

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

In the matter of:

**Baldwin & Sons, Inc. et al.
Portola Center South Construction
Site
Orange County**

**WDID No. 9 30C371181
PIN: SM-831856**

**COMPLAINT NO. R9-2020-0006
FOR
ADMINISTRATIVE CIVIL LIABILITY**

**Noncompliance with
Order No. 2009-0009-DWQ,
Water Code § 13376,
Water Quality Control Plan for the
San Diego Basin, and
Clean Water Act § 301**

January 10, 2020

Baldwin & Sons, Inc. and the Baldwin Entities and Individuals, as defined in paragraph 1, are hereby given notice that:

1. Baldwin & Sons, Inc.; Sunranch Capital Partners, LLC; Sunrise Pacific Construction, Inc.; SRC-PH Investments, LLC; ASSR Pacific Investments, LLC; USA Portola Properties, LLC; USA Portola West, LLC; USA Portola East, LLC; Portola Project, LLC; Rancho Portola Investments, LLC; Baldwin & Sons, LLC; and Sunrise Company (Baldwin Entities); William G. Bone, individually, and dba Sunrise Company; James P. Baldwin; Alfred E. Baldwin; Shawn M. Baldwin; Randall G. Bone; Jose Capati, and; Gary Berger (collectively, "Dischargers"¹ or "Baldwin Entities and Individuals") have violated provisions of law for which the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) may impose civil liability pursuant to Water Code section 13385.
2. This Administrative Civil Liability Complaint (Complaint) is issued under authority of Water Code section 13323. References are also made to California state law, where appropriate.

¹ The term "Dischargers" as used throughout the Complaint and Technical Analysis refers to the entities and individuals that are liable for the violations alleged herein. Often, it refers collectively to the Baldwin Entities and Individuals identified in Paragraph 1. If it does not refer to the group as an entirety, it refers to any of the parties that are ultimately ordered to pay an administrative penalty by the San Diego Water Board.

FACTUAL BACKGROUND AND CHRONOLOGY

3. The violations alleged herein occurred during the Dischargers' development of a 95-acre residential construction project called "Portola Center South" (Site), which is the Southern-most area of three planning areas that comprise the greater Portola Center Project.² (Exhibit 187, Portola Center Public Financing Phasing Plan.) The Site is located just south of the intersection of Glenn Ranch Road and Saddleback Ranch Road in the City of Lake Forest (City), County of Orange, California.
4. Sunranch Capital Partners, LLC acquired the Site from Rancho Portola Investments, LLC without paying consideration on July 2, 2010. On October 2, 2014, Gary Berger, on behalf of Sunranch Capital Partners, LLC filed a Notice of Intent (NOI) to comply with California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* (Construction Storm Water Permit) as a Risk Level 2 discharger and was issued Waste Discharge Identification (WDID) No. 9 30C371181. (Exhibit 6, Notice of Intent, October 2, 2014; Exhibit 182, Grant Deed, June 27, 2010, and; Exhibit 188, Stipulation for Entry of Judgment Against Certain Defendants; Order Filed November 18, 2016.)
5. Construction Storm Water Permit section V.A.2. requires the implementation of best management practices (BMPs), using best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to reduce pollution from storm water runoff from construction sites.
6. While ownership of the Site was transferred from Sunranch Capital Partners, LLC to SRC-PH Investments, LLC in July of 2015, a Notice of Termination (NOT) was not filed by Sunranch Capital Partners, LLC, as required by the Construction Storm Water Permit, and a new NOI was not filed by SRC-PH Investments, LLC as required by the Construction Storm Water Permit. (Exhibit 184, Grant Deed, July 29, 2015; Exhibit 189, Notice of Intent, February 17, 2016.)

² The other two Portola Center Project areas are the Northwest and the Northeast sites. This Complaint is limited to the South area.

7. After receiving a request from the City to assist it with improving storm water regulatory compliance at the Site on December 10, 2015, the San Diego Water Board inspected the Site on January 19, 2016, and documented violations of the Construction Storm Water Permit. Additionally, the San Diego Water Board conducted storm water inspections and drive-by visual inspections of the Site on March 14, 2016 and March 21, 2016. (Exhibit 101, San Diego Water Board Inspection Report, January 19, 2016; Exhibit 190, City of Lake Forest Telephone Log, December 10, 2015.)
8. The City provided the San Diego Water Board with photographs and videos taken by City staff of the Site, as well as City inspection reports, Notices of Violation, Cease and Desist Orders, and Citations for the Site.
9. The City issued a Notice of Violation (NOV) and Citation to Jose Capati c/o Joe Giedeman of "Baldwin & Sons" on October 6, 2015 citing BMP violations. On October 9, 2015, the City issued an NOV and citation to Gary Berger of Sunranch Capital Partners, LLC for BMP violations. The City issued an NOV, Citation, and Stop Work Order to Gary Berger on behalf of "Sunranch Capital Partners, LLC/Baldwin & Sons" on January 21, 2016. The City issued an NOV and Citation to Jose Capati on behalf of "Baldwin & Sons" on February 5, 2016. On February 10, 2016, the City issued a Cease and Desist Order and Notice to Abate Nuisances to Jose Capati of Baldwin & Sons, LLC. The City issued a Stop Work Order on March 17, 2016, which halted grading activities based on the "[discharger's] failure/refusal to implement appropriate BMPs." (Exhibit 30, City Citation No. 2221, October 6, 2015; Exhibit 34, City Citation No. 2240, October 9, 2015; Exhibit 105, City Citation No. 2258, January 21, 2016; Exhibit 106, City Stop Work Order No. 2257-2258, January 21, 2016; Exhibit 125, City Citation No. 2247, February 5, 2016; Exhibit 131, City Cease and Desist Order, February 10, 2016; Exhibit 155, City Stop Work Order No. 170316, March 17, 2016.)
10. The Site lies within the Aliso Creek Hydrologic Subarea (HSA) (901.13) of the San Juan Hydrologic Unit. Storm water discharges from the Site flow directly into Aliso Creek and into unnamed tributaries to Aliso Creek, both waters of the United States.
11. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for Aliso Creek and its tributaries:
 1. Agricultural Supply (AGR);
 2. Contact Water Recreation (REC-1);
 3. Non-contact Water Recreation (REC-2);
 4. Warm Freshwater Habitat (WARM); and
 5. Wildlife Habitat (WILD).

12. Aliso Creek is designated as impaired for Benthic Community Effects, Indicator Bacteria, Malathion, Nitrogen, Phosphorus, Selenium, and Toxicity pursuant to Clean Water Act section 303(d).³
13. Construction at the Site resulted in a significant loss in wildlife habitat that needed to be mitigated, both to compensate for permanent loss of habitat, as well as restrictions during construction to minimize temporary impacts. (Exhibit 191, Baldwin & Sons Letter Re: Portola Project NCCP Amendment Habitat Mitigation Fee Payments, January 14, 2015; Exhibit 192, Nature Preserve of Orange County Letter Re: Receipt of NCCP/HCP In-Lieu Mitigation Fee, January 15, 2015.) In addition, a Clean Water Act section 401 Water Quality Certification for the Portola Center Project was obtained from the San Diego Board that required certain additional actions to minimize impacts. (Exhibit 334, Portola Center 401 Certification Application; Exhibit 335, 401 Water Quality Certification, Exhibit 336, 401 Water Quality Certification Amendment 1; Exhibit 337, Water Quality Certification Amendment 2; and Exhibit 338 Water Quality Certification Amendment 3.)
14. The Site was designed to receive the storm water runoff flows from the Northwest and Northeast sites and the existing housing development of Portola Hills. (Exhibit 193, City Council Agenda Report, November 5, 2013, at pages 104-115; and Exhibit 354 Portola Center Area Plan, chapter 2.) The Dischargers did not adequately prepare for, or respond to, these flows, which were significant. The 401 Certification for the Site required that discharges of concentrated flow during construction or after project completion must not cause downstream erosion or damage to properties or stream habitat. (Exhibit 335, Water Quality Certification at section III.G.) The Construction Storm Water Permit requires a Storm Water Pollution Prevention Plan (SWPPP) for all projects, which requires control of all pollutants and their sources, including sources of sediment associated with construction, construction site erosion, and confirmation of calculations and design details as well as BMP controls for site run-on. (Exhibit 4, Construction Storm Water Permit; Exhibit 5, Dischargers Storm Water Pollution Prevention Plan; Exhibit 154, SWPPP Amendment 1; Exhibit 326, SWPPP Amendment 2; Exhibit 327, SWPPP Amendment 3; Exhibit 328, SWPPP Amendment 4; Exhibit 329, SWPPP Amendment 5; Exhibit 330, SWPPP Amendment 6; Exhibit 331, SWPPP Amendment 7; Exhibit 332, SWPPP Amendment 8; and Exhibit 333, SWPPP Amendment 9.)

³ 33 U.S.C. § 1313.

There were significant concerns related to grading given the change in elevation on the Site. Prior to the commencement of grading, the City conditioned the grading permit with a 40% Rain Event Action Plan (REAP) requirement. (Exhibit 350, Rough Grading Plan, NPDES Notes No. 16, page 2 of 21.) It is highly unusual for a city to identify more stringent requirements than what is required by the Construction Storm Water Permit. Typically, a REAP is required for a Construction Storm Water Permit Risk Level 2 site when there is a 50% chance of precipitation. The purpose of a REAP is to require some level of planning to address potential sediment runoff and/or erosion during a rain event. The REAP requirement, regardless of the likelihood of a precipitation event, requires dischargers to develop a plan (the REAP) within 48 hours of the likely precipitation event. The Dischargers often continued construction activity until rain began to fall and failed to develop and implement the REAP. In addition, BMPs that were installed prior to the precipitation event were not implemented soon enough or Site-wide to protect against erosion. The unique characteristics of this Site (the average Site slope was between 25% and 200%, with the majority being between 25% and 49%; and the Site size was more than 90 acres), the failure to stop construction prior to a rain event, and the vulnerabilities caused by mass grading without satisfactory BMPs, led to massive sediment discharges. All of these conditions were foreseeable. (Exhibit 354, Portola Center Plan; Exhibit 360, Final Water Quality Management Plan.)

15. In addition to the steep Site slopes and the large size of the disturbed area, which triggered additional pre-storm actions by the Dischargers, significant runoff from the existing Portola Hills development was a factor related to Site capacity for responding to storm events that the Dischargers were required to consider and plan for. (Exhibit 360, Final Water Quality Management Plan.) This and the preceding paragraphs related to Site conditions indicate that the Site was vulnerable to significant discharges and required greater protections due to the potential risk of sediment loss during construction activities.
16. The violations addressed by this Complaint occurred between August 20, 2015, through March 31, 2016 (Violation Period). Violations continued after this date, and occurred on other portions of the Portola Center Project, but given the consideration of factors under the Water Code, the State Water Resources Control Board's Enforcement Policy (Enforcement Policy), and the recommended penalty, San Diego Water Board Prosecution Staff (Prosecution Team) is electing to proceed with the violations described herein at this time.
17. Sunranch Capital Partners, LLC transferred the Site land to SRC-PH Investments, LLC on July 29, 2015. The related Grant Deed states that "Grantors & Grantees are comprised of the same parties who continue to hold the same proportionate interest in the property." The latter was the property owner until November 12, 2015. (Exhibit 184, Sunranch Capital Partners, LLC to SRC-PH Investments, LLC, July 29, 2015.)

18. On September 23, 2015, SRC-PH Investments, LLC and Landsea Holding Corporation entered into a Purchase and Sale Agreement for the majority of the Site. (Exhibit 196, Purchase and Sale Agreement and Escrow Instructions Portola South by and between SRC-PH Investments, LLC and Landsea Holding Corporation.) Landsea Holding Corporation assigned the Purchase Agreement to LS-OC Portola (Landsea) at the close of escrow. SRC-PH Investments, LLC did not file a Change of Information (COI), which would have been required if it had enrolled under the Construction General Permit. Landsea and Sunrise Pacific Construction, Inc. entered into a General Contractor Agreement (GMAX Contract), whereby Sunrise Pacific Construction, Inc. would act as general contractor on the Site. (Exhibit 195, General Contractor Agreement Guaranteed Maximum Price Portola South Between LS-OC Portola LLC and Sunrise Pacific Construction, Inc.) The GMAX contract and the grant deed were effective when the sale was completed, and the grant deed was recorded on November 12, 2015. (Exhibit 194, Westlaw Real Property Transaction Record, SRC-PH Investments, LLC to LS-OC Portola, LLC; Exhibit 185, Grant Deed SRC-PH Investments, LLC to LS-OC Portola, LLC, November 11, 2015.)
19. Despite the sale, the Baldwin Entities and Individuals continued to operate the construction storm water activities at the Site after November of 2015. Sunranch Capital Partners, LLC, filed another NOI replacing Gary Berger with Jose Capati as the contact on February 17, 2016, well after that entity had already transferred ownership of the property to SRC-PH Investments, LLC and the latter to Landsea. On March 21, 2016, Landsea filed an NOI for coverage under the Construction Storm Water Permit and was issued WDID No. 9 30C375761. (Exhibit 197, Notice of Intent, March 21, 2016; Exhibit 198, Declaration of Brian Frame with Exhibits, December 21, 2016.)
20. Landsea and Sunrise Pacific Construction, Inc. had disputes under the GMAX Contract, and Landsea provided a Notice of Default to Sunrise Pacific Construction, Inc. in February 2016, and ultimately obtained possession of the Site with the right of entry and general contractor responsibilities on August 12, 2016. The violation period alleged herein is from August 20, 2015 to March 31, 2016. Landsea, in addition to Baldwin Entities and Individuals, could be named as a responsible party during a part of the Violation Period. (Exhibit 198, Declaration of Brian Frame with Exhibits, December 21, 2016.)

21. Landsea may have claims under the GMAX Contract under various theories, and it is the Prosecution Team's understanding that Landsea and the Baldwin Entities have entered into a tolling agreement to resolve GMAX claims after administrative penalties are resolved. Landsea was prohibited from accessing the portions of the Site it owned in any meaningful way until at least August 12, 2016. (Exhibit 198, Declaration of Brian Frame with Exhibits, December 21, 2016.) Therefore, Landsea could not have exerted control over the portions of the Site it owned that would allow it to address chronic BMP inadequacies or infrastructure problems that led to discharges in September and December 2015 and January 2016. The Prosecution Team reserves its right to bring additional enforcement against the Baldwin Entities and Individuals and/or Landsea, for violations that occur after the Violation Period, or as directed by the San Diego Water Board.
22. The San Diego Water Board takes no position regarding indemnity agreements or responsibilities, common law or contractual, between Landsea and Sunrise Pacific Construction, Inc. The initial goal of the Prosecution Team when learning of the repeated violations, including significant discharge events, was to bring the Site into compliance and prevent future discharges. This Complaint follows significant efforts made by the Prosecution Team to return the entirety of the Portola Center Project to substantial compliance and to investigate the ownership and control of the Site. Issuance of this Complaint also follows actions taken by both Landsea and the Baldwin Entities and Individuals to resolve the City's and the San Diego Water Board's NOVs. The Violation Period for this Complaint goes through March 2016. If the San Diego Water Board seeks additional information about the current Site conditions, ownership, or activities from March 2016 to the present, it will be provided.
23. On November 14, 2016, the Prosecution Team issued Order No. R9-2016-0212 pursuant to Water Code section 13267, an Investigative Order to Landsea and Sunranch Capital Partners, LLC, seeking information about the volume of an October 24, 2016, discharge that occurred after the Violation Period. The Prosecution Team also issued investigatory subpoenas to Landsea, Sunranch Capital Partners, LLC and USA Portola Properties, LLC about general construction activities, as well as seeking documents informally from the City. (Exhibit 199, Investigative Order Issued November 14, 2016; Exhibit 200, 2016 Investigative Subpoena to Landsea; Exhibit 201, 2016 Investigative Subpoena to Sunranch Capital Partners, LLC; Exhibit 202, 2016 Investigative Subpoena to USA Portola Properties, LLC.)

24. In early 2017, the Prosecution Team met with representatives of several of the Dischargers. The discussions focused mainly on the consideration of the Enforcement Policy factors, including the calculation of the accurate volume of material discharged from the Site. When settlement discussions were not productive, the Prosecution Team issued investigatory subpoenas to additional Baldwin Entities⁴ and Individuals to determine who to name, given the complexity regarding the allocation of Site control amongst the entities, and the responsible parties' ability to pay. (Exhibit 203, 2017 Investigative Subpoena to Sunrise Pacific Construction, Inc.; Exhibit 204, 2017 Investigative Subpoena to USA Portola Properties, LLC; Exhibit 205, 2017 Investigative Subpoena to Baldwin & Sons, Inc.; Exhibit 206, 2017 Investigative Subpoena to Sunranch Capital Partners, LLC; Exhibit 207, 2018 Investigative Subpoena to Baldwin & Sons, LLC.)
25. Upon receipt of the investigatory subpoenas, the Baldwin Entities objected to the production of financial documents and other materials that detail how the companies and individuals' financial assets are distributed. The Baldwin Entities offered to produce documents pursuant to a protective order, but no terms could be reached that were acceptable to the Prosecution Team, consistent with California law, and allowed the documents to be used in an enforcement proceeding for this Complaint. (Exhibit 208, Declaration of Julie Macedo, Subpoenas for Records and Documents, and Responses and Objections to Subpoenas.)
26. Thereafter, the Prosecution Team elected to refer the matter to the Office of the Attorney General for enforcement of the investigatory subpoenas. The matter was first heard on December 20, 2018. An Order by the San Diego Superior Court was entered on February 11, 2019, which compelled production of most of the Prosecution Team's requests, except for the Baldwin Entities' tax returns. (Exhibit 209, Petition for Order to Show Cause, September 21, 2018; Exhibit 210, Superior Court Order and Proposed Protective Order, December 20, 2018.)

⁴ The 2017 investigatory subpoenas also sought certain CEQA documents, related to known Site conditions prior to construction. These documents were produced and were not subject to the San Diego Water Board's motion to compel, discussed *infra*.

27. The Baldwin Entities timely filed an appeal.⁵ Other than the CEQA documents, the Baldwin Entities have not produced any financial or corporate documents, as sought by the investigatory subpoenas and ordered by the San Diego Superior Court. Evidence that was produced by Sunranch Capital Partners, LLC and USA Portola Properties, LLC, Landsea, and the City indicate that corporate formalities were not observed, and the Baldwin Entities and Individuals often acted on behalf of one another. Third parties were given the impression that they were dealing with the “Baldwins,” regardless of the particular entity name on the letterhead, business card, or contract. The Prosecution Team sought to further these arguments by issuing investigatory subpoenas to analyze any inappropriate commingling of assets, inadequate capitalization, and other relevant factors. Notwithstanding the Baldwin Entities’ failure to fully comply with investigatory subpoenas, existing public documentation provides a basis for naming all parties identified in this Complaint. (Exhibit 30, City Citation No. 2221, October 6, 2015; Exhibit 106, City Stop Work Order No. 2257-2258, January 21, 2016; Exhibit 211, Notice of Appeal, March 14, 2019; Exhibit 212, Varner Construction, Inc. Application for Payment and Invoice; Baldwin & Sons, Inc. Conditional Waiver and Release Upon Progress Payment, SRC-PH Investments, LLC Checks; Exhibit 213, Baldwin & Sons Email Correspondence, April 1, 2016; Exhibit 214, 2016 Employee Expense Report 2016 on Baldwin & Sons and Sunrise Company Letterhead; Exhibit 215, Bistline Construction, Inc. Invoice to Sunranch Capital Partners, Sunrise Pacific Construction, Inc. Conditional Waiver and Release Upon Progress Payment.)
28. The Prosecution Team elected to deviate from traditional methods of naming only the permittees given the Baldwin Entities and Individuals’ pattern and practice of utilizing the corporate form to avoid responsibilities and liabilities. The bases for naming all of the Dischargers identified in the caption to the Complaint are articulated in a stand-alone document to this Complaint, Legal Analysis and Allegations Related to Naming Additional Entities and Individuals (Legal Brief) which is incorporated by reference herein.

⁵ This is despite the San Diego Superior Court Order being more narrow than the *Brovelli v. Superior Ct.* (1961) 56 Cal.2d 524 decision, which establishes the test to warrant production of documents in response to an investigative subpoena, requiring 1) the investigation be one the agency demanding production is authorized to make; 2) the demand not be too indefinite; and 3) the information sought by the subpoenas be reasonably relevant. The San Diego Superior Court concluded there may be some privacy rights of the party receiving the subpoena, which were not contemplated in *Brovelli*. Nonetheless, the Court ordered the production of all documents subpoenaed except the entities’ tax returns.

29. The Prosecution Team has satisfied its burden of investigation into the named parties' ability to pay, within the meaning of the California Water Code and Enforcement Policy. Based on current information, no reduction of the recommended penalty is appropriate. The Prosecution Team reserves the right to challenge the validity of any documents that are produced by the Dischargers in support of an argument to reduce the recommended penalty, and reserves the right to argue that the penalty should not be reduced despite an alleged inability to pay.
30. The Prosecution Team reserves its right to supplement the violations and/or parties depending on direction from the San Diego Water Board. The Prosecution Team also reserves the right to prevent inappropriate transfers and/or liquidations of assets away from any Baldwin Entity or Individual ultimately named in a San Diego Water Board order.

ALLEGED VIOLATIONS

31. **Violation No. 1:** The Dischargers violated Water Code section 13376; Construction Storm Water Permit Discharge Prohibitions III.A. and III.B., section V.A.2. and Attachment D section A.1.b; Basin Plan Waste Discharge Prohibitions; and the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. § 1251 et seq.) section 301 (33 U.S.C. § 1311) by discharging pollutants (sediment-laden storm water) from the Site into waters of the United States (Aliso Creek and its tributaries) on the following 4 days in the following amounts: September 15, 2015 (457,457 gallons); December 22, 2015 (1,208,066 gallons); January 5, 2016 (3,120,093 gallons); and January 6, 2016 (1,511,822 gallons).
32. **Violation No. 2:** The Dischargers violated Construction Storm Water Permit Attachment D, section B.1.b. by failing to implement material stockpile BMPs at the Site on the following 28 days: August 20, 2015; September 15, 2015; September 17, 2015; October 7, 2015; November 5, 2015; December 8, 2015; December 18, 2015; December 22, 2015; December 23, 2015; January 5, 2016; January 8, 2016; January 12, 2016; January 19, 2016; January 20, 2016; January 22, 2016; January 25, 2016; February 4, 2016; March 3, 2016; March 11, 2016; March 14, 2016; March 21, 2016; March 24, 2016; March 25, 2016; March 26, 2016; March 28, 2016; March 29, 2016; March 30, 2016; and March 31, 2016.
33. **Violation No. 3:** The Dischargers violated Construction Storm Water Permit Attachment D, section B.3.a. by failing to implement vehicle fluid leak BMPs at the Site on the following 15 days: August 20, 2015; August 31, 2015; September 17, 2015; October 7, 2015; October 8, 2015; November 3, 2015; November 23, 2015; November 30, 2015; December 9, 2015; December 10, 2015; January 5, 2016; January 7, 2016; January 19, 2016; February 8, 2016, and March 2, 2016.

34. **Violation No. 4:** The Dischargers violated Construction Storm Water Permit Attachment D, section D.2. by failing to implement erosion control BMPs in inactive areas at the Site on the following 35 days: September 17, 2015; October 1, 2015; October 6, 2015; October 7, 2015; October 9, 2015; October 12, 2015; October 13, 2015; October 19, 2015; October 20, 2015; October 23, 2015; October 26, 2015; November 12, 2015; November 19, 2015; December 1, 2015; December 7, 2015; December 8, 2015; December 21, 2015; December 23, 2015; December 29, 2015; January 4, 2016; January 7, 2016, January 8, 2016; January 12, 2016, January 13, 2016, January 14, 2016; January 19, 2016, January 20, 2016; January 21, 2016, January 22, 2016; January 26, 2016; January 27, 2016; January 29, 2016; February 17, 2016; March 14, 2016; and March 21, 2016.
35. **Violation No. 5:** The Dischargers violated Construction Storm Water Permit Attachment D, section E.3. by failing to implement erosion control BMPs in active areas at the Site on the following 12 days: September 14, 2015; September 15, 2015; October 6, 2015; October 12, 2015; October 19, 2015; October 26, 2015; December 10, 2015; December 22, 2015; January 7, 2016; February 8, 2016; February 17, 2016; and March 14, 2016.
36. **Violation No. 6:** The Dischargers violated Construction Storm Water Permit Attachment D, section E.4. by failing to apply linear sediment controls at the Site on the following 53 days: September 16, 2015, September 17, 2015, October 1, 2015; October 9, 2015; October 13, 2015; October 20, 2015; October 23, 2015; November 12, 2015; November 19, 2015; November 24, 2015; December 1, 2015; December 7, 2015; December 8, 2015; December 9, 2015; December 10, 2015, December 16, 2015, December 18, 2015; December 21, 2015; December 22, 2015; December 23, 2015; December 29, 2015; January 4, 2016; January 5, 2016; January 6, 2016; January 7, 2016; January 8, 2016; January 11, 2016; January 12, 2016; January 13, 2016; January 14, 2016, January 15, 2016; January 19, 2016; January 20, 2016, January 21, 2016; January 22, 2016, January 23, 2016; January 25, 2016; January 26, 2016, January 27, 2016; January 29, 2016; January 30, 2016; February 1, 2016; February 2, 2016; February 3, 2016; February 4, 2016; February 8, 2016; February 17, 2016; February 26, 2016; March 4, 2016; March 7, 2016; March 10, 2016; March 11, 2016; and March 14, 2016.
37. **Violation No. 7:** The Dischargers violated Construction Storm Water Permit Attachment D, section B.1.c. by failing to properly store chemicals at the Site on the following 10 days: August 20, 2015; October 7, 2015; November 3, 2015; November 23, 2015; November 30, 2015; December 10, 2015; January 19, 2016; March 2, 2016; March 14, 2016; and March 21, 2016.

38. **Violation No. 8:** The Dischargers violated Construction Storm Water Permit Attachment D, section B.2.i. by failing to prevent the discharge of concrete waste to the ground at the Site on the following 5 days: January 5, 2016; February 8, 2016; March 21, 2016; March 30, 2016 and March 31, 2016.
39. The details of these violations are set forth in full in the accompanying Technical Analysis, which is incorporated herein by this reference as if set forth in full.

MAXIMUM LIABILITY

40. Pursuant to Water Code section 13385(a), a person who violates either Water Code section 13376, a waste discharge requirement, a basin plan prohibition, or a requirement of section 301 of the federal 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 of the following:
- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
 - (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.
41. Therefore, the maximum liability that the San Diego Water Board may assess for the alleged violations listed above is \$64,554,380 pursuant to Water Code section 13385(c).

MINIMUM LIABILITY

42. Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy further instructs the Regional Water Boards to assess liability against a violator at least ten percent higher than the economic benefit realized from the violation, such that liabilities are not construed as the cost of doing business and provide a meaningful deterrent to future violators.
43. As detailed in the attached Technical Analysis, and based on a calculated economic benefit of \$747,258, the minimum liability amount the San Diego Water Board may assess the Dischargers is \$821,983. This reflects the economic benefit for violation 1, calculated through April 8, 2020. While the other violations have nominal economic benefit, such benefit would be captured by this minimum recovery. The Prosecution Team does not support the imposition of the minimum liability in this matter, given the repeated failures to respond to written notices of violation and significant deviation from permit standards.

PROPOSED LIABILITY

44. Pursuant to Water Code section 13385(e), in determining the amount of any civil liability, the San Diego Water Board shall consider the nature, circumstances, extent, and gravity of the violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge; and with respect to the Dischargers, the ability to pay, the effect on the Dischargers' ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters as justice may require.
45. The total investment of the San Diego Water Board to date is \$96,594. These staff costs are not divided by violation and are added at the end of the collective penalty assessment. A summary of the staff costs incurred to date is provided in Exhibit 174, the Staff Cost Summary. The Prosecution Teams finds that it is appropriate to increase the Total Base Liability to include staff costs in consideration of an appropriate penalty. Increasing the Total Base Liability Amount in this manner serves to create a more appropriate deterrent against future violations.
46. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385(e). The required factors have been considered for the violations alleged herein using the methodology in the Enforcement Policy, as explained in detail in the Technical Analysis and summarized in the Enforcement Policy Calculation Methodology.
47. Based on consideration of the above facts, the applicable law, and after applying the penalty calculation methodology in section VI of the Enforcement Policy, the Prosecution Team recommends that the San Diego Water Board impose civil liability against the Dischargers in the amount of \$9,115,932 for the violations alleged herein and set forth in full in the accompanying Technical Analysis. The assessed amount includes \$96,594 of San Diego Water Board staff time to investigate and prepare the enforcement documents, as described in Exhibit 174, Staff Cost Summary. If the San Diego Regional Water Quality Control Board issues an order for an administrative penalty other than this amount, appropriate findings supporting the penalty should be made.



JAMES G. SMITH
Assistant Executive Officer

Signed pursuant to the authority delegated by the Executive Officer to the Assistant Executive Officer.

Attachments: **Complaint Package:**

- (a) ACLC (this document)
- (b) Technical Analysis
- (c) Legal Analysis and Allegations Related to Naming Additional Entities and Individuals (Legal Brief)
- (d) Volume Calculation Report prepared by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Prosecution Team
- (e) Economic Benefit Calculation prepared by the Prosecution Team
- (f) Enforcement Policy Methodology (calculator matrix)
- (g) **Exhibits** provided concurrently herewith (1-449), provided on USB thumb drive or via San Diego Water Board FTP site.

SMARTS:

Place ID: SM-831856

Violation IDs: 860175, 860176, 860177, 860178, 860179, 860180, and 860184

WDID No: 9 30C371181

Enforcement ID: 435808