

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

**(PROPOSED) ORDER NO. R9-2023-XXXX
ASSESSING ADMINISTRATIVE CIVIL LIABILITY
AGAINST QUALITY INVESTORS 1 2016 LLC &
DAVID G. EPSTEIN**

**In the Matter of
Quality Investors 1 2016 LLC & David G. Epstein
Vista Pacific Construction Project
San Diego County**

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board or Board), having held a public hearing on September 13, 2023, to hear evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R9-2023-0013, and having considered and deliberated on the evidence received during the public hearing and in the record, and having considered all comments received, orders Quality Investors 1 2016 LLC and David G. Epstein (together, Dischargers) to pay administrative civil liability in the amount of \$411,475 and finds as follows:

BACKGROUND

1. The Vista Pacific construction site (Site) is a 3.5-acre residential housing project located approximately 400 feet northeast of the Rancho Del Oro Drive and Vista Way intersection in Oceanside, California. The Site is a Risk Level 2 site and is located on a previously undeveloped, steep hillside, which had a natural creek bisect the property before construction began. The Site receives run-on directly from the existing Buena Hills development and City of Oceanside's (City's) municipal separate storm sewer system (MS4) located immediately east of the Site. Runoff from the Site enters the City of Oceanside's MS4 via inlets on Rancho Del Oro Drive and Vista Way and discharges directly to Buena Vista Creek and subsequently Buena Vista Lagoon, a sensitive waterbody with important ecological functions. Buena Vista Creek and Buena Vista Lagoon are waters of the United States (U.S.).
2. The Site property owner is Quality Investors 1 2016 LLC, which is managed by David G. Epstein. David G. Epstein, the Legally Responsible Person, enrolled the Site in State Water Board Order No. 2009-0009-DWQ, NPDES No. CAS000002 (as amended), *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction and Land Disturbance Activities* (Construction General Permit)¹ on March 23, 2018. The Site

¹ A copy of the Construction General Permit is available at:
https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_2009_0009_complete.pdf

was assigned Waste Discharge Identification No. 9 37C382834. The Dischargers are responsible for compliance with the Construction General Permit.

3. As manager of Quality Investors 1 2016 LLC, David G. Epstein is liable for violations of the Construction General Permit based on the responsible corporate officer doctrine. That doctrine holds that a corporate officer may be liable for the violations of the corporation if the following three conditions exist: (1) the individual must be in a position of responsibility which allows the person of responsibility to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.²
4. David G. Epstein was in a position of responsibility that allowed him to influence corporate policies and activities. David G. Epstein is the manager of Quality Investors 1 2016 LLC, the owner of the Site, and serves as the Legally Responsible Person under the Construction General Permit. David G. Epstein had the ability to hire, and did hire, entities and/or individuals tasked with storm water management and compliance with Construction General Permit requirements. There was a nexus between David G. Epstein's position and the violations in question such that he could have influenced the corporate actions which constituted the violations. David G. Epstein had the ability to control activities at the Site and did, in fact, exercise control and oversight of storm water compliance activities. Specifically, David G. Epstein hired environmental and stormwater professionals to develop and implement a Stormwater Pollution Prevention Plan (SWPPP) and comply with a Clean Water Act Section 401 Water Quality Certification. David G. Epstein served as the contact person for San Diego Water Board staff and communicated with staff on several occasions via phone and email regarding violations of the Construction General Permit and how to correct the violations. David G. Epstein also served as the contact person for the City when the City identified several violations of City ordinances related to stormwater management. In his role as manager of Quality Investors 1 2016 LLC, David G. Epstein had the responsibility to ensure that the work conducted at the Site adhered to applicable laws, including the Construction General Permit. David G. Epstein's actions or inactions facilitated the violations. David G. Epstein could have directed the environmental and stormwater professionals he hired to timely implement best management practices (BMPs) to control run-on discharged onto the Site and to ensure compliance with the General Construction Permit, but he failed to do so. Accordingly, David G. Epstein is liable for the violations alleged herein.

² People v. Roscoe (2008) 169 Cal.App.4th 829, 839; U.S. v. Iverson (9th Cir. 1998) 162 F.3d 1015, 1024 [applying doctrine to federal Clean Water Act]; see In re. Original Sixteen to One Mine, Inc. State Water Board Order No. WQO 2003-0006, pp. 6-7; In re: Mr. Kelly Engineer/All Star Gas, State Water Board Order No. WQO 2002-0001, p. 5

5. According to the Stormwater Multiple Application and Report Tracking System (SMARTS) database, construction began at the Site on April 13, 2020, and is scheduled to be completed by September 30, 2024.
6. The Site is in the Carlsbad Watershed Management Area, Buena Vista Creek hydrologic subarea (904.21) approximately 0.3 miles upstream of Buena Vista Creek, which drains to Buena Vista Lagoon less than 2 miles away. As designated in the Water Quality Control Plan for the San Diego Basin (Basin Plan), Buena Vista Creek supports many beneficial uses, namely agricultural supply (AGR), industrial service supply (IND), rare, threatened, or endangered species habitat (RARE), water contact (REC-1) and non-contact recreation (REC-2), warm freshwater habitat (WARM) and wildlife habitat (WILD). Buena Vista Lagoon supports many beneficial uses, namely biological habitat of special significance (BIOL), estuarine habitat (EST), marine habitat (MAR), rare, threatened, or endangered species habitat (RARE), water contact (REC-1) and non-contact recreation (REC-2), warm freshwater habitat (WARM) and wildlife habitat (WILD). Because the Site's receiving waters support multiple ecologically important beneficial uses, and in accordance with San Diego Water Board Resolution No. [R9-2017-0030](#),³ the San Diego Water Board has identified Buena Vista Lagoon as a key area and priority for protection within the region.
7. Buena Vista Creek is listed as impaired on the 2020-2022 [California Integrated Report](#) (Clean Water Act Section 303(d) List and 305(b) Report) for benthic community effects, bifenthrin, cyfluthrin, cypermethrin, indicator bacteria, nitrogen, phosphorus, pyrethroids, selenium, total dissolved solids, and toxicity. Buena Vista Lagoon is listed as impaired for indicator bacteria, nutrients, sedimentation/siltation, and toxicity (the original listing status of Buena Vista Lagoon has not changed since 2016).⁴

CHRONOLOGY

8. The Dischargers have a history of non-compliance at the Site with the City's land development ordinances. Between March 10, 2021, and August 13, 2021, the City issued five administrative citations and other enforcement actions to the Dischargers for their repeated failure to implement erosion and sediment control BMPs at the Site, and failure to control run-on from the Buena Hills neighborhood to the east. The construction project at the Site involved installation of a City-approved 30-inch diameter storm drain pipe and necessary infrastructure to collect runoff from Mira Pacific Drive and connect it to the City's MS4 on Rancho Del Oro Drive; this critical storm drain pipe effectively replaced what was once a natural creek. The storm drain pipe was designed to be underground, beneath the construction Site, allowing

³ A copy of Resolution No. R9-2017-0030 is available at:
https://www.waterboards.ca.gov/sandiego/board_decisions/adopted_orders/2017/R9-2017-0030.pdf

⁴ A copy of the 2020-2022 California Integrated Report is available at:
https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2020_2022_integrated_report.html

stormwater runoff from the Buena Hills community to flow beneath the Site without contacting disturbed soil.

9. The Dischargers commenced construction at the Site on April 13, 2020, but failed to install the storm drain infrastructure, or alternative run-on management strategy, ahead of the 2021-2022 rainy season. The volume of runoff from the existing 20-acre Buena Hills neighborhood would have necessitated storm drain installation as the primary and most effective means for run-on and flood management. Even though the Dischargers' site-specific SWPPP included alternative strategies for run-on management, the Dischargers did not implement any of them. Assuming the storm drain and related infrastructure installation started on April 13, 2020, the task could have been completed by July 15, 2020 (93 days). The actual date of storm drain completion was on or about October 10, 2022. The Dischargers were out of compliance with the requirement to manage run-on for at least 817 days, from July 15, 2020, to October 10, 2022. For the purposes of determining a proposed liability, the Prosecution Team has exercised its prosecutorial discretion to allege only 2 days of violation for Violation 1 when the failure to manage run-on caused and/or contributed to substantial unauthorized discharges of sediment-laden stormwater on December 14 and 24, 2021, as discussed below.
10. At some point during the 2021-2022 rainy season, the Dischargers dug a large pit at a depression on the Site to capture run-on from the Buena Hills neighborhood. The dirt pit was not featured in the Dischargers' SWPPP or City-approved erosion control plans. In contrast, the pit was constructed on an impromptu basis in preparation for impending storms but was not engineered to satisfy minimum run-on volumes. The pit was never approved by the City or the Qualified SWPPP Developer (QSD). This is contrary to the SWPPP, which requires explicit approval from the QSD for alternative strategies for run-on management.
11. During intense storms in December 2021, two major unauthorized discharge events occurred at the Site. During storm events on at least December 14, 2021, and December 24, 2021, run-on from the Buena Hills neighborhood filled and overtopped the approximately 12,000 cubic foot (89,766 gallon) dirt pit. The overflowing pit resulted in approximately 425,670 gallons of sediment-laden stormwater discharging into the City's MS4 and caused flooding on public streets. The December 14, 2021 discharge was so large that the City deployed emergency traffic control measures at the flooded intersection of Rancho Del Oro Drive and Vista Way to ensure public safety.
12. Following the December 2021 storm events, the Dischargers used one or more pumps to dewater the pit, with no BMPs such as filtration, and discharged sediment-laden stormwater into the City's MS4, with average turbidity values in excess of the Technology-Based Numeric Action Levels (NALs) established in the Construction General Permit on at least two days (December 28 and 30, 2021). NALs are designed to prompt a discharger to make corrective actions at a construction site to minimize the discharge of pollutants and to protect beneficial uses and receiving waters from the adverse effects of construction-related stormwater discharges. As described in the Construction General Permit, for Risk Level 2 dischargers, the NAL

for turbidity is 250 Nephelometric Turbidity Units (NTU). On December 28, 2021, and December 30, 2021, the Qualified SWPPP Practitioner (QSP) recorded average values of 348, 292, and 426 NTU during three sampling events. Even though the NALs were exceeded, the Dischargers failed to implement corrective actions or even evaluate the effectiveness of their onsite measures. The pumping and discharge of sediment-laden stormwater in excess of the turbidity NAL constituted unauthorized discharges of sediment-laden stormwater into the City's MS4 and subsequently, Buena Vista Creek.

13. On January 5, 2022, the San Diego Water Board issued Notice of Violation No. R9-2022-0017 to the Dischargers for failure to prohibit unauthorized discharges of stormwater, failure to implement effective erosion control BMPs to reduce pollutants in stormwater discharges to the Best Available Technology Economically Achievable (BAT)/Best Conventional Pollutant Control Technology (BCT) standard, and failure to control run-on to reduce pollutants in stormwater discharges to the BAT/BCT.
14. On January 16, 2022, David G. Epstein submitted photos of corrective actions in response to the Notice of Violation but failed to demonstrate compliance with the Construction General Permit requirement to manage run-on.
15. On May 23, 2022, the San Diego Water Board issued Administrative Civil Liability Settlement Offer No. R9-2022-0065 (Settlement Offer) to David G. Epstein, which provided the Dischargers with an opportunity to resolve alleged violations through the payment of \$66,479 in administrative civil liability (Settlement Amount). The Settlement Amount was based on the minimum liability allowed (economic benefit plus ten percent) under the State Water Resources Control Board's 2017 Water Quality Enforcement Policy ([Enforcement Policy](#)).⁵ The Settlement Offer alleged days of violation only and did not include a liability based on the volume of unauthorized sediment-laden stormwater discharged from the Site. The Settlement Offer notified the Dischargers that if the Settlement Offer was rejected, the Prosecution Team reserved the right to seek a higher liability amount through issuance of an Administrative Civil Liability Complaint. If issued, the Administrative Civil Liability Complaint could include staff costs and penalties for additional violations and/or days of violation or assess liability on a per-gallon basis (in addition to a per-day basis) as allowed by statute. On June 21, 2022, David G. Epstein rejected the Settlement Offer and provided neither more information for consideration nor a counteroffer.
16. The Prosecution Team provided the Dischargers with additional opportunities to reconsider and accept the Settlement Offer. On July 5, 2022, the Prosecution Team contacted David G. Epstein to provide one last opportunity to accept the Settlement Offer by July 12, 2022. On July 12, 2022, David G. Epstein requested an extension of no less than 10 days. The Prosecution Team extended the deadline until July 25, 2022, and again extended it to August 1, 2022, at David G. Epstein's request. On

⁵ A copy of the Enforcement Policy is available at:
https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

August 1, 2022, David G. Epstein requested another extension to prepare a response. By letter dated August 3, 2022, the Prosecution Team revoked Settlement Offer No. R9-2022-0065 and notified the Dischargers that an Administrative Civil Liability Complaint would be prepared and issued.

REGULATORY REQUIREMENTS

17. Provision III.A of the Construction General Permit prohibits violation of any discharge prohibition contained in the Basin Plan or statewide water quality control plans.
18. Provision III.B of the Construction General Permit prohibits all discharges except for stormwater and non-stormwater discharges specifically authorized by the Construction General Permit or another NPDES permit.
19. Basin Plan Prohibition 1 prohibits “the discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in Water Code section 13050.”
20. Water Code section 13050(*l*)(1) defines “pollution” as “an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects” either the waters for beneficial uses or the facilities which serve these beneficial uses.
21. Basin Plan 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.
22. Provision X of the Construction General Permit states that all Risk Level 2 dischargers must comply with the requirements included in Attachment D of the Construction General Permit.
23. Construction General Permit Attachment D, Provision F states that all Risk Level 2 dischargers must effectively manage all run-on, all runoff within the site, and all runoff that discharges off the site. Run-on from offsite must be directed away from all disturbed areas or must collectively be in compliance with the Construction General Permit’s effluent limitations.
24. Provision V.A.2 of the Construction General Permit establishes a narrative effluent limitation that requires dischargers to minimize or prevent pollutants in stormwater discharges through the implementation of BMPs that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.
25. Provision V.B.2 of the Construction General Permit states that the NAL for turbidity is 250 NTU.

PROCEDURAL AND EVIDENTIARY ISSUES

26. Administrative Civil Liability Complaint No. R9-2023-0013 was issued on November 10, 2022. The Evidentiary Hearing was conducted on September 13, 2023. In preparation for the hearing, Parties exchanged evidence, submitted legal argument, rebuttal evidence and argument, procedural and evidentiary objections and responses. The evidence submitted by the Prosecution Team to support the alleged violations consists largely of City inspection records, City enforcement actions, San Diego Water Board staff inspection records and notice of violation, and corresponding photographs and videos. The San Diego Water Board staff serving as Prosecution Team also testified at the hearing.
27. The Dischargers' evidence consisted mainly of photographs and witness testimony at the hearing.
28. The Dischargers did not object to evidence submitted by the Prosecution Team.

PERMIT VIOLATIONS

29. **Violation 1:** The Dischargers violated Attachment D, Provision F of the Construction General Permit on at least two days. On December 14 and 24, 2021, the Dischargers failed to control run-on to minimize or prevent pollutants in stormwater discharges through the implementation of BMPs that achieve BCT for conventional pollutants.
30. **Violation 2:** The Dischargers violated Provisions III.B and V.A.2 of the Construction General Permit on at least two days. During storm events on December 14 and 24, 2021, the Dischargers failed to comply with the Construction General Permit's narrative effluent limitation by failing to prohibit the discharge of approximately 425,670 gallons of sediment-laden stormwater to waters of the U.S.
31. **Violation 3:** The Dischargers violated Provision III.A of the Construction General Permit on at least two days. On December 28 and 30, 2021, the Dischargers pumped sediment-laden stormwater with turbidity levels in excess of 250 NTU from the dirt pit at the Site and into the City's MS4 and waters of the U.S. in violation of Basin Plan Prohibitions 1 and 14.

ADMINISTRATIVE CIVIL LIABILITY

32. Water Code section 13385, subdivision (a) states, in relevant part:
- (a) A person who violates any of the following shall be liable civilly in accordance with this section:
- (1) Section 13375 or 13376,
- (2) A waste discharge requirement . . . issued pursuant to [Chapter 5.5] ...
- (5) a requirement of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the federal Clean Water Act ... as amended.

33. Water Code section 13385, subdivision (c) states, in relevant part:

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

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

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

34. The Dischargers violated provisions of law for which the San Diego Water Board may impose civil liability pursuant to Water Code section 13385.

35. Pursuant to Water Code section 13385(c), the maximum liability that the San Diego Water Board may impose pursuant to Water Code section 13385 is \$10,886,700 for all violations.

36. Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t 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 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, such that liabilities are not construed as the cost of doing business and provide a meaningful deterrent to future violators.

37. As detailed in the attached Liability Methodology (Attachment A), and based on a calculated economic benefit of \$47,236, the minimum liability amount that the San Diego Water Board may assess for the alleged violations is \$51,960.

38. Pursuant to Water Code section 13385(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 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 the violator's 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.

39. The Enforcement Policy establishes a penalty calculation methodology for assessing administrative civil liability. Use of the methodology addresses the factors required by Water Code section 13385(e). The required factors have been considered for the violations alleged herein using the penalty calculation methodology in the Enforcement Policy, as explained in detail in Attachment A.

40. The penalty calculation methodology analysis described in Attachment 1 and incorporated in full in this Order is consistent with the evidence received and the circumstances of this case, as independently evaluated by the San Diego Water Board, and supports the administrative civil liability in the amount of \$411,475 imposed against Dischargers.

REGULATORY CONSIDERATIONS

41. Notwithstanding issuance of this Order, the San Diego Water Board retains the authority to assess additional penalties for violations of the requirements of the Permit for which penalties have not yet been assessed or for violations that may subsequently occur.
42. This is an action to enforce the laws and regulations administered by the San Diego Water Board. The method of compliance with this enforcement action consists entirely of payment of an administrative liability. The San Diego Water Board finds that issuance of this Order is not subject to the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.) as it will not result in a direct or reasonably foreseeable indirect physical change in the environment, and it is not considered a "project" (Public Resources Code 21065, 21080(a); 15060(c)(2),(3); 15378(a), Title 14, of the California Code of Regulations). The San Diego Water Board finds that issuance of this Order is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) because it can be seen with certainty that the project will not have a significant effect on the environment and in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations as an enforcement action by a regulatory agency and there are no exceptions that would preclude the use of this exemption.
43. Any person aggrieved by this action may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.
44. Fulfillment of Dischargers' obligations under this Order constitutes full and final satisfaction of Administrative Civil Liability Complaint No. R9-2023-0013.
45. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for collection or other enforcement if Dischargers fail to comply with payment of the administrative civil liability.

IT IS HEREBY ORDERED, pursuant to Water Code section 13385, that administrative civil liability be imposed upon the Dischargers in the amount of \$411,475 for the above

violations of the Construction General Permit. The Dischargers shall pay the total administrative civil liability amount within thirty (30) days of adoption of this Order executed by the San Diego Water Board. Payment shall be made by check to the "State Water Board Cleanup and Abatement Account" and a copy e-mailed to San Diego Water Board contact Christina Arias at christina.arias@waterboards.ca.gov. The Dischargers shall include the number of this Order (R9-2023-XXXX) on the check and send it to:

State Water Resources Control Board
Accounting Office
Attn: ACL Payment
P.O. Box 1888
Sacramento, California 95812-1888

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region on September 13, 2023.

DAVID W. GIBSON
Executive Officer

Attachment

A: Liability Methodology for Order No. R9-2023-XXXX