

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

COMPLAINT NO. R2-2010-0068

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF
SANITARY SEWER OVERFLOWS AND
EFFLUENT VIOLATIONS
EAST BAY MUNICIPAL UTILITY DISTRICT
ALAMEDA AND CONTRA COSTA COUNTIES

This Administrative Civil Liability Complaint (Complaint) is issued under the authority of California Water Code (CWC) section 13323 to the East Bay Municipal Utility District (the Discharger) to assess administrative civil liability pursuant to CWC section 13385(c). The Complaint addresses three discharges from two wet weather facilities (WWFs) and one diversion structure: the Point Isabel Wet Weather Facility in Richmond, Contra Costa County; the San Antonio Creek Wet Weather Facility in Oakland, Alameda County; and the Webster Street Diversion Structure in Alameda, Alameda County. The discharges occurred on February 17, 2009, and October 13, 2009. The Discharger violated Order No. R2-2009-0004 (National Pollutant Discharge Elimination System [NPDES] Permit No. CA0038440) (2009 NPDES Permit); Cease and Desist Order No. R2-2009-0005 (2009 CDO); and State Water Resources Control Board (State Water Board) Order No. 2006-0003 DWQ, Statewide General Waste Discharge Requirements for Sanitary Sewer Systems (General WDR).

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

1. The Discharger owns and operates a sanitary sewer collection system (collection system) that serves the San Francisco Bay Area. The Discharger's collection system consists of approximately 37 miles of sewer pipe, 15 pump stations, five overflow structures, four diversion structures, three wet weather facilities, and a one million gallon wet weather storage basin. Sewage from the Discharger's collection system flows to its wastewater treatment facility, and during large wet weather events to its wet weather facilities for primary treatment and disinfection.
2. The Discharger is alleged to have violated provisions of law for which the Regional Water Board may impose civil liability pursuant to CWC sections 13350 or 13385. This Complaint proposes to assess two hundred nine thousand eight hundred fifty one dollars (\$209,851) in administrative civil liability pursuant to CWC section 13385 for the alleged violations based on the considerations described herein.
3. Issuance of this Complaint is exempt from the provisions of the California Environmental Quality Act (Public Resources Code 21000 et seq.) in accordance with Section 15321 of Title 14, California Code of Regulations.

STATEMENT OF PROHIBITIONS AND REQUIREMENTS APPLICABLE TO THE DISCHARGER

4. Section 301 of the Federal Water Pollution Control Act (33 U.S.C. § 1311) (Clean Water Act) and CWC section 13376 prohibit the discharge of pollutants to surface water except in compliance with an NPDES permit. On January 14, 2009, the Regional Water Board adopted the 2009 NPDES Permit, which prescribes waste discharge requirements to the Discharger for discharges from its collection system.
5. Discharge Prohibition III.A of the 2009 NPDES Permit states that discharge from the WWFs to waters of the State is prohibited. Discharge Prohibition III.B of the 2009 NPDES Permit states that any sanitary sewer overflow (SSO) that results in a discharge of untreated or partially treated wastewater to waters of the United States is prohibited.
6. CWC section 13301 authorizes the Regional Water Board to issue a cease and desist order when it finds that a waste discharge is taking place, or threatening to take place, in violation of Regional Water Board requirements or discharge prohibitions. A cease and desist order may direct the entity not in compliance to comply in accordance with a time schedule set by the Regional Water Board, or in the event of a threatened violation, to take appropriate or preventative action. The Regional Water Board adopted the 2009 CDO concurrent with the adoption of the 2009 NPDES Permit on January 14, 2009.
7. Finding 8 of the 2009 CDO states that as part of the time schedules to achieve compliance, the Discharger is required to comply with interim effluent limits. These interim effluent limits were retained from Regional Water Board Order No. R2-2005-0047 and are intended to ensure that the Discharger maintains at least its existing performance while completing all tasks required by the 2009 CDO.
8. Table 1 of the 2009 CDO provides time schedules and prescribes actions for discharges from the Discharger’s WWFs. The time schedules require the Discharger to achieve full compliance with Discharge Prohibition III.A of the 2009 NPDES Permit by January 13, 2019. Provision 1 of the 2009 CDO states, in part: “The Discharger shall comply with the required actions in Table 1 [of the 2009 CDO] in accordance with the time schedules provided therein to comply with all effluent limits contained in the [2009 NPDES] Permit.” Table 1 also contains the compliance effluent limits for total coliform organisms, chlorine residual, and pH, as summarized in part in the following table:

Constituents	Units	Instantaneous Max.	Moving median of 5-consecutive sample	Any single sample
Chlorine Residual	mg/l	0.0		
Total Coliform Organisms	MPN/100 ml	n/a	240	10,000

9. On May 2, 2006, the State Water Board adopted the General WDR, which establishes minimum requirements to prevent SSOs from publicly owned and/or operated sanitary sewer

collection systems. The Discharger is required to operate and maintain its sewage collection system to prevent SSOs in compliance with requirements of the General WDR. Prohibition 1 of the General WDR states that any SSO that results in a discharge of untreated or partially treated wastewater to waters of the United States is prohibited. The General WDR is not an NPDES Permit.

ALLEGATIONS

10. Violation One: On February 17, 2009, a valve that delivered water to a tank that provided chase water¹ to the water-based dechlorination delivery system at the Point Isabel WWF failed, which resulted in the discharge of approximately 108,698 gallons of primary-treated sewage with a chlorine residual concentration that ranged from 4.2 to 10 milligrams per liter (mg/l) into San Francisco Bay, a water of the State and of the United States. The chlorine residual concentration of this discharge exceeded the interim effluent limitation set forth in Table 1 of the 2009 CDO, which requires that discharges not exceed the effluent limit of 0.0 (zero point zero) mg/l for chlorine.
11. Elevated chlorine concentrations in a sewage discharge can be quite toxic to aquatic life and at high enough concentrations can result in fish and wildlife mortality in the vicinity of a discharge. In this case, the chlorine concentration in the discharge was 300 to 700 times higher than the federal one-hour average water quality criterion of 0.013 mg/l.²
12. Violation Two: On October 13, 2009, a sodium hypochlorite (chlorination) system flow sensor/switch at the San Antonio WWF failed, which resulted in the discharge of approximately 89,000 gallons of partially treated sewage effluent into San Francisco Bay. The effluent had received fine screening and grit removal treatment but did not receive disinfection treatment. This discharge had a concentration of total coliform of greater than 16,000 most probable number of coliform per 100 ml (MPN/100 ml), which was the maximum reportable concentration for this particular analysis³. The interim effluent for total coliform set forth in Table 1 of the 2009 CDO requires that discharges not exceed the effluent limit of 10,000 MPN/100ml for any single sample. Elevated coliform concentrations greater than 160,000 MPN/100ml (the maximum reportable concentration for this particular analysis) were detected in the receiving water for two additional days, though October 15, 2009.
13. Violation Three: On October 13, 2009, the failure of a sodium bisulfite (dechlorination) delivery system at the San Antonio WWF, due to sodium bisulfite crystallization, required the Discharger to shut down the San Antonio WWF. This shut-down temporarily reduced

¹ Chase water is a term of art that refers to additional clean water that is mixed with the desired treatment chemical, thereby increasing the mixed liquid's volume and flow rate and decreasing the possibility of crystallization, which improves and accelerates the chemical delivery to the waste water.

² Ambient Water Quality Criteria for Chlorine; 1984; United States Environmental Protection Agency; Office of Regulation and Standards, Standards and Criteria Division; Page 18; ...saltwater aquatic organisms and their uses should not be affected unacceptably...if the one-hour average concentration does not exceed 0.013 mg/l more than once every three years.

³ The maximum reportable concentration is determined on a sample by sample basis depending on dilution.

the sanitary sewer system's overall treatment capacity, which likely caused or contributed to the sanitary sewer overflow (SSO) and discharge from the Webster Street Diversion Structure in the City of Alameda directly to San Francisco Bay. Approximately 233,000 gallons of untreated sewage discharged to San Francisco Bay from the Webster Street Diversion Structure in violation of Discharge Prohibition III.B of the Discharger's 2009 NPDES Permit.

14. An SSO is any overflow, spill, release, discharge, or diversion of untreated or partially-treated domestic, industrial, and/or commercial wastewater from a sanitary sewer collection system. An SSO may contain high levels of suspended solids, pathogenic organisms, toxic pollutants, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants. An SSO can cause a public nuisance when untreated wastewater is discharged to areas with public exposure, such as streets or surface waters used for drinking, fishing, body contact recreation, and/or other beneficial uses. An SSO that discharges to land and is not fully cleaned up or contained may discharge to surface water and/or infiltrate into groundwater. An SSO may pollute surface waters and/or groundwaters, threaten public health, adversely affect aquatic life, and impair the recreational use and aesthetic enjoyment of surface waters.

ALLEGED VIOLATIONS

15. An administrative civil liability may be imposed pursuant to the procedures described in CWC section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.
16. Pursuant to CWC section 13350(a), any person who violates any cease and desist order hereafter issued, reissued, or amended by a regional board or the State Board, shall be liable civilly in accordance with CWC section 13350(e). Pursuant to CWC section 13350(e), the Regional Water Board may impose civil liability on either (1) a per day basis that may not exceed five thousand dollars (\$5,000) for each day of violation or (2) a per gallon basis that may not exceed ten dollars (\$10) for each gallon of waste discharged.
17. Pursuant to CWC section 13385(a), any person who violates any waste discharge requirements issued pursuant to Chapter 5.5 of the CWC or who violates any order or prohibition issued pursuant to Article 1 (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under Chapter 5.5 of the CWC, is subject to administrative civil liability pursuant to CWC section 13385(c), in an amount not to exceed the sum of both of the following: (1) ten thousand dollars (\$10,000) for each day in which the violation occurs; and (2) where there is a discharge, any portion of which is not susceptible to cleanup or is 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.
18. As alleged above, the Discharger discharged chlorinated water from the Point Isabel WWF to waters of the State and the United States in violation of Provision 1 of the 2009 CDO, which

constitutes a violation under CWC section 13350, or, in the alternative, CWC section 13385. Further, the Discharger discharged partially treated sewage from the San Antonio WWF and untreated sewage from the Webster Street Diversion Structure to waters of the State and the United States. The discharge from the San Antonio WWF violated Provision 1 of the 2009 CDO, which constitutes a violation under CWC Section 13350, or, in the alternative, CWC section 13385. The discharge from the Webster Street Diversion Structure violated Discharge Prohibition B.III. of the 2009 NPDES Permit, which constitutes a violation under CWC section 13385.

MAXIMUM ADMINISTRATIVE CIVIL LIABILITY THAT MAY BE IMPOSED

19. The maximum administrative civil liability the Regional Water Board may impose pursuant to CWC section 13350(e) for violations of the 2009 CDO as alleged herein is \$1,976,980, calculated using the per gallon option.

$$(108,698 + 89,000 \text{ [gallons discharged]}) \times \$10 \text{ [per gallon]} = \$1,976,980$$

20. In the alternative, the maximum administrative civil liability the Regional Water Board may impose pursuant to CWC section 13385(c) for violations of the 2009 CDO as alleged herein is \$1,976,980.

$$(108,698 + 89,000 - 2,000 \text{ [gallons discharged but not cleaned up in excess of 1,000 gallons for two spills]}) \times \$10 \text{ [per gallon]} + (2 \text{ [days of violation; 1 for each violation]}) \times \$10,000 \text{ [per day of violation]} = \$1,976,980$$

21. The maximum administrative civil liability the Regional Water Board may impose pursuant to CWC section 13385(c) for violation of Discharge Prohibition III.B as alleged herein is \$2,330,000.

$$(233,000 - 1,000 \text{ [gallons discharged but not cleaned up in excess of 1,000 gallons for two spills]}) \times \$10 \text{ [per gallon]} + (1 \text{ [days of violation]}) \times \$10,000 \text{ [per day of violation]} = \$2,330,000.$$

22. The total maximum administrative liability the Regional Water Board may impose pursuant to CWC section 13385 for the violations alleged herein is $\$2,330,000 + \$1,976,980 = \underline{\$4,306,980}$.

FACTORS CONSIDERED IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY

23. On November 17, 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in CWC section 13385(e). The entire Enforcement Policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

The specific required factors in CWC section 13385(e) are: the nature, circumstances, extent, and gravity of the violation or violations; whether the discharge is susceptible to cleanup or abatement; and the degree of toxicity of the discharge. With respect to the violator, the required factors are: the ability to pay; the effect on the violator's 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.

The Enforcement Policy sets forth an approach to determining liability using a penalty calculation methodology that considers the following: the potential harm to beneficial uses; the physical, chemical, biological or thermal characteristics of the discharge; the discharge's susceptibility to cleanup; the violation's deviation from requirements; the discharger's culpability; cleanup and the discharger's cooperation; the history of violations; the discharger's ability to pay; other factors as justice may require; and economic benefit from the avoidance or delay of implementing requirements. The penalty calculation methodology was used to calculate the proposed administrative civil liability as outlined in Attachment A.

PROPOSED CIVIL LIABILITY

24. Based on the consideration of factors above, and consistent with the Enforcement Policy, it is proposed that pursuant to CWC section 13385, the Regional Water Board should assess the Discharger a civil liability of \$209,851 for the violations alleged herein. The proposed civil liability assessment includes \$28,500 to recover costs incurred by staff of the Regional Water Board and the State Water Board, as detailed in Attachment A under "other such matters as justice may require."

July 19, 2010

Dyan C. Whyte
Assistant Executive Officer

Attachments: A - Specific Factors Considered – Civil Liability
B – Evidence in Support of Alleged Violations

Attachment – A

Specific Factors Considered – Civil Liability

Attachment – A, Complaint No. R2-2010-0068
Specific Factors Considered - Civil Liability
East Bay Municipal Utility District

This document describes how the Enforcement Policy's penalty calculation methodology was used to calculate the proposed administrative civil liability for Complaint No. R2-2010-0068.

1. **Violation One:** On February 17, 2009, the Discharger discharged 108,698 gallons of primary-treated and disinfected sewage from its Point Isabel WWF to the San Francisco Bay. Chlorine residual concentrations in the discharge ranged from 4.2 to 10 mg/l. The discharge was caused by a failed valve on a water-based dechlorination delivery system used to inject sodium bisulfite into the sewage prior to discharge.

a) **Specific Factor:** Potential Harm to Beneficial Uses

Category: 3, moderate

Discussion: While there were no reports of fish mortality, given the volume of the discharge and the residual chlorine concentrations, minor short term impacts to aquatic life and estuarine beneficial uses likely occurred. The U.S. EPA recommends that waters not exceed the federal criterion of 0.013 mg/l (one hour average) more than once every three years as it is the agency's best scientific judgment that 3 years is the average time it will take an aquatic ecosystem to recover from a pollution event in which exposure exceeds the criterion.¹

b) **Specific Factor:** Physical, Chemical, Biological or Thermal Characteristics

Category: 3, above moderate risk or threat to potential receptors

Discussion: Discharges of chlorinated water are prohibited because of its moderate-to-high acute toxicity to fish and other aquatic life. The residual chlorine concentration (a range of 4.2 to 10 mg/l) reported for the discharge from the Point Isabel WWF on February 17, 2009 was significantly (more than two orders of magnitude) above the water quality criterion of 0.013 mg/l. The chlorine concentrations documented to produce acute effects to saltwater aquatic organisms range from 0.026 mg/l to 1.4 mg/l.² The discharge's chlorine concentrations were above this range.

c) **Specific Factor:** Susceptibility to Cleanup or Abatement

Category: 1, <50% of the discharge is susceptible to cleanup or abatement

Discussion: The discharge was directly into San Francisco Bay, thereby making cleanup or abatement impracticable.

¹ Ambient Water Quality Criteria for Chlorine; 1984; United States Environmental Protection Agency; Office of Regulation and Standards, Standards and Criteria Division; Page 17.

² Ibid

- d) ***Specific Factor:*** Deviation from Requirement

Category: Moderate

Discussion: The Discharger deviated moderately from the effluent limitation requirements because it achieved partial sewage treatment due to settling, solids removal, and disinfection processes. However, the lack of an alarm and valve failure resulted in a discharge with an elevated chlorine residual.

- e) ***Civil Liability:*** Initial Amount of Administrative Civil Liability for this violation

Amount: \$45,479

Adjustments to Determination of Initial Liability for Violation One

- f) ***Specific Factor:*** Culpability

Adjustment: 1

Discussion: The Discharger's culpability adjustment factor neither raises nor lowers the civil liability amount. The Point Isabel WWF did not have an alarm or backup water supply system for the water-based dechlorination delivery system, which would likely have prevented the discharge from the Point Isabel WWF. Alarms for critical infrastructure failure are an industry standard.

- g) ***Specific Factor:*** Cleanup and Cooperation

Adjustment: 1

Discussion: The Discharger's Cleanup and Cooperation adjustment factor for this violation neither raises nor lowers the civil liability amount. The Discharger was cooperative during the spill investigation and complied with their permit requirements.

- h) ***Specific Factor:*** History of Violations

Adjustment: 1

Discussion: The Discharger's adjustment factor for this factor is one, which neither raises nor lowers the civil liability. The Discharger does not have a history of violations similar to the one alleged here.

- i) ***Civil Liability:*** Adjusted Amount of Administrative Civil Liability for this violation

Amount: \$59,729

2. **Violation Two:** On October 13, 2009, a sodium hypochlorite (chlorination) system flow sensor/switch failed, which resulted in approximately 89,000 gallons of partially treated (fine screening and grit removal) sewage effluent to be discharged into San Francisco Bay from the San Antonio WWF. This discharge had a concentration of total coliform greater than 16,000 most probable number of fecal coliform per 100 ml (MPN/100 ml).

- a) **Specific Factor:** Potential Harm to Beneficial uses

Category: 2, below moderate

Discussion: This partially treated sewage discharge occurred during wet weather and was diluted with stormwater and likely posed a lower level of toxicity or impact compared to an equal volume of raw sewage discharged during non-storm conditions. However, dilute sewage can still impact both water contact recreation and non-contact water recreation. Receiving water samples collected for three days after the discharge event exceeded the single sample fecal coliform maximum criteria of 10,000 MPN/100ml established to protect the recreational beneficial uses.³

- b) **Specific Factor:** Physical, Chemical, Biological or Thermal Characteristics

Category: 2, moderate risk or threat to potential receptors

Discussion: This October 13, 2009, discharge consisted of dilute, partially treated sewage, which has the characteristics described below:

Partially treated sewage, as compared to properly treated wastewater, typically contains biochemical oxygen demand, total suspended solids, oil and grease, ammonia, viruses, and bacteria (measured in terms of total and fecal coliform). These pollutants exert varying levels of impact on water quality, and, as such, will adversely affect beneficial uses of receiving waters to different extents. Some possible adverse effects on water quality and beneficial uses as a result of partially treated sewage discharges include: 1) adverse impacts to fish and other aquatic biota caused by discharges of biosolids and oil and grease; 2) creation of a localized toxic environment in the water column as a result of the discharge of oxygen-demanding pollutants that lower dissolved oxygen, and elevated ammonia concentration, which is a demonstrated fish toxicant; 3) harm to fish and wildlife as a result of elevated bacteria levels including pathogens; and 4) future impacts to fish and other aquatic biota caused by recently identified pollutants in wastewater, such as pharmaceutical and personal care product chemicals.

- c) **Specific Factor:** Susceptibility to Cleanup

Category: 1, <50% of the discharge is susceptible to cleanup or abatement

Discussion: The discharge was directly into San Francisco Bay, thereby making cleanup or abatement impracticable.

³ San Francisco Bay Basin Water Quality Control Plan, January 18, 2007, Page 66, Table 3-1

- d) ***Specific Factor:*** Deviation from Requirement

Category: Moderate

Discussion: The deviation is moderate because the sewage received partial treatment (fine screening and grit removal) prior to discharge. However chlorination, a critical step in sewage treatment, did not occur.

- e) ***Civil Liability:*** Initial Amount of Administrative Civil Liability for this violation

Amount: \$18,800

Adjustments to Determination of Initial Liability for Violation Two

- f) ***Specific Factor:*** Culpability

Adjustment: 1.1

Discussion: The Discharger did not perform a wet weather test on its San Antonio Creek WWF prior to the October 13, 2009, rains. The equipment failure could have been identified and corrected prior to the rains if such a test had occurred.

- g) ***Specific Factor:*** Cleanup and Cooperation

Adjustment: 1.0

Discussion: The Discharger's Cleanup and Cooperation adjustment factor for this violation neither raises nor lowers the civil liability amount. The Discharger was cooperative during the spill investigation and complied with their permit requirements.

- h) ***Specific Factor:*** History of Violations

Adjustment: 1.0

Discussion: The Discharger's adjustment factor for this factor is one, which neither raises nor lowers the civil liability. The Discharger does not have a history of violations similar to the one alleged here.

- i) ***Civil Liability:*** Adjusted Amount of Administrative Civil Liability for this Violation

Amount: \$20,680

3. ***Violation Three:*** Subsequent to the 89,000-gallon discharge discussed above as Violation Two, the Discharger's staff successfully started and operated the WWF for 40 minutes. At 12:40 pm they shut down the WWF because they were concerned that the facility's sodium bisulfite (dechlorination) system might have failed due to sodium bisulfite crystallization having caused a sodium bisulfite flow restriction. The lack of flow could have resulted in

ineffective dechlorination and an elevated chlorine residual in the discharge. To avoid discharging chlorine, the Discharger's staff shut down the dechlorination system and the WWF and flushed the sodium bisulfite delivery piping. This 45-minute shut-down decreased the sanitary sewer system's overall treatment capacity and, beginning at about 12:50 pm, likely caused or contributed to the overflow and discharge of 233,000 gallons of untreated sewage from the Webster Street Diversion Structure in the City of Alameda. The Webster Street Diversion Structure discharge occurred only ten minutes after the shut-down of the WWF.

a) ***Specific Factor:*** Potential Harm to Beneficial Uses

Category: 2, below moderate

Discussion: This untreated sewage discharge occurred during wet weather directly into San Francisco Bay and was diluted with stormwater and likely posed a lower level of toxicity or impact as an equal volume of raw sewage during non-storm conditions. However, dilute sewage can still impact both water contact recreation and non-contact water recreation. In this event, the total coliform concentration samples collected from the receiving water and analyzed exceeded the 10,000 MPN/100ml surface water recreation criteria for three days after the discharge event, which required warning sign postings to discourage recreational water contact.

b) ***Specific Factor:*** Physical, Chemical, Biological or Thermal Characteristics

Category: 3, above moderate risk or threat to potential receptors

Discussion: This October 13, 2009, discharge consisted of dilute untreated, raw sewage, which has the characteristics described below, but likely with lower pollutant concentrations and therefore less toxicity.

Raw sewage, as compared to properly treated wastewater, typically has over ten times the concentrations of biochemical oxygen demand, trash, total suspended solids, oil and grease, ammonia, and over a thousand times the levels of viruses and bacteria (measured in terms of total and fecal coliform). These pollutants exert varying levels of impact on water quality, and, as such, will adversely affect beneficial uses of receiving waters to different extents. Some possible adverse effects on water quality and beneficial uses as a result of SSOs include: 1) Adverse impacts to fish and other aquatic biota caused by discharges of biosolids and oil and grease; 2) Creation of a localized toxic environment in the water column as a result of the discharge of oxygen-demanding pollutants that lower dissolved oxygen, and elevated ammonia concentration, which is a demonstrated fish toxicant; 3) harm to fish and wildlife as a result of elevated bacteria levels including pathogens; and 4) future impacts, to fish and other aquatic biota caused by recently identified pollutants in wastewater, such as pharmaceutical and personal care product chemicals.

c) ***Specific Factor:*** Susceptibility to Cleanup

Category: 1, <50% of the discharge is susceptible to cleanup or abatement

Discussion: The discharge was directly to the San Francisco Bay, thereby making cleanup or abatement impracticable.

d) ***Specific Factor:*** Deviation from Requirement

Category: Major

Discussion: The deviation is major because the sewage did not receive any treatment prior to discharge and SSO discharges are prohibited.

e) ***Civil Liability:*** Initial Amount of Administrative Civil Liability for this Violation

Amount: \$104,720

Adjustments to Determination of Initial Liability for Violation Three

f) ***Specific Factor:*** Culpability

Adjustment: 1.1

Discussion: The Discharger did not perform a wet weather test on its San Antonio Creek WWF prior to the October 13, 2009, rains. As a result, a failure that could have been identified and corrected by such a test occurred while the facility was needed during a discharge event.

g) ***Specific Factor:*** Cleanup and Cooperation

Adjustment: 1.0

Discussion: The Discharger's Cleanup and Cooperation adjustment factor for this violation neither raises nor lowers the civil liability amount. The Discharger was cooperative during the spill investigation and complied with their permit requirements.

h) ***Specific Factor:*** History of Violations

Adjustment: 1.0

Discussion: The Discharger's adjustment factor for this factor is one, which neither raises nor lowers the civil liability. This discharge/SSO was caused by a shutdown of the WWF due to an operational failure. The Discharger does not have a history of violations similar to the one alleged herein.

- i) ***Civil Liability:*** Adjusted Amount of Administrative Civil Liability for this Violation
Amount: \$115,192

FACTORS APPLIED TO ALL THREE VIOLATIONS

4. The following factors apply to all three of the violations discussed above.

- a) ***Specific Factor:*** Ability to Pay and Continue in Business

Adjustment: 1

Discussion: Based on information included in the Discharger's 2009 Comprehensive Financial Report, the Discharger has the ability to pay the proposed civil liability and continue to provide its services. The Discharger has an annual operating budget of \$361,000,000, net assets of \$1,600,000,000, and cash reserves of \$151,000,000. The Discharger's adjustment factor for this factor is one, which neither raises nor lowers the civil liability.

- b) ***Specific Factor:*** Other factors as justice may require

Discussion: Regional Water Board Resolution No. R2-2005-0059 declares support of local programs that inspect and rehabilitate private sewer laterals, and states that the Regional Water Board will consider the existence of such programs, especially those experiencing significant infiltration and inflow from private sewer laterals, as an important factor when considering enforcement actions for sanitary sewer overflows. The United States Environmental Protection Agency (EPA) ordered the Discharger to address the issue of excess rainwater entering its treatment facilities by establishing local requirements to address leaky private sewer laterals where requirements are not already in place. In response, on February 9, 2010, the Discharger's Board of Directors approved amendments to its Wastewater Control Ordinance to require property owners in certain areas of the Discharger's wastewater service area to obtain a compliance certificate that shows their private sewer laterals are without defects and have proper connections. The requirement will go into effect on January 1, 2011. This effort to reduce infiltration and in-flow into the sanitary sewer system was considered during the calculation of the proposed civil liability amount.

The Regional Water Board and State Water Board prosecution staff spent an estimated 190 hours to investigate the violations and prepare this Complaint and supporting evidence. Based on an average staff cost to the State of \$150 per hour, the total staff cost is \$28,500. The total penalty was raised by this amount.

c) ***Specific Factor:*** Economic Benefit

Amount: \$20,000

Discussion: The Discharger received a benefit of about \$20,000 due to deferred maintenance, deferred upgrades, and infrequent system testing of both the San Antonio Creek and the Point Isabel WWFs. The proposed administrative civil liability exceeds the economic benefit or savings the Discharger realized as a result of the violations alleged in this Complaint. Therefore, this factor does not change the civil liability.

d) ***Civil Liability:*** Minimum Liability Amount

Amount: \$22,000

Discussion: The Enforcement Policy requires that the minimum civil liability cannot be less than the economic benefit plus ten percent.

e) ***Civil Liability:*** Maximum Liability Amount

Amount: \$4,306,980

Attachment – B

Evidence in Support of the Alleged Violations

EVIDENCE IN SUPPORT OF THE ALLEGED VIOLATIONS

The following evidence supports the alleged violations described above:

1. EBMUD Point Isabel Wet Weather Facility – Violation One
 - a) February 18, 2009, CalEMA Hazardous Materials Spill Report.
 - b) February 24, 2009, EBMUD Spill Report Letter
 - c) April 6, 2009, EBMUD Spill Report Letter
 - d) September 1, 2009, Water Board Inspection and Meeting Notes (David Elias)
 - e) September 30, 2009, EBMUD Supplemental Information Letter
 - f) October 16, 2009, EBMUD Supplemental Information Letter

2. EBMUD San Antonio Creek Wet Weather Facility - Violations Two and Three
 - a) October 13 and 14, 2009, Cal EMA and Water Board 2-hour Reports
 - b) October 16, 2009, EBMUD Spill Report Letter for San Antonio Creek Wet Weather Facility
 - c) November 5, 2009, EBMUD Report of SSO Letter for Webster Street Interceptor
 - d) November 25, 2009, EBMUD Self-Monitoring Report
 - e) Water Board January 5, 2010, Inspection and Meeting Notes (David Elias)