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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

16 In the Matter of the Donahue Schriber Asset)
17 Management Corporation, Petition for Review)
18 of Actions and Failures to Act by the)
19 California Regional Water Quality Control)
20 Board, Central Valley Region, in Adopting)
Administrative Civil Liability Order No.)
R5-2013-0123)

JOINT PETITION FOR REVIEW;
PRELIMINARY POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION (WATER CODE
SECTION 13320)

21 Petitioners Donahue Schriber Asset Management (Donahue Schriber), along with S. D.
22 Deacon (Deacon), in accordance with section 13320 of the California Water Code, hereby jointly
23 petition the State Water Resources Control Board (State Water Board) to review Order No. R5-
24 2013-0123 of the California Regional Water Quality Control Board, Central Valley Region
25 (Regional Water Board) issuing an Administrative Civil Liability (ACL) penalty of \$190,038 for a
26 construction storm water discharge event that occurred at the Rocklin Crossing construction site
27 (hereafter "Rocklin Crossing construction site" or "site") during a large storm event in November
28 of 2012. This discharge event occurred during a rain event that saw several inches of heavy

1 rainfall over several days. The highest intensity rain corresponded to the time that the discharge
2 event at the Rocklin Crossings site occurred. Instead of issuing this substantial penalty, the
3 Regional Water Board should have recognized that the discharge of turbid storm water is not
4 prohibited during rain events, even water exceeding the Numeric Action Level (NAL) for turbidity
5 set forth in the Construction General Storm Water National Pollutant Discharge Elimination
6 System (NPDES) Permit. Alternatively, the Regional Water Board should have acknowledged the
7 immediate efforts undertaken to stop the discharge and prevent future untreated storm water
8 discharges from the site.

9 A copy of ACL Order No. R5-2013-0123 is attached to this Petition as **Exhibit A**,¹ and a
10 copy of the ACL Complaint issued in June of 2012 is attached as **Exhibit B**. A copy of this
11 Petition has been sent to the Regional Water Board. At the time of filing, a transcript of the
12 hearing and the full administrative record for this ACL Order were not available. Therefore, at
13 such time as the full administrative record is available and has been submitted and accepted for
14 review, the Petitioners reserve the right to file a supplemental memorandum in support of the Joint
15 Petition or to address any proposed State Water Board Order.²

16 **A. FACTUAL BACKGROUND**

17 Donahue Schriber is the legally responsible person (LRP) for the Rocklin Crossing
18 construction site as that term is defined in the General Permit for Storm Water Discharges
19 Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ, as
20 amended by Order No. 2010-0014-DWQ, issued by the California State Water Resources Control
21 Board (hereinafter "Construction Storm Water General NPDES Permit"). Stormwater discharges
22 from the site are regulated by the Construction Storm Water General NPDES Permit. (Van
23 Veldhuizen Decl. at ¶ 4; Ex. H.) Four (4) Notices of Intent (NOIs) to be covered under the
24 Construction Storm Water General NPDES Permit were submitted by the LRP in mid-July of

25 _____
26 ¹ To the extent these exhibits are cited, they will be cited with the full word Exhibit, while the exhibits in the
administrative record will be cited using "Ex." to signify exhibit or exhibits.

27 ² The State Water Resources Control Board's regulations require submission of a memorandum of points and
28 authorities in support of a petition, and this document is intended to serve as a *preliminary* memorandum. (23 C.C.R.
§2050(a).)

1 2012. (*See* Ex. H; *see also* Ex. 27, 32, 50, 57, 59, 66, 83 and 84.) Four (4) original SWPPPs for
2 this construction site, dated July 11, 2012, were prepared by RSC Engineering. (*See* Ex. H; *see*
3 *also* Ex. 31, 49, 67, and 82.) The SWPPPs were submitted, as required by the Construction
4 Stormwater General NPDES Permit, to the Regional Water Board via the Storm Water Multiple
5 Application and Reporting Tracking System (SMARTS). (*See* Ex. H; *see also* Prosecution Team’s
6 Evidence List, indicating these were “Documents located in SMARTS Database.”)

7 At the Rocklin Crossings construction site, Deacon provided general contractor services to
8 the LRP Donahue Schriber. (*See* Declaration of Andy Van Veldhuizen (Van Veldhuizen Decl.) at ¶
9 3.) The Qualified SWPPP Developer (QSD) for this site was Daniel Taylor of RSC Engineering
10 and the Qualified SWPPP Practitioner (QSP) for the site was Dave Clayson of Total Site
11 Maintenance (TSM). (*Id.*) The QSD was responsible for the creation and day-to-day upkeep of the
12 site’s Storm Water Pollution Prevention Plan (SWPPP) and any required SWPPP amendments;
13 while the QSP was responsible for Best Management Practices (BMPs) observation and inspection
14 activities, undertaking any required sampling, and providing sediment and erosion control
15 recommendations. (*Id.*)

16 The Rocklin Crossings construction site consists of approximately 50.4 acres and is located
17 on the southeast corner of Interstate 80 and Sierra College Boulevard in Rocklin, California. (Van
18 Veldhuizen Decl. at ¶ 5.) The main project site is located approximately 1,000 feet north of Secret
19 Ravine. (*Id.*) Prior to construction, storm water runoff generated from the site sheet flowed into a
20 number of offsite ephemeral drainages that ultimately discharged into Secret Ravine. (*Id.*)

21 Since the commencement of construction, the site was mass graded into two onsite
22 watersheds, Shed A and Shed B (*See* Van Veldhuizen Decl. at ¶6; Ex. A (Site Map)). Until mid-
23 December 2012, Shed A sheet-flowed in a north to south direction, to numerous on-site low spots,
24 where any accumulating water was then pumped to Basin A to allow for settlement prior to
25 discharge. (*Id.*) Shed B also sheet-flowed to various on-site low spots and then was captured,
26 pumped and transported to Basin A. Basin A then discharged indirectly to Secret Ravine. (*Id.*)

27 Throughout the site, good housekeeping BMPs were deployed, such as those listed below,
28 and good housekeeping practices were followed to ensure storm water runoff did not come into

1 contact with waste or hazardous materials. (Van Veldhuizen Decl. at ¶ 7.)

- 2 • A self-contained tire wash was installed at the entrance.
- 3 • All sanitation facilities were located away from watercourses and storm drains, and
4 were placed in a manner that they could not easily be knocked over by equipment or
5 vehicles.
- 6 • Waste disposal containers were covered.
- 7 • Hazardous and waste materials were stored in a manner that would eliminate the
8 potential for these materials to come into contact with storm water runoff.

9 In addition, other BMPs were in place including, among other things, sediment and erosion
10 control BMPs. (Van Veldhuizen Decl. at ¶ 8; testimony of A. Van Veldhuizen, M. Hartzell, and R.
11 Chavez.) The site had been regularly inspected by the contractor, QSP, City of Rocklin inspectors,
12 and Regional Board staff, and Deacon was in regular communication with Regional Water Board
13 staff about activities and BMPs at the site. (Van Veldhuizen Decl. at ¶ 8.) When substantive
14 modifications to the SWPPP were made or BMPs needed to be altered substantially, revisions to
15 the SWPPP map onsite and/or were uploaded to SMARTS. (*See id.*; *see also* Ex. 39-41, 43, and
16 70.)

17 Prior to the storm event at issue, Rain Event Action Plans (REAPs) were prepared. (*See*
18 Van Veldhuizen Decl. at ¶ 9; Ex. B.) The events in question took place on November 30th, 2012.
19 (Van Veldhuizen Decl. at ¶ 9.)

20 During the 23-hour period leading up to these events, beginning 8:00 AM on November
21 28th and ending 7:00 AM on November 29th, the rain gauge present on the site indicated that the
22 site had received 0.75 inches of rain. (Van Veldhuizen Decl. at ¶ 10; Ex. C.) During the inspection
23 that occurred the morning of November 29th, the BMPs implemented on the site were effectively
24 controlling sediment at the site. (Van Veldhuizen Decl. at ¶ 10.) The Contractor performed BMP
25 maintenance as necessary and continued pumping operations, removing water from low
26 containment areas to transport sediment laden water to Basin A. (*Id.*)

27 During the 96-hour period, starting at 5:00 AM on November 30th through 7:00 AM
28 December 2nd, the site received an additional approximately **6.25** inches of rain. (Van Veldhuizen
Decl. at ¶ 11.) During an inspection that occurred at 5:30 AM on November 30, 2012, the QSP

1 observed that although heavy rain was occurring, the BMPs and runoff control measures on the site
2 were effectively managing storm water runoff and controlling the discharge of sediment. (*Id.*)

3 By 8:00 AM, the storm event overwhelmed some of the BMPs at the site due to the
4 intensity of the storm event, which exceeded the 5-year, 24-hour Compliance Storm Event size
5 identified in the Construction Stormwater General Permit. (*See* Veldhuizen Decl. at ¶ 13; *see also*
6 Ex. K (RSC Summary Memo) at p. 2 (“the average rainfall intensity experience the morning of
7 November 30 significantly exceeded the average intensity of a 5 year-24 hour storm....the
8 documented storm intensity exceeds the average storm intensity of a 25 year, 24 hour storm
9 event.”).)

10 Due to the very heavy rain and associated storm water accumulation, at one location located
11 near Basin A, a constructed berm breached, resulting in sediment laden water overwhelming a
12 protected outlet culvert located on the south side of the as yet to be constructed detention basin.
13 Immediately upon the identification of this issue, repairs to the berm were initiated and the culvert
14 was plugged to prevent future discharges. (Van Veldhuizen Decl. at ¶ 12.)

15 While the Contractor was addressing the berm breach near Basin A, the containment area
16 located at the west end of Dominguez Loop also became overwhelmed due to the severe rain
17 accumulation that the site was experiencing. (Van Veldhuizen Decl. at ¶ 13.) Normally, runoff
18 accumulating in the containment area was pumped into a water truck that then transported the
19 water to Basin A. (*Id.*) However, due to the very large amount of rainfall occurring in a short
20 period of time, the containment area was overwhelmed resulting in storm water eroding an earthen
21 dike that had been constructed to prevent storm water runoff from leaving the site. (*Id.*) Immediate
22 efforts were initiated to repair the dike, and the flow of storm water runoff was partially stopped by
23 10:00 a.m. when the rock berm was reconstructed, and completely halted just over an hour later at
24 approximately 11:15 a.m. (*Id.*) As a temporary measure, the dike was immediately protected with
25 Visquine. (*Id.*) The Contractor had also immediately contacted a subcontractor to request the
26 instantaneous deployment of a dozer to re-grade the dike higher and wider. Re-grading of the dike
27 began at 11:00 AM. (*Id.*) By the end of the day, on November 30, 2012, the dike had been
28 completely reconstructed. (*Id.*) Much of the sediment that left the site came from the broken berm

1 and was stopped by heavy vegetation prior to reaching Secret Ravine. After the event, and where
2 accessible, this deposited sediment was protected with straw blankets, straw wattles, rock bags, and
3 hydro-seeding to prevent later discharge. (Van Veldhuizen Decl. at ¶ 14.)

4 In addition to the dike repair, the Contractor also immediately ordered a 6-inch pump to be
5 delivered the following day (December 1, 2012). (Van Veldhuizen Decl. at ¶ 15.) This larger
6 pump was used to pump water from the containment area, located within Dominguez Loop, to
7 Basin A. (*Id.*) The 6-inch pump was on site by 7:00 AM on December 1, 2012, the day after the
8 incident. (*Id.*) Pumping began by 9:30 AM and was continued through the weekend. (*Id.*)

9 To eliminate the potential for further discharges of sediment, the Contractor worked
10 diligently to implement additional BMPs on the site. (Van Veldhuizen Decl. at ¶ 16.) Immediately
11 after the event, a long term corrective action strategy was developed and provided to Regional
12 Board staff on December 10, 2012, that included:

- 13 • The construction of an additional basin to increase on-site storm water storage
14 capacity.
- 15 • Placement of additional pumps and associated piping to transport water to the basin.
- 16 • The implementation of a phased grading plan to make the site more manageable in
17 regards to management of storm water runoff.
- 18 • The application of additional erosion control measures.
- 19 • Construction of all-weather access roads.
- 20 • Obtaining additional support from storm water consultants (Supplemental QSP) as a
21 QA/QC oversight of the contracted QSP and QSD to review and supplement the
22 SWPPP. (*Id.*)

22 In addition, on the day of the incident, November 30, 2012, the Contractor contacted Active
23 Treatment Systems, Inc. to provide an Active Treatment System (ATS) to treat storm water
24 generated from the site. (Van Veldhuizen Decl. at ¶ 17.) Between December 5-10, 2012, a second
25 basin, Basin B, was constructed to provide additional onsite storage. (*Id.*) Runoff was pumped to
26 Basin B for holding and then transferred to Basin A for treatment by the ATS. (*Id.*) Active
27 Treatment Systems, Inc. prepared an ATS Plan that was submitted to the Regional Water Board for
28 approval per the requirements of the Construction Storm Water General NPDES Permit. (*Id.*) The

1 system described in the ATS Plan and implemented on site was designed to accommodate a 10-
2 year, 24-hour storm event (4 inches of rain) and drain in less than 72-hours. (*Id.*) The ATS Plan
3 was uploaded to SMARTs on December 11, 2012 (Ex. 33) and approval of the plan was obtained
4 from the Regional Water Board on December 12, 2012. (*Id.*) Deployment of the ATS was on
5 December 10, 2012 and the system was fully operational on December 18, 2012. (*Id.*) The storm
6 water treated by ATS was discharged indirectly to Secret Ravine. (*Id.*)

7 For the remainder of the 2012/13 storm season, storm water accumulating within
8 Dominguez Loop was pumped by the 6-inch pipe to either Basin A or Basin B. (Van Veldhuizen
9 Decl. at ¶ 18.) If Basin A had capacity and was not in the process of actively treating storm water,
10 water was pumped to Basin A. (*Id.*) If Basin A did not have adequate capacity, water was pumped
11 to Basin B and stored until such time that the water was pumped to Basin A for pre-treatment and
12 settlement. (*Id.*) The chemical additive Chitosan was added to the water in Basin A to aid in
13 flocculation of the sediment particles. (*Id.*) Once the appropriate amount of flocculation had
14 occurred, sediment settled out within the basin. (*Id.*) Water was then transferred to a series of
15 baker tanks for additional ATS treatment and then was finally processed through a series of sand
16 filters that removed the remaining sediment and the chemical additive prior to discharge. (*Id.*)

17 For the end of 2012/13 rain season, the treatment system worked as intended and the site
18 was in compliance with the ATS requirements indicated in the Construction Storm Water General
19 NPDES Permit. (*See accord* Ex. 34-38, and 42.) (Van Veldhuizen Decl. at ¶ 19.) For the 2013/14
20 rain season, the large permanent detention basin will be finalized and used to store any stormwater
21 coming off of the whole construction site. (*Id.*)

22 A final certified spill estimate was provided to the Regional Water Board of approximately
23 76,613 gallons between 8 a.m. and noon on November 30th, 2012.³ It should be noted that this was
24 the discharge amount accepted by the Regional Water Board and this amount accounted for less
25 than .32 % of the total flow in Secret Ravine and this amount was heavily diluted by other storm
26 water (more than 316 to 1). (Ex. K, RSC 9/4/13 Memo at pg. 2.)

27

28 ³ See Ex. K at RSC 9/4/13 Memo at pg. 1 and Attachments A and B.

1 Petitioners attended many meetings with Regional Water Board staff prior to and after the
2 issuance of the ACL Complaint and were very cooperative and open, but were unable to come to
3 an acceptable settlement of this matter. This challenge to this enforcement action primarily
4 addresses the allegations and findings related Violation 1 of the ACL Order⁴ (Order No. R5-2013-
5 0123 at pg. 5, para. 21; *see also* Ex. 13, ACL Complaint at pg. 5, para. 21, and Attachment A at
6 pgs. 1-5), and mainly hinges on the ACL's inconsistency with the State Water Board's
7 Enforcement Policy and its requirements related to proving harm and assessing penalties on a
8 dollars per gallon basis. (*See* Van Veldhuizen Decl. at ¶ 20; Ex. D (Enforcement Policy) at p. 14;
9 *see also* comment letters filed with the Advisory Team from the Building Industry Legal Defense
10 Foundation (Sept. 3, 2013), and from the Associated General Contractors of California (August 1,
11 2013).) Had the proposed penalty been more reasonable and consistent with the Enforcement
12 Policy and other ACLs in this region and statewide, a hearing on this ACL and this appeal would
13 not have been necessary. (*See* Van Veldhuizen Decl. at ¶ 20; Ex. E-G (other ACLs).)

14

15 **B. LEGAL BACKGROUND**

16 1. Requirements of the Construction Storm Water General NPDES Permit

17 The ACL Complaint and final Order alleged that Violation 1 occurred due to a violation of
18 Section V.A.2 of the Construction Storm Water General NPDES Permit. (*See* Order No. R5-2013-
19 0123 at pg. 5, para. 21.) Section V.A.2. of the Permit on page 28 reads as follows:

20

21 **V. EFFLUENT STANDARDS & RECEIVING WATER MONITORING**

22 A. Narrative Effluent Limitations

- 23 2. Dischargers shall minimize or prevent pollutants in storm water
24 discharges and authorized non-storm water discharges through the use of
25 controls, structures, and management practices that achieve BAT for
26 toxic and non-conventional pollutants and BCT for conventional
27 pollutants.

28

⁴ However, to the extent that the Regional Water Board's actions are found unlawful due to a lack of findings and evidence to support the harm or for another reason, challenged herein or not, and this unlawful action also affected the final value assessed for Violations 2 and 3, those are also being appealed herein.

1 This section also includes Table 1 that sets a NAL for turbidity applicable to Risk 2
 2 discharges of 250 NTU. Subsections V.B.2-4 on page 29 then address how the NAL applies and
 3 what to do if these levels are exceeded, as follows:
 4

5 B. Numeric Action Levels (NALs)

- 6 2. For Risk Level 2 and 3 dischargers, the NAL storm event daily average for
 7 turbidity is 250 NTU. The discharger shall take actions as described below if the
 8 discharge is outside of this range of turbidity values.
- 9 3. Whenever the results from a storm event daily average indicate that the discharge
 10 is below the lower NAL for pH, exceeds the upper NAL for pH, or exceeds the
 11 turbidity NAL (as listed in Table 1), the discharger shall conduct a construction
 12 site and run-on evaluation to determine whether pollutant source(s) associated
 13 with the site's construction activity may have caused or contributed to the NAL
 14 exceedance and shall immediately implement corrective actions if they are
 15 needed.
- 16 4. The site evaluation shall be documented in the SWPPP and specifically address
 17 whether the source(s) of the pollutants causing the exceedance of the NAL:
- 18 a. Are related to the construction activities and whether additional BMPs are
 19 required to (1) meet BAT/BCT requirements; (2) reduce or prevent pollutants
 20 in storm water discharges from causing exceedances of receiving water
 21 objectives⁵; and (3) determine what corrective action(s) were taken or will be
 22 taken and with a description of the schedule for completion.

18 AND/OR:

- 19 b. Are related to the run-on associated with the construction site location and
 20 whether additional BMPs measures are required to (1) meet BAT/BCT
 21 requirements; (2) reduce or prevent pollutants in storm water discharges from
 22 causing exceedances of receiving water objectives; and (3) what corrective
 23 action(s) were taken or will be taken with a description of the schedule for
 24 completion.

23 (Construction Storm Water General NPDES Permit at pg. 29, Section V.B.2-4 (emphasis added).)

24 Importantly, the Construction Storm Water General NPDES Permit makes it clear that “[a]n
 25 exceedance of a NAL does not constitute a violation of this General Permit.” (See Construction
 26

27 ⁵ Because there were no samples taken in the receiving water below the lower discharge, and because the upper
 28 discharge did not cause the in-stream turbidity to exceed 153 NTU (Ex. 3 at pg. 2), there were no allegations of and no
 proof of any Receiving Water Limitations violations for these events.

1 Storm Water General NPDES Permit at page 9, para. 53 (emphasis added).) Dischargers with
 2 NAL exceedances are required “to immediately implement additional BMPs and revise their Storm
 3 Water Pollution Prevention Plans (SWPPPs) accordingly to either prevent pollutants and
 4 authorized non-storm water discharges from contaminating storm water, or to substantially reduce
 5 the pollutants to levels consistently below the NALs. NAL exceedances are reported in the State
 6 Water Boards SMARTS system, and the discharger is required to provide an NAL Exceedance
 7 Report when requested by a Regional Water Board.” (*Id.* at pgs. 9-10, para. 54.)

8 While the ACL Order may have established that the storm water discharges from the
 9 Rocklin Crossings site exceeded the NAL for turbidity, the Regional Water Board failed to make
 10 any findings as to how these exceedances constituted an actionable violation of the Construction
 11 Storm Water General NPDES Permit. At the hearing, there were some unsupported arguments
 12 made that the site failed to meet “controls, structures, and management practices that achieve BAT
 13 for toxic and non-conventional pollutants and BCT for conventional pollutants” as required in
 14 Section V.A.2. However, the final ACL Order failed to contain any findings or evidence to support
 15 such allegations.⁶ Further, that section of the Permit only requires that dischargers “minimize or
 16 prevent pollutants in storm water discharges,” it is not a complete prohibition on turbid discharges.

17 This is supported by the Fact Sheet for the Construction Storm Water General NPDES
 18 Permit at page 19, which states as follows (emphasis added):

19 **2. Determining Compliance with Effluent Standards**

20 a. Technology-Based Numeric Action Levels (NALs)

21 This General Permit contains technology-based NALs for pH and turbidity, and
 22 requirements for effluent monitoring at all Risk level 2 & 3, and LUP Type 2 & 3 sites.
 23 Numeric action levels are essentially numeric benchmark values for certain parameters that,
 24 if exceeded in effluent sampling, trigger the discharger to take actions. Exceedance of an
 25 NAL does not itself constitute a violation of the General Permit. If the discharger fails to
 26 take the corrective action required by the General Permit, though, that may constitute a
 27 violation.

28 The primary purpose of NALs is to assist dischargers in evaluating the effectiveness of their
on-site measures. Construction sites need to employ many different systems that must work

⁶ The Regional Water Board is aware of this requirement, but failed to do so here. (*Compare* Order No. R5-2013-0123 to Ex. E, Order No. R5-2012-0520, at pg. 1, para. 3(a), and at pg. 3, para. 11.)

1 together to achieve compliance with the permit's requirements. The NALs chosen should
2 indicate whether the systems are working as intended.

3 Another purpose of NALs is to provide information regarding construction activities and
4 water quality impacts. This data will provide the State and Regional Water Boards and the
5 rest of the storm water community with more information about levels and types of
6 pollutants present in runoff and how effective the dischargers BMPs are at reducing
7 pollutants in effluent. The State Water Board also hopes to learn more about the linkage
8 between effluent and receiving water quality. In addition, these requirements will provide
9 information on the mechanics needed to establish compliance monitoring programs at
10 construction sites in future permit deliberations....

11 ii. Turbidity

12 BPJ was used to develop an NAL that can be used as a learning tool to help
13 dischargers improve their site controls, and to provide meaningful information
14 on the effectiveness of storm water controls. A statewide turbidity NAL has
15 been set at 250 NTU.

16 Thus, it is clear from the plain language of the Construction Storm Water General NPDES
17 Permit that NALs were not meant to trigger violations, but instead were to be used as an indicator
18 of the effectiveness of BMPs implemented onsite and to provide a “learning tool to help
19 dischargers” to improve their site controls. (*Id.*) This is consistent with the iterative processes
20 contained in other storm water permits, requiring that BMPs are enhanced when benchmarks are
21 exceeded.

22 2. The 2010 Enforcement Policy’s Per Gallon Assessment

23 In 2009, the State Water Resources Control Board (“SWRCB”) updated and adopted its
24 2002 Enforcement Policy, which was approved by the Office of Administrative Law on May 20,
25 2010. (*See* Ex. D (2010 Enforcement Policy).) One of the modifications to that policy was to
26 move away from using the statutory maximum amount of \$10.00 per gallon set under Water Code
27 section 13385(c)(2)⁷ for the baseline penalty calculation for certain categories of discharges

28 ⁷ Water Code section 13385(c) states: “Civil liability may be imposed administratively by the state board or a regional
board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of
both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) 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 by which the volume discharged but not cleaned up exceeds 1,000 gallons.

1 because historic penalty actions for certain types of discharges (stormwater discharges, and sewer
 2 and recycled water spills) were previously set too high for these categories. (*Compare to 2002*
 3 *Enforcement Policy* using the maximum \$10 per gallon, which can be found at the following site:
 4 (http://www.swrcb.ca.gov/water_issues/programs/enforcement/archived.shtml at p. 22 (“Up to
 5 \$10,000 per day of violation plus an additional liability of \$10 per gallon for each gallon over
 6 1,000 gallons where there is a discharge that is not cleaned up.”)(emphasis added).) The result was
 7 the following language related to a *lower per gallon amount* of \$1-\$2 per gallon being imposed as
 8 starting point for certain categories of discharges of stormwater, recycled water, and sewer spills
 9 larger than 1000 gallons:⁸

10 “The Water Boards shall apply the above per gallon factor to the maximum per gallon
 11 amounts allowed under statute for the violations involved. Since the volume of sewage
 12 spills and releases of stormwater from construction sites and municipalities can be very
 13 large for sewage spills and releases of municipal stormwater or stormwater from
 14 construction sites, a maximum amount of \$2.00 per gallon should be used with the above
 15 factor to determine the per gallon amount for sewage spills and stormwater. Similarly, for
 16 releases of recycled water that has been treated for reuse, a maximum amount of \$1.00 per
 17 gallon should be used with the above factor. Where reducing these maximum amounts
 18 results in an inappropriately small penalty, such as dry weather discharges or small volume
 19 discharges that impact beneficial uses, a higher amount, up to the maximum per gallon
 20 amount, may be used.”

21 (*See Ex. D* at p. 14 (emphasis added).)

22 3. The 2010 Enforcement Policy’s Consistency Requirements

23 The 2010 Enforcement Policy contains numerous references to the requirement and goal
 24 that Water Board enforcement actions throughout California be consistent. (*See accord Ex. D*
 25 (*Enforcement Policy*) at p. 1 (“Timely and consistent enforcement of these laws is critical”;
 26 “create a fair and consistent statewide approach to liability assessment”); p. 2 (Chapter Heading -
 27 “FAIR, FIRM, AND **CONSISTENT ENFORCEMENT**”; “Water Boards shall strive to be fair,
 28 firm, and **consistent**”; “Water Board orders shall be consistent”; “Water Boards shall implement a

⁸ Arguably, any discharges above 1000 gallons should be considered “high volume discharges” under the 2010 Enforcement Policy since gallonage below that amount is not charged any per gallon penalty. (*See accord Water Code section 13385(c)(2)* (emphasis added); *Ex. D* at p. 14.) Further, having any other cut off point for recycled water would make no sense since all of that water is treated to high levels.

1 **consistent** and valid approach”; “providing **consistent** treatment for violations that are similar in
 2 nature”; p. 9 (“the public expect them to fairly and **consistently** implement”); p. 10 (“it is a goal of
 3 this Policy to establish broad consistency in the Water Boards’ approach to enforcement”;
 4 “provide a **consistent** approach and analysis of factors to determine administrative civil liability “;
 5 “a **consistent** outcome can be reasonably expected using this Policy”; “Be assessed in a fair and
 6 **consistent** manner”; “this chapter provides the decision-maker with a methodology for arriving at a
 7 liability amount consistent with these objectives”; p. 32 (“In order to provide a **consistent**
 8 approach to enforcement throughout the State, enforcement orders shall be standardized to the
 9 extent appropriate.”.) Thus, the Enforcement Policy requires that the Regional Board ensure that
 10 this ACL imposes a penalty similar to those imposed in other construction stormwater matters, and
 11 that the liability factors are determined in a manner consistent with the express goals and intent of
 12 the 2010 Enforcement Policy. The currently proposed ACL No. R5-2013-0519 fails to meet this
 13 consistency requirement.

14
 15 **1. NAMES, ADDRESSES AND EMAILS OF PETITIONERS:**

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24
 25 **2. THE SPECIFIC ACTIONS OR INACTIONS OF THE REGIONAL WATER BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:**

26
 27 Petitioners seek review of Regional Water Board ACL Order No. R5-2013-0123, issuing an
 28 Administrative Civil Liability (“ACL”) penalty of \$190,038 for a construction storm water incident

1 in November of 2012. The specific issues which the State Water Board is requested to review
2 include whether:

- 3 (A) The Regional Water Board failed to include adequate findings and to support any
4 findings made in Order No. R5-2013-0123 with evidence in the record.
- 5 (B) The Regional Water Board failed to properly interpret the Construction Storm
6 Water General NPDES Permit's requirements.
- 7 (C) The Regional Water Board failed to recognize and apply a valid upset defense
8 available under the Construction Storm Water General NPDES Permit and federal
9 regulations.
- 10 (D) The Regional Water Board imposed a penalty that is inconsistent with other ACL
11 orders and penalties in California.
- 12 (E) The Regional Water Board failed to adequately support its findings on Harm.
- 13 (F) The Regional Water Board awarded a per gallon penalty that was unsupported by the
14 plain language of the Enforcement Policy and was unreasonable.
- 15 (G) The Regional Water Board's penalty was unreasonably high for a single day event.
- 16 (H) The Regional Water Board's failure to comply with the law and denial to the
17 Petitioners of adequate Due Process in the ACL hearing process.

18 The State Water Board is also requested to generally review the Regional Water Board's
19 actions and failures to act in adopting ACL Order No. R5-2013-0123 for compliance with the U.S.
20 and California Constitutions (e.g., due process and equal protection requirements), the California
21 Government, Evidence, and Water Codes, and the California Administrative Procedures Act (APA)
22 and implementing regulations.

23 **3. THE DATE ON WHICH THE REGIONAL BOARD ACTED, OR REFUSED TO
24 ACT:**

25 The Regional Water Board held an adjudicatory hearing on this matter spanning
26 approximately 6 hours on October 4, 2014 (from approximately 1:00 p.m. until approximately 7:00
27 p.m.), and also adopted the final ACL Order on October 4, 2014 in Rancho Cordova, California
28 after deliberating in open session.

1 **4. A STATEMENT OF THE REASONS THE ACTIONS WERE INAPPROPRIATE**
2 **OR IMPROPER:**

3 The Petitioners' preliminary statement of points and authorities is set forth in Section 7
4 below. The Petitioners reserve the right to supplement this statement upon receipt and review of
5 the complete and final administrative record and hearing transcript.

6 In Section 7, the Petitioners assert *inter alia* that the findings and conclusions of Order No.
7 R5-2013-0123 are inappropriate and improper as these findings and conclusions are inconsistent
8 with the evidence presented in the case, inconsistent with the law, and otherwise inappropriate for
9 various reasons, including: failure to comply with the Porter-Cologne Water Quality Control Act
10 (Cal. Water Code, section 13000 *et seq.*) and implementing regulations governing the Water
11 Boards; failure to comply with the California Government and Evidence Codes (*e.g.*, Cal. Gov't
12 Code, sections 11425.10(a)(6); §11425.50(a), §11425.50(b)(applicable through 23 C.C.R.
13 §648(b)); Cal. Evid. Code sections 801-804; failure to comply with the Administrative Procedures
14 Act (APA); 23 Cal. Code of Regs, section 648 *et seq.*; inconsistency with the State Water Board's
15 Enforcement Policy (Ex. D); inconsistency with the NPDES Permit at issue, the Clean Water Act
16 (33 U.S.C. § 1251 *et seq.*), and its implementing regulations (*e.g.*, 40 C.F.R. Part 122); absence of
17 specific and detailed findings supporting the provisions of the Order; inclusion of Regional Water
18 Board findings that are not supported by the evidence; and other grounds that may be or have been
19 asserted by the Petitioners herein.

20 **5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED:**

21 The Petitioners are aggrieved in that Donahue Schriber was issued a substantial penalty for
22 a discharge event that was not prohibited by the Construction Storm Water General NPDES Permit
23 and was based on findings unsupported by the evidence presented in the case. The Petitioners are
24 also aggrieved since the penalty is inconsistent with the Enforcement Policy and with other ACL
25 penalties issued in California. This inconsistent treatment under the same laws and policies
26 violates the Enforcement Policy's requirements for fairness and consistency as well as
27 constitutional Equal Protection rules and principles. In addition, the Petitioners were aggrieved by
28 being denied Due Process in the ways explained further in this Petition.

1 **6. THE SPECIFIC ACTIONS THE PETITIONERS REQUEST THAT THE STATE**
 2 **BOARD TAKE:**

3 The main issue for the State Water Board to decide is whether it was fair and consistent with
 4 the Enforcement Policy to fine Donahue Schriber nearly two hundred thousand dollars for
 5 unintentional and temporary construction storm water discharges that occurred during a large storm
 6 event when there was no evidence presented of any actual harm to beneficial uses of waters of the
 7 state or United States. The record reflects that any potential harm would have been minor and that
 8 no actual harm was demonstrated. The record also reflects that Deacon went to great lengths to
 9 immediately stop the discharges and to provide the Regional Water Board staff with extensive
 10 information about the event and the Petitioners' corrective actions. (*See e.g.*, Ex. 6 and 10; Van
 11 Veldhuizen Decl.) Based on this record, this issue must now be decided by the State Water Board
 12 members, who will hopefully provide a more reasonable and reasoned result than that adopted by
 13 the Regional Water Board.

14 Petitioner seeks an Order by the State Water Board that will make modifications to or
 15 invalidate Order No. R5-2013-0123 due to:

- 16 A. The Regional Water Board's failures to include adequate findings and to support
 17 any findings made with evidence in the record.
- 18 B. The Regional Water Board's failure to recognize that the discharge of turbid storm
 19 water is not prohibited by the Construction Storm Water General NPDES Permit.
- 20 C. The Regional Water Board's failure to apply a valid upset defense available under
 21 the Construction Storm Water General NPDES Permit and federal regulations.
- 22 D. The Regional Water Board's imposition of a penalty inconsistent with other
 23 construction storm water ACL penalties in its own region and statewide.
- 24 E. The Regional Water Board's failure to support its findings on Harm.
- 25 F. The Regional Water Board's awarding of a per gallon penalty that was unsupported
 26 by the plain text of the Enforcement Policy and unreasonable.
- 27 G. The Regional Water Board's penalty being unreasonably high for a single day event.
- 28 H. The Regional Water Board's failure to comply with the law and the denial of
 adequate due process at the ACL hearing.

1 **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**
 2 **ISSUES RAISED IN THE PETITION:**

3 **A. The Regional Board Failed to Support Each and Every One of Its Findings in**
 4 **ACL Order No. R5-2013-0123 with Adequate Findings and Evidence in the**
 5 **Record.**

6 A decision of a State agency, such as the Regional Water Board, must be in writing, be
 7 based on the record, and include a statement of the *factual and legal basis* for each decision. (Gov.
 8 Code, §11425.10(a)(6); §11425.50(a).) When an administrative agency makes a decision in an
 9 administrative proceeding, it is not enough to merely recite the statutory or legal requirements as
 10 findings. Rather, the agency must undertake a *detailed analysis* of the evidence in the record and
 11 the applicable legal factors or standards,⁹ and must set forth its determinations in writing to make
 12 clear how it undertook its analysis and reached its final conclusions. (*Id.*) Thus, findings in an
 13 adjudicatory order must “bridge the analytical gap between the raw evidence and ultimate decision
 14 or order.” (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515
 15 (1974).)

16 In reviewing the Regional Water Board’s Order and actions, the State Water Board must
 17 ensure that the Regional Water Board adequately considered all relevant factors, and demonstrated
 18 a rational connection between those factors, the choices made, and the purposes of the enabling
 19 statutes. (*See California Hotel & Motel Ass’n v. Industrial Welfare Comm.*, 25 Cal.3d 200, 212

20 ⁹ In addition to the requirements under the Government Code, the Water Code only authorizes the imposition of civil
 21 penalties for specified violations. (Wat. Code §13385.) However, all civil penalties under this statute are discretionary,
 22 except those deemed to be a “Mandatory Minimum Penalty” or “MMP” under Water Code section 13385(h) and (i).
 The proposed penalty in this action was not for MMPs; only for discretionary penalties. Whenever prescribing such
 penalties, the Regional Board must consider several mandatory factors:

- 23 1) The nature, circumstances, extent, and gravity of the violation or violations;
- 24 2) Whether the violation is susceptible to cleanup or abatement;
- 25 3) The degree of toxicity of the discharge;
- 26 4) With respect to the discharger:
 - 27 a) the ability to pay,
 - 28 b) the effect on its ability to continue its business,
 - c) any voluntary cleanup efforts undertaken,
 - d) any prior history of violations,
 - e) the degree of culpability,
 - f) economic benefit or savings, if any, resulting from the violation, and
- 5) Other matters that justice may require.

(Wat. Code §13385(e), §13327; *see accord Ojavan Investors, Inc. v. California Coastal Comm.* (1997) 54 Cal.App.4th
 373, 395; *see also* Ex. D (Enforcement Policy).)

1 (1979).) The level of detail that must be included in the Regional Water Board’s consideration of
2 the statutorily mandated factors is governed by a rule of reason. However, it must be reasonably
3 clear that the Regional Board addressed each of the mandatory factors and traveled the “analytical
4 route” contemplated under *Topanga*. (See *Department of Corrections v. State Personnel Board*, 59
5 Cal.App.4th 131, 151 (1997).)

6 It must be clear from the record that the Regional Water Board actually analyzed all of the
7 evidence and statutory factors and that this analysis supported the agency’s final conclusion. (See
8 *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 71 Cal.App.3d 84, 93 (1977) (held written
9 findings of fact were insufficient as a matter of law because they were merely a recitation of the
10 statutory language).) Further, specific requirements regarding the factual basis must be followed,
11 including “a concise and explicit statement of the underlying facts of record that support the
12 decision.” (Gov’t Code §11425.50(b); applicable through 23 C.C.R. §648(b).) Further, if the
13 factual basis for the decision included a determination based substantially on the credibility of a
14 witness, the Regional Water Board was required to identify any specific evidence of the observed
15 demeanor, manner, or attitude of the witness that supported the determination. (*Id.*) The Regional
16 Water Board’s Order failed to meet these requirements. Without the requisite analysis and a
17 transparent view of the analytical route followed, the Regional Water Board violated the
18 requirements needed for a valid final decision.

19 The level of detail that must be included in the Regional Water Board’s consideration of the
20 factors required by statute and under the Enforcement Policy must clearly demonstrate the
21 “analytical route” traveled in making its ultimate decision. (See *Department of Corrections v. State*
22 *Personnel Board* (1997) 59 Cal.App.4th 131, 151.) It was insufficient for the Regional Water
23 Board to simply cite to unsubstantiated findings based on hearsay evidence or without proof
24 demonstrated by a citation to evidence to support those findings. The Regional Water Board was
25 required to make findings based on evidence in the record and may not claim compliance without
26 supporting evidence. (See *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 71 Cal.App.3d at 93;
27 see also accord Cal. Code Civ. Proc. §1094.5(b)(defining “abuse of discretion” where “the
28 respondent has not proceeded in the manner required by law, the order or decision is not supported

1 by the findings, or the findings are not supported by the evidence.”.)

2 As evidenced by the final Order, which was almost identical to the ACL Complaint and
3 included not a single citation to any specific exhibit or any witness testimony, the Regional Water
4 Board completely failed to support its findings with evidence. In addition, evidence contrary to the
5 findings in the ACL was presented by the Petitioners at the hearing that was apparently ignored by
6 the Regional Water Board since this evidence was not addressed or even acknowledged in the final
7 Order.

8 In addition, although at least one of the Regional Water Board members expressed an
9 opinion during deliberations at the hearing that the Petitioners’ witnesses were credible, the
10 Regional Water Board made no written findings as to the credibility of any witness. (*See* Order
11 No. R5-2013-0123.) This failure violated Gov’t Code §11425.50(b), which requires that “[i]f the
12 factual basis for the decision includes a determination based substantially on the credibility of a
13 witness, the statement shall identify any specific evidence of the observed demeanor, manner, or
14 attitude of the witness that supports the determination.” The Order contained no findings on the
15 demeanor or credibility of either the Prosecution Team’s witnesses or the Petitioners’ percipient
16 and expert witnesses.

17 Such a failure to comply with the legal requirements and an absence of supporting evidence
18 invalidates the Regional Water Board’s findings and voids the totality of Order No. R5-2013-0123.
19 (*See accord Topanga Assn., supra*, 11 Cal.3d at 515; *California Hotel & Motel Ass’n., supra*, 25
20 Cal.3d at 212.)

21 **B. The Regional Water Board Failed to Recognize that the Construction Storm**
22 **Water General NPDES Permit Does Not Prohibit Discharges of Turbid Storm**
23 **Water.**

24 Under the Construction Stormwater General NPDES Permit, as explained in detail in
25 Section B.1. above, a discharge of turbid stormwater is not prohibited and does not constitute a
26 Permit violation, even when the turbidity NAL is exceeded. (*See accord* Construction Storm
27 Water General NPDES Permit at pgs. 28-29, Section V.A.-B.; at pg. 9, para. 53 (“An exceedance
28 of a NAL does not constitute a violation of this General Permit.”) (emphasis added); and Permit

1 Fact Sheet at pages 19-20.) If there were some other part of this Section V.A. that the Regional
2 Water Board alleged that Donahue Schriber violated, the Order fails to contain any reasoning,
3 findings, or evidence to support such allegations. For this reason, this violation should be
4 dismissed in its entirety.

5 Even if NAL exceedances *did* somehow constitute a violation, the Regional Water Board
6 failed to acknowledge that the Construction Storm Water General NPDES Permit contains
7 exemptions from compliance where storm events are large enough. For example, Risk Level 3
8 discharges are *exempt* from receiving water monitoring to determine compliance with Numeric
9 Effluent Limitations, including those for turbidity, if rainfall is equal to or greater than a 5-year,
10 24-hour storm. (*See* Ex. H (Permit) at p. 30, Provision V.C.3.) Arguably, a Risk Level 2 site, such
11 as Rocklin Crossings (*see accord* Ex. 30, 56, 63, and 79), should be exempt from compliance with
12 NALs in a similar size storm event. This interpretation is supported by case law in a case where
13 the Construction Storm Water General NPDES Permit's numeric effluent limits were challenged
14 and voided. In that case, the court expressly recognized that larger storm events may exceed "the
15 capacities of available BMPs to minimize discharges." (*See accord California Building Industry*
16 *Association v. SWRCB*, Judgment in Case No. 34-2009-800000338-CU-WM-GDS at p. 9, lines 23-
17 25; *see also* Ex. H (Permit) at 25-26 (upset defense).) The failure of the Regional Water Board to
18 take these factors into consideration also calls into question the validity of the allegations made that
19 the discharge of turbid storm water violated the Construction Storm Water General NPDES Permit.

20 **C. The Regional Water Board Failed to Apply Valid Defenses Available Under the**
21 **Construction Storm Water General NPDES Permit and Federal Regulations.**

22 1. The Storm Water Discharges were Covered by an NPDES Permit and that
23 Permit's Upset Defense.

24 The ACL Complaint alleged the discharge of untreated turbid storm water to waters of the
25 United States violated Section V.A.2. of the Construction Storm Water General NPDES Permit.
26 (*See* ACL Complaint at pg. 5, Para. 21.) These allegedly unlawful discharges of storm water were
27 covered by the **upset defense** in the federal NPDES permit regulations at 40 C.F.R. section
28 122.41(n), and in the Construction Storm Water General NPDES Permit, Ex. H, at pgs. 25-26,

1 Section IV.M.¹⁰ Although the CWA and California's Porter-Cologne Water Quality Control Act
2 are "strict liability" statutes, several courts (including the 9th Circuit Court of Appeals where
3 California sits) have ruled that an upset defense *must be provided* at the very least for any
4 technology-based requirements, because technology is inherently fallible. (*See FMC Corp. v.*
5 *Train*, 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977);
6 *California Building Industry Association v. SWRCB*, Judgment in Case No. 34-2009-800000338-
7 CU-WM-GDS at p. 9, lines 23-25 (acknowledgment that BMPs can be overwhelmed).)

8 The Regional Water Board completely ignored this defense raised by Deacon in its briefs
9 and at the hearing, and did not include any discussion of this issue in Order No. R5-2013-0123.
10 However, the Construction Storm Water General NPDES Permit's BAT/BCT requirements
11 measured indirectly through NALs represent "technology-based" effluent limitations. (Ex. H,
12 Permit at 28, Section V.A., "Narrative Effluent Limitations.") An "effluent limitation" is *any*
13 *restriction* imposed on quantities, discharge rates, and concentrations of pollutants discharged from
14 point sources into waters of the United States. (CWA Section 502(11), 33 U.S.C. §1362(11); 40
15 C.F.R. §122.2; *see also* Cal. Wat. Code §13385.1(d)(may be expressed as a prohibition).) "The
16 intent of a technology-based effluent limitation is to require a minimum level of treatment for
17 industrial/municipal point sources based on currently available treatment technologies while
18 allowing the discharger to use any available control technique to meet the limitations." (EPA
19 Permit Writer's Manual, Ch. 5 at 49; Wat. Code §13360(a).) Construction storm water is required
20 to meet Best Available Control Technology Economically Achievable ("BAT") and Best
21 Conventional Control Technology ("BCT") standards, which are technology-based standards.

22 _____
23 ¹⁰ The Ninth Circuit has acknowledged the availability of the upset defense for storm water violations. (*Sierra Club v.*
24 *Union Oil Co. of California*, 813 F.2d 1480, 1488 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988),
25 *reinstated by* 853 F.2d 667 (1988).) In the *Union Oil* case, Sierra Club filed a citizen suit against Union Oil alleging a
26 number of violations of its NPDES permit limitations during a five-year period from 1979 to 1983. The violations
27 alleged involved discharges of process wastewater and stormwater from its treatment plant. Union Oil raised the upset
28 defense, asserting that a number of violations were due to circumstances beyond its reasonable control: including
unusually high levels of rainfall during the winters of 1981-1982 and 1982-1983. Ultimately, the Ninth Circuit held
that the NPDES permit did not contain an upset provision, and therefore Union Oil was not entitled to use the upset
defense to excuse any of the exceedances of its permit limitations. In this case before the State Water Board, the
permit at issue *does* contain an upset provision, which should be utilized to excuse any validly alleged violations under
this facts set forth herein.

1 (EPA Permit Writer’s Manual, Ch. 5 at 77; 33 U.S.C. §1311(b)(1)(B).) The violation of Section
 2 V.A.2. referenced in the ACL Order found that “the Discharger violated this requirement of the
 3 General Permit by discharging 76,613 gallons of turbid storm water to Secret Ravine on 30
 4 November 2012.” (Order No. R5-2013-0123 at pg. 6, para. 21.) This allegation must relate to a
 5 technology-based narrative BMP requirement (*see* Construction Storm Water General NPDES
 6 Permit Fact Sheet at pg. 6 (“Technology-Based Numeric Action Levels: this General Permit
 7 includes NALs for pH and turbidity.”) and at pg. 19 (“Technology-Based Numeric Action Levels
 8 (NALs)”); *see also* 40 C.F.R. §122.44(k)(allowing BMPs in lieu of effluent limitations)), because
 9 turbid construction storm water discharges themselves are not prohibited. (Construction Storm
 10 Water General NPDES Permit at pgs. 28-29, Section V.A.-B.; at pg. 9, para. 53.)

11 Thus, the Petitioners’ discharges occurred as the result of an “upset” as defined by federal
 12 regulations and the applicable NPDES Permit. (*See* 40 C.F.R. §122.41(n); *see also* Construction
 13 Storm Water General NPDES Permit, Ex. H, at pgs. 25-26, Section IV.M.) The federal regulations
 14 define “upset” as “an exceptional incident in which there is unintentional and temporary
 15 noncompliance with technology based¹¹ permit effluent limitations because of factors beyond the
 16 reasonable control of the Discharger.” (*See* 40 C.F.R. §122.41(n)(1).) “Upsets may be caused by
 17 external events, such as power failures or storms, or by unpreventable failures of effluent treatment
 18 equipment.” (*Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 205
 19 (1988)(emphasis added).)

20 _____

21 ¹¹ In 1982, EPA proposed to extend the upset defense to violations of water-quality-based limits. (47 Fed.Reg. at
 22 52,089/1.) EPA’s failure to do so resulted in a legal challenge. The Court reviewing the industry challenge found that:
 23 Lacking infallibility, no pollution control technology works perfectly all of the time. Occasionally, through no fault
 24 of the operator, the technology will fail, and pollution levels in the effluent will correspondingly rise. Current EPA
 25 regulations provide that when permit effluent limitations based on technological capabilities are briefly exceeded
 26 as the result of such an incident, the offending plant will nevertheless be deemed to be in compliance with the Act.
 27 [40 C.F.R. §122.41(n)] This is the so-called “upset defense.” . . . because the technology used to satisfy water
 28 quality-based permit limitations is no more foolproof than that employed to meet technology-based permit
limitations, industry petitioners contend that the rationale for the upset defense extends to water quality-based
 limitations as well.
 (*Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d at 206 (finding meritorious industry’s claim that EPA
 acted arbitrarily when it declined to provide an upset defense to WQBELs)(emphasis added).) The Court ordered EPA
 to conduct further proceedings to determine whether to extend the upset defense to violations of water quality-based
 permit limitations. It is not clear that EPA has ever complied with this court order. Thus, under the *Marathon* case, an
 upset defense must be provided where technology fails and would otherwise cause a permit violation.

1 The Petitioners proved the existence of an “upset,” through properly signed,
 2 contemporaneous operating logs and other evidence that: (a) an upset occurred due to an
 3 identifiable cause; (b) the permitted facility was being properly operated at the time of the upset; (c)
 4 notice of upset was timely submitted; and (d) remedial measures were implemented. (40 C.F.R.
 5 §122.41(n)(3)(i)-(iv); *see also* Ex. 6 and 10.) Specifically, in addition to a demonstration that the
 6 discharge was temporary¹² and unintentional,¹³ the Petitioners demonstrated that it met each of the
 7 other required factors to prove upset, as follows:

8 a. The Upset Occurred Due to an Identifiable Cause(s).

9 Federal regulations at 40 C.F.R. section 122.41(n)(3)(i) and the equivalent terms of
 10 the Construction Storm Water General NPDES Permit (Ex. H, at pgs. 25-26, Section IV.M.)
 11 require that the permittee must show that an upset occurred and identify the cause(s) of the upset.
 12 The upset in this case was due to a strong rain event. (Ex. 6 and 10, and Exhibit A, Order No. R5-
 13 2013-0123 at pg. 5, para. 20.) Others local construction sites also had similar discharge events
 14 during and as a result of this same large storm. (Ex. E (Order No. R5-2013-0520 at pg. 2, para. 10
 15 and pg. 4, para. 18), and Ex. 99 (Order No. R5-2013-0521 at pg. 2, para. 10, and pg. 3, paras. 11-
 16 12.)

17 b. The Permitted Facility was Being Properly Operated at the Time of
 18 the Upset.

19 Federal regulations at 40 C.F.R. section 122.41(n)(3)(ii) and the equivalent terms of the
 20 Construction Storm Water General NPDES Permit (Ex. H, at pgs. 25-26, Section IV.M.) require
 21 that the permitted facilities were being operated properly at the time of the upset. The Regional
 22 Board failed to provide any evidence to rebut this fact. Importantly, as stated above, the site had
 23 not experienced an off-site storm water discharge before this event. (*Id.*) The site had been
 24 _____

25 ¹² Clearly, the evidence demonstrated, and there was no rebuttal, that this spill event was of a temporary nature,
 26 corresponding to the severe rain event in the foothill area above Sacramento and subsiding soon thereafter. (Ex. K at
 27 Figure 1 – Flow Hydrograph at Gauge Station (and modified version used at hearing in power point presentation to
 show small sliver of time representing actual discharge events.) Moreover, this rain event’s average rainfall intensity
 exceeded the average intensity of a 5 year, 24-hour storm, and the documented storm intensity exceeded that of a 25-
 year, 24 hour storm event. (*See* Ex.K, RSC 9/4/13 Memo at pg. 2.)

28 ¹³ No evidence exists that this discharge event was intentionally caused.

1 inspected by no less than 5 different entities: the QSD, the QSP, the contractor's site inspector, the
2 City of Rocklin, and the Regional Water Board's inspector. None of these people pointed out any
3 glaring problems at the site that would have caused the discharges that occurred on November 30th,
4 2012.

5 Even well operated sites can occasionally have unanticipated discharges, just as well
6 operated treatment systems can experience occasional malfunctions. (*See Weyerhaeuser Company*
7 *v. Costle*, 590 F.2d. 1011, 1056 (D.C. Cir. 1978)("Waste treatment facilities occasionally release
8 excess pollutants due to such unusual events as plant start-up and shut-down, equipment failures,
9 human mistakes, and natural disasters."); *Marathon Oil v. EPA*, 564 F.2d 1253, 1273 (9th Cir.
10 1977)(emphasis added).) In the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded
11 that a facility using proper technology operated in an exemplary fashion would not necessarily be
12 able to comply one hundred percent of the time, and thus an upset defense in the permit was
13 necessary. Further, in the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded an upset
14 defense in the permit was necessary and could be used to cover instances of equipment failure and
15 *human error*. These events, which could be characterized as an act of God, human error, and/or
16 BMP/technology failures, would be covered by the upset defense as set forth in *Marathon Oil*.

17 c. Notice of the Upset was Submitted as Required.

18 Federal regulations at 40 C.F.R. section 122.41(n)(3)(iii) and the equivalent terms of the
19 Construction Storm Water General NPDES Permit (Ex. H, at pgs. 25-26, Section IV.M.) require
20 that the permittee submitted timely notice of the upset. (*See* 40 C.F.R. section 122.41(n)(3)(iii)
21 (referencing paragraph 122.41(l)(6)(ii)(B) (24 hour notice); and Ex. H, at H, at pgs. 25-26, Section
22 IV.M.1.c.) The Regional Water Board's inspector was notified immediately because he was
23 present on the construction site the morning when the discharges occurred. (*See* Ex. 3.) This initial
24 notice was confirmed with a written report as required by the Regional Water Board. (*See* Ex. 6
25 and 10.)¹⁴ Thus, the Petitioners timely submitted the notice as required by both the federal
26

27
28 ¹⁴ An extension of time to submit the NAL Exceedance Report requirement was granted by Regional Water Board.
(*See* Ex. 9.)

1 regulations and the NPDES permit. The findings in the ACL Order failed to acknowledge or
2 recognize these uncontroverted facts.

3 d. Remedial Measures were Implemented as Required

4 Federal regulations at 40 C.F.R. section 122.41(n)(3)(iv) and the equivalent terms of the
5 Construction Storm Water General NPDES Permit (Ex. H, at pgs. 25-26, Section IV.M.1.d.) require
6 that the permittee complied with any remedial measures. The regulations reference requirements
7 under paragraph (d) of 40 C.F.R. section 122.41. The EPA regulations at section 122.41(d) provide
8 the following:

9 “The permittee shall take all reasonable steps to minimize or prevent any discharge or
10 sludge use or disposal in violation of this permit which has a reasonable likelihood of
adversely affecting human health or the environment.”

11 (40 C.F.R. §122.41(d) (Duty to Mitigate); *see also* Ex. H, at pg. 22, Section IV.D. (emphasis
12 added).)

13 On December 18, 2012, Petitioners submitted a detailed BMP report. Then, on January 25,
14 2013, the Petitioners submitted a detailed written NAL Exceedance Report further describing the
15 events and setting forth the corrective actions taken, and further improvements in BMPs planned to
16 prevent similar events from occurring in the future. (*See* Ex. 6 and 10.) These repairs and
17 improvements were all timely made. (*Id.*) These remedial activities were successful since no other
18 untreated storm water discharges have occurred since December 18, 2012. (*Ibid.*)

19 All of the above demonstrates that the incident experienced by the Petitioners was an
20 “upset.” Because there was no rebuttal presented on this issue, the Petitioners have successfully
21 established an *affirmative defense* against liability for this incident, and no penalty can be assessed
22 for this upset condition.¹⁵

23 The *Marathon Oil* decision cited above is very instructive in this case. In the *Marathon Oil*
24 case, the Court determined that “it would be impossible and impracticable to set a standard that
25 _____

26 ¹⁵ The ACL Order failed to include any conclusions raised at the hearing about the upset defense at all. The Regional
27 Water Board also cited to no evidence to demonstrate that any of the upset defense provisions were not met or that any
28 exceptions applied. For these reasons, the Regional Water Board failed to disprove the existence of an upset and this
affirmative defense must be recognized for Violation 1.

1 could be met 100 percent of the time” even assuming the technology is “employed in an exemplary
2 fashion.” (See *Marathon Oil*, 564 F.2d at 1272.) The Court in *Marathon Oil*, therefore, required
3 EPA to place an “upset” provision in the permit to deal with this event. (*Id.* at 1273.) Other case
4 law holds similarly:

5 “This court is of the opinion that EPA should provide an excursion provision Plant
6 owners should not be subject to sanctions when they are operating a proper treatment
7 facility. Such excursions are provided for ... under the Clean Air Act, ..., and this Court
8 sees no reason why appropriate excursion provisions should not be incorporated in these
9 water pollution regulations.” (emphasis added)

9 (*FMC Corp v. Train*, 539 F.2d 973, 986 (4th Cir. 1976); see also *Portland Cement Ass’n v.*
10 *Ruckleshaus*, 486 F.2d 375, 398-99, n. 91 (D.C.Cir. 1973) *cert. denied* 417 U.S. 921 (1974)
11 (informal treatment of upsets is inadequate; “companies must be on notice as to what will constitute
12 a violation”); see also *California Building Industry Association v. SWRCB*, Judgment in Case No.
13 34-2009-800000338-CU-WM-GDS at p. 9, lines 23-25.)

14 A very telling analogous case is the case of *Essex Chem. Corp. v. Ruckleshaus*, 486 F.2d
15 427, 432-433 (D.C.Cir. 1973) *cert. denied* 416 U.S. 969 (1974). In that case, the Court held that
16 “variant provisions appear necessary to preserve the reasonableness of the standards as a whole....
17 The record does not support the ‘never to be exceeded’ standard currently in force.” *Id.* (emphasis
18 added). The Regional Water Board apparently believes that a similar “never to occur” or zero
19 discharge standard exists in the NPDES permit for turbid construction storm water discharges.
20 Such a standard is technology-based because BMPs are a form of technology standard and, thus, is
21 subject to the upset defense. Otherwise, the standards would not be reasonable as set forth in the
22 *Essex* case, and as required under the California Water Code at sections 13000 and 13263.

23 The Ninth Circuit has held or at least alluded to the fact that a permit’s “upset” defense
24 should be utilized to offset these expected, but unintentional and temporary instances of non-
25 compliance. (See *Marathon Oil*, 564 F.2d. at 1274; *FMC Corp.*, 539 F.2d at 986.) The Petitioners
26 encourage the State Water Board to recognize this affirmative defense and deem the November 30,
27 2012 discharges to not be “violations” subject to the assessment of penalties. If it is determined that
28 there was a permit violation notwithstanding Petitioners’ arguments that there was no violation,

1 then the State Water Board should utilize the “upset” defense to determine that the instances of
 2 alleged permit noncompliance do not constitute “violations” for enforcement purposes. If such
 3 recognition is not provided, then the upset defense provided in the Permit and federal regulations
 4 are illusory and meaningless, which cannot be the case.¹⁶

5 Given the facts, the Petitioners have demonstrated the existence of an upset, and the
 6 relevant case law makes it clear that construction storm water discharges can be subject to the upset
 7 defense recognized in the Construction Storm Water General NPDES Permit. The Regional Water
 8 Board failed to discuss the upset defense raised in the moving papers and at the hearing. Therefore,
 9 the Petitioners ask that the State Water Board recognize and apply an upset defense in this case.

10 **D. The Regional Water Board’s imposition of a penalty inconsistent with other**
 11 **construction storm water ACL penalties in its own region and statewide.**

12 1. The Per Gallon Amount of the Penalty is Inconsistent with Other
 13 Construction Storm Water Enforcement Actions Statewide and in its own
 14 Region.

15 The Regional Water Board failed to include any findings or evidence that it considered
 16 other penalties when adopting this fine. Further, the Regional Water Board failed to acknowledge
 17 that many ACL orders have been adopted for construction storm water discharges under the 2010
 18 Enforcement Policy where the per gallon penalty was *substantially less*. For example, in the
 19 recent enforcement action for the Cascade Crossing construction site, in ACL No. R5-2013-0520,
 20 which occurred during the same large rain event as the one in this case, the Prosecution Team for
 21 that matter used \$2.00 per gallon, not \$10 per gallon. (See Ex. E to Van Veldhuizen Decl., ACL
 22 No. R5-2013-0520 at Attachment A, p. 2.) The following justification was provided in that case:

23 “Because of the volume of the discharge, it is considered a “high volume discharge” under
 24 the Enforcement Policy. For high volume discharges, the Enforcement Policy allows a civil
 25 liability value of either \$2 per gallon (for sewage) or \$1 per gallon (for recycled water)
 26 instead of the maximum civil liability of \$10 per gallon allowed under Water Code section

27 ¹⁶ “It is an accepted canon of statutory interpretation that we must interpret the statutory phrase as a whole, giving
 28 effect to each word and not interpreting the provision so as to make other provisions meaningless or superfluous.” *U.S.*
v. 144,774 pounds of Blue King Crab, 410 F.3d 1131, 1134 -1135 (9th Cir. 2005); *see also Northwest Environmental*
Advocates v. City of Portland, 56 F.3d 979, 983 (9th Cir. 1995)(rejecting plaintiffs’ proposed permit interpretation in
 part because “this reasoning would require the court to read [certain provisions] out of the permit altogether.”)
 (emphasis added).

1 13385. In this case, it is appropriate to use the \$2 per gallon value in calculating the liability
2 because of the high volume.”

3 While part of the penalty in Cascade Crossing was for a larger discharge event of 193,500
4 gallons, the Regional Board also used \$2/gallon for a smaller discharge event *on a different day* of
5 37,500 gallons, about half the size of the event at issue for Rocklin Crossings. (*See* Ex. E at
6 Attachment A, p. 3.) Thus, the size of the event in the Rocklin Crossings case at issue should not
7 have been used as a justification to vary from the clear mandate in the Enforcement Policy to use
8 \$2 per gallon for stormwater discharges exceeding 1000 gallons. (*See also accord* Ex. F, Placentia-
9 Yorba Linda Unified School District, ACL No. R8-2010-0024 at Attachment A (applying \$2 per
10 gallon to smaller discharge of 55,887 gallons).)

11 All discharge penalties in similar construction stormwater matters should be determined in
12 a manner consistent with the express goals and intent of the 2010 Enforcement Policy. The final
13 ACL Order fails to meet that consistency requirement. Most all construction stormwater ACL
14 penalties found in California that were imposed after adoption of the 2010 Enforcement Policy¹⁷
15 have used \$2.00 per gallon as the starting point for calculating base liability. In one matter where
16 \$2 per gallon was not used, Region 8 did not automatically jump from \$2 per gallon to the
17 maximum of \$10 as was done in Donahue Schriber’s case, but used a lower amount of three dollars
18 per gallon. (*See id.* (R8-2010-0025).) A justification for using the maximum amount of \$10/gallon
19 as the starting point in the Rocklin Crossings case was not provided.

20 //

21 _____
22 ¹⁷ The only exceptions were in the enforcement action against EI-PLA 75, LLC, ACL No. R8-2010-0025 (Ex. G.),
23 where Region 8 used \$3.00 per gallon and in a Caltrans Order where it was not imminently clear what was used, but if
24 calculations were done, it appeared that \$10/gallon was used initially, but the penalty was ultimately based on
25 Economic Benefit alone (Ex. 89, Order No. R2-2010-0071 at pgs. A1-A4, A7) and was settled for a lesser amount
26 (Order No. R202011-0024 (not allowed to be added at the hearing, but administratively noticeable by the State Water
27 Board). In the EI-PLA matter, the situation was distinguishable because the discharge was larger (101,631 gallons)
28 and the ACL followed serial enforcement actions against the discharger by the City of Placentia (*see* Ex. G, ACL
Order No. R8-2010-0025 at p. 2, para. 5.b.), two Stop Work Orders, a Cease and Desist Order, two citations totaling
\$300 (*id.*), and two Notices of Violation from the Santa Ana Regional Board (*id.* at pg. 3, para. 5.d. and pg. 4, para.
5.k.). That Complaint cited a litany of alleged violations, including failing to employ effective erosion and sediment
controls despite numerous previous warnings and inspections, and failing to implement effective tracking and
perimeter controls, effective trash and waste management controls, and adequate storm drain protection among other
violations. (*See id.* (R8-2010-0025).) Similar facts were not present in the Rocklin Crossings matter.

1 Thus, the Regional Water Board wholly failed to demonstrate its penalty was consistent
2 with other enforcement actions in California under the new 2010 Enforcement Policy on a per
3 gallon basis. Such differential treatment not only violates the consistency requirements of the
4 Enforcement Policy (*see* Section B.3. above), it also raises the issue of equal protection under the
5 law. If the law is the same in both places, but the Petitioners are being punished more harshly
6 without adequate justification, then constitutional equal protection requirements have been
7 violated. For the reasons set forth above, if not overturned on other grounds, ACL Order No. R5-
8 2013-0123 must be recalculated using a \$2.00 per gallon base amount in order to be consistent with
9 the Enforcement Policy and with other ACLs issued both statewide and in this region.

10 2. The Regional Water Board's Harm Penalty Factor Determination Was Also
11 Inconsistent with Other Recent ACL Orders.

12 As previously stated, the Enforcement Policy requires that ACL penalties be fair and
13 consistent. (*See* Section B. 3. above; *see also* Ex. D at pgs. 1, 2, 9, 10, and 32.) Nevertheless, the
14 Regional Water Board failed to demonstrate that that the challenged penalty adjustment factor for
15 Harm was fairly assigned by failing to adequately demonstrate its Harm factor analysis was
16 consistent with other ACLs. (*See* Order No. R5-2013-0123.)

17 Moreover, the assignment of a "3" to this spill for Harm was inconsistent with other
18 enforcement actions for construction storm water and other discharges. (*See e.g.*, Ex. 89, Order No.
19 R2-2010-0071 at pg. A3 (This ACL had a *lower score* even when many more types of species of
20 concern might have been involved: "**Score: 2 - Below Moderate**"); Ex. F, Order No. R8-2010-
21 0024 (Attachment A (Harm score of 2 – Below Moderate Risk); ACLC No. R9-2012-0036 (Harm
22 score of 2 (moderate) for greater than 5 million gallon sewage spill); ACLC No. R2-2011-0006 at
23 (Harm score of 3 where *lagoon closed to public for 14 days*); ACLC No. R2-2010-0102,
24 Supporting Memo (Harm score of 1 for spill in wet weather when human use was minimal and
25 sewage is diluted); ACL Complaint No. R2-2012-0055 (Harm score of 2 or 1 due to diluted wet
26
27
28

1 weather flows, posting due to stormwater runoff, limited recreation in wet weather).¹⁸ Despite this
2 available information, the Regional Water Board failed to meet its burden of proof to establish that
3 its final Harm factor was fair and consistent with other enforcement actions as required by the
4 Enforcement Policy (Ex. D). Thus, the Regional Water Board's final number on the Harm factor
5 suffers from severe inconsistency, and must be adjusted to lower the penalty, if any, imposed upon
6 the Petitioners.¹⁹ For these reasons, the Regional Water Board's Harm factor analysis was unlawful
7 and must be overturned.

8 3. The State Board Must Adjust this ACL to Ensure Statewide Consistency.

9 Principles of due process and equal protection require fundamental fairness in adjudicatory
10 hearings, and also require that persons subject to legislation or regulation that are in the same
11 circumstances be treated alike. (U.S. Const. amend. XIV, §1; Cal. Const. art. I, §§ 7, 15.) When
12 comparing the Rocklin Crossings ACL to other ACLs in the Central Valley Region or elsewhere in
13 the state, the Regional Water Board did not treat similar discharges similarly. The ACL penalty is
14 neither fair nor consistent with other recent enforcement actions under similar laws. Such
15 differential treatment raises issues of equal protection and fundamental fairness. In this case,
16 Donahue Schriber is being punished more harshly than other similar situated construction
17 stormwater dischargers without adequate justification, thereby potentially violating constitutional
18 equal protection requirements.

19 The State Board must modify the Rocklin Crossings ACL to be consistent with other
20 similar discharges using the clear terms of the 2010 Enforcement Policy, which explicitly states
21 that: “[e]xamples of circumstances warranting an adjustment under this step are: c. The calculated
22 amount is entirely disproportionate to assessments for similar conduct made in the recent past using
23 the same Enforcement Policy.” (See Enforcement Policy at pg. 19 (Step 7 – Other Factors as
24 Justice may Require).)

25 _____
26 ¹⁸ To the extent any of these ACLs or ACL Complaints were not in the administrative record, Petitioners request that
the State Water Board take official administrative notice of these official Water Board documents.

27 ¹⁹ See Ex. 90. The Prosecution Team provided a spreadsheet demonstrating how modifications to the “per gallon”
28 factor substantially affected the ultimate penalty amount, but failed to do the same for the harm factor.

1 **E. The Regional Water Board Failed to Support Its Findings on Harm.**

2 The Regional Water Board found that the “potential harm to beneficial uses was determined
3 to be **moderate** (i.e. a score of 3), which is defined as a ‘moderate threat to beneficial uses (i.e.,
4 impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely
5 to attenuate without appreciable acute or chronic effects).” (Order No. R5-2013-0123 at Attachment
6 A, pg. 1.) However, the Prosecution Team failed to present any evidence of, much less prove, any
7 potential or actual harm that could or did occur to beneficial uses as a result of the discharges.
8 Similarly, the Regional Water Board failed to cite any evidence or include findings regarding the
9 potential or actual harm to beneficial uses from the discharges.

10 Although the Regional Water Board assigned a number to each of the factors set forth in the
11 Enforcement Policy, there were little to no citations to evidence to adequately explain the basis for
12 each of these numbers. (Order No. R5-2013-0123 at Attachment A, pgs. 1-3.)

13 For example, the Regional Water Board deemed the Petitioners’ November 30, 2012
14 discharges to warrant the score of 3, or moderate impact and harm to beneficial uses. Yet, the
15 Regional Water Board cited only irrelevant²⁰ hearsay evidence to support this arbitrary
16 determination. To the extent that the Regional Water Board relied on the Environmental Impact
17 Report for the construction project and its technical analysis, that 2005 Draft and 2008 Final EIR
18 and accompanying technical report could not and did not opine on the potential harm of the
19 discharges at issue four to seven years later. (Ex. 21, 22 and 92.) Moreover, the EIR and
20 accompanying documents and the conclusions contained therein are hearsay for which no witnesses
21 were presented by the Prosecution Team to opine on its contents. Thus, the Order failed to provide
22 any support for its harm determination.

23 In addition, this Harm Factor was directly contrary to the un rebutted expert opinions
24 provided by the Petitioners. The Regional Water Board members failed to include any reasons for
25

26 ²⁰ Petitioners’ objections to the admission of EIR based on lack of foundation and relevancy grounds were also
27 improperly overruled. No expert testimony was provided explaining the relevancy of the EIR to the discharges at issue
28 in this matter. Moreover, Petitioners’ expert explained why the EIR could not and did not support the harm alleged in
the ACL.

1 not accepting the opinions of Dr. Michael Bryan, a Ph.D. in Fisheries Biology and unimpeachable
2 expert on issues related to harm to aquatic life from sediment discharges. Dr. Bryan's opinion that
3 the Harm Factor should have be a "1" instead of a "3" was not refuted and thus, as the only
4 evidence on the level of potential harm from the discharges, should have formed the basis for the
5 ACL Order's final calculations of the applicable penalty.

6 The State Water Board must keep in mind that, in disciplinary administrative proceedings,
7 the burden of proof is upon the Regional Water Board and guilt must be established to a reasonable
8 certainty and *cannot be based on surmise or conjecture, suspicion, theoretical conclusions, or*
9 *uncorroborated hearsay.* (See *Cornell v. Reilly* (App. 1 Dist. 1954) 127 Cal.App.2d 178, 273 P.2d
10 572; see also Cal. Evid. Code §500 (stating "Except as otherwise provided by law, a party has the
11 burden of proof as to each fact the existence or nonexistence of which is essential to the claim".))
12 The State Water Board has also confirmed that "[i]t is up to the Regional Board staff to
13 *affirmatively prove each element....*" (See *In the Matter of the Petition of Freedom County*
14 *Sanitation Petitioners*, SWRCB Order No. WQ 87-2 (emphasis added).)

15 In this case, the Regional Water Board failed to support its Harm factor analysis with
16 adequate findings and with direct supporting evidence. In addition, the Regional Water Board
17 failed to cite to any non-hearsay evidence to support its findings of moderate harm. For these
18 reasons, the unsupported and inaccurate findings of harm must be overturned.

19
20 **F. The Regional Water Board's awarding of a \$10 per gallon penalty was**
21 **unsupported by the plain text of the Enforcement Policy and Unreasonable.**

22 In the discretionary penalty imposed for the alleged discharge violations in ACL No. R5-
23 2013-0123 against Donahue Schriber, the Regional Water Board, without reason or any analysis,
24 supported the Prosecution Team's use of \$10 per gallon to compute the base liability amount. (See
25 Order R5-2013-0123, Attachment A at pg. 4; see also ACL Complaint No. R5-2013-0519, Ex. 13,
26 at pp. 7-8, and Attachment A at pp. 3-4.) The justification for the use of this amount was the
27 same in both documents and was as follows:

28 "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

1 section 13385 is \$10 per gallon for discharges. While the Enforcement Policy states that a
2 lower initial per-gallon value may be used for “high volume” discharges, for this case,
3 Water Board staff do not recommend using less than \$10/gallon in the initial penalty
4 calculation, given the relatively small volume of discharge on 30 November 2012 and the
5 beneficial uses of the receiving water.” (*Id.* at p. 3.)

6 This recommendation, however, ignores the express language and requirements in the
7 Enforcement Policy. Further, the statutory maximum of \$10 per gallon should not have been used
8 in this case since there was no supporting evidence to prove that this 76,613 gallon event
9 constituted a “relatively small volume of discharge.” Further, the Enforcement Policy makes clear
10 that, for sewage spills and stormwater, a maximum of \$2 per gallon should be used. This was
11 meant to be the default requirement *unless* findings have been made, supported by adequate
12 reasoning and evidence cited in the ACL, that the penalty is inappropriately small and that the
13 discharge was either a dry weather discharge or a small volume discharge that impacts beneficial
14 uses.

15 The Enforcement Policy only allows a maximum per gallon amount for stormwater
16 discharges above the specifically prescribed \$2 per gallon “[w]here reducing these maximum
17 amounts results in an inappropriately small penalty, such as dry weather discharges or small
18 volume discharges that impact beneficial uses.” (*See* Ex. D at p. 14 (emphasis added).) If the
19 section of the Enforcement Policy applies only to high volume discharges (and not small volume
20 discharges), as the Prosecution Team alleged at trial, this section would not include the example of
21 “small volume discharges that impact beneficial uses,” because small volume would not qualify
22 regardless of whether they impacted beneficial uses. In other words, the Prosecution Team’s
23 interpretation of the Enforcement Policy, which was apparently accepted by the Regional Water
24 Board, impermissibly ignores the words – “small volume discharges” – in this section rendering
25 them meaningless. In other words, the Prosecution Team’s interpretation of the Enforcement
26 Policy impermissibly renders the words – “small volume discharges” - as mere surplusage. (*Kraus*
27 *v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.) [courts should give meaning to
28 every word of a statute if possible, and should avoid a construction making any word surplusage.]

1 When specific words follow general words in a statute “the general term or category is restricted
 2 to those things that are similar to those which are enumerated specifically. [Citation.] . . . [I]f the
 3 Legislature intends a general word to be used in its unrestricted sense, it does not also offer as
 4 examples peculiar things or classes of things since those descriptions then would be surplusage.
 5 [Citation.]” (*Ibid.*)

6 The Regional Water Board failed to demonstrate that the use of \$2 per gallon in its
 7 calculation would result in an “inappropriately small penalty.” Further, the discharge in question
 8 was not a “dry weather discharge” since it occurred during a very large rain event. (*See Van*
 9 *Veldhuizen Decl.* at ¶¶ 11-13.) Finally, the Regional Water Board failed to demonstrate this was a
 10 “small volume discharge” or that the discharge would or did “impact beneficial uses.” In fact,
 11 Petitioners’ fisheries expert in this case, Dr. Michael Bryan, concluded that “level of impact,
 12 should any impact to aquatic life have occurred, would have been sufficiently small in magnitude,
 13 duration, and geographic extent that no appreciable harm to any of the populations of aquatic
 14 organisms using Secret Ravine would have occurred.” (*See Ex. I* at p. 11; *see also Ex. J*
 15 (*Curriculum Vitae of Dr. Michael Bryan.*)

16 Finally, *even if* such a demonstration of impacts had been made, the Regional Water Board
 17 provided no justification whatsoever why the *maximum* per gallon amount of \$10 per gallon was
 18 used instead of some lesser amount between \$2 and \$10 per gallon. (*See Ex. 13, Attachment A;*
 19 *Ex. D (Enforcement Policy)*(if justification demonstrated, “a higher amount, up to the maximum
 20 per gallon amount, may be used.”)(emphasis added).) There was no justification for using the
 21 maximum \$10 per gallon amount, particularly when the Prosecution Team’s calculated a Harm
 22 Factor of 6, which only equates to a harm factor of *moderate*, not high, and does not provide
 23 justification for a higher per gallon penalty amount. Further, according to the Petitioners’ fisheries
 24 expert in this case, there was no evidence of impacts to beneficial uses from the discharges and the
 25 more accurate potential harm factor was **minor**, not moderate. (*See Ex. I* at p. 10-11.) Thus, no
 26 justification has been provided or exists for exceeding the Enforcement Policy’s specifically
 27 prescribed maximum of \$2 per gallon or for using the *maximum* of \$10 per gallon for storm water
 28 discharges.

1 In this case, for the reasons set forth herein, Petitioners respectfully request that the State
2 Board recalculate the proposed penalty in a manner consistent with the requirements of the
3 Enforcement Policy, using \$2 per gallon.

4 **G. The Regional Water Board’s Penalty was Unreasonably High for a Single Day**
5 **Event.**

6 Courts have recognized that sometimes rote application of penalty provisions can produce
7 excessive penalties. (*See Hale, supra*, 22 Cal.3d at 404 (“The exercise of a reasoned discretion is
8 replaced by an adding machine.”)(emphasis added.); *see also Kinney v. Vaccari* (1980) 27 Cal.3d
9 348, 352 (“We first noted that the Legislature may constitutionally impose *reasonable* penalties to
10 secure obedience to statutes enacted under the police power, so long as those enactments are
11 *procedurally fair* and reasonably related to a proper legislative goal.”)(emphasis added).) The trier
12 of fact must use its discretion as applied to the facts of the case or else the penalty could violate the
13 process of law. (*Id.*; *Lungren v. City and County of San Francisco* (1996) 14 Cal.4th 294, 313
14 (stating that trier of fact should “take into account the good faith motivation of the offend[er].”))

15 Thus, the imposition of this excessive penalty without adequate consideration of the
16 statutory factors as discussed above (Wat. Code, §13385(e), §13327) and without adequate
17 exercise of its discretion is violated federal and state constitutional prohibitions against “excessive
18 fines.” (U.S. Const., 8th Amend; Cal. Const., art. I, §17.)

19 **H. The Petitioners Were Denied Adequate Due Process in the ACL Hearing**
20 **Process.**

- 21 1. Regional Water Board Assistant Executive Officer, Ken Landau, as a
22 Member of the Advisory Team, Should Not Have Been Allowed to Question
or Cross Examine Witnesses.

23 The Assistant Executive Officer, Ken Landau, was designated as a member of the Advisory
24 Team in this matter and was designated to “provide legal and technical advice to the Board.” (*See*
25 *Ex. 13*, attached Hearing Procedures at pgs. 2-3.) The Petitioners object to the fact that Mr. Landau
26 was allowed to question and cross-examine witnesses at the hearing because, by doing so, he was
27 effectively acting in both an advisory and prosecutorial role in the same proceeding. (*See id.* at pg.
28 2 (describing the functions of the Prosecution Team as “those who will act in a prosecutorial role

1 by presenting evidence for consideration by the Board” and stating that “[t]o help ensure the
2 fairness and impartiality of this proceeding,” the two functions “have been separated.”) Also,
3 notably, Mr. Landau was the only one on the Advisory Team questioning witnesses, as the
4 Advisory Team’s legal counsel did not ask any questions of witnesses.

5 Such questioning was also unnecessary as there were at least five (5) members of the
6 Prosecution Team available to cross-examine witnesses about previous testimony, and each of the
7 present Regional Water Board members were willing and able to ask witnesses clarifying
8 questions. Allowing a member of the Advisory Team to essentially act as an additional member of
9 the Prosecution Team and ask questions and create more evidence to seemingly trying to prove the
10 Prosecution Team’s case violated the guarantees of due process because, where an agency acts as
11 both prosecutor and adjudicator, a strict separation of prosecutorial and advisory functions must be
12 maintained. (*See Morongo Band of Mission Indians v. State Water Resources Control Board*
13 (2009) 45 Cal.4th 731, 737-742; *Department of Alcoholic Beverage Control v. Alcoholic Beverage*
14 *Control Appeals Bd.* (2006) 40 Cal.4th 1, 10 “[p]rocedural fairness does not mandate the
15 dissolution of unitary agencies, but it does require some internal separation between advocates and
16 decision makers to preserve neutrality” (emphasis added)); *see also Quintero v. City of Santa Ana*
17 (2003) 114 Cal.App.4th 810, 817, *disapproved on other grounds in Morongo Band of Mission*
18 *Indians v. State Water Resources Control Board, supra* [holding that constitutional due process had
19 been violated where the Deputy City Attorney had acted in both an advisory role to the state
20 personnel board after acting in a prosecutorial role in the same matter, stating: “For the [personnel
21 board] to allow its legal adviser to also act as an advocate before it creates a substantial risk that the
22 [personnel board]’s judgment in the case before it will be skewed in favor of the prosecution.”.);
23 *County of Los Angeles v. SWRCB*, Los Angeles Superior Court Case No. BS 122724 (June 2, 2010
24 Minute Order)(remanding the matter back to the Regional Water Board to ensure that “the same
25 person does not act as both an advocate before the Board and an advisor to the Board.”)) Since Mr.
26 Landau acted as both an advocate and an advisor before the Board, his participation was improper
27 and tainted the “fairness and impartiality” of this proceeding.

28

1 Voting Regional Water Board members were permitted to and did ask ample questions of
2 the witnesses during this adversarial hearing for the purpose of clarifying the witnesses' testimony.
3 In addition, members of the Prosecution Team asked questions of witnesses during their direct
4 and/or cross-examinations in order to elicit facts and admissions. Because this occupied the field
5 of necessary questioning, no need existed for a member of the supposedly "neutral" Advisory
6 Team, who was neither supposed to be putting on nor advocating for the agency's case-in-chief nor
7 deciding the resolution of the case, to question or cross-examine witnesses. By doing so, the
8 Assistant Executive Officer necessarily took on the role of an advocate rather than a neutral
9 advisor, creating the appearance of bias in favor of the Prosecution Team and against the
10 Petitioners, and interjecting a substantial risk that the Regional Water Board's judgment in the case
11 was similarly skewed in favor of the prosecution. Further, many of the questions asked by the
12 Assistant Executive Officer were of a highly technical nature, amounting to requests for
13 conclusions or admissions, and were objectionable on other grounds. "Procedural fairness ... does
14 require some internal separation between advocates and decision makers to preserve neutrality."
15 (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40
16 Cal.4th 1, 10.) Therefore, if the entire proceeding is not ruled improper, then at the very least all
17 questions to witnesses posed by the Assistant Executive Officer, and the witnesses' answers to all
18 such questions, should be stricken from the record and deemed not considered by the Regional
19 Water Board. A failure to do so violates due process, and violates the requirement for a separation
20 of duties. (Gov't Code §11425.10(a)(4).)

21 2. Regional Water Board Assistant Executive Officer Andrew Altevogt Should
22 Not Have Been Allowed to Testify During the Prosecution Team's "Closing
23 Argument."

24 Despite objections from Petitioners and contrary to the Regional Water Board Chair's prior
25 rulings, the Assistant Executive Officer, Andrew Altevogt, was permitted to testify as to evidence
26 not introduced at trial and advance new arguments during what was supposed to be the Prosecution
27 Team's closing argument. This testimony was improper and deprived Petitioners of a fair hearing
28 in violation of their due process rights.

1 It is well-settled that improper argument, such as urging facts not justified by the record in a
2 closing argument, is misconduct and may warrant a new trial.²¹ (*City of Los Angeles v. Decker*
3 (1977) 18 Cal.3d 860, 870; *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 745.) Here, Mr. Altevogt
4 committed prosecutorial misconduct in testifying during the Prosecution Team's closing argument
5 that the Contractor lied to the Regional Water Board staff about what BMPs were installed at the
6 site despite no such evidence being presented during the trial, and in direct contradiction to sworn
7 witness testimony. (See e.g., *Kenworthy v. State of Calif.* (1965) 236 Cal.App.2d 378, 398
8 [insinuating existence of "facts" not proved at trial improper argument]; see also *Stone v. Foster*
9 (1980) 106 Cal.App.3d 334, 355 [personal attacks on the character or motives of the adverse party
10 and witnesses are misconduct.].) This situation was especially egregious here because not only
11 were Petitioners not afforded an opportunity to rebut Mr. Altevogt's new testimony, but due to his
12 position as the Assistant Executive Officer, Mr. Altevogt's testimony and arguments likely carried
13 considerable weight with the Regional Water Board and resulted in discussion by the Board
14 members about modifying the Culpability factors in the ACL, even though this issue was not
15 challenged and properly part of the hearing.

16 Similarly, Mr. Altevogt's testimony alleging that the proposed penalty in the ACL was
17 warranted because lowering the amount would result in the fine being just a cost of doing business
18 was also improper and deprived Petitioners of a fair hearing. This argument was permitted over
19 the contemporaneous objection of Petitioners and despite the fact the Regional Water Board
20 Chair/Advisory Team had granted Petitioners' pre-hearing motion to exclude any argument that a
21 higher fine was warranted to deter similar violations. Specifically, the Board Chair's ruled:
22 "Deterrence was not offered as a rationale for the \$10 per gallon base liability calculation, and this
23 argument cannot subsequently be introduced as a "rebuttal" argument" and "The Board's Advisory
24 Team orders that the discussion of whether or not the use of \$10 as a base assessment figure **not**
25 **involve any discussion of deterrence.**" (Board Chair Rulings on 26 and 25 September 2013 Re:
26

27
28 ²¹ This also violated the prohibition on surprise evidence in the Hearing Procedures. (See Ex. 13, attached Hearing Procedures at pg. 5.)

1 ACL Complaint R5-2013-0519 (emphasis added.) The Prosecution Team's request for
2 reconsideration on this issue was also denied:

3 With respect to deterrence, the Prosecution Team has contended
4 that its legal analysis was contained in the ACL Complaint. That
5 analysis specified that the assessment of *civil liability greater than
6 the economic benefit was sufficient to serve a deterrent effect.
Deterrence was not offered as a rationale for the \$10 per gallon
base liability calculation, and this argument cannot subsequently
be introduced as a "rebuttal" argument.*

7 (Board Chair Rulings 26 September 2013 Re: ACL Complaint R5-2013-0519 (emphasis added).)

8 Based on these rulings, Petitioners did not address deterrence during the trial. Nor did the
9 Prosecution Team during its case-in-chief. Despite the foregoing, Mr. Altevogt was permitted to
10 testify during the Prosecution Team's closing argument, over Petitioners' objections, that the
11 proposed penalty in the ACL was warranted because lowering the amount would result in the fine
12 being just a cost of doing business. This was improper. Referring directly or indirectly to matters
13 ordered excluded is improper argument and an extreme form of misconduct. (See *Hawk v. Sup.Ct.*
14 *(People)* (1974) 42 Cal.App.3d 108, 126-127.) Mr. Altevogt's testimony also violated the Hearing
15 Procedures prohibition on surprise evidence and the prohibition on insinuating existence of "facts"
16 not proved at trial because no argument or evidence was presented on this issue during the trial.
17 (See Ex. 13, attached Hearing Procedures at pg. 5; *City of Los Angeles, supra*, 18 Cal.3d at p. 870;
18 *Malkasian, supra*, 61 Cal.2d at p. 745.) Petitioners were not afforded an opportunity to respond to
19 Mr. Altevogt's testimony during closing argument because that came at the very end of the
20 hearing. As a result, Petitioners were not afforded the opportunity to address this testimony,
21 depriving them of a fair hearing and due process. If the entire proceeding is not ruled improper,
22 then at the very least Mr. Altevogt's testimony and arguments should be stricken from the record
23 and deemed not considered by the Regional Water Board.

24
25 **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL
BOARD:**

26 A true and correct copy of this Petition was mailed by First Class mail on November 1,
27 2013 to the Regional Water Board at the following address:
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DOWNEY BRAND LLP

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Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

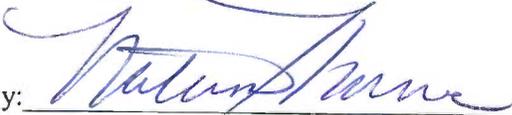
9. **A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL WATER BOARD, OR AN EXPLANATION WHY NOT.**

Nearly all of the substantive factual and legal issues and objections set forth in this Petition were presented to the Regional Water Board either before or during the ACL Hearing on this matter. However, specific issues related to the findings made in and the evidence relied upon in the Regional Water Board's final Order or related to the impact of actions occurring during the hearing were not raised since the final determination was unknown until after the Order was issued.

Respectfully submitted,

DATED: November 1, 2012

DOWNEY BRAND LLP

By: 
MELISSA A. THORME
Attorneys for
S.D. Deacon of California

DATED: November 1, 2012

REMY MOOSE MANLEY, LLP

By: 
HOWARD E. WILKINS III
Attorneys for
Donahue Schriber Asset Management Corp.

1344182.1

Exhibit A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ORDER R5-2013-0123

ADMINISTRATIVE CIVIL LIABILITY ORDER

IN THE MATTER OF

DONAHUE SCHRIBER ASSET MANAGEMENT CORPORATION
ROCKLIN CROSSINGS
PLACER COUNTY

This Order is issued to Donahue Schriber Asset Management Corporation (hereafter Discharger) pursuant to Water Code section 13385, which authorizes the imposition of Administrative Civil Liability. This Order is based on evidence that the Discharger violated provisions of the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ (NPDES No. CAS000002).

The California Regional Water Quality Control Board (Central Valley Water Board or Board) finds the following:

Background

1. Rocklin Crossings, LLC and Rocklin Holdings, LLC are the property owners of Rocklin Crossings and Rocklin Crossings Detention Basin construction sites, and Donahue Schriber Asset Management Corporation (Donahue Schriber) is the property owner of the Dominguez Loop Road and Center at Secret Ravine construction sites. Collectively, all four construction sites will be referred to as the Rocklin Crossings construction sites, or Site(s) in this Order.
2. All four Sites are contiguous and are located southeast of the intersection of Interstate 80 and Sierra College Boulevard in Placer County. The Sites cover 59.4 acres and are being developed for two anchor tenants (Walmart and Home Depot), multiple smaller retail stores and restaurants, parking lots, and a two-acre storm water detention basin.
3. S.D. Deacon Corporation of California (S.D. Deacon) is the general contractor and is responsible for all phases of construction under contract to Donahue Schriber.
4. On 2 September 2009, the State Water Resources Control Board adopted the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ (NPDES No. CAS000002) (General Permit). This Order became effective on 1 July 2010.
5. On 16 July 2012, Donahue Schriber, acting as the property owners' representative, applied for permit coverage under the General Permit for the Rocklin Crossings construction sites by filing four Notice of Intent applications on the Water Board's SMARTS (Storm Water Multiple Application and Tracking System) data management system. Donahue Schriber determined that all four projects are Risk Level 2 sites based on Project Sediment Risk and Receiving

Water Risk under the terms of the General Permit. Janet Petersen, Vice President of Development Services with Donahue Schriber, is listed as the legally responsible person (LRP) for the Rocklin Crossing construction sites, and Donahue Schriber is responsible for complying with all elements of the General Permit at all four Sites. This Order is being issued to Donahue Schriber, only, because of its status as the LRP for the Sites.

6. On 18 July 2012, the Notices of Intent for the four Rocklin Crossings construction sites were approved and the Sites were assigned the following Waste Discharge Identification Numbers (WDID #).

Site Name	WDID #
Rocklin Crossings	5S31C364098
Rocklin Crossings Detention Basin	5S31C364108
Dominguez Loop Road	5S31C364102
Center at Secret Ravine	5S31C364105

7. Among other items, the General Permit requires that:
- (a) Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT (best available technology economically achievable) for toxic and non-conventional pollutants and BCT (best conventional control technology) for conventional pollutants. (General Permit, Section V.A.2);
 - (b) Risk Level 2 dischargers shall implement appropriate erosion control BMPs (runoff and soil stabilization) in conjunction with sediment control BMPs for areas under active construction (General Permit, Attachment D, Section E);
 - (c) A State-certified Qualified SWPPP Developer (QSD) shall prepare a site-specific Storm Water Pollution Prevention Plan (SWPPP) and dischargers identify the Risk Level prior to construction (General Permit, Sections XIV, A. and VIII); and
 - (d) Risk Level 2 dischargers shall ensure a Qualified SWPPP Practitioner (QSP) develops a Rain Event Action Plan (REAP), a written document specific for each rain event, that when implemented is designed to protect all exposed portions of a site within 48 hours prior to any likely precipitation event. A REAP must be developed when there is a forecast of 50% or greater probability of precipitation in the project area (General Permit, Attachment D, Section H) and is to be implemented no later than 24 hours prior to the likely precipitation event
8. The Discharger completed site-specific SWPPPs for all four Rocklin Crossings sites and uploaded the SWPPPs to the SMARTS data management system between 12 July and 13 July 2012. As listed in SMARTS, construction activities for all four Sites were scheduled to begin on 25 July 2012 and are to be completed by 15 October 2013.
9. Section 3 of the site-specific SWPPP for the Rocklin Crossings construction sites states that the entire site will be disturbed during the rough grading phase, and that straw mulch will be applied to all disturbed soils prior to any forecast rain event. The SWPPP states that straw mulch will be applied as a temporary erosion control BMP and shall be applied in conformance with the CASQA (California Stormwater Quality Association) BMP Factsheet EC-6. However, as described below, the Discharger did not follow its SWPPP because it

failed to apply straw mulch to disturbed soils prior to a rain event and failed to implement appropriate erosion and sediment control BMPs.

Chronology

10. On 22 October 2012, Water Board staff conducted an inspection at the Site following an approximate one inch rain event in the Rocklin area. No construction activity was observed from the construction entrance at Sierra College Boulevard. Ponding was observed on graded lots, and staff observed that no erosion controls were installed on active construction areas visible from the construction entrance. The lack of erosion control BMPs on a Risk Level 2 site prior to a rain event is a violation of the General Permit. Staff contacted Janet Petersen on 25 October 2012 and arranged a site meeting for 31 October 2012.
11. On 31 October 2012, Water Board staff met with Janet Petersen and S.D. Deacon staff and completed a thorough inspection of the four Sites. Staff observed that perimeter sediment controls were in place and appeared to be working; however, no erosion control best management practices (BMPs) were installed across the active construction sites. The Discharger was in the process of stabilizing completed building pads with tree mulch, and covering some perimeter slopes with tree mulch. Following the inspection, staff discussed stabilizing all active construction areas prior to rain events as required by the General Permit.
12. Starting on 2 November 2012 and continuing weekly to 18 February 2013, S.D. Deacon provided a weekly summary of construction activities and activities completed to stabilize the Sites. Active construction through November 2012 included drilling and blasting granite outcrops and using the rock and soil to fill portions of the Center at Secret Ravine and the Dominguez Loop Road sites. As of 26 November 2012, S.D. Deacon reported in its weekly summary that multiple areas were stabilized with rock, tree mulch, or hydro-mulch, and that future parking lot areas had not been graded and would contain all storm water in low spots. As documented in later weekly summary reports, between 26 and 28 November 2012, three earthen berms were added to the temporary haul roads in the parking lot areas, and an area at the southwest end of the Dominguez Loop Road site was excavated for temporary water storage during the forecasted rain events.
13. Temporary water storage was not addressed in the SWPPP, although updated SWPPP maps provided in weekly summaries showed the water storage features described above. However, Board staff did not find documentation in the record that the temporary storage basin or the 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 installation of temporary water storage areas, 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 the appropriate combination of BMPs.
14. From 28 November 2012 through 5 December 2012, multiple rainfall events occurred throughout northern and central California. In the Rocklin area, the heaviest rainfall occurred on 30 November (Friday) and 2 December (Sunday). This storm was forecast by NOAA (National Oceanic and Atmospheric Administration) National Weather Service a minimum of five days prior to the first rainfall on 28 November. As stated 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, as noted below, the Water Board staff inspection on 30 November 2012 found that BMPs were not adequately deployed across the southern portion of the Rocklin Crossing site, the Center at Secret Ravine site, and the Dominguez Loop Road site.

15. On 30 November 2012, Water Board staff completed a site inspection during a heavy rain event. The rain event started on 28 November 2012 and produced approximately 0.75 inches of rainfall within the first two days, and then 2.25 inches of rainfall within the first 11 hours on 30 November. Water Board staff subsequently determined that the 30 November to 2 December storm event was approximately equivalent to a 25 year recurrence interval as provided by NOAA Precipitation Frequency Data Server.¹

During the inspection, staff observed turbid storm water discharging from two locations at the Site. First, from the Dominguez Loop Road site where an earthen berm, constructed for perimeter control, had breached allowing stored storm water to flow to Secret Ravine. Staff collected a grab sample of turbid storm water below the Dominguez Loop Road discharge point and a grab sample from Secret Ravine upstream of the discharge point. Both samples were analyzed for turbidity using a portable turbidimeter. The Dominguez Loop Road sample result was greater than 1,000 NTU, and the Secret Ravine sample result was 153 NTU.

Staff then met with the QSP for the site and reviewed the Rocklin Crossings Detention Basin site. Staff observed a second turbid storm water discharge from the Detention Basin site into a ditch that leads to Secret Ravine. It was later identified by the Discharger that a plug was placed in the detention basin outlet, but this plug failed, allowing turbid storm water to flow into Secret Ravine. The QSP collected a grab sample from within the ditch and identified the turbidity at 2,425 NTU. This sample represents the turbidity in storm water discharging from the Detention Basin Site into Secret Ravine. Due to the high flows in Secret Ravine, it was not safe for staff to collect an upstream or downstream sample directly from the creek. However, photographs taken at the time of the discharge show that the storm water flowing off the construction site was visibly turbid while the water upstream of the discharge point in Secret Ravine was much clearer.

16. Based on the 30 November 2012 inspection, Board staff determined that the Site did not have appropriate erosion or sediment control BMPs installed prior to the 28 November through 5 December 2012 rain events as required by the SWPPP and the General Permit. This lack of soil stabilization led to the discharge into Secret Ravine from two separate locations on the same day.
17. During the 28 November to 5 December 2012 rain events, the Discharger pumped storm water collected across the Site to both of the existing on-site detention basins to minimize potential discharges to Secret Ravine. On 18 December 2012, the Discharger started operating an on-site active treatment system (ATS) to treat suspended sediment in storm water. Treated effluent was discharged to the storm drain system on Schriber Way, which flows to Secret Ravine.

¹ <http://hdsc.nws.noaa.gov/hdsc/pfds/>

18. On 21 December 2012, Board staff issued a Notice of Violation (NOV) and Water Code section 13267 Order for the General Permit violations observed during the inspection on 30 November 2012. The Notice of Violation required a response from the Discharger by 18 January 2013, which was later extended to 25 January 2013. The NOV and 13267 Order required the Discharger to install appropriate erosion and sediment control BMPs throughout the Sites and submit a complete Numeric Action Level (NAL) Exceedance Report for the 28 November 2012 through 5 December 2012 storm events.
19. On 24 December 2012, Board staff conducted an inspection following a storm event which started on 21 December (Friday) and continued through 25 December 2012 (Tuesday) and produced approximately 2.75 inches of precipitation as of 24 December. 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, and 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. However, this evaluation was not conducted. As presented in Finding 9 above, 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.

Staff also observed the active treatment system in operation and the system operator reported that approximately 523,000 gallons of turbid storm water had been treated and discharged since the system became operational on 18 December 2012.

20. On 25 January 2013, the Discharger submitted a NOV Response, and on 17 February 2013, the Discharger provided additional responses following staff's initial review. The Discharger's NOV Response with additions stated that the Site received seven inches of rainfall between 28 November and 2 December 2012, and estimated that approximately 76,613 gallons of turbid storm water discharged from the Site to Secret Ravine on 30 November 2012 between 8:00 AM and 12 noon. The Discharger states that BMP repairs were completed at the two discharge points by 12 noon and the remaining volume of storm water was contained on-site in low areas, road depressions, and detention basins. Board staff reviewed the Discharger's estimates and calculations and agrees that the estimated discharge volume from the Site is reasonable.

Violations at Rocklin Crossings Construction Sites

21. General Permit Section V.A.2, Effluent Standards, Narrative Effluent Limitations, states, in part:
 2. *Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management*

practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.

Violation 1: The Board finds that the Discharger violated this requirement of the General Permit by discharging 76,613 gallons of turbid storm water to Secret Ravine on 30 November 2012.

22. General Permit Attachment D, Provision E.3. Sediment Controls, states in part: *Additional Risk Level 2 Requirement: Risk Level 2 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.*

Violation 2: The Board finds that the Discharger violated this requirement of the General Permit for a period of eight days (28 November to 5 December 2012) for failure to implement appropriate erosion control BMPs for areas under active construction.

Violation 3: The Board finds that the Discharger violated this requirement of the General Permit for a period of five days (21 December to 25 December 2012) for failure to implement appropriate erosion control BMPs for areas under active construction.

23. On 8 July 2013, the Executive Officer issued ACL Complaint R5-2013-0519 in the amount of \$211,038 for the General Permit violations described above. During the Board meeting on 4 October 2013, the Board removed \$21,000 in staff costs from this amount, thereby reducing the ACL to \$190,038.

Surface Water Beneficial Uses

24. Surface water drainage from the Rocklin Crossings construction sites flows to Secret Ravine, which is a tributary to Miners Ravine, which is tributary to Dry Creek, which is tributary to the Sacramento River between Colusa Drain and the I Street Bridge.
25. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Water Resources Control Board. The existing and potential beneficial uses for the Sacramento River from Colusa Basin Drain to the "I" Street Bridge, and tributary streams, are 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..

Calculation of Penalties Under Water Code Section 13385

26. Water Code section 13385 states, in relevant part:
- (a) *Any person who violates any of the following shall be liable civilly in accordance with this section:*

(2) A waste discharge requirement ... issued pursuant to this chapter... (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.

27. The General Permit was adopted by the State Water Board on 2 September 2009, pursuant to Clean Water Act sections 201, 208(b), 302, 303(b), 304, 306, 307, 402, and 403. Section IV(A)(1) of the General Permit, states in part:

Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and the Porter-Cologne Water Quality Control Act and is grounds for enforcement action and/or removal from General Permit coverage.

28. The Discharger's failure to implement the elements of the General Permit described above violated the General Permit and therefore, violated the Clean Water Act and the Porter-Cologne Water Quality Control Act. Water Code section 13385 authorizes the imposition of administrative civil liability for such violations.

29. Water Code section 13385 states, in relevant part:

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) 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 by which the volume discharged but not cleaned up exceeds 1,000 gallons.

(e) ...At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

30. **Maximum Administrative Civil Liability under Water Code Section 13385:** Pursuant to Water Code section 13385(c), each violation of the General Permit identified above is subject to penalties not to exceed \$10,000 per day and \$10 per gallon of discharge exceeding 1,000 gallons.

- The Discharger failed to comply with Sediment Control Provision E.3 from 28 November through 5 December 2012, a period of 8 days, and from 21 December through 25 December 2012, a period of 5 days. Therefore, the maximum penalty is \$10,000 X 13 days, or \$130,000.
- A total of 76,613 gallons of turbid storm water discharged from the Site to Secret Ravine on 30 November 2012. The maximum penalty for this discharge is (76,613–1,000) gallons X \$10 per gallon plus \$10,000 (for one day of violation), or \$766,130.

The maximum liability for these violations is **eight hundred ninety six thousand one hundred and thirty dollars (\$896,130).**

31. **Minimum Administrative Civil Liability under Water Code Section 13385:** Pursuant to Water Code section 13385(e), at a minimum, civil liability 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 failure to implement appropriate erosion and sediment control BMPs as listed in the site specific SWPPP. 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 estimated that approximately 40 acres of disturbed area was not adequately protected with BMPs. Therefore, the cost to stabilize this construction site is estimated to be \$80,000. The economic benefit incurred by the Discharger is the failure to spend \$80,000 between 28 November and 25 December 2012; the value can be calculated as the interest on a loan to complete the work. Using the US EPA's BEN model, the economic benefit gained by non-compliance is calculated to be approximately one hundred seventeen dollars (\$117), which becomes the minimum civil liability which must be assessed pursuant to section 13385.

Proposed Administrative Civil Liability

32. Pursuant to Water Code section 13385(e), in determining the amount of any civil liability imposed under Water Code section 13385(c), the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
33. On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385(e).
34. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A. The civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
35. As described above, the maximum penalty for the violations is \$896,130. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the estimated economic benefit of \$117, so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. In this case, the economic benefit amount, plus 10%, is \$129.

Regulatory Considerations

36. Notwithstanding the issuance of this Order, the Central Valley Water Board retains the authority to assess additional penalties for violations of the requirements of the General Permit for which penalties have not yet been assessed or for violations that may subsequently occur.
37. Issuance of this Administrative Civil Liability Order to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).
38. Any person affected by this action of the Central Valley Water Board may petition the State Water Resources Control Board to review this action. The State Water Board must receive the petition within thirty (30) days of issuance of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

IT IS HEREBY ORDERED that Donahue Schriber Asset Management Corporation shall pay a civil liability of \$190,038 as follows:

Within 30 days of adoption of this Order, the Discharger shall pay one hundred ninety thousand thirty-eight dollars (\$190,038) by check made payable to the *State Water Pollution Cleanup and Abatement Account*. The check shall have written upon it the ACL Order number (R5-2013-0123) and be mailed to the Central Valley Water Board.

I, Kenneth D. Landau, Assistant Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 4 October 2013.

-- Original Signed By --

KENNETH D.LANDAU, Assistant Executive Officer

Attachment A: Specific Factors Considered for Civil Liability

**Attachment A to ACL Order R5-2013-0123:
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 Project². 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

²http://www.rocklin.ca.us/depts/develop/planning/publications_n_maps/rocklin_crossings_environmental_impact_report/default.asp

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.

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 days x \$10,000 per day x 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 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 **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): $5 \text{ days} \times \$10,000 \text{ per day} \times 0.15 = \$7,500$

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 release³, 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 website⁴, S. D. Deacon is the largest retail contractor on the West Coast and fifth largest in the

³ <http://www.donahueschriber.com/newsdetails.aspx?newsid=126>

⁴ <http://www.sddeacon.com/>

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

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.

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 \$190,038.

Exhibit B

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2013-0519

IN THE MATTER OF

DONAHUE SCHRIBER ASSET MANAGEMENT CORPORATION
FOR
ROCKLIN CROSSINGS
PLACER COUNTY

This Complaint is issued to Donahue Schriber Asset Management Corporation (hereafter Discharger) pursuant to Water Code 13385, which authorizes the imposition of Administrative Civil Liability, and Water Code section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on evidence that the Discharger violated provisions of the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ (NPDES No. CAS000002).

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) alleges the following:

Background

1. Rocklin Crossings, LLC and Rocklin Holdings, LLC are the property owners of Rocklin Crossings and Rocklin Crossings Detention Basin construction sites, and Donahue Schriber Asset Management Corporation (Donahue Schriber) is the property owner of the Dominguez Loop Road and Center at Secret Ravine construction sites. Collectively, all four construction sites will be referred to as the Rocklin Crossings construction sites, or Site(s) in this Complaint.
2. All four Sites are contiguous and are located southeast of the intersection of Interstate 80 and Sierra College Boulevard in Placer County. The Sites cover 59.4 acres and are being developed for two anchor tenants (Walmart and Home Depot), multiple smaller retail stores and restaurants, parking lots, and a two-acre storm water detention basin.
3. S.D. Deacon Corporation of California (S.D. Deacon) is the general contractor and is responsible for all phases of construction under contract to Donahue Schriber.
4. On 2 September 2009, the State Water Resources Control Board adopted the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ (NPDES No. CAS000002) (General Permit). This Order became effective on 1 July 2010.
5. On 16 July 2012, Donahue Schriber, acting as the property owners' representative, applied for permit coverage under the General Permit for the Rocklin Crossings construction sites by filing four Notice of Intent applications on the Water Board's SMARTS (Storm Water Multiple Application and Tracking System) data management system. Donahue Schriber determined that all four projects are Risk Level 2 sites based on Project Sediment Risk and Receiving Water Risk under the terms of the General Permit. Janet Petersen, Vice President of Development Services with Donahue Schriber, is listed as the legally responsible person (LRP) for the Rocklin Crossing construction sites, and Donahue Schriber is responsible for complying with all elements of the General Permit at all four Sites. This Complaint is being issued to Donahue Schriber, only, because of its status as the LRP for the Sites.

6. On 18 July 2012, the Notices of Intent for the four Rocklin Crossings construction sites were approved and the Sites were assigned the following Waste Discharge Identification Numbers (WDID #).

Site Name	WDID #
Rocklin Crossings	5S31C364098
Rocklin Crossings Detention Basin	5S31C364108
Dominguez Loop Road	5S31C364102
Center at Secret Ravine	5S31C364105

7. Among other items, the General Permit requires that:
- (a) Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT (best available technology economically achievable) for toxic and non-conventional pollutants and BCT (best conventional control technology) for conventional pollutants. (General Permit, Section V.A.2);
 - (b) Risk Level 2 dischargers shall implement appropriate erosion control BMPs (runoff and soil stabilization) in conjunction with sediment control BMPs for areas under active construction (General Permit, Attachment D, Section E);
 - (c) A State-certified Qualified SWPPP Developer (QSD) shall prepare a site-specific Storm Water Pollution Prevention Plan (SWPPP) and dischargers identify the Risk Level prior to construction (General Permit, Sections XIV, A. and VIII); and
 - (d) Risk Level 2 dischargers shall ensure a Qualified SWPPP Practitioner (QSP) develops a Rain Event Action Plan (REAP), a written document specific for each rain event, that when implemented is designed to protect all exposed portions of a site within 48 hours prior to any likely precipitation event. A REAP must be developed when there is a forecast of 50% or greater probability of precipitation in the project area (General Permit, Attachment D, Section H) and is to be implemented no later than 24 hours prior to the likely precipitation event
8. The Discharger completed site-specific SWPPPs for all four Rocklin Crossings sites and uploaded the SWPPPs to the SMARTS data management system between 12 July and 13 July 2012. As listed in SMARTS, construction activities for all four Sites were scheduled to begin on 25 July 2012 and are to be completed by 15 October 2013.
9. Section 3 of the site-specific SWPPP for the Rocklin Crossings construction sites states that the entire site will be disturbed during the rough grading phase, and that straw mulch will be applied to all disturbed soils prior to any forecast rain event. The SWPPP states that straw mulch will be applied as a temporary erosion control BMP and shall be applied in conformance with the CASQA (California Stormwater Quality Association) BMP Factsheet EC-6. However, as described below, the Discharger did not follow its SWPPP because it failed to apply straw mulch to disturbed soils prior to a rain event and failed to implement appropriate erosion and sediment control BMPs.

Chronology

10. On 22 October 2012, Water Board staff conducted an inspection at the Site following an approximate one inch rain event in the Rocklin area. No construction activity was observed from the construction entrance at Sierra College Boulevard. Ponding was observed on graded lots,

and staff observed that no erosion controls were installed on active construction areas visible from the construction entrance. The lack of erosion control BMPs on a Risk Level 2 site prior to a rain event is a violation of the General Permit. Staff contacted Janet Petersen on 25 October 2012 and arranged a site meeting for 31 October 2012.

11. On 31 October 2012, Water Board staff met with Janet Petersen and S.D. Deacon staff and completed a thorough inspection of the four Sites. Staff observed that perimeter sediment controls were in place and appeared to be working; however, no erosion control best management practices (BMPs) were installed across the active construction sites. The Discharger was in the process of stabilizing completed building pads with tree mulch, and covering some perimeter slopes with tree mulch. Following the inspection, staff discussed stabilizing all active construction areas prior to rain events as required by the General Permit.
12. Starting on 2 November 2012 and continuing weekly to 18 February 2013, S.D. Deacon provided a weekly summary of construction activities and activities completed to stabilize the Sites. Active construction through November 2012 included drilling and blasting granite outcrops and using the rock and soil to fill portions of the Center at Secret Ravine and the Dominguez Loop Road sites. As of 26 November 2012, S.D. Deacon reported in its weekly summary that multiple areas were stabilized with rock, tree mulch, or hydro-mulch, and that future parking lot areas had not been graded and would contain all storm water in low spots. As documented in later weekly summary reports, between 26 and 28 November 2012, three earthen berms were added to the temporary haul roads in the parking lot areas, and an area at the southwest end of the Dominguez Loop Road site was excavated for temporary water storage during the forecasted rain events.
13. Temporary water storage was not addressed in the SWPPP, although updated SWPPP maps provided in weekly summaries showed the water storage features described above. However, Board staff did not find documentation in the record that the temporary storage basin or the 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 installation of temporary water storage areas, 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 the appropriate combination of BMPs.
14. From 28 November 2012 through 5 December 2012, multiple rainfall events occurred throughout northern and central California. In the Rocklin area, the heaviest rainfall occurred on 30 November (Friday) and 2 December (Sunday). This storm was forecast by NOAA (National Oceanic and Atmospheric Administration) National Weather Service a minimum of five days prior to the first rainfall on 28 November. As stated 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, as noted below, the Water Board staff inspection on 30 November 2012 found that BMPs were not adequately deployed across the southern portion of the Rocklin Crossing site, the Center at Secret Ravine site, and the Dominguez Loop Road site.
15. On 30 November 2012, Water Board staff completed a site inspection during a heavy rain event. The rain event started on 28 November 2012 and produced approximately 0.75 inches of rainfall within the first two days, and then 2.25 inches of rainfall within the first 11 hours on 30 November. Water Board staff subsequently determined that the 30 November to 2 December storm event

was approximately equivalent to a 25 year recurrence interval as provided by NOAA Precipitation Frequency Data Server.¹

During the inspection, staff observed turbid storm water discharging from two locations at the Site. First, from the Dominguez Loop Road site where an earthen berm, constructed for perimeter control, had breached allowing stored storm water to flow to Secret Ravine. Staff collected a grab sample of turbid storm water below the Dominguez Loop Road discharge point and a grab sample from Secret Ravine upstream of the discharge point. Both samples were analyzed for turbidity using a portable turbidimeter. The Dominguez Loop Road sample result was greater than 1,000 NTU, and the Secret Ravine sample result was 153 NTU.

Staff then met with the QSP for the site and reviewed the Rocklin Crossings Detention Basin site. Staff observed a second turbid storm water discharge from the Detention Basin site into a ditch that leads to Secret Ravine. It was later identified by the Discharger that a plug was placed in the detention basin outlet, but this plug failed, allowing turbid storm water to flow into Secret Ravine. The QSP collected a grab sample from within the ditch and identified the turbidity at 2,425 NTU. This sample represents the turbidity in storm water discharging from the Detention Basin Site into Secret Ravine. Due to the high flows in Secret Ravine, it was not safe for staff to collect an upstream or downstream sample directly from the creek. However, photographs taken at the time of the discharge show that the storm water flowing off the construction site was visibly turbid while the water upstream of the discharge point in Secret Ravine was much clearer.

16. Based on the 30 November 2012 inspection, Board staff determined that the Site did not have appropriate erosion or sediment control BMPs installed prior to the 28 November through 5 December 2012 rain events as required by the SWPPP and the General Permit. This lack of soil stabilization led to the discharge into Secret Ravine from two separate locations on the same day.
17. During the 28 November to 5 December 2012 rain events, the Discharger pumped storm water collected across the Site to both of the existing on-site detention basins to minimize potential discharges to Secret Ravine. On 18 December 2012, the Discharger started operating an on-site active treatment system (ATS) to treat suspended sediment in storm water. Treated effluent was discharged to the storm drain system on Schriber Way, which flows to Secret Ravine.
18. On 21 December 2012, Board staff issued a Notice of Violation (NOV) and Water Code section 13267 Order for the General Permit violations observed during the inspection on 30 November 2012. The Notice of Violation required a response from the Discharger by 18 January 2013, which was later extended to 25 January 2013. The NOV and 13267 Order required the Discharger to install appropriate erosion and sediment control BMPs throughout the Sites and submit a complete Numeric Action Level (NAL) Exceedance Report for the 28 November 2012 through 5 December 2012 storm events.
19. On 24 December 2012, Board staff conducted an inspection following a storm event which started on 21 December (Friday) and continued through 25 December 2012 (Tuesday) and produced approximately 2.75 inches of precipitation as of 24 December. 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

¹ <http://hdsc.nws.noaa.gov/hdsc/pfds/>

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 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. However, this evaluation was not conducted. As presented in Finding 9 above, 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.

Staff also observed the active treatment system in operation and the system operator reported that approximately 523,000 gallons of turbid storm water had been treated and discharged since the system became operational on 18 December 2012.

20. On 25 January 2013, the Discharger submitted a NOV Response, and on 17 February 2013, the Discharger provided additional responses following staff's initial review. The Discharger's NOV Response with additions stated that the Site received seven inches of rainfall between 28 November and 2 December 2012, and estimated that approximately 76,613 gallons of turbid storm water discharged from the Site to Secret Ravine on 30 November 2012 between 8:00 AM and 12 noon. The Discharger states that BMP repairs were completed at the two discharge points by 12 noon and the remaining volume of storm water was contained on-site in low areas, road depressions, and detention basins. Board staff reviewed the Discharger's estimates and calculations and agrees that the estimated discharge volume from the Site is reasonable.

Violations at Rocklin Crossings Construction Sites

21. General Permit Section V.A.2, Effluent Standards, Narrative Effluent Limitations, states, in part: *2. Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.*

Violation 1: The Discharger is alleged to have violated this requirement of the General Permit by discharging 76,613 gallons of turbid storm water to Secret Ravine on 30 November 2012.

22. General Permit Attachment D, Provision E.3. Sediment Controls, states in part: *Additional Risk Level 2 Requirement: Risk Level 2 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.*

Violation 2: The Discharger is alleged to have violated this requirement of the General Permit for a period of eight days (28 November to 5 December 2012) for failure to implement appropriate erosion control BMPs for areas under active construction.

Violation 3: The Discharger is alleged to have violated this requirement of the General Permit for a period of five days (21 December to 25 December 2012) for failure to implement appropriate erosion control BMPs for areas under active construction.

Surface Water Beneficial Uses

23. Surface water drainage from the Rocklin Crossings construction sites flows to Secret Ravine, which is a tributary to Miners Ravine, which is tributary to Dry Creek, which is tributary to the Sacramento River between Colusa Drain and the I Street Bridge.
24. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Water Resources Control Board. The existing and potential beneficial uses for the Sacramento River from Colusa Basin Drain to the "I" Street Bridge, and tributary streams, are 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..

Calculation of Penalties Under Water Code Section 13385

25. Water Code section 13385 states, in relevant part:
 - (a) *Any person who violates any of the following shall be liable civilly in accordance with this section:*
 - (2) *A waste discharge requirement ... issued pursuant to this chapter...*(5) *Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.*
26. The General Permit was adopted by the State Water Board on 2 September 2009, pursuant to Clean Water Act sections 201, 208(b), 302, 303(b), 304, 306, 307, 402, and 403. Section IV(A)(1) of the General Permit, states in part:

Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and the Porter-Cologne Water Quality Control Act and is grounds for enforcement action and/or removal from General Permit coverage.
27. The Discharger's failure to implement the elements of the General Permit described above violated the General Permit and therefore, violated the Clean Water Act and the Porter-Cologne Water Quality Control Act. Water Code section 13385 authorizes the imposition of administrative civil liability for such violations.
28. Water Code section 13385 states, in relevant part:
 - (c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:
 - (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
 - (2) 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 by which the volume discharged but not cleaned up exceeds 1,000 gallons.

(e) ...At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

29. **Maximum Administrative Civil Liability under Water Code Section 13385:** Pursuant to Water Code section 13385(c), each violation of the General Permit identified above is subject to penalties not to exceed \$10,000 per day and \$10 per gallon of discharge exceeding 1,000 gallons.

- The Discharger failed to comply with Sediment Control Provision E.3 from 28 November through 5 December 2012, a period of 8 days, and from 21 December through 25 December 2012, a period of 5 days. Therefore, the maximum penalty is \$10,000 X 13 days, or \$130,000.
- A total of 76,613 gallons of turbid storm water discharged from the Site to Secret Ravine on 30 November 2012. The maximum penalty for this discharge is (76,613– 1,000) gallons X \$10 per gallon plus \$10,000 (for one day of violation), or \$766,130.

The maximum liability for these violations is **eight hundred ninety six thousand one hundred and thirty dollars (\$896,130)**.

30. **Minimum Administrative Civil Liability under Water Code Section 13385:** Pursuant to Water Code section 13385(e), at a minimum, civil liability 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 failure to implement appropriate erosion and sediment control BMPs as listed in the site specific SWPPP. 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 estimated that approximately 40 acres of disturbed area was not adequately protected with BMPs. Therefore, the cost to stabilize this construction site is estimated to be \$80,000. The economic benefit incurred by the Discharger is the failure to spend \$80,000 between 28 November and 25 December 2012; the value can be calculated as the interest on a loan to complete the work. Using the US EPA's BEN model, the economic benefit gained by non-compliance is calculated to be approximately one hundred seventeen dollars (\$117), which becomes the minimum civil liability which must be assessed pursuant to section 13385.

Proposed Administrative Civil Liability

31. Pursuant to Water Code section 13385(e), in determining the amount of any civil liability imposed under Water Code section 13385(c), the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
32. On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement

Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385(e).

33. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
34. As described above, the maximum penalty for the violations is \$896,130. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the estimated economic benefit of \$117, so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. In this case, the economic benefit amount, plus 10%, is \$129. Based on consideration of the above facts and after applying the penalty methodology and allowing for staff costs pursuant to the Enforcement Policy, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$211,038**. The specific factors considered in this penalty are detailed in Attachment A.

Regulatory Considerations

35. Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of the requirements of the General Permit for which penalties have not yet been assessed or for violations that may subsequently occur.
36. An administrative civil liability may be imposed pursuant to the procedures described in Water Code section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.
37. Issuance of this Administrative Civil Liability Complaint to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).

DONAHUE SCHRIBER IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes an administrative civil liability in the amount of **two hundred and eleven thousand and thirty eight dollars (\$211,038)**. The amount of the proposed liability is based upon a review of the factors cited in Water Code section 13385, as well as the State Water Resources Control Board's 2010 Water Quality Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled on **3-4 October 2013**, unless the following occurs by **29 July 2013**:

The Discharger waives the hearing by completing the attached form (checking off the box next to Option #1) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of **two hundred and eleven thousand and thirty eight dollars (\$211,038)**.

3. If a hearing is held, the Central Valley 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 recovery of judicial civil liability.



for PAMELA C. CREEDON, Executive Officer

8 July 2013

Date

Waiver Form
Attachment A: Specific Factors Considered for Civil Liability

WMH/SER/WSW: 8 July 2013

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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

I am duly authorized to represent Donahue Schriber Asset Management Corporation (hereafter Discharger) in connection with Administrative Civil Liability Complaint R5-2013-0519 (hereafter Complaint). I am informed that 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. The person who has been issued a complaint may waive the right to a hearing."

(**OPTION 1: Check here if the Discharger waives the hearing requirement and will pay in full.**)

- a. I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board.
- b. I certify that the Discharger will remit payment for the proposed civil liability in the full amount of **two hundred and eleven thousand and thirty eight dollars (\$211,038)** by check that references "ACL Complaint R5-2013-0519" made payable to the *State Water Pollution Cleanup and Abatement Account*. Payment must be received by the Central Valley Water Board by **29 July 2013**.
- c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after a 30-day public notice and comment period. Should the Central Valley Water Board receive significant new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. 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.

(Print Name and Title)

(Signature)

(Date)

**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 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 **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 of 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): $5 \text{ days} \times \$10,000 \text{ per day} \times 0.15 = \$7,500$

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).

Central Valley Regional Water Quality Control Board

HEARING PROCEDURE
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
R5-2013-0519

ISSUED TO
DONAHUE SCHRIBER ASSET MANAGEMENT CORPORATION
ROCKLIN CROSSINGS
PLACER COUNTY

SCHEDULED FOR 3-4 OCTOBER 2013

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.

Overview

Pursuant to Water Code section 13323, the Executive Officer has issued an Administrative Civil Liability (ACL) Complaint to Donahue Schriber Asset Management Corporation (hereafter Discharger), alleging violations of Water Code section 13385 for violations of the *NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order 2009-0009-DWQ*. The ACL Complaint proposes that the Central Valley Water Board impose administrative civil liability in the amount of \$211,038. A hearing is currently scheduled to be conducted before the Board during its 3-4 October 2013 meeting.

The purpose of the hearing is to consider relevant evidence and testimony regarding the ACL Complaint. At the hearing, the Central Valley Water Board will consider whether to issue an administrative civil liability order assessing the proposed liability, or a higher or lower amount. The Board may also decline to assess any liability, or may continue the hearing to a later date. If less than a quorum of the Board is available, this matter may be conducted before a hearing panel. The public hearing will commence at 8:30 a.m. or as soon thereafter as practical, or as announced in the Board's meeting agenda. The meeting will be held at:

11020 Sun Center Drive, Suite 200, Rancho Cordova, California.

An agenda for the meeting will be issued at least ten days before the meeting and posted on the Board's web page at:

http://www.waterboards.ca.gov/centralvalley/board_info/meetings

Hearing Procedure

The hearing will be conducted in accordance with this Hearing Procedure, which has been approved by the Board Chair for the adjudication of such matters. The procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and are available at

<http://www.waterboards.ca.gov>

Copies will be provided upon request. In accordance with section 648(d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in section 648(b) and herein, Chapter 5 of the Administrative Procedures Act (Gov. Code, § 11500 et seq.) does not apply to this hearing.

The Discharger shall attempt to resolve objections to this Hearing Procedure with the Prosecution Team BEFORE submitting objections to the Advisory Team.

Separation of Prosecutorial and Advisory 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 Board (the "Prosecution Team") have been separated from those who will provide legal and technical advice to the Board (the "Advisory Team"). Members of the Advisory Team are: Kenneth Landau, Assistant Executive Officer and Patrick Pulupa, Staff Counsel. Members of the Prosecution Team are: Pamela Creedon, Executive Officer; Andrew Altevogt, Assistant Executive Officer; Wendy Wyels, Environmental Program Manager; Steve Rosenbaum, Senior Engineering Geologist; Marty Hartzell, Engineering Geologist; Mike Fischer, Water Resources Control Engineer; Mayumi Okamoto, Staff Counsel, and David Boyers, Supervising Senior Staff Counsel.

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. Pamela Creedon regularly advises the Central Valley Water Board in other, unrelated matters, but is not advising the Central Valley Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Central Valley Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Central Valley Water Board or the Advisory Team regarding this proceeding.

Hearing Participants

Participants in this proceeding are designated as either "Designated Parties" or "Interested Persons." Designated Parties may present evidence and cross-examine witnesses and are subject to cross-examination. Interested Persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested Persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). At the hearing, both Designated Parties and Interested Persons may be asked to respond to clarifying questions from the Central Valley Water Board, staff, or others, at the discretion of the Board Chair.

The following participants are hereby designated as Designated Parties in this proceeding:

1. Central Valley Water Board Prosecution Team
2. Donahue Schriber Asset Management Corporation

Requesting Designated Party Status

Persons who wish to participate in the hearing as a Designated Party must request designated party status by submitting a request in writing so that it is received no later than the deadline listed under "Important Deadlines" below. The request shall include an explanation of the basis for status as a Designated Party (i.e., how the issues to be addressed at the hearing affect the person, the need to present evidence or cross-examine witnesses), along with a statement explaining why the parties listed above do not adequately represent the person's interest. Any objections to these requests for designated party status must be submitted so that they are received no later than the deadline listed under "Important Deadlines" below.

Primary Contacts**Advisory Team:**

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Discharger

Donahue Schriber Asset Management Corporation
Janet Petersen, Vice President
Donahue Schriber
200 East Baker Street, Suite 100
Costa Mesa, CA 92626
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jpetersen@dsrg.com

Ex Parte Communications

Designated Parties and Interested Persons are forbidden from engaging in ex parte communications regarding this matter. An ex parte communication is a written or verbal communication related to the investigation, preparation, or prosecution of the ACL Complaint between a Designated Party or an Interested Person and a Board Member or a member of the Board's Advisory Team (see Gov. Code, § 11430.10 et seq.). However, if the communication is copied to all other persons (if written) or is made in a manner open to all other persons (if verbal), then the communication is not considered an ex parte communication. Communications regarding non-controversial procedural matters are also not considered ex parte communications and are not restricted.

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 (including evidence presented by witnesses called by the Designated Party), to cross-examine witnesses (if warranted), and to provide a closing statement. Each Interested Person shall have 3 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 the deadline listed under "Important Deadlines" below. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Board Chair (at the hearing) upon a showing that additional time is necessary. Such showing shall explain what testimony, comments, or legal argument requires extra time, and why it could not have been provided in writing by the applicable deadline.

A timer will be used, but will not run during Board questions or the responses to such questions, or during discussions of procedural issues.

Submission of Evidence and Policy Statements

The Prosecution Team and all other Designated Parties (including the Discharger) must submit the following information 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 Central Valley Water Board to consider. Evidence and exhibits already in the public files of the Central Valley Board may be submitted by reference, as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3. Board members will not generally receive copies of materials incorporated by reference unless copies are provided, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. 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 estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.

Prosecution Team: The Prosecution Team's information must include the legal and factual basis for its claims against each Discharger; a list of all evidence on which the Prosecution Team relies, which must include, at a minimum, all documents cited in the ACL Complaint, Staff Report, or other material submitted by the Prosecution Team; and the witness information required under items 3-4 for all witnesses, including Board staff.

Designated Parties (including the Discharger): All Designated Parties shall submit comments regarding the ACL Complaint along with any additional supporting evidence not cited by the Central Valley Water Board's Prosecution Team no later than the deadline listed under "Important Deadlines" below.

Rebuttal: Any Designated Party that would like to submit evidence, legal analysis, or policy statements to rebut information previously submitted by other Designated Parties shall submit this rebuttal information so that it is received no later than the deadline listed under "Important Deadlines" below. "Rebuttal" means evidence, analysis or comments offered to disprove or contradict other submissions. Rebuttal shall be limited to the scope of the materials previously submitted. Rebuttal information that is not responsive to information previously submitted may be excluded.

Copies: Board members will receive copies of all submitted materials. The Board Members' hard copies will be printed in black and white on 8.5"x11" paper from the Designated Parties' electronic copies. Designated Parties who are concerned about print quality or the size of all or part of their written materials should provide an extra nine paper copies for the Board Members. For voluminous submissions, Board Members may receive copies in electronic format only. Electronic copies will also be posted on the Board's website. Parties without access to computer equipment are strongly encouraged to have their materials scanned at a copy or mailing center. The Board will not reject materials solely for failure to provide electronic copies.

Other Matters: The Prosecution Team will prepare a summary agenda sheet (Summary Sheet) and will respond to all significant comments. The Summary Sheet and the responses shall clearly state that they were prepared by the Prosecution Team. The Summary Sheet and the responses will be posted online, as will revisions to the proposed Order.

Interested Persons: Interested Persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible, but they must be received by the deadline listed under "Important Deadlines" to be included in the Board's agenda package. Interested Persons do not need to submit written comments in order to speak at the hearing.

Prohibition on Surprise Evidence: In accordance with California Code of Regulations, title 23, section 648.4, the Central Valley Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Board Chair 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 Central Valley Water Board and will not be included in the administrative record for this proceeding.

Presentations: Power Point and other visual presentations may be used at the hearing, but their content shall not exceed the scope of other submitted written material. These presentations must be provided to the Advisory Team at or before the hearing both in hard copy and in electronic format so that they may be included in the administrative record.

Witnesses: All witnesses who have submitted written testimony shall appear at the hearing to affirm that the testimony is true and correct, and shall be available for cross-examination.

Evidentiary Documents and File

The ACL Complaint and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 11020 Sun Center Drive, Rancho Cordova, CA 95670. 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 Central Valley Water Board's Chair. Many of these documents are also posted on-line at:

http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml

Although the web page is updated regularly, to assure access to the latest information, you may contact Wendy Wyels (contact information above) for assistance obtaining copies.

Questions

Questions concerning this proceeding may be addressed to the Advisory Team attorney (contact information above).

IMPORTANT DEADLINES

All required submissions must be received by 5:00 p.m. on the respective due date.

8 July 2013	<ul style="list-style-type: none"> ▪ Prosecution Team issues ACL Complaint, Hearing Procedure, and other related materials.
15 July 2013	<ul style="list-style-type: none"> ▪ Objections due on Hearing Procedure. ▪ Deadline to request "Designated Party" status. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
19 July 2013	<ul style="list-style-type: none"> ▪ Deadline to submit opposition to requests for Designated Party status. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
29 July 2013	<ul style="list-style-type: none"> ▪ Discharger's deadline to submit payment and waiver or proceed to Hearing . <p><u>Electronic or Hard Copy to:</u> Prosecution Team Primary Contact</p>
1 August 2013	<ul style="list-style-type: none"> ▪ Advisory Team issues decision on requests for designated party status. ▪ Advisory Team issues decision on Hearing Procedure objections.
9 August 2013	<ul style="list-style-type: none"> ▪ Prosecution Team's deadline for submission of information required under "Submission of Evidence and Policy Statements," above. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
29 August 2013	<ul style="list-style-type: none"> ▪ Remaining Designated Parties' (including the Discharger's) deadline to submit all information required under "Submission of Evidence and Policy Statements" above. This includes all written comments regarding the ACL Complaint. ▪ Interested Persons' comments are due. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
6 September 2013	<ul style="list-style-type: none"> ▪ All Designated Parties shall submit any rebuttal evidence, any rebuttal to legal arguments and/or policy statements, and all evidentiary objections. ▪ Deadline to submit requests for additional time. ▪ If rebuttal evidence is submitted, all requests for additional time (to respond to the rebuttal at the hearing) must be made within 3 working days of <i>this</i> deadline. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
11 September 2013 [†]	<ul style="list-style-type: none"> ▪ Prosecution Team submits Summary Sheet and responses to comments. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
3-4 October 2013	<ul style="list-style-type: none"> ▪ Hearing

[†] This deadline is set based on the date that the Board compiles the Board Members' agenda packages. Any material received after this deadline will not be included in the Board Members' agenda packages.