

EXHIBIT A

Factors Considered in Determining Administrative Civil Liability

The San Francisco Bay Regional Water Quality Control Board's ("Regional Water Board") Prosecution Team proposed to assess administrative civil liability based on the violations alleged in Complaint No. R2-2013-1017 ("Complaint"), and the penalty calculation methodology described in the Water Quality Enforcement Policy ("Enforcement Policy"), dated November 17, 2009.

The Enforcement Policy addresses factors required by statute, and it provides a statewide methodology for calculating administrative civil liabilities. The methodology considers duration of the violation and volume of discharge (if applicable), and it allows for quantitative assessments of the following: (1) potential for harm to beneficial uses; (2) physical, chemical, biological or thermal characteristics of the discharged material; (3) susceptibility of the discharge to cleanup; (4) deviation from regulatory requirements; (5) culpability; (6) cleanup and cooperation; (7) history of violations; (8) ability to pay; (9) economic benefit; and (10) other factors as justice may require.

The Prosecution Team's discussion of how the liability factors were considered in the assessment of the alleged violation is provided below. The Enforcement Policy should be used as a companion document in conjunction with this administrative civil liability assessment since the penalty calculation methodology and definition of terms that are in the policy are not replicated herein. A copy of the Enforcement Policy can be found at:

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

Alleged Violation

In October 2013, the Contra Costa County Public Works Department ("Department") violated Clean Water Act section 301 and Water Code section 13376 by discharging 49 tons of fill material into Green Valley Creek without first filing a report of the discharge and without first obtaining a dredge or fill permit issued pursuant to regulations under section 404 of the Clean Water Act.

Per-Day and Per-Gallon Assessments

One day of discharge has been assessed for the violation. In addition, gallons of discharge (a per-gallon factor) were calculated by converting tons fill material to gallons of discharge for this liability assessment. Approximately 49 tons of riprap equates to 7,330 gallons.¹

Harm or Potential for Harm to Beneficial Uses (Factor 1)

Factor 1: Minor (score value = 1)

Discussion: The beneficial uses of any specifically identified water body generally apply to all its tributaries. Beneficial uses of water bodies downstream of Green Valley Creek include cold freshwater habitat (COLD), fish migration, preservation of rare and endangered species, fish spawning, warm freshwater habitat, and wildlife habitat. These beneficial uses apply to Green Valley Creek. The placement of fill material likely had short term minor effects on

¹ <http://www.aqua-calc.com/calculate/weight-to-volume> (for Rip Rap material; Rip Rap [1602]).

COLD, and possibly the wildlife habitat and preservation of rare and endangered species beneficial uses of Green Valley Creek. The COLD beneficial use is defined as: *uses of water that support cold water ecosystems, including, but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish, or wildlife, including invertebrates.* The addition of fill material to a channel results in an immediate physical harm by crushing some invertebrates living on the bottom of the stream. However, the impact to the invertebrate community would be localized and minor. Adding fill material can change stream bottom habitat and cause a change in the type invertebrates living on the bottom of the stream. The new habitat may be similar to the habitat before the addition of the fill material, but due to the lack of documentation, it is unclear. There is also potential for minor impacts to in-stream habitat due to sedimentation, because soil and/or sediment were disturbed during the placement of the fill material. Wildlife habitat and preservation of rare and endangered species beneficial uses were possibly affected, during the placement of fill, due to disturbance of riparian vegetation and stream channel habitat used by wildlife.

Characteristics of the Discharge (Physical, Chemical, Biological, or Thermal; Factor 2)

Factor 2: Minor (score value = 1)

Discussion: The physical, chemical, biological, or thermal characteristics of the fill material discharge are relatively benign. The fill material consisted of large rock. Though, there was potentially some minor sediment discharge to Green Valley Creek from rock dust, the impact would have been minor. There is a minor risk to potential receptors associated with the discharge of the fill material.

Susceptibility to Cleanup or Abatement (Factor 3). All Categories of Violations

Factor 3: 50% or more of the discharge is susceptible to cleanup or abatement
(score value = 0)

Discussion: The discharge is susceptible to cleanup or abatement because the fill material can be removed from the channel and the effects of the fill material can be abated (mitigated).

Deviation from Requirement

Assessment: Major

Discussion: The Clean Water Act authorizes the Regional Water Board to establish appropriate and contemporaneous mitigation to offset impacts from in-stream maintenance activities. The Department's work without filing a report of the discharge and obtaining a permitting rendered the requirement and opportunity for contemporaneous mitigation ineffective.

Conduct Factors

Specific Factor: Culpability

Adjustment: 1.2

Discussion: The Department was aware of mitigation requirements that the Water Board would have required for channel maintenance work because it had a history of mitigation requirements from the Regional Water Board for similar maintenance work. It failed to exercise ordinary care in conducting its in-stream work without notifying the Regional Water Board of its plans and implementing mitigation projects that would have been required through a permitting process.

Specific Factor: Cleanup and Cooperation

Adjustment: 1

Discussion: The Department has been sufficiently cooperative in providing information about its in-stream work from January 1, 2013, through October 15, 2013, in response to Regional Water Board staff inquiries. No adjustment is recommended to either raise or lower the amount of the liability.

Specific Factor: History of Violations

Adjustment: 1

Discussion: Regional Water Board staff is not aware of past similar alleged violations by the Department. No adjustment is recommended to increase the amount of the liability.

Initial Liability

Amount: **\$1,319**

Discussion: The initial liability amount for the discharge violation is calculated using the Enforcement Policy penalty methodology. For the alleged discharge, the maximum per day amount allowed under the Water Code is \$10 per gallon and \$10,000 per day. These amounts are multiplied by the “Per Gallon Factor,” (Table 1 in the Enforcement Policy) and the “Per Day Factor” (Table 2 in the Enforcement Policy), respectively. The Per Gallon and Per Day Factors are determined based on the “Potential for Harm” score and “Deviation from Requirement” factors discussed above. Potential for Harm is the sum of score for the first three factors (“Harm to Beneficial Uses,” “Characteristics of the Discharge,” and “Susceptibility to Cleanup or Abatement” scores.) This resulting liability (the initial liability) is then adjusted using multipliers for the conduct factors (“Culpability,” “Cleanup and Cooperation,” and “History of Violations”).

Discharge Violation

((Maximum per day amount x Per Day Factor) + (Maximum per gallon amount x Per Gallon Factor)) x (Conduct Factors) = Initial Liability

(((\$10,000 x 0.015) + (\$63,300 x 0.015)) x (1.2 x 1 x 1) = **\$1,319**

Total Base Liability Amount

Amount: \$1,319

Other Considerations

Ability to Pay and Continue in Business

Adjustment: 1

Discussion: Contra Costa County has a large tax base. The estimated population is over one million people. According to the "County of Contra Costa's Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 2013," as of June 30, 2013, the county's governmental funds had a combined ending balance of \$579,855,000. No adjustment is recommended for this factor to either raise or lower the civil liability.

Other Factors as Justice May Require

Adjustment: Increase to \$10,000

Discussion: The adjustment upwards is appropriate because the amount of the calculated total base liability (\$1,319) is not an adequate deterrent for the alleged unpermitted stream channel work in October 2013, in light of up to 77 other in-stream maintenance projects by the Department between January 1, 2013, through October 15, 2013, all without prior notification to the Regional Water Board. Pursuit of enforcement for these other alleged violations would potentially require substantial resources both by Regional Water Board staff and Department staff in response. It is in the public interest to avoid use of further public resources if the same effect can be achieved by other means. Deterrence is clear when liabilities are based on a statutory maximum. Therefore, Prosecution Staff proposes that for the October 2013, violation, the total base liability be adjusted to the statutory maximum liability for one day of violation pursuant to Water Code section 13385(c) (\$10,000).

Economic Benefit

Amount: **\$3,650** (\$400 + \$2,162 + \$1,088 = \$3,650)

Discussion: The Department realized an economic benefit of about \$400 due to the avoided cost of mitigation for the 80 feet of channel (calculated based on a \$5 per linear foot estimate for vegetation replacement and establishment). The Department also realized an economic benefit for the avoided cost a 401 application filling fee of \$2,162 (calculated using the State Dredge and Fill Fee Calculator) and an estimated two days of time it would take a County environmental services manager to prepare a 401 application and complete necessary follow up actions. Work associated with the 401 application could potentially take longer than two days and would likely require some additional time for review by other Department staff. This estimate is based on the minimum time required. Using the County's salary schedule it would cost the County about \$1,088 to pay an environmental services manager for two days of work (the cost of an employee is figured at twice the hourly compensation).

Minimum Liability

***Amount:* \$4,015**

Discussion: The Enforcement Policy requires that the minimum civil liability cannot be less than the economic benefit plus ten percent. The proposed administrative civil liability exceeds the economic benefit or savings the Department realized as a result of the violations alleged in this Complaint. Therefore, this factor does not change the civil liability.

Maximum Liability Amount

***Amount:* \$73,300**

Discussion: The maximum liability amount for the discharge violation is the maximum amount allowed per day and per gallon by Water Code section 13385.

Final Liability Amount

***Amount:* \$10,000**