

**STATE OF CALIFORNIA  
REGIONAL WATER QUALITY CONTROL BOARD  
NORTH COAST REGION**

**PROPOSED ORDER NO. R1-2025-0017  
for Administrative Civil Liability**

**In the Matter of: Bo Dean Co., Inc.  
Mark West Quarry  
4611 Porter Creek Road, Santa Rosa, CA 95404**

The California Regional Water Quality Control Board, North Coast Region (hereinafter North Coast Water Board, Regional Water Board or Board) finds the following:

This matter comes before the North Coast Water Board pursuant to Administrative Civil Liability Complaint No. R1-2021-0047-A dated September 14, 2023, (amending Administrative Civil Liability Complaint No. R1-2021-0047) (Complaint) issued to Bo Dean Co., Inc. (Bo Dean or Discharger). The Complaint alleged seven violations based on evidence that the Discharger failed to implement the requirements of the *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Industrial Activities*, Order NPDES No. CAS000001 (Permit or Industrial General Permit) and North Coast Water Board Investigative Order R1-2019-0029, while operating the Mark West Quarry (Facility), as described below. The Prosecution alleged a maximum penalty of \$110,193,080 could be assessed. After application of the State Water Board's Enforcement Policy, the Prosecution arrived at a base liability of \$12,752,256 for Violations 1-7. The Prosecution adjusted this amount to a proposed administrative civil liability of \$8,589,406, focusing on Violation 1 only. A hearing took place on February 5-7, 2025, in accordance with the hearing notice and procedures and applicable laws and regulations, including California Code of Regulations, title 23, sections 648-648.8.<sup>1</sup> The Board has evaluated the evidence and argument and based on the allegations in the Complaint have determined for the reasons set forth below that Bo Dean violated the Industrial General Permit and Investigative Order No R1-2019-0029 and is liable for **\$126,969** in penalties.

## **Background**

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<sup>1</sup> The hearing was also conducted in accordance with a series of pre-hearing rulings by the Board presiding officer.

1. Bo Dean operates the Facility, an aggregate rock quarry, located on three parcels of land at 4611 Porter Creek Road in Sonoma County that covers approximately 120 acres.
2. Bo Dean is subject to the terms of the Industrial General Permit because it conducts industrial activity for which it is required to enroll in the Permit. The Discharger enrolled in previous iterations of the Permit since at least 1993 and submitted a Notice of Intent to comply, thereby enrolling in the current iteration of the Permit, in June 2015.
3. The North Coast Water Board staff began the formal investigation that is the subject of the Complaint on December 17, 2018, after a Regional Water Board staff person travelling on Porter Creek Road observed a sediment plume in Porter Creek.<sup>2</sup> (Complaint, Att. A p.7)
4. Following a series of inspections, issuance of Investigative Orders and Bo Dean's response to those Investigative Orders, on September 10, 2021, the Prosecution issued an Administrative Civil Liability Complaint with a total proposed liability of \$4,500,000.
5. The Parties entered settlement negotiations but were unable to agree on final settlement terms.
6. The Prosecution then revised its complaint and issued the revised Administrative Civil Liability Complaint R1-2021-0047A on September 14, 2023. The revised Complaint added 67 days of violation, and the proposed penalty was increased to \$8,589,406.
7. The Complaint alleges seven violations. Violation 1 alleges a violation of Industrial General Permit Section III.A, alleging Bo Dean discharged approximately 10,519,608 gallons of sediment-laden stormwater not otherwise specifically authorized by the Permit for 73 days.
8. Violations 2-5 list alleged Best Management Practice (BMP) violations of the Permit. Violation 2 alleges 127 days of violation for the failure to implement good housekeeping BMPs (Permit section X.H.1.a.); Violation 3 alleges 93 days of violation for failure to maintain and implement material handling and waste management minimum BMPs (Permit section X.H.1.d.); Violation 4 alleges 121 days of violation for failure to implement erosion and sediment control minimum BMPs (Permit section X.H.1.e.); and Violation 5 alleges 83 days of violation for failure to implement advanced BMPs (Permit section X.H.2).

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<sup>2</sup> Attachment A states the first inspection day was December 18, however, it was December 17 according to the staff inspection report. The staff person who observed the sediment plume was travelling on Porter Creek Road on December 16, the day prior.

9. Violation 6 alleges Bo Dean failed to submit all sampling and reports as required by Permit section XI.B.11.a. The Prosecution proposed penalties for three days of violation, one day of violation for each late report submitted.
10. Violation 7 alleges Bo Dean failed to comply with Investigative Order No. R1-2019-0029 between April 4, 2020, and January 14, 2023, by failing to conduct receiving water monitoring and documenting the monitoring with photographs. The Prosecution proposes penalties for seven days of violation pursuant to Water Code section 13268.
11. The North Coast Water Board issued a notice of public hearing and hearing procedure on March 29, 2024. After discussion and agreement from the Parties, the Board issued a final public notice and hearing procedure on September 4, 2024.
12. Prior to the hearing the parties submitted a series of motions and objections. The North Coast Water Board Chair issued rulings on those motions and objections. In a January 24, 2025, ruling, the Chair deferred ruling on certain evidentiary objections pending discussion at the hearing. The night before the hearing on February 4, 2025, Bo Dean submitted an additional Motion to Dismiss and Objection to the Prosecution's presentation slides.
13. The North Coast Water Board held a public hearing on February 5-7, 2025, and received evidence and argument from the Parties. On February 5, the first day of the hearing, the Board conducted a site visit with the Parties. The Board did not permit argument at the site visit. The site visit was conducted consistent with a pre-approved site hearing script that covered the locations and description of each site location.
14. At the conclusion of the hearing the Board met in closed session on February 7, March 17, and April 1 to review the evidence and argument and released this Order to the Parties for their review on April 1.

## **Legal and Regulatory Considerations**

15. Section 301 of the Clean Water Act (33 U.S.C. § 1311) and Water Code section 13376 prohibit the discharge of pollutants to surface waters except in compliance with an NPDES permit.
16. The Industrial General Permit was issued pursuant to Clean Water Act section 402 and implementing regulations adopted by the US EPA and chapter 5.5., division 7 of the Water Code (commencing with section 13370), including Water Code section 13376. The Industrial General Permit serves as an NPDES permit for discharges of stormwater runoff from the Facility.

17. The North Coast Water Board is the public agency with primary responsibility for the protection of groundwater and surface water quality for all beneficial uses within the North Coast Region of the State of California. Stormwater runoff from the Facility discharges to Porter Creek, a tributary to Mark West Creek, a tributary to the Russian River, and a water of the United States.
18. The Russian River is listed on the Clean Water Act section 303(d) impaired water body list as being impaired for sediment and temperature.
19. The *Water Quality Control Plan for the North Coast Region* (Basin Plan) identifies beneficial uses for the Mark West Subarea and Porter Creek including Municipal and domestic supply; Agricultural supply; Industrial service supply; Industrial process supply; Groundwater recharge; Freshwater replenishment; Navigation; Water contact recreation; Non-contact water recreation; Commercial and sport fishing; Warm freshwater habitat; Cold freshwater habitat; Wildlife habitat; Rare, threatened, or endangered species; Migration of aquatic organisms; and, Spawning, reproduction, and/or early development.
20. The Basin Plan contains water quality objectives which are necessary for reasonable protection of the beneficial uses. Protection of the following beneficial uses (i.e., Cold Freshwater Habitat; Commercial and Sport Fishing; Spawning, Reproduction, and/or Early Development; Rare, Threatened, or Endangered Species; and Migration of Aquatic Organisms) are of relevance here and include the following objectives related to sediment:
  - a. Sediment (Section 3.3.11) "The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses."
  - b. Suspended Material (Section 3.3.12) "Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses."
  - c. Turbidity (Section 3.3.17) "Turbidity shall not be increased more than 20 percent above naturally occurring background levels."

#### **Water Code Authority for Imposing Administrative Civil Liability**

21. Pursuant to Water Code section 13385(a), any person who violates waste discharge requirements or any requirements of section 301 of the Clean Water Act is subject to administrative civil liability pursuant to Water Code section 13385(c), in an amount not to exceed the sum of both the following: (1) ten thousand dollars (\$10,000) for each day in which the violations occurs; and (2) where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000

gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

22. Pursuant to Water Code section 13268(a), any person who fails to furnish technical or monitoring program reports as required by Water Code section 13267(a) or (b) may be subject to civil liability pursuant to Water Code section 13268(b), in an amount not to exceed \$1,000 for each day in which the violation occurs.
23. The violations alleged are subject to liability in accordance with Water Code sections 13268 and 13385.
24. Pursuant to Water Code sections 13385(e) and 13327, in determining the amount of civil liability, the North Coast Water Board shall take into consideration the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup and abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on the ability to continue in business, and voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
25. On April 4, 2017, the State Water Resources Control Board (State Water Board) adopted Resolution No. 2017-0020, which adopted the 2017 Water Quality Enforcement Policy (2017 Enforcement Policy).<sup>3</sup> The 2017 Enforcement Policy was approved by the Office of Administrative Law and became effective on October 5, 2017. The 2017 Enforcement Policy establishes a methodology for assessing administrative civil liability that addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code sections 13385(e) and 13327.
26. The Prosecution alleged the Board could assess a maximum statutory penalty of \$110,193,080. After application of the State Water Board's Enforcement Policy, the Prosecution arrived at a base liability of \$12,752,256 for Violations 1-7. The Prosecution adjusted this amount and proposed administrative civil liability of \$8,589,406, focusing on Violation 1.
27. The Prosecution has the burden of proof to support a violation by the preponderance of the evidence. As noted by the Prosecution in its rebuttal brief, the standard is met if the Prosecution Team's evidence "which when weighed

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<sup>3</sup> On November 7, 2024, the 2024 Water Quality Enforcement Policy went into effect. However, because the ACL Complaint and violations alleged in this matter predate November 7, 2024, the 2017 Enforcement Policy is used here.

with contrary evidence, has more convincing force and the greater probability of truth.”<sup>4</sup>

## Violation 1

28. Violation 1 is based on an alleged violation of Section III.A. of the Permit. The Prosecution alleges Bo Dean violated Section III.A., when it discharged approximately 10,519,608 gallons of sediment-laden stormwater not otherwise specifically authorized by the Permit for 73 days: October 2, 2018; November 21-23, 27-29, 2018; December 1, 5, 15-16, 21, 23-24, 2018; January 5-6, 8-9, 11, 15-16, 20, 2019; February 1-4, 8-10, 12-17, 25-27, 2019; March 2-3, 5-6, 9-10, 20, 22-23, 25-28, 2019; April 5-7, 15, 2019; May 16-17, 19-20, 26, 2019; December 2, 4, 22, 29, 2019; January 21, 2020; March 24, 2020; April 4, 2020; November 17, 2020; January 4, 2021; October 22, 2021; December 10, 2022; January 13-14, 2023.
29. Permit Section III.A. states, “All discharges of stormwater to waters of the United State are prohibited except as specifically authorized by this General Permit or another NPDES permit.”<sup>5</sup>
30. The Prosecution asserts that any stormwater discharged from the site was unauthorized if Bo Dean had insufficient BMPs to comply with the Permit. (Complaint, Att. A. p.9; Final Hearing Transcript “H.T.” 2/6 p. 227 [“every gallon that they discharged was in violation”].)
31. Under Water Code section 13385, liability may be assessed for: 1) a per gallon amount of discharged waste (up to \$10 per gallon) and per day amount (up to \$10,000). For the first 60 days of Violation 1, from December 17, 2018 to May 26, 2019, the Prosecution Team is seeking both the per gallon and per day penalty. For the remaining 13 days, the Prosecution Team is only seeking liability for the per day amount and does not present evidence of discharge volumes.
32. For Violation 1, the Prosecution focused on one area of the site, Tributary Area C, and runoff from that area to culvert “SP-3” that discharges to Porter Creek. (Complaint, Att. A p.10.)<sup>6</sup> There was no direct measurement of stormwater runoff volumes from any of the culverts or other discharge points, the volumes are entirely based on the technical memorandum (PT Ex. 7) submitted by Bo Dean to fulfill requirements of an Investigative Order (PT Ex. 8) issued by the Prosecution Team. The modeling estimated 10, 519,608 gallons of stormwater were

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<sup>4</sup> *City of Long Beach v. Workers’ Comp. Appeals Bd* (2005) 126 Cal.App.4th 298,314; *Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.

<sup>5</sup> PT Ex 1, Factsheet p. 22. The Industrial General Permit is also available at: [https://www.waterboards.ca.gov/water\\_issues/programs/stormwater/docs/industrial/2014indgenpermit/order.pdf](https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/industrial/2014indgenpermit/order.pdf)

<sup>6</sup> SP-3 is the designated culvert discharge relevant to Violation 1.

discharged from Tributary C area to Porter Creek from October 2, 2018, to May 26, 2019. (Complaint, Att. A, p.9.) To support its allegation that a discharge of stormwater occurred, the Prosecution relies on the technical memorandum. (Complaint, Att. A p.19) Although Bo Dean disagrees that the Prosecution has shown that that all stormwater discharged was “sediment-laden” it does not challenge the modelling estimate of gallons discharged as presented in the Prosecution’s Complaint.

33. The Prosecution’s evidence of discharge, and that the discharge from culvert SP-3 was sediment laden also includes NOAA precipitation data (PT Ex 39), inspection reports, staff observations, photographs and turbidity data, which is summarized in Prosecution Exhibit 29.
34. To support a violation under condition III.A. two elements must be met: 1) a discharge of stormwater to Waters of the United States<sup>7</sup>, and 2) that discharge was not “specifically authorized” under the Permit.
35. The Prosecution alleges that discharges are not specifically authorized and violations of condition III.A. due to Bo Dean’s failure to implement best management practices (BMPs) as required by the Industrial General Permit sections X.H.1 and X.H.2. (Complaint p.2 paragraphs 8-10.)
36. In Complaint Violations 2-5, the Prosecution lists the four types of BMPs that it alleges were not implemented consistent with the Permit section X.H.1 and X.H.2: Minimum housekeeping BMPs X.H.1.a, (Violation 2), Erosion and Sediment Control BMPs X.H.1.d (Violation 3), Material and Waste Management Handling BMPs X.H.1.e. (Violation 4), and Advanced BMPs X.H.2 (Violation 5).
37. The Permit Factsheet discusses Permit Sections X.H.1 and X.H.2. The Permit requires: “[A]ll Dischargers to implement minimum BMPs, as well as any advanced BMPs that are necessary to adequately reduce or prevent pollutants in discharges consistent with the TBELs. The minimum BMPs specified in this General Permit represent common practices that can be implemented by most facilities. This General Permit generally does not mandate the specific mode of design, installation or implementation for the minimum BMPs at a Discharger’s facility. It is up to the Discharger, in the first instance, to determine what must be done to meet the applicable effluent limits. (PT Ex.1, Factsheet p.23.)
38. Some BMPs are structural while most minimum BMPs are non-structural. (PT Ex.1, Factsheet p.5) Minimum BMPs include generally: preventative maintenance, procedures to control spills and response actions, minimize tracking and dust generation, storage, diversion actions, observations and identification of areas that need controls. (PT Ex.1 p. 35). Advanced BMPs are primarily structural and include settling tanks, storage ponds, shelters, and other

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<sup>7</sup> Bo Dean does not contest that the discharge to Porter Creek was a discharge to a Water of the United States.

physical BMPs that divert runoff, treat runoff, contain it, or minimize exposure. (PT Ex. 1, p. 38.)

39. In summary, the Permit requires minimum and advanced BMPs to be implemented to the extent feasible. To the extent feasible requires Dischargers to select, design, install and implement BMPs that reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability. (PT Ex. 1, p.35 FN 14.)
40. The Prosecution's evidence to support a lack of required BMPs is almost exclusively contained in the series of 18 inspection reports and one inspection report from US EPA generated from December 17, 2018- January 23, 2023 following site visits. (PT Ex.10- PT Ex. 27; PT Ex. 49).
41. Before discussing the specific evidence that the Prosecution asserts supports a violation of Permit condition III.A., and that Bo Dean discharged stormwater without BMPs in compliance with the Permit, the North Coast Water Board must address the substance of the Prosecution's Complaint and Attachment A to the Complaint.
42. The Complaint alleges a violation of Permit condition III.A. In Attachment A to the Complaint, the Prosecution cites turbidity data on certain dates to show violations of the water quality objective for turbidity. (Complaint Att. A, p.11.) In Attachment A to the Complaint the Prosecution discusses 13 days of violation where the turbidity data shows Bo Dean's discharges caused an exceedance of the water quality objective. (Complaint, Att. A p.11.) Those dates are December 2, 2019, December 4, 2019, December 22, 2019, December 29, 2019, January 21, 2020, March 24, 2020, April 4, 2020, November 17, 2020, January 4, 2021, October 22, 2021, December 10, 2022, January 13, 2023, and January 14, 2023. The Complaint, however, does not allege a violation of water quality objectives.
43. Exceedances of water quality objectives are discussed in section VI. of the Permit that discusses Receiving Water Limitations.<sup>8</sup> The Complaint does not cite a violation of Receiving Water Limitations as a basis for Violation 1, it cites only BMP sections X.H.1 and X.H.2.
44. Although both parties at times presented conflicting information as to how or whether the turbidity data by itself could support a violation<sup>9</sup>, the Board finds it

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<sup>8</sup> PT Ex 1, Section VI.A. p.25 of the Permit states: "Dischargers shall ensure that industrial storm water discharges and authorized NSWDS do not cause or contribute to an exceedance of any applicable water quality standards in any affected receiving water".

<sup>9</sup> For example, in its Response Brief, and Findings of Fact and Conclusions of Law, Bo Dean listed days with turbidity data that could support a violation of receiving water limitations based on water quality



consistent with the Complaint, Attachment A, and argument presented to consider turbidity data as relevant evidence to support either a discharge and/or a lack of adequate BMPs such that discharges were not specifically authorized as specified in Permit condition III.A.

45. The Prosecution Team presented additional conflicting and inconsistent information on whether it is seeking penalties for other violations of the Permit. In Presentation Slide 83, the Prosecution listed a violation of Permit Prohibition III.D which prohibits discharges that violate Basin Plan Prohibitions. But neither Permit Prohibition III. D, nor a violation of a Basin Plan Prohibition was alleged in the Complaint. Moreover, the cited Basin Plan provision, the turbidity objective in Basin Plan section 3.3.17 is a water quality objective, not a prohibition.<sup>10</sup> Even if it was a Basin Plan prohibition and not a water quality objective, the Prosecution Team cannot add violations at the hearing or in a rebuttal brief that were not alleged in the Complaint. Based on the plain language of the Complaint along with its statements at the hearing, the Board may only consider an alleged violation of Permit condition III.A based on inadequate BMPs. (See 2/6 H.T. pp. 55-57 and 2/5 pp. 92-94 [confirming that the Prosecution's case depends on a violation of III.A of the IGP related to inadequate BMPs].) To allow the Prosecution to expand claims would be prejudicial and the Board does not consider Prosecution references or argument related to violations not contained in the Complaint.
46. To support liability under Violation 1, for each day there was an alleged discharge and lack of required BMPs, the Prosecution Team must allege a BMP violation. The Prosecution acknowledged this, "As described in more detail in Violations 2 through 5, the Discharger failed to implement the Permit during the days alleged herein..." (Complaint, Att. A p.9) "The Discharger failed to meet the minimum and Advanced BMP requirements of the Permit, as alleged in Violations 2 through 5, during the entire time period alleged for Violation 1." (Complaint Att. A, p.18). At the hearing, the Prosecution directed the North Coast Water Board to this language on page 9 in Attachment A to the Complaint when a Board member asked how Violations 2-5 relate to Violation 1. (H.T. 2/6 p. 230.) The Prosecution again confirmed that the BMP deficiencies to support Violation 1 are outlined in Complaint Violations 2-5: "While Violation 1 focused on the site's discharge, Violations 2 through 5 are for the specific lack of BMPs for a

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standards that would constitute a discharge not authorized by the permit. (Bo Dean Response Brief, p. 65; Bo Dean Findings of Fact and Conclusions of Law p.29.) In the Prosecution's discussion of deviation from requirements, cleanup and cooperation, and culpability factors, the Prosecution directly ties the receiving water data to the lack of BMPs. (Complaint Att. A. pp. 18, 21-25, 27-28.)

<sup>10</sup> Section II of the Prosecution's Rebuttal Brief notes that the Violation 1 is based on Bo Dean's failure to comply with Sections III.C (prohibiting discharges that cause or threaten a condition of pollution) and III.D (prohibiting discharges that violate basin plan discharge prohibitions), in addition to III.A. (Rebuttal Brief p. 7.) At the hearing, the Prosecution Team asserted that days 61-73 of Violation 1 are based on violation of the basin plan's turbidity objective and ties to Permit Section III.D. (H.T. 2/6 pp. 120, 127; H.T. 2/7 pp. 336, 342.) These representations conflict with the Complaint and other statements at the hearing.

period of time, including and extending beyond Violation 1. Basically, Violation 1 focuses on the portion of the permit which says a site can't discharge stormwater unless it's in compliance with the permit. Violations 2 through 5 specify how BoDean failed to comply with the permit's requirements to have certain specific BMPs." (H.T. 2/7 pp.343-344.) "Violations 2 through 5 will show in detail how BoDean failed to implement the permit such that no discharge of stormwater from its site was authorized during the period of alleged violations." (H.T. 2/6 p.19.)

47. For the following 15 alleged violation days under Violation 1, the Prosecution did not allege a BMP violation in Complaint Violations 2-5: October 2, 2018, November 21, 2018, November 22, 2018, November 23, 2018, November 27, 2018, November 28, 2018, November 29, 2018, December 1, 2018, December 5, 2018, December 15, 2018, December 16, 2018, May 17, 2019, January 4, 2021, October 22, 2021, January 13, 2023.
48. As discussed above, the North Coast Water Board must evaluate the case based on the allegations contained in the Prosecution's Complaint. The Prosecution confirmed to the Board and Bo Dean that its case and arguments are contained in the Complaint and Attachment A to the Complaint.<sup>11 12</sup> The North Coast Water Board cannot expand the scope of violations or assess liability for violations not clearly alleged. Moreover, the Board must look to Violations 2-5 as the support for the BMP violations alleged under Violation 1 because Violations 2-5 list the specific types of BMPs that were allegedly missing on specific days and Violation 1 does not specifically contain this information. For example, the Board has no information in the Complaint or Attachment A about which specific BMP is alleged to have been violated during the October 2-December 17, 2018 period. Because the Prosecution did not allege specific BMP violations in Violations 2-5 of the Complaint for the above dates, the Board has no basis to consider these days of violation under Violation 1.
49. Nevertheless, the North Coast Water Board has reviewed the 15 listed days that do not have a corresponding BMP violation listed in Violations 2-5 and finds that, except for possibly one day, even if the Prosecution had listed a BMP violation in Violations 2-5, or otherwise included BMP violation information in Violation 1,

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<sup>11</sup> In its Opposition to a Motion to Dismiss filed by Bo Dean on September 6, 2024, the Prosecution stated, "The Complaint, Attachment A.... provide Bo Dean with the evidence and argument supporting the Prosecution Team's position in this matter." The Board Chair's ruling acknowledged the Prosecution's case depended on the evidence and argument in the Complaint and Attachment A.

<sup>12</sup> The Prosecution states in its rebuttal brief that it intentionally did not list a BMP violation in violations 2-5 for May 17, 2019 although it could have based on photographs in Mr. Boyle's Declaration, Rt Ex.9 Mr. Boyle's Declaration was filed after the Complaint and Attachment A were issued, the Prosecution would have had to amend and reissue the Complaint to list violations based on this Declaration. This is also inconsistent with statements in the Complaint, Attachment A and at the hearing and does not explain why the Prosecution did not list a BMP violation in Violations 2-5 for the entire October 2 to December 17, 2018, period leading up the first site inspection.

there is insufficient evidentiary support for the Board to find a violation of Permit Condition III.A. on the above dates.<sup>13</sup>

50. The 12 violation days alleged to have occurred from October 2, 2018 - December 16, 2018, predated any site visit or investigation. The first inspection visit and report date is December 17, 2018. The December 17, 2018, inspection report did not document specific BMPs that were lacking.<sup>14</sup> The inspection did not cover the entire site, or even a significant portion of the site, it was limited to the bottom area of the site and publicly accessible area along the road and creek area. To support BMP violations extending back to as early as October 2, 2018, the Board would have to find that the December 17 inspection, which included photographs of turbid water in Porter Creek and observations of settling tanks with water discharging from the tanks that “appeared relatively clear”, supported a BMP violation as far back as October 2, 2018.<sup>15</sup> The Board cannot find based on the limited evidence presented that Bo Dean had inadequate BMPs in place on December 17<sup>16</sup>, let alone on the 11 alleged violation days in the approximately 10-week period prior to this inspection.
51. The Prosecution submitted insufficient evidence to support a BMP violation for 3 of the additional days listed above that do not have a corresponding BMP violation listed in Violations 2-5: May 17, 2019, October 22, 2021, and January 4, 2021. No site inspection occurred on May 17, 2019, so there is no report documenting site conditions or a lack of BMPs. No turbidity data was collected for this date.<sup>17</sup> On October 22, 2021, similarly there is no inspection report documenting site conditions or BMP deficiencies. The turbidity data is unresponsive of an inference that BMPs were lacking or inadequate. The data shows that the culvert discharge turbidity value at SP-3 was lower than the upstream creek value (31.3 NTU versus 64.7 NTU) and lower than the mixed creek sample of 215 NTU. On January 4, 2021, there is also no inspection report to document site conditions or BMPs. As with the October data, turbidity data does not support a BMP violation. The data shows a culvert discharge turbidity value of 18.7 NTU and a mixed sample point turbidity of 69.2 NTU. The upstream turbidity value is roughly four times higher than the culvert turbidity at 78.5 NTU. As on October 2, 2021, the discharge from the culvert was less turbid than the upstream water sample in Porter Creek. On January 13, 2023, the inspection report noted an advanced BMP failure. Bo Dean acknowledged the failure to the system and that it was working to fix the treatment system. (H.T. 2/7, p.111.) A BMP violation was alleged and documented, however even if the Board

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<sup>13</sup> The exception is January 13, 2023, where the evidence of an advanced BMP failure potentially could have supported a violation.

<sup>14</sup> Bo Dean also asserted it was not provided until March 14, 2019. (H.T. 2/6 p.91.)

<sup>15</sup> The inspection report also included a statement from Bo Dean staff that a pump in the settling tanks had recently failed and a new pump was scheduled to be installed at the time of the inspection.

<sup>16</sup> Because December 17, 2018, was also not an alleged discharge violation day, there is no turbidity data that might be supporting evidence of a potential BMP violation.

<sup>17</sup> Given the lack of turbidity data characterizing the discharge on May 17, the Board does not find the May 16 inspection report contains sufficient evidence to infer a BMP violation on May 17.

overlooked the absence of an alleged BMP violation in the Complaint, the turbidity data on this date again shows the culvert discharge value of 12.81 NTU, and mixed value 40.2 NTU were lower than upstream turbidity in Porter Creek 45.1 NTU. The Board declines to impose a penalty based on these facts as the evidence does not show Bo Dean's discharges led to turbidity increases in Porter Creek.

52. The North Coast Water Board finds that the Prosecution team has provided sufficient evidentiary support for the Board to determine a violation of Permit condition III.A. on the following days: January 9, 2019, January 16, 2019, February 26, 2019, March 20, 2019, May 16, 2019, December 2, 2019, December 4, 2019, December 22, 2019, December 10, 2022, January 14, 2023<sup>18</sup>. For each of these days, the Prosecution's evidence shows it is more likely than not that 1) a discharge occurred; and 2) additional BMPs were necessary or existing BMPs were not sufficient to comply with the Permit.
53. All days are supported by evidence in site inspection reports and turbidity data. With respect to the turbidity data, the parties asserted various positions on what the appropriate sampling point was to determine compliance with the water quality objective for turbidity. Without specific guidance or regulation, or a zone of dilution specified in the Permit, the Board considers all turbidity data collected to determine whether runoff caused a 20 percent increase in turbidity in Porter Creek. As noted earlier, no receiving water limitation violation was alleged in the Complaint and the Board is not determining whether a violation of receiving water limits occurred. The data and evidence showing an exceedance of a water quality objective is relevant in determining whether additional BMPs were necessary to comply with the Permit.
54. The North Coast Water Board finds that a combination of turbidity data and direct observations and documentation of BMP deficiencies on the date of the violation meets the evidentiary standard to support a violation. The Board's findings in this case, however, should not be read as a general principle that violations on non-inspection days cannot be supported by the evidence in all cases and circumstances, only that in this case the Prosecution did not submit sufficient evidence when weighed against Bo Dean's evidence to support violations on many non-inspection days.<sup>19</sup>
55. On January 9, 2019, the Prosecution alleged 151,100 gallons of runoff from the facility to culvert SP-3 based on Bo Dean's modeling data. The Prosecution collected turbidity data showing culvert discharges from SP-3 of 1,068 NTU, a

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<sup>18</sup> The Prosecution alleged violations of water quality objectives for the days between December 19, 2019 and January 14, 2023. The Board evaluates these days as violations of condition III.A and failure to implement BMPs in compliance with the permit. Even if they were evaluated as violations of receiving water limitations the outcome would be unaffected.

<sup>19</sup> The Board relies in part, on the February 19, 2019, November 26, 2019, December 6, 2019 inspection reports to find that violations occurred on other days close in time where turbidity data was also collected.

mixed turbidity value of 1,684 NTU, downstream turbidity of 93.9 NTU and upstream Porter Creek receiving water turbidity of 61.7 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. The Prosecution Team also conducted an inspection at the bottom of the site on this day, noting that the runoff from the settling tank system, an advanced BMP, exceeded the capacity of the system. In Violation 5, the Prosecution alleged that this was a violation of Permit section X.H.2., and failure to implement advanced BMPs. The Board determines that the turbidity data combined with the observation that the advanced BMP at the site was insufficient to contain the runoff supports a violation of Permit condition III.A.

56. On January 16, 2019, the Prosecution alleged 533,189 gallons of runoff from the facility from SP-3 based on Bo Dean's modeling data. The data shows a culvert discharge turbidity value of 887 NTU, a mixed turbidity value of 164 NTU, downstream turbidity of 46.2 NTU and the upstream Porter Creek turbidity value of 23.5 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. The Prosecution's inspection noted that runoff from the settling tank system was turbid. A sample of the drainage water from the settling tanks was 1,002 NTU. In Violation 5, the Prosecution alleged that this was a violation of Permit section X.H.2., the failure to implement advanced BMPs. The Board determines that the observations of the settling tanks, and that turbid water was discharging from the tanks, combined with turbidity data, including the turbidity values in the drainage ditch downstream from the settling tanks, shows it more likely than not that advanced BMPs at the site were insufficient to contain/treat the runoff in accordance with the Permit and additional or modified BMPs were necessary to comply with the Permit.

57. On February 26, 2019, the Prosecution alleged 1,188,311 gallons of stormwater discharge from culvert SP-3 based on Bo Dean's modeling data. Data shows discharge from the settling tanks was 2,823 NTU and an upstream Porter Creek sample of 115 NTU. Staff conducted a site inspection with County officials and identified significant sediment runoff from areas of the site and water exceeding settling basin capacity. Bo Dean responded to these findings pointing out that exceptional rainfall, 4.64 inches, fell on this date. Bo Dean asserted this exceeded the Permit's 85 percent advanced BMP design standard for new stormwater capture features by more than four times, and it was infeasible to contain stormwater on this day.<sup>20</sup> Bo Dean also provided testimony that the settling tank discharge was affected by sediment impacts associated with a landslide. (Boyle Declaration, RT Ex. 9 p.24.)<sup>21</sup> Although the Board questions

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<sup>20</sup> Testimony from Mr. Boyle established that these settling/storage basins were constructed prior to 2015. The current permit and 85 percent design standard for new volume based BMPs applies only to storage BMPs after adoption of the 2014 Permit.

<sup>21</sup> The Director of Operations, Anthony Boyle, acknowledged that Bo Dean is not excused from Permit requirements because there is a large storm event. (H.T. 2/7, p. 294.)

whether additional BMPs would have been possible to fully contain stormwater runoff on this date, it finds it more likely than not that additional BMPs were necessary to comply with the Permit. In reaching this decision, the Board also relies on the inspection that occurred on February 19, one week prior. This was a joint inspection with US EPA and included substantially the entire site. Both the US EPA inspection report, and the inspection report generated by North Coast Water Board staff documented staff observations of areas that needed additional BMPs.<sup>22</sup> The reports documented a series of BMPs that were insufficient or lacking and the need to implement: additional use of check dams in rock lined ditches, increased pond capacity, improved fines management and road grading, and better maintenance of structural BMPs. (PT Ex 49; PT Ex. 14.) Anthony Boyle acknowledged and confirmed that Bo Dean would correct BMPs and implement additional feasible BMPs in a follow up conversation with the EPA inspector. He communicated that the expansion of settling pond 1 would require County approval first. Bo Dean pursued County approval of that expansion. (Boyle Dec. RT Ex 9.) The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs), X.H.1.d., (material and waste management) X.H.1.e., (erosion and sediment control BMPs) and X.H.2 (advanced BMPs) in Violations 2-5 on February 26. The Board finds that the site observations on February 26 and turbidity data from the settling tanks, coupled with the inspection that occurred on February 19 and documented insufficient BMPs, is sufficient evidence for the Board to determine that additional BMPs were more likely than not necessary on February 26. The Board expresses concern, however, that Bo Dean presented evidence that the report was not provided or uploaded to SMARTS for approximately 6 months after the inspection date (Bo Dean slide 87.) This has at least some bearing on the reliability of the report and Bo Dean's ability to respond to noted deficiencies.

58. On March 20, 2019, the Prosecution alleged 114,917 gallons of runoff from culvert discharge SP-3 based on Bo Dean's modelling data. The staff inspection on this date documented muddy water flowing in certain areas of the site and an area in front of the cake storage where muddy water ponded. The samples collected showed a culvert discharge NTU value of 2,107, a mixed turbidity value of 405 NTU, downstream turbidity of 93.4 NTU and an upstream value of 19.6 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. Following the inspection, an email communication from staff to Bo Dean documents that staff communicated findings from the inspection that additional BMPs were necessary. (PT Ex. 86.) The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs), X.H.1.d. (materials handling and waste

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<sup>22</sup> While the Board relies on the February 19 inspection report to support BMP deficiencies on February 26, it cannot impose any penalties for non-discharge BMP violations on February 19 as the Prosecution did not allege non-discharge BMP violations in Violations 2-5 with respect to February 19. The Methodology where violation 2-5 days were selected based on 0.1 inch of rainfall, excluded one of the most comprehensive inspections of the site where BMPs were documented, deficiencies noted, and recommendations made during the rainy season.

management BMPs, X.H.1.e. (erosion and sediment control BMPs) and X.H.2 (advanced BMPs) in Violations 2-5. The Board finds that the turbidity values combined with the site inspection notes, photographs, and follow up communication noting necessary BMP improvements is sufficient for the Board to determine it more likely than not that additional BMPs were necessary on this day to comply with the Permit.

59. On May 16, 2019, the Prosecution alleged 463,713 gallons of discharge from culvert discharge point SP-3 based on Bo Dean's modelling data. During the site inspection on this day staff observed muddy storm water runoff, accumulation of muddy water in front of the cake storage area, and photographs of turbid water near the culvert discharge. The turbidity data showed a culvert discharge turbidity value of 482 NTU, a mixed turbidity value of 109 NTU, downstream turbidity of 45 NTU and an upstream value of 23 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs), X.H.1.d. (materials handling and waste management BMPs, X.H.1.e. (erosion and sediment control BMPs) and X.H.2 (advanced BMPs) in Violations 2-5. Although the report did not provide extensive detail on specific BMP deficiencies, the Board finds that the turbidity data combined with the site inspection notes and photographs of site conditions are sufficient for the Board to determine it more likely than not that additional BMPs were necessary to comply with the Permit.

### **Remaining Violation 1 Days Where No Per Gallon Discharge was Alleged**

60. On December 2, 2019, the Prosecution supports a discharge based on NOAA precipitation data and turbidity data. Turbidity samples show that the mixed discharge point of 74.3 NTU, downstream of 32 NTU, and upstream turbidity of 7.96 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. Bo Dean acknowledges this exceedance in its response brief and Findings of Fact and Conclusions of Law.<sup>23</sup> The November 26, 2019, inspection report primarily focused on the installation of the new advanced treatment system that Bo Dean was installing, but also noted generally that improved BMPs are necessary to avoid sediment on paved surfaces. The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs), X.H.1.d. (materials handling and waste management BMPs, X.H.1.e. (erosion and sediment control BMPs) and X.H.2 (advanced BMPs) in Violations 2-5. Although the report lacked extensive observations of BMP deficiencies, and it is unclear whether all of these BMPs were inadequate on December 2, the Board finds that the turbidity data, which Bo Dean concedes shows an exceedance of water quality objectives, combined with the site inspection notes and photographs showing sediment on roadways is sufficient for the Board to determine it more likely than not that additional

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<sup>23</sup> Bo Dean Findings of Fact and Conclusions of Law p.29

housekeeping BMPs were necessary on December 2 to comply with the Permit and reduce turbidity levels in runoff.

61. On December 4, 2019, the Prosecution supports a discharge based on NOAA precipitation data and turbidity data. Turbidity samples show a culvert discharge of 733 NTU, a mixed turbidity value of 169 NTU, downstream turbidity of 362 NTU and upstream Porter Creek turbidity value of 77.8 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. Bo Dean acknowledges this exceedance. On December 6, 2019, staff noted conversations with Bo Dean staff about ensuring BMPs were in place on upper access roads and noted concerns that BMPs may not be adequate in the next precipitation event. The inspection noted sediment on roadways, concerns with sediment releases from the cake storage area, and the parties discussed ways to slow down flow in the rock lined ditches. The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs), X.H.1.d. (materials handling and waste management BMPs, X.H.1.e. (erosion and sediment control BMPs) and X.H.2 (advanced BMPs) in Violations 2-5. The Board finds that the turbidity data, which Bo Dean concedes shows an exceedance of water quality standards, combined with the site inspection notes and photographs on November 26 and December 6, is sufficient for the Board to determine it more likely than not that additional BMPs were necessary on December 4 to comply with the Permit BMP requirements and reduce turbidity levels in runoff.
62. On December 22, 2019, the Prosecution supports a discharge based on NOAA precipitation data and turbidity data. Turbidity samples show a culvert discharge turbidity of 270 NTU, a mixed turbidity value of 66.6, downstream turbidity of 16 NTU and an upstream Porter Creek turbidity value of 8.84 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. Bo Dean acknowledges this exceedance in its Findings of Fact and Conclusions of Law. The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs), X.H.1.d. (materials handling and waste management BMPs, X.H.1.e. (erosion and sediment control BMPs) in Violations 2-4. The Board finds that the turbidity values, which Bo Dean concedes, shows an exceedance of water quality standards, combined with the site inspection notes and photographs on December 6, are sufficient for the Board to determine it more likely than not that additional BMPs were necessary to comply with the Permit to reduce turbidity levels in runoff.
63. On December 10, 2022, the Prosecution supports a discharge based on NOAA precipitation data, site inspection notes and turbidity data. Turbidity data shows a culvert discharge of 1,646 NTU, a mixed turbidity value of 1,366 NTU, downstream turbidity of 457 NTU and upstream Porter Creek turbidity of 42 NTU. North Coast Water Board staff noted a failure of the Advanced Treatment system. Bo Dean acknowledged this failure due to an inoperable backflush valve,



and Mr. Boyle testified it was quickly corrected. (H.T. 2/7 p.107.) The data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs) in Violation 2. The Board finds that the turbidity values combined with the site inspection notes, photographs, and Bo Dean's admission of an advanced treatment system failure and lack of backup power for the system is sufficient for the Board to determine it more likely than not that existing BMPs were inadequate or additional BMPs were necessary to comply with the Permit.<sup>24</sup>

64. On January 14, 2023, the Prosecution supports a discharge based on NOAA precipitation data and site inspection notes. Turbidity data shows that the culvert discharge was 4,016 NTU, a mixed turbidity value of 374/348 NTU, downstream turbidity of 76.1 NTU, and the upstream Porter Creek turbidity value of 47.3 NTU. This data indicates that discharges from the facility increased turbidity beyond the 20 percent limitation of the water quality turbidity objective. The active treatment system was offline due to a power outage. Staff observed the vacuuming out of the systems while they were offline.<sup>25</sup> The Prosecution alleged violations of Permit conditions X.H.1.a, (good housekeeping BMPs), and X.H.1.d. (materials handling and waste management BMPs in violations 2,3 respectively.) The inspection report includes a photograph of straw wattles and statement that the BMPs appear overwhelmed. The Board finds that the turbidity data combined with the site inspection notes and photograph, which does appear to show wattles overwhelmed by runoff, is sufficient for the Board to determine it more likely than not that existing BMPs were inadequate or additional BMPs were necessary to comply with the Permit.

### **Alleged Violation 1 Days Where the Board Imposes No Penalty**

65. For the remaining alleged violation days under Violation 1, the Board finds the Prosecution has not provided sufficient evidence to support a violation of Permit Condition III.A. The decision is based on the evidence in the record including pre-hearing evidence submittals, witness testimony, arguments from the parties, and review of the relevant provisions of the Permit. The following findings summarize key points in the Board reaching this decision.
  - a. There were relatively few inspections during the alleged violation period that covered a significant portion of the site. In total, 14 of the 18 site inspections were limited to the publicly accessible areas along Porter Creek Road or limited to the processing area at the bottom portion of the site. It is impossible for the Board to evaluate whether the site had sufficient BMPs throughout the facility, in upslope areas, and whether BMP

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<sup>24</sup> It is unknown why the Prosecution did not allege an advanced BMP violation in Violation 5 on this day or on January 14, 2023 given Bo Dean's admission that the system had temporarily failed.

<sup>25</sup> Again, it is unknown why the Prosecution did not allege an advanced BMP violation in Violation 5 on this date with Bo Dean's admission that the system was offline.

design was ineffective with the limited scope of most of the inspections. The Prosecution's main witness did not visit the site during the 2018-2019 season, first visited the site in August 2020 and only visited the site twice where reports were generated during the duration of the investigation from 2018-2023. (H.T. 2/6 pp. 259-261.) Only two inspections that included a substantial portion of the site occurred during the rainy season, and only one of these, the February 19, 2019 inspection, occurred during the 2018-2019 alleged violation period which covers a significant number of the violation days in the Complaint.

- b. When inspections did not cover a substantial portion of the site, the Prosecution asserts the Board should infer that BMPs were inadequate throughout the site based on limited site observations. The November 17, 2020 inspection, which did cover a substantial portion of the site, shows the limitations with this approach. Although the inspection covered a significant portion of the site and noted the condition of BMPs throughout the site, (including areas with adequate BMPs), Mr. Boyle provided testimony and argument contesting staff representations from the visit, including the number of straw wattles in use, the representations of existing rock lined ditches, and hydroseeding on berms (H.T. 2/7 pp.45, 47,50.) Additionally, the turbidity data collected on November 17, 2020, is inconclusive, but suggests BMPs were effective on that day. Although it shows turbidity values of 6.84 NTU upstream, 12.3 NTU downstream, and 20.2 NTU mixed, which suggests a more than 20 percent increase of the water quality objective, the culvert discharge turbidity was only 1.27 NTU. The Prosecution did not explain how the culvert turbidity that collects discharge from the site could be substantially less than instream values, and the inspection report did not document any turbid runoff from SP-3. The Board cannot determine if BMPs were inadequate when runoff from the facility was less turbid than upstream receiving water.
- c. Many of the inspection reports lacked specific, detailed BMP documentation. In many cases, where BMP observations were made, the Board cannot determine those observations demonstrate violations of the Permit. Bo Dean presented evidence that the Board found credible and persuasive that many of the BMP deficiencies claimed by the Prosecution were not supported or that site conditions were mischaracterized by the Prosecution. For example, the Prosecution presented argument that plugged culverts with vegetation growing in them indicated maintenance had not occurred and "the measures above this location are not effective at preventing the sediment from discharging". (H.T. 2/6 p.135.) Testimony from Mr. Boyle refuted the claim and testified the pipes were not in use, the pond they drained to had been removed and they were blocked and not part of Bo Dean's stormwater management. (H.T. 2/7 p. 121.) The Prosecution did not contest this testimony. Mr. Boyle also testified that every drainage area on the site had at least one pond or settling structure

to counter claims of a “complete” lack of BMPs in some photographs. (H.T. 2/7 pp.54.) Bo Dean also questioned the Prosecution’s depictions of straw wattles. Mr. Boyle also disagreed with the Prosecution representations of wattle use and depiction in photographs and the general statement that they are ineffective or improperly used. (H.T. 2/7 pp. 43-45.) Mr. King, Bo Dean’s expert witness, disagreed with the Prosecution’s general statements that straw wattles were incorrectly installed and testified that in his opinion they were effective. (H.T. 2/7 pp. 188-190.) Mr. Boyle also contested Prosecution representations that settling ponds had little capacity and were filled with sediment. He testified that rather than being full, the pond photographs showed how the ponds were designed to slope to a shallow end to allow excavators to remove collected sediment from the shallow end. (H.T. 2/7 p. 68.) Bo Dean also refuted depictions of a settling pond that appeared to have been narrowed with sediment releases. Mr. Boyle testified this was due to an active slide, that he had explained this to Board staff and submitted an amendment to the site Reclamation Plan to remove the portion of the slope contributing to the slide. (H.T. 2/7 p. 69.) The Board found Bo Dean’s evidence and testimony credible to refute claims by the Prosecution that BMPs were either ineffective or not in use. Based on the evidence presented, including the nature of the operation and testimony from Bo Dean’s experts and Mr. Boyle, the Board cannot determine that BMPs were inadequate on many of the site inspection days and that additional BMPs were feasible, necessary, or lacking.

- d. There was also testimony that inspectors did not promptly communicate BMP deficiencies or recommendations to Bo Dean following inspections or consistently note that BMP improvements were necessary. (H.T. 2/7 pp. 141-146.) A Prosecution witness acknowledged in several instances that he did not have direct knowledge of whether site observations and recommendations regarding BMPs were communicated to Bo Dean. (H.T. 2/6 pp.235-250.) The Board finds that although Bo Dean was informed of the staff’s observations at the site, communications were delayed, with reports uploaded to SMARTs between 2 weeks to 6 months from the inspection date.<sup>26</sup> Additionally, there is inconsistent documentation that staff timely followed up with Bo Dean on their site observations and assessments of where they believed additional BMPs were necessary.<sup>27</sup> The Board finds that delays in producing reports bear on the reliability of the reports and weight that the Board assigns to the inspection reports.

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<sup>26</sup> Mr. Boyle testified that he was made typically aware of the inspection reports by the SMARTS upload. (H.T. 2/7 p.142.) Bo Dean Presentation Slide 87 listed inspection dates and upload dates to SMARTS. The Prosecution did not refute the slide representations.

<sup>27</sup> Prosecution Exhibit 86 contains a series of communications with Bo Dean staff, however, few of the communications directly relate to BMP conditions or recommended follow up actions.

- e. Bo Dean presented evidence that some staff were relatively unfamiliar with quarry/mining operations and the types of BMPs that are typically used at these operations (H.T. 2/6 p.261.)<sup>28</sup> The Board does not question the qualifications of the Board's witnesses; however, the Permit acknowledges that BMPs must be tailored to the type of facility. Experience with mining/quarry operations and the specific BMPs used on those operations is relevant in evaluating Permit compliance. (PT Ex 1. p.151 [Dischargers are required to select and implement BMPs for their specific facility to reduce or prevent industrial storm water discharges of pollutants to comply with the technology-based effluent limitations]); (PT Ex 1 Factsheet p.24 [to determine technological availability and economic practicability and achievability, Dischargers need to consider what control measures are considered "best" for their industry].) Mr. King, one of Bo Dean's experts, testified on stormwater management at industrial sites.<sup>29</sup> He provided testimony that he had developed over 200 SWPPPs in his career and over 40 involving mines and quarries. (H.T. 2/7 p.169.) He testified that in his opinion Bo Dean had BMPs that met the Permit standards, including best industry practice, and requirements for BMP implementation. (RT Surrebuttal Ex 1 p.1; H.T. 2/7 pp.177,189.) He testified that he generally found the facility to be a very well run and sophisticated operation. (H.T. 2/7 p.176) He testified to the amount of paving throughout the site, which was a very effective and extensive BMP and the use of settling tanks and reuse of water. (H.T. 2/7, pp.176-179.) In approximately 75 visits of surface mining operations, he testified that Bo Dean's advanced treatment system was the most advanced system he had seen. (H.T. 2/7 pp.178-181.)
- f. The Prosecution asserts that the North Coast Water Board may rely on direct evidence on inspection days to support BMP violations on days between inspections because it is inconceivable that Bo Dean would install BMPs, then remove them prior to the next inspection. However, it is conceivable that BMPs may need to be adjusted day to day, and certainly over a span of many days. One problem with this assertion, as noted in the findings above, is the direct evidence of BMP violations on inspection days is limited. With limited evidence of BMP deficiencies on direct observation days, the Board cannot expand the evidence to infer BMP violations on intervening days between inspections.<sup>30</sup> Regarding BMP adjustments from day to day, the Permit Factsheet states that BMPs "can be just about anything that is effective at preventing pollutants from entering the environment". (PT Ex. 1, Factsheet pp 23-24.) This includes

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<sup>28</sup> The Prosecution also presented a map of the quarry and Tributary area C that Mr. Boyle testified was inaccurate. (H.T. 2/7 pp. 198-200.)

<sup>29</sup> Mr. King is qualified industrial stormwater practitioner, SWPPP developer and practitioner and certified professional in erosion and sediment control.

<sup>30</sup> As discussed earlier, the Board finds that turbidity data can supplement and support a BMP violation on an inspection or non-inspection day.

processes, scheduling, procedures, that may be non-structural. Bo Dean's witness testified to the shifting nature of BMP implementation based on circumstances unique to mining operations. (H.T. 2/7 pp.177-180.) Mr. Boyle testified to the processes that staff follow to winterize a site and prepare for precipitation events. (H.T. 2/7 pp.19-21.)<sup>31</sup> Mr. Boyle testified that BMPs are often non-structural, temporary, or movable, and that BMPs are adjusted based on activities and conditions. For example, the timing of sediment scraping, re-rocking ditches and sweeping activities, hydroseeding and mulching, use of temporary berms, and berms at the cake storage facility, and the design of the facility itself. (H.T. 2/7 pp. 21, 25-26 76-78, 80-86, 127-130.)

- g. Additionally, the Board finds the length of time between inspections was often too great to reasonably apply inspection observations to intervening violation days. For example, from late 2019 to mid-late 2020, the length of time between inspections is more than 8 months. Board staff conducted inspections on December 6, 2019, and August 13, 2020, to support alleged violations on January 21, 2020, March 24, 2020, and April 4, 2020. For an active quarry site where BMPs may be dynamic, the Board cannot find the preponderance of evidence standard is met by two inspections eight months apart that bracket intervening violation days.<sup>32</sup> Nearly an additional year passed between an inspection in November 2020 and the next inspection in August 2021, and more than a year passed between the inspection in October 2021 and the next inspection in December 2022.
- h. The Moore Declaration (PT Rebuttal Ex. 1) asserts that the Board can infer violations on days without site visits, data, or direct observations of BMPs based on site inspections with direct observations. Starting with the violation days alleged in the two months prior to the December 17, 2018, (October 2, 2018-December 17, 2018 period) the Declaration asserts that based on "the scale of the Facility, and the and the condition of the facility during the December 17, 2018 inspection it is inconceivable that BMPs were present during the two months prior to the inspection and somehow and for some reason were removed prior to the Regional Board staff inspection." (PT Rebuttal Ex. 1, p.5.) As discussed earlier, the inspection on December 17, 2018, was limited to the bottom of the quarry and the area around Porter Creek. That inspection report includes no notation of BMPs that were missing or inadequate. Staff notes that water discharging

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<sup>31</sup> The Prosecution agreed that scheduling is an important BMP (H.T. 2/6 pp.163-164.)

<sup>32</sup> The turbidity data alone on these dates cannot support a finding of a BMP violation. For example, the January 21, 2020, turbidity data shows the culvert NTU at 10.7 and the downstream NTU at 12.2. Neither party has explained how culvert turbidity which captures runoff from the site could show a lower turbidity value than downstream values. The data on this date and other dates with low culvert turbidity values suggests runoff from the site was less turbid than the receiving water and BMPs were functioning to control runoff.

from the settling tank “appeared relatively clear”.<sup>33</sup> There is no, or at most extremely limited, evidence in this inspection report to support a Permit violation for inadequate BMPs on the inspection date, let alone for the Prosecution to meet its evidentiary burden on days prior to the inspection. The statement references the scale and conditions of the facility, however, the inspection covered only a small portion of the facility, and the inspection report does not document any specific condition of the facility that was observed besides the settling tanks. The Declaration evaluates subsequent blocks of days in a similar manner, for example for violation days alleged between December 17, 2018, and January 9, 2019, the Declaration asserts the two inspections support violations on the intervening days. The January 9, 2019 inspection, however, similar to the December 17, 2018 inspection, covered a limited area of the site. January 9, 2019, contains evidence, including turbidity data, sufficient to evaluate whether violations occurred on that day based on observations of the settling tank capacity, but those specific and limited observations cannot support violations on other days. There are no other BMP observations included in the report. The Board cannot reasonably infer violations on intervening days based on the evidence in these two inspections. Similar assertions are made for subsequent inspections and intervening days, and the Board finds the same general deficiency in the evidence. The limited scope of many of the inspections cannot support inferences of BMP violations on non-inspection days.

- i. Finally, to support intervening violation days the declaration refers to photographic evidence and includes statements interpreting those photographs. The statements claim that photographs show the “absence of BMPs”. On cross-examination, Bo Dean’s counsel pointed out a significant number of BMPs that were present in the photographs, including: sediment basins, grading limited to a certain percent grade, winterization practices, rock-lined ditches, fiber rolls, storage sheds, and an advanced treatment system. (H.T. 2/6, pp.264-281.) The witness acknowledged that some BMPs may have been present but they remained inadequate. The Board found the testimony unpersuasive. The Prosecution further asserted, however, that the Prosecution is not solely relying on the rebuttal arguments and evidence to support the violations: “We’re not alleging any violations solely on the basis of the photos that were provided...But rather, this further supports the direct evidence that we had on our direct inspections of the conditions of absent or inadequate BMPs.” (H.T. 2/6 p. 274.) Overall, the Board finds this statement unpersuasive. It is difficult to discern the specific direct evidence of inadequate BMPs that the rebuttal supplements. For example, the Prosecution cites photographs in the Boyle Declaration from September

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<sup>33</sup> The Moore declaration includes discussion of inadequate straw wattles employed and installed on the December 17<sup>th</sup> inspection. The inspection report for this date does not include any discussion of wattles or their installation.

17 and September 24, 2018, to assert that the same conditions were observed at the December 17, 2018 inspection. (PT Rebuttal Ex. 1 p. 5.) The December 17, 2018 inspection, however, as noted, was limited to the bottom of the site and included no notes or observations relevant to inadequate BMPs. The Declaration includes similar argument for the remaining days where violations are alleged on non-inspection days and the assertion is that the same conditions as observed on inspection days must be present. The Board finds the arguments and evidence unpersuasive for the same reasons discussed above.<sup>34</sup> The Prosecution did not carry its burden and show the weight of the evidence supports the Prosecution's assertions.

- j. Although Bo Dean's expenses related to BMP and stormwater management at the site are not necessarily indicative that BMPs complied with the Permit, the Board finds the testimony and evidence that Bo Dean spent the following amounts on stormwater management and BMPs relevant in evaluating its efforts to operate in compliance with the Permit, and whether it had expended resources to implement BMPs:
- i. 2018: \$81,319.28 on BMPs, \$11,229.10 on monitoring and stormwater management, purchased a sweeper at cost of \$263,284.08
  - ii. 2019: \$77,621.43 on BMPs, \$107,371.20 on stormwater management and monitoring, \$29,920 on a hydroseeder contractor, approximately \$150,000 on pilot treatment system, \$2,685,510.46 on advanced treatment system currently in use
  - iii. 2020: \$14,246.66 on BMPs, \$83,876.07 on stormwater management and monitoring, purchased a hydroseeder for approximately \$100,000
  - iv. 2021: \$6,436.54 on BMPs and \$53,568.90 on stormwater management and monitoring
  - v. 2022: \$7,160.40 on BMPs, \$38,822.28 on stormwater management and monitoring
  - vi. 2023: \$14,2017.37 on BMPs and \$138,484.27 on stormwater management and monitoring

(Boyle Declaration, RT Ex 9.)

## **Violations 2-5**

66. The Prosecution's Complaint Violations 2-5 allege non-discharge violations of the Industrial General Permit for Bo Dean's failure to implement and maintain BMPs in compliance with the Permit. To select the days, the Prosecution's

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<sup>34</sup> Where the Declaration refers to prior inspections, or photographic evidence as supporting the "same conditions" that the Prosecution directly observed, the Board cannot determine from the inspection reports and observations included in the reports what conditions are being compared.

methodology was to select days based on site inspections, start with the first day where BMP deficiencies were observed (December 17, 2018) and the last date where significant deficiencies were noted (August 13, 2020). The Prosecution then identified those days where rainfall of 0.1 inches or more fell.<sup>35</sup> (Complaint, Att. A p. 34.) The Prosecution alleged all intervening days based on the argument that BMPs could not be easily corrected between inspections and the same violations were observed at each inspection. For the days after August 13, 2020, the Prosecution did not allege intervening days, and allegations were based on direct site observations by Board staff, CDFW or Sonoma County. The allegations in the Complaint are as follows<sup>36</sup>:

67. Violation 2: The Discharger violated Industrial General Permit Section X.H.1.a., by failing to implement and maintain good housekeeping minimum BMPs for 126 days: December 18, 21, 23-24, 2018; January 5-6, 8-9, 11, 14-20, 30-31, 2019; February 1-5, 8-17, 25-17, 2019; March 2-6, 9-10, 20, 22-23, 25-28, 2019; April 1-8, 15, 2019; May 15-16, 18-21, 26, 2019; September 16, 18, 2019; November 26-27, 29-30, 2019; December 1-4, 6-8, 10-13, 18-19, 22, 25, 29, 2019; January 4, 7, 9, 11, 13, 16, 21, 24-26, 28, 2020; March 6-7, 14-15, 17-18, 24-25, 28-29, 2020; April 4-6, 9, 12, 2020; May 11-14, 16-18, 2020; November 17, 2020; October 25, 2021; November 7, 2022; December 8, 2022; and January 14, 2023.

68. Violation 3: The Discharger violated Industrial General Permit Section X.H.1.d., by failing to implement and maintain material handling and waste management minimum BMPs for 93 days: February 25-27, 2019; March 2-6, 9-10, 20, 22-23, 25-28, 2019; April 1-8, 15, 2019; May 15-16, 18-21, 26, 2019; September 16, 18, 2019; November 26-27, 29-30, 2019; December 1-4, 6-8, 10-13, 18-19, 22, 25, 29, 2019; January 4, 7, 9, 11, 13, 16, 21, 24-26, 28, 2020; March 6-7, 14-15, 17-18, 24-25, 28-29, 2020; April 4-6, 9, 12, 2020; May 11-14, 16-18, 2020; November 17, 2020; October 25, 2021; November 7, 2022; December 8, 2022; and January 14, 2023.

69. Violation 4: The Discharger violated Industrial General Permit Section X.H.1.e., by failing to implement and maintain erosion and sediment control minimum BMPs for 121 days: December 18, 21, 23-24, 2018; January 5-6, 8-9, 11, 14-20, 30-31, 2019; February 1-5, 8-17, 25-27, 2019; March 2-6, 9-10, 20, 22-23, 25-28,

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<sup>35</sup> The Board does not express an opinion on the Prosecution's decision to allege violation days based on those days with 0.1 inch of rainfall, but notes that this resulted in not capturing days such as February 19, 2019 or August 13, 2020 when complete site inspections was performed. And for non-discharge violations, the relevance of using rainfall as a method to select days of violation is unclear.

<sup>36</sup> The parties asserted varying positions on whether staff could dictate BMP measures, evaluate selected BMPs or direct BMP improvements. Based on Permit language, it appears clear that staff may assess whether BMPs are consistent with the Permit, notify Permittee's when BMPs do not meet the Permit standards, and direct Stormwater Water Pollution Prevention Plan (SWPPP) revisions when BMPs are not effective and/or not consistent with the Permit. The SWPPP is the primary means in which Permittees describe BMPs that they implement to control stormwater runoff and comply with the Permit. (PT Ex. 1 Factsheet pp 22-24; 143-156.)



2019; April 1-8, 15, 2019; May 15-16, 18-21, 26, 2019; September 16, 18, 2019; November 26-27, 29-30, 2019; December 1-4, 6-8, 10-13, 18-19, 22, 25, 29, 2019; January 4, 7, 9, 11, 13, 16, 21, 24-26, 2020; March 6-7, 14-15, 17-18, 24-25, 28-29, 2020; April 4-6, 9, 12, 2020; and May 11-14, 16-18, 2020.

70. Violation 5: The Discharger violated Industrial General Permit Section X.H.2. by failing to implement and maintain advanced BMPs for 83 days on: December 18, 21, 23-24, 2018; January 5-6, 8-9, 11, 14-20, 30-31, 2019; February 1-5, 8-17, 25-27, 2019; March 2-6, 9-10, 20, 22-23, 25-28, 2019; April 1-8, 15, 2019; May 15-16, 18-21, 26, 2019; September 16, 18, 2019; November 26-27, 29-30, 2019; December 1-4, 6, 2019; November 17, 2020; August 24, 2021; November 9, 2022; and January 23, 2023.
71. Based on the evidence and testimony presented, the North Coast Water Board declines to consider a penalty for non-discharge BMP violations listed under Violations 2-5 except for November 7, 2022, and December 8, 2022.
72. The North Coast Water Board's decision is based on the following: 1) the Prosecution did not propose that penalties be assessed for non-discharge Violations 2-5; 2) the same lack of evidence to support days of violation under Violation 1 applies to the days alleged under Violations 2-5<sup>37</sup>; 3) where evidence of a BMP violation is supported on a given day to support Violation 1, the Board declines to impose an additional "non-discharge" based penalty for the same BMP deficiency on the same day.
73. The North Coast Water Board determines that the evidence supports non-discharge BMP violations on November 7, 2022, and December 8, 2022. Although neither November 7, 2022, nor December 8, 2022, coincide with a staff inspection, evidence including concessions by Bo Dean support the Board's decision to find a violation and impose penalties on these days.
74. On November 7, 2022, emails and photographs submitted by CDFW staff document sediment laden water cascading down the driveway and an apparent misplacement of a concrete block. Bo Dean concedes a BMP violation on this date due to "concrete blocks used for diverting runoff inadvertently moved out of place by passing truck." (Bo Dean Findings of Fact and Conclusions of Law, p.33, PT Ex 59.)

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<sup>37</sup> The Board cannot infer intervening, non-inspection day BMP violations on the days between December 17 2018, and August 13, 2020 for the reasons outlined. Looking at the two bracketed days generally show the evidentiary deficiencies. The December 17 report is discussed in detail and does not support BMP violations. The August 13, 2020 inspection was as substantial inspection of the site and discusses site BMPs and areas of improvement (PT Ex 21), but is not an alleged violation day. The next closest alleged violation days to the August inspection are May 18, 2020 and November 17, 2020 which are too distant in time from the August inspection to support violations.

75. On December 8, 2022, County of Sonoma staff sent an email to Mr. Boyle noting sheet flow running down the driveway and the notation that the flow seemed to be bypassing the detention systems. Mr. Boyle confirmed this, stating that he received the email from the County and that two large concrete blocks located along the driveway had been hit by a truck.” (RT Ex. 9, p. 60.) The movement of the blocks had partially blocked access to the collection tank. This blockage was corrected. (H.T. 2/7, pp. 92-93.)

76. The North Coast Water Board finds sufficient evidence, including the admissions and concessions by Bo Dean staff to conclude that non-discharge BMP violations occurred on these days and will assess a penalty in accordance with the penalty methodology in Attachment A to this Order.

### **Violation 6**

77. For Violation 6, the North Coast Water Board finds that Bo Dean violated Industrial General Permit Section XI.B.11.a., by failing to submit all sampling and analytical results for individual or Qualified Combined Samples via the Stormwater Multiple Application Report Tracking System (SMARTS) within 30 days of obtaining all results for each sampling event. Three reports were submitted beyond the required 30 days, and a single day of violation is alleged for each late report.

78. Bo Dean did not contest the alleged violation or the Prosecution’s proposed liability.

79. The North Coast Water Board will impose liability consistent with the Prosecution’s analysis included in Attachment A to the Complaint.

### **Violation 7**

80. For Violation 7, the North Coast Water Board finds that Bo Dean violated Investigative Order Sections B.1. and B.2., between April 4, 2020, and December 10, 2022, by failing to conduct receiving water monitoring and sampling and failing to document the monitoring with photographs. The Prosecution Team alleged seven days of violations on: April 4, 2020; November 17, 2020; January 4, 2021; March 18, 2021; October 22, 2021; December 13, 2021; and December 10, 2022.

81. Bo Dean did not contest the alleged violation or the Prosecution’s proposed liability.

82. The North Coast Water Board will impose liability consistent with the Prosecution’s analysis included in Attachment A to the Complaint.

### **Rulings on Objections**

83. The North Coast Water Board affirms all prehearing rulings and oral rulings made during the hearing by the Chair. Objections are overruled except for Bo Dean's objection to the Prosecution's introduction of vials showing water samples at various levels of turbidity. The Board cannot determine whether the vials represent the claimed turbidity values. The Prosecution did not introduce calibration data or testimony for the Board to evaluate whether the evidence was reliable and so will exclude it from consideration. In the January 24, 2025 ruling on certain pre-hearing evidentiary objections and motions, the Chair deferred a ruling until the hearing on certain evidentiary exhibits which include: staff inspection reports, Declaration of Heaven Moore (PT Rebuttal Ex. 1) PT Rebuttal Exhibits 2,3 and 7, Prosecution Exhibits PT 29, 77b, 82, 84. At the hearing, following discussion and agreement by the parties, testimony and cross examination, 13 declarations from Prosecution witnesses that were submitted on 1/30/25 were admitted. The Board affirms the declarations are admitted into the record and determines that the exhibits referenced in the January 24 pre-hearing ruling for which the Chair deferred a ruling are admitted-- except for any US EPA photographs in PT Exhibit 84 that were also not included in the US EPA inspection report that has been admitted as an official record. The Board determines that the North Coast Water Board inspection reports are admitted as official records and any hearsay contained within those reports is admitted under hearsay standards applicable to this hearing and applicable hearsay exceptions.<sup>38</sup> Admission of the evidence has no bearing on the weight the Board affords the evidence, only that it meets the standards for inclusion in this hearing. In Bo Dean's motion to dismiss and objections submitted on February 4, the night before the hearing, Bo Dean objected to the late argument in the Prosecution's presentation. The arguments are similar to those raised in Bo Dean's September 9, 2024 Motion to Dismiss. The Board denies the motion and objections. The Board notes, however, that the Prosecution's failure to submit an opening brief outlining its evidence and argument to support 457 violations over a roughly five-year period impacted the Board's evaluation of the case. The Board can find no reasonable basis for the Prosecution to reserve arguments for rebuttal or its presentation that were clearly offered to support the Complaint and Attachment A and could have been set forth for the Board and Bo Dean to review when its case in chief was submitted in August 2024.

### **Administrative Civil Liability**

84. Based on consideration of the above facts, the evidence submitted by the parties, testimony and arguments presented at hearing, applicable law, and applying the methodology in the Enforcement Policy as discussed in detail in Attachment A, the North Coast Water Board finds that civil liability shall be imposed administratively against the Discharger in the amount of **\$126,969**, as explained in detail in this Order.

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<sup>38</sup> The Prosecution claimed these were admissions of party opponents and Bo Dean did not object. (H.T. 2/5, p.96.)

85. As further discussed in Attachment A, the Enforcement Policy methodology, the North Coast Water Board's proposed liability complies with the Policy and does not exceed the maximum amount allowed pursuant to Water Code section 13385. The Enforcement Policy requires the minimum liability to be at least 10 percent higher than the estimated economic benefit derived from the actions that constitute the violation. The intent is that liabilities should not be viewed as the cost of doing business and are a meaningful deterrent to future violations. The Board could not, however, determine an economic benefit in this case based on the evidence submitted and its determination that violations were not supported for most of the days of alleged violation. Without additional evidence that would link economic benefit to the days the Board has determined violations occurred, the Board cannot determine an appropriate value. In addition, the Board cannot determine whether the largest economic benefit alleged, the delayed installation of the advanced treatment systems is supported. The evidence shows Bo Dean was pursuing a treatment system prior to the initiation of this investigation. The Board must consider the economic benefit is \$0.

86. Notwithstanding the issuance of this Order, the North Coast Water Board retains the authority to assess additional penalties for violations for which penalties have not yet been assessed or for violations that may subsequently occur.

87. Any person aggrieved by this action of the North Coast Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, section 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions will be provided upon request and may be found on the Internet at:  
[http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality/](http://www.waterboards.ca.gov/public_notices/petitions/water_quality/)

**IT IS HEREBY ORDERED**, pursuant to Water Code section 13385 and other applicable law, that:

1. Bo Dean Co., Inc., shall be assessed an Administrative Civil Liability in the amount of \$126,969.
2. Payment shall be made no later than 30 days from the date on which this Order is adopted. Bo Dean Co., Inc. shall send the original signed check to:

State Water Resources Control Board  
Division of Administrative Services  
ATTN: Accounting  
1001 I Street, 18<sup>th</sup> Floor

Sacramento, CA 95814

And shall send a copy to:  
North Coast Regional Water Quality Control Board  
ATTN: Jeremiah Puget  
5550 Skylane Boulevard, Suite A  
Santa Rosa, CA 95403

I, Valerie Quinto, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, North Coast Region, on April 2, 2025:

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Valerie Quinto  
Executive Officer

### **Attachment A: North Coast Water Board Penalty Methodology**

The State Water Resource Control Board's (State Water Board) 2017 Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for determining administrative civil liability (ACL) by addressing the factors that are required to be considered under California Water Code (Water Code) section 13385(e). Each factor is discussed below. The Enforcement Policy can be found at:

[https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2017/040417\\_9\\_final%20adopted%20policy.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf)

#### **Violation of Industrial General Permit Condition III.A.**

Between January 9, 2019, and January 14, 2023, the Board finds that Bo Dean violated the Industrial General Permit Condition III.A. on a total of 10 days as discussed in Order No. R1-2025-0017. These violations subject Bo Dean to administrative civil liability pursuant to Water Code section 13385.

#### **Violation 1**

The Prosecution sought both a per gallon and per day penalty for days of violation under Violation 1. For the per-gallon discharge penalty, the Prosecution recommended

reducing the base liability from \$10 per gallon to \$1 per gallon. For large volume discharges, like stormwater, the Enforcement Policy allows this reduction of the base per gallon liability. The Board finds this reduction appropriate in large volume stormwater cases where it is difficult to discern precisely how much waste is present in the stormwater.

The Enforcement Policy sets forth a series of steps that the Board must apply in calculating a penalty for both the per gallon and per day discharge violations.

### **1. Determine the Actual Harm or Potential for Harm for Discharge Violations**

The Board must consider the harm that the violation caused or may have caused considering the following three factors: (1) the degree of toxicity of the discharge (scoring values range from 0-4); (2) the actual or potential for harm to beneficial uses; (scoring values range from 0-5 and (3) the discharge's susceptibility to cleanup or abatement for each violation or group of violations. (scoring values range from 0-1)

The Board's Consideration of the 3 Factors:

#### **A. Degree of Toxicity of the Discharge:**

The Prosecution assigned a value of 3, to the stormwater runoff which indicates an "above moderate" risk associated with the stormwater discharges. Bo Dean's experts testified that a value of 0-1 "low risk" was supported.

The Enforcement Policy defines a score of 3 as: Discharged material poses an above-moderate risk or a direct threat to potential receptors (e.g., the chemical and/or physical characteristics of the discharged material exceed known risk factors or there is substantial threat to potential receptors [e.g. human health, aquatic life, habitat, etc.]).

The Enforcement Policy defines a score of 2 or moderate as: 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 threat to potential receptors).

The Enforcement Policy defines a score of 1 or below moderate as: Discharged material poses only minor risk or threat to potential receptors (e.g., the chemical and/or physical characteristics of the discharged material are relatively benign and would not likely cause harm to potential receptors [e.g. human health, aquatic life, habitat, etc.]).

Based on the evidence submitted, primarily the inspection reports which contained the site-based evaluation and documentation of the discharge, the Board cannot find an "above moderate" risk or a level 3 value is supported. The Prosecution submitted argument that the sediment contained in stormwater was detrimental to aquatic life, including anadromous fish, aquatic insects and plants and domestic water users. (Complaint Att. A p. 13). Bo Dean's experts presented testimony that the sediment impacts would be highly diluted and facility runoff would range from a 1/10,000 to

57/10,000 ratio, comparing runoff from the site and the total runoff volume of the watershed. Bo Dean's expert witnesses asserted that given the dilution in the watershed any impact on sensitive species from sediment originating from Bo Dean's site would be transitory and move through the system quickly. (RT Ex 077, RT Ex 080; H.T. 2/7 p. 241.)

The Board finds that a score of 2 is appropriate. While sediment may have been quickly dispersed, and the stormwater runoff in total comprised a small proportion of the watershed runoff, based on staff observations and photographs, localized impacts would be likely to occur. The Board determines the sediment posed a moderate level of toxicity.

### **B. Actual or Potential Harm to Beneficial Uses:**

In the second factor, the Board must consider the specific characteristics of waste discharged and specific beneficial uses of the impacted waters. The Prosecution assigned a value of 3 which corresponds to a moderate level of harm. Bo Dean's expert witnesses assigned a value of 0-1, corresponding to a minor level of harm.

The Enforcement Policy defines the Harm levels as follows:

1-Minor – no actual harm and low threat of harm to beneficial uses. A score of minor is typified by a lack of observed impacts but based on the characteristics of the discharge and applicable beneficial uses, there is potential short-term impact to beneficial uses with no appreciable harm.

2-Below moderate – less than moderate harm or potential harm to beneficial uses. A score of below moderate is typified by observed or reasonably expected potential impacts but based on the characteristics of the discharge and applicable beneficial uses, harm or potential harm to beneficial uses is measurable in the short term, but not appreciable.

3-Moderate – moderate harm or potential harm to beneficial uses. A score of moderate is typified by observed or reasonably expected potential impacts, but harm or potential harm to beneficial uses is moderate and likely to attenuate without appreciable medium or long term acute or chronic effects.

4-Above Moderate- more than moderate harm or potential harm to beneficial uses. A score of above moderate is typified by observed or reasonably expected potential significant impacts, and involves potential for actual partial or temporary restrictions on, or impairment of, beneficial uses

5-Major- high harm or threat of harm to beneficial uses. A score of major is typified by observed or reasonably expected potential significant impacts, and involves potential for or actual acute, and/or chronic (e.g., more than five day) restrictions on, or impairment of, beneficial uses, aquatic life, and/or human health

To support its value of 3, or moderate level of harm, the Prosecution cited the importance of the watershed as aquatic species habitat, the significant amount of sediment discharged from the facility, that the receiving water is listed as impaired for sediment, and the persistent discharges likely impacted habitat quality. The Prosecution also acknowledged that “it is also likely that the turbidity and sediment discharged from the facility into receiving waters attenuated without appreciable medium or long term acute or chronic effects because exceedances were limited to storm events and subsequent high flow events.” (Complaint, Att. A p. 17) The Prosecution did not perform site specific or expert analysis of any effects on salmon habitat or beneficial uses. Bo Dean’s expert testimony asserted that any salmon present in the watershed would be found downstream near the confluence with Mark West Creek, and in the unlikely event there were salmon present immediately downstream from the quarry that the temporary sediment increase would a minimal and transitory impact, and it would be difficult to differentiate the impacts of the quarry sediment discharges from background turbidity in the watershed. (RT Ex. 82, p.17.) Bo Dean’s experts asserted a value of 0-1 was appropriate. (RT Ex. 78, 82; H.T. 2/7 pp.255, 271.)

Based on a review of the evidence and witness testimony, the Board finds a “below moderate” or value of 2 is supported by the evidence and appropriate.

### **C. Susceptibility to Cleanup and Abatement**

Where less than 50 percent of the discharge is susceptible to cleanup and abatement a value of 1 is assigned per the Enforcement Policy. There is no evidence to deviate from this value. It was likely infeasible for stormwater to have been cleaned up or addressed once it was discharged from the site and into the receiving water. Evidence suggests that discharged sediment was quickly dispersed. A neutral value of 1 is recommended based on Enforcement Policy guidance.

The total score from the above factors is five.

### **2. Determine the Deviation from Requirement**

With this factor the Board looks at whether the activity or violation made the requirement ineffective. In this case the requirement was to maintain minimum and advanced BMPs in compliance with the Permit. The Prosecution alleges that the Permit provisions were made totally ineffective due to Bo Dean’s actions or inactions and Bo Dean’s facility represented a major deviation from Permit requirements. Bo Dean asserted they essentially complied with the Permit and took actions to modify, update and improve their BMPs when necessary.

Under the Policy the deviation may be considered “major”, “moderate”, or “minor”:

Minor: The intended effectiveness of the requirement remained generally intact (e.g., while the requirement was not met, its intended effect was not materially compromised).



Moderate: The intended effectiveness of the requirement was partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement was only partially achieved).

Major: The requirement was rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions).

The Board determines that violations were not supported on most of the days claimed by the Prosecution. The evidence does not support a major deviation from the requirements of the Permit. Over the course of the years covered by the Complaint (2018-2023) there are limited documented BMP deficiencies based on direct observations included in reports. Bo Dean submitted evidence asserting the Prosecution's evaluation of its BMPs was either uninformed, incomplete or flawed. Bo Dean's witnesses' opinions were that Bo Dean complied with the Permit and met "best industry practice" for BMP implementation. Bo Dean updated its stormwater pollution prevention plans (SWPPPs) five times between 2018 and 2023 and spent significant resources improving stormwater management over the five years covered by the Complaint. The Board determines that turbidity data on violation days demonstrates that site BMPs likely needed improvement on those days. After review of the evidence and argument, the Board cannot determine that site-wide BMP requirements over the roughly five-year period of this investigation had more than a minor deviation from the requirements.

The Board notes that with respect to the February 26 violation day where BMP violations are, in part, based on the February 19 site inspection that covered most of the site, the deviation from the facility's sitewide BMP requirements might be classified as moderate. However, the Board determines a minor classification is appropriate for this date given the facts and circumstances. Additional advanced BMPs to capture stormwater may have been infeasible given the heavy precipitation and rainfall totals. Bo Dean provided testimony of a landslide that affected stormwater treatment, and that it had responded to the BMP recommendations made following the February 19 inspection one week earlier. The County, who also participated in the February 26 inspection issued a notice of correction based on the inspection but did not refer the matter to code enforcement or take additional actions. (H.T. 2/7 p.196.) Finally, the Board is concerned that both the February 19 and February 26 inspection reports were not released or uploaded to an online database until August 14, 2019.<sup>39</sup> This late production has bearing on how reliable the reports are and the weight the Board assigns them. The delayed production also has an impact on Bo Dean's ability to respond to the reports.

Final Score: The scores for the three factors are added to provide a final Potential for Harm score of 5. Applying Tables 1 and 2 in the Enforcement Policy to the "minor" deviation from requirements results in a final multiplier of 0.04 for both the per gallon and per day penalty for violations of Permit Condition III.A.

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<sup>39</sup> Bo Dean Presentation Slide 87 listed inspection dates and upload dates to SMARTS. The Prosecution did not refute the slide representations.

The calculation of liability for the per gallon liability is as follows:

[Gallons of Discharge (minus the first 1,000 gallons per Water Code section 13385) x Per Gallon Factor (From Table 1) x Per Gallon Liability]

(2,450,230 gallons) x (0.04) x \$1 = \$98,009

The calculation of liability for the per day discharge liability is as follows:

[Days x Per Day Factor (from Table 2) x Maximum per day Penalty (\$10,000 pursuant to Water Code section 13385.)]

(10 days) x (0.04) x \$10,000 = \$4,000

### **3. Adjustment for Conduct Factors under Enforcement Policy for Violation 1**

After applying the methodology outlined above the following multipliers may be used to adjust the penalty:

#### **A. Degree of Culpability**

The Policy provides for a multiplier range from 0.75-1.5. 1 is neutral value. The Policy recommends higher culpability for intentional or gross negligent violations compared to simple, accidental, or non-negligent violations. The Policy points to the reasonable and prudent person test, and the Board should apply a neutral value if the discharger acted as reasonable and prudent person would have under the circumstances. Higher culpability is warranted for dischargers who are made aware of the violation and the violation continues or subsequent violations occur.

The Prosecution asserts a 1.3 culpability enhancement is supported for 60 days and 1.4 enhancement for the remaining 13 days that were alleged after the original complaint was issued. The Prosecution's primary argument is that Bo Dean's BMPs were inadequate or ineffective for entire seasons. (Complaint Att. A. pp.21-26) Based on the Board's determination that the Prosecution did not prove BMP violations on most of the alleged days, a value of 1 is appropriate. The record shows Bo Dean responded to requests from Board staff, completed investigative order requirements, spent significant resources on BMP requirements and stormwater management, was working on the installation of pilot advanced treatment systems in 2018 before the first Regional Board inspection of the Facility, installed effective advanced treatment systems in early 2020 and was generally responsive to follow-up emails and requests. Bo Dean presented evidence that inspection reports were uploaded to SMARTS and made available to Bo Dean as long as 6 months after inspection. This may have limited the information that Bo Dean had to respond to staff concerns and observations. The Board concludes that Bo Dean responded as a reasonable and prudent person would under the circumstances and a neutral value of 1 is supported.

## **B. History of Violations**

If a party has no prior violations the Policy provides that this multiplier value should be neutral, or 1.

Based on violations alleged at another Bo Dean facility, the Prosecution Team asserts that a 1.1 multiplier is appropriate.

The other Bo Dean facility that the Prosecution cites as support for the enhanced multiplier is also enrolled in the Industrial General Permit. That Facility was subject to a stipulated Cease-and-Desist Order that Bo Dean did not contest. (PT Ex. 60.) With respect to the Mark West Quarry facility, the Board determines the stipulated Cease-and-Desist Order applicable to the other Bo Dean facility has no bearing on the violations alleged at the Mark West Quarry operations. The Board determines a neutral value of 1 is appropriate.

## **C. Cleanup and Cooperation**

The Prosecution asserts a 1.3 multiplier for 60 days and 1.4 multiplier for the remaining 13 days. The Enforcement Policy provides that if a responsible party acts as a reasonable and prudent person would to a discharge and provides a timely response, a neutral value of 1 is appropriate. The Prosecution alleges that Bo Dean fell below what would be normally expected to cooperate, respond and make improvements to its site operations and BMP implementation. (Complaint Att. A pp. 26-28.)

As discussed in its evaluation of alleged Violation 1, the Board finds Bo Dean was cooperative. Bo Dean took actions to improve BMPs, install an effective advanced treatment system, cooperated with site visits, and modified their SWPPPs and BMPs to improve stormwater management. The Board finds a neutral value of 1 is supported.

### **Final Base Liability for Violation 1: Per Gallon liability + Per Day liability x Conduct Factors**

$\$98,009 + \$4000 \times 1 = \mathbf{\$102,009}$

If the proposed liability amount is greater than what is statutorily authorized, the Board must adjust the penalty downward to that limit. In this case, without any adjustments, the maximum per gallon discharge penalty pursuant to Water Code section 13385 is \$24,502,300. The maximum per day discharge penalty is \$100,000 pursuant to Water Code section 13385. The proposed amount is well below the maximum allowed by statute.

### **Violations 2, 3 Non-Discharge Violations**

The Board finds Bo Dean violated Industrial General Permit Conditions X.H.1a on two days on November 7, 2022, December 8, 2022.

To determine liability for these non-discharge BMP violations pursuant to the

Enforcement Policy the Board must determine both a “Deviation from the Requirement” and “Potential for Harm” as outlined in the Policy.

The Prosecution asserts a “Moderate” Potential for Harm and a “Major” Deviation from Requirements.

### **Potential for Harm Factor**

The Enforcement Policy specifies the following categories for Potential for Harm:

Minor – The characteristics of the violation have little or no potential to impair the Water Boards’ ability to perform their statutory and/or regulatory functions, present only a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm.

Moderate – The characteristics of the violation have substantially impaired the Water Boards’ ability to perform their statutory and/or regulatory functions, present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most non-discharge violations should be considered to present a moderate potential for harm.

Major – The characteristics of the violation have wholly impaired the Water Boards’ ability to perform their statutory and/or regulatory functions, present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm. Non-discharge violations involving failure to comply with directives in cleanup and abatement orders (CAO), cease and desist orders, and investigative orders, involving reports relating to impaired water bodies and sensitive habitats, should be considered major.

### **Deviation from Requirement**

The Enforcement Policy specifies the following categories:

Minor – The intended effectiveness of the requirement remained generally intact (e.g., while the requirement was not met, its intended effect was not materially compromised).

Moderate – The intended effectiveness of the requirement was partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement was only partially achieved).

Major – The requirement was rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions).

The Board finds that for these non-discharge violations a “minor” determination is appropriate for the Deviation from Requirements and a “moderate” determination is appropriate for Potential for Harm. For the Deviation from Requirements component, Bo Dean acknowledged that both violations occurred and testimony and shows it took steps to correct the violation. The intended effectiveness of these specific BMPs were at

least partially compromised. As there were no staff inspections on these days, the Board cannot determine that Bo Dean's BMPs throughout the facility, working together, represented significant deviations from Permit requirements.

#### Calculating the Penalty

(Days) x (multiplier from Table 3) x (Maximum Liability under statute)

Applying Table 3 in the Policy and selecting a midpoint multiplier of (0.25) for each of these days results in a proposed penalty of (2 days) x (0.25) x (\$10,000) per day = **\$5,000.**

The Board finds the same conduct factors applicable to the discharge violations apply to the non-discharge violations and makes no adjustment to the liability.

The maximum penalty pursuant to Water Code section 13385 is \$20,000. The proposed liability is below this amount and no adjustment is necessary.

#### **Violation 6**

The Board finds Bo Dean violated Industrial General Permit section XI.B.11.a. by failing to submit all sampling and analytical results within 30 days obtaining all results for each sampling event for three days. The Board accepts the Prosecution's discussion and application of the Enforcement Policy to Violation 6 as discussed in Attachment A to its Complaint on pages 68-73 and incorporates those findings and conclusions by reference.

Bo Dean concedes this violation and the proposed penalty. Further discussion is unwarranted.

The maximum penalty pursuant to Water Code section 13385 is \$30,000. The base amount is below this limit and no adjustment is necessary.

Total Base Liability for Violation 6= **\$12,870**

#### **Violation 7**

The Board finds Bo Dean violated Investigative Order No. R1-2019-0029, Sections B.1 and B.2 by failing to conduct receiving water monitoring and sampling and failing to document the monitoring with photographs for seven days. The Board accepts the Prosecution's discussion and application of the Enforcement Policy to Violation 7 as discussed in Attachment A to its Complaint on pages 74-79 and incorporates those findings and conclusions by reference.

Bo Dean concedes this violation and the proposed penalty. Further discussion is unwarranted.

Pursuant to Water Code section 13268, the maximum statutory liability amount for Violation 7 is \$7,000. The Prosecution adjusted the penalty to reflect this limit. No further adjustment is necessary.

Final Proposed Liability for Violation 7= **\$7,000**

### **Total Proposed Base Liability**

\$102,009 + \$5,000 + \$12,870 + \$7,000 = **\$126,969**

### **Additional Factors Applicable to All Violations**

#### *Ability to Pay and Ability to Continue in Business*

The Enforcement Policy provides that if the Water Boards have sufficient financial information necessary to assess a violator's ability to pay the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in business. The ability of a discharger to pay administrative civil liability is determined by its income (revenues minus expenses) and net worth (assets minus liabilities). The Water Boards are not required to ensure that civil liabilities are set at levels that allow violators to continue in business. Rather, the Water Code only requires the Water Boards to consider this issue when imposing civil liabilities.

The Prosecution alleges: "based on review of public records, Bo Dean Co., Inc. continues to operate as a for-profit entity. In addition, Bo Dean Co., Inc. owns several substantial assets including businesses and real estate assets. Based on the currently available information, the Prosecution Team has determined the Discharger has the ability to pay the proposed liability amount and continue in business." (Complaint Att. A. p 82.)

By letter dated May 24, 2024, Bo Dean advised the Board that it was waiving any ability to pay defense that it may have in relation to the Complaint. The Board determines that the Prosecution has asserted that Bo Dean has the ability to pay administrative civil liabilities up to its proposed amount of \$8,589,406. The Board need not evaluate whether Bo Dean has the ability to pay the lesser liability directed by this Order as Bo Dean has waived any defense of this factor. (Letter from Sean Hungerford to Board Advisory Team 3/24/24.)

No adjustment to the proposed base liability is warranted based on consideration of this factor.

#### *Economic Benefit*

Water Code section 13385(e) requires that when pursuing civil liability under Water Code section 13385, “[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any derived from the acts that constitute the violation.”

The 2017 Enforcement Policy directs that the minimum liability be at least 10 percent higher than the economic benefit amount such that the liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violation. The Prosecution calculated the economic benefit plus 10 percent for the alleged violations to be \$333,280<sup>40</sup> as described in Prosecution Team Exhibit 76.<sup>41</sup>

The Prosecution alleged the delayed and avoided costs to implement necessary BMPs was \$3,324,411. In countering the economic benefit analysis, Bo Dean’s witness, Mr. Boyle, presented testimony that Bo Dean was already employing BMPs that the Prosecution claimed were avoided, such as hydroseeding, lining ditches with rocks, and the infeasible recommendation to hydroseed in rock benches. (H.T, 2/7 pp.154-156.) The Prosecution did not dispute these claims.

The Board cannot accurately assess an economic benefit value in this matter and must therefore set the value at 0. It is not possible to determine if the activities that constitute avoided costs such as hydroseeding, rocking ditches, installing perimeter controls, or check dam maintenance were necessary or avoided costs on the 12 violation days. The Economic Benefit analysis is based on the suite of violations alleged in the Complaint and the Board has found a limited number of violation days.<sup>42</sup>

The largest line-item economic benefit was the failure to install a treatment system until January 2020. (PT Ex 76, 77a.) Bo Dean presented evidence that they were working to install a pilot “active” treatment system in December 2018. (H.T. 2/7 pp. 99-101; RT Ex. 65) The Prosecution did not dispute this claim. The pilot system was ultimately unsuccessful and the current treatment systems were installed in early 2020. (H.T. 2/7 pp.105-106.) Bo Dean presented evidence that it had installed a pilot advanced treatment system prior to the dates of violation alleged in the Complaint. While this system was unsuccessful, the Board determines that it cannot assign a cost-avoided amount of \$135,496 related to the delayed installation of the current and effective system that is used at the site when Bo Dean had been testing and attempting to install an advanced treatment system that would control stormwater runoff in 2018 prior to the initiation of the investigation that led to the Complaint.

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<sup>40</sup> The statutory minimum, of recovery of the economic benefit, is applicable to Violations 1 through 6. For Violation 7, for which liability is not sought pursuant to Water Code section 13385, there is no statutory minimum pursuant to Water Code section 13327.

<sup>41</sup> The Prosecution Team increased the minimum liability after issuance of the Complaint and Attachment A. The Board need not reach the issue of whether the Prosecution may allege a higher economic benefit following issuance of the Complaint as the Board finds the minimum value is less than the original amount proposed.

<sup>42</sup> The Prosecution’s witness confirmed that to calculate a benefit, “First, we must know what the violations are.” (H.T. 2/6 p. 214.)

### *Other Factors as Justice May Require*

The Enforcement Policy provides that if the Water Board believes that the total base liability amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this adjustment.

The Enforcement Policy allows for the recovery of staff costs. Under this factor the Prosecution, while not seeking recovery of staff costs in its proposed liability listed staff costs totaling over \$510,550 prior to the issuance of the Complaint.

The Board determines that the total base liability of \$126,969 is appropriate and further adjustments are not warranted.