

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

NOTICE OF PENDING ENFORCEMENT ACTION  
MDI FOREST PRODUCTS, LLC

The California Regional Water Quality Control Board, San Francisco Bay Region (Water Board) Prosecution Team issued a Complaint for Administrative Civil Liability (ACL) on February 17, 2016. The Complaint alleges that MDI Forest Products, LLC (Discharger) is responsible for a discharge of turbid stormwater to San Francisco Bay at 1450 Maritime Street, Oakland, Alameda County and inadequate stormwater best management practices at 700 Murmansk Street Oakland, Alameda County, and proposes that the Discharger pay \$176,000.

The ACL and related documents, including the procedure for Water Board hearings (with deadlines for submitting comments), are available at [http://www.waterboards.ca.gov/sanfranciscobay/public\\_notices/pending\\_enforcement.shtml](http://www.waterboards.ca.gov/sanfranciscobay/public_notices/pending_enforcement.shtml). The Prosecution Team may amend and re-notice its ACL in response to comments from the Discharger or the public.

The Water Board will hold a hearing on May 11, 2016, to consider adoption of the ACL and/or referral of the matter to the Attorney General, unless the Discharger waives its right to a hearing within 90 days. The 90-day hearing requirement may be waived to pay the penalty as proposed, extend deadlines, or pursue settlement and/or a supplemental environmental project.

For additional information and updates, please contact prosecutorial staff Yan Nusinovich at (510) 622-2932 or [yan.nusinovich@waterboards.ca.gov](mailto:yan.nusinovich@waterboards.ca.gov) or check the Water Board website link cited above for documents and future developments associated with this matter.

Dated: February 17, 2016

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**San Francisco Bay Regional Water Quality Control Board**

HEARING PROCEDURE  
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

NO. R2-2016-1001  
ISSUED TO  
MDI FOREST PRODUCTS, LLC  
LOG-SHIPPING FACILITIES  
1450 MARITIME STREET, OAKLAND, ALAMEDA COUNTY AND  
700 MURMANSK STREET OAKLAND, ALAMEDA COUNTY

HEARING SCHEDULED FOR MAY 11, 2016

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

***Background***

The Assistant Executive Officer of the San Francisco Bay Regional Water Quality Control Board (Regional Water Board) has issued an Administrative Civil Liability Complaint (Complaint) pursuant to California Water Code (Water Code) section 13323 against MDI Forest Products, LLC (Discharger) alleging that it has violated provisions of the General Permits for Storm Water Discharges Associated with Industrial Activities, Order Nos. 97-03-DWQ (1997 General Permit) and 2014-0057-DWQ (2014 General Permit), NPDES No. CAS000001 (collectively, General Permits).<sup>1</sup> The Discharger allegedly violated (1) Discharge Prohibitions A.2 of the 1997 General Permit by discharging 406,000 gallons of stormwater polluted by facility activities to the San Francisco Bay (Bay) at its Maritime Street facility on December 11 and 19, 2014; and (2) Minimum BMPs section X.H.1.d of the 2014 General Permit by failing to both implement and maintain minimum stormwater best management practices (BMPs) at its Murmansk Street facility on December 14 and 15, 2015. The Complaint proposes that a civil liability in the amount of \$176,000 be imposed as authorized by Water Code section 13385.

***Purpose of Hearing***

The purpose of the hearing is to consider relevant evidence and testimony regarding the Complaint. At the hearing, the Regional Water Board will consider whether to issue an administrative civil liability (ACL) order assessing the liability proposed in the Complaint, or a higher or lower amount, reject the proposed liability, or refer the matter to the Attorney General

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<sup>1</sup> The 2014 General Permit, effective on July 1, 2015, replaced the 1997 General Permit. According to section I.A.6 of the 2014 General Permit, "State Water Board Order 97-03-DWQ is rescinded as of the effective date of this General Permit (July 1, 2015) except for Order 97-03-DWQ's requirement that annual reports be submitted by July 1, 2015 and except for enforcement purposes."

for judicial enforcement. An agenda for the Regional Water Board meeting where the hearing will be held will be issued at least ten days before the meeting and posted on the Regional Water Board's web site (<http://www.waterboards.ca.gov/sanfranciscobay/>).

### ***Hearing Procedure***

The hearing will be conducted in accordance with this Hearing Procedure. This Hearing Procedure has been pre-approved by the Regional Water Board Advisory Team in model format. A copy of the general procedures governing adjudicatory hearings before the Regional Water Board may be found at Title 23 of the California Code of Regulations (CCR), section 648 et seq., and is available at <http://www.waterboards.ca.gov/> or upon request. In accordance with section 648, subdivision (d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in section 648 and herein, subdivision (b), Chapter 5 of the Administrative Procedures Act (commencing with section 11500 of the Government Code) does not apply to the hearing.

The procedures and deadlines herein may be amended by the Advisory Team at its discretion. **Any objections to this Hearing Procedure must be received by Tamarin Austin by February 29, 2016 or they will be waived.**

### ***Hearing Participants***

Participants in this proceeding are designated as either "parties" or "interested persons." Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons generally may not submit evidence, cross-examine witnesses, or be subject to cross-examination, but may present policy statements. Policy statements may include comments on any aspect of the proceeding, but may not include evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from the Regional Water Board, its staff or others, at the discretion of the Regional Water Board.

The following participants are hereby designated as parties in this proceeding:

- (1) The Regional Water Board Prosecution Team
- (2) MDI Forest Products, LLC, referred to as the Discharger

Principal:

Gary H. Liu  
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Emeryville, CA 94608  
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***Requesting Designated Party Status***

Persons who wish to participate in the hearing as a designated party (who have not been designated as parties above) must request party status by submitting a request in writing (with copies to the existing designated parties) so that it is received by 5 p.m. on February 29, 2016 to Tamarin Austin. The request shall include an explanation of the basis for status as a designated party (e.g., how the issues to be addressed in the hearing and the potential actions by the Regional Water Board affect the person), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be received by the Advisory Team, the person requesting party status, and all parties by 5 p.m. on March 3, 2016. The parties will be notified by 5 p.m. on March 8, 2016 in writing whether the request has been granted or denied.

***Separation of Functions***

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Regional Water Board (Prosecution Team) have been separated from those who will provide advice to the Regional Water Board (Advisory Team). Members of the Advisory Team and the Prosecution Team are:

**Advisory Team:**

Bruce Wolfe, Executive Officer  
[bruce.wolfe@waterboards.ca.gov](mailto:bruce.wolfe@waterboards.ca.gov)  
(510) 622-2314  
1515 Clay St, Suite 1400, Oakland, CA 94612

Tamarin Austin, Staff Counsel III  
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1001 I Street, 22nd Floor, Sacramento, CA 95814

Primary contact: Tamarin Austin

**Prosecution Team:**

Thomas Mumley, Assistant Executive Officer  
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Marnie Ajello, Attorney

[marnie.ajello@waterboards.ca.gov](mailto:marnie.ajello@waterboards.ca.gov)

(916) 327-4439  
1001 I Street, 22nd Floor, Sacramento, CA 95814

Primary contact: Yan Nusinovich

Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Members of the Prosecution Team may have acted as advisors to the Regional Water Board in other, unrelated matters, but they are not advising the Regional Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Regional Water Board or the Advisory Team regarding this proceeding.

***Ex Parte Communications***

The designated parties and interested persons are forbidden from engaging in ex parte communications regarding this matter with members of the Advisory Team or members of the

Regional Water Board. An ex parte contact is any written or verbal communication pertaining to the investigation, preparation or prosecution of the Complaint between a member of a designated party or interested person on the one hand, and a Regional Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all other designated parties (if written) or made in a manner open to all other designated parties (if verbal). Communications regarding non-controversial procedural matters are not ex parte contacts and are not restricted. Communications among one or more designated parties and interested persons themselves are not ex parte contacts.

### ***Hearing Time Limits***

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined 30 minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have three minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received no later than April 21, 2016, by 5 p.m. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Regional Water Board Chair (at the hearing) upon a showing that additional time is necessary.

### ***Submission of Evidence and Policy Statements***

The following information must be submitted in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the designated party would like the Regional Water Board to consider. Evidence and exhibits already in the public files of the Regional Water Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with Title 23, CCR, section 648.3.
2. All legal and technical arguments or analysis.
3. The name of designated party members, title and/or role, and contact information (email addresses, addresses, and phone numbers).
4. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the qualifications of each expert witness.
5. (Discharger only) If the Discharger intends to argue an inability to pay the civil liability proposed in the Complaint (or an increased or decreased amount as may be imposed by the Regional Water Board), the Discharger should submit supporting evidence as set forth in the "ACL Fact Sheet" under "Factors that must be considered by the Board."

The Prosecution Team shall submit one hard copy and one electronic copy of the above information not already included in or with the Complaint to Tamarin Austin and other designated parties no later than April 1, 2016, by 5 p.m.

The remaining designated parties shall submit one hard copy and one electronic copy of the above information to Tamarin Austin and other designated parties no later than April 11, 2016, by 5 p.m.

Any designated party that would like to submit information that rebuts the information previously submitted by other designated parties shall submit one hard copy and one electronic copy to Tamarin Austin and the other designated parties no later than April 21, 2016, by 5 p.m. Rebuttal information shall be limited to the scope of the information previously submitted by the other designated parties. Rebuttal information that is not responsive to information previously submitted by other designated parties may be excluded.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team to Tamarin Austin and each designated party no later than March 18, 2016 by 5 p.m. Interested persons do not need to submit written non-evidentiary policy statements in order to speak at the hearing.

For all submissions, the Advisory Team may require additional hard copies for those submittals that are either lengthy or difficult and expensive to reproduce.

In accordance with Title 23, CCR, section 648.4, the Regional Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Regional Water Board may exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will not be considered by the Regional Water Board and will not be included in the administrative record for this proceeding. PowerPoint and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. A copy of such material intended to be presented at the hearing must be submitted to the Advisory Team at or before the hearing for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

### ***Request for Pre-hearing Conference***

A designated party may request that a pre-hearing conference be held before the hearing in accordance with Water Code section 13228.15. Requests must contain a description of the issues proposed to be discussed during that conference, and must be submitted to Advisory Team, with a copy to all other designated parties, as early as practicable.

### ***Evidentiary Objections***

Any designated party objecting to written evidence or exhibits submitted by another designated party must submit a written objection to the Tamarin Austin and all other designated parties no later than April 21, 2016, by 5 p.m. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

### ***Evidentiary Documents and File***

The Complaint and related evidentiary documents are on file and may be inspected or copied at the Regional Water Board's office. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Regional Water Board Chair. Many of these documents are also posted on the Regional

Hearing Procedure  
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Water Board's web site. Although the web page is updated regularly, to assure access to the latest information, you may contact Yan Nusinovich.

*Questions*

Questions concerning this proceeding may be addressed to Tamarin Austin.



### **IMPORTANT DEADLINES**

Note: the Regional Water Board is required to provide a hearing within 90 days of issuance of the Complaint (Water Code section 13323). The Advisory Team will generally adhere to this schedule unless the Discharger waives that requirement.

**These deadlines apply to all cases upon issuance of the Complaint whether or not the 90-day hearing requirement is waived.**

February 17, 2016	Prosecution Team issues the Complaint to Discharger
February 29, 2016	Deadline for objections, if any, to this Hearing Procedure
February 29, 2016	Deadline for requests for designated party status
March 3, 2016	Deadline for oppositions to requests for designated party status
March 8, 2016	Advisory Team issues decision on requests for designated party status, if any
March 18, 2016	Discharger's deadline for waiving right to hearing
March 18, 2016	Interested persons deadline for submission of written non-evidentiary policy statements

**These deadlines apply to cases scheduled to be heard by the Regional Water Board (actual dates are subject to change if the 90-day hearing requirement is waived).**

April 1, 2016	Prosecution Team's deadline for all information required under "Submission of Evidence and Policy Statements"
April 11, 2016	Remaining designated parties' deadline for all information required under "Submission of Evidence and Policy Statements"
April 21, 2016	All designated parties' deadline for rebuttal information, evidentiary objections, and requests for additional time, if any
May 11, 2016	Regional Water Board Hearing

**WAIVER FORM**  
**ACL COMPLAINT No. R2-2016-1001**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent **MDI Forest Products, LLC** (hereinafter "Discharger") in connection with Administrative Civil Liability (ACL) Complaint noted above (hereinafter the "Complaint"). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

**OPTION 1: PAY THE CIVIL LIABILITY**

**(Check here, and in the appropriate box in subsection b, if the Discharger waives the hearing requirement and will pay the civil liability.)**

- a. I hereby waive any right the Discharger may have to a hearing before the Regional Water Board.
- b. I certify that the Discharger will remit payment for the proposed civil liability following one of the payment options below (please place a "✓" or "✗" in the appropriate box and fill in blanks if appropriate):

Pay a portion to the State and pay the remaining balance (up to a maximum of 50 percent of the assessed liability, less any Regional Water Board staff costs) towards the Supplemental Environment Projects (SEP) Fund to supplement the Regional Monitoring Program (RMP). This SEP Fund will supplement RMP studies that would not otherwise be conducted through the Regional Water Board's annually approved RMP cost allocations. The guiding principal of the RMP is to collect data and communicate information about water quality in the San Francisco Estuary in support of management decisions to restore and protect beneficial uses of the region's waters. Information about the RMP is at <http://www.sfei.org/rmp>. Funding for the RMP is managed and administered by the non-profit San Francisco Estuary Institute. No funds will go to the Regional Water Board. The Regional Water Board will consider the Discharge to have fulfilled its obligation for this SEP after its contribution to the SEP Fund has been received by the Institute. Selection of this SEP Fund option does not change the total amount the Discharger will pay.

**\$88,000**      Maximum allowable portion that can be paid to the SEP Fund.

\$ \_\_\_\_\_      Leave blank unless the Discharger chooses to pay less than the maximum allowable to the SEP Fund; in this case, then indicate the amount to be paid to the SEP Fund.

\$ \_\_\_\_\_      Indicate the amount to be paid to the State which is **\$88,000** unless the Discharger has chosen to pay less than the maximum allowable to the SEP Fund. If the Discharger has chosen to pay less than the maximum allowable to the SEP Fund, then enter the amount to be paid to the State, which shall be the balance of the total assessed liability and the amount the Discharge choses to pay to the SEP Fund.

**\$176,000**      Total amount of assessed liability. This amount must equal the sum of the above, either lines 1 plus 3, or lines 2 plus 3.

Selection of the SFP Fund option will involve payment by two checks, one payable to the "State Water Resources Control Board" and the other to the "Regional Monitoring Program." The Regional Water Board will send an invoice for any payment that is due to the Institute for the SEP Fund, and the State Water Resources Control Board will send an invoice for payment that is due to the State.

Pay full amount of **\$176,000** by check to the State following the directions above for payment to the "State Water Resources Control Board," with a copy of payment to the Regional Water Board.

- c. I understand the payment of the above amount(s) constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period. Should the Regional Water Board receive significant new information or comments from any source (excluding the Regional Water Board Prosecution Team) during this comment period, the Regional Water Board's Assistant Executive Officer may withdraw the complaint, return any payment received, and issue a new complaint. I understand that this proposed settlement is subject to approval by the Regional Water Board or its Executive Officer, and that the Regional Water Board may consider this

**WAIVER FORM**  
**ACL COMPLAINT No. R2-2016-1001**

proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.

- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.
- e. I understand that if timely payment(s) is (are) not received, the Regional Water Board will adopt an ACL order requiring payment.

**OPTION 2: REQUEST A TIME EXTENSION**

*(Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.)*

I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the Complaint. By checking this box, the Discharger requests that the Regional Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Regional Water Board Advisory Team to approve the extension.

**OPTION 3: ENGAGE IN SETTLEMENT DISCUSSIONS**

*(Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.)*

I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the Complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will contact the Regional Water Board Prosecution Team within five business days of submittal of this waiver to request that the Prosecution Team engage in settlement discussions to attempt to resolve the outstanding violation(s). As part of a settlement discussion, the Discharger may propose a supplemental environmental project to the extent such a project is authorized by law and the State Water Resources Control Board Policy on Supplemental Environmental Projects. By checking this box, the Discharger requests that the Regional Water Board Advisory Team delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Regional Water Board Advisory Team to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1c and d."

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Print Name and Title

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Signature

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Date

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

**COMPLAINT R2-2016-1001**

**ADMINISTRATIVE CIVIL LIABILITY IN THE MATTER OF**

**MDI FOREST PRODUCTS, LLC**

**DISCHARGE OF POLLUTED STORMWATER TO SAN FRANCISCO BAY**

**1450 MARITIME STREET, OAKLAND, ALAMEDA COUNTY**

**WDID 2 01I024845**

**AND**

**INADEQUATE STORMWATER BEST MANAGEMENT PRACTICES**

**700 MURMANSK STREET, OAKLAND, ALAMEDA COUNTY**

**WDID 2 01I025537**

This Administrative Civil Liability Complaint (Complaint) alleges that MDI Forest Products, LLC (Discharger or MDI) violated provisions of the General Permits for Storm Water Discharges Associated with Industrial Activities, Order Nos. 97-03-DWQ (1997 General Permit) and 2014-0057-DWQ (2014 General Permit), NPDES No. CAS000001 (collectively, General Permits).<sup>1</sup> The Discharger allegedly violated (1) Discharge Prohibitions A.2 of the 1997 General Permit by discharging 406,000 gallons of stormwater polluted by facility activities to the San Francisco Bay (Bay) at its Maritime Street facility on December 11 and 19, 2014; and (2) Minimum BMPs section X.H.1.d of the 2014 General Permit by failing to both implement and maintain minimum stormwater best management practices (BMPs) at its Murmansk Street facility on December 14 and 15, 2015. The California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) is authorized to impose administrative civil liabilities pursuant to California Water Code (Water Code) sections 13323 and 13385(c) for the alleged violations. The proposed liability is \$176,000.

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 \$176,000 liability for the alleged violation.
2. Unless waived, the Regional Water Board will hold a hearing on this matter on May 11, 2016, 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

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<sup>1</sup> The 2014 General Permit, effective on July 1, 2015, replaced the 1997 General Permit. According to section I.A.6 of the 2014 General Permit, "State Water Board Order 97-03-DWQ is rescinded as of the effective date of this General Permit (July 1, 2015) except for Order 97-03-DWQ's requirement that annual reports be submitted by July 1, 2015 and except for enforcement purposes."

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](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 March 18, 2016, 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 (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 VIOLATIONS**

1. MDI is a wood products export business that specializes in supplying the Far East with hardwood logs and lumber. California Secretary of State records list Messrs. Dulun and Gary H. Liu as principals of MDI. Gary H. Liu is named as the owner, chief executive officer, and/or contact person in the Notices of Intent and Stormwater Pollution Prevention Plans (SWPPPs) for MDI's Port of Oakland facilities.
2. MDI operates two industrial facilities at the Port of Oakland. MDI has conducted operations at 1450 Maritime Street (Maritime Facility) since 2011 until about October 2015 when operations moved to 700 Murmansk Street (Murmansk Facility). MDI is in the process of vacating the Maritime Facility.
3. MDI's facilities receive, store, prepare, and transfer wood logs for export. These industrial activities are conducted outdoors and not protected by the cover of a warehouse. As part of its operations, MDI strips the bark off of logs. The debarking and general moving of logs result in piles of bark wastes at its facilities. Debarking activity at the Murmansk Facility stopped on December 18, 2015. The production of raw wood logs fits under the classification of a logging operation (SIC 2411), which requires coverage under the General Permit.
4. MDI obtained coverage under the 1997 General Permit on May 6, 2014, although it started operation at the Maritime Facility in 2011. Below is MDI's history related to obtaining coverage under the 1997 General Permit and developing a stormwater pollution prevention plan (SWPPP) as required by the General Permit:
  - a. On March 24, 2014, Regional Water Board staff sent MDI a Notice of Noncompliance requiring MDI to both file a notice of intent (NOI) for coverage under the 1997 General Permit and submit a SWPPP by April 24, 2014.
  - b. On May 6, 2014, MDI submitted the NOI, 14 days after the date required by the notice of noncompliance.

- c. On September 2, 2014, Regional Water Board staff issued MDI a notice of violation (NOV) for failing to submit a SWPPP for the Maritime Facility by April 24, 2014.
  - d. On September 3, 2014, MDI submitted a SWPPP for the Maritime Facility to the Regional Water Board, 134 days after the date required by the notice of noncompliance.
  - e. On October 1, 2014, Regional Water Board staff sent a report describing the findings from its September 26, 2014, inspection, and required BMP improvements to the SWPPP for the Maritime Facility such as a rock egress and drop inlet protection.
  - f. On October 9, 2014, MDI submitted a new SWPPP for the Maritime Facility to the Regional Water Board. Regional Water Board staff responded the same day with a letter stating that the SWPPP was adequate for compliance and may be implemented.
5. Regional Water Board staff inspected the Maritime Facility during a rain event<sup>2,3</sup> on December 11, 2014, and observed the discharge of turbid stormwater resulting from inadequate implementation of the SWPPP. Regional Water Board staff notified MDI in a December 17, 2014, email of this and other violation findings and informed MDI that the violations had been referred to the Prosecution Team for a possible administrative civil liability penalty.
  6. Regional Water Board and Prosecution Team staff revisited the Maritime Facility during a rain event<sup>4</sup> on December 19, 2014, and again observed the discharge of turbid stormwater from inadequate implementation of the SWPPP. This included failure to adequately protect storm drains and drop inlets from runoff that contained dirt, wood, and bark from MDI's operations, and failure to cleanup those materials that had accumulated onsite prior to rain in accordance with the SWPPP. The stormwater discharge was laden with sediment and wood debris and appeared reddish-brown in color. Regional Water Board staff discussed violations with MDI staff onsite and sent an email on December 22, 2014, requesting a response to the violations.
  7. The Prosecution Team estimates that MDI discharged approximately 406,000 gallons of polluted stormwater from its Maritime Facility on December 11 and 19, 2014, in violation of the 1997 General Permit. This estimate is based on direct measurements of runoff flow during the December 19, 2014, inspection.<sup>5</sup>

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<sup>2</sup> For purposes of this Complaint, a "rain event" refers to precipitation with rainfall intensity over 0.1 inches per hour. This definition is consistent with 40 CFR 122.21; for more information see <https://www.law.cornell.edu/cfr/text/40/122.21>.

<sup>3</sup> On December 11, 2014, there was 17 hours with 3.6 inches of rain recorded at the Oakland South Station. "California Data Exchange Center - Query Tools." California Data Exchange Center. Accessed January 26, 2016. <http://cdec.water.ca.gov/cgi-progs/queryCSV>. Station ID: OSO. Sensor Number: 2.

<sup>4</sup> On December 19, 2014, there was 4 hours with 0.4 inches of rain at the Oakland South Station. "California Data Exchange Center - Query Tools." California Data Exchange Center. Accessed January 26, 2016. <http://cdec.water.ca.gov/cgi-progs/queryCSV>. Station ID: OSO. Sensor Number: 2.

<sup>5</sup> Staff measured stormwater discharges at three storm drains between approximately 3 p.m. and 4:30 p.m. on December 19, 2014, using a bucket and stopwatch. The average of the three flow measurements (24.8 gallons per minute) was multiplied by the duration of the December 11 and 19, 2014 storm events (17 and 4 hours, respectively) and the number of storm drains on site (13) to estimate the volume of discharge (406,000 gallons, to the lowest

8. The discharge of 406,000 gallons of polluted stormwater from the Maritime Facility on December 11 and 19, 2014, had the potential to impact beneficial uses of the Lower Bay.
  - a. The San Francisco Bay Regional Water Quality Control Plan (Basin Plan) lists the following beneficial uses for the Lower Bay: industrial service supply, commercial and sport fishing, shellfish harvesting, estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, water contact recreation, noncontact water recreation, and navigation (Table 2-1).
  - b. The Basin Plan's water quality objective for sediment requires that sediment discharge rates not alter surface water in such a manner as to cause nuisance or adversely affect beneficial uses. MDI's operations increased sediment loads to the Bay. Sediment loading can negatively impact estuarine habitat and fish spawning and migration.
  - c. Basin Plan Prohibition 7 prohibits the discharge of bark, sawdust, or other solid waste to surface waters primarily to protect recreational uses that include boating and navigation and also to protect industrial service supply as floating debris can impair industrial cooling and other pump diversions.
9. On January 15, 2015, Regional Water Board staff sent an NOV with the reports of its December 11 and 19, 2014, inspections. This NOV required MDI to eliminate discharges of turbid stormwater from the Maritime Facility and to address the inadequate implementation of SWPPP violations alleged. The notice also required the submittal of weekly reports to the Regional Water Board detailing how violations were corrected.
10. In February 2015, MDI submitted a new SWPPP for the Maritime Facility to the Regional Water Board. On March 25, 2015, Regional Water Board staff issued an NOV for this new SWPPP because the BMPs and the monitoring plan did not adequately comply with the 1997 General Permit.
11. On June 9, 2015, MDI filed an NOI for coverage under the 2014 General Permit for operations at the Maritime Facility and the Murmansk Facility.<sup>6</sup> According to a December 18, 2015, letter from one of MDI's two environmental consultants, Vestra Resources, Inc., the Murmansk Facility became active on October 15, 2015. The letter also stated that MDI planned to remove the debarker and waste bark piles from the Maritime Facility by December 31, 2015, and "efforts to vacate" the Maritime Facility "have been ongoing."<sup>7</sup> It explained that MDI decided to move because the Murmansk Facility has less "dirt" and less stormwater "run-on" than the Maritime Facility.

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1,000 gallons). The average flow rate is considered representative of the December 19 event based on the precipitation curve, and the total volume is conservative because the rain event on December 11 was significantly larger in duration and intensity.

<sup>6</sup> The NOI for the Murmansk Facility included a new SWPPP that only applied to the Murmansk Facility. The Maritime Facility NOI and all the editions of the Maritime Facility SWPPP did not include the Murmansk Facility.

<sup>7</sup> Coverage for the Maritime Facility remains active until Regional Water Board staff determines that MDI has completely vacated the site and approves MDI's Notice of Termination (NOT) for the Maritime Facility.

12. On December 14, 2015, Regional Water Board staff and Prosecution Team staff inspected the Maritime and Murmansk facilities during a non-rain day to assess the adequacy of MDI's BMPs. This inspection was in follow-up to a site inspection of the Maritime Facility by Regional Water Board staff on November 6, 2015, and then again with Prosecution Team staff on November 9, 2015, to assess MDI's BMP preparation in anticipation of the El Niño weather forecasted. On December 15, 2015, Regional Water Board staff sent an email to MDI with a summary of the facility inspections and associated violations. In part, the email alleged the following BMP violations at the Murmansk Facility:
  - a. Failure to implement Material Handling and Waste Management BMP – There was no containment for piles of wood bark waste that could be transported by stormwater. Rock check dams were not constructed along a drainage swale to control organic wood debris in storm runoff.
  - b. Failure to maintain Material Handling and Waste Management BMP - Hay bales around the stormwater drop inlet<sup>8</sup> had gaps and damage. The straw wattles around the perimeter of the facility had gaps and damage.
13. The December 14, 2015, violations continued until at least December 15, 2015. On December 18, 2015, MDI submitted a report showing that it had completed substantial BMP improvements in response to the December 15, 2015, email. A January 28, 2016, letter from MDI's environmental consultant, Vestra Resources, Inc., further states, "MDI immediately initiated corrective action following your email dated December 15, 2015, in which you summarized your findings from your site visits." For the Murmansk Facility, MDI completed the following:
  - a. Installed straw wattles at the base of bark-on logs that were stored on site.
  - b. Replaced broken sandbags and straw wattles along the facility's perimeter.
  - c. Replaced hay bales and straw wattles surrounding the facility's drop inlet.
  - d. Installed rock and wattle check dams along the drainage swale as outlined in the SWPPP.
  - e. Made commitments to properly inspect the facility to identify BMPs necessary to eliminate pollutant(s) from discharge.
14. On January 22, 2016, Regional Water Board staff sent a letter to MDI stating that with regards to the Murmansk Facility, corrective action had been implemented and the violations had been adequately addressed in a manner consistent with the 2014 General Permit as of December 31, 2015.<sup>9</sup>

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<sup>8</sup> The Murmansk Facility has only one drop inlet.

<sup>9</sup> The January 22, 2016, letter also stated that the Maritime Facility remained out of compliance.



## APPLICABLE REQUIREMENTS

15. Discharge Prohibitions A.2 of the 1997 General Permit states that, “Storm water discharges and authorized non-storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.”
16. SWPPP Elements section X.A of the 2014 General Permit states, “Dischargers shall develop and implement a site-specific SWPPP for each industrial facility covered by this General Permit that shall contain [Minimum BMPs and applicable Advanced BMPs].”
17. SWPPP Performance Standards section X.C of the 2014 General Permit requires the Discharger to ensure the SWPPP is prepared to, among other things, identify and describe the Minimum BMPs and any Advanced BMPs to reduce or prevent pollutants in industrial storm water discharges. BMPs shall be selected to achieve compliance with the 2014 General Permit.
18. The General Permit requires the Discharger to select a schedule to implement BMPs and to maintain internal procedures to ensure that the BMPs are implemented according to that schedule. (*See* 2014 General Permit Fact Sheet, page 38.)
19. Minimum BMPs section X.H.1 of the 2014 General Permit states in part as follows:

*The discharger shall, to the extent feasible, implement and maintain all of the following minimum BMPs to reduce or prevent pollutants in industrial stormwater discharges.*

...

*d. Material Handling and Waste Management*

...

*ii. Contain all stored non-solid industrial materials or wastes (e.g., particulates, powders, shredded paper, etc.) that can be transported or dispersed by the wind or contact with storm water.*
20. MDI prepared a SWPPP for the Murmansk Facility on October 28, 2015. Section 5.1 of the SWPPP discusses “Minimum-Required BMPs” for the facility, which include the following:
  - Organic material is scraped daily and placed in piles. Wattles are placed and maintained around piles of organic material during the winter season (Section 5.1.1).
  - Organic piles will be kept as small as possible and wattled to prohibit run-on and runoff during storm events. If needed, piles will be covered (Section 5.1.5).
  - Drain rock check dams are used as needed (Section 5.1.5). Table 5-1 states that rock check dams will be used to slow stormwater flow and remove organic material along K-rails on the west and south sides of the facility, and Figure 5 shows the construction of rock check dams every 40 feet along the south and west perimeter barrier to slow flow.

### **ALLEGED VIOLATIONS**

21. MDI violated Discharge Prohibitions A.2 of the 1997 General Permit by discharging 406,000 gallons of stormwater polluted by site activities to the Bay at the Maritime Facility on December 11 and 19, 2014, causing or threatening to cause pollution, contamination, nuisance, and harm to beneficial uses.
22. MDI separately violated Minimum BMPs in section X.H.1.d.ii of the 2014 General Permit (Material Handling and Waste Management) on December 14 and 15, 2015, first by failing to implement minimum BMPs and then also by failing to maintain other minimum BMPs required to prevent or minimize stormwater pollution at the Murmansk Facility.
  - a. MDI failed to implement BMPs to contain the piles of wood bark waste that could be transported by contact with stormwater. MDI also failed to implement a rock check dams as described in its SWPPP to remove organic wood debris from storm runoff from the facility
  - b. MDI failed to maintain by fixing the gaps and damage to the hay bales around the stormwater drop inlet and straw wattles around the facility perimeter to prevent transport of wood bark waste offsite with stormwater.

### **LEGAL AUTHORITY**

23. 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 Discharge Prohibitions A.2 of the 1997 General Permit and Minimum BMPs section X.H.1 of the 2014 General Permit, 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 Permits, is civilly liable. Administrative civil liability may be imposed under Water Code section 13385(c).
24. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to “actions” and “special proceedings” in the Code of Civil Procedure apply to judicial proceedings, not administrative proceedings. (See *City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Proc. 5<sup>th</sup> (2008) Actions, § 430, p. 546.)
25. 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.
26. 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 Permits, 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

27. Under Water Code 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

28. **Maximum Liability:** The maximum administrative civil liability is \$4,110,000. 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.
29. **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 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 \$15,500. Applying the methodology as set forth in Exhibit A, the minimum liability in this matter is \$17,100.
30. **Proposed Liability:** The Assistant Executive Officer of the Regional Water Board proposes that administrative civil liability be imposed in the amount of **\$176,000**, of which \$10,800 is for the recovery of staff costs incurred thus far. Exhibit A (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.

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Thomas Mumley  
Assistant Executive Officer

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Date

Attachment:

Exhibit A: Factors Considered in Determining Administrative Civil Liability

**EXHIBIT A**

**Alleged Violations and Factors in Determining  
Administrative Civil Liability**

**MDI Forest Products, LLC**

**Violation 1: Discharge of Turbid Stormwater to San Francisco Bay  
1450 Maritime Street, Port of Oakland, Alameda  
WDID No: 2 01I024845**

**Violations 2 and 3: Inadequate Stormwater Best Management Practices  
700 Murmansk Street, Port of Oakland, Alameda  
WDID No.: 2 01I025537**

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, subdivision (e). Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount for each of the violations is presented below.

**ALLEGED VIOLATIONS**

**Violation 1: Discharge of Turbid Stormwater to San Francisco Bay**

MDI Forest Products, LLC (MDI) violated Discharge Prohibitions A.2 of the General Permit for Storm Water Discharges Associated with Industrial Activities, Order No. 97-03-DWQ, NPDES No. CAS000001 (1997 General Permit) by discharging 406,000 gallons of stormwater<sup>1</sup> polluted by site activities at 1450 Maritime Street (Maritime Facility) to San Francisco Bay (Bay), causing or threatening to cause pollution, contamination, or nuisance. Stormwater laden with sediment and wood debris and tainted a reddish-brown color (presumably from wood tannins) discharged to the Bay during a 17-hour rain event on December 11, 2014, and a 4-hour rain event on December 19, 2014.

**Violations 2 and 3: Inadequate Stormwater Best Management Practices**

MDI violated Minimum BMPs in section X.H.1.d (Material Handling and Waste Management) of the General Permit for Stormwater Discharges Associated with Industrial Activities, Order No. 2014-0057-DWQ, NPDES No. CAS000001 (2014 General Permit) by failing to first implement and then failing to maintain the minimum best management practices (BMPs) required by the 2014 General Permit at 700 Murmansk Street (Murmansk Facility) on December 14 and 15, 2015.

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<sup>1</sup>Attachment 4 of the 1997 General Permit defines stormwater as “stormwater runoff, snowmelt runoff, and stormwater surface runoff and drainage.”

## **ADMINISTRATIVE CIVIL LIABILITY CALCULATION STEPS**

### **STEP 1 – POTENTIAL FOR HARM FOR DISCHARGE VIOLATION (ONLY APPLICABLE FOR VIOLATION 1)**

The “potential harm” factor considers the harm to beneficial uses that resulted or that may result from exposure to the pollutant(s) 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**

The Enforcement Policy specifies that a score between 0 and 5 be assigned based on a determination of whether direct or indirect harm, or potential for harm, from a violation is negligible (0) to major (5).

The potential harm to beneficial uses for the discharge is **minor (1)**. The Enforcement Policy assigns “minor” when the violation results in a “low threat to beneficial uses (i.e., no observed impacts [to beneficial uses] but potential impacts to beneficial uses with no appreciable harm).” The sediment-laden and wood-impacted stormwater that discharged to the Bay had the potential to cause harm to the beneficial uses of the Bay. The San Francisco Bay Basin Water Quality Control Plan (Basin Plan) lists beneficial uses of the Bay as: industrial service supply (IND), industrial process supply (PROC), commercial and sport fishing (COMM), shellfish harvesting (SHELL), estuarine habitat (EST), fish migration (MIGR), preservation of rare and endangered species (RARE), fish spawning (SPWN), wildlife habitat (WILD), water contact recreation (REC1), noncontact water recreation (REC2), and navigation (NAV). Beneficial uses of the Bay potentially affected by the discharge are IND, PROC, COMM, SHELL, EST, MIGR, RARE, SPWN, WILD, REC1, and REC2.

The stormwater discharged from MDI’s site to the Bay was a reddish-brown color. Sediment contributed to the brown coloring of the stormwater, from dirt and debris entrained by runoff. The large quantity of logs, wood debris, and bark from site operations contributed to the reddish coloring of the stormwater, likely due to the leaching of tannins in the wood. Sediment and tannins are pollutants that threaten beneficial uses, as discussed under Factor 2 of Step 1, but the overall threat to aforementioned beneficial uses of the Bay is considered low because of the Bay’s assimilative capacity and the resilience of Bay ecosystems to wood and sediment in stormwater. San Francisco Bay Regional Water Quality Control Board (Regional Water Board) staff did not observe adverse impacts during site inspections on December 11 and 19, 2014 (collectively, “December 2014 inspections”), however, the absence of any observations of fish, invertebrate, or aquatic habitat injury (as explained below) during the inspections does not mean that such adverse impacts failed to occur, nor does the lack of such observations diminish the potential for such harm. Such adverse impacts could

have occurred before, during, or after the Prosecution Team staff's December 2014 inspections, but at a level that could not be or was not measured, quantified, or observed.

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

The Enforcement Policy specifies that a score between 0 and 4 be assigned based on a determination of the risk or threat of the discharged material to potential receptors. It defines "potential receptors" as those identified considering human, environmental and ecosystem health exposure pathways.

The risk or threat of the discharge is **moderate (2)**. The Enforcement Policy assigns "moderate" when "[d]ischarged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection)."

The discharge consisted of turbid stormwater polluted by sediment and organic material from wood operations at the Maritime Facility. High turbidity reduces the respiratory capacity and feeding efficiency of fish, and reduces light penetration into the water column decreasing primary productivity. Excessive sediment deposition can infill aquatic habitats, damage aquatic biota, and smother non-motile life forms. The breakdown of organic compounds by oxidation can result in a reduction in the concentration of oxygen in the water column. Reduced dissolved oxygen can be a cause of chronic and acute toxicity to aquatic species, including invertebrates and fish. Wood also contains tannins. Tannins, composed of organic compounds, when leached into stormwater can remain in a suspended state for months and have the potential to lower the pH of stormwater runoff. Some tannins also have antimicrobial properties that may be toxic to aquatic life.

Samples of stormwater runoff collected by the discharger on December 11, 2014, show that although pH was within acceptable levels (measured as low as 6.8, which is within the Basin Plan water quality objective of 6.5 to 8.5), other constituents and parameters exceeded U.S. EPA benchmarks (shown parenthetically). Chemical oxygen demand was up to 1,300 mg/L (120 mg/L), specific conductance was up to 550 mg/L (200 mg/L), oil and grease was up to 95 mg/L (15 mg/L), zinc was up to 1.0 mg/L (0.117 mg/L), and total suspended solids were up to 12,000 mg/L (100 mg/L).

**Factor 3: Susceptibility to Cleanup or Abatement**

The Enforcement Policy specifies that if 50 percent or more of the discharge is susceptible to cleanup or abatement, then a score of 0 is assigned. 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 and is assigned a score of **1**. The discharged material flowed into and commingled with ambient receiving waters. There was no opportunity for abating the effects of the discharge of 406,000 gallons of polluted stormwater to the Bay.

**STEP 2 – ASSESSMENTS FOR DISCHARGE VIOLATIONS (ONLY APPLICABLE FOR VIOLATION 1)**

The Enforcement Policy specifies that 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 Deviation from Requirement. The Deviation from Requirement reflects the extent to which a violation deviates from the specific requirement that was violated.

The sum of the three factors from Step 1 is **4**. The **Deviation from Requirement is major**. This was determined based on the following:

The Enforcement Policy defines a “major” Deviation from Requirement as one where “the requirement has been rendered ineffective.” Discharge Prohibitions A.2 of the 1997 General Permit states that stormwater discharges shall not cause or threaten to cause pollution, contamination, or nuisance. The discharge of polluted stormwater directly violated this 1997 General Permit discharge prohibition, rendering the requirement ineffective.

The resulting per-gallon and per-day multiplier factor is **0.025** from the matrix in Tables 1 and 2 of the Enforcement Policy, based on the Potential for Harm score and extent of Deviation from Requirement described above. The Prosecution Team used both per-gallon and per-day factors as allowed by statute.

**Initial Liability Amount for Violation 1**

There was no adjustment of the maximum \$10/gallon for a high volume discharge of stormwater, because reducing the maximum amount 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:  $(406,000 \text{ gallons} - 1,000 \text{ gallons}) \times (0.025) \times (\$10/\text{gallons}) = \$101,300$

Per Day Liability:  $\$10,000/\text{day} \times (0.025) \times (2 \text{ days}) = \$500$

**Initial Liability = \$101,800**



### **STEP 3 – PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS (ONLY APPLICABLE FOR VIOLATIONS 2 AND 3)**

The Enforcement Policy specifies that for non-discharge violations, an initial liability is determined from the maximum per day liability multiplied by the number of days in violation and a per day factor using a matrix that ranges from 0.1 to 1 corresponding to an appropriate Potential for Harm and Deviation from Requirement. The Potential for Harm reflects the characteristics and/or the circumstances of the violation and its threat to beneficial uses. Deviation from Requirement reflects the extent to which a violation deviates from the specific requirement that was violated.

#### **Potential for Harm**

The Potential for Harm is **minor**. The Enforcement Policy assigns “minor” when “the characteristics of the violation present a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm.”

The 2014 General Permit requires BMPs to minimize or prevent pollutants associated with industrial activity in stormwater discharges and authorized non-stormwater discharges. MDI failed to install and maintain minimum BMPs at the facility to adequately control discharges of bark, wood, and sediment in stormwater from reaching the Bay during rain events. All Minimum BMP violations had the same potential for harm, since they all failed to adequately control discharges of bark, wood, and sediment in stormwater from reaching the Bay during rain events.

The Potential for Harm to beneficial uses is minor for the same reason as described for Violation 1. In summary, the failure of adequate BMPs in the wet season would result in discharge during a storm<sup>2</sup> with a minor threat to beneficial uses because of the assimilative capacity of the Bay for wood debris and sediment.

#### **Deviation from Requirement**

The Deviation from Requirement is **moderate**. The Enforcement Policy assigns “moderate” when “the intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).”

The Deviation from Requirement is moderate because MDI implemented some minimum BMPs required in the 2014 General Permit but substantially not others, thus warranting a per day factor on the high end of moderate.

As described in the complaint, Prosecution Team staff observed some deficient and missing BMPs:

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<sup>2</sup> On December 13, 2015, the day before the BMP violations alleged by the Prosecution Team, a 2-hour, 0.6 inch rain event occurred.

- No containment of piles of wood and bark waste and debris.
- No rock check dams in the drainage swale to slow runoff flow and remove wood debris.
- Gaps and broken hay bales and straw wattles around drop inlet and facility perimeter.

Prosecution Team staff did observe some adequate Good Housekeeping, Material Handling and Waste Management, and Erosion and Sediment Controls BMPs:

- Rock check dam around the drop inlet to prevent large debris from entering.

Therefore, on balance a per day factor on the high end of moderate is warranted.

The resulting per day factor is **0.30** based on the above Potential Harm and Deviation from Requirement from the matrix in Table 3 of the Enforcement Policy.

**Initial Liability Amount for Violations 2 and 3**

**Initial Liability:** \$10,000/day x (0.30) x (2 days) x (2 BMPs violations) =  
\$12,000

**STEP 4 – ADJUSTMENTS TO INITIAL LIABILITY (APPLICABLE FOR ALLEGED VIOLATIONS)**

The Enforcement Policy specifies that three additional factors should 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**

The Enforcement Policy specifies that higher liabilities should result from intentional or negligent violations as opposed to accidental violations. It specifies use of a multiplier between 0.5 and 1.5, with a higher multiplier for intentional or negligent behavior.

**Violation 1:** The culpability multiplier is increased at **1.2**. Polluted storm runoff occurred because MDI did not implement and/or improperly implemented the BMPs described in its approved SWPPP for the Maritime Facility, despite being informed of BMP requirements and receiving multiple notices from Regional Water Board staff.

On the days of discharge, there were large piles of bark, wood debris, and soil throughout the site. Silt fencing was not installed at all the locations described in the SWPPP, and it was not anchored into the ground where it was installed. Straw wattles and sandbags were not installed at all the locations described in the SWPPP, and straw wattles and sandbags that were installed were out of place and not effective at controlling or filtering stormwater flowing off the site. A rocky egress was installed but the amount of wood

bark waste and associated debris that mixed with and covered the rocks, rendered the rocky egress ineffective. BMPs were installed ineffectively at all storm drain inlets at the site and turbid stormwater was flowing into all storm drain inlets at the site.

Additionally, prior to the December 11 and 19, 2014, discharges, Regional Water Board staff inspected the MDI facility and worked with MDI staff during September and October 2014 to help ensure that the SWPPP for the site was sufficient to comply with 1997 General Permit requirements. Despite Regional Water Board staff's efforts to work with MDI to develop an adequate SWPPP, MDI failed to properly implement the approved SWPPP. The SWPPP lists the removal of bark as an existing BMP. During the December 2014 inspections, Regional Water Board and Prosecution Team staff documented the substantial amount of wood debris and bark throughout the MDI site. Regional Water Board staff provided sufficient information and assistance to MDI staff for MDI to understand that failure to implement the SWPPP would result in the discharge of polluted stormwater.

**Violations 2 and 3:**

The culpability multiplier is increased at **1.3** for both minimum BMP violations because MDI showed a willful indifference to complying with 2014 General Permit minimum BMP requirements. MDI stated it moved to the Murmansk Facility to be away from the drainage problems at the Maritime Facility. It also stated in its October 28, 2015, SWPPP that debarking activities would not occur at the Murmansk Facility. But MDI continued with its debarking operations and continued to inadequately implement and maintain BMPs despite clear requirements in the 2014 General Permit, and Regional Water Board staff feedback since 2014 on BMP improvements that were necessary (see description in Violation 1).

During the December 14, 2015, inspection, Prosecution Team staff noted that some BMPs were lacking and some of the existing BMPs lacked maintenance. There were gaps in straw wattles along the perimeter, deteriorating straw hay bales installed at the storm drain inlet, and piles of wood bark waste with no straw wattles or cover. Some of these BMP deficiencies were noted by one of MDI's environmental consultants, Frog Environmental, during pre-storm inspections documented for the November 24 and December 3, 2015, rain events. Frog Environmental recommended BMP improvements to preclude turbidity from entering storm drains.

In response to the December 14, 2015, inspection, MDI stated in a December 18, 2015, letter from Vestra Resources, Inc., that, "MDI had not intended to receive bark-on logs at the Murmansk Facility; however...there were insufficient debarking facilities [elsewhere so we debarked]." This is not a satisfactory response. Throughout 2014 and into 2015, Regional Water Board staff made clear the BMP improvements necessary to prevent pollution of storm runoff by debarking waste materials because debarking operations significantly increases the amount of bark and wood debris that accumulates onsite. Yet MDI failed to implement the minimum management controls necessary.

### **Cleanup and Cooperation**

The Enforcement Policy provides for an adjustment to reflect the extent to which a violator voluntarily cooperated in returning to compliance and correcting environmental damage. The adjustment is a multiplier between 0.75 and 1.5, with a higher multiplier where there is a lack of cooperation.

**Violation 1:** The cleanup and cooperation multiplier is increased at **1.2**. MDI has been generally timely in its response to Regional Water Board staff. MDI's responses to notices of violations at the Maritime Facility are generally timely, and MDI complied with the requirement to submit weekly reports to the Regional Water Board about the status of the Maritime Facility's BMPs from January 19 to August 3, 2015. While MDI has been responsive in attempting to return to compliance, it has not cooperated in achieving compliance. The history of communications about the Maritime Facility outlined in the findings of the Complaint show that MDI will ultimately respond to fix an identified problem, but it will not maintain BMPs and implement SWPPPs to manage the facility.

Regional Water Board staff issued a letter on January 22, 2016, which noted that the Maritime Facility was still in violation of the 2014 General Permit (the Maritime Facility received coverage under the 2014 General Permit instead of the 1997 General Permit on June 9, 2015). MDI is still attempting to resolve violations at the Maritime Facility and terminate 2014 General Permit coverage for this facility. For example, according to a January 28, 2016 letter from Vestra Resources, Inc., "MDI acknowledges that [the] perimeter BMPs needed to be replaced," and, "MDI acknowledges that the BMPs along Maritime Street were damaged during site cleanup and closure activities."

**Violations 2 and 3:** The cleanup and cooperation multiplier for both BMP violations is increased at **1.2**. MDI had the same issues at the Murmansk Facility, including uncovered bark stockpiles and poor perimeter control, as at the Maritime Facility. MDI did not voluntarily comply and clean up the Murmansk Facility until after the December 14, 2015, inspection from the Regional Water Board. The Regional Water Board gave verbal warning of the violations at the site during the inspection, and then followed up with an emailed Notice of Violation on December 15, 2015. After these multiple warnings, MDI began to cooperate and made some significant improvements as described in its December 18, 2015, letter to bring the site back into compliance.

### **History of Violations**

The Enforcement Policy provides that where there is a history of repeat violations, a minimum multiplier of 1.1 should be used.

The history multiplier for the violations is **1** because the Regional Water Board has not previously taken action against MDI.

**STEP 5 – DETERMINATION OF TOTAL BASE LIABILITY (APPLICABLE FOR ALLEGED VIOLATIONS)**

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

**Violation 1:**

Total Base Liability = \$101,800 (Initial Liability) x 1.2 (Culpability Multiplier) x 1.2 (Cleanup and Cooperation Multiplier) x 1 (History of Violations Multiplier)

**Total Base Liability = \$146,500**

**Violations 2, 3, and 4:**

Total Base Liability = \$12,000 (Initial Liability) x 1.3 (Culpability Multiplier) x 1.2 (Cleanup and Cooperation Multiplier) x 1 (History of Violations Multiplier)

**Total Base Liability = \$18,700**

**STEP 6 – ABILITY TO PAY AND TO CONTINUE IN BUSINESS (APPLICABLE FOR ALLEGED VIOLATIONS)**

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 Team has sufficient information to conclude that MDI has the ability to pay the proposed liability. MDI exports timber to Far East lumber mills. According to online business records (Manta.com), MDI has annual revenue of approximately \$1 to 2.5 million. Prosecution Team does not have evidence suggesting that MDI would be 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 (APPLICABLE FOR ALLEGED VIOLATIONS)**

The Enforcement Policy provides that if the Regional Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require.” The Enforcement Policy includes the costs of investigation and enforcement as “other factors as justice may require,” that should be added to the liability amount.

The Prosecution Team, not including legal counsel, incurred **\$10,800** in staff costs to investigate these violations and to prepare this analysis and supporting information. These staff costs included \$1,999 spent on Violation 1, and \$8,800 spent on Violations 2 and 3. The adjusted Total Base Liability for Violation 1 is \$148,500 and the adjusted Total Base Liability for Violations 2 and 3 is \$27,500. This increase in consideration of investigation and enforcement costs relative to Total Base Liability for the violations is

warranted given the totality of the circumstances and is intended to serve as a sufficient general and specific deterrent against future violations.

The Total Base Liability for both violations after adjusting for staff costs is **\$176,000**.

These costs consist of time spent by the Prosecution Team based on the low end of the salary range for each classification. Costs would continue to accrue during any settlement and/or hearing. The Enforcement Policy gives the Regional Water Board discretion to increase the total administrative civil liability in consideration of investigation and enforcement costs incurred in prosecuting this matter. Although the final amount cannot be determined until completion of the matter, staff 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.

### **STEP 8 – ECONOMIC BENEFIT (APPLICABLE FOR ALLEGED VIOLATIONS)**

The Enforcement Policy requires recovery of the economic benefit gained associated with the violations plus 10 percent. Economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation.

**Violation 1:** MDI may have realized an economic benefit estimated at **\$15,500** at the Maritime Street site. This amount is based on the deferred costs for implementing adequate BMPs. The 1997 General Permit requires implementation of BMPs sufficient to protect stormwater quality and prevent the discharge of polluted stormwater. Deferred costs include: improvements MDI implemented after the December 19, 2014, inspection such as cleaning wood debris, bark, and loose soil from the site, placing rock at site egress locations and at the debarking operations, improving drain inlet protection, and placing rock and hay bales along the site perimeter. This amount also includes the potential cost of stormwater treatment described in the current SWPPP (i.e., the amount does not include avoided capital costs, which would increase the amount of economic benefit gained). The economic benefit gained by MDI for delaying the implementation of adequate BMPs is significantly less than the proposed liability amount.

**Violations 2 and 3:** MDI realized **no significant** economic benefit at the Murmansk Street site for the BMP violations. Regional Water Board and Prosecution Team staff inspected the facility on December 14, 2015, and found inadequate BMPs. MDI reported on December 18, 2015, having completed substantial improvements to BMPs. The deferred cost of delaying implementing BMPs was negligible. The economic benefit gained by MDI for delaying the implementation of adequate BMPs is significantly less than the proposed liability amount.

Each adjusted Total Base Liability from Step 7 is unchanged because it is more than ten percent higher than the estimated economic benefit.

**STEP 9 – MAXIMUM AND MINIMUM LIABILITY (APPLICABLE FOR ALLEGED VIOLATIONS)**

a) *Minimum Liability*

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 **\$17,100** (\$15,500 x 1.1).

b) *Maximum Liability*

The maximum administrative civil liability is \$4,110,000. The maximum for Violation 1 is **\$4,070,000**. The maximum administrative civil liability for Violations 2 and 3 is **\$40,000**. This is based on the maximum allowed by Water Code section 13385, \$10,000 for each day in which the violation occurs; and where there is a discharge, an additional liability not to exceed \$10 for each gallon exceeding 1,000 gallons that is discharged and not cleaned up.

The adjusted Total Base Liability of **\$148,500**, for Violation 1 is within the maximum. The adjusted Total Base Liability of **\$27,500** for Violations 2 and 3 is also within the maximum. Thus, the Total Base Liabilities for all the violations are unchanged. Alternatively, the Regional Water Board may refer such matters to the Office of the Attorney General for prosecution and seek up to \$25,000 per day of violation and \$25 per gallon discharged in excess of 1,000 gallons pursuant to Water Code section 13385, subdivision (b).

**STEP 10 – FINAL LIABILITY (APPLICABLE FOR ALLEGED VIOLATIONS)**

The final liability proposed is **\$176,000** for the alleged violations, based on consideration of the penalty factors discussed above. It is within the minimum and maximum liabilities.

# Administrative Civil Liability Fact Sheet

The California Regional Water Quality Control Boards (Regional Water Boards) have the authority to impose administrative civil liabilities for a variety of violations under California Water Code (CWC) Section 13323. This document generally describes the process that the Regional Water Boards follow in imposing administrative civil liabilities.

The first step is the issuance of an administrative civil liability complaint by the authorized Regional Water Board's Executive Officer or Assistant Executive Officer. The complaint describes the violations that are alleged to have been committed, the CWC provisions authorizing the imposition of liability, and the evidence that supports the allegations. **Any person who receives a complaint must respond timely as directed, or risk the Regional Water Board imposing the administrative civil liability by default.** The complaint is accompanied by a letter of transmittal, a Waiver Form, and a Hearing Procedure. Each document contains important information and deadlines. You should read each document carefully. A person issued a complaint is allowed to represent him or herself. However, legal advice may be desirable to assist in responding to the complaint.

## Parties

The parties to complaint proceedings are the San Francisco Bay Regional Water Quality Control Board (Regional Water Board) Prosecution Team and the person or entity named in the complaint, referred to as the "Discharger." The Prosecution Team is comprised of Regional Water Board staff and management. Other interested persons may become involved and may become "designated parties." Only designated parties are allowed to submit evidence and participate fully in the proceeding. Other interested persons may play a more limited role in the proceeding and are allowed to submit non-evidentiary policy statements. If the matter proceeds to hearing, the hearing will be held before the full membership of the Regional Water Board (composed of up to seven board members appointed by the Governor) or before a panel of three Board members. The Board members who will hear the evidence and rule on the matter act as judges. They are assisted by an Advisory Team, which provides advice on technical and legal issues. The Advisory Team is comprised of Regional Water Board staff and management. Both the Prosecution Team and the Advisory Team have their own attorney. Neither the Prosecution Team nor the Discharger or his/her representatives are permitted to communicate with the Board members or the Advisory Team about the complaint without including all other parties. This is explained in more detail in the Hearing Procedure.

## Complaint Resolution options

Once issued, a complaint can lead to (1) withdrawal of the complaint; (2) withdrawal and reissuance; (3) payment and waiver; (4) settlement; and/or (5) hearing. Each of these options is described below.

**Withdrawal:** may result if the Discharger provides information to the Prosecution Team that clearly demonstrates that a fundamental error exists in the information set forth in the complaint.

**Withdrawal and reissuance:** may result if the Prosecution Team becomes aware of information contained in the complaint that can be corrected.



**Payment and waiver:** may result when the Discharger elects to pay the amount of the complaint rather than to contest it. The Discharger makes a payment for the full amount and the matter is ended, subject to public comment.

**Settlement:** results when the parties negotiate a resolution of the complaint. A settlement can include such things as a payment schedule, or a partial payment and suspension of the remainder pending implementation by the Discharger of identified activities, such as making improvements beyond those already required that will reduce the likelihood of a further violation or the implementation or funding of a Supplemental Environmental Project (SEP) or a Compliance Project. Qualifying criteria for Compliance Projects and SEPs are contained in the State Water Resources Control Board's (State Water Board) Enforcement Policy, which is available at the State Water Board's website at: [http://www.waterboards.ca.gov/plans\\_policies/](http://www.waterboards.ca.gov/plans_policies/). Settlements are generally subject to public notice and comment, and are conditioned upon approval by the Regional Water Board or its authorized staff management. Settlements are typically memorialized by the adoption of an uncontested order for administrative civil liability.

**Hearing:** if the matter proceeds to hearing, the parties will be allowed time to present evidence and testimony in support of their respective positions. The hearing must be held within 90 days of the issuance of the complaint, unless the Discharger waives that requirement by signing and submitting the Waiver Form included in this package. The hearing will be conducted under rules set forth in the Hearing Procedure. The Prosecution Team has the burden of proving the allegations and must present competent evidence to the Board regarding the allegations. Following the Prosecution Team's presentation, the Discharger and other designated parties are given an opportunity to present evidence, testimony and argument challenging the allegations. The parties may cross-examine each others' witnesses. Interested persons may provide non-evidentiary policy statements, but may generally not submit evidence or testimony. At the end of the presentations by the parties, the Board members will deliberate to decide the outcome. The Regional Water Board may issue an order requiring payment of the full amount recommended in the complaint, may issue an order requiring payment of a reduced amount, may order the payment of a higher amount, decide not to impose an assessment, or may refer the matter to the Attorney General's Office for further enforcement.

## **Factors that must be considered by the Regional Water Board**

Except for Mandatory Minimum Penalties under CWC Section 13385 (i) and (h), the Regional Water Board is required to consider several factors specified in the CWC, including nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any resulting from the violations, and other matters as justice may require (CWC sections 13327, 13385(e) and 13399). During the period provided to submit evidence (set forth in the Hearing Procedure) and at the hearing, the Discharger may submit information that it believes supports its position regarding the complaint. If the Discharger intends to present arguments about its ability to pay, it must provide reliable documentation to establish that ability or inability. The kinds of information that may be used for this purpose include:

## For an individual:

1. Last three years of signed federal income tax returns (IRS Form 1040) including schedules
2. Members of household, including relationship, age, employment and income
3. Current living expenses
4. Bank account statements
5. Investment statements
6. Retirement account statements
7. Life insurance policies
8. Vehicle ownership documentation
9. Real property ownership documentation
10. Credit card and line of credit statements
11. Mortgage loan statements
12. Other debt documentation

## For a business:

1. Copies of last three years of company IRS tax returns, signed and dated
2. Copies of last three years of company financial audits
3. Copies of last three years of IRS tax returns of business principals signed and dated
4. Any documentation that explains special circumstances regarding past, current, or future financial conditions

## For larger firms:

1. Federal income tax returns for the last three years, specifically:
  - IRS Form 1120 for C Corporations
  - IRS Form 1120 S for S Corporations
  - IRS Form 1065 for partnerships
2. A completed and signed IRS Form 8821. This allows the IRS to provide the Regional Water Board with a summary of the firm's tax returns that will be compared to the submitted income tax returns. This prevents the submission of fraudulent tax returns.
3. The following information can be substituted if income tax returns cannot be made available:
  - Audited Financial Statements for last three years
  - A list of major accounts receivable with names and amounts
  - A list of major accounts payable with names and amounts
  - A list of equipment acquisition cost and year purchased
  - Ownership in other companies and percent of ownership for the last three years
  - Income from other companies and amounts for the last three years

## For a municipality, county, or district:

1. Type of entity:
  - City/Town/Village
  - County
  - Municipality with enterprise fund
  - Independent or publicly owned utility
2. The following 1990 and 2000 US Census data:
  - Population
  - Number of persons age 18 and above

- Number of persons age 65 and above
  - Number of individuals below 125% of poverty level
  - Median home value
  - Median household income
3. Current or most recent estimates of:
    - Population
    - Median home value
    - Median household income
    - Market value of taxable property
    - Property tax collection rate
  4. Unreserved general fund ending balance
  5. Total principal and interest payments for all governmental funds
  6. Total revenues for all governmental funds
  7. Direct net debt
  8. Overall net debt
  9. General obligation debt rating
  10. General obligation debt level
  11. Next year's budgeted/anticipated general fund expenditures plus net transfers out

This list is provided for information only. The Discharger remains responsible for providing all relevant and reliable information regarding its financial situation, which may include items in the above lists, but could include other documents not listed. Please note that all evidence regarding this case, including financial information, will be made public. Consequently, **please take care in submitting any documents that include private information**, such as social security numbers, home addresses, home telephone numbers, account numbers and/or drivers' license numbers. Such private information must be "redacted" (i.e., obscured or crossed out) prior to submittal of the documents.

## Petitions

If the Regional Water Board issues an order requiring payment, the Discharger may challenge that order by filing a petition for review with the State Water Board pursuant to CWC Section 13320.

More information on the petition process is available at:

[http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality/index.shtml](http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml)

An order of the State Water Board resolving the petition for review of the Regional Water Board's order for administrative civil liability can be challenged by filing a petition for writ of mandate in the superior court pursuant to CWC Section 13330.

Once an order for administrative civil liability becomes final, the Regional Water Board or State Water Board may seek a judgment of the superior court under CWC Section 13328, if necessary, in order to collect payment of the administrative civil liability amount.

**STATE WATER RESOURCES CONTROL BOARD**

**POLICY  
ON  
SUPPLEMENTAL  
ENVIRONMENTAL PROJECTS**

February 3, 2009

**CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY**

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## INTRODUCTION

The State Water Board or Regional Water Board may allow a discharger to satisfy part of the monetary assessment imposed in an administrative civil liability (ACL) order by completing or funding one or more Supplemental Environmental Projects (SEPs.) SEPs are projects that enhance the beneficial uses of the waters of the State, that provide a benefit to the public at large and that, at the time they are included in the resolution of an ACL action, are not otherwise required of the discharger. California Water Code section 13385(i) allows limited use of SEPs associated with mandatory minimum penalties. California Water Code section 13399.35 also allows limited use of SEPs for up to 50 percent of a penalty assessed under section 13399.33. In the absence of other statutory authority in the Water Code regarding the use of SEPs, Government Code section 11415.60 has been interpreted by the Office of Chief Counsel to allow the imposition of SEPs as part of the settlement of an ACL.

The State Water Board supports the inclusion of SEPs in ACL actions, even when SEPs are not expressly authorized, so long as these projects meet the criteria specified below to ensure that the selected projects have environmental value, further the enforcement goals of the State Water Board and Regional Water Boards (Water Boards), and are subject to appropriate input and oversight by the Water Boards. These criteria should also be considered when the State Water Board or a Regional Water Board considers a SEP as part of the settlement of civil litigation.

SEPs are an adjunct to the Water Boards' enforcement program and are never the basis or reason for bringing an enforcement action. While SEPs can be useful in the facilitation of settlements, the funding of SEPs is not a primary goal of the Water Boards' enforcement program nor is it necessary that a SEP always be included in the settlement of an enforcement action that assesses a monetary liability or penalty.

### ***A. Addressing the State Water Board's Interest in Supplemental Environmental Projects***

While many other jurisdictions require that penalties and administrative liabilities be paid into a general fund, administrative civil liabilities and civil penalties assessed under the Water Code are paid into special funds for specific environmental purposes. The State Water Board has a strong interest in monitoring the use of funds for SEPs that would otherwise be paid into accounts for which it has statutory management and disbursement responsibilities. As a general rule, unless otherwise permitted by statute, no settlements shall be approved by the Water Boards that fund a SEP in an amount greater than 50 percent of the total adjusted monetary assessment against the discharger, absent compelling justification. The total adjusted monetary assessment is the total amount assessed, exclusive of a Water Board's investigative and enforcement costs.

If a Regional Water Board proposes an order containing a SEP that exceeds 50 percent of the total adjusted monetary assessment, that Regional Water Board shall affirmatively notify the Director of the Office of Enforcement of the State Water Board of that proposal. The notification shall describe in detail the proposed SEP, the settlement value of the SEP, the reasons why the Regional Water Board proposes to accept the SEP in lieu of a monetary liability payment, and the exceptional circumstances that justify exceeding the recommended percentage limit. If the Director of the Office of Enforcement of the State Water Board determines that there is no compelling justification, he or she shall notify the Regional Water Board of that determination and the Regional Water Board will be limited to the 50 percent limit.

## ***B. General Considerations***

### **1. Types of SEPs**

There are two general categories of SEPs: (1) SEPs performed by the discharger; and (2) SEPs performed by third-parties paid by the discharger. Third-party entities that are paid to perform a SEP must be independent of both the discharger and the Water Board. Any actual or apparent conflict of interest must be avoided. A third-party is not independent if it is legally or organizationally related to the discharger or the Water Board. A contract between the discharger and the third-party for the performance of a SEP that allows the discharger to ensure that the SEP is completed pursuant to the terms of the contract, does not affect whether that third-party is otherwise independent of the discharger for the purposes of this Policy.

### **2. Accounting Treatment**

The monetary value of a SEP will be treated as a suspended liability. Unless otherwise required by law, any order imposing a SEP shall state that, if the SEP is not fully implemented in accordance with the terms of the order and, if any costs of Water Board oversight or auditing are not paid, the Water Board is entitled to recover the full amount of the suspended penalty, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim milestone. Full payment of the penalty shall be in addition to any other applicable remedies for noncompliance with the terms of the order.

## ***C. General SEP Qualification Criteria***

Nothing in this policy restricts the Regional Water Boards from establishing additional, more stringent criteria for SEPs. All SEPs approved by a Water Board must, at a minimum, satisfy the following criteria:

1. A SEP shall only consist of measures that go above and beyond the otherwise applicable obligations of the discharger. The SEP shall not be an action, process, or product that is otherwise required of the discharger by any rule or regulation of any federal, state, or local entity or is proposed as mitigation to offset the impacts of a discharger's project(s). (Note: "Compliance Projects" as authorized by Water Code section 13385(k)(1) are not SEPs.)
  
2. The SEP shall directly benefit or study groundwater or surface water quality or quantity, and the beneficial uses of waters of the State. Examples include but are not limited to<sup>1</sup>:
  - a. monitoring programs;
  - b. studies or investigations (e.g., pollutant impact characterization, pollutant source identification, etc.);
  - c. water or soil treatment;
  - d. habitat restoration or enhancement;
  - e. pollution prevention or reduction;
  - f. wetland, stream, or other waterbody protection, restoration or creation;
  - g. conservation easements;
  - h. stream augmentation;
  - i. reclamation;
  - j. watershed assessment (e.g., citizen monitoring, coordination and facilitation);
  - k. watershed management facilitation services;
  - l. compliance training, compliance education, and the development of educational materials;
  - m. enforcement projects, such as training for environmental compliance and enforcement personnel; and
  - n. non-point source program implementation.

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<sup>1</sup> Nothing in this section is intended to affect the authority of the State Water Board to make disbursements from the State Water Pollution Cleanup and Abatement Account, including but not limited to, authorized disbursements for education projects.



3. A SEP shall never directly benefit, in a fiscal manner, a Water Board's functions, its members, its staff, or family of members and staff. Any indirect benefits provided to members, staff, or family shall be only those that are enjoyed by the public generally. A SEP shall not benefit or involve friends of members, staff, or family where there could be an appearance of undue influence, suggesting an actual or apparent conflict of interest for the Water Boards.
4. As contemplated by this policy, a SEP is a project or group of projects, the scope of which is defined at the time the SEP is authorized by a Water Board. The placement of settlement funds into an account or fund managed by a Regional Water Board that is not an account or fund authorized by statute or otherwise allowed by the State Water Board is not permissible. If a Regional Water Board wishes to establish any fund that is designed to receive money that is paid by a discharger to resolve a claim of liability under the Water Code, the Regional Water Board should obtain the express authorization of the State Water Board. Such authorization will be subject to conditions that the State Water Board may place on such a fund.

#### ***D. Additional SEP Qualification Criteria***

The following additional criteria shall be evaluated by the Water Boards during final approval of SEPs:

1. Does the SEP, when appropriate, include documented support by other public agencies, public groups, and affected persons?
2. Does the SEP directly benefit the area where the harm occurred or provide a region-wide or statewide use or benefit?
3. Does the SEP proposal, considering the nature or the stage of development of the project, include documentation that the project complies with the California Environmental Quality Act?
4. Does the SEP proposal address whether it can be the basis for additional funding from other sources?
5. Does the entity identified as responsible for completing the SEP have the institutional stability and capacity to complete the SEP? Such consideration should include the ability of the entity to accomplish the work and provide the products and reports expected.
6. Does the SEP proposal include, where appropriate, success criteria and requirements for monitoring to track the long-term success of the project?

## ***E. Nexus Criteria***

There must be a nexus between the violation(s) and the SEP. In other words, there must be a relationship between the nature or location of the violation and the nature or location of the proposed SEP. A nexus exists if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future.

## ***F. Project Selection***

Each Regional Water Board will maintain a list of the SEPs that it has authorized pursuant to an order. The list of authorized SEPs shall be available on the Regional Water Board's web site. A Regional Water Board also may maintain and post on its web site a list of environmental projects that it has pre-approved for consideration as a potential SEP. Each Regional Water Board may determine when and how it wishes to consider an environmental project for placement on its list of potential SEPs.

## ***G. Orders Allowing SEPs***

When SEPs are appropriate, they are imposed as stipulated ACL orders, in settlement of an ACL complaint or some other order entered under the authority of a Water Board. There is no legal authority for an ACL complaint to contain a proposed SEP. Funding for SEPs is addressed as a suspended liability.

All orders that include a SEP must:

1. Include or reference a scope of work, including a budget.
2. Require periodic reporting (quarterly reporting at a minimum) on the performance of the SEP by the discharger to the Water Board to monitor the timely and successful completion of the SEP. Copies of the periodic reports must be provided to the Division of Financial Assistance of the State Water Board.
3. Include a time schedule for implementation with single or multiple milestones and that identifies the amount of liability that will be permanently suspended or excused upon the timely and successful completion of each milestone. Except for the final milestone, the amount of the liability suspended for any portion of a SEP cannot exceed the projected cost of performing that portion of the SEP.
4. Contain or reference performance standards and identified measures or indicators of performance in the scope of work.

5. Specify that the discharger is ultimately responsible for meeting these milestones, standards, and indicators.
6. Require that whenever the discharger, or any third party with whom the discharger contracts to perform a SEP, publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of a Water Board enforcement action.

Any portion of the liability that is not suspended shall be paid to the CAA or other fund or account as authorized by statute. The order shall state that failure to pay any required monetary assessment on a timely basis will cancel the provisions for suspended penalties for SEPs and that the suspended amounts will become immediately due and payable.

It is the discharger's responsibility to pay the suspended amount(s) when due and payable, regardless of any agreements between the discharger and any third party contracted to implement or perform the project.

Upon completion of the SEP, the Water Board shall provide the discharger with a statement indicating that the SEP has been completed in satisfaction of the terms of the order and that any remaining suspended liability is waived.

#### ***H. Project Payment, Tracking, Reporting and Oversight Provisions***

Except under unusual circumstances, ACL orders shall include the provisions for project payment, tracking, reporting, and oversight as follows:

1. For any SEP that requires oversight by the State Water Board or Regional Water Board, the full costs of such oversight must be covered by the discharger. Based on its resource constraints, the Water Board may require the discharger to select and hire an independent management company or other appropriate third party, which reports solely to the Water Board, to oversee implementation of the SEP in lieu of oversight by Water Board staff. If no arrangement for the payment for necessary oversight can be made, the SEP shall not be approved, except under extraordinary circumstances. As a general rule, such oversight costs are not costs that should be considered part of the direct cost of the SEP to the discharger for the purposes of determining the value of the SEP for settlement purposes unless the Regional Water Board or State Water Board expressly finds that such costs should be considered part of the SEP.

2. A written acknowledgment and other appropriate verification and enforceable representation to the Water Boards by each third-party performing the SEP that any SEP funds it receives from the discharger will be spent in accordance with the terms of the order. The third-party performing the SEP must agree to an audit of its SEP expenditures, if requested by the Water Board.
3. The discharger must provide the Water Board and the Division of Financial Assistance of the State Water Board with a final completion report, submitted under penalty of perjury, declaring the completion of the SEP and addressing how the expected outcome(s) or performance standard(s) for the project were met. Where a third-party performed the SEP, that entity may provide the report and the certification.
4. The discharger must provide the Water Board a final, certified, post-project accounting of expenditures, unless the Water Board determines such an audit is unduly onerous and the Water Board has other means to verify expenditures for the work. Such accounting must be paid for by the discharger and must be performed by an independent third-party acceptable to the Water Board.
5. The Water Board will not manage or control funds that may be set aside or escrowed for performance of a SEP unless placed in an account authorized by statute or permitted by the State Water Board.
6. The Water Board does not have authority to directly manage or administer the SEP.
7. Where appropriate, it is permissible for a SEP funding agreement between a discharger and a third-party to require pre-approval of invoices or confirmation of completed work by a Water Board before escrowed or set-aside funds are disbursed to the party performing the work.

### ***I. Public Reporting of SEP Status Information***

The State Water Board shall post on the State Water Board website, by March 1 of each year, a list, by Regional Water Board, of the completed SEPs for the prior calendar year, and shall post information on the status of SEPs that are in progress during that period.