CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

Amended
TECHNICAL ANALYSIS

ADMINISTRATIVE CIVIL LIABILITY CONTAINED IN
COMPLAINT NO. R9-2015-0110
for
SAN ALTOS-LEMON GROVE, LLC
VALENCIA HILLS CONSTRUCTION SITE
WDID 9 37C369143

NONCOMPLIANCE
with
State Water Resources Control Board Order No. 2009-0009-DWQ,
as amended by Order No. 2010-0014-DWQ and 2012-0006-DWQ,
National Pollutant Discharge Elimination System (NPDES)
General Permit for Storm Water Discharges associated with
Construction and Land Disturbance Activities
and
Water Quality Control Plan for the San Diego Basin
and
Water Code Section 13376
and
Clean Water Act Section 301

Prepared by

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October 19, 2015
Amended March 18, 2016, as directed by the Chair of the San Diego Water Board

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I. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence that support the findings in Administrative Civil Liability Complaint No. R9-2015-0110 (Complaint) and the recommended assessment of civil liability in the amount of **$848,374** against San Altos-Lemon Grove, LLC (Discharger) for violations of California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* (Construction Storm Water Permit).

A. Construction Storm Water Permit

The Construction Storm Water Permit authorizes discharges of storm water associated with construction activity so long as the dischargers comply with all requirements, provisions, limitations and prohibitions in the permit. Pursuant to federal statutes and regulations, the Construction Storm Water Permit requires the implementation of the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to reduce or eliminate pollutants in storm water runoff, as well as additional requirements necessary to implement applicable water quality standards.

Sites with any construction or demolition activity resulting in a land disturbance of equal to or greater than one acre are required to obtain coverage under the Construction Storm Water Permit. Dischargers that have obtained coverage under the Construction Storm Water Permit are required to implement controls, structures, and management practices (a.k.a. Best Management Practices [BMPs[1]]) that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.

Based upon each site's sediment transport and receiving water risk (Risk Level), the Construction Storm Water Permit requires different BMPs, monitoring, and reporting to achieve and demonstrate BAT and BCT. The specific requirements for each Risk Level are contained in Attachments C, D, and E to the permit (Risk Level 1, 2, or 3, respectively). Sites that fail to implement one or more of the requirements contained in Attachments C, D, or E, as applicable, are not in compliance with the implementation of BMPs that achieve BAT and BCT. Discharges of storm water or non-storm water from sites where BMPs have not been implemented that achieve BAT and BCT, as required by the Construction Storm Water Permit, are unauthorized discharges.

[1] Best Management Practices (BMPs) are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 C.F.R. § 122.2)

B. Site Description

The 18.26 acre Valencia Hills construction site (Site) is located within the City of Lemon Grove, and is within the Chollas Hydrologic Subarea (HSA 902.22) of the Pueblo San Diego Hydrologic Unit. Runoff from the Site discharges into Encanto Channel, and then discharges into Chollas Creek which discharges into San Diego Bay. Encanto Channel runs parallel to Akins Avenue along the southeastern side of the Site. See Figure 1.

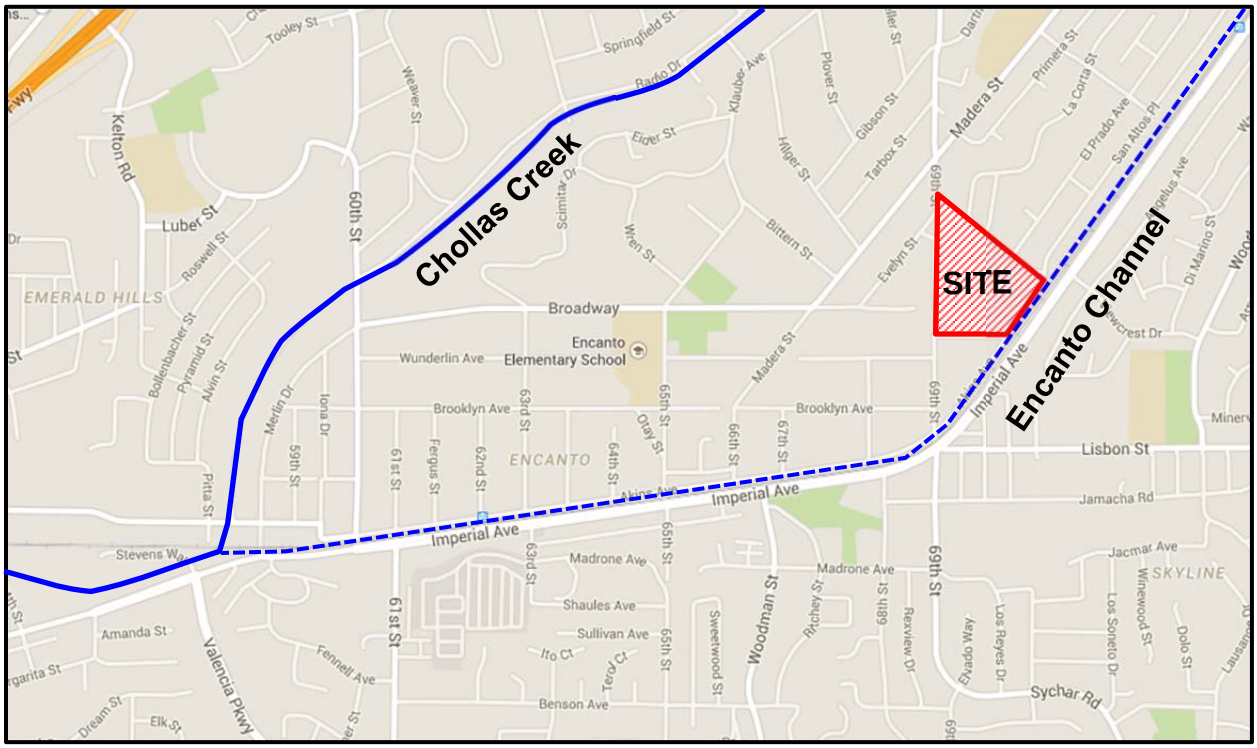

Figure 1. Valencia Construction Site Location (Outlined in Red)

The Site is owned by San Altos-Lemon Grove, LLC (Discharger). Ben C. Anderson is the contact and the "Legally Responsible Person" (LRP) for the Discharger. On March 6, 2014, Ben Anderson, on behalf of the Discharger, filed a Notice of Intent (NOI) with the State Water Board to comply with the requirements of the Construction Storm Water Permit. See Exhibit No. 1, Notice of Intent. On March 12, 2014, the State Water Board processed the NOI and assigned Waste Discharge Identification (WDID) No. 9 37C369143 to the Discharger. The submitted NOI lists BCA Development, Inc. as the "Contractor/Developer" and Ben Anderson as its contact.

The NOI identifies the Site as a Risk Level 2 construction site that must implement the requirements in Attachment D to the Construction Storm Water Permit to achieve BAT and BCT. The submitted NOI, states that construction activities will disturb all 18.26 acres of the Site. The NOI further states that construction activities would begin on March 1, 2014, and final stabilization would be completed on December 31, 2015.

C. Beneficial Uses of Potentially Affected Waters

The Site indirectly discharges to Chollas Creek. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates beneficial uses for all surface and ground waters in the San Diego Region. These beneficial uses "*form the cornerstone of water quality protection under the Basin Plan*." (Basin Plan, Chapter 2) Beneficial uses are defined in the Basin Plan as "*the uses of water necessary for the survival or well being of man, plants and wildlife*." (*Id.*)

The Basin Plan also designates water quality objectives to protect the designated beneficial uses. Water Code section 13050(h) defines "water quality objectives" as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."

The Basin Plan designates the following potential and existing beneficial uses for Chollas Creek:

- Contact Water Recreation (REC-1)
- Non-contact Water Recreation (REC-2)
- Warm Freshwater Habitat (WARM)
- Wildlife Habitat (WILD)

Chollas Creek is designated as impaired for diazinon, dissolved metals (copper, lead, and zinc), indicator bacteria, nutrients (phosphorus and nitrogen), and trash pursuant to Clean Water Act section 303(d). In August 2002, the San Diego Water Board adopted its first Total Maximum Daily Load (TMDL) to address diazinon impairment in Chollas Creek. In June 2007, the San Diego Water Board adopted a TMDL to address the dissolved metals impairment in Chollas Creek. In February 2010, the San Diego Water Board adopted a TMDL to address the indicator bacteria impairment in Chollas Creek.

D. Compliance History

December 2014: The City issued the Discharger a Stop Work Notice on December 2, 2014, for failing to implement required BMPs. See Exhibit No. 2, City Stop Work Notice December 2, 2014. The City warned the Discharger that without adequate BMPs, a "*discharge is imminent.*" The Discharger failed to implement the required BMPs and there was an unauthorized discharge of sediment and sediment laden storm water runoff from the Site into Encanto Channel on December 4, 2014. This resulted in the City issuing the Discharger a second Stop Work Notice on December 4, 2014. See Exhibit No. 3, Stop Work Notice December 4, 2014. The same BMP deficiencies identified before the storm event, as well as additional deficiencies in perimeter sediment controls were identified in a follow up City inspection of the Site on December 8 and 9, 2014. See Exhibit No. 4, City Inspection Report December 8, 2014; and Exhibit No. 5, City Inspection Report December 9, 2014.

On December 11, 2014, the City issued an Administrative Citation to the Discharger warning that if recommended BMPs were not installed by December 15, 2014, then monetary penalties would begin. See Exhibit No. 6, City Administrative Citation December 11, 2014. The City documented another unauthorized discharge of sediment and sediment laden storm water on December 12, 2014, from the Site into Encanto Channel and issued a second Administrative Citation. See Exhibit No. 7, City Administrative Citation December 15, 2014.

On December 12, 2014, the City requested the San Diego Water Board's assistance in obtaining regulatory compliance at the Site after the Discharger's second sediment discharge. By this time, the City had inspected the Site at least seven times; resulting in two administrative citations, three stop work notices, and one correct work notice. Therefore, the San Diego Water Board inspected the Site on December 15, 2014, and noted violations of the Construction Storm Water Permit. See Exhibit No. 8, San Diego Water Board Inspection Report December 15, 2014. On December 16, 2014, the City issued the Discharger its third Administrative Citation for failure to install adequate BMPs. See Exhibit No. 9, City Letter with Administrative Citation and Inspection Report December 16, 2014. On December 17, 2014, after a storm event, the City inspected the Site and observed workers power washing a City of San Diego street south of the Site to remove accumulated sediment discharged from the Site. See Exhibit No. 10, City Contractor Report December 17, 2014. On December 19, 2014, the San Diego Water Board issued Notice of Violation No. R9-2014-0153 to the Discharger, and requested a written response to confirm that the violations were corrected. See Exhibit No. 11, NOV No. R9-2014-0153. On December 31, 2014, after a storm event, the City documented another discharge from the Site. See Exhibit No. 12, City Contractor Report December 31, 2014.

January 2015: The City lifted the Site's Stop Work Order on January 22, 2015, after the Discharger corrected the bulk of the violations.

March 2015: The City documented Discharger BMP violations on March 18, 2015; including discharges of cement to the ground for which the City fined the Discharger $1,000. See Exhibit No. 13, City Inspection Report March 18, 2015; and Exhibit No. 14, City Administrative Citation March 19, 2015. The City noted continued BMP violations on March 23 and 24, 2015, and issued a $1,000 Administrative Citation for the discharge of cement to the ground. See Exhibit No. 15, City Inspection Report March 24, 2015; and Exhibit No. 16, City Administrative Citation March 24, 2015. On March 27, 2015, San Diego Water Board staff during an inspection found that the Discharger had implemented corrective actions that largely addressed the violations noted in Notice of Violation No. R9-2015-0153.

April 2015: The City issued the Discharger a second $1,000 fine for cement discharges to the ground. See Exhibit No. 17, City Administrative Citation April 1, 2015.

May 2015: On the morning of May 8, 2015, San Diego Water Board staff advised the Discharger that an Administrative Civil Liability was being considered. On the evening of May 8, 2015, San Diego Water Board staff documented a sediment discharge from the Site into Encanto Channel, as well as other BMP violations. See Exhibit No. 18, San Diego Water Board Inspection Report May 8, 2015. On May 12, 2015, the San Diego Water Board provided the Site Superintendent with the May 8, 2015, inspection report. San Diego Water Board staff documented additional Site BMP violations on May 13, 2015. See Exhibit No. 19, San Diego Water Board Inspection Report May 13, 2015. On May 14, 2015, San Diego Water Board staff spoke by telephone with the Site Superintendent about the approaching storm event, the inadequacy of existing Site BMPs, the strong likelihood of an administrative civil liability, and that San Diego Water Board staff would inspect the Site again on May 15, 2015. On May 15, 2015, after a storm event, San Diego Water Board staff documented additional BMP violations at the Site. See Exhibit No. 20, San Diego Water Board Inspection Report May 15, 2015.

June through October 2015: The City inspected the site once in June and once in July 2015. The City characterizes the Site as “High Priority” and returned to inspecting the Site every other week beginning in September 2015. The City issued a $1,000 Administrative Citation to the Discharger for discharging sediment from the Site into Encanto Channel and for failing to have adequate BMPs during an inspection on September 15, 2015. See Exhibit No. 21, City Administrative Citation September 22, 2015; and Exhibit No. 22, City Inspection Report September 15, 2015. On September 17, 2015, the City sent letters warning all active construction sites within the City that failure to implement effective BMPs may result in City, State or Federal penalties. The City issued another $1,000 Administrative Citation on October 5, 2015, for inadequate erosion control BMPs. See Exhibit No. 23, City Administrative Citation October 5, 2015. The City found BMP deficiencies in every inspection since May 2015; erosion control BMP deficiencies were the most prevalent.

II. ALLEGED VIOLATIONS

The following allegations against the Discharger are the basis for assessing administrative civil liability pursuant to Water Code section 13385, and also appear in the Complaint:

A. Violation No. 1: Unauthorized Discharge of Sediment. (6 Days)

The Discharger discharged pollutants to waters of the United States without filing a Report of Waste Discharge as required under Water Code section 13376. Pursuant to section III.B. of the Construction Storm Water Permit, *"[a]ll discharges are prohibited except for storm water and non-storm water discharges specifically authorized by [the Construction Storm Water Permit]*." Furthermore, pursuant to section III.A. of the Construction Storm Water Permit, *"[d]ischargers shall not violate any discharge prohibitions contained in applicable Basin Plans or statewide water quality control plans*." Waste Discharge Prohibition No. 8 in Chapter 4 of the Basin Plan prohibits discharges to the storm water conveyance system that are not composed entirely of storm water. In addition, pursuant to section V.A.2. and Attachment D, section A.1.b. of the Construction Storm Water Permit, "*[d]ischargers 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*."

Sediment-laden water was discharged from the Site into Encanto Channel and Chollas Creek on December 4, 12, 17, 31, 2014, May 8, 2015, and September 15, 2015. See Figure 2. May 8, 2015, Sediment Discharge. The violations were noted in the following documents:

City Stop Work Notice December 4, 2014 (Exhibit No. 3); and December 4, 2014, QSP Report at pp. 1, 4 and 8 (Exhibit No. 37.C);

City Administrative Citation December 15, 2014 (Exhibit No. 7~~),~~); ~~and~~ San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8); photographs taken on December 12, 2014: IMG_0648.jpg (Exhibit No. 39); IMG_0640.jpg (Exhibit No. 40); IMG_0643.jpg (Exhibit No. 40); IMG_0651.jpg (Exhibit No. 40); IMG_0628.jpg (Exhibit No. 40) and IMG_0679.jpg (Exhibit No. 40);

City Contractor Report December 17, 2014 (Exhibit No. 10); photographs taken on December 17, 2014: IMG_0250.jpg (Exhibit No. 40); IMG_0252.jpg (Exhibit No. 40); IMG_0257.jpg (Exhibit No. 40); and IMG_0260.jpg (Exhibit No. 40);

City Contractor Report December 31, 2014 (Exhibit No. 12); rainfall data (Exhibit No. 34), photographs taken on December 31, 2014: IMG_0727.jpg (Exhibit No. 39); IMG_0728.jpg (Exhibit No. 39); IMG_0724.jpg (Exhibit No. 40); and IMG_0742.jpg (Exhibit No. 40);

in photographs and text in San Diego Water Board Inspection Report May 8, 2015 (Exhibit No. 18); photographs taken on May 8, 2015: 20150508_191716.jpg (Exhibit No. 32); 20150508_191734.jpg (Exhibit No. 32); 20150508_191955.jpg (Exhibit No. 32); 20150508_192234.jpg (Exhibit No. 32); 20150508_191802.jpg (Exhibit No. 33); 20150508_191855.jpg (Exhibit No. 33); IMG_0271.jpg (Exhibit No. 33); IMG_0273.jpg (Exhibit No. 33); and IMG_0274.jpg (Exhibit No. 33)~~, and~~; and

City Administrative Citation September 15, 2015 (Exhibit No. 21); City Inspection Report September 15, 2015 (Exhibit No. 22); photographs taken on September 15, 2015: IMG_6842.jpg (Exhibit No. 40); IMG_6844.jpg (Exhibit No. 40); and IMG_6845.jpg (Exhibit No. 40).

Additionally, Tables 7.10 (p. 49) and G.1 (p.92) from San Altos' SWPPP (Exhibit No. 35); and Construction Storm Water Permit Finding 11 (§ I.A.11 at p. 3) states "[s]ediment also transports other pollutants such as nutrients, metals, and oils and grease."

The discharges into Encanto Channel and Chollas Creek were unauthorized and a violation of the Construction Storm Water Permit section III.B. because the Discharger failed to reduce or eliminate the pollutants in the storm water runoff prior to discharge (i.e., to implement BMPs that achieve BAT and BCT).

Figure 2. May 8, 2015, Sediment Discharge. View of sediment in street (Orlando Drive) after storm event. Photograph taken by Frank Melbourn, San Diego Water Board. 20150508_191716.jpg

B. Violation No. 2: Failure to Implement Material Stockpile BMPs. (10 days)
Pursuant to section B.1.b. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*[c]over and berm loose stockpiled construction materials that are not actively being used (i.e. soil, spoils, aggregate, fly-ash, stucco, hydrated lime, etc.).*"

The Discharger was in violation of section B.1.b. for 10 days; from December 2 through 8, 2014, December 15, 2014, May 13, 2015, and September 15, 2015. See Figure 3. Failure to implement material stockpile BMPs. The violations were noted in the following documents:

City Stop Work Notice December 2, 2014 (Exhibit No. 2); December 2, 2014, QSP Report at p. 3 (Exhibit No. 37); December 3, 2014, QSP Report at p.4 (Exhibit No. 37); City Stop Work Notice December 4, 2014 (Exhibit No. 3), December 4, 2014, QSP Report at p. 3 (Exhibit No. 37; December 5, 2014, QSP Report at p. 3 (Exhibit No. 37); City Inspection Report December 8, 2014 (Exhibit No. 4);

San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8), December 15, 2014, QSP Report at p. 2 (Exhibit No. 37); photographs taken on December 15, 2014: IMG_5029.jpg (Exhibit No. 33); IMG_5091.jpg (Exhibit No. 33); IMG_5062.jpg (Exhibit No. 32) and IMG_5092.jpg (Exhibit No. 33);

San Diego Water Board Inspection Report May 13, 2015 (Exhibit No. 19); photographs taken on May 13, 2015: IMG_5743.jpg (Exhibit No. 32); IMG_5727.jpg (Exhibit No. 32.C); IMG_0266.jpg (Exhibit No. 33); IMG_0305.jpg (Exhibit No. 33); IMG_6443.jpg (Exhibit No. 40); and IMG_6444.jpg (Exhibit No. 40)~~, and~~;

City Inspection Report September 15, 2015 (Exhibit No. 22); and photographs taken on September 15, 2015: IMG_6852.jpg (Exhibit No. 40); IMG_6865.jpg (Exhibit No. 40); IMG_6866.jpg (Exhibit No. 40); and IMG_6880.jpg (Exhibit No. 40).

Additionally, San Altos' NOV response (Exhibit No. 36) photographs at page 8 (§ 3. Soil Stockpiles).

Figure 3. Failure to implement material stockpile BMPs. Photograph taken by the City of Lemon Grove on December 2, 2014.

C. Violation No. 3: Failure to Implement Vehicle Fluid Leak BMPs. ***(2 days)***
Pursuant to section B.3.a. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*[p]revent oil, grease, or fuel to leak in to the ground, storm drains or surface waters.*" The Discharger was in violation of section B.3.a. for two days: December 15, 2014; and May 13, 2015. See Figure 4. Failure to have vehicle fluid leak protection. The violations were noted in the following documents:

San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8); December 15, 2014, QSP Report at p. 3 (Exhibit No. 37); photographs taken on December 15, 2014: IMG_5064.jpg (Exhibit No. 32); IMG_5075.jpg (Exhibit No. 32); IMG_5041.jpg (Exhibit No. 33); and IMG_5080.jpg (Exhibit No. 33); ~~and~~

San Diego Water Board Inspection Report May 13, 2015 (Exhibit No. 19); and photograph IMG_5742.jpg (Exhibit No. 32) taken on May 13, 2015.

Additionally, San Altos' NOV response (Exhibit No. 36) photographs at page 9 (§ 4. BMP's for Vehicle Storage and Maintenance).

Figure 4. Failure to have vehicle fluid leak protection. Photograph taken by Wayne Chiu, San Diego Water Board on December 15, 2014, of heavy equipment without vehicle fluid leak protection. IMG_5064.jpg

D. Violation No. 4: Failure to Implement Erosion Control BMPs in Inactive Areas. (22 days)

Pursuant to section D.2. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.*" The Discharger was in violation of section B.2. for 22 days: 9 days (December 1 through 9, 2014); 2 days (December 15 through 16, 2014); 1 day (January 6, 2015); 1 day (January 14, 2015); 8 days (May 8 through 15, 2015), and 1 day (September 15, 2015). See Figure 5. Failure to implement erosion control BMPs on inactive areas.

The violations were noted in the following documents:

in photographs and text in City Stop Work Notice December 2, 2014 (Exhibit No. 2); City Stop Work Notice December 4, 2014 (Exhibit No. 3); December 5, 2014, QSP Report (Exhibit No. 37) at p. 2; City Inspection Report December 8, 2014 (Exhibit No. 4); Photograph IMG_9452.jpg (Exhibit No. 40) taken on December 9, 2014; City Inspection Report December 16, 2014 (Exhibit No. 9); City letter dated December 16, 2014 (Exhibit No. 41); photographs taken on December 16, 2014: IMG_9536.jpg (Exhibit No. 40); IMG_9528.jpg (Exhibit No. 40) IMG_9529.jpg (Exhibit No. 40); 100_0061.jpg (Exhibit No. 38); 100_0074.jpg (Exhibit No. 38); and NORTHEASTCORNERBYMTSROAD.jpg (Exhibit No. 38); City Contractor Report January 16, 2015 (Exhibit No. 24);

San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8); December 15, 2014, QSP Report at p. 2 (Exhibit No. 37): photographs taken on December 15, 2014: IMG_5039.jpg (Exhibit No. 32); IMG_5061.jpg (Exhibit No. 32), IMG_5063.jpg (Exhibit No. 32), IMG_5028.jpg (Exhibit No. 33), IMG_5092.jpg (Exhibit No. 33); IMG_5066.jpg (Exhibit No. 32); and IMG_5068.jpg (Exhibit No. 33);

City Inspection Report January 6, 2015 (Exhibit No. 25); photographs taken on January 6, 2015: IMG_9589.jpg (Exhibit No. 40); IMG_9600.jpg (Exhibit No. 40): and IMG_9607.jpg (Exhibit No. 40);

City Inspection Report January 14, 2015 (Exhibit No. 26); photograph IMG_9629.jpg (Exhibit No. 40) taken on January 14, 2015;

San Diego Water Board Inspection Report May 8, 2015 (Exhibit No. 18); photographs taken on May 8, 2015: 20150508_191716.jpg (Exhibit No. 32); 20150508_191734 (Exhibit No. 32); 20150508_191955.jpg (Exhibit No. 32); 20150508_192214.jpg (Exhibit No. 32); and 20150508_192253.jpg (Exhibit No. 32); San Diego Water Board Inspection Report May 13, 2015 (Exhibit No. 19); photographs taken on May 13, 2015: IMG_5751.jpg (Exhibit No. 32); IMG_5763.jpg (Exhibit No. 32); IMG_5770.jpg (Exhibit No. 32); IMG_6427.jpg (Exhibit No. 40); and IMG_6454.jpg (Exhibit No. 40); San Diego Water Board

Inspection Report May 15, 2015 (Exhibit No. 20); photographs taken on May 15, 2015: IMG_0350.jpg (Exhibit No. 32); IMG_0354.jpg (Exhibit No. 32); IMG_0356.jpg (Exhibit No. 32); IMG_0359.jpg (Exhibit No. 32); IMG_0019.jpg (Exhibit No. 40); IMG_0015.jpg (Exhibit No. 40); and IMG_0017.jpg (Exhibit No. 40); and City Contractor Report dated May 15, 2015 (Exhibit No. 41):~~, and~~

City Inspection Report September 15, 2015 (Exhibit No. 22); and photographs taken on September 15, 2015: IMG_6840.jpg (Exhibit No. 40); IMG_6883.jpg (Exhibit 40); IMG_6841.jpg (Exhibit No. 40); and IMG_6885.jpg (Exhibit 40).

Additionally, SWPPP (Exhibit No. 35) at p. 22/197 (§ 3. Best Management Practices) at p. 39/197 (§ 4.1. BMP Inspection and Maintenance), and Site Maps starting at p. 94/197, and City Inspection Reports for December 2, 4, 8, 16, 2014, January 6, and 14, 2015, and September 15, 2015, and San Diego Water Board Inspection Reports for December 15, 2014, and May 8, 13, and 15, 2015 (Exhibit Nos. 2, 3, 4, 8, 9, 18, 19, 20, 22, 24, 25, and 26).

Figure 5. Failure to implement erosion control BMPs on inactive areas. Photograph taken by Wayne Chiu, San Diego Water Board on December 15, 2014, of housing pad without erosion control BMPs. Note the erosion rills. IMG_5061.jpg

E. Violation No. 5: Failure to Implement Perimeter Sediment Control BMPs. (14 days)

Pursuant to section E.1. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*establish and maintain effective perimeter controls and stabilize all construction entrances and exits to sufficiently control erosion and sediment discharges from the site.*" The Discharger was in violation of section E.1. for 14 days: 5 days (December 4 through 8, 2014); 2 days (December 15 through 16, 2014); 6 days (May 8 through 13, 2015), and 1 day (September 15, 2015). See Figure 6. Failure to implement perimeter sediment control BMPs. The violations were noted in the following documents:

in photographs and text in City Stop Work Notice December 4, 2014 (Exhibit No. 3); City Inspection Report December 8, 2014 (Exhibit No. 4);

San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8); December 18, 2014, QSP Report at p. 2 (Exhibit 37): photographs taken on December 15, 2014: IMG_5042.jpg (Exhibit No. 32); IMG_5043.jpg (Exhibit No. 32); and IMG_5051.jpg (Exhibit No. 32); IMG_5052.jpg (Exhibit No. 32); IMG_5054.jpg (Exhibit No. 32); IMG_5056.jpg (Exhibit No. 32); and IMG_5026.jpg (Exhibit No. 33); City Inspection Report December 16, 2014 (Exhibit No. 9);

San Diego Water Board Inspection Report May 8, 2015 (Exhibit No. 18); photograph 20150508_192234.jpg (Exhibit No. 32) taken on May 8, 2015; San Diego Water Board Inspection Report May 13, 2015 (Exhibit No. 19); photographs taken on May 13, 2015: IMG_5712.jpg (Exhibit No. 32); IMG_5721.jpg (Exhibit No. 32); IMG_5726.jpg (Exhibit No. 32); IMG_0266.jpg (Exhibit No. 33); and IMG_6453.jpg (Exhibit No. 40~~,~~); ~~and~~

City Inspection Report September 15, 2015 (Exhibit No. 21); and photographs taken on September 15, 2015: IMG_6841.jpg (Exhibit No. 40); IMG_6842.jpg (Exhibit No. 40); and IMG_6852.jpg (Exhibit No. 40)].

Figure 6. Failure to implement perimeter sediment control BMPs. Photograph taken by Frank Melbourn, San Diego Water Board on May 8, 2015, of gap (identified by red arrow) in perimeter sediment control BMPs that resulted in sediment discharge to Encanto Channel. 20150508_192234.jpg

F. Violation No. 6: Failure to Implement Erosion Control BMPs in Active Areas. (22 days)

Pursuant to section E.3. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.*" The Discharger was in violation of section E.3. for 22 days: 8 days (December 1 through 8, 2014); 2 days (December 15 through 16, 2014); 1 day (January 6, 2015); 2 days (March 23 through 24, 2015); 8 days (May 8 through 15, 2015), and 1 day (September 15, 2015). See Figure 7. Lack of erosion control BMPs in active areas. The violations were noted in the following documents:

in photographs and text in City Stop Work Notice December 2, 2014 (Exhibit No. 2); City Stop Work Notice December 4, 2014 (Exhibit No. 3); December 5, 2014, QSP Report at p. 3 (Exhibit No. 37); in photograph in City Inspection Report December 8, 2014 (Exhibit No. 4); San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8); photographs taken on December 15, 2014: IMG_5057.jpg (Exhibit No. 32); IMG_5029.jpg (Exhibit No. 33); IMG_5092.jpg (Exhibit No. 33); and IMG_5071.jpg (Exhibit No. 33); City Inspection Report December 16, 2014 (Exhibit No. 9); rainfall data (Exhibit No. 34); photographs taken on December 16, 2014: IMG_9526.jpg (Exhibit No. 40); IMG_9565.jpg (Exhibit No. 40); IMG_9566.jpg (Exhibit No. 40); IMG_9524.jpg (Exhibit No. 40); IMG_9543.jpg (Exhibit No. 40); IMG_9549.jpg (Exhibit No. 40); and AVALONBERMS.jpg (Exhibit No. 38); City Contractor Report January 16, 2015 (Exhibit No. 24);

rainfall data (Exhibit 34); photograph IMG_9607.jpg (Exhibit No. 40) taken on January 6, 2015;

in photograph in City Administrative Citation March 24, 2015 (Exhibit No. 16);

in photograph in San Diego Water Board Inspection Report May 8, 2015 (Exhibit No. 18); and in photograph 20150508_192214.jpg (Exhibit No. 32.B.4) taken on May 8, 2015; San Diego Water Board Inspection Report May 13, 2015 (Exhibit No. 19); photographs taken on May 13, 2015: IMG_5712.jpg (Exhibit No. 32); IMG_5715.jpg (Exhibit No. 32); IMG_5738.jpg (Exhibit No. 32); IMG_5745.jpg (Exhibit No. 32); IMG_5750.jpg (Exhibit No. 32); IMG_5758.jpg (Exhibit No. 32); IMG_6424.jpg (Exhibit No. 40); IMG_6434.jpg (Exhibit No. 40); and IMG_6452.jpg (Exhibit No. 40); City Contractor Report dated May 15, 2015 (Exhibit No. 41); San Diego Water Board Inspection Report May 15, 2015 (Exhibit No. 20); photographs taken on May 15, 2015: IMG_0354.jpg (Exhibit No. 32); IMG_0366.jpg (Exhibit No. 32); IMG_0355.jpg (Exhibit No. 33); IMG_0364.jpg (Exhibit No. 33); IMG_0362.jpg (Exhibit No. 33); IMG_0075.jpg (Exhibit No. 40); and IMG_0079.jpg (Exhibit No. 40~~,~~);

~~and~~ City Inspection Report September 15, 2015 (Exhibit No. 22); and photographs taken on September 15, 2015: IMG_6837.jpg (Exhibit No. 40); and IMG_6865.jpg (Exhibit No. 40).

Figure 7. Lack of erosion control BMPs in active areas. Photograph on May 15, 2015, of muddy thoroughfare (Tangelos Place) lacking erosion control BMPs after rain event. Photograph taken by Frank Melbourn, San Diego Water Board. IMG_0354.jpg

G. Violation No. 7: Failure to Apply Linear Sediment Controls. (9 days)

Pursuant to section E.4. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*apply linear sediment controls along toe of slope, face of the slope, and at the grade breaks of exposed slopes to comply with the sheet flow lengths in accordance with Table 1.*" The Discharger was in violation of section E.4. for nine days: 2 days (December 15 through 16, 2014); 6 days (May 8 through 13, 2015), and 1 day (September 15, 2015). See Figure 8. Failure to apply linear sediment controls. The violations were noted in the following documents:

San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8); December 15, 2014, QSP Report at. p. 2 (Exhibit No. 37); photographs taken on December 15, 2014: IMG_5039.jpg (Exhibit No. 32); IMG_5061.jpg (Exhibit No. 32); IMG_5063.jpg (Exhibit No. 32); IMG_5066.jpg (Exhibit No. 32); IMG_5028.jpg (Exhibit No. 33); IMG_5071.jpg (Exhibit No. 33); and IMG_5074.jpg (Exhibit No. 33); City Inspection Report December 16, 2014 (Exhibit No. 9); photographs taken on December 16, 2014: 100_0050.jpg (Exhibit No. 38); 100_0061.jpg (Exhibit No. 38); IMG_9525.jpg (Exhibit No. 40); IMG_9528.jpg (Exhibit No. 40); IMG_9529.jpg (Exhibit No. 40); IMG_9536.jpg (Exhibit No. 40); IMG_9552.jpg (Exhibit No. 40); and IMG_9553.jpg (Exhibit No. 40);

San Diego Water Board Inspection Report May 8, 2015 (Exhibit No. 18); photographs taken on May 8, 2015: 20150508_191716.jpg (Exhibit No. 32); and 20150508_191955.jpg (Exhibit No. 32); San Diego Water Board Inspection Report May 13, 2015 (Exhibit No. 19); photographs taken on May 13, 2015: IMG_5712.jpg (Exhibit No. 32); IMG_5715.jpg (Exhibit No. 32); IMG_5727.jpg (Exhibit No. 32); IMG_5738.jpg (Exhibit No. 32); IMG_5745.jpg (Exhibit No. 32); IMG_5758.jpg (Exhibit No. 32); IMG_5763.jpg (Exhibit No. 32); IMG_5770.jpg (Exhibit No. 32); IMG_6421.jpg (Exhibit No. 40); IMG_6422.jpg (Exhibit No. 40); IMG_6433.jpg (Exhibit No. 40); IMG_6434.jpg (Exhibit No. 40); and IMG_6449.jpg (Exhibit No. 40);~~, and~~

City Inspection Report September 15, 2015 (Exhibit No. 22); and photographs taken on September 15, 2015: IMG_6839.jpg (Exhibit No. 40); IMG_6842.jpg (Exhibit No. 40); IMG_6866.jpg (Exhibit No. 40); IMG_6882.jpg (Exhibit No. 40); IMG_6883.jpg (Exhibit No. 40) and IMG_6885.jpg (Exhibit No. 40).

Figure 8. Failure to apply linear sediment controls. Photograph taken by Wayne Chiu, San Diego Water Board, on December 15, 2014, depicting the lack of linear sediment controls on a slope. IMG_5035.jpg

H. Violation No. 8: Failure to Manage Run-On and Runoff. (7 days)

Pursuant to section F. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*effectively manage all run-on, all runoff within the site and all runoff that discharges off the site. Run-on from off site shall be directed away from all disturbed areas or shall be collectively be in compliance with the effluent limitations in this General Permit.*" The Discharger was in violation of section F. for seven days: 1 day (December 15, 2014); and 6 days (May 8 through 13, 2015). See Figure 9. Failure to manage run-on and runoff. The violations were noted in the following documents:

San Diego Water Board Inspection Report December 15, 2014 (Exhibit No. 8); photographs taken on December 15, 2014: IMG_5039.jpg (Exhibit No. 32); IMG_5042.jpg (Exhibit No. 32); IMG_5043.jpg (Exhibit No. 32); IMG_5026.jpg (Exhibit No. 33); IMG_5073.jpg (Exhibit No. 33); and IMG_5074.jpg (Exhibit No. 33);

San Diego Water Board Inspection Report May 8, 2015 (Exhibit No. 18); photographs taken on May 8, 2015: 20150508_191716.jpg (Exhibit No. 32); 20150508_191734.jpg (Exhibit No. 32); and 20150508_191955.jpg (Exhibit No. 32); ~~and~~ San Diego Water Board Inspection Report May 13, 2015 (Exhibit No. 19); and photographs taken on May 13, 2015: IMG_5712.jpg (Exhibit No. 32); IMG_5715.jpg (Exhibit No. 32); IMG_5721.jpg (Exhibit No. 32); IMG_5726.jpg (Exhibit No. 32); IMG_5738.jpg (Exhibit No. 32); IMG_5745.jpg (Exhibit No. 32); IMG_5750.jpg (Exhibit No. 32); IMG_5758.jpg (Exhibit No. 32); IMG_0266.jpg (Exhibit No. 33); IMG_6434.jpg (Exhibit No. 40); and IMG_6451.jpg (Exhibit No. 40).

Figure 9. Failure to manage run-on and runoff. Photograph taken by Wayne Chiu, San Diego Water Board on December 15, 2014, displaying erosion caused by runoff flowing under fence and offsite. IMG_5042.jpg.

I. Violation No. 9: Failure to Remove Sediment or Other Construction Materials from Roads. (10 days)

Pursuant to section E.7. in Attachment D to the Construction Storm Water Permit, dischargers are required "*at a minimum daily (when necessary) and prior to any rain event, the discharger shall remove any sediment or other construction activity-related materials that are deposited on the roads (by vacuuming or sweeping).*" The Discharger was in violation of section E.7. for 10 days: 8 days (December 2 through 9, 2014) December 16, 2014, and September 15, 2015. See Figure 10. Failure to remove sediment from roads. The violations were noted in the following:

City Stop Work Notice December 2, 2014 (Exhibit No. 2); in City photographs from December 4, 2014; December 4, 2014, QSP Report at p. 4 (Exhibit No. 37); in December 5, 2014, QSP Report at p. 4 (Exhibit No. 37); City Inspection Report December 8, 2014 (Exhibit No. 4); City Inspection Report December 9, 2014 (Exhibit No. 5); December 10, 2014, QSP Report at p. 4 (Exhibit No. 37); in photograph IMG_9481.jpg (Exhibit No. 40) taken on December 9, 2014; City Inspection Report December 16, 2014 (Exhibit No. 9); in photograph IMG_9568.jpg (Exhibit No. 40) taken on December 16, 2014~~, and~~;

City Inspection Report September 15, 2015 (Exhibit No. 22); and photographs taken on September 15, 2015: IMG_6842.jpg (Exhibit No. 40); and IMG_6852.jpg (Exhibit No. 40).

Figure 10. Failure to remove sediment from roads. Photograph taken by the City of Lemon Grove on December 4, 2014, depicting sediment on Akins Avenue southwest of the Site.

J. Violation No. 10: Failure to Protect Storm Drain Inlets. (3 days)
Pursuant to section E.6. in Attachment D to the Construction Storm Water Permit, dischargers "*shall ensure that all storm drain inlets and perimeter controls, runoff control BMPs, and pollutant controls at entrances and exits (e.g. tire washoff locations) are maintained and protected from activities that reduce their effectiveness.*" The Discharger was in violation of section E.6. for three days: December 8, 2014; May 13, 2015, and September 15, 2015. See Figure 11. Failure to protect storm drain inlets. The violation was noted in the following:

City Inspection Report December 8, 2014 (Exhibit No. 4);

in San Diego Water Board photographs from May 13, 2015 (Exhibit No. 19); photographs taken on May 13, 2015: IMG_0295.jpg (Exhibit No. 32); IMG_0271.jpg (Exhibit No. 33); IMG_0272.jpg (Exhibit No. 33); IMG_0273.jpg (Exhibit No. 33); IMG_0274.jpg (Exhibit No. 33); and IMG_5724.jpg (Exhibit No. 33); ~~, and~~

City Inspection Report September 15, 2015 (Exhibit No. 22); and photograph IMG_6845.jpg (Exhibit No. 40) taken on September 15, 2015.

Figure 11. Failure to protect storm drain inlets. Photograph taken by Frank Melbourn, San Diego Water Board on May 13, 2015, displaying unprotected storm drain inlet. IMG_0295.jpg.

K. Violation No. 11: Failure to Contain and Securely Protect Stockpiled Waste Material from Wind and Rain. (9 days)

Pursuant to section B.2.f. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*[c]ontain and securely protect stockpiled waste material from wind and rain at all times unless actively being used.*" The Discharger was in violation of section B.2.f. for nine days (January 6 through 14, 2015). The violations were noted in the following documents:

City Inspection Report January 6, 2015 (Exhibit No. 25); photographs IMG_9585.jpg (Exhibit No. 40); and IMG_9588.jpg (Exhibit No. 40) taken on January 6, 2015; ~~and~~ City Inspection Report January 14, 2015 (Exhibit No. 26); and photographs IMG_9629.jpg (Exhibit No. 40); and IMG_9631.jpg (Exhibit No. 40) taken on January 14, 2015.

L. Violation No. 12: Failure to Properly Store Chemicals. (7 days)

Pursuant to section B.1.c. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*[s]tore chemicals in watertight containers (with appropriate secondary containment to prevent any spillage or leakage) or in a storage shed (completely enclosed).*" The Discharger was in violation of section B.1.c. for seven days (March 18 through 24, 2015). See Figure 12. Failure to properly store chemicals. The violations were noted in the following documents: City Inspection Report March 18, 2015 (Exhibit No. 13); and photograph IMG_6155.jpg (Exhibit No. 40) taken on March 18, 2015; and City Correct Work Notice March 24, 2015 (Exhibit No. 15).

Figure 12. Failure to properly store chemicals. Photograph taken by the City of Lemon Grove on March 24, 2015, depicting chemicals and vehicle lubricants stored on pallets without protection from the elements and without secondary containment.

M. Violation No. 13: Failure to Prevent Discharge of Concrete Waste to the Ground. (15 days)

Pursuant to section B.2.i. in Attachment D to the Construction Storm Water Permit, dischargers are required to "*[e]nsure the containment of concrete washout areas and other washout areas that may contain additional pollutants so there is no discharge into the underlying soil and onto the surrounding areas.*" The Discharger was in violation of section B.2.i. for 15 days (March 18 through April 1, 2015). See Figure 13. Failure to prevent discharge of concrete waste to the ground. The violations were noted in the following documents:

City Administrative Citation March 19, 2015 (Exhibit No. 14); photographs taken on March 18, 2015: IMG_6131.jpg (Exhibit No. 39); IMG_6134.jpg (Exhibit No. 39); and IMG_6133.jpg (Exhibit No. 40); City Administrative Citation March 24, 2015 (Exhibit No. 16); photographs IMG_6165.jpg (Exhibit No. 40); and IMG_6166.jpg (Exhibit No. 40) taken on March 27, 2015; ~~and~~ City Administrative Citation April 1, 2015 (Exhibit No. 17); and photograph IMG_6183.jpg (Exhibit No. 40) taken on April 1, 2015.

Figure 13. Failure to prevent the discharge of concrete waste to the ground. Photograph taken by the City of Lemon Grove on March 24, 2015, depicting discharge of concrete waste on slope (identified by red circle).

III. LIABILITY CALCULATIONS

A. Determination of Administrative Civil Liability

An administrative civil liability may be imposed pursuant to the procedures in Water Code section 13323. The Complaint alleges the act(s) or failure to act that constitutes a violation of law, the provision of law authorizing civil liability, and the proposed civil liability. Pursuant to the relevant portions of Water Code section 13385(a):

> *A person who violates any of the following shall be liable civilly in accordance with this section:*
>
> *(1) Section 13375 or 13376.*
> *(2) A waste discharge requirement or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.*
> *(3) A requirement established pursuant to section 13383.*

Furthermore, Water Code section 13385 (c) provides that:

> *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.*

Water Code section 13385(e) requires the consideration of several factors when determining the amount of civil liability to impose. These factors include:

> *…the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on 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 violation, and other matters that justice may require. 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*.

B. State Water Board Enforcement Policy

On November 17, 2009, 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 May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in Water Code section 13385(e). The liability calculation methodology enables the Regional Water Boards to fairly and consistently implement liability provisions of the Water Code for maximum enforcement impact to address, correct, and deter water quality violations.

Pursuant to the Enforcement Policy, Regional Water Boards determine an initial liability factor based on the Potential for Harm and the extent of Deviation from Requirements for a violation. Regional Water Boards may then use three adjustment factors for modification of the initial liability amount. These factors are Culpability, Cleanup and Cooperation, and History of Violations. The initial liability amount can be increased or decreased based on these adjustment factors. Additional adjustments may be used regarding multiple violations resulting from the same incident and multiple day violations.

C. Proposed Base Civil Liabilities for Alleged Violations

This section provides the recommendations for the proposed base civil liabilities for each of the alleged violations discussed in Section II, developed in accordance with the procedures in the Enforcement Policy methodology. A summary of the information and factors used to develop the proposed base civil liabilities for each of the violations are provided in Exhibit No. 27, Penalty Methodology Summary.

1. **Violation No. 1: Unauthorized Discharge of Sediment.**

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 1)
The Potential for Harm for Discharge Violations is determined by using a three-factor scoring system to quantify: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement. The determination of these three factors and the final score are discussed below.

Factor 1: Harm or Potential Harm to Beneficial Uses
A score between 0 and 5 is assigned in accordance with the statutory factors of the nature, circumstances, extent, and gravity of the violation, based on a determination of whether the harm or potential for harm is negligible (0), minor (1), below moderate (2), moderate (3), above moderate (4), or major (5).

The San Diego Water Board Prosecution Team (Prosecution Team) assigned a score of **3**. The Enforcement Policy defines a score of **3** 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)*." A score of **3** was selected because:

a. Sediment, the primary storm water pollutant from construction sites, was indirectly discharged into Chollas Creek.

b. Chollas Creek is designated as an impaired water body for dissolved metals (copper, lead, and zinc) pursuant to Clean Water Act section 303(d). Storm water runoff containing sediment discharged from the Site likely transported other pollutants such as metals; therefore it is reasonable to state that the unauthorized discharge further degraded the already impaired waters of Chollas Creek.

c. Sediment discharges from the Site into Chollas Creek are reasonably expected to have a negative impact on its beneficial uses (REC-1, REC-2, WARM, and WILD). However the discharges are likely to attenuate without appreciable acute and chronic effects.

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 whether the discharged material poses a negligible (0), minor (1), moderate (2), above moderate (3), or major (4) risk or threat to potential receptors. "Potential receptors" are those identified considering human, environmental and ecosystem health exposure pathways.

The Prosecution Team assigned a score of **2**. The Enforcement Policy defines a score of **2** as "*[d]ischarged material poses a moderate risk or threat to potential receptors (i.e. the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection)*." A score of **2** was selected because:

a. Sediment discharges can adversely impact the physical quality of in-stream waterways by altering or obstructing flows and affecting existing riparian functions.

b. Sediment acts as a binding carrier to other toxic constituents like metals and organic contaminants (i.e., pesticides and PCBs).

c. Sediment discharges typically increase receiving water turbidity levels which have an adverse impact on the quality of receiving waters and the ability to support habitat related beneficial uses by reducing visibility and interfering with biotic feeding and reproduction.

d. Sediment discharges cause acute effects on the invertebrate aquatic community (e.g., it can be lethal when the benthic community is buried in sediment).

Factor 3: Susceptibility to Cleanup and Abatement

A score of 0 is assigned if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement.

The Prosecution Team assigned a score of **1**. A score of **1** was selected because the San Diego Water Board determined that less than 50 percent of the unauthorized discharges of sediment and sediment laden water to Encanto Channel and Chollas Creek was susceptible to cleanup or abatement.

FINAL SCORE – "Potential for Harm"

The Potential for Harm for Discharge Violations is the sum of Factors 1, 2, and 3. Based on the determinations above, the final Potential for Harm score is **6** (3 + 2 + 1).

STEP 2 – Assessment for Discharge Violations (Violation No. 1)

According to Water Code section 13385, a Regional Water Board may impose civil liability on a per day basis, a per gallon basis, or both. Due to the difficulty in accurately determining the volume of unauthorized discharges from the Site, civil liability was only calculated on a per day basis for the violation.

Per day assessments for discharge violations are determined based on the final Potential for Harm score and the extent of the Deviation from Requirement, which are used in Table 2 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Major "Deviation from Requirement" as "[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)."

The Prosecution Team has determined that the Deviation from Requirement is **Major** because the Construction Storm Water Permit prohibits all discharges except for storm water and non-storm water discharges specifically authorized by the permit. Only discharges that have been controlled with BMPs that achieve BAT and BCT are authorized. Because the Discharger did not implement BMPs that achieve BAT and BCT, the requirements of the Construction Storm Water Permit were "rendered ineffective."

Per Day Factor

Using a Potential for Harm factor score of **6** (see Step 1) and Deviation from Requirement of **Major**, the Per Day Factor for the unauthorized discharges from the Site to Chollas Creek is **0.220** in Table 2 of the Enforcement Policy.

Days of Discharge Violations
Sediment laden water was discharged from the Site into Encanto Channel and Chollas Creek on December 4, 12, 17, 31, 2014, May 8, 2015, and September 15, 2015. Therefore, there were six days of discharge.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 1)
Step 3 does not apply to Discharge Violations

STEP 4 – Adjustment Factors (Violation No. 1)
There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability
An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not implement BMPs that achieve BAT and BCT, which resulted in the unauthorized discharges from the Site. The Discharger was informed by the City and the San Diego Water Board in writing various times that the Site's BMPs were inadequate. A reasonable person would have corrected the deficient BMPs to prevent future discharges.

Cleanup and Cooperation
An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger in many cases ignored the BMP recommendations or took longer than 72 hours to correct deficiencies.

History of Violations
Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 1)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	6	x	0.220	x	$10,000	x	1.3	x	1.1	x	1.0	=	$18,876

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 1)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 1)

See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 1)

The Discharger derived an economic benefit by not properly implementing the erosion and sediment control BMPs that are required for all construction sites. At a minimum, the Discharger should have implemented erosion control and sediment control requirements for a Risk Level 1 construction site. The estimated cost to implement effective soil cover and effective perimeter sediment controls is **$13,500** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$9,476.** See Exhibit No. 28, Economic Benefit Calculation and Supporting Documentation.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 1)

For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars ($10,000) per day of violation (per violation); and (b) ten dollars ($10) for every gallon discharged, over one thousand (1,000) gallons discharged, that was not cleaned up. In this instance, the Prosecution Team is proposing the assessment of civil liability for the discharge of sediment to waters of the United States only on a per day basis based on information currently available. The Maximum Liability Amount that could be assessed for this violation is **$10,000 per day per discharge**. Therefore, the maximum liability amount is **$60,000** for five days of discharge.

Minimum Liability Amount

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability Amount be at least ten percent (10%) higher than the Economic Benefit. Therefore the Minimum Liability Amount that should be assessed for this violation is (1.1 x $9,476) = **$10,424**.

STEP 10 – Final Liability Amount (Violation No. 1)

Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for **six days** of discharge in violation of the Construction Storm Water Permit is **$18,876**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

2. Violation No. 2: Failure to Implement Material Stockpile BMPs.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 2)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 2)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 2)

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation is characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement adequate stockpile management BMPs poses a substantial potential for harm if there is storm water or non-storm water runoff that flows through and transports sediment from the Site to receiving waters.

Deviation from Requirement
The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." **Moderate** was selected because the Discharger covered only some of the material stockpiles, thus rendering the requirement only partially effective.

Per Day Factor
Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to implement the stockpile management requirements is **0.35** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation
According to the documentation included with this technical analysis, the Discharger was in violation of the stockpile management requirements of or B.1.b. in Attachment D to the Construction Storm Water Permit for **10 days** (December 2 through 8, 2014, December 15, 2014, May 13, 2015, and September 15, 2015).

STEP 4 – Adjustment Factors (Violation No. 2)
There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability
An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not adequately implement the stockpile management requirements. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger repeatedly failed to comply with the requirement over several months.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 2)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	10	x	0.35	x	$10,000	x	1.3	x	1.1	x	1.0	=	$50,050

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 2)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 2)

See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 2)

The Discharger derived an economic benefit by not properly implementing the stockpile management BMPs that are required for all construction sites. At a minimum, the Discharger should have properly covered and contained stockpiles on the Site before the predicted storm events. The estimated cost to properly cover and contain the stockpiles is **$1,550** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$1,088.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 2)
For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). The Maximum Liability Amount that could be assessed for this violation is **$10,000 per day**. Therefore the maximum liability amount for ten days of violation is **$100,000**.

Minimum Liability Amount
Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $1,088) = **$1,197**.

STEP 10 – Final Liability Amount (Violation No. 2)
Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for 10 days of violation of the Construction Storm Water Permit is **$50,050**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

3. Violation No. 3: Failure to Implement Vehicle Fluid Leak BMPs.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 3)
Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 3)
Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 3)
While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm
The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement adequate vehicle storage and maintenance BMPs poses a substantial potential for harm if there is storm water or non-storm water runoff that flows through and transports oil, grease, or fuel from the Site to receiving waters.

Deviation from Requirement
The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Major "Deviation from Requirement" as "[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)." The Prosecution Team has determined that the Deviation from Requirement is **Major** because the Discharger failed to provide drip pans for vehicles stored on the Site, thus rendering the requirement ineffective.

Per Day Factor
Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement vehicle fluid leak BMPs is **0.55** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation
According to the documentation included with this technical analysis, the Discharger was in violation of the vehicle storage and maintenance requirements of Sections B.3.a. in Attachment D to the Construction Storm Water Permit for **2 days** (December 15, 2014, and May 13, 2015).

STEP 4 – Adjustment Factors (Violation No. 3)
There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not adequately implement the vehicle storage and maintenance requirements. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to comply with the requirement twice over several months.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 3)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	2	x	0.55	x	$10,000	x	1.3	x	1.1	x	1.0	=	$15,730

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 3)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 3)

See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 3)

The Discharger derived an economic benefit by not properly implementing the vehicle storage and maintenance BMPs that are required. At a minimum, the Discharger should have provided drip pans for construction equipment stored on the Site. The estimated cost to provide drip pans for construction vehicles on the Site is **$1,286** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$823.** See Exhibit No. 27.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 3)

For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). The Maximum Liability Amount that could be assessed for this violation is **$10,000 per day of violation**. Therefore the maximum liability amount is **$20,000**.

Minimum Liability Amount

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $823) = **$905**.

STEP 10 – Final Liability Amount (Violation No. 3)

Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to adequately implement vehicle storage and maintenance requirements for **two days** in violation of the Construction Storm Water Permit is **$15,730**, plus staff costs. The proposed liability is within the minimum and maximum liability range.

4. Violation No. 4: Failure to Implement Erosion Control BMPs in Inactive Areas.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 4)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 4)
Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 4)
While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm
The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement adequate erosion control BMPs poses a substantial potential for harm if there is storm water or non-storm water runoff that flows through the Site and erodes exposed soil areas which generates sediment that can be transported in runoff to receiving waters.

Deviation from Requirement
The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Major "Deviation from Requirement" as "[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)." The Prosecution Team has determined that the Deviation from Requirement is **Major** because San Diego Water Board and City inspectors consistently found inactive areas without erosion control BMPs.

Per Day Factor
Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement erosion control BMPs on inactive areas is **0.55** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation

According to the documentation included with this technical analysis, the Discharger was in violation of the erosion control requirements of Section D.2. in Attachment D to the Construction Storm Water Permit for a period of **22 days**: 9 days (December 1 through 9, 2014); 2 days (December 15 through 16, 2014); 1 day (January 6, 2015); 1 day (January 14, 2015); 8 days (May 8 through 15, 2015), and 1 day (September 15, 2015).

STEP 4 – Adjustment Factors (Violation No. 4)

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not adequately implement the erosion control requirements for inactive areas of the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger was repeatedly told by San Diego Water Board and City inspectors to address the violation.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 4)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	22	x	0.55	x	$10,000	x	1.3	x	1.1	x	1.0	=	$173,030

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 4)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 4)

See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 4)

The Discharger derived an economic benefit by not properly implementing the erosion control BMPs that are required for inactive areas. At a minimum, the Discharger should have provided effective soil cover for all inactive areas on the Site. The estimated cost to provide effective soil cover for all inactive areas on the Site is **$8,500** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$5,966.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 4)

For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$220,000**.

Minimum Liability Amount

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $5,966) = **$6,563**.

STEP 10 – Final Liability Amount (Violation No. 4)

Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to adequately implement erosion control requirements for inactive areas for **22 days** in violation of the Construction Storm Water Permit is **$173,030**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

5. Violation No. 5: Failure to Implement Perimeter Sediment Control BMPs

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 5)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 5)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 5)

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement adequate perimeter sediment control BMPs poses a substantial potential for harm if there is loose or eroded sediment that can be transported from the Site in storm water or non-storm water runoff to receiving waters.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." The Prosecution Team has determined that the Deviation from Requirement is **Moderate** because there was evidence that the Discharger had attempted to implement perimeter sediment control BMPs; however they were ineffective as evidenced by sediment discharges, gaps in perimeter protection, and unmaintained BMPs during inspections.

Per Day Factor

Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to implement the perimeter sediment control BMPs is **0.35** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation

According to the documentation included with this technical analysis, the Discharger was in violation of the perimeter sediment control requirements of Section E.1. in Attachment D to the Construction Storm Water Permit for a period of **14 days:** 5 days (December 4 through 8, 2014); 2 days (December 15 through 16, 2014); 6 days (May 8 through 13, 2015), and 1 day (September 15, 2015).

STEP 4 – Adjustment Factors (Violation No. 5)

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not adequately implement the perimeter sediment control requirements to prevent erosion and sediment discharges from the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation
An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger did not adequately implement perimeter sediment control BMPs over several months.

History of Violations
Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 5)
The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	14	x	0.35	x	$10,000	x	1.3	x	1.1	x	1.0	=	$70,070

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 5)
See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 5)
See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 5)
The Discharger derived an economic benefit by not properly implementing the perimeter sediment control BMPs that are required. At a minimum, the Discharger should have maintained or repaired gaps in perimeter sediment control BMPs when identified. The estimated cost to maintain or repair gaps in perimeter sediment control BMPs is **$3,100** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$2,175.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 5)
For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$140,000**.

Minimum Liability Amount
Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $2,175) = **$2,393**.

STEP 10 – Final Liability Amount (Violation No. 5)
Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to adequately implement perimeter sediment control requirements for **14 days** in violation of the Construction Storm Water Permit is **$70,070**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

6. Violation No. 6: Failure to Implement Erosion Control BMPs in Active Areas.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 6)
Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 6)
Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 6)
While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm
The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement the additional erosion control requirements for a Risk Level 2 construction site to reduce the higher potential of sediment generation poses a substantial potential for harm that may be caused by additional sediment potentially discharged in storm water runoff to receiving waters.

Deviation from Requirement
The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Major "Deviation from Requirement" as "[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)." The Prosecution Team has determined that the Deviation from Requirement is **Major** because there was no evidence that the Discharger had adequately implemented, or was prepared to implement erosion control BMPs for active areas, thus rendering the requirement ineffective.

Per Day Factor
Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement the additional Risk Level 2 erosion control requirements is **0.55** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation
According to the documentation included with this technical analysis, the Discharger was in violation of the Risk Level 2 erosion control requirements of Section E.3. in Attachment D to the Construction Storm Water Permit for **22 days:** 8 days (December 1 through 8, 2014); 2 days (December 15 through 16, 2014); 1 day (January 6, 2015); 2 days (March 23 through 24, 2015); 8 days (May 8 through 15, 2015), and 1 day (September 15, 2015).

STEP 4 – Adjustment Factors (Violation No. 6)

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not adequately implement the additional Risk Level 2 erosion control requirements for active areas of the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger was repeatedly told by San Diego Water Board and City inspectors to address the violation.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 6)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	22	x	0.55	x	$10,000	x	1.3	x	1.1	x	1.0	=	$173,030

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 6)
See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 6)
See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 6)
The Discharger derived an economic benefit by not properly implementing the additional erosion control BMPs that are required on active areas for Risk Level 2 construction sites. At a minimum, the Discharger should have applied erosion control BMPs on active areas of the Site prior to the predicted storm events, and have BMPs available on site for deployment. The estimated cost to have materials available on site and provide erosion control BMPs for active areas on the Site is **$8,500** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$5,966.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 6)
For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$220,000**.

Minimum Liability Amount
Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $5,966) = **$6,563**.

STEP 10 – Final Liability Amount (Violation No. 6)
Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to adequately implement additional Risk Level 2 erosion control requirements for **22 days** in violation of the Construction Storm Water Permit is **$173,030**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

7. Violation No. 7: Failure to Apply Linear Sediment Controls

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 7)
Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 7)
Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 7)
While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm
The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement the additional sediment control requirements for a Risk Level 2 construction site to reduce the higher potential of sediment generation and transport from exposed slopes poses a substantial potential for harm that may be caused from additional sediment potentially discharged in storm water runoff to receiving waters.

Deviation from Requirement
The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Major "Deviation from Requirement" as "[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)." The Prosecution Team has determined that the Deviation from Requirement is **Major** because the failure of the Discharger to implement effective BMPs resulted in sediment discharges.

Per Day Factor
Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement the additional Risk Level 2 linear sediment control requirements is **0.55** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation
According to the documentation included with this technical analysis, the Discharger was in violation of the Risk Level 2 linear sediment control requirements of Section E.4. in Attachment D to the Construction Storm Water Permit for **nine days:** 2 days (December 15 through 16, 2014); 6 days (May 8 through 13, 2015), and 1 day (September 15, 2015).

STEP 4 – Adjustment Factors (Violation No. 7)
There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability
An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not adequately implement the additional Risk Level 2 linear sediment control requirements for exposed slopes on the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation
An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger did not adequately implement the additional Risk Level 2 sediment control BMPs for exposed slopes over several months.

History of Violations
Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 7)
The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	9	x	0.55	x	$10,000	x	1.3	x	1.1	x	1.0	=	$70,785

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 7)
See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 7)
See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 7)
The Discharger derived an economic benefit by not properly implementing the additional sediment control BMPs that are required on exposed slopes for Risk Level 2 construction sites. At a minimum, the Discharger should have applied linear sediment control BMPs on exposed areas of the Site prior to the predicted storm events. The estimated cost to implement linear sediment control BMPs for exposed slopes on the Site is **$1,000** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$700.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 7)
For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$90,000**.

Minimum Liability Amount

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $700) = **$770**.

STEP 10 – Final Liability Amount (Violation No. 7)

Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to adequately implement additional Risk Level 2 linear sediment control requirements for exposed slopes for **nine days** in violation of the Construction Storm Water Permit is **$70,785**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

8. Violation No. 8: Failure to Manage Run-On and Runoff.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 8)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 8)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 8)

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to adequately control run-on, runoff within the Site, and runoff that discharged from the Site poses a substantial potential for harm from additional sediment that potentially discharged in storm water runoff to receiving waters.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." The Prosecution Team has determined that the Deviation from Requirement is **Moderate** because there was evidence that the Discharger had at least implemented partially run-on controls, runoff controls within the Site, and runoff controls to prevent discharges off the Site, but the lack of adequate runoff controls within the Site compromised the intended effectiveness of the requirement.

Per Day Factor

Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to implement the run-on and runoff control requirements is **0.35** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation

According to the documentation included with this technical analysis, the Discharger was in violation of the run-on and runoff control requirements of Section F. in Attachment D to the Construction Storm Water Permit for **seven days:** 1 day (December 15, 2014); and 6 days (May 8 through 13, 2015).

STEP 4 – Adjustment Factors (Violation No. 8)

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not adequately implement the run-on and runoff control requirements on the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger did not adequately implement the run-on and runoff control BMPs over several months.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 8)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	7	x	0.35	x	$10,000	x	1.3	x	1.1	x	1.0	=	$35,035

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 8)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 8)

See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 8)

The Discharger derived an economic benefit by not properly implementing the run-on and runoff control requirements. At a minimum, the Discharger should have implemented runoff controls within the Site in addition to implementing adequate perimeter sediment controls. The estimated cost to implement runoff controls within the Site is **$600** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$420.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 8)

For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$70,000**.

Minimum Liability Amount

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $420) = **$462**.

STEP 10 – Final Liability Amount (Violation No. 8)

Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to adequately implement run-on and runoff control requirements for **seven days** in violation of the Construction Storm Water Permit is **$35,035**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

9. Violation No. 9: Failure to Remove Sediment or Other Construction Materials from Roads.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 9)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 9)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 9)

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the existence of sediment and/or construction materials and waste in the streets poses a substantial threat to receiving water beneficial uses when there are storm events.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." The Prosecution Team has determined that the Deviation from Requirement is **Moderate** because there was evidence that the Discharger attempted to reduce the existence of sediment and construction materials from roadways however their efforts were clearly unsuccessful as evidenced in the inspection reports.

Per Day Factor

Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to adequately sweep up sediment and construction materials from roadways is **0.35** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation

According to the documentation included with this technical analysis, the Discharger was in violation of the requirement of Section E.7. in Attachment D to the Construction Storm Water Permit for **10 days:** December 2 through 9, 2014; December 16, 2014, and September 15, 2015.

STEP 4 – Adjustment Factors (Violation No. 9)

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence failed to remove sediment and construction materials from roadways. There was no reason the Discharger could not reasonably have hired a street sweeper or employed laborers to sweep the roadways.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger did not sweep the sediment and construction materials within 72 hours after repeated notifications to do so.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 9)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	10	x	0.35	x	$10,000	x	1.3	x	1.1	x	1.0	=	$50,050

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 9)
See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 9)
See discussion in Section III.E.

STEP 8 – Economic Benefit
The Discharger derived an economic benefit by removing the sediment and construction materials from the roadways. At a minimum, the Discharger should have swept the roadways. The estimated cost to implement the BMPs on the Site is **$300** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$211.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 9)
For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$100,000**.

Minimum Liability Amount
Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $211) = **$232**.

STEP 10 – Final Liability Amount (Violation No. 9)
Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to sweep the streets of sediment and construction materials for **10 days** in violation of the Construction Storm Water Permit is **$50,050**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

10. Violation No. 10: Failure to Protect Storm Drain Inlets.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 10)
Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 10)
Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 10)
While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm
The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Prosecution Team has determined that the Potential for Harm is **Moderate** because the failure to implement adequate storm drain inlet protections poses a substantial potential for harm because in the event of storm event or non-storm water discharge pollutants will flow unabated into the receiving water.

Deviation from Requirement
The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." The Prosecution Team has determined that the Deviation from Requirement is **Moderate** because there was evidence that the Discharger had attempted to implement storm drain inlet protection on some of the storm drain inlets at the Site but not all.

Per Day Factor
Using a Potential for Harm determination of **Moderate** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to implement the perimeter sediment control BMPs is **0.35** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation
According to the documentation included with this technical analysis, the Discharger was in violation of the requirement to protect storm drain inlets, Section E.6. in Attachment D to the Construction Storm Water Permit for **three days:** December 8, 2014; May 13, 2015, and September 15, 2015.

STEP 4 – Adjustment Factors (Violation No. 10)
There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability
An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not protect some of the storm drain inlets on the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation
An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.0** for this violation because the Discharger corrected the violations with 72 hours of being notified.

History of Violations
Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 10)
The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	3	x	0.35	x	$10,000	x	1.3	x	1.0	x	1.0	=	$13,650

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 10)
See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 10)
See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 10)
The Discharger derived an economic benefit by not protecting storm drain inlets as required. At a minimum, the Discharger should have installed storm drain inlet inserts to protect the storm drain inlets. The estimated cost to install storm drain inserts into the storm drain inlets is **$600** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$420.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 10)
For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$30,000**.

Minimum Liability Amount
Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $420) = **$462**.

STEP 10 – Final Liability Amount (Violation No. 10)
Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to protect storm drain inlets for **three days** in violation of the Construction Storm Water Permit is **$13,650**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

11. Violation No. 11: Failure to Contain and Securely Protect Stockpiled Waste Material from Wind and Rain.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 11)
Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 11)
Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 11)
While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm
The Potential for Harm is based on a determination of whether the circumstances of the violation indicate “a minor potential for harm” (Minor), “a substantial potential for harm” (Moderate), or “a very high potential for harm” (Major). The Enforcement Policy defines Minor Potential for Harm as “[t]he 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 Prosecution Team has determined that the Potential for Harm is **Minor** because the stockpile that the Discharger failed to cover contained scrap lumber which poses a minor threat to beneficial uses.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." The Prosecution Team has determined that the Deviation from Requirement is **Moderate** because there was evidence that the Discharger had attempted to cover other waste stockpiles at the Site.

Per Day Factor

Using a Potential for Harm determination of **Minor** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to implement the perimeter sediment control BMPs is **0.25** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation

According to the documentation included with this technical analysis, the Discharger was in violation of the requirement to cover waste stockpiles, Section B.2.f. in Attachment D to the Construction Storm Water Permit for **nine days:** January 6 through 14, 2015.

STEP 4 – Adjustment Factors (Violation No. 11)

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not protect some of the storm drain inlets on the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to correct the violation with 72 hours of being notified.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 11)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	9	x	0.25	x	$10,000	x	1.3	x	1.1	x	1.0	=	$32,175

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 11)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 11)

See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 11)

The Discharger derived an economic benefit by not properly protecting waste stockpiles as required. At a minimum, the Discharger should have covered and bermed the waste stockpiles. The estimated cost to cover and berm the waste stockpiles is **$455** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$315.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 11)

For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$90,000**.

Minimum Liability Amount
Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $315) = **$347**.

STEP 11 – Final Liability Amount (Violation No. 11)
Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to protect waste stockpiles for **nine days** in violation of the Construction Storm Water Permit is **$32,175**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

12. Violation No. 12: Failure to Properly Store Chemicals.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 12)
Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 12)
Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 12)
While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm
The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Enforcement Policy defines Major Potential for Harm as "[t]he characteristics of the violation present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm." The Prosecution Team has determined that the Potential for Harm is **Major** because the failure to have secondary containment of diesel fuels and asphaltic material poses an egregious threat to beneficial uses because there is a very high potential for harm if these materials were discharged to the receiving waters.

Deviation from Requirement
The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Moderate "Deviation from Requirement" as "[t]he intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved)." The Prosecution Team has determined that the Deviation from Requirement is **Moderate** because although there was no secondary containment for the chemicals they were in water tight containers.

Per Day Factor
Using a Potential for Harm determination of **Major** and Deviation from Requirement determination of **Moderate**, the Per Day Factor for the failure to implement the perimeter sediment control BMPs is **0.55** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation
According to the documentation included with this technical analysis, the Discharger was in violation of the requirement to provide secondary containment for stored chemicals and fuels, Section B.1.c. in Attachment D to the Construction Storm Water Permit for **7 days:** March 18 through 24, 2015.

STEP 4 – Adjustment Factors (Violation No. 12)
There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not provide secondary containment for the chemicals and fuels. There was no reason secondary containment could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to correct the violation with 72 hours of being notified.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 12)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	7	x	0.55	x	$10,000	x	1.3	x	1.1	x	1.0	=	$55,055

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 12)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 12)

See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 12)

The Discharger derived an economic benefit by not providing secondary containment as required. At a minimum, the Discharger should have installed secondary containment structures. The estimated cost to protect the chemicals and fuels is **$3,213** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$1,985.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 12)

For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$70,000**.

Minimum Liability Amount

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $1,985) = **$2,184**.

STEP 10 – Final Liability Amount (Violation No. 12)

Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to provide secondary containment for chemicals and fuels for **seven days** in violation of the Construction Storm Water Permit is **$55,055**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

13. Violation No. 13: Failure to Prevent Discharge of Concrete Waste to the Ground.

STEP 1 - Potential for Harm for Discharge Violations (Violation No. 13)

Step 1 does not apply to Non-Discharge Violations.

STEP 2 – Assessment for Discharge Violations (Violation No. 13)

Step 2 does not apply to Non-Discharge Violations.

STEP 3 – Per Day Assessment of Non-Discharge Violations (Violation No. 13)

While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Per day assessments of non-discharge violations are determined based on the Potential for Harm and the extent of Deviation from Requirement, which are used in Table 3 of the Enforcement Policy to determine the Per Day Factor. The Per Day Factor is multiplied by the Statutory Maximum Liability amount allowed under the Water Code (i.e. $10,000 per day).

Potential for Harm

The Potential for Harm is based on a determination of whether the circumstances of the violation indicate "a minor potential for harm" (Minor), "a substantial potential for harm" (Moderate), or "a very high potential for harm" (Major). The Enforcement Policy defines Minor Potential for Harm as "[t]he 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 Prosecution Team has determined that the Potential for Harm is **Minor.** While cementious material is highly toxic to plants and animals; in this case the several instances of discharge appear to be less than five gallons in volume to the ground, and not directly into a storm drain.

Deviation from Requirement

The Deviation from Requirement is based on a determination of whether the intended effectiveness of the requirement "remains generally intact" (Minor), "has been partially compromised" (Moderate), or "rendered ineffective" (Major). The Enforcement Policy defines a Major "Deviation from Requirement" as "[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)." The Prosecution Team has determined that the Deviation from Requirement is **Major** because no intent was made to use wash out or concrete waste bins when facilities existed at the Site.

Per Day Factor

Using a Potential for Harm determination of **Minor** and Deviation from Requirement determination of **Major**, the Per Day Factor for the failure to implement the perimeter sediment control BMPs is **0.55** in Table 3 of the Enforcement Policy.

Days of Non-Discharge Violation

According to the documentation included with this technical analysis, the Discharger failed to prevent the discharge of concrete waste to the ground in violation of section B.2.i. in Attachment D to the Construction Storm Water Permit for **15 days:** March 18 through April 1, 2015.

STEP 4 – Adjustment Factors (Violation No. 13)

There are three additional factors that are considered for modification of the amount of the initial liability: the Discharger's Culpability, the Discharger's efforts for Cleanup and Cooperation after the violation, and the Discharger's History of Violations. These three factors are discussed below.

Culpability

An adjustment for the initial liability based on the Discharger's Culpability should result in a multiplier between 0.5 to 1.5, with a lower multiplier for accidental or non-negligent violations, and a higher multiplier for intentional or negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances. The Prosecution Team assigned a Culpability multiplier of **1.3** for this violation because the Discharger either intentionally or due to negligence did not use the concrete washout facilities on the Site. There was no reason BMPs could not reasonably have been implemented to be in compliance with the Construction Storm Water Permit.

Cleanup and Cooperation

An adjustment for the initial liability based on the Discharger's efforts for Cleanup and Cooperation should result in a multiplier between 0.75 to 1.5, with a lower multiplier where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. The Prosecution Team assigned a Cleanup and Cooperation multiplier of **1.1** for this violation because the Discharger failed to correct the violation with 72 hours of being notified.

History of Violations

Where there is a history of repeated violations, a minimum multiplier of 1.1 should be used to reflect this. The Prosecution Team assigned a History of Violations multiplier of **1.0** for this violation because the Discharger does not have a history of construction storm water violations determined by this Board.

STEP 5 – Determination of Total Base Liability Amount (Violation No. 13)

The Total Base Liability Amount (i.e. initial amount of liability) is determined by multiplying the Per Day Assessment by the Days of Violation and then applying the adjustment factors as follows:

Total Base Liability	=	Days of Violation	x	Per Day Factor	x	Statutory Maximum Liability	x	Culpability Multiplier	x	Cleanup & Cooperation Multiplier	x	History of Violations Multiplier		
Total Base Liability	=	15	x	0.55	x	$10,000	x	1.3	x	1.1	x	1.0	=	$75,075

STEP 6 – Ability to Pay and Ability to Continue in Business (Violation No. 13)

See discussion in Section III.D.

STEP 7 – Other Factors as Justice May Require (Violation No. 13)
See discussion in Section III.E.

STEP 8 – Economic Benefit (Violation No. 13)
The Discharger derived an economic benefit by not properly disposing of the concrete waste as required. At a minimum, the Discharger should have discharged the concrete waste into a designated concrete washout container. The estimated cost to rent a concrete washout container and properly dispose of the concrete is **$618** based upon costs estimated by the San Diego Water Board. Using the US EPA BEN Model the Discharger enjoyed an economic benefit of **$378.** See Exhibit No. 28.

STEP 9 – Maximum and Minimum Liability Amounts (Violation No. 13)
For all violations, Water Code section 13385 sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed.

Maximum Liability Amount
Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars ($10,000) per day of violation (per violation). Therefore, the Maximum Liability Amount that could be assessed for this violation is **$150,000**.

Minimum Liability Amount
Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "*at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation*." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the Economic Benefit. Therefore, the minimum liability is (1.1 x $378) = **$416**.

STEP 11 – Final Liability Amount (Violation No. 13)
Based on the unique facts of this case, and the liability calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for failing to properly dispose of concrete waste for **15 days** in violation of the Construction Storm Water Permit is **$75,075**, plus staff costs. The proposed liability is within the minimum and maximum liability range. See Exhibit No. 27.

D. Consideration of Ability to Pay and Ability to Continue in Business

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. For a violation addressed pursuant to Water Code section 13385, the adjustment for ability to pay and ability to continue in business cannot reduce the liability to less than the economic benefit amount.

According to the NOI, the property owner is San Altos-Lemon Grove, LLC, and the developer is BCA Development, Inc. The contact for both entities is Ben Anderson. According to publicly available information (http://www.manta.com/c/mmj25wg/bca-development-inc), Ben Anderson is the owner of BCA Development, Inc., and the estimated annual revenue of BCA Development, Inc. is $10 to $20 million. According to this information, the Discharger has the ability to pay the proposed civil liability and continue in business.

Based on this publicly available data, the burden of this affirmative defense now shifts to the Discharger to offer any evidence they would like to the Prosecution Team to consider when evaluating their ability to pay the Total Proposed Liability Amount.

E. Other Factors as Justice May Require

The Enforcement Policy provides that if the San Diego Water Board believes that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express finding are made.

Examples of circumstances warranting an adjustment under this step are:

a. The discharger has provided, or Water Board staff has identified, other pertinent information not previously considered that indicates a higher or lower amount is justified.

b. A consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular disadvantaged group.

c. The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the Enforcement Policy.

(Enforcement Policy, p. 19.)

The circumstances in this matter do not warrant an adjustment under this step.

The Enforcement Policy also provides under the "Other Factors as Justice May Require" that the cost of investigation and enforcement should be added to the liability amount. From December 15, 2014, to September 10, 2015, the San Diego Water Board invested 212.50 hours to investigate, prepare enforcement documents, and consider this action. The total investment of the San Diego Water Board to date is **$15,763**. These staff costs are not divided by violation and are added at the end of the collective penalty assessment. A summary of the staff costs incurred to date is provided in Exhibit No. 29, Staff Cost Summary. If the Discharger elects to contest this matter, the recommended liability may increase to recover necessary additional staff costs incurred through to the day of hearing.

F. Total Proposed Liability Amount

The total proposed liability amount for the violations in ACL Complaint No. R9-2015-0110 is $832,611, plus staff costs of $15,763 for a total of **$848,374**. A summary of the methodology used by the Prosecution Team to calculate the proposed civil liability is provided in Exhibit No. 27, Penalty Methodology Summary. Below is a tabular summary of the total proposed liability, Table No. 1.

Table No. 1. Total Proposed Liability Amount Summary

Violation No.	Alleged Violation	Liability Per Day of Violation	Days of Violation Assessed	Proposed Liability Amount
1	Discharges of sediment	$3,146	6	$18,876
2	Failure to protect material stockpiles.	$5,005	10	$50,050
3	Failure to protect against vehicle leaks.	$7,865	2	$15,730
4	Failure to protect against Erosion in inactive areas.	$7,865	22	$173,030
5	Failure to implement adequate perimeter sediment controls.	$5,005	14	$70,070
6	Failure to protect against Erosion in active areas.	$7,865	22	$173,030
7	Failure to implement adequate linear sediment controls.	$7,865	9	$70,785
8	Failure to implement adequate run-on/runoff controls.	$5,005	7	$35,035
9	Failure to remove sediment from roadways.	$5,005	10	$50,050
10	Failure to protect storm drain inlets.	$4,550	3	$13,650
11	Failure to protect waste stockpiles.	$3,575	9	$32,175
12	Failure to adequately store chemicals.	$7,865	7	$55,055
13	Failure to prevent concrete discharges to the ground.	$5,005	15	$75,075
Total Base Liability Amount				**$832,611**
Staff Costs to Date				**$15,763**
Total Proposed Liability Amount				**$848,374**