

**Attachment A to ACL Complaint R5-2013-0519:
Specific Factors Considered for Civil Liability
Rocklin Crossings, Placer County**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code (CWC) section 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

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

Violation 1: Two Separate Discharges of Turbid Water on 30 November 2012

Step 1 – Potential for Harm for Discharge Violations

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

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). In this case the potential harm to beneficial uses was determined to be **moderate** (i.e. a score of **3**), which is defined as a “moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).”

The Discharger failed to implement appropriate erosion control BMPs prior to the 28 November to 5 December 2012 (8 days) storm event(s) as required by the General Permit. This failure resulted in a sediment-laden discharge to Secret Ravine, a sensitive water body with cold, spawn, and migratory beneficial uses. Both erosion and sediment control BMPs are required to be implemented on active construction sites to prevent soil particles from detaching and to contain any soil particles that become entrained in storm water runoff. These BMPs need to be designed by the Qualified SWPPP Developer (QSD) to work in unison and prevent or reduce sediment discharging from the site. In lieu of erosion control BMPs, the Discharger implemented a strategy to contain storm water on site which was not designed for the predicted storm event and ultimately failed.

The failure to implement appropriate erosion control BMPs has the potential to impact beneficial uses in Secret Ravine. The beneficial uses of Secret Ravine, as a tributary to the Sacramento River between Colusa Drain and “I” Street Bridge via Miners Ravine and Dry Creek, include municipal and domestic supply, agricultural supply for irrigation, contact water recreation, other non-contact water recreation, warm and cold freshwater aquatic habitat, warm and cold fish migration habitat, warm and cold spawning habitat, wildlife habitat, and navigation. Discharges of sediment to surface waters can cloud the receiving water, thereby reducing the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease.

In April 2008, the consulting firm EDAW (now called AECOM – Design + Planning) completed a Final Environmental Impact Report (EIR) for the Rocklin Crossings Project¹. EDAW identified that Secret Ravine Creek provides spawning and rearing habitat for the federally threatened Central Valley Steelhead and spawning habitat for the federal candidate species and state species of special concern Central Valley fall- and late fall-run Chinook Salmon. EDAW received a number of comments on the Draft EIR regarding the project's potential effect on Secret Ravine and the creek's salmon population. In response, the Final EIR states that uncontrolled soil erosion generated during project construction could indirectly affect fish habitat and benthic macro-invertebrates by degrading the water quality within Secret Ravine Creek. However, EDAW added that the project's runoff, erosion, and subsequent sedimentation issues would be minimized or eliminated through preparation and implementation of an erosion control plan and stormwater pollution prevention plan (SWPPP) and the installation of appropriate Best Management Practices (BMPs).

Section 2 of the Final EIR, Master Response on Water Quality, states the following: "The BMPs proposed to be implemented during construction include: the use of soil stabilizers, fiber rolls, inlet filters, and gravel bags to prevent pollutants from being carried off-site in stormwater generated on the project site. The erosion control plan would ensure that proper control of siltation, sedimentation, and other pollutants would be implemented per the National Pollution Discharge Elimination System (NPDES) permit requirements and City ordinance standards. Debris, soil, silt, sand, bark, slash, sawdust, cement, concrete, washings, petroleum products or other organic or earthen material would not be allowed to enter into or be placed where it may be washed by rainfall or runoff into Secret Ravine Creek."

Section 4 of the Final EIR states that construction techniques shall be identified that would reduce the potential runoff, the SWPPP shall identify the erosion and sedimentation control measures to be implemented, and BMPs identified in the SWPPP shall be used in subsequent site development activities. As discussed below, erosion and sediment control measures were identified in the SWPPP; however, erosion control measures were not implemented, and sediment controls were not effective in preventing sediment discharges from the site.

As discussed in the EIR, the discharge of sediment to surface waters can negatively impact aquatic organisms. However, the discharges took place over a four hour period during a time of high flow in Secret Ravine, and the impacts are expected to attenuate without appreciable acute or chronic effects. Therefore a moderate score of 3 was assigned to this factor.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. In this case, a score of 2 was assigned, which means that the chemical and/or physical characteristics of the discharged 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). Discharges of sediment can cloud the receiving water, which reduces the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease.

¹http://www.rocklin.ca.us/depts/develop/planning/publications_n_maps/rocklin_crossings_environmental_impact_report/default.asp

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, sediment laden storm water discharged into Secret Ravine and was carried downstream with the current. Cleanup or abatement is not possible and therefore, a factor of **1** is assigned.

Final Score – “Potential for Harm”

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a final score of **6** was calculated. The total score is then used in Step 2 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties based on both a per-gallon and a per-day basis for the discharge violation.

Per Gallon Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per gallon basis using the Potential Harm score from Step 1 and the Extent of Deviation from Requirement of the violation. The Potential Harm score from Step 1 is **6** and the Extent of Deviation from Requirements is considered to be **Major** because the Discharger failed to implement appropriate erosion control BMPs and rendered the requirement ineffective. General Permit requires both erosion and sediment control BMPs on active construction sites to prevent soil particles from detaching and to contain any soil particles that become entrained in storm water runoff. The installation of temporary water storage areas as done by the Discharger, if engineered and designed correctly, is considered a BMP. However, the General Permit requires that both erosion control and sediment control BMPs be installed. The Discharger did not install an appropriate combination of BMPs.

Table 1 of the Enforcement Policy (p. 14) is used to determine a “per gallon” factor based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the per gallon factor is 0.22. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

An estimated volume of 76,613 gallons of turbid storm water was discharged from two locations on 30 November 2012. The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon for discharges. While the Enforcement Policy states that a lower initial per-gallon value may be used for “high volume” discharges, for this case, Water Board staff do not recommend using less than \$10/gallon in the initial penalty calculation, given the relatively small volume of discharge on 30 November 2012 and the beneficial uses of the receiving water.

Water Code section 13385(c)(2) states that the civil liability amount is to be based on the number of gallons discharged but not cleaned up, over 1,000 gallons for each spill or discharge event. As shown in the table below, there was one discharge event on 30 November 2012 with an estimated volume of 76,613 gallons. The Per Gallon Assessment is calculated as: (Factor from Table 1) x (discharge volume-1,000) x (\$10 per gallon).

Per Day Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per day basis using the same Potential Harm score from Step 1 and the same Extent of Deviation from Requirement used in the per-gallon analysis. The Potential Harm score from Step 1 is 6 and the Extent of Deviation from Requirements is considered to be **Major**. Therefore, the “per day” factor is **0.22** as determined from Table 2 in the Enforcement Policy. The Per Day Assessment is calculated as (factor from Table 2) x (number of days) x \$10,000 per day.

Violation 1 – Per Gallon and Per Day Assessment for Discharge Violations

The initial liability amount for the discharge violations of the General Permit, Section V., A.2.(Narrative Effluent Limitations) on 30 November 2012 is as follows:

Per Gallon Liability:

a) $0.22 \times (76,613 \text{ gallons discharged} - 1000 \text{ gallons}) \times \$10 \text{ per gallon} = \$166,349$

Per Day Liability:

b) $0.22 \times (1 \text{ day}) \times \$10,000 = \$2,200$

Total Initial Liability (a+b) = **\$168,549**

Step 3 – Per Day Assessment for Non-Discharge Violations

In this case, this factor does not apply because Violation 1 is related to a discharge to surface waters and the liability was determined in Step 2.

Step 4 – Adjustment Factors

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

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.1** because of the Discharger failed to implement erosion control BMPs as required by the Construction General Permit for a forecasted multi-day storm event. Although the Discharger utilized low areas to hold water, there is no documentation in the record that the temporary storage basins and earthen berms were designed with consideration of the size of the impending storm event or that they were equipped with overflow protection such as a rocked spillway to protect the structures from failure.

The General Permit requires that Risk Level 2 dischargers develop and implement a Rain Event Action Plan (REAP) to protect all exposed portions of a site within 48 hours prior to a precipitation event when there is a forecast of 50% or greater probability of precipitation in the project area. The Discharger’s REAPs completed for the four construction Sites on 26 November 2012 stated that site erosion and sediment control BMPs were deployed at each of the four construction Sites. However, the Water Board staff inspection on 30 November 2012 found that straw and tack erosion control BMPs were not implemented across the southern portion of the Rocklin Crossing site, the Center at Secret Ravine site, and the Dominguez Loop Road site. This failure to implement appropriate BMPs led to the discharge of

turbid water which should have been avoided based on the strength of the storm forecast. The Discharger did not anticipate what a reasonable person would have and did not implement appropriate measures to avoid the discharge.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **0.75** because of the cooperation exhibited by the Discharger to return to compliance. Following discovery of discharges off the construction site, the Discharger deepened a failed temporary detention basin at the Center at Secret Ravine site and pumped accumulated storm water to larger on-site detention basins and stopped the discharges off the construction site within four hours.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1** was used because there have been no previous unauthorized discharge violations at this Site other than the alleged violations currently at issue in this Complaint.

Step 5 - Determination of Total Base Liability Amount

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

<p><u>Violation 1 – Total Base Liability Amount</u></p> <p>Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability</p> <p style="text-align: center;">$\\$168,549 \times 1.1 \times 0.75 \times 1 = \\$139,053$</p> <p style="text-align: right;">Total Base Liability = \$139,053</p>

Steps 6 through 10 are applied to the combined Total Base Liability Amount for all violations and will be discussed after the Total Base Liability Amount has been determined for the remaining violations.

Violation 2: Failure to Implement Appropriate BMPs on Active Construction Areas during a rain event prior to installation of the Active Treatment System.

The General Permit requires Risk Level 2 dischargers to implement appropriate erosion and sediment control BMPs. The Rocklin Crossings site is Risk Level 2.

Board staff considered the Discharger to be in violation of the erosion control BMP requirements only on the days when rain occurred at the site because the General Permit distinguishes between active and inactive construction areas. Active construction areas are defined in the General Permit as: *“areas undergoing land surface disturbance. This includes construction activity during the preliminary stage, mass grading stage, streets and utilities stage and the vertical construction stage.”* Active areas must

have appropriate erosion and sediment controls installed prior to and during rain events, but not between rain events. The General Permit defines inactive areas of construction as “*areas of construction activity that have been disturbed and are not scheduled to be re-disturbed for at least 14 days.*” Inactive areas must have effective soil cover during the entire period of inactivity, regardless of rainfall.

For the Rocklin Crossings site, Board staff understands that the Discharger was conducting drilling and blasting, grading, and compaction work at the south end of the Site, and utility installation activities, and returned to work as soon as possible following the rain events. Therefore, staff considered the requirements for installation of erosion control BMPs at active construction areas, rather than inactive areas, when determining the violations in this case.

Violation 2 is for the period of 28 November through 5 December 2012 (8 days) when the Discharger failed to have appropriate erosion control BMPs installed at the site during a rain event prior to installing an Active Treatment System (ATS). The ATS began operation on 18 December 2012.

Step 1 – Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2 – Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. The Potential for Harm is considered to be **Moderate**, which is defined in the Enforcement Policy as “The characteristics of the violation present a substantial threat to beneficial uses and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.”

The Discharger failed to implement appropriate erosion control BMPs prior to the 28 November to 5 December 2012 (8 days) storm event(s) as required by the General Permit. Temporary erosion controls such as straw and tack cover disturbed soils and protect soil particles from detaching, which helps lock the soil particles in place and reduces turbidity in storm water runoff. Discharges of sediment to surface waters can cloud the receiving water, thereby reducing the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease. This failure to implement appropriate erosion control BMPs has the potential to impact beneficial uses of a sensitive habitat. As described in the EIR, “*The BMPs proposed to be implemented during construction include: the use of soil stabilizers, fiber rolls, inlet filters, and gravel bags to prevent pollutants from being carried off-site in stormwater generated on the project site. The erosion control plan would ensure that proper control of siltation, sedimentation, and other pollutants would be implemented per the National Pollution Discharge Elimination System (NPDES) permit requirements and City ordinance standards. Debris, soil, silt, sand, bark, slash, sawdust, cement, concrete, washings, petroleum products or other organic or earthen material would not be allowed to enter into or be placed where it may be washed by*

rainfall or runoff into Secret Ravine Creek.” However, the Discharger did not follow the mitigation measures identified in the EIR or the erosion control BMPs required by the General Permit.

Deviation from Requirement

The violation represents either a minor, moderate, or major deviation from the applicable requirements. The Deviation from Requirement is considered **Major**, which is defined in the Enforcement Policy as “The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).”

General Permit requires both erosion and sediment control BMPs on active construction sites to prevent soil particles from detaching and to contain any soil particles that become entrained in storm water runoff. The installation of temporary water storage areas as done by the Discharger, if engineered and designed correctly, is considered a BMP. However, the General Permit requires that both erosion control and sediment control BMPs be installed. The Discharger did not install an appropriate combination of BMPs.

The Discharger failed to implement appropriate erosion controls as required by the General Permit and rendered the permit requirements ineffective. There was a high potential for sediment laden storm water to discharge from the construction site to Secret Ravine, and it is appropriate to select a “Major” Deviation from Requirement.

Using Table 3 in the Enforcement Policy, the range of factors for a **Moderate** Potential for Harm and a **Major** Deviation from Requirement is 0.4 to 0.7, and the middle of the range (0.55) was used for the Per Day Factor. This value is multiplied by the days of violation and the maximum per day penalty, as shown below.

Violation 2 –Per Day Assessment for Non-Discharge Violations

The initial liability amounts for the violations of the General Permit, Att. D., Section E.3. (Sediment Controls) calculated on a per-day basis, are as follows:

a) 28 November to 5 December 2012 (8 days): $8 \text{ days} \times \$10,000 \text{ per day} \times 0.55 = \$44,000$

Total Initial Liability = \$44,000

Step 4 – Adjustment Factors

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

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.1** because of the Discharger’s failure to implement appropriate BMPs prior to a forecasted multi-day storm event. This failure to implement BMPs led to the

discharges of turbid water which could have been avoided had appropriate BMPs been in place prior to the forecasted storm event. Again, as presented above, the General Permit requires that Risk Level 2 dischargers develop and implement a Rain Event Action Plan (REAP) to protect all exposed portions of a site within 48 hours prior to a precipitation event when there is a forecast of 50% or greater probability of precipitation in the project area. The Discharger's REAPs completed for the four construction Sites on 26 November 2012 stated that site erosion and sediment control BMPs were deployed at each of the four construction Sites. However, the Water Board staff inspection on 30 November 2012 found that straw and tack erosion control BMPs were not implemented across the southern portion of the Rocklin Crossing site, the Center at Secret Ravine site, and the Dominguez Loop Road site. This failure to implement appropriate BMPs led to the discharge of turbid water which should have been avoided based on the strength of the storm forecast. The Discharger did not anticipate what a reasonable person would have and did not implement appropriate measures to avoid the violations.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **0.9** because of the cooperation exhibited by the Discharger to implement structural BMPs that reduce the potential for future discharges. Following notification of turbid storm water discharging off the construction site, the Discharger deepened a failed temporary detention basin and pumped accumulated storm water to larger on-site detention basins, and discharges off the construction site were stopped within four hours. However, the Discharger did not implement appropriate erosion control BMPs on active construction areas for the eight days identified in this violation.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1.0** was used because there have been no previous violations at the Site other than the alleged violations currently at issue in this Complaint.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation 2 - Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$44,000 \times 1.1 \times 0.9 \times 1.0 = \$43,560$$

Total Base Liability = **\$43,560**

Steps 6 through 10 are applied to the combined Total Base Liability Amount for all violations and will be discussed after the Total Base Liability Amount has been determined for the remaining violation.

Violation 3: Failure to Implement Appropriate BMPs on Active Construction Areas following Installation of the Active Treatment System.

Violation 3 is for the period of 21 December to 25 December 2012 (5 days) when the Discharger failed to have adequate erosion control BMPs installed at the site during a rain event after the Active Treatment System was installed. Again, Board staff considered the requirements for installation of erosion control BMPs on active construction areas in determining these violations.

Step 1 – Potential for Harm for Discharge Violations

This step is not applicable because the violation is not a discharge violation.

Step 2 – Assessment for Discharge Violations

This step is not applicable because the violation is not a discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm

The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. The Potential for Harm is considered to be **Minor**, which is defined in the Enforcement Policy as “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 Discharger applied an Earthguard product to disturbed soils prior to the 21 December to 25 December 2012 storm event. During a 24 December 2012 site inspection, Board staff identified that the Earthguard-treated areas were not covered with mulch, straw, or fibers to prevent soil particles from detaching and becoming transported in storm water runoff, and evidence of erosion was observed across portions of the Center at Secret Ravine site. Based on the lack of soil coverage and erosion observed across the active site, it appeared to Board staff that the Earthguard product was not effective in stabilizing soils during rainfall events, and concluded that this application was not an appropriate erosion control and therefore a violation of the General Permit.- This failure to implement appropriate erosion control BMPs has the potential to impact beneficial uses.

The Discharger substantially mitigated the potential for harm by implementing structural BMPs that reduce the potential for future discharges. Although these efforts do not negate the requirement to implement appropriate erosion control BMPs at the Sites during rain events, the effective combination of erosion and sediment control BMPs combined with a strategy to pump accumulated storm water from temporary detention basins to larger on-site basins significantly reduced the potential for discharges off the construction site. Therefore, the Potential for Harm is “minor”.

Deviation from Requirement

The violation represents either a minor, moderate, or major deviation from the applicable requirements. The Deviation from Requirement is considered **Minor**, which is defined in the Enforcement Policy as “The intended effectiveness of the requirement remains generally intact (e.g., while the requirement was not met, there is general intent by the discharger to follow the requirement).”

The Discharger implemented an Earthguard product to disturbed soils prior to the 21 December to 25 December 2012 storm event; however, as discussed above, Board staff determined that the Discharger failed to implement appropriate erosion control BMPs as required by the General Permit. The Discharger implemented structural BMPs that reduce the potential for future discharges, and these BMPs combined with a strategy to pump accumulated storm water from temporary detention basins to larger on-site basins significantly reduced the potential for discharges off the construction site.

Using Table 3 in the Enforcement Policy, the range of factors for a **Minor** Potential for Harm and a **Minor** Deviation from Requirement is 0.1 to 0.2, and the middle of the range (0.15) was used for the Per Day Factor. This value is multiplied by the days of violation and the maximum per day penalty, as shown below.

Violation 3 –Per Day Assessment for Non-Discharge Violations

The initial liability amounts for the violations of the General Permit, Att. D., Section E.3. (Sediment Controls) calculated on a per-day basis, are as follows:

a) 21 December to 25 December 2012 (5 days): 5 days x \$10,000 per day x 0.15 = \$7,500

Total Initial Liability = **\$7,500**

Step 4 – Adjustment Factors

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

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.1** because of the Discharger's failure to implement appropriate BMPs prior to a forecasted multi-day storm event.

The Center at Secret Ravine site was still actively being graded and compacted prior to the start of the storm event on 21 December 2012, and S.D. Deacon staff stated that disturbed soils across the Center at Secret Ravine site were treated with an "Earthguard" product prior to the rain event. However, the Earthguard-treated areas were not covered with mulch, straw, or fibers to prevent soil particles from detaching and becoming transported in storm water runoff, and evidence of erosion was observed across portions of the Center at Secret Ravine site. Based on the lack of soil coverage and erosion observed across the active site, it appeared to Board staff that the Earthguard product was not effective in stabilizing soils during rainfall events. Staff concluded that this application was not an appropriate erosion control and therefore a violation of the General Permit. In addition, staff reviewed the SWPPP to determine if the QSD had evaluated whether the Earthguard product was appropriate for use as a soil stabilization BMP at the Rocklin Crossings construction sites. Board staff found no evidence that this evaluation was conducted. Instead, the site-specific SWPPP for the Rocklin Crossings construction sites stated that straw mulch, not Earthguard, would be applied to all disturbed soils prior

to any forecast rain event. The Discharger did not anticipate what a reasonable person would have and did not implement appropriate measures to avoid the violations.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **0.9** because of the cooperation exhibited by the Discharger to implement additional BMPs and reduce the potential for sediment discharges to surface waters. However, the Discharger did not implement appropriate erosion control BMPs on active construction areas for the five days identified in this violation.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1.0** was used because there have been no previous violations at this Site other than the alleged violations currently at issue in this Complaint.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation 3 - Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$7,500 \times 1.1 \times 0.9 \times 1.0 = \$7,425$$

Total Base Liability = **\$7,425**

COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS

The combined Total Base Liability Amount for the two violations is **\$190,038** (\$139,053 + \$43,560 + \$7,425).

The following factors apply to the combined Total Base Liability Amount for the violations discussed above.

STEP 6 – Ability to Pay and Continue in Business

The Order is only being issued to the Legally Responsible Party (LRP), Donahue Schriber, therefore Central Valley Water Board staff considered only Donahue Schriber’s ability to pay and to continue in business when determining the administrative civil liability amount.

According to a March 2013 press release², Donahue Schriber is a private Real Estate Investment Trust (REIT) operating on the West Coast. The company owns and manages 76 neighborhood, community, and power shopping centers representing over 11 million square feet of retail space. The shopping centers are located throughout California, Arizona, Nevada, Oregon, and Washington. When completed, the Crossings site will consist of approximately 544,000 square feet of new retail and restaurant space with Walmart and Home Depot as the anchor tenants.

In 2013, the company's major investors, the New York State Teacher's Retirement System and J.P. Morgan Strategic Property Fund approved an additional \$100 million in common equity for growth capital to allow the Company to "take advantage of new market opportunities". In 2012, Donahue Schriber disposed of \$250 million of non-strategic assets and acquired four shopping centers valued at over \$200 million.

Given the size of the Discharger's company and the scale of the Rocklin Crossings project, the Discharger has the ability to pay the combined Total Base Liability Amount.

Although the Order only names Donahue Schriber as the responsible party, Board staff are aware that some LRPs have contract provisions in which any civil liability is passed to the contractor. The record for this case does not include the contract between Donahue Schriber and the contractor, S.D. Deacon, but staff still completed a brief review of the contractor's ability to pay. According to its website³, S. D. Deacon is the largest retail contractor on the West Coast and fifth largest in the U.S. The company projected \$400 million in business volume in 2012, and employs 400 people in five offices, including one in Sacramento. Given the size of the company, S.D. Deacon has the ability to pay the penalty, if it were to be passed on by Donahue Schriber by any indemnity provisions in the contract.

STEP 7 – Other Factors as Justice May Require

The costs of investigation and enforcement are "other factors as justice may require", and should be added to the liability amount. The Central Valley Water Board has incurred \$21,000 in staff costs associated with the investigation and enforcement of the violations alleged herein. This represents approximately 140 hours of staff time devoted to investigating and drafting the complaint at \$150 an hour. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

It should be recognized that the Discharger, Donahue Schriber, also violated the Storm Water General Permit at its Rocklin Commons construction site, which is across the freeway from Rocklin Crossings. In that matter, the Executive Officer issued an Administrative Civil Liability Complaint in the amount of \$51,550 for the failure to install appropriate erosion controls from 28 November to 5 December 2012, and for the failure to collect storm water samples. Donahue Schriber paid the liability and waived its right to a hearing before the Central Valley Water Board. Given the history of violations for this Discharger, it could be argued that a higher "history of violations" multiplier would be more appropriate than the neutral multiplier of 1 which the Prosecution Team is currently proposing.

² <http://www.donahueschriber.com/newsdetails.aspx?newsid=126>

³ <http://www.sddeacon.com/>

STEP 8 – Economic Benefit

Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The violations of the General Permit were due to a failure to implement appropriate erosion and sediment control BMPs as required by the General Permit and listed in the site specific SWPPP. The California Stormwater Quality Association (CASQA) estimates installation and maintenance of straw mulch at \$1,823 to \$4,802 per acre (July 2007 data), and this range is generally dependent on slope and soil type. The economic benefit received by the Discharger by not installing and maintaining appropriate erosion control BMPs is estimated to be \$2,000 per acre, based on a generally flat site that can be easily accessed by wheeled vehicles. Based on information submitted by the Discharger, Board staff calculated that approximately 40 acres of disturbed area were not adequately protected with BMPs. Therefore, the cost to stabilize this acreage is estimated to be \$80,000 (40 acres x \$2,000/acre). The Discharger realized some cost savings by not spending \$80,000 prior to the 28 November 2012 or 21 December 2012 storm events. However, the Discharger started using an active treatment system on 18 December 2012. Therefore, the economic benefit can be calculated as the interest saved by not spending \$80,000 for a period of 20 days from 28 November to 18 December 2012. Water Board Senior Economist staff used the US EPA's BEN model to determine the economic benefit, as required by the Enforcement Policy. The estimated value is \$117.

The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations." The economic benefit plus 10% is \$129.

STEP 9 – Maximum and Minimum Liability Amounts

a) Minimum Liability Amount: Economic Benefit plus 10%: **\$129**

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the violations cited in this Complaint is \$117. Therefore, the minimum liability amount pursuant to the Enforcement Policy is \$129.

b) Total Maximum Liability Amount: **\$896,130**

- i. Maximum liability amount Violation 1: \$766,130 (76,613 gallons discharged (-1,000 gallons) x \$10 per gallon, plus 1 day x \$10,000/day)
- ii. Maximum liability amount Violation 2: \$80,000 (8 days x \$10,000/day)
- iii. Maximum liability amount Violation 3: \$50,000 (5 days x \$10,000/day)

Discussion: The maximum administrative liability amount is the maximum amount allowed by CWC section 13385. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could be assessed up to \$896,130 in administrative civil liabilities for the alleged violations.

The proposed liability falls within these maximum and minimum liability amounts.

STEP 10 – Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the alleged violations is **\$211,038** (\$190,038 + \$21,000).