



California Regional Water Quality Control Board, San Diego Region

November 21, 2013

Mr. Glenn Prum
Director of Public Works
and Engineering
City of Encinitas
505 South Vulcan Avenue
Encinitas, CA 92024

CERTIFIED-RETURN RECEIPT REQUESTED
7011 0470 0002 8952 5522

Mr. Mohammad Qahoush
Regional Operations Manager
USS Cal Builders, Inc.
402 West Broadway, Suite 400
San Diego, CA 92101

CERTIFIED-RETURN RECEIPT REQUESTED
7011 0470 0002 8952 5539

In reply refer to/attention:
SM-802594/CW-222765:rstewart

NOTICE OF HEARING AND ISSUANCE OF COMPLAINT NO. R9-2013-0152 FOR ADMINISTRATIVE CIVIL LIABILITY AGAINST THE CITY OF ENCINITAS AND USS CAL BUILDERS, INC. FOR VIOLATIONS OF ORDER NOS. 2009-0009-DWQ AND R9-2007-0001, AND BASIN PLAN WASTE DISCHARGE PROHIBITION 14

Mr. Prum, Mr. Qahoush:

Enclosed find Complaint No. R9-2013-0152 (Complaint) for Administrative Civil Liability against the City of Encinitas and USS Cal Builders, Inc. (collectively, Dischargers) for \$430,851 for violations of State Water Resources Control Board Order No. 2009-0009-DWQ, NPDES No. CAS000002, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* and California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Order No. R9-2007-0001, NPDES No. CAS0108758, *Waste Discharge Requirements for Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority*, and the Water Quality Control Plan for the San Diego Basin (9) (Basin Plan) Waste Discharge Prohibition 14. The alleged violations are described in the Complaint and the attached Technical Analysis to the Complaint. Pursuant to Water Code section 13323, the San Diego Water Board shall hold a hearing on the Complaint no later than ninety (90) days after it is issued.

November 21, 2013

Waiver of Hearing

You may elect to waive your right to a hearing before the San Diego Water Board. Waiver of the hearing constitutes admission of the violations alleged in the Complaint and acceptance of the assessment of civil liability in the amount of \$430,851 as set forth in the Complaint. For the San Diego Water Board to accept the waiver of your right to a public hearing, you must submit the following to the San Diego Water Board by 5 p.m., **December 23, 2013**:

1. The enclosed waiver forms signed by an authorized agent of the City of Encinitas and USS Cal Builders, Inc. with Option 1 selected; and
2. A check for the full amount of civil liability of \$430,851 made out to the "State Water Resources Control Board Cleanup and Abatement Account."

Settlement Discussions

You may also waive your right to a hearing conducted within ninety (90) days of issuance of the Complaint in order to engage in settlement discussions. For the San Diego Water Board to accept your request to enter into settlement discussions, you must submit the following to the San Diego Water Board no later than 5 p.m., **December 23, 2013**:

1. The enclosed waiver forms signed by an authorized agent of the City of Encinitas and USS Cal Builders, Inc. with Option 2 selected; and
2. A proposed settlement offer.

Public Hearing

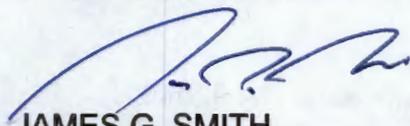
Alternatively, if you elect to proceed to a public hearing, a hearing is tentatively scheduled to be held at the San Diego Water Board meeting on **February 12, 2014**. The meeting is scheduled to convene at the San Diego Water Board, 2375 Northside Drive, Suite 100, San Diego, California at 9:00 a.m. At that time, the San Diego Water Board will accept testimony, public comment, and decide whether to affirm, reject, or modify the proposed liability, or whether to refer the matter for judicial civil action.

Enclosed are recommended procedures for the San Diego Water Board to follow in conducting the hearing. Please note that comments on the proposed procedures are due by **December 2, 2013** to the San Diego Water Board's advisory attorney, Catherine Hagan, at the address indicated in the hearing procedures.

In the subject line of any response, please include the reference number SM-802594/CW-222765:rstewart. For questions or comments, please contact Rebecca Stewart by phone at 619-521-3004, or by email at rstewart@waterboards.ca.gov.

November 21, 2013

Respectfully,



JAMES G. SMITH
Assistant Executive Officer

JGS:jh:cmc:rls

- Enclosures:
1. ACL Complaint R9-2013-0152
 2. Technical Analysis
 3. Administrative Civil Liability Complaint Fact Sheet
 4. Proposed Hearing Procedure
 5. Waiver of Public Hearing Forms
 6. Technical Analysis Exhibits A - X

cc: (with enclosures)

David Gibson, Executive Officer, San Diego Water Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108, dgibson@waterboards.ca.gov

Catherine Hagan, Senior Staff Counsel, Office of Chief Counsel, State Water Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108, chagan@waterboards.ca.gov

Julie Macedo, Staff Counsel, Office of Enforcement, State Water Board, P.O. Box 100, Sacramento, CA 95812-0100, jmacedo@waterboards.ca.gov

(without enclosure 6, available upon request)

Erik Steenblock, Storm Water Program Manager, City of Encinitas, 505 South Vulcan, Encinitas, CA 92024, esteenblock@encinitasca.gov

Mike Emerson, Environmental Specialist, City of Encinitas, 505 South Vulcan, Encinitas, CA 92024, memerson@encinitasca.gov

Edward Deane, Capital Improvement Division Manager, City of Encinitas, 505 South Vulcan, Encinitas, CA 92024, edeane@encinitasca.gov

Stephanie Kellar, Associate Civil Engineer, City of Encinitas, 505 South Vulcan, Encinitas, CA 92024, skellar@encinitasca.gov

Larry Sobolewski, Sr., Project Superintendent, USS Cal Builders, Inc., 402 West Broadway, Unit #6, San Diego, CA 92101, larrysr@usscalbuilders.com

Louai Jalabi, Project Engineer, USS Cal Builders, Inc., 402 West Broadway, Unit #6, San Diego, CA 92101, louai@usscalbuilders.com

Yolanda Leal, Brian Thomas Consulting, Inc., P.O. Box 876, Oceanside, CA 92049, Yolanda@brianthomasconsulting.com

Doug Gibson, Executive Director, San Elijo Lagoon Conservancy, doug@sanelijo.org

Megan Baehrens, San Diego Coastkeeper, MeganB@sdcoastkeeper.org

Tech Staff Info & Use	
Order No.	R9-2013-0152
Party (GT/CIWQS) ID	CW-11079
WDID	9 000510S16
	9 37C357837
NPDES No.	CAS0108758
	CAS000002
Reg. Measure ID	SM-414258
Place ID	CW-222765
	SM-802594

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

In the matter of:

**City of Encinitas
USS Cal Builders, Inc.
Hall Property Park**

**COMPLAINT NO. R9-2013-0152
FOR
ADMINISTRATIVE CIVIL LIABILITY**

**Violations of Order Nos.
2009-0009-DWQ and
R9-2007-0001 and
Basin Plan Prohibition 14**

Place ID: SM-802594, CW-222765

November 21, 2013

**THE CITY OF ENCINITAS AND USS CAL BUILDERS, INC. ARE HEREBY
GIVEN NOTICE THAT:**

1. The City of Encinitas (City) and USS Cal Builders, Inc. (collectively Dischargers) have violated provisions of law for which the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) may impose civil liability pursuant to section 13385 of the California Water Code (CWC).
2. This Administrative Civil Liability Complaint is issued under authority of CWC section 13323.
3. The City submitted a Notice of Intent for coverage under State Water Resources Control Board Order No. 2009-0009-DWQ, NPDES No. CAS000002, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* for the construction of a 43-acre community park known as Hall Property Park (Project) in San Diego County, California. The City, as the Legally Responsible Party identified USS Cal Builders, Inc. as the developer responsible for all land disturbance and construction activities. The Dischargers are required to construct the project in compliance with the requirements of Order No. 2009-0009-DWQ by using the Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT).

City of Encinitas

USS Cal Builders, Inc.

Violation of Order Nos. 2009-0009-DWQ and
R9-2007-0001

4. The City owns and operates a municipal separate storm sewer system (MS4) in San Diego County, California. The City is required to prohibit discharges into and from its MS4 that cause, or threaten to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050) in waters of the state, prohibit discharges from its MS4 that contain pollutants which have not been reduced to the maximum extent practicable (MEP), and prohibit discharges from its MS4 that cause or contribute to the violation of water quality standards, in compliance with requirements of San Diego Water Board Order No. R9-2007-0001, NPDES No. CAS0108758, *Waste Discharge Requirements for Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority.*
5. California Regional Water Quality Control Plan, San Diego Region (Basin Plan) Waste Discharge Prohibition 14 states, "The discharge of sand, silt, clay, or other earthen materials from any activity including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited."
6. Discharge Prohibition III.A of Order No. 2009-0009-DWQ states, "Dischargers shall not violate any discharge prohibitions contained in the applicable Basin Plans or statewide water quality control plans..."
7. Discharge Prohibition III.B of Order No. 2009-0009-DWQ states, "All discharges are prohibited except for the storm water and non-storm water discharges specifically authorized by this General Permit or another NPDES permit."
8. Prohibitions and Receiving Water Limitations A.1 of Order No. R9-2007-0001 states, "Discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited."
9. Prohibitions and Receiving Water Limitations A.2. of Order No. R9-2007-0001 states, "Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited."

10. Prohibitions and Receiving Water Limitations A.3 of Order No. R9-2007-0001 states, "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial use) are prohibited."
11. Effluent Standard V.A.2 of Order No. 2009-0009-DWQ states, "dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve the BAT for toxic and non-conventional pollutants and BCT for conventional pollutants."
12. Section D.2 of the Jurisdictional Urban Runoff Management Program Construction Component of Order No. R9-2007-0001 states, "Each Copermitttee shall implement a construction program which meets the requirements of this section, reduces construction site discharges of pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards."

ALLEGED VIOLATIONS

13. The Dischargers violated Basin Plan Prohibition 14 and Discharge Prohibitions III.A and III.B of Order No. 2009-0009-DWQ, by discharging sediment from the Project to Rossini Creek upstream of San Elijo Lagoon on December 13, 2012 and March 8, 2013.
14. The Dischargers violated Effluent Standard V.A.2 of Order No. 2009-0009-DWQ by failing to implement adequate controls, structures, and management practices at the Project from the commencement of construction activities on October 8, 2012 through December 27, 2012 and again from January 8, 2013 through March 8, 2013.
15. The City violated Prohibitions and Receiving Water Limitations A.1, A.2, and A.3 of Order No. R9-2007-0001 by allowing the discharge of sediment from the Project into the MS4, Rossini Creek and San Elijo Lagoon on December 13, 2012 and March 8, 2013.
16. The City violated section D.2 of Order No. R9-2007-0001 by failing to require the Project to comply with the requirements of Order No. 2009-0009-DWQ from October 8, 2012 through December 13, 2012 and again from January 8, 2013 through March 8, 2013.

17. The City is jointly and severally liable for all of the violations in this Complaint as a result of obtaining the permits described herein to complete the Project. USS Cal Builders, Inc. is jointly and severally liable for all of the violations in the Complaint as a result of its day-to-day control over decisions that directly affected water quality during the Project and its contractual relationship with the City, except for the violations related to the City's failure to comply with Order No. R9-2007-0001.
18. The details of these violations are set forth in full in the accompanying Technical Analysis, which is incorporated herein by this reference as if set forth in full.

MAXIMUM LIABILITY

19. Pursuant to CWC section 13385, subdivision (a), any person who violates Water Code section 13376 is subject to administrative civil liability pursuant to Water Code section 13385, subdivision (c), 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 and (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.
20. The alleged violations, set forth in full in the accompanying Technical Analysis, constitute violations subject to Water Code section 13385. The maximum liability that the San Diego Water Board may assess pursuant to Water Code section 13385, subdivision (c) is \$2,700,000.

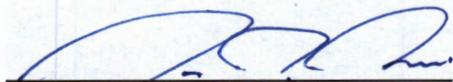
MINIMUM LIABILITY

21. CWC section 13385, subdivision (e) requires that, 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(s). The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) further instructs the Regional Water Boards to assess liability against a violator at least ten percent higher than the economic benefit realized from the violation so that liabilities are not construed as the cost of doing business and so that the assessed liability provides a meaningful deterrent to future violators.
22. As detailed in the incorporated Technical Analysis, and based on an economic benefit amount of \$58,794, the minimum liability amount the San Diego Water Board should assess the Dischargers is \$64,673.

PROPOSED LIABILITY

23. Pursuant to CWC section 13385, subdivision (e), in determining the amount of any civil liability, the San Diego Water Board shall consider the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges; and with respect to the Dischargers, the ability to pay, the effect on the Dischargers' ability to continue in business, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters as justice may require.
24. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385, subdivision (e). The required factors have been considered for the violations alleged herein using the methodology in the Enforcement Policy, as explained in detail in the Technical Analysis and summarized in Attachment 1.
25. Based on consideration of the above facts, the applicable law, and after applying the penalty calculation methodology in section VI of the Enforcement Policy, it is recommended that the San Diego Water Board impose civil liability against the Dischargers in the amount of **\$430,851** for the violations alleged herein and set forth in full in the accompanying Technical Analysis.

Dated this 21st day of November, 2013.



JAMES G. SMITH

Assistant Executive Officer

Signed pursuant to the authority delegated
by the Executive Officer to the Assistant
Executive Officer.

Attachment 1: Penalty Methodology Decisions

SMAIRTS: Place ID: SM-802594,	CIWQS: Place ID: CW-222765
Violation ID: 850270	Violation ID: 956776
WDID 9:37C357837	WDID: 9 000510S16
Reg. Measure ID: SM-414258	Order No.: R9-2013-0152

Step 1: Potential Harm Factor

Violations	Harm/Potential Harm to Beneficial Uses [0-5]	Physical, Chemical, Biological or Thermal Characteristics [0-4]	Susceptibility to Cleanup or Abatement [0 or 1]	Total Potential for Harm [0-10]
Violation 1	4	2	1	7

Step 2: Assessments for Discharge Violations

Violations	Per Gallon Factor					Statutory or Policy Max per Gallon [\$]
	Potential for Harm [0-10]	Deviation from Requirement [minor, moderate, major]	High Volume Discharges [yes / no]	Gallons Discharged	Total Per Gallon Factor	

No Per Gallon Discharge Violations

Violations	Per Day Factor				Statutory Max per Day [section 13xxx]
	Potential for Harm [0-10]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 1	7	Major	0.31	2	\$10,000

Step 3: Per Day Assessments for Non-Discharge Violations

Violations	Per Day Factor				Statutory/ Adjusted Max [section 13xxx]
	Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 2	Major	Major	0.85	142	\$10,000
Violation 3	Major	Major	0.85	128	\$10,000

Initial Liability From Steps 1 - 3

Violation 1: $(.31) \times (2) \times (10,000) = \$6,200$
 Violation 2: $(0.85) \times (142) \times (\$10,000) = \$1,207,000$
 Violation 3: $(0.85) \times (128) \times (\$10,000) = \$1,088,000$

Step 4: Adjustments

Violations	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Multiple Violations (Same Incident)	Adjusted Days of Violation
Violation 1	1.3	1.1	1	n/a	n/a
Violation 2	1.3	1.1	1	n/a	16
Violation 3	1.4	1.1	1	n/a	16

Step 5: Total Base Liability Amount

(Per day Factor x statutory maximum) x (Step 4 Adjustments)

Violation 1: $(0.31) \times (\$10,000) \times (1.3) \times (1.1) \times (1) \times (2) = \$8,866$
 Violation 2: $(0.85) \times (\$10,000) \times (1.3) \times (1.1) \times (1) \times (16) = \$194,480$
 Violation 3: $(0.85) \times (\$10,000) \times (1.4) \times (1.1) \times (1) \times (16) = \$209,440$

Step 6: Ability to Pay / Continue in Business

[Yes, No, Partly, Unknown]
 Yes

Step 7: Other Factors as Justice May Require

Costs of Investigation and Enforcement	Other
\$18,065	n/a

Step 8: Economic Benefit

Violation 1: \$0
 Violation 2: \$58,794
 Violation 3: \$0

Step 9: Maximum and Minimum Liability Amounts

	Minimum	Maximum
Violation 1	\$0	\$20,000
Violation 2	\$64,673	\$1,410,000
Violation 3	\$0	\$1,270,000

Step 10: Final Liability Amount

(total base liability) + (other factors)

\$430,851

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

TECHNICAL ANALYSIS

**Proposed Administrative Civil Liability
Contained in Complaint No. R9-2013-0152**

Against

**City of Encinitas
and
USS Cal Builders, Inc.**

Hall Property Park

Noncompliance with

**State Water Board
*Order No. 2009-0009-DWQ, NPDES No. CAS000002***

**San Diego Water Board
*Order No. R9-2007-0001, NPDES No. CAS0108758***

And

***Water Quality Control Plan, San Diego Basin, Region 9
Waste Discharge Prohibition 14***

November 21, 2013

By

**Rebecca Stewart
Sanitary Engineering Associate**

A. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence that supports the findings in Administrative Civil Liability (ACL) Complaint No. R9-2013-0152 (Complaint) and the recommended assessment of administrative liability in the amount of **four hundred thirty thousand eight hundred fifty one dollars (\$430,851)** against the City of Encinitas (City) and USS Cal Builders, Inc. (USS Cal Builders) (collectively, Dischargers) for violations of State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, NPDES No. CAS000002, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities*, California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Order No. R9-2007-0001, NPDES No. CAS0108758, *Waste Discharge Requirements for Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority*, and the Water Quality Control Plan for the San Diego Basin (9) (Basin Plan) Waste Discharge Prohibition 14.

The Complaint was issued because the Dischargers failed to implement the requirements of Order No. 2009-0009-DWQ and because the City failed to implement the requirements of Order No. R9-2007-0001 during construction of a municipal capital improvement project, Hall Property Park (Project). The Dischargers' failure to comply with the requirements of Order No. 2009-0009-DWQ resulted in at least two discharges of sediment to the MS4, Rossini Creek, and San Elijo Lagoon, on December 13, 2012 and March 8, 2013.

State Water Board Order No. 2009-0009-DWQ

Order No. 2009-0009-DWQ authorizes discharges of storm water associated with construction activity as long as the Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) is implemented to reduce or eliminate pollutants in storm water runoff. BAT/BCT technologies include passive systems such as erosion and sediment control best management practices (BMPs) as well as structural controls, as necessary, to achieve compliance with water quality standards.

Order No. 2009-0009-DWQ identifies effective erosion control measures such as preserving existing vegetation where feasible, limiting disturbance, and stabilizing and re-vegetating disturbed areas as soon as possible after grading or construction activities. Order No. 2009-0009-DWQ further identifies erosion control BMPs as the primary means of preventing storm water contamination. Order No. 2009-0009-DWQ identifies sediment controls as the secondary means of preventing storm water contamination. Order No. 2009-0009-DWQ further states that when erosion control techniques are ineffective, sediment control techniques should be used to capture any soil that becomes eroded.

Storm Water Pollution Prevention Plan

Order No. 2009-0009-DWQ requires the creation of a Storm Water Pollution Prevention Plan (SWPPP) developed by a Qualified SWPPP Developer (QSD). SWPPPs are required to detail the types of BMPs that will be implemented at a construction site based on the site characteristics, proximity to, and sensitivity of, receiving waters, and the associated risk level.

Order No. 2009-0009-DWQ also requires dischargers to ensure all BMPs identified in the SWPPP are implemented by a Qualified SWPPP Practitioner (QSP).

Risk-Based Permitting Approach

Order No. 2009-0009-DWQ requires dischargers to determine the sediment and receiving water risk associated with each construction site. Order No. 2009-0009-DWQ identifies three risk levels, (1, 2 or 3) based on a project's sediment risk (the relative amount of sediment that can be discharged, given the project location and details), and receiving water risk (the risk that sediment discharges pose to the receiving waters).

Order No. 2009-0009-DWQ further states that because Risk Level 2 and 3 construction sites pose a higher risk to water quality, additional requirements for the application of sediment controls are imposed on these types of projects. Order No. 2009-0009-DWQ prescribes effluent standards, site management, non-storm water management, erosion control, sediment control, run-on and run-off control, inspection, maintenance and repair, and rain event action plan (REAP) requirements for each risk level. The City calculated the risk level for the Project as a Risk Level 2 due to a low threat of sediment loss and San Elijo Lagoon being a sediment-sensitive waterbody.

Risk Level 2 projects are required to minimize or prevent pollutants in 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. Risk Level 2 projects must implement effective soil cover for inactive¹ areas, effective perimeter controls to sufficiently control erosion and sediment discharges, and appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active² construction.

Risk Level 2 projects are also required to effectively manage all run-on, all runoff within the site, and all runoff that discharges off the site, conduct weekly BMP inspections, develop a REAP, conduct visual inspections during qualifying rain events,³ and perform sampling and analysis of storm water discharges.

San Diego Water Board Order No. R9-2007-0001

Order No. R9-2007-0001⁴ prohibits discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in California Water Code (CWC) section 13050), in waters of the state, prohibits discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP), and prohibits discharges from MS4s that cause or contribute to the violation of water quality standards.

Order No. R9-2007-0001 requires municipalities to establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Grading ordinances must be in place and enforced to achieve compliance with the requirements of the Order.

¹ Inactive areas of construction are areas that have been disturbed and are not scheduled to be re-disturbed for at least 14 days.

² Active areas of construction are areas undergoing land surface disturbance. This includes construction activity during the preliminary stage, mass grading stage, streets and utilities stage and the vertical construction stage.

³ A qualifying rain event is any event that produces 0.5 inches or more precipitation within a 48 hour or greater period between rain events.

⁴ On May 8, 2013, the San Diego Water Board adopted Order No. R9-2013-0001, which supersedes Order No. R9-2007-0001. Order No. R9-2013-0001 became effective June 26, 2013. The requirements of Order No. R9-2007-0001 referenced in this Order remain unchanged. The dates of noncompliance referenced in this Order are during the effective period of Order No. R9-2007-0001.

Section 23.24.370 of the City's Municipal Code addresses wet season work at construction sites. It states that "Grading shall be minimized during the wet season to the extent feasible. Grading operations shall be phased as necessary to allow minimal exposure of disturbed soils during grading operation. If grading does occur during the wet season, the City Engineer may require the applicant to implement additional best management practices for any rain event that may occur. No grading permit shall be issued for work occurring from October 1 to April 30 unless the plans include details of protective measures, including desilting basins or other temporary drainage control measures, or both, as may be deemed necessary by the City Engineer to protect adjoining public and private property or the Waters of the State from damage by erosion, flooding, or the deposit of mud or debris which may originate from the site or result from grading operations."

Section 23.24.390 of the City's Municipal Code addresses erosion control maintenance. It states that, "After each rainstorm exceeding ¼-inch in a 24-hour period, silt and debris shall be removed from all temporary check berms and desilting basins and the basins pumped dry."

On September 24, 2012 the City sent all the construction entities within its jurisdiction a notification with the City's municipal code requirements for construction sites (**Appendix A**).

Order No. R9-2007-0001 also requires municipalities to create and implement a Jurisdictional Urban Runoff Management Program (JURMP). JURMPs must contain a construction component that requires inspections of construction sites every other week, at a minimum, during the wet season if the construction site is 1 acre or more and tributary to a Clean Water Act section 303(d) listed water body impaired for sediment. The inspections are to ensure that construction projects are complying with the requirements of Order No. 2009-0009-DWQ and the local ordinances required by R9-2007-0001. The City employed a contractor, Geopacifica, to conduct its inspections at the Project.

Hall Property Park Construction Project

On March 29, 2010 the City submitted a Notice of Intent (NOI) for coverage under Order No. 2009-0009-DWQ for the construction of the 43-acre Project located immediately west of Interstate 5, between Santa Fe Drive to the north, and Warwick Avenue to the south (**Appendix B**). In its SWPPP, the City identified Rossini Creek as a sensitive wetland habitat, and San Elijo Lagoon as a sensitive receiving water body. Rossini Creek is located adjacent to the park at its western boundary. Rossini Creek discharges into San Elijo Lagoon approximately two miles to the south (Figure 1).



Figure 1: Location Map. Rossini Creek undergrounds at Birmingham Dr. surfacing east of Highway 101 into a concrete sided channel prior to discharging into San Elijo Lagoon.

The NOI identified the City as the Legally Responsible Party (LRP) and the City contracted with USS Cal Builders to develop the Project. According to the Contract between the City and USS Cal Builders, the City was responsible for development of the SWPPP, and USS Cal Builders was responsible for obtaining the QSP (**Appendix C**). A SWPPP developed by the City's QSD, MCE Consultants, dated August 19, 2011 was uploaded into the Stormwater Multiple Application and Report Tracking System (SMARTS) database (**Appendix D**). According to the City, land disturbance activities began on October 8, 2012.

City inspections, conducted by Geopacifica, began on October 4, 2012 and occurred on a daily basis (Monday through Friday). The inspections conducted through the first reported discharge on December 13, 2012 failed to address compliance with City storm water and grading ordinances or compliance with Order No. 2009-0009-DWQ, thereby violating Order No. R9-2007-0001 (**Appendix E**).

USS Cal Builders' QSP, Scott Environmental, began conducting inspections on November 7, 2012, one month after the commencement of construction. The first QSP inspection report indicates that the site was already completely disturbed with 100 percent exposed soil. The inspection report identified the need to improve sediment controls for a drain inlet and to empty vehicle storage spill pans prior to a rain event forecasted for November 9, 2012, but did not identify any erosion control BMPs that were required or deficient even though the site was 100 percent graded. Subsequent QSP inspections on November 20, 2012, November 26, 2012, December 3, 2012, and December 10, 2012 again identified sediment control BMP deficiencies but did not identify any erosion control BMPs that were required or deficient (**Appendix F**).

December 13, 2012 Discharge Event

On December 13, 2012 the City reported that sediment had discharged from the Project to Rossini Creek during a storm event. The National Weather Service rain gauge located in Solana Beach, reported 1.07-inches of rain on that date. The QSP December 13, 2012 inspection report had a rain gauge reading of 0.73-inches.

The City issued a Stop Work Order to USS Cal Builders, on December 13, 2012 prohibiting all construction activity except for the installation of erosion and sediment control BMPs (**Appendix G**). The City also issued an Administrative Citation for violations of the Encinitas Municipal Code (**Appendix H**).

The City's December 14, 2012 inspection report indicated that a significant sediment discharge occurred from the graded slopes at the Project's southern boundary along Warwick Avenue and from the dog park area along the Project's western boundary (**Appendix I**). The discharges were caused by the failure to control run-on to the Project at the south boundary and in the dog park area, and the failure to implement erosion and sediment control BMPs that would prevent the discharge of pollutants (sediment) in storm water. Both discharges entered the MS4 and Rossini Creek upstream of San Elijo Lagoon.

San Diego Water Board staff inspected the site on December 17, 2012 (**Appendix J**). The inspection revealed that temporary erosion control BMPs identified in the City's SWPPP (soil binders and velocity dissipation devices) **were not implemented**. The inspection also revealed that most of the sediment control BMPs identified in the SWPPP (sediment traps, fiber rolls, street sweeping, storm drain inlet protection and construction entrance and exit stabilization) **were not implemented or were totally ineffective**, as shown in the following photographs:



Photo 1: Large graded area with no erosion or sediment controls. Looking south towards Caretta Way.



Rossini Creek discharge point.

Photo 2: Dog park area located along Santa Fe Drive tributary to Rossini Creek with no erosion control BMPs.

Drain pipes from neighboring properties along the dog park area that were identified in a December 4, 2012 City inspection report resulted in run-on carrying sediment from unprotected areas directly into Rossini Creek as shown in the following photographs:



Photo 3: Lack of run-on protection from slope drain from neighboring residence that discharged to dog park area.



Photo 4: Lack of run-on protection from slope drain from neighboring residence that discharged to dog park area.

The lack of erosion control BMPs on graded slopes resulted in perimeter sediment controls being overwhelmed, and subsequent discharges to the MS4 as shown in the photographs below:



Photo 5: Significant erosion rills leading toward property boundary along Carretta Way.



Photo 6: Sediment discharged to MS4 from erosion in previous photo.

The limited sediment controls that were in place prior to the December 13, 2012 storm event were ineffective evidenced by the amount of sediment leaving disturbed areas and lack of erosion control BMPs as shown in the photograph below:



Photo 7: Inundated storm drain inlet. Green gravel bags and two outer silt fences were installed after the December 13, 2012 discharges.

The San Diego Water Board received complaints of sediment discharges from downstream residents. The following photograph of sediment laden storm water in Rossini Creek was taken by a complainant after the discharge event:



Photo 8: Sediment in Rossini Creek downstream of Hall Property Park.

On December 20, 2012 the City brought in a third party QSP, Summit Erosion Control, to inspect the Project (**Appendix K**). The third party QSP inspection revealed that USS Cal Builders' QSP (Scott Environmental) failed to identify non-functioning BMPs and failed to effectively communicate with the QSD (MCE Consultants) when additional BMPs were needed. The inspection also revealed that previous QSP inspection reports were not in the jobsite trailer, the SWPPP Wall Map did not reflect the conditions that existed at the jobsite, and that all parties lacked familiarity with Risk Level 2 requirements. Summit Erosion Control's inspection also identified numerous BMP corrections that needed to be implemented prior to construction activities continuing. The City's Stop Work Order was terminated at the end of the day on December 20, 2012.

The San Diego Water Board issued the City Notice of Violation No. R9-2013-0008 on January 24, 2013 (**Appendix L**). The City responded to the Notice of Violation on February 15, 2013 (**Appendix M**). In its response the City provided a detailed chronology of the corrective actions taken to bring the site into compliance with Order No. 2009-0009-DWQ including the construction of three sediment basins which the SWPPP indicates were required to reduce sediment discharges from active construction areas.

Post-December 2012 Discharge Activities

After construction activities resumed, City staff took over storm water inspections required by Order No. 2007-0001 from its contractor (Geopacifica). From December 20, 2012 through December 27, 2012, City staff noted various BMPs that needed installation and maintenance (**Appendix N**). From December 31, 2012 through January 4, 2013, City inspection reports indicate that no corrective action was required (**Appendix O**).

On January 10, 2013, Geopacifica inspected the site for the City. The inspection report referenced the need for USS Cal Builders to address run-on conditions along Warwick Street that were identified in a December 28, 2012 email from the City's QSD (MCE Consultants) (**Appendix P**). The January 10, 2013 inspection report also addressed the need for USS Cal Builders to provide slope stabilization with erosion control BMPs also referenced in the QSD's December 28, 2012 email (**Appendix Q**). The erosion control deficiencies outlined in the December 28, 2012 QSD email were referenced in four subsequent inspection reports through January 16, 2013 (**Appendix R**) before USS Cal Builders made the necessary corrections.

Geopacifica's inspection report on January 18, 2013 referenced the need for USS Cal Builders to again address an email from the City's QSD requiring stabilization of exposed slopes (**Appendix S**). The January 18, 2013 email was referenced again during seven subsequent inspections through January 30, 2013 (**Appendix T**). USS Cal Builders did not address the deficiencies until City staff inspected the site, and required corrections (**Appendix U**). City inspection reports indicate that corrections were made on or about February 4, 2013. Subsequent City inspection reports indicate that no additional corrective action was required until March 7, 2013 when BMP maintenance was required prior to a forecasted storm event.

March 8, 2013 Discharge Event

On March 8, 2013, the City notified the San Diego Water Board that the sediment basins at the Project had reached capacity and overflowed during a storm event. Because the basins were not constructed with overflow pipes, the discharged storm water came into contact with on-site sediment that discharged into the City's MS4, tributary to Rossini Creek and San Elijo Lagoon.

The discharge occurred because the Dischargers failed to pump the basins dry prior to the March 8, 2013 storm event to ensure adequate freeboard to capture rainfall from the storm. Prior to the discharge, QSP and City inspections failed to identify the need to maintain the sediment basin BMPs, thereby violating Order No. 2009-0009-DWQ. The inspections also failed to require compliance with the City's ordinance requiring basins to be pumped dry after each rain storm exceeding ¼-inch. National Weather Service rainfall data indicates that there were three rain events (January 7, 2013, 0.40-inches, January 25, 2013, 0.39-inches and February 20, 2013, 0.33-inches) after which the basins should have been pumped dry, prior to the March 8, 2013 1.30-inch rain event that resulted in a sediment discharge.

The City issued a Notice of Violation to Cal USS Builders for the March 8, 2013 discharge, but issued a warning rather than a monetary penalty in its Administrative Citation (**Appendix V**).

Beneficial Uses of Affected Waters

The 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 the water necessary for the survival or well-being of man, plants and wildlife."

The Basin Plan also designates water quality objectives to protect the designated beneficial uses. CWC section 13350(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.”

Water quality objectives are numerical values for water quality constituents or narrative descriptions based on sound water quality criteria needed to protect the most sensitive beneficial uses designated for a water body.

The Basin Plan has designated the following beneficial uses for San Elijo Lagoon:

- Contact Water Recreation (REC-1)
- Non-contact Water Recreation (REC-2)
- Preservation of Biological Habitats of Special Significance (BIOL)
- Estuarine Habitat (EST)
- Wildlife Habitat (WILD)
- Rare, Threatened, or Endangered Species (RARE)
- Marine Habitat (MAR)
- Migration of Aquatic Organisms (MIGR).

Impaired Water Bodies

Section 303(d) of the Clean Water Act requires Regional Water Boards to identify waters that do not meet, or are not expected to meet, water quality standards after the implementation of certain technology based controls, and schedule them for development of Total Maximum Daily Loads (TMDLs). A TMDL determines the amount of pollutants that can be discharged to receiving waters without the water quality objectives being exceeded. The sediment discharge to Rossini Creek entered San Elijo Lagoon, an impaired water body for eutrophication, indicator bacteria, and sedimentation/siltation. Currently it is estimated that approximately 150 acres of the 590-acre Lagoon are impaired for sedimentation/siltation. A TMDL addressing the sedimentation impairment in the lagoon is scheduled to be completed before 2020.

The discharge of sediment from the Project has contributed to the further impairment of San Elijo Lagoon for sedimentation/siltation. Excessive sedimentation around the mouth of the lagoon results in decreased circulation and tidal flushing. This can, in turn, trigger the need for increased anthropogenic management of the lagoon mouth opening, or absent such management, can result in anoxic conditions, and subsequent fish kills. Sedimentation also proliferates invasive plant and animal species within the lagoon.

B. ALLEGED VIOLATIONS

The Dischargers are required to ensure that the Project is in compliance with the requirements of State Water Board Order No. 2009-0009-DWQ. The City is required to conduct the necessary oversight of construction projects within its jurisdiction in compliance with the requirements of Order No. R9-2007-0001. The Complaint alleges the following violations:

1. Discharges of Sediment to the MS4, and Rossini Creek, Tributary to San Elijo Lagoon – Against Both Dischargers

The Dischargers violated Basin Plan Prohibition 14 which states, "The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited."

The Dischargers violated Discharge Prohibition III.A of Order No. 2009-0009-DWQ which states, "Dischargers shall not violate any discharge prohibitions contained in the applicable Basin Plans or statewide water quality control plans..."

The Dischargers violated Discharge Prohibition III.B of Order No. 2009-0009-DWQ which states, "All discharges are prohibited except for the storm water and non-storm water discharges specifically authorized by this General Permit or another NPDES permit."

The City violated Prohibitions and Receiving Water Limitations A.1 of Order No. R9-2007-0001 which states, "Discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited."

The City violated Prohibitions and Receiving Water Limitations A.2. of Order No. R9-2007-0001 which states, "Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited."

The City violated Prohibitions and Receiving Water Limitations A.3 of Order No. R9-2007-0001 which states, "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial use) are prohibited."

2. Failure to Prevent Pollutants in Storm Water Discharges – Against Both Dischargers

The Dischargers violated Effluent Standard V.A.2 of Order No. 2009-0009-DWQ which states, "dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants."

3. Failure to Implement an Adequate Jurisdictional Urban Runoff Management Program – Against City Only

The City violated section D.2 Jurisdictional Urban Runoff Management Program Construction Component of Order No. R9-2007-0001 which states, "Each Copermittee shall implement a construction program which meets the requirements of this section, reduces construction site discharges of pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards."

C. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

Pursuant to CWC section 13385, any person who violates waste discharge requirements issued pursuant to Chapter 5.5 of the CWC (i.e., NPDES Permits) shall be liable civilly.

Pursuant to CWC section 13385(c), the maximum civil liability that the San Diego Water Board may impose for a violation of an NPDES permit is ten thousand dollars (\$10,000) for each day the violation occurs and/or ten dollars (\$10) per gallon discharged but not cleaned up that exceeds 1,000 gallons.

CWC section 13385(e) specifies the factors that the San Diego Water Board shall consider in establishing the amount of discretionary liability for the alleged violations. 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."

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy), provides a penalty calculation methodology for Water Boards⁵ to use in administrative civil liability cases. The penalty calculation methodology enables the 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. The penalty calculation methodology provides a consistent approach and analysis of factors to determine liability based on the applicable Water Code section.

Pursuant to the Enforcement Policy, when there is a discharge, Water Boards shall determine an initial liability factor based on the Potential for Harm score and the extent of Deviation from Requirements for the violation. Water Boards shall calculate the Potential for Harm by determining the actual or threatened impact to beneficial uses caused by the violation 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. These factors will be used to determine a per day factor using the matrix set forth in the Enforcement Policy that is multiplied by the maximum per day amount allowed under the Water Code. If applicable, the Water Board shall also determine an initial liability amount on a per gallon basis using the Potential for Harm score and the extent of Deviation of Requirement of the violation.

For each non-discharge violation Water Boards shall calculate an initial liability factor, considering the Potential for Harm and extent of Deviation from Requirements. Water Boards shall use the matrix set forth in the Enforcement Policy that corresponds to the appropriate Potential for Harm and the Deviation from Requirement categories.

⁵ "Water Boards" refers to the State Water Resources Control Board and the Regional Water Quality Control Boards.

Pursuant to the Enforcement Policy, Water Boards shall use three adjustment factors for modification of the initial liability amount. These factors include: 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.

VIOLATION 1: DISCHARGES OF SEDIMENT TO THE MS4 AND ROSSINI CREEK TRIBUTARY TO SAN ELIJO LAGOON – AGAINST BOTH DISCHARGERS

Step 1 – Potential for Harm for Discharge Violations

Factor 1: Harm or Potential for Harm to Beneficial Uses

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 (negligible) and 5 (major) is assigned in accordance with the statutory factors of the nature, circumstances, extent and gravity of the violation.

The San Diego Water Board Prosecution Team (Prosecution Team) has assigned a score of **4 (above moderate)** out of 5 to Factor 1 of the penalty calculation because:

- a. Sediment was directly discharged to Rossini Creek, a sensitive wetland area.
- b. Impacts to Rossini Creek were likely substantial, with temporary restrictions on beneficial uses.
- c. The discharge entered Rossini Creek less than 2 miles upstream of its inlet into San Elijo Lagoon.
- d. Sediment was indirectly discharged to San Elijo Lagoon, a high risk receiving water.
- e. San Elijo Lagoon is a Clean Water Act section 303(d) listed impaired water body for sediment.
- f. Sediment discharges negatively impact water contact recreation, wildlife habitat, riparian and marine habitat, and endangered species habitat beneficial uses.

- g. Sediment discharges cause acute effects on the invertebrate aquatic community.

The Enforcement Policy defines **above moderate** for discharge violations as:

More than moderate threat to beneficial uses (i.e., impacts are observed or likely substantial, temporary restrictions on beneficial uses (e.g., less than 5 days), and human or ecological health concerns.)

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

The discharge of sediment to receiving waters poses a **moderate** risk or threat to potential receptors because:

- a. Sediment discharges diminish 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). It is possible, if not likely, that these toxic constituents were present in the discharged sediment, since the Project site was a former agricultural operation, with contaminated sediment.
- c. Sediment discharges affect the quality of receiving waters and the ability to support habitat related beneficial uses by reducing visibility and impacting biotic feeding and reproduction.

Accordingly, the Prosecution Team assigns a score of **2** out of 4 to Factor 2 of the penalty calculation. The Enforcement Policy defines **moderate** as:

Discharged material poses a moderate risk or threat to potential receptors (i.e, the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection).

Factor 3: Susceptibility to Cleanup and Abatement

Pursuant to the Enforcement Policy a score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned to this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement.

Less than 50 percent of the discharge was susceptible to cleanup or abatement. Accordingly, a score of **1 (one)** is assigned to the penalty calculation for Factor 3.

Final Score – “Potential for Harm”

Based on the above determinations, the Potential for Harm final score for these discharge violations is **7 (seven)**.

Step 2 – Assessments for Discharge Violations

CWC section 13385 states that a Regional Water Board may impose civil liability on a daily basis, a per gallon basis, or both. Due to the difficulty in accurately determining the volume of sediment discharged during the two documented discharge events, civil liability was only calculated on a per day basis for these violations.

Per Day Assessments for Discharge Violations

a. Extent of Deviation from Requirement

The Prosecution Team has assigned a Deviation from Requirement score of “**major**” because:

- a. Order No. 2009-0009-DWQ prohibits all discharges other than storm water from construction sites to waters of the United States unless otherwise authorized by an NPDES permit. Pollutants were discharged to waters of the United States from the Project on at least two occasions.
- b. Order No. R9-2007-0001 prohibits: (1) discharges into and from MS4s that cause or threaten to cause a condition of pollution, contamination, or nuisance, (2) discharges which have not been reduced to the MEP, and (3) discharges that cause or contribute to the violation of water quality standards. Pollutants were discharged into and from the MS4 that were not reduced to the MEP and caused or threatened to cause a condition of pollution, contamination, or nuisance.

The Enforcement Policy defines **major** for discharge violations as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of 7 and "Deviation from Requirement" factor of "Major", the "Per Day Factor" for discharging sediment from the Project to the MS4, Rossini Creek and San Elijo Lagoon is **0.310** in Table 2 of the Enforcement Policy. Pursuant to CWC section 13385 the maximum civil liability for these violations is ten thousand dollars (\$10,000) per day of violation (per violation). Calculating the Per Day Assessment is achieved by multiplying:

$$\begin{aligned} &(\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) = \\ &(0.310) \times (\$10,000) = \$3,100 \end{aligned}$$

Step 3 – Per Day Assessments for Non-Discharge Violations

Step 3 does not apply to discharge violations.

Step 4 – Adjustment Factors

Culpability

The Prosecution Team has assigned a culpability multiplier of **1.3** out of a range from 0.5 to 1.5 for these violations because:

- a. BMPs identified in the SWPPP were not implemented.
- b. Grading activities were initiated in the wet season, the site was immediately completely graded, and appropriate BMPs were not implemented by Cal USS Builders or required by the City, contrary to the recommendations in Order No. 2009-0009-DWQ and Encinitas Municipal Code section 23.24.370.
- c. The Dischargers' QSP failed to adequately prepare the Project to prevent sediment discharges prior to forecasted rain events.
- e. The Dischargers failed to correct identified BMP deficiencies in a timely manner.
- f. The City failed to require the timely correction of identified BMP deficiencies.

Cleanup and Cooperation

The Prosecution Team has assigned a cleanup and cooperation multiplier of **1.1** from a range of .75 to 1.5 for this violation because the Dischargers failed to expeditiously return the site to compliance during the rainy season.

History of Violation

The Prosecution Team assigned a history of violation multiplier of **1.0** because the Dischargers do not have a history of construction or municipal storm water violations.

Multiple Day Violations

At this time the Prosecution Team only has evidence indicating discharges of sediment from the Project occurred on two days; therefore, a reduction for multiple days of violation does not apply to these violations.

Step 5 – Determination of Initial Amount of Liability

The Base Liability amount for these violations of **eight thousand eight hundred sixty six dollars (\$8,866)** is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{aligned} &(\text{Per Day Assessment}) \times (\text{Days of Violation}) = \\ &(\$3,100) \times 2 = \$6,200 \end{aligned}$$

$$\begin{aligned} &(\text{Initial Liability Amount}) \times (\text{Culpability}) \times (\text{Cooperation}) \times (\text{History of Violation}) = \\ &(\$6,200) \times (1.3) \times (1.1) \times (1.0) = \$8,866 \end{aligned}$$

Step 6 – Ability to Pay and Ability to Continue In Business

See section D. Adjustment Factors as to All Dischargers and All Violations

Step 7 – Other Factors as Justice May Require

See section D. Adjustment Factors as to All Dischargers and All Violations

Step 8 – Economic Benefit

The San Diego Water Board has determined that the Dischargers did derive an economic benefit from discharging pollutants to waters of the United States. The economic benefit was derived by failing to implement and maintain adequate erosion and sediment control BMPs. Violation 2 in this Technical Analysis addresses the BMP violations, and the calculated economic benefit for those violations was estimated to be **fifty eight thousand seven hundred ninety four dollars (\$58,794)** using the USEPA BEN model (**Appendix W**).

Step 9 – Maximum and Minimum Liability Amounts

Pursuant to CWC section 13385 the maximum civil liability that the San Diego Water Board may assess for these violations 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 gallons discharged, that was not cleaned up. CWC section 13385(d) requires that when pursuing civil liability under CWC section 13385, "At a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitutes the violation." If no economic benefit was derived from the violation, there is no minimum liability requirement.

In this instance, the Prosecution Team is only proposing the assessment of civil liability for the discharges of sediment to waters of the United States on a per day basis based on information currently available. Sediment was known to be discharged to waters of the United States on December 13, 2012 and March 8, 2013, therefore, the maximum civil liability that could be assessed for these violations is **twenty thousand dollars (\$20,000)**.

CWC 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 higher than the Economic Benefit Amount. Because the economic benefit is the same for Violations 1 and 2, the minimum liability amount is achieved cumulatively with the two violations, and is calculated to be **sixty four thousand six hundred seventy three dollars (\$64,673)** as applied in Violation 2.

Step 10 – Proposed Civil Liability for Violation No. 1

Based on the penalty calculation methodology within Section VI of the Enforcement Policy, the proposed civil liability for discharging sediment to waters of the United States in violation of Order Nos. 2009-0009-DWQ and R9-2007-0001 and the Basin Plan on two days is **eight thousand eight hundred sixty six dollars (\$8,866)** plus staff costs.

VIOLATION 2: FAILURE TO PREVENT POLLUTANTS IN STORM WATER DISCHARGES – AGAINST BOTH DISCHARGERS

Step 1 – Potential for Harm for Discharge Violations

Step 1 does not apply to this non-discharge violation.

Step 2 – Assessments for Discharge Violations

Step 2 does not apply to this non-discharge violation.

Step 3 – Per Day Assessments for Non-Discharge Violations

Pursuant to the Enforcement Policy, Water Boards shall calculate an initial liability factor for each non-discharge violation. The calculation shall consider the violation's potential for harm, and extent to which the violation deviates from applicable requirements.

Potential for Harm

The Prosecution Team has assigned a "Potential for Harm" score for this violation of "major" because:

- a. Rossini Creek is a sensitive wetland area.
- b. The failure to implement adequate BMPs resulted in the direct discharge of sediment to Rossini Creek.
- c. Impacts to Rossini Creek were likely substantial, with temporary restrictions on beneficial uses.
- d. San Elijo Lagoon is a high risk receiving water.

- e. San Elijo Lagoon is a Clean Water Act section 303(d) listed impaired water body for sediment.
- f. The failure to implement adequate BMPs resulted in the indirect discharge of sediment to San Elijo Lagoon.
- g. Sediment discharges negatively impact water contact recreation, wildlife habitat, riparian and marine habitat, and endangered species habitat beneficial uses.

The Enforcement Policy defines “**major**” for non-discharge violations as:

The 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. Additionally, non-discharge violations involving particularly sensitive habitats should be considered major.

Deviation from Requirement

The Prosecution Team has assigned a “Deviation from Requirement” score of “**major**” because:

- a. Order No. 2009-0009-DWQ identifies erosion control BMPs as a necessary BAT/BCT and the primary means for preventing storm water contamination at construction sites. Although the SWPPP identified numerous erosion control BMPs that would be deployed during the construction process, including erosion control blankets, check dams, erosion control seeding or alternate methods for concentrated flow paths, inspections and records indicate they were insufficient or entirely absent prior to the December 13, 2012 discharge.
- b. Order No. 2009-0009-DWQ identifies sediment control BMPs as the secondary means for preventing storm water contamination at construction sites. Although the SWPPP identified numerous sediment control BMPs that would be deployed during the construction process, including sediment traps, fiber rolls, street sweeping, storm drain inlet protection and stabilized construction entrance and exits, inspections and records indicate they were ineffective or entirely absent prior to the December 13, 2012 discharge.

- c. Order No. 2009-0009-DWQ requires Risk Level 2 dischargers to effectively manage all run-on, all runoff within the site and all runoff that discharges off the site. The SWPPP failed to address run-on at the south end of the Project. Run-on in the dog park area identified in a December 4, 2012 inspection report was not addressed prior to the December 13, 2012 discharge.
- d. Order No. 2009-0009-DWQ requires Risk Level 2 dischargers to inspect, maintain and repair pollution controls. Site inspections failed to address maintenance of the sediment basins prior to the March 8, 2013 discharge.

The Enforcement Policy defines “major” for non-discharge violations as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Per Day Factor and Per Day Assessment

Using a “Potential for Harm” factor of “Major” and “Deviation from Requirement” factor of “Major”, the “Per Day Factor” for failing to implement effective erosion and sediment controls in Table 3 of the Enforcement Policy is **0.85**. Calculating the Per Day Assessment is achieved by multiplying:

$$\begin{aligned} \text{(Per Day Factor)} \times \text{(Statutory Maximum Liability)} &= \\ (0.85) \times (\$10,000) &= \$8,500 \end{aligned}$$

Step 4 – Adjustment Factors

Culpability

The Prosecution Team assigned a culpability multiplier for this violation of **1.3** out of a range from 0.5 to 1.5 for this violation because:

- a. The Dischargers’ QSP and QSD failed to adequately evaluate the erosion and sediment control BMPs needed to prevent discharges from the Project prior to the December 13, 2012 forecasted rain event.
- b. The Dischargers failed to implement erosion and sediment control BMPs identified in the SWPPP prior to the December 13, 2012 discharge.

- c. The Dischargers failed to properly maintain sediment control BMPs (sediment basins) after multiple storm events between January 7, 2013 and March 8, 2013.
- d. The Dischargers' QSD failed to identify the run-on potential at the south end of the construction project in the SWPPP.
- e. The Dischargers failed to mitigate the run-on potential in the dog park area prior to the December 13, 2012 discharge.
- f. The Dischargers failed to address the BMP corrections identified by the QSP, QSD or City inspector in a timely manner.
- g. The Dischargers failed to comply with Encinitas Municipal Code 12.24.370 by grading during the wet season without erosion control BMPs.

Cleanup and Cooperation

The Prosecution Team has assigned a cleanup and cooperation multiplier of **1.1** from a range of .75 to 1.5 for this violation because the Dischargers failed to expeditiously return the site to compliance during the rainy season.

History of Violation

The Prosecution Team assigned a history of violation multiplier of **1.0** because the Dischargers do not have a history of construction or municipal storm water violations.

Multiple Day Violations

The days of violation for failure to prevent pollutants in storm water discharges has been determined to be:

October 8, 2012 – December 27, 2012 = 81 days
January 8, 2013 – March 8, 2013 = 60 days

The period from December 28, 2012 through January 7, 2013 was not included in the violation period because there is no evidence of noncompliance during this period.

The Enforcement Policy provides that for violations lasting more than 30 days, the daily assessment can be less than the calculated daily assessment provided that it is not less than the per day economic benefit, if any, resulting from the violation and the Water Board can make one of the following findings:

- The violation is not causing daily detrimental impacts to the environment or the regulatory program;
- The violation results in no economic benefit from the illegal conduct that can be measured on a daily basis; or,
- The violation occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.

Upon review of the findings necessary to invoke the Enforcement Policy's Multiple Day Violations reduction, the Prosecution Team concludes that the failure to prevent pollutants in storm water discharges did not cause a daily detrimental impact because it did not rain during the majority of the one hundred forty one days (141) that the alleged violations occurred. Therefore, in this instance it is appropriate to apply an adjustment to the number of days of violation. The Prosecution Team elected to apply the maximum reduction allowed by the Enforcement Policy as indicated in the table below:⁶

Alleged Violation	Days of Violation	Adjusted Days of Violation	Total Adjusted Days of Violation
Failure to Prevent Pollutants in Storm Water Discharges	10/8/2012 – 12/27/2013 = 81 1/8/2013 – 3/8/2013 = 60	8 8	16

⁶ The Enforcement Policy allows for a maximum reduction for multiple day violations resulting from an assessment of the Initial Total Base Liability Amount for the first day of violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment for each additional thirty (30) days of violation.

Step 5 – Determination of Base Liability Amount

The Base Liability amount for failure to prevent pollutants in storm water discharges of **one hundred ninety four thousand four hundred eighty dollars (\$194,480)** is determined by multiplying the Per Day Assessment by the Adjusted Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as calculated as follows:

$$\begin{aligned} \text{Per Day Assessment) x (Days of Violation) =} \\ (\$8,500) \times (16) = \$136,000 \end{aligned}$$

$$\begin{aligned} \text{(Initial Amount of Liability) x (Culpability) x (Cooperation) x (History of Violation) =} \\ (\$136,000) \times (1.3) \times (1.1) \times (1.0) = \$194,480 \end{aligned}$$

Step 6 – Ability to Pay and Ability to Continue in Business

See section D. Adjustment Factors as to All Dischargers and All Violations

Step 7 – Other Factors as Justice May Require

See section D. Adjustment Factors as to All Dischargers and All Violations

Step 8 – Economic Benefit

The Prosecution Team has determined that the Dischargers achieved an economic benefit from failing to install the appropriate pollution control devices (erosion and sediment control BMPs) from the commencement of construction activities on October 8, 2012 through December 20, 2012. Based on the USEPA BEN model, the Dischargers avoided the costs associated with the maintenance and repair of sediment and erosion control BMPs in the amount of **forty eight thousand four hundred thirty dollars (\$48,430)** during the violation period.

In addition, the Dischargers achieved an economic benefit for failing to properly maintain the sediment basins from January 8, 2013 through March 8, 2013. The USEPA BEN model, has calculated an economic benefit for this avoided cost of **ten thousand three hundred sixty four dollars (\$10,364)** during the violation period.

The total economic benefit for this violation is calculated to be **fifty eight thousand seven hundred ninety four dollars (\$58,794)**.

Step 9 – Maximum and Minimum Liability Amounts

Pursuant to CWC 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 gallons discharged, that was not cleaned up. The maximum liability for failure to prevent pollutants in storm water discharges for one hundred forty one (141) days is **one million four hundred ten thousand dollars (\$1,410,000)**.

The minimum liability, achieved cumulatively with Violations 1 and 2, is the economic benefit plus ten percent, for a total of **sixty four thousand six hundred seventy three dollars (\$64,673)**.

Step 10 – Proposed Civil Liability for Violation No. 2

Based on the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to prevent pollutants in storm water discharges in violation of Order No. 2009-0009-DWQ on one hundred forty one (141) days is calculated to be **one hundred ninety four thousand four hundred eighty dollars (\$194,480)**, plus staff costs.

**VIOLATION 3: FAILURE TO IMPLEMENT AN ADEQUATE
JURISDICTIONAL URBAN RUNOFF
MANAGEMENT PLAN – AGAINST CITY ONLY**

Step 1 – Potential for Harm for Discharge Violations

Step 1 does not apply to this non-discharge violation.

Step 2 – Assessments for Discharge Violations

Step 2 does not apply to this non-discharge violation.

Step 3 – Per Day Assessments for Non-Discharge Violations

Potential for Harm

The Prosecution Team assigned a “Potential for Harm” score of “**major**” to this violation because:

- a. Rossini Creek is a sensitive wetland area.

- b. San Elijo Lagoon is a Clean Water Act section 303(d) listed impaired water body for sediment.
- c. Failure to implement the construction component of the City's JURMP resulted in discharges of sediment into and from the MS4 to particularly sensitive habitats.
- d. Failure to implement the construction component of the City's JURMP has the potential to cause harm to other receiving waters throughout the City's jurisdictional boundaries.

The Enforcement Policy defines **major** for non-discharge violations as:

The 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. Additionally, non-discharge violations involving particularly sensitive habitats should be considered major."

Deviation from Requirement

The Prosecution Team assigned a "Deviation from Requirement" score of "**major**" to this violation because:

- a. Order No. R9-2007-0001 prohibits discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined by CWC section 13050), in waters of the state. The City failed to prohibit discharges into and from its MS4 that caused, or threatened to cause, a condition of pollution, contamination, or nuisance in Rossini Creek and San Elijo Lagoon.
- b. Order No. R9-2007-0001 prohibits discharges from MS4s that have not been reduced to the MEP. The City failed to require the implementation of adequate controls, structures and management practices at the Project to the MEP.
- c. Order No. R9-2007-0001 requires municipalities to enforce grading ordinances to ensure compliance with the Order. The City failed to enforce its own Municipal Code 23.24.370 by not requiring the implementation of adequate BMPs prior to rain events. The City failed to enforce its own Municipal Code 23.24.390 by not requiring maintenance of sediment basins after rain events.

- d. Order No. 2007-0001 requires municipalities to implement follow-up actions (i.e., enforcement) necessary to comply with the Order. The City failed to take appropriate enforcement action at the Project when BMP deficiencies identified in inspection reports were not corrected.

The Enforcement Policy defines **major** for non-discharge violations as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of "Major" and "Deviation from Requirement" factor of "Major", the "Per Day Factor" for failing to implement an adequate JURMP in Table 3 of the Enforcement Policy is **0.85**. Calculating the Per Day Assessment is achieved by multiplying:

$$\begin{aligned} \text{(Per Day Factor)} \times \text{(Statutory Maximum Liability)} &= \\ (0.85) \times (\$10,000) &= \$8,500 \end{aligned}$$

Step 4 – Adjustment Factors

Culpability

The Prosecution Team has assigned a culpability multiplier of **1.4** out of a range from 0.5 to 1.5 to this violation because:

- a. The City, as both a municipal Copermittee and the Project's LRP, was aware of the applicable requirements and failed to implement these requirements on its own capital improvement project.
- b. The City allowed pollutants (sediment) from the Project to discharge into and from the MS4 in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined by CWC section 13050) in waters of the state.
- c. The City allowed discharges of pollutants (sediment) downstream of the Project that were not reduced to the MEP.
- d. The City failed to enforce its grading ordinances in compliance with Order No. R9-2007-0001.

- e. The City failed to take adequate follow-up actions (i.e. enforcement) on BMP deficiencies that were not undertaken in compliance with Order R9-2007-0001.
- f. The City failed to adequately oversee the construction project with regards to compliance with local ordinances or Order No. 2009-0009-DWQ from the commencement of construction activities until after the December 13, 2012 discharges.
- g. The City failed to identify the failure to maintain the sediment basins in accordance with Encinitas Municipal Code 23.24.390.

Cleanup and Cooperation

The Prosecution Team has assigned a cleanup and cooperation multiplier of 1.1 from a range of .75 to 1.5 for this violation because the City failed to ensure that the Project stayed in compliance with Order No. 2009-0009-DWQ during the rainy season.

History of Violation

The Prosecution Team assigned a history of violation multiplier of 1.0 because the City does not have a history of construction or municipal storm water violations.

Multiple Day Violations

The days of violation for failure to implement an adequate JURMP has been calculated to be:

October 8, 2012 through December 13, 2012 = 67 days

January 8, 2013 through March 8, 2013 = 60 days

The period from December 14, 2012 through January 7, 2013 was not included in the violation period because the City's inspection reports indicate that it was conducting adequate storm water inspections by identifying and requiring correction of observed violations during this period of time. The violation period commenced again on January 8, 2013 because the City failed to implement Municipal Code 23.24.390 when it did not require the sediment basins to be pumped dry after a qualifying storm event.

Upon review of the findings necessary to invoke the Enforcement Policy's Multiple Day Violations reduction, the Prosecution Team believes that the failure to implement an adequate JURMP did not cause a daily detrimental impact because it did not rain during the majority of the one hundred twenty seven (127) days that the alleged violations occurred. Therefore, in this instance it is appropriate to apply an adjustment to the number of days of violation. The Prosecution Team elected to apply the maximum reduction allowed by the Enforcement Policy as indicated in the table below:

Alleged Violation	Days of Violation	Adjusted Days of Violation	Total Adjusted Days of Violation
Failure to Implement an Adequate JURMP	10/8/12 – 12/13/12 = 67	8	16 days
	1/8/13 – 3/8/13 = 60	8	

Step 5 – Determination of Base Liability Amount

The Base Liability amount for failure to implement an adequate JURMP of **two hundred nine thousand four hundred forty dollars (\$209,440)** is determined by multiplying the Per Day Assessment by the Adjusted Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as calculated as follows:

$$\begin{aligned} &(\text{Per Day Assessment}) \times (\text{Days of Violation}) = \\ &(\$8,500) \times (16) = \$136,000 \end{aligned}$$

$$\begin{aligned} &(\text{Initial Amount of Liability}) \times (\text{Culpability}) \times (\text{Cooperation}) \times (\text{History of Violation}) = \\ &(\$136,000) \times (1.4) \times (1.1) \times (1.0) = \$209,440 \end{aligned}$$

Step 6 – Ability to Pay and Ability to Continue in Business

See section D. Adjustment Factors as to All Dischargers and All Violations

Step 7 – Other Factors as Justice May Require

See section D. Adjustment Factors as to All Dischargers and All Violations

Step 8 – Economic Benefit

The Prosecution Team suspects that the City obtained some economic benefit by failing to conduct the appropriate oversight of the Project. However, the information necessary to quantify the economic benefit is not available. It is anticipated that the proposed liability amount for this violation would recover any economic benefit derived by the City.

Step 9 – Maximum and Minimum Liability Amounts

Pursuant to CWC 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 on thousand gallons discharged, that was not cleaned up. The maximum liability for failure to implement an adequate JURMP for one hundred twenty seven days (127) is **one million two hundred seventy thousand dollars (\$1,270,000)**.

No minimum liability amount for this violation has been assigned because the economic benefit derived by the City cannot be calculated due to the complexity in determining whether or how much staff time was saved by not conducting the appropriate oversight of the Project.

Step 10 – Proposed Civil Liability for Violation No. 3

Based on the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement an adequate JURMP in violation of Order No. R9-2007-0001 on one hundred twenty seven (127) days was calculated to be **two hundred nine thousand four hundred forty dollars (\$209,440)** plus staff costs.

D. ADJUSTMENT FACTORS AS TO ALL DISCHARGERS, AND ALL VIOLATIONS

Ability to Pay and Ability to Continue In Business

According to the City's budget ending June 30, 2012, it had \$60,401,659 in total assets and \$11,667,071 in total liabilities. Based on this information, the City has the ability to pay the proposed liability without impacting its required governmental activities.

Based on the contracted amount owed to USS Cal Builders for construction of the Project of \$16,941,882 and therefore the small percentage of the project price that the recommended penalty represents, it is anticipated that the USS Cal Builders has the ability to pay. In addition, information contained in SMARTS indicates that USS Cal Builders has four large-scale active constructions sites within the state in addition to twelve terminated large-scale construction projects.

Based on this publicly available data and the joint and several nature of the liability, the burden of this affirmative defense now shifts to the Dischargers to offer any evidence they would like the Prosecution Team to consider when evaluating their ability to pay the recommended administrative liability.

Other Factors as Justice May Require

The San Diego Water Board has incurred approximately **eighteen thousand sixty five dollars (\$18,065)** in staff costs associated with investigating the violations and preparing the Complaint. The total liability proposed in Complaint No. R9-2013-0152 includes the addition of these identified staff costs. If the Dischargers elect to contest this matter, the recommended liability may increase to recover additional necessary staff costs incurred through hearing. These staff costs are not divided by violation and are added at the end of the collective penalty assessment.

E. TOTAL PROPOSED LIABILITY AMOUNT

The total proposed liability amount for the violations addressed in Complaint No. R9-2013-0152 is **four hundred twelve thousand seven hundred eighty six dollars (\$412,786)** plus staff costs of **eighteen thousand sixty five dollars (\$18,065)** for a total of **four hundred thirty thousand eight hundred fifty one dollars (\$430,851)**. A summary of the staff costs incurred to date is provided in **Appendix X**. A summary of the methodology used by the Prosecution Team to calculate the proposed civil liability is summarized in Attachment 1, Penalty Methodology Decision of ACL Complaint No. R9-2013-0152. The civil liability for each violation addressed in ACL Complaint R9-2013-0152 is summarized in Table 1 below:

Alleged Violation	Days of Violation	Adjusted Days of Violation	Liability Per Adjusted Days of Violation	Total Liability
Discharges of Sediment to the MS4, and Rossini Creek Tributary to San Elijo Lagoon	2	n/a	\$4,433	\$8,866
Failure to Prevent Pollutants in Storm Water Discharges	141	16	\$12,155	\$194,480
Failure to Implement an Adequate JURMP	127	16	\$13,090	\$209,440
Total Base Liability Amount				\$412,786
Staff Costs to Date				\$18,065
Total Proposed Civil Liability⁷				\$430,851

Table 1: Total Proposed Civil Liability

⁷ Of this amount, the City is jointly and severally liable for all of the violations identified in ACL Complaint R9-2013-0152 for a total liability amount of \$430,851. USS Cal Builders is jointly and severally liable for all the violations in ACL Complaint R9-2013-0152 except for the violations related to the City's failure to implement an adequate JURMP, for a total liability amount of \$221,441.

Appendices

Appendix A	City of Encinitas September 24, , 2012 letter "Required Sediment and Erosion Control"
Appendix B	Notice of Intent
Appendix C	Contract
Appendix D	SWPPP
Appendix E	City (Geopacifica) Inspection Reports October 12, 2012 through December 13, 2012
Appendix F	QSP Inspection Reports November 7, 2012 through December 4, 2012
Appendix G	City of Encinitas Stop Work Order
Appendix H	City of Encinitas Administrative Citation
Appendix I	City Inspection Report December 14, 2012
Appendix J	San Diego Water Board Inspection Report December 17, 2012
Appendix K	Summit Erosion Control Inspection December 20, 2012
Appendix L	NOV R9-2013-0008
Appendix M	Response to NOV R9-2013-0008
Appendix N	City Inspection Reports December 20 – 27, 2012
Appendix O	City Inspection Reports December 31, 2012 – January 4, 2013
Appendix P	City Inspection Report January 10, 2013
Appendix Q	QSD Email December 28, 2012
Appendix R	City Inspection Reports January 11 – 16, 2013
Appendix S	Geopacifica Inspection Report January 18, 2013
Appendix T	Geopacifica Inspection Reports January 22 – 30, 2013
Appendix U	City Inspection Report January 31, 2013
Appendix V	City Notice of Violation and Administrative Citation
Appendix W	BEN Calculations
Appendix X	Staff Costs

Administrative Civil Liability Complaint

Fact Sheet

The State Water Resources Control Board and the nine Regional Boards are authorized to issue complaints for civil liabilities under Water Code section 13323 for violations of the Water Code. This document describes generally the process that follows the issuance of a complaint.

The issuance of a complaint is the first step in the possible imposition of an order requiring payment of penalties. The complaint details the alleged violations including the appropriate Water Code citations, and it summarizes the evidence that supports the allegations. **If you receive a complaint, you must respond timely as directed. If you fail to do so, a default order may be issued against you.** The complaint is accompanied by a letter of transmittal, a waiver options form, and a Hearing Procedure. Each document contains important information and deadlines. You should read each document carefully. A person issued a complaint is allowed to represent him or herself. However, legal advice may be desirable to assist in responding to the complaint.

Parties

The parties to a complaint proceeding are the Regional Water Board or State Water Board Prosecution Team and the person(s) named in the complaint, referred to as the "Discharger(s)." The Prosecution Team is comprised of Regional Water Board staff and management. Other interested persons may become involved and may become "designated parties." Only designated parties are allowed to submit evidence and participate fully in the proceeding. Other interested persons may play a more limited role in the proceeding and are allowed to submit comments. If the matter proceeds to hearing, the hearing will be held before the full membership of the Regional Water Board (seven Governor appointed members) or before a panel. The board members who will hear the evidence and rule on the matter act as judges. They are assisted by advisory staff, who provide advice on technical and legal issues. Both the Prosecution Team and the Advisory Team have their own attorney. Neither the Prosecution Team nor the Discharger or his/her representatives are permitted to communicate with the board members or the Advisory Team about the complaint without the presence or knowledge of the other. This is explained in more detail in the Hearing Notice.

Complaint Resolution Options

Once issued, a complaint can lead to (1) withdrawal of the complaint; (2) withdrawal and reissuance; (3) payment and waiver; (4) settlement; or (5) hearing.

Withdrawal may result if the discharger provides information to the Prosecution Team that clearly and unmistakably demonstrates that a fundamental error exists in the information set forth in the complaint.

ACL Complaint Fact Sheet

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

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

Settlement results when the Parties negotiate a resolution of the complaint. The settlement can be payment of an amount less than the proposed penalty or partial payment and suspension of the remainder pending implementation by the Discharger(s) of identified activities, such as making improvements that will reduce the likelihood of a further violation or the implementation or funding of a Supplemental Environmental Project (SEP) or a Compliance Project (CP). Qualifying criteria for CPs and SEPs are contained in the State Water Board's Enforcement Policy, which is available at the State Water Board's website at: www.swrcb.ca.gov/plans_policies/docs/wgcp.doc.

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

Factors That Must Be Considered By the Board

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

ACL Complaint Fact Sheet

that ability or inability. The kinds of information that may be used for this purpose include:

For an individual:

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

For a business:

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

For larger firms:

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

ACL Complaint Fact Sheet

For a municipality, county, or district:

1. Type of entity:
 - a. City/Town/Village;
 - b. County;
 - c. Municipality with enterprise fund;
 - d. Independent or publicly owned utility;
2. The following 1990 and 2000 US Census data:
 - a. Population;
 - b. Number of persons age 18 and above;
 - c. Number of persons age 65 and above;
 - d. Number of Individual below 125% of poverty level;
 - e. Median home value;
 - f. Median household income.
3. Current or most recent estimates of:
 - a. Population;
 - b. Median home value;
 - c. Median household income;
 - d. Market value of taxable property;
 - e. Property tax collection rate.
4. Unreserved general fund ending balance;
5. Total principal and interest payments for all governmental funds;
6. Total revenues for all governmental funds;
7. Direct net debt;
8. Overall net debt;
9. General obligation debt rating;
10. General obligation debt level.
11. Next year's budgeted/anticipated general fund expenditures plus net transfers out.

This list is provided for information only. A discharger remains responsible for providing all relevant and reliable information regarding your financial situation, which may include items in the above lists, but could include other documents not listed. Please note that all evidence regarding this case, including financial information, will be made public.

Petitions

If the Regional Water Board issues an order requiring payment, a discharger may challenge that order by filing a petition for review with the State Water Board pursuant to Water Code section 13320. More information on the petition process is available at www.swrcb.ca.gov/public_notices/petitions. An order of the State Water Board, including its ruling on a petition from a Regional Water Board order, can be challenged by filing a petition for writ of mandate in Superior Court pursuant to Water Code section 13330.

Once an order for payment of penalties becomes final, the Regional or State Water Board may seek an order of the Superior Court under Water Code Section 13328, if necessary, in order to collect payment of the penalty amount.

SAN DIEGO WATER QUALITY CONTROL BOARD

PROPOSED DRAFT

HEARING PROCEDURE FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
NO. R9-2013-0152
ISSUED TO

CITY OF ENCINITAS
AND
USS CAL BUILDERS, INC.

SCHEDULED FOR FEBRUARY 12, 2014

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

Background

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (CWC) section 13385 against the City of Encinitas (City) and USS Cal Builders, Inc. (collectively, Dischargers) alleging that they have violated Prohibition III.A and III.B, and Effluent Standard V.A.2 of Order No. 2009-0009-DWQ, Prohibitions and Receiving Water Limitations A.1, A.2, and A.3 and Basin Plan Waste Discharge Prohibition 14 and that the City has violated Section D.2 of the Jurisdictional Urban Runoff Management Program Construction Component of Order No. R9-2007-0001, by failing to prevent the discharge of sediment to the municipal separate storm sewer (MS4), Rossini Creek and San Elijo Lagoon during construction of the Hall Property Park in Encinitas, California. The ACL Complaint proposes that administrative civil liability in the amount of \$430,851 be imposed as authorized by CWC Section 13385. Unless the Dischargers waive their right to a hearing, and pay the proposed liability, a hearing will be held before the San Diego Water Board during its meeting of February 12, 2014, in San Diego.

Purpose of Hearing

The purpose of the hearing is to receive relevant evidence and testimony regarding the proposed ACL Complaint. At the hearing, the San Diego Water Board will consider whether to adopt, modify, or reject the proposed assessment.

The public hearing on February 12, 2014, will commence as announced in the San Diego Water Board meeting agenda. The meeting will be held at the San Diego Water Board Office at 2375 Northside Drive, Suite 100, in San Diego. An agenda for the

meeting will be issued at least ten days before the meeting and will be posted on the San Diego Water Board's web page at: www.waterboards.ca.gov/sandiego.

Hearing Procedures

The hearing will be conducted in accordance with this hearing procedure. This proposed draft version of the hearing procedure has been prepared by the Prosecution Team, and is subject to revision and approval by the San Diego Water Board's Advisory Team. A copy of the procedures governing an adjudicatory hearing before the San Diego Water Board may be found at Title 23 of the California Code of Regulations, § 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with Section 648, subdivision (d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in Title 23 of the California Code of Regulations (CCR), § 648(b), Chapter 5 of the Administrative Procedures Act (commencing with § 11500 of the Government Code) does not apply to adjudicatory hearings before the San Diego Water Board. This Notice provides additional requirements and deadlines related to the proceeding.

THE PROCEDURES AND DEADLINES HEREIN MAY BE AMENDED BY THE ADVISORY TEAM IN ITS DISCRETION. ANY OBJECTIONS TO THE PROPOSED HEARING PROCEDURE MUST BE RECEIVED BY CATHERINE HAGAN, SENIOR STAFF COUNSEL, NO LATER THAN DECEMBER 2, 2013, OR THEY WILL BE WAIVED. FAILURE TO COMPLY WITH THE DEADLINES AND REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF DOCUMENTS AND/OR TESTIMONY.

Hearing Participation

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

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

- (1) San Diego Water Board Prosecution Staff
- (2) City of Encinitas Staff
- (3) Cal USS Builders, Inc. Staff

Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party, and not already listed above, shall request party status by submitting a request in writing (with copies to the existing designated parties) no later than 5 p.m. on **December 11, 2013**, to Catherine Hagan, Senior Staff Counsel, at the address set forth below. The request shall include an explanation of the basis for status as a designated party (e.g., how the issues to be addressed in the hearing and the potential actions by the San Diego Water Board affect the person), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be submitted by 5 p.m. on **December 23, 2013**. The parties will be notified by 5 p.m. on **December 31, 2013**, as to whether the request has been granted or denied.

Contacts

Advisory Staff:

Catherine Hagan, Esq.
Senior Staff Counsel
California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108
CHagan@Waterboards.ca.gov

David Gibson
Executive Officer
California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108

Prosecution Staff:

Julie Macedo
Staff Counsel
State Water Resources Control Board
Office of Enforcement
P.O. Box 100
Sacramento, CA 95812

James Smith
Assistant Executive Officer
California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108

Jeremy Haas
Environmental Program Manager
California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108

Chiara Clemente
Senior Environmental Scientist of the Compliance Assurance Unit
California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108

Rebecca Stewart
Sanitary Engineering Associate
California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108

Dischargers:

Glenn Pruim
Director of Public Works and Engineering
City of Encinitas
505 South Vulcan Avenue
Encinitas, CA 92024

Mohammad Qahoush
Regional Operations Manager
USS Cal Builders, Inc.
402 West Broadway, Suite 400
San Diego, CA 92101

Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the San Diego Water Board (Prosecution Staff) have been separated from those who will provide advice to the San Diego Water Board (Advisory Staff). Members of the Advisory Staff are: Catherine Hagan, Senior Staff Counsel, and David Gibson, Executive Officer. Members of the Prosecution Staff are: Julie Macedo, Staff Counsel, James Smith, Assistant Executive Officer, Jeremy Haas, Environmental Program Manager, Chiara Clemente, Senior Environmental Scientist of the Compliance Assurance Unit, and Rebecca Stewart, Sanitary Engineering Associate.

Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in *ex parte* communications regarding this matter with members of the Advisory Staff or members of the San Diego Water Board. An *ex parte* contact is any written or verbal communication pertaining to the investigation, preparation, or prosecution of the ACL Complaint between a member of a designated party or interested party on the one hand, and a San Diego Water Board member or an Advisory Staff member on the other hand, unless the communication is copied to all other designated and interested parties (if written) or made at a proceeding open to all other parties and interested persons (if verbal). Communications regarding non-controversial procedural matters are not *ex parte* contacts and are not restricted. Communications among the designated and interested parties themselves are not *ex parte* contacts.

Hearing Time limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined 20 minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have 3 minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received no later than ten days after all of the evidence has been received (**January 23, 2014**). Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the San Diego Board Chair (at the hearing) upon a showing that additional time is necessary.

Submission of Evidence and Policy Statements

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

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the San Diego Water Board to consider. Evidence and exhibits already in the public files of the San Diego Water Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with Title 23, CCR, Section 648.3.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.
5. (Dischargers only) If the Dischargers intend to argue an inability to pay the civil liability proposed in the Complaint (or an increased or decreased amount as may be imposed by the San Diego Water Board), the Dischargers should

submit supporting evidence as set forth in the "ACL Fact Sheet" under "Factors that must be considered by the Board."

6. (Dischargers only) If the Dischargers would like to propose a Supplemental Environmental Project (SEP) or Enhanced Compliance Action (ECA) in lieu of paying some or all of the civil liability in accordance with the State Water Board's Water Quality Enforcement Policy, the Dischargers shall submit a detailed SEP or ECA proposal including a specific implementation timetable.

The Prosecution Team shall submit two hard copies of the information to Catherine Hagan, Senior Staff Counsel, so that it is received no later than 5 p.m. on **December 31, 2013**.

The remaining designated parties shall submit 2 hard copies and one electronic copy of the information to Catherine Hagan, Senior Staff Counsel, so that they are received no later than 5 p.m. on **January 13, 2014**.

In addition to the foregoing, each designated party shall send (1) one copy of the above information to each of the other designated parties by 5 p.m. on the deadline specified above.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to Catherine Hagan, Senior Staff Counsel, as early as possible, but they must be received by **January 15, 2014**. Interested persons do not need to submit written comments in order to speak at the hearing.

In accordance with Title 23, California Code of Regulations, Section 648.4, the San Diego Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the San Diego Water Board may exclude evidence and testimony that is not submitted in accordance with this hearing procedure. Excluded evidence and testimony will not be considered by the San Diego Water Board and will not be included in the administrative record for this proceeding. Power Point and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. A copy of such material intended to be presented at the hearing must be submitted to the Advisory Team at or before the hearing¹ for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Request for Pre-hearing Conference

A designated party may request that a pre-hearing conference be held before the hearing in accordance with CWC section 13228.15. A pre-hearing conference may

¹ Each Regional Board may choose to require earlier submission of all visual aids by all parties. OE prefers early submission of visual aids, so that they have time to confirm that the aids do not go beyond the scope of previously-submitted evidence.

address any of the matters described in subdivision (b) of Government Code Section 11511.5. Requests must contain a description of the issues proposed to be discussed during that conference, and must be submitted to the Advisory Team, with a copy to all other designated parties, no later than 5 p.m. on **January 23, 2014**.

Evidentiary Objections

Any designated party objecting to written evidence or exhibits submitted by another designated party must submit a written objection so that it is received by 5 p.m. on **January 22, 2014** to the Advisory Team with a copy to all other designated parties. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

Evidentiary Documents and File

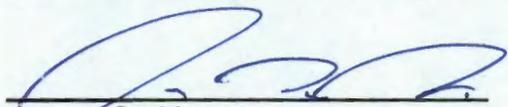
The Complaint and related evidentiary documents are on file and may be inspected or copied at the San Diego Water Board office at 2375 Northside Drive, Suite 100, San Diego, CA 92108. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the San Diego Water Board Chair. Many of these documents are also posted on-line at www.waterboards.ca.gov/sandiego. Although the web page is updated regularly, to ensure access to the latest information, you may contact Catherine Hagan, Senior Staff Counsel.

Questions

Questions concerning this proceeding may be addressed to Catherine Hagan, Senior Staff Counsel.

IMPORTANT DEADLINES

- November 21, 2013 Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends proposed Hearing Procedure to Discharger and Advisory Team, and publishes Public Notice
- December 2, 2013 Objections due on proposed Hearing Procedure.
- December 11, 2013 Deadline for submission of request for designated party status.
- December 13, 2013 Advisory Team issues Hearing Procedure.
- December 23, 2013 Deadline for opposition to request for designated party status.
- December 23, 2013 Dischargers' deadline for waiving right to hearing.
- December 31, 2013 Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above.
- December 31, 2013 Advisory Team issues decision on requests for designated party status, if any.
- January 13, 2014 Remaining Designated Parties' Deadline for submission of all information required under "Evidence and Policy Statements," above.
- January 15, 2014 Interested Parties' deadline for submission of non-evidentiary policy statements.
- January 22, 2014 All Designated Parties' deadline for submission of rebuttal evidence (if any) and evidentiary objections.
- January 23, 2014 All Designated Parties' deadline for submission of request for pre-hearing conference.
- February 12, 2014 Hearing


James Smith
Assistant Executive Officer

21 Nov 2013
DATE

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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

I am duly authorized to represent USS Cal Builders, Inc. (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R9-2013-0152 (hereinafter the "Complaint"). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

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

- a. I hereby waive any right the Discharger may have to a hearing before the San Diego Water Board.
- b. I certify that the Discharger will remit payment for the joint and several portion of the administrative civil liability imposed in the amount of **two hundred twenty one thousand four hundred forty one dollars (\$221,441)** by check that references "ACL Complaint No. R9-2013-0152" made payable to the "State Water Resources Control Board". Payment must be received by the San Diego Water Board by **January 11, 2013** or this matter will be placed on the San Diego Water Board's agenda for a hearing as initially proposed in the Complaint.
- c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period. Should the San Diego Water Board receive significant new information or comments from any source (excluding the San Diego Water Board's Prosecution Team) during this comment period, the San Diego Water Board's Assistant Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I understand that this proposed settlement is subject to approval by the Executive Officer of the San Diego Water Board, and that the San Diego Water Board may consider this proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.
- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.
- e. I understand that both USS Cal Builders, Inc. and the City of Encinitas must waive their right to a hearing before the San Diego Water Board or this waiver will become void and a hearing will be scheduled. The Regional Board does not make any determination regarding appropriate contribution rights, either in settlement discussions or at hearing.

(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.) I hereby waive any right the Discharger may have to a hearing before the San Diego Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the San Diego Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the San Diego Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the San Diego Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.) I hereby waive any right the Discharger may have to a hearing before the San Diego Water Board within 90 days after service of the complaint. By checking this box, the Discharger requests that the San Diego Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the San Diego Water Board to approve the extension.

(Print Name and Title)

(Signature)

(Date)

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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

I am duly authorized to represent the City of Encinitas. (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R9-2013-0152 (hereinafter the "Complaint"). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

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

- a. I hereby waive any right the Discharger may have to a hearing before the San Diego Water Board.
- b. I certify that the Discharger will remit payment for the joint and several portion of the administrative civil liability imposed in the amount of **four hundred thirty thousand eight hundred fifty one (\$430,851)** by check that references "ACL Complaint No. R9-2013-0152" made payable to the "State Water Resources Control Board". Payment must be received by the San Diego Water Board by **January 11, 2013** or this matter will be placed on the San Diego Water Board's agenda for a hearing as initially proposed in the Complaint.
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- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.
- e. I understand that both the City of Encinitas and USS Cal Builders, Inc. must waive their right to a hearing before the San Diego Water Board or this waiver will become void and a hearing will be scheduled. The Regional Board does not make any determination regarding appropriate contribution rights, either in settlement discussions or at hearing.

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(Print Name and Title)

(Signature)

(Date)