

Attachment A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

TECHNICAL ANALYSIS

Settlement Agreement and Stipulation for Entry of
Administrative Civil Liability

Order No. R9-2015-0015

Jacobs Center for Neighborhood Innovation
Northwest Village Creek Construction Project

Noncompliance with

State Water Resources Control 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

and

Water Code section 13376

and

Clean Water Act section 301

Prepared
by

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A. Introduction

This technical analysis provides a summary of factual and analytical evidence that support the findings in Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R9-2015-0015 in the Matter of Jacobs Center for Neighborhood Innovation (Stipulated Order) and the assessment of civil liability in the amount of forty-six thousand seven hundred and eighteen dollars (**\$46,718**) against Jacobs Center for Neighborhood Innovation (Discharger) for violations of 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). See Exhibit No. 1, Construction Storm Water Permit.

The Stipulated Order will be issued to the Discharger because the Discharger failed to comply with the terms and conditions of the Construction Storm Water Permit during the ongoing construction of a retail shopping center that includes a Walgreens store, referred to as the Northwest Village Creek Construction Project (Project), located on 3.7 acres within the City of San Diego's Chollas View community at 602 Euclid Avenue, San Diego, California 92114 (Site). The Site lies within the Chollas Hydrologic Subarea (HSA) (908.22) of the Pueblo San Diego Hydrologic Unit. Storm water discharges from the Site drain directly into Chollas Creek and indirectly into Chollas Creek via the City of San Diego's storm water conveyance system. See Figure 1. Site Location Map.

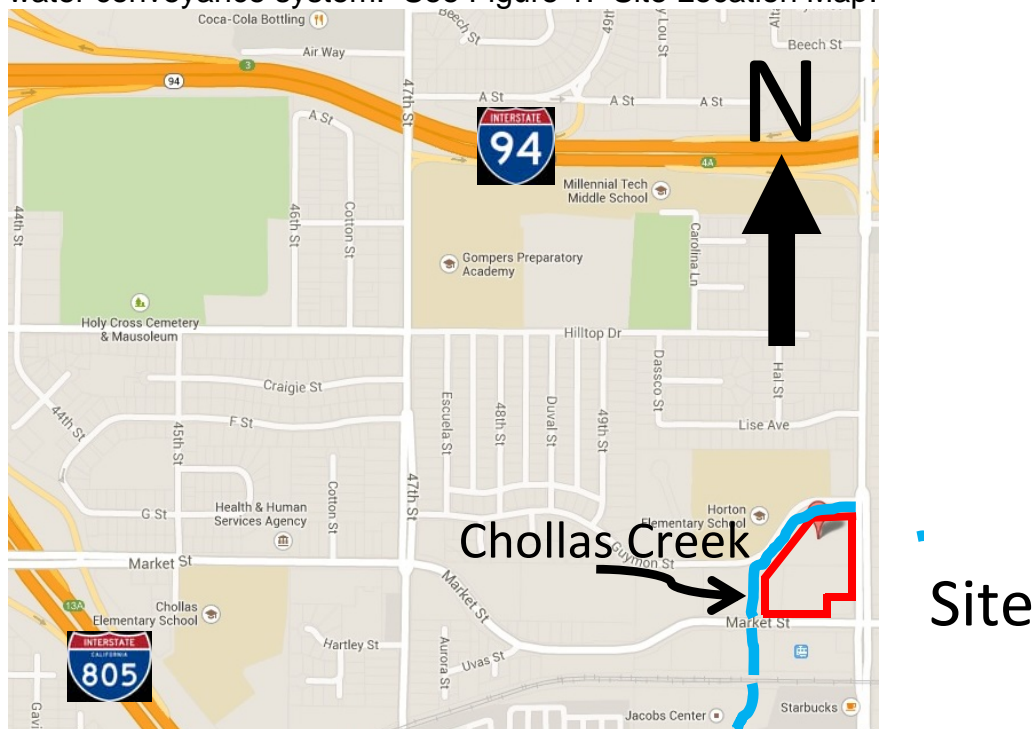


Figure 1. Site Location Map. Location of Northwest Village Creek Construction Project site (outlined in red) at 602 Euclid Avenue, San Diego, California 92114.

Jacobs Center for Neighborhood Innovation (JCNI) is the project developer. Stephen Maduli-Williams is the contact for JCNI and the “Legally Responsible Person” (LRP) for the Discharger for the Project. JCNI was founded in 1995 and is a nonprofit foundation working in partnership with the Jacobs Family Foundation. On March 26, 2014, Stephen Maduli-Williams, on behalf of JCNI, filed a Notice of Intent (NOI) to comply with the Construction Storm Water Permit for the Project with the State Water Board. See Exhibit No. 2, Notice of Intent. The NOI stated that construction activities would begin on March 24, 2014, and end on October 31, 2014. On March 28, 2014, the State Water Board processed the NOI and assigned Waste Discharge Identification (WDID) No. 9 37C369293 to the Project. On December 19, 2014, Mr. Maduli-Williams submitted a Change of Information (COI) to the NOI stating that construction activity for the Project did not commence until August 25, 2014.

The Site’s Storm Water Pollution Prevention Plan (SWPPP) characterizes the Project as being Risk Level 1. Pursuant to Construction Storm Water Permit section VIII, dischargers “calculate the site’s sediment risk and receiving water risk during periods of soil exposure (i.e. grading and site stabilization).” “Risk Level 1” is assigned to projects with low receiving water risk and low sediment risk. (Construction Storm Water Permit, § II.J.1.a.)

B. Construction Storm Water Permit

The Construction Storm Water Permit authorizes discharges of storm water associated with construction activity as long as the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) are implemented to reduce or eliminate pollutants in storm water runoff. BAT/BCT technologies include passive systems such as erosion and sediment control best management practices (BMPs¹) as well as structural controls, as necessary, to achieve compliance with water quality standards. The Construction Storm Water Permit identifies effective erosion control measures such as “preserving existing vegetation where feasible, limiting disturbance, and stabilizing and re-vegetating disturbed areas as soon as possible after grading or construction activities.” (Construction Storm Water Permit, § II.J.1.e.)

¹ Best management practices (BMPs) are “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ‘waters of the United States.’ BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 C.F.R. § 122.2)

The Construction Storm Water Permit further identifies erosion control BMPs as the primary means of preventing storm water contamination. (Construction Storm Water Permit, § II.J.1.e.) The Construction Storm Water Permit identifies sediment controls as the secondary means of preventing storm water contamination. (*Id.* at § II.J.1.f.) The Construction Storm Water Permit further states that when erosion control techniques are ineffective, sediment control techniques should be used to capture any soil that becomes eroded. (*Id.* at § II.J.1.e.)

C. Complaint Inspection

On December 4, 2014, the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) received a telephone complaint from a concerned citizen about a discharge of sediment laden storm water from the Project. The concerned citizen emailed photographs of the Site in the form of JPG computer files and videos in the form of MOV files that document violations of the Construction Storm Water Permit. See Exhibit No. 3, Concerned Citizen Photographs.

San Diego Water Board inspector Wayne Chiu inspected the Site on December 4, 2014, after receiving the citizen complaint that morning of a sediment laden storm water discharge from the Site into Chollas Creek. Mr. Chiu observed multiple violations of the Construction Storm Water Permit as outlined in the December 10, 2014, Notice of Violation (NOV) No. R9-2014-0145. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.²

D. QSP Site Inspection Reports

Whitson Contracting & Management, Inc., the Project Qualified SWPPP Practitioner (QSP) conducted weekly storm water site inspections for the Discharger as well as pre-, during-, and post-storm event inspections. These reports further documented the failure of the Discharger to implement effective erosion and sediment control BMPs, as well as Housekeeping BMPs. See Exhibit No. 5, Qualified SWPPP Practitioner Inspection Reports.

² The NOV transmittal includes a copy of the December 4, 2014, San Diego Water Board inspection report.

E. Beneficial Uses of Affected Waters

The Basin Plan designates beneficial uses for all surface and ground waters in the San Diego Region. These beneficial uses "form the cornerstone of water quality protection under the Basin Plan." (Basin Plan, Chapter 2) Beneficial uses are defined in the Basin Plan as "the uses of water necessary for the survival or well being of man, plants and wildlife." (*Id.*)

The Basin Plan also designates water quality objectives to protect the designated beneficial uses. Water Code section 13050(h) defines "water quality objectives" as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."

The Basin Plan designates the following beneficial uses for Chollas Creek:

1. Contact Water Recreation (REC-1);
2. Non-contact Water Recreation (REC-2);
3. Warm Freshwater Habitat (WARM); and
4. Wildlife Habitat (WILD).

Chollas Creek is designated as an impaired water body for copper, lead, and zinc pursuant to Clean Water Act section 303(d). A Total Maximum Daily Load (TMDL) has been adopted to address this impairment. Chollas Creek is designated as a water quality limited segment for indicator bacteria pursuant to Clean Water Act section 303(d). A TMDL has been adopted to address this impairment.

F. Determination of Administrative Civil Liability

An administrative civil liability may be imposed pursuant to the procedures in Water Code section 13323. The Stipulated Order alleges the act(s) or failure to act that constitutes a violation of law, the provision of law authorizing civil liability, and the civil liability. Pursuant to the relevant portions of Water Code section 13385(a)

A person who violates any of the following shall be liable civilly in accordance with this section:

- (1) Section 13375 or 13376.
- (2) A waste discharge requirement or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.
- (3) A requirement established pursuant to section 13383.

Furthermore, Water Code section 13385 (c) provides that

Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
- (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

Water Code section 13385(e) requires the consideration of several factors when determining the amount of civil liability to impose. These factors include

the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

G. Alleged Violations

The following allegations against the Discharger are the basis for assessing administrative civil liability pursuant to Water Code section 13385, and also appear in the Stipulated Order:

1. Discharge of Sediment Laden Storm Water Runoff (1 day, December 4, 2014)

All discharges except for storm water and non-storm water discharges specifically authorized by the Construction Storm Water Permit are prohibited. (Construction Storm Water Permit, § III.B.) Furthermore, “[d]ischargers shall not violate any discharge prohibitions contained in applicable Basin Plans or statewide water quality control plans.” (*Id.* at § III.A.) San Diego Water Board Basin Plan, Chapter 4, Waste Discharge Prohibition No. 8 prohibits discharges to the storm water conveyance system that are not composed entirely of storm water. “Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.” (*Id.* at § V.A.2. and Att. C, § A.1.b.)

During the storm event of December 3-4, 2014, storm water runoff flowed across the Site to its southwest corner and into two basins with drains that discharge directly into Chollas Creek without retaining the runoff and allowing the sediment to drop out. The Discharger describes the basins as “detention basins.” However, the basins fail to meet design requirements; therefore, they are not “detention basins.” The SWPPP clearly states that the basins were not designed to remove pollutants such as a sedimentation basin (SE-2).³ See Exhibit No. 6, Storm Water Pollution Prevention Plan at p. 26, Note SC-b. This was further documented by the San Diego Water Board inspector in his notes that the basins failed to have risers or spillways.⁴ The failure to reduce or eliminate the pollutants in the storm water runoff prior to discharge into Chollas Creek is a violation of the Construction Storm Water Permit, and therefore the discharge is unauthorized. The sediment laden storm water runoff from the Project’s two basins discharged directly into Chollas Creek on December 4, 2014, and was documented by photographs taken by a concerned citizen. See Exhibit No. 3, Concerned Citizen Photographs, December 4, 2014.

³ California Stormwater BMP Handbook, Construction, November 2009.

⁴ Inspection Report dated December 4, 2014, p. 3, Note 7. The inspection report is part of Exhibit No. 4.

2. Failure to Implement Erosion Control (1 day, December 4, 2014)
“Risk Level 1 dischargers shall provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.” (Construction Storm Water Permit, Att. C, § D.2.) During the December 4, 2014, inspection, Mr. Chiu noted that several areas of the Site appeared to be inactive and without effective soil cover for erosion control. Furthermore, evidence of erosion due to a lack of erosion control was observed throughout the Site. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.
3. Failure to Implement Sediment Controls (1 day, December 4, 2014)
“Risk Level 1 dischargers shall establish and maintain effective perimeter controls and stabilize all construction entrances and exits to sufficiently control erosion and sediment discharges from the site.” (Construction Storm Water Permit, Att. C, § E.1.) During Mr. Chiu’s inspection of December 4, 2014, he noted the discharge of a significant amount of sediment onto Market Street and the sidewalk as a result of inadequate sediment control BMPs along the Site perimeter and the two Market Street entrances. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.
4. Failure to Implement Run-on and Runoff Controls (1 day, December 4, 2014)
“Risk Level 1 dischargers shall effectively manage all run-on, all runoff within the site and all runoff that discharges off the site.” (Construction Storm Water Permit, Att. C, § F.) During Mr. Chiu’s inspection of December 4, 2014, he observed and documented where Site perimeter sediment controls were not established or maintained resulting in run-on from the Church’s Chicken property onto the Site. The run-on resulted in a sediment discharge to Market Street from the Site. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.
5. Failure to Cover Stockpiles (1 day, December 4, 2014)
“Risk Level 1 dischargers shall implement good site management (i.e., ‘housekeeping’) measures for construction materials that could potentially be a threat to water quality if discharged.” (Construction Storm Water Permit, Att. C, § B.1.) This includes covering and berming inactive loose stockpiles. (*Id.* at § B.1.b.) On December 4, 2014, Mr. Chiu documented that the large soil stockpile failed to have adequate cover. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.

6. Failure to Implement Entrance Tracking BMPs (1 day, December 4, 2014)
“Risk Level 1 dischargers shall implement good site management (i.e., ‘housekeeping’) measures for construction materials that could potentially be a threat to water quality if discharged.” (Construction Storm Water Permit, Att. C, § B.1., emphasis in the original.) This includes implementing BMPs to prevent off-site tracking of loose construction and landscape materials. (*Id.* at § B.1.e.) On December 4, 2014, Mr. Chiu documented significant sediment tracking at the Market Street site entrance (east, near Church’s Chicken). This demonstrates the inadequacy of sediment control BMPs and sweeping of the entrance. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.

7. Failure to Implement Vehicle Fluid Leaks BMPs (1 day, December 4, 2014)
“Risk Level 1 dischargers shall implement good housekeeping for vehicle storage and maintenance which at a minimum shall consist of the following:” (Construction Storm Water Permit, Att. C, § B.3., emphasis in the original.) This includes implementing BMPs for vehicle storage and maintenance by preventing oil, grease, or fuel leaks to the ground, storm drains, or surface waters. (*Id.* at § B.3.a.) On December 4, 2014, Mr. Chiu confirmed that the vehicles did not have drip pans to catch vehicle fluid leaks. See Exhibit No. 4, Notice of Violation No. R9-2014-0145; see also Exhibit No. 3, Concerned Citizen Photographs.

8. Failure to Complete Inspection Checklist (1 Report)
The Construction Storm Water Permit requires Risk Level 1 dischargers to perform weekly inspections and observations and to record a checklist of information. (Construction Storm Water Permit, Att. C, § G.) “Risk Level 1 dischargers shall ensure that checklists shall remain onsite with the SWPPP and at a minimum, shall include: ... Any corrective actions required, including any necessary changes to the SWPPP and the associated implementation dates.” (*Id.* at § G.5.g.)

The weekly QSP inspection report for December 4, 2014, did not include implementation dates. Therefore, it is unclear whether the recommended corrective actions for noted failures or other shortcomings were completed. See Exhibit No. 5, Qualified SWPPP Practitioner Inspection Reports. Failure to correct BMP deficiencies increases the likelihood of a sediment discharge and decreases the pollutant removal effectiveness of the Site’s BMPs.

H. Penalty Calculation

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy) provides a penalty calculation methodology for the State Water Board and the nine Regional Water Quality Control Boards (collectively Water Boards) to use in administrative civil liability cases. The penalty calculation methodology enables the Water Boards to fairly and consistently implement liability provisions of the Water Code for maximum enforcement impact to address, correct, and deter water quality violations. The penalty calculation methodology provides a consistent approach and analysis of factors to determine liability based on the applicable Water Code section.

Pursuant to the Enforcement Policy, Water Boards shall determine an initial liability factor based on the Potential for Harm score and the extent of Deviation from Requirements for the violation when there is a discharge. Water Boards shall calculate the Potential for Harm by determining the actual or threatened impact to beneficial uses caused by the violation using a three-factor scoring system to quantify: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement. These factors will be used to determine a per day factor using the matrix set forth in the Enforcement Policy that is multiplied by the maximum per day amount allowed under the Water Code. If applicable, the Water Board shall also determine an initial liability amount on a per gallon basis using the Potential for Harm score and the extent of Deviation from Requirement of the violation.

For each non-discharge violation, the Water Boards shall calculate an initial liability factor, considering the Potential for Harm and extent of Deviation from Requirements, using the matrix set forth in the Enforcement Policy that corresponds to the appropriate Potential for Harm and the Deviation from Requirement categories.

Pursuant to the Enforcement Policy, Water Boards shall use three adjustment factors for modification of the initial liability amount. These factors are culpability; cleanup and cooperation; and history of violations. The initial liability amount can be increased or decreased based on these adjustment factors. Additional adjustments may be used regarding multiple violations resulting from the same incident and multiple day violations.

**Violation No. 1: Discharge of Sediment Laden Water (1 day)
December 4, 2014**

Step 1 – Potential for Harm for Discharge Violations

Factor 1: Harm or Potential for Harm to Beneficial Uses

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 (negligible) and 5 (major) is assigned in accordance with the statutory factors of the nature, circumstances, extent, and gravity of the violation.

The San Diego Water Board Prosecution Team (Prosecution Team) assigns a score of **3 (Moderate)** out of 5 for Factor 1 of the penalty calculation. The Enforcement Policy defines “Moderate” as “moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).” A score of 3 (Moderate) is selected because:

1. Sediment was directly and indirectly discharged into Chollas Creek. The primary storm water pollutant at construction sites is sediment.
2. Chollas Creek is designated as an impaired water body for copper, lead, and zinc pursuant to Clean Water Act section 303(d). Sediment discharged from the Project likely transported other pollutants such as metals; therefore the unauthorized discharge further degraded the poor health of the Chollas Creek waters.
3. Sediment discharges negatively impact the beneficial uses of Chollas Creek: Contact and Non-contact Water Recreation (REC-1 and REC-2, respectively), Warm Freshwater Habitat (WARM), and Wildlife Habitat (WILD); and
4. Impacts to Chollas Creek were likely due to the turbidity and volume of the discharge; resulting in temporary restrictions on beneficial uses.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem health exposure pathways. In this matter, the Prosecution Team assigns the discharge of sediment to receiving waters a score of **2**. The Enforcement Policy defines a score of 2 as "[d]ischarged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection." A score of 2 is selected because:

1. Sediment discharges diminish the physical quality of in-stream waterways by altering or obstructing flows and affecting existing riparian functions.
2. Sediment acts as a binding carrier to other toxic constituents like metals and organic contaminants (i.e., pesticides and PCBs).
3. Sediment discharges affect the quality of receiving waters and the ability to support habitat related beneficial uses by reducing visibility and impacting biotic feeding and reproduction. Sediment discharges typically increase receiving water turbidity levels.
4. Sediment discharges cause acute effects on the invertebrate aquatic community; e.g., it can be lethal when the benthic community is buried in sediment.

Factor 3: Susceptibility to Cleanup and Abatement

Pursuant to the Enforcement Policy a score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned to this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement. Less than 50 percent of the discharge was susceptible to cleanup or abatement. Accordingly, the Prosecution team assigns a score of **1** to the penalty calculation for Factor 3.

Final Score - "Potential for Harm"

Based on the above determinations, the Potential for Harm final score for this discharge violation is **6**.

Step 2 - Assessments for Discharge Violations

Water Code section 13385 states that a Regional Water Board may impose civil liability on a daily basis, a per gallon basis, or both. Due to the difficulty in accurately determining the volume of sediment laden storm water discharged during the discharge event, civil liability was only calculated on a per day basis for the violation.

Per Day Assessments for Discharge Violations

The Water Boards shall calculate an initial liability factor for each discharge violation, considering Potential for Harm and the extent of Deviation from Requirement.

Deviation from Requirement

The Prosecution Team assigns a Deviation from Requirement score of **Major** because the Construction Storm Water Permit prohibits all discharges other than storm water from construction sites to waters of the United States, unless otherwise authorized by an NPDES permit. The Enforcement Policy defines major for discharge violations as: "The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)." Pollutants were discharged from the Project to waters of the United States because pollutant controls were not implemented; therefore the discharge occurred without NPDES Permit authorization.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of 6 and "Deviation from Requirement" factor of "Major," the "Per Day Factor" for discharging sediment from the Project to Chollas Creek is **0.220** in Table 2 of the Enforcement Policy. Pursuant to Water Code section 13385 the maximum civil liability for these violations is ten thousand dollars (\$10,000) per day of violation (per violation). Calculating the Per Day Assessment is achieved by multiplying:

$$(\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) = (0.220) \times (\$10,000) = \$2,200$$

Step 3 - Per Day Assessments for Non-Discharge Violations

Step 3 does not apply to discharge violations.

Step 4 - Adjustment Factors

Culpability

The Prosecution Team assigns a culpability multiplier of **1.5** out of a range from 0.5 to 1.5 for this violation for the following reasons:

1. Discharger knew the requirements of the Construction Storm Water Permit and agreed to comply with the requirements as evidenced by its certified NOI.
2. Discharger failed to implement BMPs to reduce the sediment in the storm water runoff;
3. The SWPPP clearly states that the two basins with drains that discharge directly into Chollas Creek were not designed to remove pollutants like sedimentation basins (SE-2) do. This was also documented in the San Diego Water Board Inspection Report; specifically that the basins failed to have risers or spillways.
4. Discharger intentionally discharged storm water runoff into Chollas Creek as evidenced by the basins being directly piped to Chollas Creek; and
5. Discharger failed to monitor or report the discharge to the San Diego Water Board.

Cleanup and Cooperation

The Prosecution Team assigns a cleanup and cooperation multiplier of **1.0** from a range of .75 to 1.5 for this violation because the Discharger ceased discharge upon direction of San Diego Water Board staff.

History of Violation

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\text{Total Base Liability} = \text{Per Day Assessment} \times \text{No. of Days} \times \text{Culpability} \times \text{Cleanup \& Cooperation} \times \text{History of Violations}$$

$$\text{Total Base Liability} = (\$2,200) \times (1) \times (1.5) \times (1.0) \times (1.0) = \$3,300$$

Step 6 - Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

The Discharger derived an economic benefit by not plugging up the two basin drains and pumping out the ponded storm water runoff for off-site disposal. It is estimated that the labor and materials necessary to plug the two basin drains is \$500. The estimated cost to pump out the two basins and dispose of the ponded storm water runoff offsite is \$450 based upon an invoice provided by the Discharger. Using the U.S. EPA BEN Model the Discharger enjoyed an economic benefit of \$973. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation); and (b) ten dollars (\$10) for every gallon discharged, over one thousand (1,000) gallons discharged, that was not cleaned up. In this instance, the Prosecution Team is only proposing the assessment of civil liability for the discharge of sediment to waters of the United States on a per day basis based on information currently available. Sediment was known to be discharged to waters of the United States on December 4, 2014; therefore, the maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$973) = \$1,070$.

Step 10 - Civil Liability for Violation No. 1

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for discharging sediment to waters of the United States in violation of the Construction Storm Water Permit and the Basin Plan for one (1) day is three thousand three hundred dollars (\$3,300), plus staff costs. The liability is within the minimum and maximum liability range.

Violation No. 2: Failure to Implement Erosion Control (1 day) December 4, 2014

Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation is characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate for the following reasons:

1. The entire site was graded. Although vertical construction of the Walgreens store commenced, the Site continued to pose a substantial threat to discharge sediment given the large soil stockpiles;
2. Chollas Creek is a sensitive water body listed as impaired under section 303(d) of the federal Clean Water Act; and

3. Sediment is a pollutant that when discharged, can have lethal effects on benthic communities. Furthermore, sediment can transport toxic materials (e.g., metals and synthetic organics) from the Site and into receiving waters.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” Moderate was selected because many inactive areas throughout the Site were without erosion control BMPs. Erosion control BMPs are the first and most valuable BMPs used at a construction site because they prevent erosion from happening in the first place (i.e., it prevents storm water runoff from being polluted with sediment).

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective erosion controls in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the failure to use erosion control BMPs on inactive areas throughout the Site during the rainy season was at a minimum negligent implementation of the Construction Storm Water Permit by the Discharger.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$4,626 by not applying an erosion control BMP (e.g., spraying of bonded fiber matrix) on the finished areas. Bonded fiber matrix costs approximately \$3,901⁵ per acre to install. Assuming that one acre was inactive, the cost would be \$3,901. The economic benefit of not spraying the bonded fiber matrix is \$4,626. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

⁵ *Soil Stabilization BMP Research for Erosion and Sediment Controls, Cost Survey Technical Memorandum, July 2007, Caltrans, Table 3-1, p. 7.*

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement erosion control BMPs for one day, December 4, 2014. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

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 requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$4,626) = \$5,089$.

Step 10 - Civil Liability for Violation No. 2

Since the minimum liability amount is above the total base liability amount, the civil liability for failing to implement erosion control for one (1) day in violation of the Construction Storm Water Permit is the minimum five thousand eighty nine dollars (\$5,089), plus staff costs.

Violation No. 3: Failure to Implement Sediment Controls (1 day) December 4, 2014

Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate because most of the Site was graded (exposed soil) and discharges indirectly and directly into Chollas Creek, a sensitive water body.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” Moderate was selected because although the Discharger implemented sediment control BMPs, it failed to maintain or augment some of the sediment control BMPs, which resulted in the discharge of sediment to the City of San Diego’s storm drain inlet on Market Street.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective sediment controls in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the Discharger was not maintaining BMPs and also failed to replace or increase the size of ineffective BMPs.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$99 by delaying the application of sediment control BMPs (e.g. straw waddles or gravel bags). See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement sediment control BMPs for one day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

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 requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$99) = \109 .

Step 10 - Civil Liability for Violation No. 3

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement sediment control BMPs for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

Violation No. 4: Failure to Implement Run-On Runoff Controls (1 day) December 4, 2014

Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.” The Prosecution Team selected Moderate for the following reasons:

1. Run-on from the Church’s Chicken property was not effectively controlled and resulted in sediment discharges from the Project onto Market Street;
2. Chollas Creek is a sensitive water body listed as impaired under section 303(d) of the federal Clean Water Act;
3. Sediment is a pollutant that when discharged can be lethal when it smothers benthic communities; and
4. Sediment can transport toxic materials (e.g., metals and synthetic organics) from the Site and into receiving waters.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” The Discharger implemented some run-on/runoff controls; however, some areas of the Site were not being addressed appropriately, nor in a timely manner, and allowed a sediment discharge to occur.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective run-on runoff controls in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\text{Total Base Liability} = \text{Per Day Assessment} \times \text{No. of Days} \times \text{Culpability} \times \text{Cleanup \& Cooperation} \times \text{History of Violations}$$

$$\text{Total Base Liability} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$497 by not implementing run-on/runoff controls. The Discharger could have used 25 foot long eight inch diameter fiber rolls or straw wattles to protect the approximately 480 feet perimeter. With an overlap of one foot on each side, twenty 25 foot long wattles were needed. At a cost of \$24.09 per waddle, the BEN computer model calculates an economic benefit of \$497. See Exhibit No. 7, Economic Benefit Calculation Violation and Supporting Documentation.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement run-on/runoff controls for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

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 requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$497) = \547 .

Step 10 - Civil Liability for Violation No. 4

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement run-on/runoff controls for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

Violation No. 5: Failure to Cover Stockpiles (1 day) December 4, 2014.

Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate because the large stockpile posed a substantial threat to discharge sediment to waters of the United States.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." Although the Discharger ultimately sprayed the stockpile and placed plastic sheeting at its base, it did not have adequate BMPs at the time of the inspection.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to cover stockpiles in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \text{Cleanup \& Cooperation} \times \text{History of Violations}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$2,314 for not covering the inactive large stockpile. Bonded fiber matrix could have been used to cover the stockpile. Bonded fiber matrix costs approximately \$3,901⁶ per acre to install. Assuming that one-half acre was inactive, the cost would be \$1,951. The economic benefit of not spraying the bonded fiber matrix is \$2,314. See Exhibit No. 7, Economic Benefit Calculation Violation and Supporting Documentation.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to cover stockpiles for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

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 requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$2,314) = \$2,545$.

Step 10 - Civil Liability for Violation No. 5

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to cover the stockpile for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

⁶ *Soil Stabilization BMP Research for Erosion and Sediment Controls, Cost Survey Technical Memorandum*, July 2007, Caltrans, Table 3-1, p. 7.

Violation No. 6: Failure to Implement Entrance Tracking BMPs (1 day) December 4, 2014.

Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.” The Prosecution Team selected Moderate because the failure to have adequate entrance tracking control can and did result in the discharge of sediment from the Site into the City of San Diego’s Market Street storm drain inlet.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” The existing controls were inadequate to prevent the discharge of sediment. Additional BMPs should have been implemented to prevent the discharge.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective entrance tracking BMPs in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\text{Total Base Liability} = \text{Per Day Assessment} \times \text{No. of Days} \times \text{Culpability} \times \text{Cleanup \& Cooperation} \times \text{History of Violations}$$

$$\text{Total Base Liability} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$1,119 by not installing a shaker rack at the southeast entrance to Market Street. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement Entrance Tracking BMPs for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

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 requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$1,119) = \$1,231$.

Step 10 - Civil Liability for Violation No. 6

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement entrance tracking BMPs for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

Violation No. 7: Failure to Implement Vehicle Fluid Leaks BMPs (1 day) December 4, 2014.

Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.” The Prosecution Team selected Moderate because storm water runoff polluted by vehicle fluids (gasoline, diesel fuel, motor oil, etc.) can be toxic to aquatic life.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Major** Deviation from Requirement. The Enforcement Policy defines a Major Deviation from Requirement as “[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).” There were no drip pans under the heavy equipment.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Major," the Per Day Factor for failing to use drip pans in Table 3 of the Enforcement Policy is **0.55**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.55) \times (\$10,000) = \$5,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.4** for this violation. QSP inspection reports from September 2014 indicated that drip pans were used. Dedicated vehicle areas with visqueen and fiber rolls were noted in the QSP's October 2014 reports; however, the November 2014 reports indicate that the visqueen and fiber rolls were removed. Therefore, at some time drip pans were no longer used. The QSP inspection reports up to December 3, 2014, stated that drip pans were being used. The December 4, 2014, QSP inspection report confirmed Mr. Chiu's finding that drip pans were not in use.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$5,500) \times (1) \times (1.4) \times (1.0) \times (1.0) = \$7,700$$

Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$2,633 by not installing drip pillow berms under heavy equipment at the Site. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement vehicle leaks BMPs for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

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 requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$2,633) = \$2,896$.

Step 10 - Civil Liability for Violation No. 7

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement vehicle leaks BMPs for one (1) day in violation of the Construction Storm Water Permit is seven thousand seven hundred dollars (\$7,700), plus staff costs. The liability is within the minimum and maximum liability range.

Violation No. 8: Failure to Complete Inspection Checklist (1 Report) December 4, 2014.

Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate because failing to complete the inspection checklist allowed problem areas to remain unaddressed and therefore, to threaten beneficial uses.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).” The Discharger employed a QSP that inspected the Site weekly and forwarded a checklist indicating what BMPs were acceptable, missing, or required repair. Weekly inspections can identify vulnerable areas of the site, provide feedback as to the effectiveness of the BMPs, and indicate where use of a different BMP may be called for. The Discharger received the checklist; however it failed to provide the date that the corrective work was initiated. Construction Storm Water Permit, Attachment C, section G.3., requires implementation of repairs within 72 hours of identification. Here, the Discharger failed to act on a key component of the Construction Storm Water Permit.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to complete the inspection checklist in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the QSP identified problems during the weekly inspections and the Discharger did not document or follow-up. Based upon the QSP's photographs, some BMP problems may have occurred over several weeks.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$103 by failing to properly implement the checklist. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to complete the inspection checklist for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

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 requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is $(1.1 \times \$103) = \113 .

Step 10 - Civil Liability for Violation No. 8

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to complete weekly inspection checklists for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

I. Ability to Pay and Ability to Continue In Business

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The Total Base Liability Amount should not be adjusted here because Discharger has the ability to pay and continue in business. Although Discharger is a section 501(c)(3) tax-exempt nonprofit foundation, Discharger's 2012 IRS Form 990-PF shows that Discharger possesses over one hundred and fifty million dollars (\$150,000,000) in assets.

J. Other Factors as Justice May Require

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

Examples of circumstances warranting an adjustment under this step are:

- a. The discharger has provided, or Water Board staff has identified, other pertinent information not previously considered that indicates a higher or lower amount is justified.
- b. A consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular disadvantaged group.
- c. The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the Enforcement Policy.

(Enforcement Policy, p. 19.)

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

The Enforcement Policy also provides under the “Other Factors as Justice May Require” that the cost of investigation and enforcement should be added to the liability amount. From December 9, 2014, to April 22, 2015, the San Diego Water Board invested 110.5 hours to investigate, prepare enforcement documents, and consider this action. The total investment of the San Diego Water Board to date is \$7,879. 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 No. 8, Staff Cost Summary.

K. Total Liability Amount

The total liability amount for the violations in Stipulated Order No. R9-2015-0015 is \$38,839, plus staff costs of \$7,879 for a total of \$46,718. A summary of the methodology used by the Prosecution Team to calculate the civil liability is provided in Exhibit No. 9, Penalty Methodology Summary. Below is a tabular summary of the total liability, Table No. 1. Penalty Summary.

Table 1. Penalty Summary

| Alleged Violation | Days of Violation | Liability Per Day of Violation | Liability Amount |
|---|--------------------------|---------------------------------------|-------------------------|
| 1. Discharge of Sediment Laden Storm Water Runoff, December 4, 2014 | 1 | \$3,300 | \$3,300 |
| 2. Failure to Implement Erosion Control, December 4, 2014 | 1 | \$4,550 | \$5,089 |
| 3. Failure to Implement Sediment Control, December 4, 2014 | 1 | \$4,550 | \$4,550 |
| 4. Failure to Implement Run-on and Runoff Controls, December 4, 2014 | 1 | \$4,550 | \$4,550 |
| 5. Failure to Cover Stockpiles, December 4, 2014 | 1 | \$4,550 | \$4,550 |
| 6. Failure to Implement Entrance Tracking BMPs, December 4, 2014 | 1 | \$4,550 | \$4,550 |
| 7. Failure to Implement Vehicle Fluid Leaks BMPs, December 4, 2014 | 1 | \$7,700 | \$7,700 |
| 8. Failure to Complete Inspection Checklist, December 4, 2014 | 1 | \$4,550 | \$4,550 |
| Total Base Liability Amount | | | \$38,839 |
| Staff Costs to Date | | | \$7,879 |
| Total Liability | | | \$46,718 |

Exhibits

1. Construction Storm Water Permit
2. Notice of Intent
3. Concerned Citizen Photographs
4. Notice of Violation No. R9-2014-0145
5. Qualified SWPPP Practitioner Inspection Reports
6. Storm Water Pollution Prevention Plan
7. Economic Benefit Calculation Violation and Supporting Documentation
8. Staff Cost Summary
9. Penalty Methodology Summary