CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

COMPLAINT R2-2015-1003
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF

OG PROPERTY OWNER, LLC
DISCHARGE OF STORM WATER
POLLUTED BY SEDIMENTS
TO SAN PABLO CREEK,
ORINDA, CONTRA COSTA COUNTY

This Administrative Civil Liability Complaint (Complaint) alleges that OG Property Owner, LLC (hereinafter Discharger) violated section V.A.2 Narrative Effluent Limitations of the NPDES General Permit for Storm Water Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ as amended (General Permit), by discharging an estimated 379,000 gallons of storm water polluted by sediments and petroleum to a storm drain tributary to San Pablo Creek. The Discharger failed to adequately implement best management practices (BMPs) at its Wilder Project construction site, which led to the discharge. The California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) is authorized to impose administrative civil liabilities pursuant to Water Code sections 13323 and 13385(c) for the alleged violation. The proposed liability is $753,000.

The Assistant Executive Officer of the Regional Water Board hereby gives notice that:

1. The Discharger is alleged to have violated provisions of law for which the Regional Water Board may impose administrative civil liability. This Complaint presents the factual basis for the alleged violation, legal and statutory authorities (including citations to applicable Water Code sections), and case-specific factors used to propose a $753,000 liability for the alleged violation.

2. Unless waived, the Regional Water Board will hold a hearing on this matter on June 10, 2015, in the Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, 94612. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for judicial civil liability. The Discharger or its representative(s) will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of civil liability by the Regional Water Board. The Discharger will be mailed an agenda approximately ten days before the hearing date. A meeting agenda will also be available at: http://www.waterboards.ca.gov/sanfranciscobay/board_info/agenda.shtml. The Discharger must submit all comments and written evidence concerning this Complaint to the Regional Water Board not later than 5 p.m. on May 11, 2015, so that such comments may be considered. Any written evidence submitted to the Regional Water Board after this date and time will not be accepted or responded to in writing.

3. The Discharger can waive its right to a hearing to contest the allegations contained in this Complaint by signing and submitting the enclosed waiver and paying the civil liability in full or by taking other actions as described in the waiver form. If this matter proceeds to

hearing, the Regional Water Board's Prosecution Team reserves the right to seek an increase in the civil liability amount to recover the costs of enforcement incurred subsequent to the issuance of this Complaint through the hearing.

FACTUAL BASIS FOR THE ALLEGED VIOLATION

4. The Discharger is the owner of 978 acres of land in Siesta Valley, located within the City of Orinda, Contra Costa County, California. The property is between downtown Orinda and the Caldecott Tunnel, to the south of State Highway 24.

5. The Discharger is developing the land, currently called the Wilder Project. The Wilder Project initially included plans to develop up to 245 lots for single-family residence, associated infrastructure, and dedicated open space lands. About 30 of the lots have been conveyed to other parties for development, but the Wilder Project currently includes at least 200 undeveloped lots.

6. The Discharger is subject to the General Permit, to Waste Discharge Requirements and Clean Water Act section 401 Water Quality Certification Order No. R2-2004-0049 (401 Certification Order), and to the San Francisco Bay Basin Water Quality Control Plan (Basin Plan).

    a. The Discharger signed a Notice of Intent for coverage under the General Permit on June 25, 2010.

    b. The Discharger has not submitted a Notice of Termination for coverage under the General Permit and the permit requirements applied to the Wilder Project on December 15, 2014.

7. On December 15, 2014, Regional Water Board staff inspected the Wilder Project and observed polluted runoff within and leaving the site. Storm water polluted by sediments discharged into a pond at the northeast boundary of the Wilder Project site. The pond is named as a permanent detention basin in the Wilder Project Storm Water Pollution Prevention Plan (June 3, 2010). This detention basin discharges into a storm drain tributary to the west branch of San Pablo Creek.

    a. Regional Water Board staff observed inadequate protection from erosion of soils exposed by the development activities, inadequate erosion and sediment control BMPs, and inadequate maintenance of installed BMPs. Observations were documented in a Notice of Violation sent to the Discharger on December 18, 2014.

    b. Regional Water Board staff observed that the detention basin was not effective in settling out fine-grained sediments from the runoff. There was insufficient detention time for the fine-grained sediments to settle, and much of the entrained sediment was fine-grained. Also, capacity of the basin had not been maintained. Emergent vegetation, indicating the shallow presence of accumulated sediment, covered at least 75 percent of the basin. Staff observed sediment-laden water flowing around the vegetation without any significant loss of sediment before flowing into the culvert outfall.

8. Regional Water Board staff estimates that 379,000 gallons of polluted runoff discharged from an approximately 17-acre area during the storm on December 15, 2014. This estimate is based on both direct flow measurements taken at the site and a calculated discharge using the Rational Method.

9. The beneficial uses of San Pablo Creek and its tributaries include freshwater replenishment, cold freshwater habitat, preservation of rare and endangered species, fish spawning wildlife habitat, fish migration, warm freshwater habitat, and noncontact water recreation. The discharge of 379,000 gallons of storm water runoff polluted by sediments would adversely affect these beneficial uses.

APPLICABLE REQUIRMENTS

10. Section V.A.2, Narrative Effluent Limitations of the General Permit requires that "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." BAT stands for best available technology economically achievable and BCT stands for best conventional pollution control technology.

ALLEGED VIOLATION

11. The Discharger violated sectionV.A.2, Narrative Effluent Limitations for Stormwater Discharges, of the General Permit by failing to adequately implement controls that minimize or prevent pollutants in storm water thus resulting in the discharge of 379,000 gallons of storm water polluted by sediments to a storm drain tributary to San Pablo Creek, on December 15, 2014.

LEGAL AUTHORITY

12. Water Code section 13323 authorizes the Regional Water Board to issue a complaint to any person on whom administrative civil liability may be imposed under the Water Code. The Discharger violated the General Permit, section V.A.2, and is therefore civilly liable pursuant to Water Code section 13385(a)(2). This sub-section states that a person who violates a waste discharge requirement, such as the General Permit, is civilly liable. Administrative civil liability may be imposed under Water Code section 13385(c).

13. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to "actions" and "special proceedings" and are contained in the Code of Civil Procedure apply to judicial proceedings, not administrative proceeding. (See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, Section 405(2), p. 510.)

14. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, Title 14, section 15321.

15. Notwithstanding the issuance of this Complaint, the Regional Water Board and/or the State Water Board shall retain the authority to assess additional penalties against the Discharger for other violations of the General Permit, Waste Discharge Requirements, or Basin Plan for which a liability has not yet been assessed or a violation(s) that may subsequently occur.

STATUTORY LIABILITY

16. Under CWC Section 13385(c), the Regional Water Board may impose administrative civil liability for the Discharger's violation in an amount not to exceed:
    a. Ten thousand dollars ($10,000) for each day in which the violation occurs; and
    b. 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 discharged but not cleaned up exceeds 1,000 gallons.

PROPOSED CIVIL LIABILITY

17. **Maximum Liability:** The maximum administrative civil liability is $3,790,000. This is based on the maximum allowed by Water Code section 13385: (1) $10,000 for each day in which the violation occurs; and (2) $10 for each gallon exceeding 1,000 gallons that is discharged and not recovered.

18. **Minimum Liability:** Pursuant to Water Code section 13385(e), at a minimum, liability shall be assessed at a level that recovers the economic benefit or savings, if any, derived from the unauthorized discharge violation. The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) requires that the minimum liability amount imposed not to be below a Discharger's economic benefit plus ten percent. The Discharger realized cost savings of approximately $10,000. Applying the methodology as set forth in Exhibit A, the minimum liability in this matter is $11,000.

19. **Proposed Liability:** The Assistant Executive Officer of the Regional Water Board proposes that administrative civil liability be imposed in the amount of $753,000, of which $2,600 is for the recovery of staff costs incurred thus far. The Exhibit A attachment (incorporated herein by this reference) presents a discussion of the factors considered and the values assessed to calculate the proposed liability in accordance with the Enforcement Policy and Water Code section 13327. The proposed liability is more than the minimum liability and less than the maximum liability allowed for the alleged violation.

March 17, 2015

Thomas Mumley
Assistant Executive Officer

Date

Attachment: Exhibit A: Factors Considered in Determining Administrative Civil Liability

EXHIBIT A

ALLEGED VIOLATION AND FACTORS IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY

OG PROPERTY OWNER, LLC DISCHARGE OF STORM WATER POLLUTED BY SEDIMENTS TO SAN PABLO CREEK, ORINDA, CONTRA COSTA COUNTY

The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors required by Water Code sections 13327 and 13385(e).

Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount for the alleged violation is presented below.

ALLEGED VIOLATION

On December 15, 2014, OG Property Owner, LLC (hereinafter Discharger) allegedly violated section V.A.2, Narrative Effluent Limitations of the NPDES General Permit for Storm Water Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ as amended (General Permit), by discharging an estimated 379,000 gallons of storm water polluted by sediments to a storm drain tributary to the west branch of San Pablo Creek. The discharge resulted from inadequate implementation of best management practices (BMPs) at the Discharger's Wilder Project construction site.

ADMINISTRATIVE CIVIL LIABILITY CALCULATION STEPS

STEP 1 – POTENTIAL FOR HARM FOR DISCHARGE VIOLATIONS

The "potential harm" factor considers the harm to beneficial uses that resulted or that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the harm or potential harm to beneficial uses; (2) the degree of toxicity of the discharge, and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5).

The potential harm to beneficial uses is **below moderate (i.e., a score of 2).** The Enforcement Policy defines below moderate for cases where "…impacts [to beneficial uses] are observed or reasonably expected [and] harm to beneficial uses is minor." The beneficial uses of San Pablo

Creek and its tributaries include freshwater and wildlife habitat, preservation of rare and endangered species, fish spawning, and fish migration. Elevated turbidity can impact these beneficial uses (as described below under Factor 2) particularly there is concentrated flow for a sustained period of time. The discharge of turbid storm water from the Wilder Project lasted for between 4 and 24 hours during the 1.25 inch rain event on December 15, 2014. The runoff was opaque due to the entrained sediments (a submerged dark object was not visible below a depth of 1 inch). The overall harm to beneficial uses from this discharge is considered minor because the sediment-laden runoff was diluted by runoff from undisturbed areas of the San Pablo Creek watershed.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material.

The risk or threat of the discharge is **moderate (i.e., a score of 2)**. The Enforcement Policy defines moderate characteristics as posing "…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)." Storm water with high levels of entrained sediments poses a moderate level of concern for protection of receptors because aquatic organisms of San Pablo Creek are adapted to relatively clean and predominantly low turbidity water. Fine-grained sediments suspended in the water column can clog the gill structures of fish, make water-column feeding difficult or impossible, and eliminate light penetration that is needed for primary production. Fine-grained sediments that settle out of the water column can smother benthic organisms, reduce water flow in gravels used for spawning, and fill pools used as resting places by aquatic organisms.

Factor 3: Susceptibility to Cleanup or Abatement

If 50 percent or more of the discharge is susceptible to cleanup or abatement, then a score of 0 is assigned for this factor. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated.

The discharge was **not susceptible to cleanup or abatement (i.e., factor of 1)**. The discharge flowed into and commingled with receiving waters. There was no opportunity for abating the effects of the discharge after it left the Wilder Project site.

STEP 2 – ASSESSMENTS FOR DISCHARGE VIOLATIONS

When there is a discharge, an initial liability amount based on a per-gallon and/or a per-day basis is determined using the sum of the Potential for Harm scores from Step 1 and a determination of degree of Deviation from Requirement.

The sum of the three factors from Step 1 is **5**. The degree of Deviation for the violation is **major,** since the permit requirement violated was rendered ineffective. Discharge from the site violated section V.A.2 of the General Permit. The Discharger did not 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. The measures in place were largely inadequate as detailed in the Notice of Violation. The inadequacies include about 17 acres of disturbed soil with inadequate erosion protection and a detention basin that was 75 percent filled in with sediment. Based on these, the permit requirement was rendered ineffective thus justifying a Deviation from Requirement of major.

The Prosecution Staff used both per-gallon and per-day penalty factors as allowed by statute. The resulting per-gallon and per-day multiplier factor is **0.15**, based the Potential for Harm score of **5** and a "**major**" Deviation from Requirement.

Initial Liability Amount

High Volume Adjustment: An adjustment to the maximum penalty per gallon may be considered for high volume discharges of storm water, but no adjustment is recommended in this case. Since the discharger was previously fined $530,000 for a similar storm water violation, a high volume adjustment would result in an inappropriately small penalty. The initial liability amount calculated on a per-gallon and per-day basis is as follows:

Per Gallon Liability: (378,000 gallons) x (0.15) x ($10/gallons) = $567,000

Per Day Liability: $10,000/day x (0.15) x (1 days) = $1,500

Initial Liability = $568,500

STEP 3 – PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS

The alleged violation is a discharge violation. Step 3 applies to non-discharge violations.

STEP 4 – ADJUSTMENTS TO INITIAL LIABILITY

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used, with a higher multiplier for negligent behavior.

The culpability multiplier is **1.2**. The Discharger failed to exercise the ordinary care that a reasonable person would use to implement the General Permit requirements. Erosion and sediment control BMPs were missing, (e.g., no erosion control blankets), inadequate (e.g., hydroseed applied too late), or improperly maintained (e.g., failed drop inlet protection and

reduced capacity of the sedimentation basin). In addition, the Rain Event Action Plan provided during the site visit was for a previous storm (December 11, 2014) that ended more than two days (56 hours) before the December 15, 2104, storm.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is used, with a higher multiplier when there is a lack of cooperation.

The cleanup and cooperation factor multiplier is **1.0**. The Discharger was cooperative during the site inspection, however unintentionally provided erroneous information about the discharge location and storm water treatment system. Also, a neutral multiplier is appropriate because the Discharger did initiate action to address General Permit violations during December 15th site investigations, though the actions were not completed until December 17 and 18.

History of Violations

This factor is used to increase the liability when there is a history of repeat violations using a minimum multiplier of 1.1.

The history multiplier is increased to **1.1** because the Discharger was responsible for a similar violation of the General Permit in 2009 for which the Regional Water Board imposed $530,000 in administrative civil liability (Order R2-2010-0085).

STEP 5 – DETERMINATION OF TOTAL BASE LIABILITY

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2 for discharge violations and in Step 3 for non-discharge violations.

Violation 1:
Total Base Liability = $568,500 (Initial Liability) x 1.2 (Culpability Multiplier) x 1.0 (Cleanup and Cooperation Multiplier) x 1.1 (History of Violations Multiplier)

Total Base Liability = $750,420

STEP 6 – ABILITY TO PAY AND TO CONTINUE IN BUSINESS

The Enforcement Policy provides that if there is sufficient financial information to assess the violator's ability to pay the Total Base Liability or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward if warranted.

In this case, Regional Water Board Prosecution Staff has sufficient information to assess that the Discharger has the ability to pay the proposed liability. The Wilder Project is developing 245 home sites in an area where the median home price is well over $1 million. The Regional Water

Board Prosecution Staff has no evidence that the Discharger is currently unable to pay the proposed liability or that payment of the proposed liability would cause undue financial hardship.

STEP 7 – OTHER FACTORS AS JUSTICE MAY REQUIRE

To date, the Regional Water Board Prosecution Staff incurred $2,600 in staff costs to investigate this case and prepare this analysis and supporting information. This consists of time spent by the prosecution using the low end of the State salary range for each classification. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing. Although the final amount for such costs cannot be determined until completion of the matter, such costs could be quite substantial when additional investigation and analysis is required or if there is a hearing on this matter before the Regional Water Board.

The Total Base Liability after adjusting for staff costs is $753,000.

STEP 8 – ECONOMIC BENEFIT

Pursuant to Water Code section 13385(e), at a minimum, liability shall be assessed at a level that recovers the economic benefit or savings, if any, derived from the unauthorized discharge violation. The Enforcement Policy requires that the minimum liability amount imposed not to be below a Discharger's economic benefit plus ten percent.

The Discharger realized cost savings of less than $10,000 by delaying maintenance of erosion and sediment control BMPs and avoiding costs to maintain the permanent detention basin at the northwest corner of the site. The economic benefit plus ten percent is well below the proposed liability amount.

STEP 9 – MAXIMUM AND MINIMUM LIABILITY

a) ***Minimum Liability***

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. The minimum administrative civil liability for the violation set forth in this complaint is $11,000. ($10,000 x 1.1 = $11,000.).

b) ***Maximum Liability***

The maximum administrative civil liability is $3,790,000. This is based on the maximum allowed by Water Code section 13385: (1) $10,000 for each day in which the violation occurs; and (2) $10 for each gallon exceeding 1,000 gallons that is discharged and not cleaned up.

STEP 10 – FINAL LIABILITY

The final liability proposed is **$**753,000 for the violation, based on consideration of the penalty factors discussed above. It is within the minimum and maximum liabilities.