Northwest but the description (930 residential units) matches the entire Portola Center. (PT Ex. 355, pp. 10-11.)

[9] The board makes no findings about whether Landsea could or should have taken control earlier.

[10] Exhibits 101 and 169a are official records based on personal observations of San Diego Water Board inspectors. To the extent any statements in the cited pages of those consist of descriptions of information obtained from other documents or statements of

II. LIABILITY CALCULATIONS

VIOLATION NO. 1:
Unauthorized Discharge of Sediment
(4 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 1)

The Potential for Harm for Discharge Violations is determined by using a three-factor scoring system to quantify: *(1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement.*

Factor 1: Harm or Potential Harm to Beneficial Uses

This factor "considers the harm that *may* result from exposure to the pollutants or contaminants in the illegal discharge, in light of the statutory factors of the nature, circumstances, extent and gravity of the violation or violations. The score evaluates direct or indirect harm or potential for harm from the violation." A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm is negligible (0), minor (1), below moderate (2), moderate (3), above moderate (4), or major (5)." (PT. Ex. 175, p. 12 (emphasis added).) This factor only considers harm or potential harm to beneficial uses of waters, not generalized harm to the environment. The Dischargers were assigned a **score of 3** (Moderate). The Enforcement Policy defines a score of 3 as a "moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects)." A score of 4 (Above Moderate) means a "*more than moderate threat to beneficial uses (i.e., impacts are observed or likely substantial, temporary restrictions on beneficial uses [e.g., less than 5 days], and human or ecological health concerns).*" A **score of 3** was assigned for the reasons in Part I and this section, particularly the large volumes of construction sediment discharged and the pre-existing impairments of Aliso Creek.

The discharge events had significant potential for harm. The testimony, City inspection reports, photographs and videos are reliable evidence that the Site was vulnerable to erosion, the predicted rain events mobilized sediment, and Dischargers' efforts to contain material on site were inadequate. The inadequate capacity of retention basins, failure to limit construction activity to portions of the Site that could reasonably be protected prior to a storm event (Rebuttal Ex. 4, ¶ 13), and construction decisions that left the southern-most slope unprotected during rain events, all created conditions that contributed to significant volumes of sediment and sediment-laden stormwater being discharged from the Site.

---

third parties, the cited statements, even if hearsay, are admissible to corroborate the personal observations of Erica Ryan and Tom Bistline.

The Prosecution Team recommended a score of 4 (Above Moderate). The volume of sediment discharged, the characteristics of construction sediment discharges, the need for post-storm sediment removal, and Aliso Creek's already-impaired condition support a score of 3 (Moderate). There is insufficient evidence of temporary restrictions on beneficial uses or the potential for such restrictions to support a score of Above Moderate, due in part to Dudek's reports that there was minimal damage to the mitigation areas (PT Ex. 313) and offsite impacts were threatened but not observed on December 9, 2015, December 30, 2015, January 6, 2016, and January 22, 2016, and observed on February 2, 2016 (illegal dewatering) (PT Ex. 358). Evidence of bioassessments in Aliso Creek or elsewhere in the region documenting the long-term effects of fine sediment discharges and/or testimony beyond the text of the Basin Plan and Construction Storm Water Permit may well have supported an "above moderate" score.

The Harm or Potential for Harm to Beneficial Uses factor was assigned a **score of 3**. Other factors take into account the Dischargers' actions prior to a discharge (Culpability) and after the discharges (Cleanup and Cooperation). This factor focuses on harm, including potential harm. Given the repeated discharges (four during the single rainy season considered during the Violation Period), the volumes of sediment-laden stormwater and sediment discharged, the potential for substantial offsite sediment transport to downstream areas, and the beneficial uses of downstream areas, the selection of this factor is appropriate.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge

A score between 0 and 4 is assigned based on a determination of whether the discharged material poses a negligible (0), minor (1), moderate (2), above moderate (3), or major (4) risk or threat to potential receptors. "Potential receptors" are those identified considering human, environmental and ecosystem health exposure pathways. The Dischargers were assigned a **score of 2** (Moderate Risk). The Enforcement Policy defines a score of 2 as "*[d]ischarged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection)*." A score of 2 was assigned because the discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection). The primary storm water pollutant at construction sites is sediment. Sediment discharges can physically and chemically cause harmful effects to beneficial uses. Sediment discharged to receiving waters can reduce the sunlight for aquatic plants, clog fish gills, smother aquatic habitat and breeding areas, smother benthic organisms, and transport construction related pollutants such as trash, nutrients, metals, oils, and grease which can be ingested or taken up by aquatic plants and organisms.

This factor considers the pollutants discharged and not their specific impacts on the receiving waters at issue. (PT Ex. 176, p. 17.) The Rincon ACLC Report focuses on pollutants after dilution in Aliso Creek watershed to assign a low score for sediment. The report concludes that a low score is appropriate for this factor because some sedimentation in Aliso Creek is natural (Disch. Ex. 1, p. 1:055) without acknowledging the Dischargers' significant alteration of the natural topography. Based on the Prosecution Team's failure to identify specific receptors, Dr. Thacher only considered sediment impacts, and primarily at locations at least ten miles downstream. (Thacher testimony, Hearing Transcript, Jan. 12, 2022, pp. 193, 213, 216.) This approach is inconsistent with the requirements of the Clean Water Act and the Water Code to protect designated uses in all waters of the United States, whether or not the waters are modified or otherwise affected by urbanization.

In addition, the report acknowledges the potential for release of vehicle contaminants during the December and January rain events warrants a higher score than if only sediment was discharged (Disch. Ex. 1, p. 1:053). The conclusion that sediment and pollutant transport was unlikely during the September event was based on incorrect assumptions about the status of grading activities, and overlooks documentation that an oily sheen was visible on September 16. (PT Ex. 367, p. 9.)

Factor 3: Susceptibility to Cleanup and Abatement

A score of 0 is assigned if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement. The Discharger was assigned a **score of 1** because the clean-up of sediment-laden stormwater runoff is generally not possible or effective because most sediment will be carried downstream with creek flows. Based on the methodology in the Rincon ACLC Report, at least 1200 tons of excess sediment discharged from the Site. An unspecified, but relatively small, volume of sediment was removed from the mitigation area following the storm events. Additional sediment removal would have caused additional harm. (PT Ex. 313; see also PT Ex. 367, pp. 20-25 [documenting onsite sedimentation observed on January 22, 2016, primarily from water entering Stream 6 from upstream during recent storm event].) There is no evidence that sediment deposited in offsite drainages (which are waters of the United States), at the SCE Viejo property, or at undeveloped property south of the Site could have been cleaned up without causing additional environmental harm or property damage, how sediment could have been safely removed from the drainages, or what volume of sediment could have been cleaned up before it was mobilized by rain or wind. (See Disch. Ex. 1, p. 1:055.) As of October 12, 2015, no efforts had been made to clean up sediment discharges in "Canyon D" from the September 15 discharge event. (PT Ex. 92, p. 30.) All four discharges occurred during significant rain events thereby severely limiting opportunities for cleanup or abatement. (See, e.g., Melbourn testimony, Hearing Transcript, Jan. 10, 2022, p. 263 and slide 52.) Therefore, less than 50 percent of the

unauthorized discharges of sediment and sediment-laden runoff from the Site was susceptible to cleanup or abatement.

Calculating the Final Potential for Harm

The Final Potential for Harm score is the sum of Factors 1, 2, and 3. Based on the above, a **score of 6** (3 + 2 + 1) was calculated.

STEP 2 - Assessment for Discharge Violations (Violation No. 1)

According to Water Code section 13385, a Regional Water Board may impose civil liability on a per day basis, a per gallon basis, or both. Where there is a discharge, the Water Boards shall determine an initial liability amount on a per gallon basis using the Potential for Harm score and the extent of Deviation from Requirement of the violation. These factors will be used in Table 1 of the Enforcement Policy to determine a Per Gallon Factor for the discharge. Per day assessments for discharge violations are determined based on the final Potential for Harm score and the extent of the Deviation from Requirement, which are used in Table 2 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e., $10,000 per day).

High Volume Gallon Calculation – 2010 Enforcement Policy

Water Code section 13385 allows a liability assessment for both the per gallon assessment and per day of discharge, with the maximum per gallon liability of $10 per gallon after the first 1,000 gallons of each discharge is subtracted. This liability is brought under the 2010 Enforcement Policy, which includes a “high volume” discount. (See PT Ex. 175, p. 19.) Recognizing that high-volume discharges of construction stormwater can result in large liabilities, the 2010 Enforcement Policy recommended (but did not require) a maximum of $2 per gallon. The final per-gallon amount ($0.83/gallon) is less than $2 per gallon.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement “remains generally intact” (Minor), “has been partially compromised” (Moderate), or “rendered ineffective” (Major). The Enforcement Policy defines a Major “Deviation from Requirement” as “[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).”

The Deviation from Requirement is Major because the Construction Storm Water Permit prohibits all discharges except for storm water and non-storm water discharges specifically authorized by the permit. Only discharges that have been controlled with BMPs that achieve BAT and BCT are authorized. Because the Dischargers did not implement BMPs that achieve BAT and BCT, the requirements of the Construction Storm Water Permit were “rendered ineffective.” Major is an appropriate selection

because there was a failure to plan for or respond to rain events, despite clear permit requirements, repeated corrective actions demanded by the City, and discharge events indicating that the BMPs were ineffective. For example, the City issued Citation No. 2258 to the Dischargers on January 21, 2016, for violations observed on January 5, 2016, stating that "very limited erosion control BMPs have been implemented on site." (See PT Ex. 105, Citation 2258.) Additionally, the Citation states that the Dischargers' excavations and berms were built hastily in an "ad hoc manner" prior to storm events as sediment basins without proper engineering design and City approval.[11]

The Rincon ACLC Report concludes that Site turbidity data indicate BMPs were partially effective. Daily average turbidity measurements during the September 15 storm were 270 NTU and 775 NTU at the Area B and Area E Drainages, respectively. Daily averages during the January 5 storm were 1,171 NTU at the Area E drainage and 261 NTU at the Stream 6 restoration pond. (Disch. Ex. 1, p. 1:044, Table 16.) As stated above and in Part I, the NAL exceedances required the Dischargers to evaluate site conditions and run-on, immediately implement necessary corrective actions, and update the SWPPP. The Dischargers did not undertake the necessary corrective actions, and did not update the SWPPP between July 14, 2015 and August 3, 2016. In addition, the Dischargers only monitored two of the nine or ten outfalls at the Site.

The report concludes there was evidence of perimeter control BMPs and construction of berms for temporary detention basins onsite, showing an attempt to reduce erosion and sediment discharge from the site. (Disch. Ex. 1, p. 1:098.) The implementation of perimeter controls is not a substitute for internal erosion control, and construction of temporary berms does not reduce the Deviation from Requirement score because the berms failed (PT Ex. 89, p. 2; PT Ex. 90, p. 51; PT Ex. 346; PT Ex. 359, p. 14; PT Rebuttal Ex. 5, p. 8), likely adding to erosion and increasing runoff volume and sediment loads. The increased volume and sediment load contributed to the failure of the perimeter control BMPs.

In addition, see the discussion of Violation Nos. 2, 4, 5, and 6 and Prosecution Team Exhibits 30; 92, pp. 8-19, 27-35, 39; 105; and 367, pp. 4, 5, 10.

Per Gallon Factor

Using a Potential for Harm factor score of 6 (see Step 1) and Deviation from Requirement of Major, the Per Gallon Factor for the unauthorized discharges from the Site to Aliso Creek is 0.220 in Table 1 of the 2010 Enforcement Policy.

[11] In addition, Dischargers failed to accurately report to the State Board about their permit compliance. For example, see PT Ex. 376, which is the annual report required for Risk Level 2 sites, the Dischargers reported no unauthorized discharges and a conclusion that the sampling requirement was "not applicable."

Per Day Factor

Using a Potential for Harm factor score of 6 (see Step 1) and Deviation from Requirement of Major, the Per Day Factor for the unauthorized discharges from the Site to Aliso Creek is 0.220 in Table 2 of the Enforcement Policy.

Days of Discharge Violations

Sediment-laden stormwater runoff was discharged from the Site into Aliso Creek on four days: September 15, 2015 (667,760 gallons); December 22, 2015 (1,584,406 gallons); January 5, 2016 (2,553,232 gallons); and January 6, 2016 (1,511,822 gallons).

STEP 3 - Per Day Assessment of Non-Discharge Violations (Violation No. 1)

Step 3 does not apply to Discharge Violations.

STEP 4 – Adjustment Factors (Violation No. 1)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts for Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior.

"A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances." The performance standard in this case is BAT/BCT, which includes preparing an adequate SWPPP and REAPs, and implementing them.

The Dischargers were given a multiplier value of **1.3** for this violation because the Dischargers either intentionally, or due to negligence, did not implement BMPs that achieved BAT and BCT, resulting in unauthorized discharges from the Site despite ample notice that a discharge was likely. The City's Notice of Violations (NOVs) for violations observed on September 15, 2015 and October 7, 2015 identified the lack of BMPs and urged the Dischargers to "[i]mplement all appropriate BMPs." The Dischargers knew of approaching storm events as documented through emails from their QSP and yet still failed to implement sufficient and effective BMPs to prevent significant sediment discharges. (See PT Ex. 229, Portola South REAPs and Emails.) The condition of the Site made it unlikely or impossible that an adequate REAP could be prepared and implemented within 48 hours of a forecast rain event. (See Bistline testimony, Hearing Transcript, Jan. 10, 2020, pp. 9-100.) Despite an actual discharge and numerous verbal and written warnings, orders and citations, the Dischargers failed to install the erosion and sediment controls required to prevent the discharges. A

reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Construction Storm Water Permit.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. For the September 15, 2015, violation, the Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** because they ignored BMP recommendations and failed to correct BMP deficiencies resulting in an unauthorized discharge during a rain event. (See, e.g., PT Ex. 92, p. 39; Ex. 367, pp. 10, 15-16.) For the remaining discharge violations (December 22, 2015, January 5, 2016, and January 6, 2016), the Cleanup and Cooperation multiplier was increased to a score of **1.5** because of the Dischargers' repeated and persistent failure to implement the necessary BMPs despite repeated warnings from the City and, beginning in January 2016, the San Diego Water Board; and because of the rapid expansion of the graded area following the September 15 rain event. The Dischargers cite evidence that Bistline repaired damage to perimeter BMPs following storm events and Varner Construction tried to "heal up" soil and build berms in the January-February 2016 timeframe. (Dischargers' Opening Brief, pp. 72-73.) Bistline was responsible for perimeter (sediment control) BMPs, which are not a substitute for interior erosion and sediment controls and which needed repair because of the lack of interior controls. (PT Ex. 216, p. 3.) There is no evidence that Varner's efforts were successful, and waiting until the "January-February timeframe" to begin partial compliance efforts increases rather than reduces the Cleanup and Cooperation score. Other evidence indicates appropriate BMPs were not completed for many months after the January 2016 rain event.

This finding also applies to all other violations.

History of Violations

Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction stormwater violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 1)

The Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Gallons Discharged Assessment

Adjusted Gallons Discharged x Per Gallon Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Gallon Liability**
September 15, 2015, Violation (667,760 – 1,000) x 0.22 x $2 x 1.3 x 1.1 x 1.0 =	**$419,525**
December 22, 2015, Violation (1,584,406 – 1,000) x 0.22 x $2 x 1.3 x 1.5 x 1.0 =	**$1,358,562**
January 5, 2016, Violation (2,553,232 – 1,000) x 0.22 x $2 x 1.3 x 1.5 x 1.0 =	**$2,189,815**
January 6, 2016, Violation (1,511,822 – 1,000) x 0.22 x $2 x 1.3 x 1.5 x 1.0 =	**$1,296,285**
	$5,264,188

Days Discharged Assessment

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
September 15, 2015, Violation 1 x 0.22 x $10,000 x 1.3 x 1.1 x 1.0 =	**$3,146**
December 22, 2015, Violation 1 x 0.22 x $10,000 x 1.3 x 1.5 x 1.0 =	**$4,290**
January 5, 2016, Violation 1 x 0.22 x $10,000 x 1.3 x 1.5 x 1.0 =	**$4,290**
January 6, 2016, Violation 1 x 0.22 x $10,000 x 1.3 x 1.5 x 1.0 =	**$4,290**
	$16,016

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 1)

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 stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. They further acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 1)

The Enforcement Policy provides that if the San Diego Water Board finds that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express findings are made.

Examples of circumstances warranting an adjustment under this step include, without limitation:

a. The discharger has provided, or Water Board staff has identified, other pertinent information not previously considered that indicates a higher or lower amount is justified.

b. A consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular disadvantaged group.

c. The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the Enforcement Policy.

(PT Ex. 175, 2010 Enforcement Policy, p. 24.)

The circumstances in this matter do not warrant an adjustment under this step.

The Enforcement Policy also provides under the "Other Factors as Justice May Require" that the cost of investigation and enforcement should be added to the liability amount. From March 2015 to November 2019 the San Diego Water Board invested **932 hours** to investigate, develop enforcement documents, and prepare to bring this matter to hearing. Following Enforcement Policy guidance, based on the staff member's position and overhead, these hours were converted into a staff cost of **$96,594**. This amount was then added at the end of the collective liability assessment. A summary of the staff costs incurred to date is provided in Prosecution Team Exhibit 174, Staff Cost Summary. The San Diego Water Board finds that it is appropriate to increase the Total Base Liability to include staff costs in the liability. Increasing the Total Base Liability Amount in this manner serves to create an appropriate deterrent against future violations. The assessed amount of staff costs does not include time the Prosecution Team spent on discovery, rebuttal, pre-hearing motions, or preparing for and attending the hearing; and does not include any of the Advisory Team's time.

STEP 8 – Economic Benefit (Violation No. 1)

Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. "The Water Boards should not adjust the economic benefit for expenditures by the discharger to abate the effects of the unauthorized conduct or discharge, or the costs to come into or return to compliance. … The discharger's conduct relating to abatement is appropriately considered under 'cleanup and

cooperation' liability factor." (PT Ex. 175, p. 21.) Economic benefit or savings is the basis to calculate the minimum penalty but it is not an independent factor in calculating a penalty amount.

The Dischargers derived an economic benefit by not properly implementing the erosion and sediment control BMPs to the BAT/BCT standard as required by the Construction Storm Water Permit. At a minimum, the Dischargers should have implemented erosion control and sediment control requirements for a Risk Level 2 site when required and ensured that REAP requirements could be completed before a forecasted rain event. Using the U.S. EPA BEN Model, the Prosecution Team concluded that Dischargers enjoyed an economic benefit of $747,258. (See Complaint Package, Economic Benefit Calculation Methodology.) While the other violations had minor economic benefit, such benefit would be captured by this amount.

The Dischargers assert that economic benefit or savings should be zero, based on their critique of the Prosecution Team's analysis. (Dischargers' Opening Brief, pp. 86-89.) At least some of the critiques are not well taken. First, as stated in the Economic Benefit Analysis and elsewhere in this Order, the Dischargers failed to construct adequate temporary storage to prevent unauthorized discharges. The Dischargers' Opening Brief misstates Elder's deposition testimony regarding post-construction sediment retention. Elder referred to post-construction BMPs as part of estimating how much storage capacity should have been available. He did not base his calculation on the cost of constructing permanent storage basins or conclude that permanent, rather than temporary, storage basins were required. His estimates for the delayed costs of constructing temporary basis assumed a retention capacity of 44% of a 1-year, 24-hour storm even, significantly less than CASQA design recommendations. (Prosecution Team's Economic Benefit Analysis, p. 2.) Second, the Dischargers misrepresent Elder's testimony to support their argument that he modified his assumptions to maximize both economic benefit or savings and runoff volumes. The CASQA standard is a four-foot berm with one foot of freeboard. (Deposition of Bryan Elder (Elder Depo.) (Oct. 26, 2020), Vol. III, pp. 391-392.) To obtain the assumed three feet of storage capacity a discharger would have to incur the cost of a four-foot basin. Third, Dischargers argue hydroseeding was not practicable during active grading. Even with the aggressive grading schedule, hydroseed could have been implemented in stages as grading progressed. (Elder Depo. (Oct. 26, 2020), Vol. III, pp. 401-403, 407.) If hydroseeding was impracticable, the Dischargers were required to select alternative BMPs and update their SWPPP to reflect the change. They did not do so, and the SWPPP required hydroseed in any inactive area, defined as inactive for 14 days or more (PT Ex. 5, pp. 20, 23).

Further quantification of the economic benefit or savings is not necessary because the assessed penalty exceeds either estimate of economic benefit or savings by at least ten percent. For purposes of analysis, this Order assumes the economic benefit or savings to be between **zero and $747,258**.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 1)

For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385, the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars ($10,000) per day of violation (per violation); and (b) ten dollars ($10) for every gallon discharged, over one thousand (1,000) gallons discharged, that was not cleaned up. In this instance, the San Diego Water Board is assessing civil liability for the discharge of sediment and sediment-laden stormwater runoff to waters of the United States on a per day and per gallon basis. The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day per discharge** and **$10 per gallon discharged over 1,000 gallons**. Therefore, the maximum liability amount for Violation No. 1 is **$63,132,200** (the sum of $40,000 for four days of discharge and $63,132,200 for the discharge of 6,317,220 gallons of storm water runoff). The maximum statutory liability does not consider adjustment factors in section 13385 or the Enforcement Policy.

Minimum Liability Amount

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at 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 Amount be at least ten percent (10%) higher than the Economic Benefit. Therefore, the Minimum Liability Amount for this violation would be (1.1 x $747,258) = **$821,983** based solely on the Prosecution Team's evidence. The Dischargers assert the minimum liability should be zero. The minimum liability is between **zero and $821,983**.

STEP 10 – Final Liability Amount (Violation No. 1)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the civil liability for **four days** of discharge of **6,317,220 gallons** of stormwater runoff in violation of the Construction Storm Water Permit is **$5,280,204** ($5,264,188 + $16,016) plus staff costs. The liability is within the minimum and maximum liability range.

VIOLATION NO. 2:
Failure to Implement Material Stockpile BMPs
(23 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 2)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 2)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 2)

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e., $10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Potential for Harm here is characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Potential for Harm is **Moderate** because the failure to implement adequate stockpile management BMPs poses a substantial potential for harm if there is wind, or stormwater or non-stormwater runoff that flows through and transports sediment from the Site to receiving waters.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). **Major** was selected because the Dischargers rarely covered the material stockpiles, and most had no protection, thus rendering the requirement ineffective. The Dischargers' efforts did not improve over time, or with a forecasted storm event, or with repeated progressive enforcement from the City. The Construction Storm Water Permit requirements were repeatedly ignored, and a selection of major is appropriate.

The Rincon ACLC Report assumes the Stockpile Management BMP (WM-3) of the CASQA manual defines the scope of the Attachment D requirement to cover and berm

stockpiles that are not actively being used. Where the permit is more stringent than the CASQA manual, as it is in Attachment D, section B.1.b as compared to BMP WM-3 of the manual, the permit requirement controls. The term "actively being used" in the stockpile requirement does not incorporate the 14-day threshold that defines "inactive areas of construction." (See PT Ex. 4, p. 169, fns. 1, 2.)

The conclusion in the Rincon ACLC Report that the Deviation from Requirement score should be "moderate" for Violation No. 2 is primarily based on erosion risk that could be caused by rainfall, which occurred or was forecast for only four of the 28 days of alleged violation. (Disch. Ex. 1, p. 1:067.) The stockpile protection requirements apply to all stockpiles at all times (with the "actively being used" proviso in the preceding paragraph).[12]

Per Day Factor

Using Enforcement Policy Table 3 - Per Day Factor, the range of liability factors for a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, is 0.4 and 0.7. The middle of the range **0.55** was used for the Per Day Factor for the failure to implement the stockpile management requirements.

Days of Non-Discharge Violation

According to the supporting evidence included with the Technical Analysis, the Dischargers were in violation of the stockpile management requirements of or B.1.b. in Attachment D to the Construction Storm Water Permit for **23 days**:[13] 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.

STEP 4 – Adjustment Factors (Violation No. 2)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts for Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

---

[12] Prosecution Team Exhibit 79, p. 12, and Prosecution Team Exhibit 91, pp. 2-5, 7, 9, 12-13, show the same stockpile on December 23, 2015 and January 8, 2016 (18 total days) without cover or berms with no evidence stockpile protection BMPs to cover and berm were readily available to implement.

[13] The ACL Complaint and Technical Analysis alleged 28 days of violation; however, prior to the hearing the Prosecution Team removed the violation allegation for January 12, 2016, upon Dischargers' request to re-examine the photograph supporting the allegation.

Culpability

An adjustment for the initial liability based on the Dischargers' Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Discharger is assigned a Culpability multiplier of **1.3** for this violation because the Dischargers either intentionally or due to negligence did not adequately implement the stockpile management requirements.

The City's NOVs for violations observed on September 15, 2015, and October 7, 2015, identified the lack of BMPs and urged the Dischargers to "[i]mplement all appropriate BMPs." The October 7, 2015, NOV specifically noted a lack of BMPs on stockpiles. Despite a discharge and numerous subsequent verbal and written orders from the City and the San Diego Water Board, the Dischargers failed to address material stockpiles. There was no reason BMPs could not reasonably have been implemented in compliance with the Construction Storm Water Permit. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT including the performance standard in the Construction Storm Water Permit, Attachment D, section B.1.b.

The Rincon ACLC Report looked at three variables for its culpability analysis: 1. Did the violation occur within 48 hours of precipitation? 2. Was the stockpile likely to erode even without meeting the cover and berm requirement? and 3. Was it practical to cover low erosional risk stockpiles at an active mass graded site? The Construction Storm Water Permit requirement, which sets forth the applicable performance standard, is not contingent on actual or forecast precipitation, or on the presence or absence of downflow sediment BMPs. (PT Ex. 4, p. 165, § B.1.b.)

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. For the August, September and October 2015 violations, the Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** because the Dischargers in many cases ignored BMP recommendations resulting in unauthorized discharges during subsequent rain events. For the remaining violations, the Cleanup and Cooperation multiplier was increased to a score of **1.5** because of the Dischargers' persistent failure to implement the necessary BMPs despite repeated warnings from the City and, beginning in January 2016, the San Diego Water Board.

History of Violations

Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction stormwater violations determined by this board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 2)

Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
August through October 2015 Violations 4 x 0.55 x $10,000 x 1.3 x 1.1 x 1.0 =	**$31,460**
November 2015 through March 2016 Violations 19 x 0.55 x $10,000 x 1.3 x 1.5 x 1.0 =	$203,775 (Exceeds **$190,000** maximum.)

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 2)

The Dischargers stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. The Dischargers further acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 2)

The circumstances in this matter do not warrant an adjustment under this step.

STEP 8 – Economic Benefit (Violation No. 2)

See Violation No. 1 Step 8.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 2)

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day**. Therefore, the maximum liability amount for 23 days of violation is **$230,000**. The cleanup and cooperation factor is higher for

violations occurring after October 2015, given the City's repeated notifications to Dischargers of this violation and the failure to implement corrective actions. The liability recommended for the August through October 2015 violations is $31,460. The total base liability for November 2015 through March 2016 violations exceeds the statutory daily maximum of $10,000 per day of violation, and so is therefore reduced to $190,000 for these 19 days of violation.[14]

Minimum Liability Amount

See Violation No. 1 Step 8.

STEP 10 – Final Liability Amount (Violation No. 2)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the final liability amount for **23 days** of violation of the Construction Storm Water Permit is **$221,460** ($31,460 + $190,000), plus staff costs. The liability is within the minimum and maximum liability range. The liability for this category is appropriate given the repeated failure to comply with the Construction Storm Water Permit requirements, lack of response to repeated warnings and violations, and the potential for harm given the use of large stockpiles that were left unprotected and exposed.

VIOLATION NO. 3:
Failure to Implement Vehicle Fluid Leak BMPs
(14 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 3)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 3)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 3)

The "per day" factor is calculated for each non-discharge violation or group of violations considering the (1) potential for harm and (2) the extent of the deviation from the applicable requirements.

[14] This occurs with several categories of violations. The maximum liability per day cannot be exceeded by grouping the violations together. Therefore, when it is appropriate to modify a conduct factor, such as cleanup and cooperation, the daily maximum was reached. For those violations, the daily maximum liability is recommended, and has been reduced accordingly in the liability calculations.

Potential for Harm

The Potential for Harm is **Moderate** because the failure to implement adequate vehicle storage and maintenance BMPs poses a substantial potential for harm if there is storm water or non-storm water runoff that flows through and transports oil, grease, or fuel from the Site to receiving waters. Vehicle fluids are often composed of oil and oil byproducts, which are known to contain harmful constituents such as metals and polycyclic aromatic hydrocarbons (PAHs). (PT Ex. 3, p.14; PT Ex. 5, pp. 94-98.) The vehicle fluids are transported into receiving waters by storm water runoff directly or indirectly when they piggyback on sediment that is transported by storm water runoff. Storm water runoff and sediment polluted with vehicle fluids is harmful to the receiving water ecosystem because vehicle fluids contain constituents that can be toxic to aquatic organisms at low concentrations. (PT Ex. 3, p. 14.) In this case, substantial land grading occurred all at once, resulting in a greater than normal amount of exposed sediment and heavy equipment vehicles at the Site. Additionally, the Dischargers conducted onsite maintenance activities that increased the threat of discharges. Onsite maintenance activities are permissible under the Construction Storm Water Permit if appropriate BMPs are employed. That was not the case in this matter.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The deviation from the requirement is **Major** because the Discharger failed to provide drip pans for all vehicles and the drip pans that were in place were in such bad condition that they leaked or only one drip pan was provided for a piece of equipment when the equipment was so large that it required multiple drip pans, thus rendering the requirement ineffective.

Furthermore, maintenance activities were conducted onsite and evidence of vehicle fluid discharges during these maintenance activities was common. Vehicle maintenance was not conducted in accordance with the Site's SWPPP that stated that onsite maintenance would only be conducted on an impermeable surface if it was unfeasible to transport the vehicle or equipment to a service facility. Vehicles and equipment were not relocated to prevent water quality impacts when they were obviously leaking, and sufficient containment was not utilized. Additionally, the Dischargers failed to address onsite fueling in the SWPPP. For these reasons, the requirement was rendered ineffective.

Per Day Factor

Using Enforcement Policy Table 3 - Per Day Factor, the range of liability factors for a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, is 0.4 and 0.7. The middle of the range **0.55** was used for the Per Day Factor for the failure to implement vehicle fluid leak BMPs.

Days of Non-Discharge Violation

According to the supporting evidence cited in the Technical Analysis, the Dischargers were in violation of the vehicle storage and maintenance requirements of Sections B.3.a. in Attachment D to the Construction Storm Water Permit for **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.

STEP 4 – Adjustment Factors (Violation No. 3)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts related to Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Dischargers were assigned a Culpability multiplier of **1.3** for this violation because the Dischargers either intentionally or due to negligence did not adequately implement the vehicle storage and maintenance requirements. (PT Ex. 4, p. 167, § B.3.a; see also p. 167, § B.3.c.) The Dischargers indicated knowledge of the requirement by the placement of drip pans, but the number of pans and their condition did not provide adequate water quality protection. The Dischargers failed to comply with the Construction Storm Water Permit's aim to have the permittee consider preventative measures (keep equipment in working order; repair offsite) or BMPs (drip pans placed at all proper locations that contain leaks prior to reaching ground and/or surface water).

The Dischargers were also warned several times about vehicle fluid leaks, receiving City citations for leak violations observed on October 7, 2015, and January 5, 2016, as well as being issued a City Cease and Desist Order on February 10, 2016. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Construction Storm Water Permit.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** for the violations occurring before the second NOV was issued on October 9, 2015, which specifically stated that there was a "lack of BMPs controlling adequately equipment drips and leaks." The Dischargers were assigned a Cleanup and Cooperation multiplier

of **1.5** for the violations occurring after the Dischargers received the second NOV because the violations continued. This increase in the Cleanup and Cooperation factor is distinct from the Culpability factor in the sense that the Culpability factor analyzes behavior before the violation, and the Cleanup and Cooperation factor analyzes behavior after the violation. The Dischargers did not take cleanup actions after significant discharges, or install BMPs after numerous citations. It required significant effort from the City and the San Diego Water Board to bring the Site into compliance. This disregard for both the Construction Storm Water Permit's requirements as well as repeated notices from the regulatory agencies should result in the maximum multiplier of this factor.

History of Violations

Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction stormwater violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 3)

The Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
August through October 2015 Violations 5 x 0.55 x $10,000 x 1.3 x 1.1 x 1.0 =	**$39,325**
November 2015 through March 2016 Violations 9 x 0.55 x $10,000 x 1.3 x 1.5 x 1.0 =	$96,525 (Exceeds **$90,000** maximum.)

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 3)

The Dischargers stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. The Dischargers further acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 3)

The circumstances in this matter do not warrant an adjustment under this step.

STEP 8 – Economic Benefit (Violation No. 3)

See Violation No. 1 Step 8.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 3)

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed. Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation).

Maximum Liability Amount

The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day**. Therefore, the maximum liability amount is **$140,000**.

It is appropriate to increase the cleanup and cooperation factor for the violations occurring in November 2015 through February 2016. Because the Enforcement Policy methodology exceeds the statutory maximum for those violations, the statutory daily maximum of $10,000 per day is applied. The liability has been adjusted accordingly in the summary box above, and the Final Liability Amount, below.

Minimum Liability Amount

See Violation No. 1 Step 8.

STEP 10 – Final Liability Amount (Violation No. 3)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the final liability amount for failing to adequately implement vehicle storage and maintenance requirements for **14 days** in violation of the Construction Storm Water Permit is **$129,325** ($39,325 + $90,000), plus staff costs. The liability is within the minimum and maximum liability range, and appropriate given the Dischargers' actions. (See Enforcement Policy Calculation Methodology.) The recommended liability for this category is appropriate given the lack of response to repeated violations, and the potential for harm that can occur when leaks can be mobilized to discharge into surface water. These violations are one of the easiest to avoid, and dischargers can utilize an alternative location for vehicle storage and repair or provide functional drip pans. There was a failure to do either of those things effectively.

VIOLATION NO. 4:
Failure to Implement Erosion Control BMPs in Inactive Areas
(28 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 4)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 4)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 4)

The "per day" factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Potential for Harm is **Moderate** because the failure to implement the erosion control BMP requirements for a Risk Level 2 site in inactive areas, finished slopes, open space, utility backfill, and completed lots poses a substantial potential for harm because there is a higher risk of erosion which leads to additional sediment in storm water runoff to receiving waters. Given the large area disturbed, there was a greater threat.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Deviation from Requirement is **Major** because San Diego Water Board and City inspectors consistently found inactive areas without erosion control BMPs, which renders the Construction Storm Water Permit requirements ineffective.

Erosion control is the best way to minimize the risk of creating erosion and sedimentation problems. (PT Ex. 4, p. 32.) Particular attention must be paid to large mass-graded sites where the potential for soil exposure to the erosive effects of rainfall and wind is great and where there is potential for significant sediment discharge from the site to surface waters. Until permanent vegetation is established, soil cover is the most cost-effective and expeditious method to protect soil particles from detachment and transport by rainfall. (*Id.*, p. 32.) Erosion control BMPs should be the primary means of preventing storm water contamination. (*Id.*, p. 32.) All construction sites are required to implement required erosion controls for inactive areas. (*Id.*, pp. 88, 156, 169, 189.)

The conclusion in the Rincon ACLC Report that the Deviation from Requirement score should be "moderate" for Violation No. 4 is primarily based on erosion risk that could be caused when rainfall is forecast. (Disch. Ex. 1, p. 1:077.) Erosion control BMPs for inactive areas must be implemented at all times. The fact that there was no forecast rain or wind advisory on a particular day does not make the BMPs "effective."

Per Day Factor

Using Enforcement Policy Table 3 - Per Day Factor, the range of liability factors for a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, is 0.4 and 0.7. The middle of the range **0.55** was used for the Per Day Factor for the failure to implement erosion control BMPs on inactive areas.

Days of Non-Discharge Violation

According to the supporting evidence included with the Technical Analysis, the Dischargers were in violation of the erosion control requirements of Section D.2. in Attachment D to the Construction Storm Water Permit for a period of **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.

STEP 4 – Adjustment Factors (Violation No. 4)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts related to Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Dischargers were assigned a Culpability multiplier of **1.3** for this violation because the Dischargers either intentionally or due to negligence did not adequately implement the erosion control requirements for inactive areas of the Site. There was no reason BMPs could not reasonably have been implemented to comply with the Construction Storm Water Permit, Attachment D, section D.2, prior to sediment discharges based on permit requirements and forecasted rain events. Furthermore, the Dischargers received multiple written NOVs after the initial sediment discharge, but failed to prevent additional discharges or adequately address Site BMP deficiencies. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Construction Storm Water Permit.

The Rincon ACLC Report considers two factors: 1. Did the violation occur within 48 hours of precipitation? 2. Did the inactive area pose a "low erosional risk" even without implementation of the required BMPs? This analysis ignores the performance standard, which is to "provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots." (PT Ex. 4, p. 169, § D.2 (footnote omitted).) This requirement applies whether or not rain is forecast, particularly where the condition and size of the Site would have made it difficult or impossible to install all necessary BMPs within a short period of time before wind, rain, or non-stormwater discharges. The evidence of the discharges that occurred when it did rain underscore the ineffectiveness of the BMPs overall.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** for the violations occurring before the City issued its second NOV on October 9, 2015. Both NOVs specifically warned the Dischargers of the lack of erosion control BMPs on the Site. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.5** for the violations occurring after the Dischargers received the second NOV because the Dischargers continued their noncompliance. The increase in this factor is appropriate because of the Dischargers' failure to take necessary post-violation cleanup actions.

History of Violations

Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used. The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction stormwater violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 4)

The Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
September through October 9, 2015 Violations 3 x 0.55 x $10,000 x 1.3 x 1.1 x 1.0 =	**$23,595**
October 12, 2015 through March 2016 Violations 25 x 0.55 x $10,000 x 1.3 x 1.5 x 1.0 =	$268,125 (Exceeds **$250,000** maximum.)

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 4)

The Dischargers stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. The Dischargers acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 4)

The circumstances in this matter do not warrant an adjustment under this step.

STEP 8 – Economic Benefit (Violation No. 4)

See Violation No. 1 Step 8.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 4)

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day**. Therefore, the Maximum Liability Amount that could be assessed for this violation is **$280,000**. The cleanup and cooperation factor was increased after three violations in September and October 2015. The total base liability for the 25 latter violations commencing with the October 12, 2015, violation exceeds the statutory daily maximum of $10,000 per day and is therefore reduced to $250,000.

Minimum Liability Amount

See Violation No. 1 Step 8.

STEP 10 – Final Liability Amount (Violation No. 4)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the final liability amount for failing to adequately implement erosion control requirements for inactive areas for **28 days** in violation of the Construction Storm Water Permit is **$273,595** ($23,595 + $250,000), plus staff costs. The liability is within the minimum and maximum liability range and is appropriate given the failure to implement any iterative improvement over the course of several months.

The liability for this category is appropriate given the disregard for the Construction Storm Water Permit requirements, lack of response to repeated violations, and the potential for harm. The installation of BMPs prior to rain events was non-existent or ineffective. This category of violations contributed to significant discharge events.

VIOLATION NO. 5:
Failure to Implement Erosion Control BMPs in Active Areas
(11 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 5)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 5)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 5)

The "per day" factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Potential for Harm is **Moderate** because the failure to implement the erosion and sediment control requirements for a Risk Level 2 site in active areas poses a substantial potential for harm because there is a high risk of erosion which leads to additional sediment in storm water runoff to receiving waters.

Deviation from Requirement

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Deviation from Requirement is **Major** because there was no evidence that the Dischargers had adequately implemented or were prepared to implement erosion control BMPs for active areas, thus rendering the requirement ineffective.

Risk Level 2 construction sites must implement additional erosion control BMPs (runoff control and soil stabilization) in conjunction with the minimum sediment controls required for areas under active construction. (PT Ex. 3, pp. 88, 169.) Temporary soil stabilization can be the single most important factor in reducing erosion at construction sites. (*Id.,* p. 32.) Sediment controls should be secondary to erosion controls, and are intended to capture eroded soils when erosion controls are ineffective. (PT Ex. 4, pp. 32-33.) The conclusion in the Rincon ACLC Report that the Deviation from Requirement score should be "moderate" for Violation No. 5 is primarily based on "sufficient" linear perimeter controls on three of the alleged violation days. (Disch. Ex. 1, pp. 1:083-1:084.) The Deviation from Requirement for Violation No. 5 must be based on whether the

erosion control BMPs (runoff control and soil stabilization) for active areas were effective, not based on the number of days of inadequate implementation of erosion control BMPs for active areas of construction. The erosion control BMPs for active areas required under the permit were not implemented and the requirement was rendered ineffective.

Per Day Factor

Using Enforcement Policy Table 3 - Per Day Factor, the range of liability factors for a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, is 0.4 and 0.7. The middle of the range **0.55** was used for the Per Day Factor for the failure to implement erosion control BMPs on active areas.

Days of Non-Discharge Violation

According to the supporting evidence included with the Technical Analysis, the Dischargers were in violation of the Risk Level 2 erosion control requirements of Section E.3. in Attachment D to the Construction Storm Water Permit for **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.

STEP 4 – Adjustment Factors (Violation No. 5)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts for Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Dischargers were assigned a Culpability multiplier of **1.3** for this violation because the Dischargers either intentionally or negligently did not adequately implement the erosion control requirements for inactive areas of the Site. There was no reason BMPs could not reasonably have been implemented to comply with the Construction Storm Water Permit, Attachment D, section E.3. The Dischargers received two NOVs after a significant sediment discharge and continued to operate the Site in violation of the Construction Storm Water Permit. The Dischargers disregarded additional NOVs from the City which resulted in three more discharges. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Construction Storm Water Permit.

The performance standard is the Construction Storm Water Permit's requirement to "implement appropriate erosion control BMPs (runoff control and soil stabilization) in connection with sediment control BMPs for areas under active construction." (PT Ex. 4,

p. 169, Attachment D, § E.3 (footnote omitted).) This requirement balances the dynamic nature of a construction site with the need for environmental protection, especially before rain events. All of the violations in this category are for failure to implement appropriate BMPs when rain was forecast for the Site. However, Varner Construction could not or did not fully implement the REAPs, and the REAPs were not always timely or adequate. Again, the evidence of the discharges that occurred when it did rain are inconsistent with the conclusions in the ACLC Report.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** for the violations occurring before the second NOV was issued on October 9, 2015. Both NOVs specifically warned the Dischargers of the lack of erosion control BMPs on the Site. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.5** for the violations occurring after the Dischargers received the second NOV because the Dischargers continued their noncompliance.

History of Violations

The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 5)

Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
September 2015 Violations 2 x 0.55 x $10,000 x 1.3 x 1.1 x 1.0 =	**$15,730**
October 2015 through March 2016 Violations 9 x 0.55 x $10,000 x 1.3 x 1.5 x 1.0 =	$96,525 (Exceeds **$90,000** maximum.)

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 5)

The Dischargers stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. The Dischargers further acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 5)

The circumstances in this matter do not warrant an adjustment under this step.

STEP 8 – Economic Benefit (Violation No. 5)

See Violation No. 1 Step 8.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 5)

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day**. Therefore, the Maximum Liability Amount that could be assessed for this violation is **$110,000**.

The cleanup and cooperation factor for the later violations, those which occurred October 2015 through March 2016 violations, were adjusted because of the repeated notices to correct and the Dischargers' failure to do so. Because the use of the Enforcement Policy methodology results in a number higher than the statutory maximum of $10,000 per day of violation, the liability for those violations has been reduced to $90,000.

Minimum Liability Amount

See Violation No. 1 Step 8.

STEP 10 – Final Liability Amount (Violation No. 5)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the civil liability for failing to adequately implement additional Risk Level 2 erosion control requirements for **11 days** in violation of the Construction Storm Water Permit is **$105,730** ($15,730 + $90,000), plus staff costs. The proposed liability is within the minimum and maximum liability range and is appropriate given the repeated notices and failure to implement any iterative improvements, leading to discharges that these BMPs are specifically designed to prevent or reduce.

VIOLATION NO. 6:
Failure to Apply Linear Sediment Controls
(42 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 6)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 6)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 6)

The "per day" factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Potential for Harm is **Moderate** because the failure to implement the linear sediment control requirements for a Risk Level 2 site poses a substantial potential for harm because there is a higher risk of discharges of additional sediment from exposed slopes to receiving waters.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Deviation from Requirement is **Major** because a substantial number of slopes did not have linear sediment control BMPs. The Dischargers failed to respond adequately to the City's repeated requests for improved BMPs. If BMPs were properly installed but overwhelmed by an unusual storm event, that might not be considered a violation. However, at this Site, there was very little adaptive management despite repeated progressive enforcement from the City. The Dischargers' response to the Construction Storm Water Permit requirements was inadequate.

Risk Level 2 construction sites are required to implement linear sediment controls along the toe of the slope, face of the slope, and at grade breaks of exposed slopes to comply with critical slope/sheet flow lengths in addition to the minimum required perimeter sediment controls. (PT Ex. 3, pp. 88, 169.) Exposed slopes are created when they are disturbed from clearing, grading, grubbing, excavation, or other land disturbance activity. (PT Ex. 3, p. 9.) Linear sediment controls are required on slopes when disturbed and erodible soils are exposed on Risk Level 2 sites. Implementation of linear

sediment controls on slopes is in addition to implementing erosion controls to stabilize the exposed soil. Linear sediment controls on slopes effectively reduce the slope by slowing sheet flow and reducing erosion, and by causing sediment to settle out. (PT Ex. 3, pp. 44, 179, 185, 191.) The high risk for erosion posed by disturbed and exposed slopes is the very reason for the additional slope-specific permit requirements to reduce the distance eroded sediment can be transported on Risk Level 2 sites.

The conclusion to reduce the Deviation from Requirement score to moderate for Violation No. 6 in the Rincon ACLC Report is primarily based on erosion risk that could have been caused by rainfall for eight of the original 53 days of alleged violation. (Disch. Ex. 1, p. 1:096.) The linear sediment controls for slopes must be implemented regardless of weather for Risk Level 2 sites. The linear sediment controls for slopes required under the permit were not implemented and the requirement was rendered ineffective.[15]

Per Day Factor

Using Enforcement Policy Table 3 - Per Day Factor, the range of liability factors for a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, is 0.4 and 0.7. The middle of the range **0.55** was used for the Per Day Factor for the failure to implement the additional Risk Level 2 linear sediment control requirements.

Days of Non-Discharge Violation

According to the supporting evidence included with the Technical Analysis, the Dischargers were in violation of the Risk Level 2 linear sediment control requirements of Section E.4. in Attachment D to the Construction Storm Water Permit for **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.

[15] Several of the same slopes are pictured without required linear sediment controls at the toe of the slope, face of the slope, and/or grade breaks of exposed slopes throughout the Violation Period.

STEP 4 – Adjustment Factors (Violation No. 6)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts for Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Dischargers were assigned a Culpability multiplier of **1.3** for this violation because the Dischargers either intentionally or due to negligence did not adequately implement the additional Risk Level 2 linear sediment control requirements for exposed slopes on the Site (PT Ex. 4, p. 169, § E.4). The City issued progressive enforcement actions against the Discharger; specifically, four NOVs, two Stop Work Orders, and a Cease and Desist Order for failure to implement required linear sediment control BMPs. A reasonably prudent person would have heeded numerous warnings and implemented BMPs to achieve BAT and BCT as required by the Construction Storm Water Permit.

The performance standard for this violation is the permit requirement to "apply linear sediment controls along the toe of the slope, face of the slope, and at the grade breaks of exposed slopes" so that sheet flow length does not exceed 10 feet for slopes over 50%. (PT Ex. 4, pp. 169-170, § E.4.) The Rincon ACLC Report considers these factors: 1. Did the violation occur within 48 hours of precipitation? 2. Did the slope provide an erosional risk even without linear sediment controls? and 3. Was it practicable or reasonable to install linear sediment controls in inactive areas where the potential for erosional risk was low? This requirement is not contingent on a forecast rain event, whether BMPs other than linear sediment controls somewhat reduced erosional risk, or whether it was practicable or reasonable to comply.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** for the violations occurring before the second NOV was issued on October 9, 2015. Both NOVs specifically warned the Dischargers of the lack BMPs on the Site. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.5** for the violations occurring after the Dischargers received the second NOV because the Dischargers continued their noncompliance.

History of Violations

The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 6)

The Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
September through October 9, 2015 Violations 2 x 0.55 x $10,000 x 1.3 x 1.1 x 1.0 =	**$15,730**
October 13, 2015 through March 2016 Violations 40 x 0.55 x $10,000 x 1.3 x 1.5 x 1.0 =	$429,000 (Exceeds **$400,000** maximum.)

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 6)

The Dischargers stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. The Dischargers further acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 6)

The circumstances in this matter do not warrant an adjustment under this step.

STEP 8 – Economic Benefit (Violation No. 6)

See Violation No. 1 Step 8.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 6)

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day**. Therefore, the Maximum Liability Amount that could be assessed for 42 days of violation is **$420,000**.

As noted in several categories of violations, the Dischargers' cleanup and cooperation factor was increased for later violations, given the repeated citations from the City and failure to respond with BMPs or corrections. When the Enforcement Policy methodology generated a total base liability that exceeds the statutory daily maximum of $10,000 per day of violation, it was reduced. This applies in this category for the violations after

October 9, 2015, and results in a recommended maximum liability of $400,000 for these 40 days of violation.

Minimum Liability Amount

See Violation No. 1 Step 8.

STEP 10 – Final Liability Amount (Violation No. 6)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the liability amount for failing to adequately implement additional Risk Level 2 linear sediment control requirements for exposed slopes for **42 days** in violation of the Construction Storm Water Permit is **$415,730** ($15,730 + $400,000), plus staff costs. The liability is within the minimum and maximum liability range. The liability for this category is appropriate given the disregard for the Construction Storm Water Permit requirements, lack of response to repeated violations, and the potential for harm given the mass grading that left so much of the Site exposed and subject to runoff.

VIOLATION NO. 7:
Failure to Properly Store Chemicals
(9 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 7)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No.7)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 7)

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Potential for Harm is **Major.** The Enforcement Policy defines Major Potential for Harm as “[t]he characteristics of the violation present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm.” The failure to have secondary containment of chemicals poses an egregious threat to beneficial uses because there is a very high potential for harm if these materials (lubricants and coolants) were discharged to the receiving waters as well as the size of the containers (55-gallon drums).

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Deviation from Requirement is **Major** because there was no secondary containment for the chemicals and those that were in watertight containers often were not sealed and were left open to the environment, thus rendering the requirement ineffective.

Per Day Factor

Using Enforcement Policy Table 3 - Per Day Factor, the range of liability factors for a Potential for Harm determination of **Major** and Deviation from Requirement determination of **Major**, is 0.7 and 1. The middle of the range **0.85** was used for the Per Day Factor for the failure to store chemicals properly.

Days of Non-Discharge Violation[16]

The Dischargers were in violation of the requirement to provide secondary containment for stored chemicals and fuels, Section B.1.c. in Attachment D to the Construction Storm Water Permit for **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.

STEP 4 – Adjustment Factors (Violation No. 7)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts for Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Dischargers were assigned a Culpability multiplier of **1.3** for this violation because the Dischargers either intentionally or due to negligence did not provide secondary containment for the chemicals and fuels after having been notified by the City of the violation in the October 9, 2016, NOV. An additional citation was issued by the City on January 21, 2016, for improper chemical storage on January 5, 2016, as well as a City Cease and Desist Order on February 10, 2016 (PT Ex. 131). There was no reason secondary containment could not reasonably have been implemented to comply with the Construction Storm Water Permit,

[16] The ACL Complaint and Technical Analysis alleged 10 days of violation; however, prior to the hearing the Prosecution Team removed the violation allegation for March 2, 2016, upon determination that the photographs relied upon for this violation were not of the Site.

Attachment D, section B.1.c. A reasonably prudent person would have heeded these warnings and implemented BMPs to achieve BAT and BCT as required by the Construction Storm Water Permit.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** for the violations occurring before the second NOV was issued on October 9, 2015. The October 9, 2015, NOV specifically informed the Dischargers that it was improperly storing the hazardous waste on the Site. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.5** for the violations occurring after the Dischargers received a citation because the Dischargers continued their noncompliance.

History of Violations

The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 7)

Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
August through October 7, 2015 Violations 2 x 0.85 x $10,000 x 1.3 x 1.1 x 1.0 =	$24,310 (Exceeds **$20,000** maximum.)
November 2015 through March 2016 Violations 7 x 0.85 x $10,000 x 1.3 x 1.5 x 1.0 =	$16,025 (Exceeds **$70,000** maximum.)

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 7)

The Dischargers stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. The Dischargers further acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 7)

The circumstances in this matter do not warrant an adjustment under this step.

STEP 8 – Economic Benefit (Violation No. 7)

See Violation No. 1 Step 8.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 7)

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day**. Therefore, the Maximum Liability Amount that could be assessed for this violation is **$90,000**.

The cleanup and cooperation factor was adjusted after notice had been expressly given, in this case, after the first two days. However, unlike in other cases, even the two initial violations resulted in the Enforcement Policy methodology producing a number over the statutory daily maximum of $10,000 per day of violation. Therefore, for all 9 days of violation, the daily maximum of $10,000 has been used.

Minimum Liability Amount

See Violation No. 1 Step 8.

STEP 10 – Final Liability Amount (Violation No. 7)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the final liability amount for failing to provide watertight containers and secondary containment for chemicals and fuels for **9 days** in violation of the Construction Storm Water Permit is **$90,000** ($20,000 + $70,000). The liability is within the minimum and maximum liability range. The liability is appropriate since, like vehicle fluid leaks, this category of violations is easy and inexpensive to prevent. Compliance requires basic good housekeeping practices. However, repeated violations demonstrate a failure to keep the Site in acceptable condition and instruct employees how to store and dispose of potentially harmful chemicals. What may appear to be a minor category is reflective of the lack of attention to detail and failure to prioritize environmental quality, leading to more significant violations and eventual environmental impacts.

VIOLATION NO. 8:
Failure to Prevent Discharge of Concrete Waste to the Ground
(5 days)

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 8)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No.8)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 8)

The "per day" factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Potential for Harm is **Moderate** due to the intentional, repeated and extensive concrete waste volume discharged to the ground from the washout area**.** Cementitious material is a highly alkaline (basic) material (pH 8.5 - 10), and when introduced into receiving waters, can increase the water's pH and alter the form of certain constituents, thereby increasing their bioavailability and toxicity. (PT Ex. 5, p. 303; Basin Plan, p. 3-21.) In this case, there were repeated discharges to the ground that left a trail of cementitious debris flowing away from the washout area, which presents a substantial potential for harm if storm water or non-storm water runoff were to transport the material into receiving waters.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Deviation from Requirement is **Major** because the Dischargers repeatedly failed to maintain the concrete washout basins which lead to the discharges and/or intentionally discharged the waste when the basins overflowed thus rendering the requirement ineffective.

Per Day Factor

Using Enforcement Policy Table 3 - Per Day Factor, the range of liability factors for a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, is 0.4 and 0.7. The middle of the range **0.55** was used for the Per Day Factor for the failure to prevent the discharge of concrete waste to the ground.

Days of Non-Discharge Violation

The Dischargers failed to prevent the discharge of concrete waste to the ground in violation of section B.2.i. in Attachment D to the Construction Storm Water Permit for **five days**: January 5, 2016; February 8, 2016; March 21, 2016; March 30, 2016 and March 31, 2016.

STEP 4 – Adjustment Factors (Violation No. 8)

There are three additional factors that are considered for modification of the amount of the initial liability: the Dischargers' Culpability, the Dischargers' efforts for Cleanup and Cooperation after the violation, and the Dischargers' History of Violations.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Dischargers were assigned a Culpability multiplier of **1.3** for this violation because the Dischargers either intentionally or due to negligence did not train workers in the proper use of the concrete washout facilities, and/or monitor and maintain the concrete washout facilities on the Site. A reasonably prudent person would have properly implemented BMPs to achieve BAT and BCT as required by the Construction Storm Water Permit, Attachment D, section B.2.i.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.1** for the violation occurring on January 5, 2016, because the City issued the Dischargers a citation and stop work order for the violation on January 21, 2016. (PT Exs. 105, 106.) This factor represents a lack of preparation and compliance with Construction Storm Water Permit requirements. The Dischargers were assigned a Cleanup and Cooperation multiplier of **1.5** for the four violations occurring in February and March 2016, because they occurred after the Dischargers were put on notice that its concrete washout facilities were not in compliance. The Dischargers failed to address the BMPs, leading to additional violations that were cited in the stop work order.

History of Violations

The Dischargers were assigned a History of Violations multiplier of **1.0** for this violation because the Dischargers do not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 8)

Total Base Liability Amount (i.e., initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Days of Violation x Per Day Factor x Statutory Max x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier =	**Total Base Liability**
January 5, 2016 Violation 1 x 0.55 x $10,000 x 1.3 x 1.1 x 1.0 =	**$7,865**
February through March 2016 Violations 4 x 0.55 x $10,000 x 1.3 x 1.5 x 1.0 =	$42,900 (Exceeds **$40,000** maximum.)

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 8)

The Dischargers stipulated to their collective ability to pay the administrative civil liability assessment in ACL Order No. R9-2021-0119 and did not assert an ability to pay defense in response to the Complaint. The Dischargers further acknowledged the San Diego Water Board does not apportion liability.

STEP 7 – Other Factors as Justice May Require (Violation No. 8)

The circumstances in this matter do not warrant an adjustment under this step.

STEP 8 – Economic Benefit (Violation No. 8)

See Violation No. 1 Step 8.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 8)

The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

The Maximum Liability Amount that could be assessed for this violation pursuant to Water Code section 13385 is **$10,000 per day**. Therefore, the Maximum Liability Amount that could be assessed for this violation is **$50,000**. For the one day of violation prior to the City's January 2016 stop work order, the liability has been generated by the Enforcement Policy methodology. For the remaining days, the total base liability for the violations exceed the statutory daily maximum of $10,000 per day of violation, and we have accordingly reduced those four days of violation to the daily maximum.

Minimum Liability Amount

See Violation No. 1 Step 8.

STEP 10 – Final Liability Amount (Violation No. 8)

Based on this analysis, the evidence in the record, and consistent with the Enforcement Policy, the final liability amount for failing to properly dispose of concrete waste for **5 days** in violation of the Construction Storm Water Permit is **$47,865** ($7,865 + $40,000), plus staff costs. The liability is within the minimum and maximum liability range. (See Enforcement Policy Calculation Methodology.) The liability for this category is appropriate given the disregard for the Construction Storm Water Permit requirements, and the potential for harm that could be caused by these materials.

TOTAL LIABILITY AMOUNT

The total liability amount for the violations in Complaint No. R9-2020-0006 is the Total Base Liability Amount plus staff costs, for a total of **$6,660,503**. Below is a tabular summary of the total assessed liability, Table 1. A summary of the methodology used to calculate the proposed civil liability is provided in Table 2, Liability Calculator.

TABLE 1
Total Assessed Liability

Violation No.	Violation	Liability Per Day of Violation	Days of Violation Assessed	Liability Amount	Total Liability Per Violation
1	**Unauthorized Discharges of Sediment**				
	Gallons Liability Assessment[17]				
	September 15, 2015 (667,760 gallons)	$0.63/gal.	N/A	$419,525	
	December 22, 2015 (1,584,406 gallons)	$0.86/gal.	N/A	$1,358,562	
	January 5, 2016 (2,553,232 gallons)	$0.86/gal.	N/A	$2,189,815	
	January 6, 2016 (1,511,822 gallons)	$0.86/gal.	N/A	$1,296,285	
	Total Violation No. 1 Gallons Liability Assessment			**$5,264,188**	
	Days Liability Assessment				
	September 15, 2015 Violation	$3,146	1	$3,146	
	December 23, 2015, and January 5 and 6, 2016 Violations	$4,290	3	$12,870	
	Total Violation No. 1 Days Liability Assessment		**4**	**$16,016**	
	TOTAL VIOLATION NO. 1 LIABILITY AMOUNT				**$5,280,204**
2	**Failure to Implement Material Stockpile BMPs**				
	August through October 2015 Violations	$7,865	4	$31,460	
	November 2015 through March 2016 Violations	$10,000	19	$190,000	
	TOTAL VIOLATION NO. 2 LIABILITY AMOUNT		**23**		**$221,460**
3	**Failure to Implement Vehicle Fluid Leak BMPs**				
	August through October 2015 Violations	$7,865	5	$39,325	
	November 2015 through March 2016 Violations	$10,000	9	$90,000	
	TOTAL VIOLATION NO. 3 LIABILITY AMOUNT		**14**		**$129,325**
4	**Failure to Implement Erosion Control BMPs in Inactive Areas**				
	September through October 9, 2015 Violations	$7,865	3	$23,595	
	October 12, 2015 through March 2016 Violations	$10,000	25	$250,000	
	TOTAL VIOLATION NO. 4 LIABILITY AMOUNT		**28**		**$273,595**
5	**Failure to Implement Erosion Control BMPs in Active Areas**				
	September 2015 Violations	$7,865	2	$15,730	
	October 2015 through March 2016 Violations	$10,000	9	$90,000	
	TOTAL VIOLATION NO. 5 LIABILITY AMOUNT		**11**		**$105,730**
6	**Failure to Apply Linear Sediment Controls**				
	September through October 9, 2015 Violations	$7,865	2	$15,730	
	October 13, 2015 through March 2016 Violations	$10,000	40	$400,000	
	TOTAL VIOLATION NO. 6 LIABILITY AMOUNT		**42**		**$415,730**
7	**Failure to Properly Store Chemicals**				
	August through October 7, 2015 Violations	$10,000	2	$20,000	
	November 2015 through March 2016 Violations	$10,000	7	$70,000	
	TOTAL VIOLATION NO. 7 LIABILITY AMOUNT		**9**		**$90,000**
8	**Failure to Prevent Discharge of Concrete Waste to the Ground**				
	January 5, 2016 Violation	$7,865	1	$7,865	
	February through March 2016 Violations	$10,000	4	$40,000	
	TOTAL VIOLATION NO. 8 LIABILITY AMOUNT		**5**		**$47,865**
	TOTAL BASE LIABILITY AMOUNT				**$6,563,909**
	STAFF COSTS TO DATE				**$96,594**
	TOTAL LIABILITY AMOUNT				**$6,660,503**

[17] For discharges of sediment-laden stormwater runoff it is liability per gallon.

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

DISCHARGE VIOLATION LIABILITY CALCULATIONS

Discharge Violation: Potential for Harm

Violation	Harm/Potential Harm to Beneficial Uses [0 – 5]	Physical, Chemical, Biological or Thermal Characteristics [0 – 4]	Susceptibility to Cleanup or Abatement [0 or 1]	Total Potential for Harm [0 – 10]
Violation No. 1 – Unauthorized Discharge of Sediment	3	2	1	**6**

Violation No. 1 – Unauthorized Discharge of Sediment (Per Gallon)

Date	Total Potential for Harm [0 – 10]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Gallons Discharged	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
9/15/2015	6	major	0.22	667,760	$10	1.3	1.1	1.0	$419,525	**$419,525**
12/22/2015	6	major	0.22	1,584,406	$10	1.3	1.5	1.0	$1,358,562	**$1,358,562**
1/5/2016	6	major	0.22	2,553,232	$10	1.3	1.5	1.0	$2,189,815	**$2,189,815**
1/6/2016	6	major	0.22	1,511,822	$10	1.3	1.5	1.0	$1,296,285	**$1,296,285**
TOTAL				**6,317,220**					$5,264,188	**$5,264,188**

Violation No. 1 – Unauthorized Discharge of Sediment (Per Day)

Date	Total Potential for Harm [0 – 10]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
9/15/2015	6	major	0.22	1	$10,000	1.3	1.1	1.0	$3,146	**$3,146**
12/22/2015	6	major	0.22	1	$10,000	1.3	1.5	1.0	$4,290	**$4,290**
1/5/2016	6	major	0.22	1	$10,000	1.3	1.5	1.0	$4,290	**$4,290**
1/6/2016	6	major	0.22	1	$10,000	1.3	1.5	1.0	$4,290	**$4,290**
TOTAL				**4**					$16,016	**$16,016**

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

NON-DISCHARGE VIOLATION LIABILITY CALCULATIONS

Violation No. 2 – Failure to Implement Material Stockpile BMPs

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
8/20/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
9/15/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
9/17/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/7/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
11/5/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/8/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/18/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/22/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/23/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/5/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/8/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/19/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/20/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/22/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/25/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
2/4/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/3/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/3/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/11/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/14/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/21/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/24/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
3/25/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/26/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/28/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/29/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
3/30/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/31/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
TOTAL				**23**					$235,235	**$221,460**

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

Violation No. 3 – Failure to Implement Vehicle Fluid Leak BMPs

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
8/20/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
8/31/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
9/17/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/7/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/8/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
11/3/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
11/23/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
11/30/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/9/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/10/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/5/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/7/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/19/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
2/8/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
TOTAL				**14**					$135,850	**$129,325**

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

Violation No. 4 – Failure to Implement Erosion Control BMPs in Inactive Areas

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
9/17/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/1/2015	moderate	major	0.55	0	$10,000	1.3	1.1	1.0	$0	**$0**
10/6/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/7/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/9/2015	moderate	major	0.55	0	$10,000	1.3	1.1	1.0	$0	**$0**
10/12/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/13/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/19/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/20/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/23/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/26/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
11/12/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
11/19/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/1/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/7/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/8/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/21/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/23/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/29/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/4/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/7/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/8/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/12/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/13/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/14/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/19/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/20/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/21/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/22/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/26/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/27/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/29/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
2/17/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
3/14/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/21/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
TOTAL				**28**					$291,720	**$273,595**

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

Violation No. 5 – Failure to Implement Erosion Control BMPs in Active Areas

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
9/14/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
9/15/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/6/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/12/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/19/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/26/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/10/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/22/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/7/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
2/8/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
2/17/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
3/14/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
TOTAL				**11**					$112,255	**$105,730**

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

Violation No. 6 – Failure to Linear Sediment Controls

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
9/16/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
9/17/2015	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
10/1/2015	moderate	major	0.55	0	$10,000	1.3	1.1	1.0	$0	**$0**
10/9/2015	moderate	major	0.55	0	$10,000	1.3	1.1	1.0	$0	**$0**
10/13/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/20/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
10/23/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
11/12/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
11/19/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
11/24/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/1/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/7/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/8/2015	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
12/9/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/10/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/16/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/18/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/21/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/21/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/22/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/23/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
12/29/2015	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/4/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/5/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/6/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/7/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/8/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/11/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/12/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/13/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/14/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/15/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/19/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/20/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/21/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/22/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/23/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/25/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/26/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/27/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
1/29/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
1/30/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

Violation No. 6 – Failure to Linear Sediment Controls (Continued)

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
2/1/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
2/2/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
2/3/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
2/4/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
2/8/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
2/17/2016	moderate	major	0.55	0	$10,000	1.3	1.5	1.0	$0	**$0**
2/26/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/4/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/7/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/10/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/11/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/14/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
TOTAL				**42**					$444,730	**$415,730**

TABLE 2
Liability Calculator
Enforcement Policy Calculation Methodology

Violation No. 7 – Failure to Properly Store Chemicals

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
8/20/2015	major	major	0.85	1	$10,000	1.3	1.1	1.0	$12,155	**$10,000**
10/7/2015	major	major	0.85	1	$10,000	1.3	1.1	1.0	$12,155	**$10,000**
11/3/2015	major	major	0.85	1	$10,000	1.3	1.5	1.0	$16,575	**$10,000**
11/23/2015	major	major	0.85	1	$10,000	1.3	1.5	1.0	$16,575	**$10,000**
11/30/2015	major	major	0.85	1	$10,000	1.3	1.5	1.0	$16,575	**$10,000**
12/10/2015	major	major	0.85	1	$10,000	1.3	1.5	1.0	$16,575	**$10,000**
1/19/2016	major	major	0.85	1	$10,000	1.3	1.5	1.0	$16,575	**$10,000**
3/14/2016	major	major	0.85	1	$10,000	1.3	1.5	1.0	$16,575	**$10,000**
3/21/2016	major	major	0.85	1	$10,000	1.3	1.5	1.0	$16,575	**$10,000**
TOTAL				**9**					$140,335	**$90,000**

Violation No. 8 – Failure to Prevent Discharge of Concrete Waste to Ground

Date	Total Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total per Gallon	Days of Violation	Statutory Max per [WC §13385]	Culpability [0.5 – 1.5]	Cleanup and Cooperation [0.75-1.5]	History of Violations	Liability Amount	Final Liability Amount
1/5/2016	moderate	major	0.55	1	$10,000	1.3	1.1	1.0	$7,865	**$7,865**
2/8/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/21/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/30/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
3/31/2016	moderate	major	0.55	1	$10,000	1.3	1.5	1.0	$10,725	**$10,000**
TOTAL				**5**					$50,765	**$47,865**

SUMMARY OF FINAL TOTAL LIABILITY CALCULATIONS

Liability Calculation	Maximum Liability Amount	Liability Amount [Before Reduction for Statutory Max]	Final Liability Amount
Discharge Violation Liability Calculations per Gallon (6,317,220 gallons)	$63,132,200	$5,264,188	$5,264,188
Discharge Violation Liability Calculations per Day (4 days)	$40,000	$16,016	$16,016
Non-Discharge Violations Liability Calculations (132 days)	$1,320,000	$1,410,890	$1,283,705
FINAL TOTAL LIABILITY	$64,492,200	$6,691,094	**$6,563,909**
Costs of Investigation and Enforcement			$96,594
FINAL TOTAL LIABILITY PLUS STAFF COSTS			**$6,660,503**