

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

In the Matter of:)	
)	COMPLAINT NO. R2-2009-0017
)	for
OG Property Owner, LLC)	ADMINISTRATIVE
Wilder Project)	CIVIL LIABILITY
Orinda, Contra Costa County)	
_____)	

This Complaint is issued to OG Property Owner, LLC, a wholly owned subsidiary of Orinda Gateway, LLC (“Discharger”), to assess administrative civil liability pursuant to California Water Code (“CWC”) Section 13385. The Complaint alleges that by discharging sediment-laden storm water and chlorinated water mixed with concrete wash water, the Discharger caused the discharge of waste to waters of the State in a manner causing or threatening to cause a condition of pollution or nuisance. These actions occurred while in violation of applicable sections of the following:

- National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity, Water Quality Order 99-08-DWQ, WDID No. 2 07C 307369 (“Construction General Permit”);
- Waste Discharge Requirements and Clean Water Act Section 401 Water Quality Certification for the Wilder Project (previously known as the “Gateway” and “Montanera” projects), issued by the Board on June 16, 2004, as Order No. R2-2004-0049 (“Order”); and
- San Francisco Bay Basin Water Quality Control Plan (“Basin Plan”).

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the Water Board), hereby gives notice that:

1. The Discharger violated provisions of law for which the Water Board may impose civil liability pursuant to CWC Sections 13350(a)(2), 13385(a)(2) and (4) and 13323. This Complaint proposes to assess \$982,350 in civil liability for the violations cited based on the considerations described herein. The deadline for comments on this Complaint is June 18, 2009, at 5 p.m.
2. Unless waived, a hearing on this Complaint will be held before the Water Board on August 12, 2009, at the Elihu M. Harris State Building, First Floor Auditorium, 1515 Clay Street, Oakland, California. The Discharger or its representative will have an opportunity to be heard and contest the allegations in this Complaint and the imposition of the civil liability. An agenda for the meeting will be mailed to the Discharger approximately 10 days before the hearing date. The procedures for the hearing and the submission of evidence are set forth in the attached Public Notice of Hearing.

3. At the hearing, the Water Board will consider whether to affirm, reject, or modify the proposed civil liability, to refer the matter to the Attorney General for recovery of judicial liability, or take other enforcement actions.

ALLEGATIONS

4. The following facts are the basis of the alleged violations in this matter:
 - a. The Discharger is the developer of the Wilder Project (hereafter referred to as the project) located on property in the Gateway Valley in the City of Orinda, Contra Costa County. The Project site is located to the east of the Caldecott Tunnel, on the southern side of Highway 24 in the Town of Orinda, Contra Costa County. The property is directly adjacent to creeks, including Quarry Creek and Brookside Creek, which is tributary to San Pablo Creek. Quarry Creek is a small tributary to Brookside Creek. A portion of Quarry Creek was filled as part of the permitted Project, and the remaining lower portion of the creek conveys storm water runoff from the site to Brookside Creek via a construction outfall. Approximately two thirds of the site drains to Brookside Creek, and the remaining part of the site discharges storm water runoff either to Quercus Creek on the northern side of the property, or to a storm drain system that eventually releases water to a tributary to San Pablo Creek.
 - b. The Project involves the disturbance of about 300 acres of land in order to construct 245 residential units and associated infrastructure. Mass grading of the site was initiated in the summer of 2006 and is anticipated to continue into 2009.
 - c. The Project includes the use of perforated plastic sub-drain pipes placed below the ground surface at depths where they will collect groundwater. This groundwater is collected and drained off the site in order to prevent instability of the graded slopes and compacted soil lifts. The collected groundwater is discharged from the sub-drains to Brookside Creek at several locations. The sub-drain pipes are typically installed during grading of the site, and a portion of the sub-drain system was in place during the fall of 2007.
 - d. On September 4, 2007, the City of Orinda and Contra Costa County Building Inspection Department issued the Discharger a letter stating that it had failed to submit an erosion control plan for review and failed to install any erosion and sediment control measures on the project site. After the Discharger submitted the project's Storm Water Pollution Prevention Plan (SWPPP), the City of Orinda issued a separate letter on September 6, 2007 reviewing the plan's inadequacies and stating requirements for revision.
 - e. On October 4, 2007, after daily site inspections, the City issued a letter to the Discharger identifying four critical areas where adequate erosion control measures still had not been installed and stated that a Stop Work Order would be issued if control measures were not installed by October 15, 2007.

- f. This Complaint contains information for two specific discharges that occurred between October 9 and October 13, 2007. These are the discharge of approximately 6,000 cubic feet of sediment-laden storm water runoff to Brookside Creek via an uncapped sub-drain pipe between October 10 and October 11, 2007, and the pumped discharge of turbid chlorinated water, combined with concrete wash-water, from a dust control pond to Brookside Creek on October 13, 2007. These are violations of the Construction General Permit; the Discharger's Order, and the Basin Plan.
- g. This Complaint also describes the continued failure on the part of the Discharger to adequately implement Construction General Permit requirements, including adequate and effective erosion and sediment control measures, during most of the 2007-2008 rainy season.
- h. Between the evening of October 9, 2007 and October 12, 2007, approximately 2.18 inches of rain fell in the vicinity of the project. According to City of Orinda records, an illicit discharge of sediment-laden storm water began on October 10, 2007, but was not discovered until the morning of October 11, 2007, when the City Public Works Director observed the Brookside Creek tributary to San Pablo Creek to be murky and gray.
- i. Additionally, on October 13, 2007, a concerned citizen contacted the California Department of Fish and Game (CDFG) complaining of concrete material in San Pablo Creek (downstream of Brookside Creek). CDFG Warden Nicole Kozicki investigated the scene and directed clean-up efforts from October 13 to October 18. On Monday, October 15, Warden Kozicki was the first to notify Water Board staff of the two discharges. Board Staff conducted an inspection on October 17, 2007.
- j. According to the City of Orinda's investigation findings, the source of the sediment-laden storm water discharge on October 10-11, 2007, was a sub-drain outfall located in Brookside Creek. This sub-drain outfall was draining water from an uncontrolled excavation area on site where a perforated sub-drain pipe had been left exposed to the surface where rainwater was collecting. Upon discovery at approximately 10:00 a.m. on October 11, 2007, the City Grading Inspector instructed the Discharger to plug the drainpipe and to notify the Water Board of the discharge details. At approximately 4:00 p.m., the inspector returned to the inlet and found that the wrong pipe had been plugged and the discharge continued unabated.

It is not known how long or at what rate the sediment-laden water was discharged to Brookside Creek. However, in its October 17, 2008, Notice of Discharge, the Discharger estimates that approximately 6000 cubic feet (37,373 gallons) of sediment-laden water was discharged to Brookside Creek. Based on discharge sample analysis (collected prior to entering the creek), that indicated a total suspended sediment reading of 17,000 mg/l, approximately 6000 pounds of sediment was discharged. Sediment discharges of this magnitude have deleterious effects on aquatic environments, may impact a variety of aquatic organisms, and are evidence of noncompliance with the project's permits.

- k. On October 13, 2007, Warden Kozicki observed milky gray turbid water and unnaturally high flows in Brookside Creek. Upon investigation, she determined that the water flowing in the creek had been discharged from a dust control water pond on the project site. The dust control water consisted in part of very turbid chlorinated potable water from East Bay Municipal Utilities District (“EBMUD”) lines. Water was pumped from that pond by the Discharger to allow re-grading of the area to create a sediment basin. The discharges from the dust control pond exacerbated the initial sediment discharge problems by transporting sediment downstream where it was more difficult to remove. They likely resulted in the discharge of chlorinated water to Brookside Creek. Such a discharge is prohibited without exception by the Basin Plan, Discharge Prohibition 1 (as described in Item 4.x).
- l. Additionally, Warden Kozicki observed construction activity at the top of Quarry Creek just upstream of its confluence with Brookside Creek. This activity involved a concrete pour for an outfall structure and a construction crew was observed rinsing concrete-laden equipment with the water that was discharging from the upstream dust control water pond out of the temporary outfall. The CDFG permit for the Project prohibits construction within the creek corridor after October 1, unless a time extension has been authorized. CDFG had not issued a time extension for the construction work on the outfall.

The Discharger estimates approximately 55,000 gallons of EBMUD water were discharged to Brookside Creek (including concrete wash water), causing a gray “concrete-like” appearance in San Pablo Creek at Moraga Way.

- m. On October 14, 2007, the Discharger was directed by Warden Kozicki to immediately begin clean-up operations within the creek, utilizing straw bales and wattles to function as sediment traps, and pumps to collect sediment-laden water for filtration prior to discharge back to Brookside Creek. At least two days passed before clean up operations were initiated in the creek. On October 17, 2007, CDFG staff observed that the water being discharged from the filtration system was still turbid, and was continuing to re-mobilize sediment in the downstream reach of the creek. An additional filter installed on the equipment the following day still did not provide adequate filtration. As a result, the creek was dammed just downstream of Brookside Drive, and the ponded water was collected and transported in water trucks to the Project’s detention ponds.
- n. As a result of the two separate discharges observed on October 11, and October 13, 2007, large amounts of fine particulate clay sediment deposits were evident along the entire reach of Brookside Creek within the Project site, and in San Pablo Creek downstream of its confluence with Brookside Creek for at least 8 days. Excess sediment was also observed further downstream in San Pablo Creek within the City of Orinda. Water Board staff conducted a site inspection on October 24, and observed sediment at the sub-drain outfall. Discharger representatives stated that this sediment would be removed from the creek. During a follow-up site inspection on November 29, 2007, Water Board staff noted that this sediment had not been removed from the creek. This sediment deposit constituted an ongoing threat to water quality in Brookside Creek.

- o. The Construction General Permit specifically requires the implementation of effective best management practices, including erosion and sediment control measures, to prevent the discharge of sediment from construction sites. It also prohibits any non-storm water discharges from its activities except as allowed in D.1 of the Construction General Permit. The discharges of concrete wash water and chlorinated potable water are not an allowed discharge under this provision.
- p. October 16, 2007, the City of Orinda issued a “stop-work order” citing the Discharger’s failure to implement erosion and sediment control measures previously identified in the City’s correspondence, dated October 4, 2008.
- q. Water Board staff inspected the site on October 17, 2007. Staff found that the discharges resulted from inadequate preparation for the rainy season, despite repeated notices to the discharger directing it to comply with permit requirements including the direction to implement a combination of erosion and sediment control measures. Sediment-laden water continued to flow downstream of the site for a period of more than seven days following the discharges, based on visual observations by Water Board staff. During the October 17 inspection, staff observed the following:
 1. Extensive areas of disturbed and actively graded soil with a variety of slope conditions, including relatively steep slopes, were exposed with no erosion control measures;
 2. There was evidence of erosion gullies and soil loss along several slope faces on the Project site;
 3. Erosion control measures were not implemented on the site’s earthen dirt roads; and the larger disturbed and actively graded area, including the roads, appeared to rely on inadequate sediment basin control measures to prevent the discharge of sediment to the local creek system.
- r. Water Board staff and City of Orinda inspectors continued to observe inadequate erosion control measures during multiple inspections between October 17, 2007, and January 30, 2008. The discharger was notified of the observed inadequacies through email and standard mail correspondence. In addition, the City of Orinda issued a Notice to Comply on December 4, 2007, specifying project areas that continued to lack adequate erosion and sediment control measures.
- s. On January 2, 2008, the Board issued a Notice of Violation for Construction General Permit violations and required the submittal of a technical report, including the facts pertaining to the discharges and revisions to the facility’s SWPPP. On January 18, 2008, the Discharger submitted the technical report addressing these items adequately.
- t. Between January 4, 2008, and January 30, 2008, Board staff conducted five separate inspections in coordination with local inspectors. Erosion and sediment control measures continued to be inadequate, resulting in the discharge of sediment-laden water during storm events. From October 9, 2007, through January 30, 2008, the local rain gauge station registered nine storm events (including 20 days of rain) with greater than 0.5

inches of measurable rain, indicating the potential for significant adverse impact to downstream creeks.

- u. The Discharger has violated the terms of its Construction General Permit. Specifically, the Discharger violated the Construction General Permit's requirement that an updated site-specific SWPPP be developed and implemented prior to the start of a project, including the implementation of "an effective combination of erosion and sediment control on all disturbed areas during the rainy season."
- v. Although it is difficult to determine how long the Discharger was out of compliance with the Construction General Permit, at a minimum, it was in violation from October 10, 2007 to January 30, 2008. The violations between October 10, 2007, and January 30, 2008, include:
 - Violation of Prohibition A.3, "Storm water discharges shall not cause or threaten to cause pollution contamination or nuisance" for at least 8 days,
 - Failure to prepare and implement an adequate SWPPP in accordance with Section A, and failure to reduce or eliminate the discharge of sediment and other pollutants during storms using Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology for at least 114 days – October 9, 2007, to January 30, 2008 (Provision C.2),
 - Failure to implement BMPs for the prevention of non-storm water discharges including dewatering muddy water from the construction area to the storm drain for 1 day. (Prohibition A.1 and A.2, and Section A.9)
- w. In addition to violating the terms of its Construction General Permit, the Discharger has violated the following terms of its Order:
 - Violation of Prohibition A.1, "The direct discharge of wastes, including rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including floodplains, is prohibited"(2 days),
 - Violation of Receiving Water Limitation B.1.c, "The discharges shall not cause the following to exist in waters of the State at any place: alteration of temperature, turbidity, or apparent color beyond present natural background levels" (8 days),
 - Violation of Receiving Water Limitation B.2, "The discharges shall not cause nuisance, or adversely affect the beneficial uses of the receiving water" (8 days), and
 - The Discharger failed to immediately notify the Board staff by telephone of the adverse condition that occurred as a result of this discharge (1 day - Provision 16).
- x. The discharge of sediment-laden storm water and chlorinated water mixed with concrete wash water is also a violation of the Basin Plan. The Basin Plan is the Board's master water quality control planning document. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. It also

includes programs of implementation, including discharge prohibitions, to achieve water quality objectives.

The Discharger violated Discharge Prohibition 9 in Table 4-1 of the Basin Plan, which prohibits the discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses. The discharged material caused extreme turbidity and visible bottom deposits in Brookside and San Pablo Creeks and unreasonably affected their beneficial uses.

In addition, the Discharger violated Discharge Prohibition 1 in Table 4-1 of the Basin Plan, which prohibits the discharge of any wastewater which has particular characteristics of concern to beneficial uses at any point at which the wastewater does not receive a minimum initial dilution of at least 10:1, or into any nontidal water, dead-end slough, similar confined waters, or any immediate tributaries thereof. The October 13, 2007 discharge from a dust control water pond consisted in part of very turbid chlorinated potable water from EBMUD lines, mixed with concrete wash water. This discharge was a discharge of wastewater toxic to aquatic life that did not receive a minimum initial dilution of 10:1.

- y. In sum, the Discharger violated applicable sections of the Construction General Permit; Order No. R2-2004-0049 and the Basin Plan, and discharged sediment-laden storm water and polluted non-storm water while being out of compliance with their permits. These are violations for which the Board may impose administrative civil liability pursuant to Water Code Sections 13350(a)(2), 13385(a)(2) and (a)(4). The authority and process for imposing civil liability is set forth in Water Code Section 13323.

PROPOSED CIVIL LIABILITY

- 5. For Construction General Permit violations, Water Code Sections 13385(c)(1) and (2) provide that the Board can administratively assess a liability of up to \$10,000 for each day in which a violation occurs, and \$10 per gallon for the volume of discharges not cleaned-up that exceeds 1,000 gallons.
 - a. For discharging approximately 37,373 gallons of sediment-laden storm water from October 10 to 11, 2007 and during clean-up activities to October 18, the Discharger is subject to a maximum liability of \$80,000 for eight days of discharge, plus \$363,730 for the gallons of waste discharged but not cleaned up in excess of 1,000 gallons (i.e., \$10 per gallon x 36,373 gallons) under Water Code Sections 13385(a)(4) and (c), for a total maximum liability of \$443,730.
 - b. For discharging 55,000 gallons of polluted non-storm water on October 13, 2007, the discharger is subject to a maximum liability of \$10,000 for one day of discharge, plus \$540,000 for the gallons of waste discharged but not cleaned up in excess of 1,000 gallons under Water Code Sections 13385(a)(4) and (c), for a total maximum liability of \$550,000.
 - c. For failing to prepare and implement an adequate SWPPP in accordance with Section A, and failure to reduce or eliminate the discharge of sediment and other pollutants during

storms using Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology from October 9, 2007, to January 30, 2008, the discharger is subject to a maximum liability of \$10,000 for 114 days, for a maximum liability of \$1,140,000.

6. For violations of Order No. R2-2004-0049 ("Order"), Water Code Sections 13350 (e)(1) provides that the Board can administratively assess a liability of \$5000 for each day the violation occurs. As described above, the discharger violated its Order for a minimum of 8 days for a total maximum liability of \$40,000.
7. For violating the Basin Plan's Discharge Prohibition Nos. 1 and 9, the Discharger is civilly liable for up to \$10,000 under Water Code Sections 13385(a)(4) and (c) for each discharge, plus up to \$10 per gallon of waste discharged but not cleaned up in excess of 1,000 gallons for a total maximum liability of \$923,730 for the discharges on October 10, 11, and 13, 2007.
8. In sum, the maximum civil liability that may be imposed against the Discharger, for the violations described above, is \$3,097,460.
9. Pursuant to Water Code Section 13385(e), the Water Board must consider the following factors in determining the amount of civil liability:
 - The nature, circumstances, extent, and gravity of the violation,
 - Whether the discharge is susceptible to cleanup or abatement,
 - The degree of toxicity of the discharge,
 - Discharger's the ability to pay and the effect on ability to continue in business,
 - Any voluntary cleanup efforts undertaken,
 - Any prior history of violations,
 - The degree of culpability,
 - The economic benefit or savings, if any, resulting from the violation, and
 - Other such matters as justice may require.

Nature, Circumstance, Extent and Gravity of the Violation

Sediment in excessive quantities that causes or threatens to cause impact to beneficial uses of waters of the State is considered to be a waste. The existing beneficial uses for San Pablo Creek and its tributaries are cold freshwater habitat, fish migration, fish spawning, warm freshwater habitat, wildlife habitat, habitat for rare, threatened and endangered species, and noncontact water recreation. Waters on the project site are known to provide habitat for the preservation of protected species, including breeding and dispersal habitat for the federally listed threatened California Red Legged Frog and the state-listed species of special concern Foothill Yellow Legged Frog.

Although, no migrating fish have been reported from Brookside Creek, land-locked populations of steelhead trout have been observed spawning further downstream in Moraga Creek.

Susceptibility of the Discharge to Cleanup or Abatement

The amount of sediment that was ultimately deposited and/or transported downstream was exacerbated by the fact that the discharger failed to immediately stop the initial October 10-11, 2007, discharge and begin clean-up (see below “Voluntary Cleanup Efforts Undertaken”). In addition, the release of 55,000 gallons of chlorinated water, two days after the sediment-laden storm water discharge and prior to any clean-up efforts, resulted in the re-suspension and downstream transport of deposited sediments. These factors, along with the ineffectiveness of the clean-up measures, indicate that a significant portion of the approximately 6000 pounds of discharged sediment was unrecoverable. The Discharger’s subsequent failure to implement acceptable erosion and sediment controls resulted in additional discharges of sediment to Brookside Creek. Those discharges were not cleaned up.

Degree of Toxicity of Discharge

Excessive sediment and turbidity have deleterious effects on aquatic environments and a variety of aquatic organisms. Some of the most significant impacts include reduced light penetration and thus decreased rates of photosynthesis within the food chain, reduction in respiratory capacity of fish gills, and smothering of gravel beds resulting in lethal effect to eggs, decreased juvenile survival rates and reduction in fish feeding efficiency. The turbidity and apparent color (milky) of water in Brookside Creek was altered beyond natural background levels for a period of time that intermittently extended for at least seven days after the October 13, 2007, discharge event.

In addition, there were approximately 9 significant storm events (including 20 days of rain), during the period of documented permit violations (October 9, 2007, to January 30, 2008), which likely contributed to additional adverse impacts to receiving waters.

The beneficial uses of Brookside Creek and San Pablo Creek were adversely affected due to the discharges of turbid water, the deposition of sediment in the bed of the creeks, and as a result of the necessary clean-up activities.

Ability to Pay and Ability to Continue Business

The Wilder project was approved by the City of Orinda in 2005, and will be Orinda's first new neighborhood in over 20 years. When finished, Wilder will be a neighborhood of 245 luxury homes, averaging 4200 square feet, located within 1,600 acres of the highly desirable Gateway Valley, just east of the Caldecott Tunnel. These homes are expected to sell in the upper end of the Lamorinda market place, according to the project's website, which currently includes listings of similar homes in size and amenities for approximately \$2.3 million each. We believe the Discharger will be able to pay the proposed civil liability. The Discharger has an opportunity to submit records of both financial information and assets as evidence of ability to pay upon the issuance of this complaint and applicable deadlines, indicated herein and in the accompanying public notice.

Voluntary Cleanup Efforts Undertaken

To prevent a re-occurrence of the October 10-11, 2007 discharge, the surface grades in the vicinity of the open sub-drain pipe were re-shaped to direct flow away from the sub-drain riser and to eliminate ponding of surface water in the area. The site was also inspected for

other instances of sub-drain risers exposed near areas of poor surface drainage. In addition to these measures, the Discharger implemented additional erosion and sediment control measures at the site after October 10, 2007; however, an adequate and effective combination of control measures sufficient to meet Construction General Permit standards was not observed until January 30, 2008.

The non-voluntary creek flushing and filtration effort was not started until October 17 (two days after Warden Kozicki directed clean-up efforts to begin), and clean-up efforts continued for a period of approximately four to seven days.

A series of wrapped straw wattles and sand bags were used at intervals along Brookside Creek to provide settlement pond check dams for the sediment. The creek was flushed to remove as much sediment as possible, and sediment-laden creek water was pumped out of the creek near the property boundary. The pumped water was passed through a filter prior to discharge to the creek downstream of the extraction point. According to CDFG, the water being discharged from the filter system back into the creek was still turbid, and was continuing to re-mobilize sediment in the downstream reaches. An additional filter placed in to use the following day was still not effectively removing the sediment. The creek was then dammed at a location further downstream, below the Brookside Road bridge. Turbid water removed at this location was transported to the Project site's sediment ponds to allow settling prior to discharge.

Sediment-laden water continued to discharge downstream of the clean-up effort for a period of more than 7 days after the October 13, 2007 event. Water Board staff conducted a site inspection on October 24, and observed sediment at the sub-drain outfall. Discharger representatives stated that this sediment would be removed from the creek. During a follow-up site inspection on November 29, 2007, Water Board staff noted that this sediment had not been removed from the creek. This sediment deposit constituted an ongoing threat to water quality in Brookside Creek.

Prior History of Violations

In addition to the October discharges, City of Orinda, Water Board and CDFG staff observed inadequate erosion control measures during multiple inspections between October 17, 2007, and January 30, 2008. The discharger was notified of the observed inadequacies through numerous emails and letters from each agency, including a letter dated September 4, 2007, from the City, regarding the Discharger's failure to submit winter plans and implement required control measures. The City issued a Stop-Work Order on October 16, 2007 and a Notice to Comply on December 4, 2007. The Water Board issued a Notice of Violation on January 2, 2008, and the CDFG has completed a formal enforcement action including liability for \$100,000.

Degree of Culpability

The Discharger is solely responsible for the proper implementation and maintenance of adequate erosion and sediment control for this project, from which the discharge occurred. Despite numerous warnings by the local inspector and multiple agency permit provisions, the Discharger did not adequately prepare its site for the rainy season in order to contain and prevent the discharge sediment-laden storm water and non-storm water into Brookside Creek.

Consistent with this failure, the Discharger has also not complied with the Construction General Permit, despite demonstrating knowledge of the permit's requirements by filing a Notice of Intent.

Further environmental review of this project, prior to Permit issuance, identified Brookside Creek and other onsite waters as significant environmental resources for wildlife habitat, including habitat for rare and protected species. The project's Order and the Discharger's own project plans, including its Creek and Mitigation Plan, specifically identifies these resources and require the discharger to avoid and minimize any adverse impacts that may result from the project. The Order also explicitly requires the Discharger to comply with the Construction General Permit requirements. Thus, the Discharger was, or should have been well aware of the need and requirement to implement effective erosion and sediment controls prior to and during the rainy season.

Economic Savings

During the period of violation addressed by this Complaint, the Discharger realized an economic benefit by not expending funds to address BMP inadequacies and SWPPP revisions and implementation. BMP-related sources of economic benefit can include the cost of materials, maintenance costs, personnel time and money spent to train site personnel, and the time to conduct routine monitoring required by the Construction General Permit. Late in the season, the Discharger hired an erosion and sediment control consultant and eventually installed and maintained additional BMPs. Therefore, the Discharger is presumed to have realized economic benefit by delaying Construction General Permit compliance expenditures. The discharger has indicated that approximately \$2,000,000 was eventually spent for BMP implementation. Therefore, it is reasonable to conclude that the proposed civil liability most likely recovers and exceeds the Discharger's economic benefit resulting from the alleged violations.

Other Matters as Justice May Require

Facility personnel exhibited irresponsible behavior by failing to act immediately to mitigate potential impacts to the creek at the time they were notified of the project's inadequate BMPs, and subsequently following the discovery of the project's inadequate BMPs and illicit discharges, and by failing to immediately report the October 10-11, 2007 discharge to the Water Board.

Staff time to investigate the incident and prepare the Complaint and supporting evidence is estimated to be 250 hours. Based on an average cost to the State of \$150 per hour, the total cost is \$37,500.

Board staff is required to publish a "Notice of Opportunity for Comment and Public Hearing" in a weekly or daily newspaper within the area affected by the facility or activity. This publication will cost approximately \$600. The total staff costs for the investigation, preparation, and issuance of this Complaint are thus \$38,100.

10. Based on the above factors, the Assistant Executive Officer proposes civil liability be imposed on the Discharger in the amount of **\$982,350** for the violations cited above. This amount includes staff costs of \$38,100.

If this matter proceeds to hearing, the Assistant Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including but not limited to increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this Complaint through completion of the hearing.

11. This action is an enforcement action and is, therefore, exempt from the California Environmental Quality Act, pursuant to Title 14, California Code of Regulations, Section 15321.
12. The Discharger can waive its right to a hearing to contest the allegations contained in this Complaint by (a) paying the civil liability in full or (b) undertaking an approved supplemental environmental project in an amount not to exceed \$472,100 and paying the remainder of the civil liability, all in accordance with the procedures and limitations set forth in the attached waiver.

May 19, 2009
Date

Thomas E. Mumley
Assistant Executive Officer

Attachment: Waiver of Hearing Form

In the Matter of:)	COMPLAINT NO. R2-2009-0017
)	for
OG Property Owner, LLC)	ADMINISTRATIVE
Wilder Project)	CIVIL LIABILITY
Orinda, Contra Costa County)	
_____)	

WAIVER OF HEARING

If you waive your right to a hearing, the matter will be included on the agenda of a Water Board meeting but there will be no hearing on the matter, unless a) the Water Board staff receives significant public comment during the comment period, or b) the Water Board determines it will hold a hearing because it finds that new and significant information has been presented at the meeting that could not have been submitted during the public comment period. If you waive your right to a hearing but the Water Board holds a hearing under either of the above circumstances, you will have a right to testify at the hearing notwithstanding your waiver. Your **waiver is due no later than June 18, 2009, by 5 p.m.**

- Waiver of the right to a hearing and agreement to make payment in full.

By checking the box, I agree to waive my right to a hearing before the Water Board with regard to the violations alleged in Complaint No. R2-2009-00017 and to remit the full penalty payment of \$982,350 to the State Water Pollution Cleanup and Abatement Account, c/o Regional Water Quality Control Board at 1515 Clay Street, Suite 1400, Oakland, CA 94612, within 30 days after the scheduled Hearing date. I understand that I am giving up my right to be heard, and to argue against the allegations made by the Assistant Executive Officer in this Complaint, and against the imposition of, or the amount of, the civil liability proposed unless the Water Board holds a hearing under either of the circumstances described above. If the Water Board holds such a hearing and imposes a civil liability, such amount shall be due 30 days from the date the Water Board adopts the order imposing the liability.

- Waiver of right to a hearing and agree to make payment and undertake an SEP.

By checking the box, I agree to waive my right to a hearing before the Water Board with regard to the violations alleged in Complaint No. R2-2009-0017, and to complete a supplemental environmental project (SEP) in lieu of the suspended liability up to \$472,100 and to pay the balance of the fine to the State Water Pollution Cleanup and Abatement Account (CAA) within 30 days after the scheduled Hearing date. The SEP proposal shall be submitted no later than **July 2, 2009 at 5 p.m.** I understand that the SEP proposal shall conform to the requirements specified in Section IX of the Water Quality Enforcement Policy, which was adopted by the State Water Resources Control Board on February 3, 2009, and be subject to approval by the Assistant Executive Officer. If the SEP proposal, or its revised version, is not acceptable to the Assistant Executive Officer, I agree to pay the suspended penalty amount within 30 days of the date of the letter from the Assistant Executive Officer

Complaint No. R2-2009-00017
OG Property Owner, LLC, Wilder Project

rejecting the proposed/revised SEP. I also understand that I am giving up my right to argue against the allegations made by the Assistant Executive Officer in the Complaint, and against the imposition of, or the amount of, the civil liability proposed unless the Water Board holds a hearing under either of the circumstances described above. If the Water Board holds such a hearing and imposes a civil liability, such amount shall be due 30 days from the date the Water Board adopts the order imposing the liability. I further agree to satisfactorily complete the approved SEP within a time schedule set by the Assistant Executive Officer. I understand failure to adequately complete the approved SEP will require immediate payment of the suspended liability to the CAA.

Waiver of right to a hearing within 90 days.

By checking this box, I hereby waive my right to have a hearing within 90 days after service of the Complaint, but I reserve the right to have a hearing in the future. I agree to promptly engage the Water Board prosecution staff in discussions to resolve the outstanding violations. By checking this box, the Discharger requests that the Water Board delay the hearing so the Discharger and Water Board Prosecution Team can discuss settlement. It remains within the discretion of the Water Board to agree to delay the hearing.

_____	_____
Name (print)	Signature
_____	_____
Date	Title/Organization