

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

In the matter of:

**San Diego Association of Governments
Rail Projects Within the LOSSAN and Mid
Coast Corridor**

PIN: SM-456294

**COMPLAINT NO. R9-2015-0166
FOR
ADMINISTRATIVE CIVIL LIABILITY**

**Noncompliance with
Order No. 2009-0009-DWQ, as
amended,**

California Water Code § 13376,

**Water Quality Control Plan for the
San Diego Basin, and**

Clean Water Act § 301

November 19, 2015

SAN DIEGO ASSOCIATION OF GOVERNMENTS IS HEREBY GIVEN NOTICE THAT:

1. San Diego Association of Governments (Discharger) has 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 California Water Code (Water Code) section 13385.
2. This Administrative Civil Liability Complaint is issued under authority of Water Code section 13323.
3. Discharger is constructing a railroad double track and utility relocation project along the LOSSAN and Mid Coast rail corridor (Project). The Project is located between Elvira Street and Morena Boulevard within the Rose Canyon Open Space Park in the City of San Diego, County of San Diego, California.
4. Jim Linthicum is the "Legally Responsible Person" (LRP) for Discharger.
5. On June 16, 2015, Jim Linthicum, on behalf of Discharger filed a Notice of Intent (NOI) to comply with State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* (Construction Storm Water Permit).

6. Discharger stated in the NOI that construction activities would begin at the Project on July 15, 2015 and end by June 1, 2016. Additionally, Discharger stated in the NOI that the Site is a Risk Level 2 construction site; thus acknowledging that Discharger must implement the requirements in Attachment D to the Construction Storm Water Permit to achieve Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT). On June 24, 2015 the State Water Board processed the NOI and assigned Waste Discharge Identification (WDID) No. 9 37C373277 to the Project.
7. Construction Storm Water Permit section V.A.2. requires the implementation of best management practices (BMPs), using BAT and BCT to reduce pollution from storm water runoff from construction sites.
8. On September 15, 2015, the San Diego Water Board received a citizen complaint that the Project was discharging sediment to Rose Creek within the Rose Canyon Open Space Park. The Complainant provided video and photographic evidence of active discharges to the San Diego Water Board.
9. San Diego Water Board inspectors arrived at the Project at approximately 2:00 p.m. on September 15, 2015. By that time, it was not raining and the bulk of the storm had passed. San Diego Water Board inspectors observed evidence of sediment discharges to Rose Creek that resulted from the lack of erosion control BMPs, ineffective sediment control BMPs, and no run-on or runoff protection.
10. The San Diego Water Board issued Notice of Violation No. R9-2015-0154 to Discharger on October 16, 2015 for violations of the Construction Storm Water Permit observed on September 15, 2015.
11. The Project is located within the Miramar Hydrologic Area of the Peñasquitos Hydrologic Unit. Storm water discharges from the Project flow directly into Rose Creek approximately four miles upstream of Mission Bay.
12. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for surface waters Rose Canyon:
 - Industrial Service Supply (IND)
 - Contact Water Recreation (REC-1)
 - Non-contact Water Recreation (REC-2)
 - Warm Freshwater Habitat (WARM)
 - Cold Freshwater Habitat (COLD)
 - Wildlife Habitat (WILD)

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ALLEGED VIOLATIONS

13. **Violation No. 1:** Discharger violated Water Code section 13376; Construction Storm Water Permit Discharge Prohibitions III.A. and III.B, section V.A.2 and Attachment D section A.1.b; Basin Plan Waste Discharge Prohibition No. 8; and the Federal Water Pollution Control Act (Clean Water Act) (22 U.S.C. § 1251 et seq.) section 301 (33 U.S.C. § 1311) by discharging sediment laden storm water from the Project into Rose Creek and thence Mission Bay on September 15, 2015.
14. **Violation No. 2:** Discharger violated Construction Storm Water Permit Attachment D, section D.2 by failing to implement erosion control BMPs in inactive areas on September 15, 2015.
15. **Violation No. 3:** Discharger violated Construction Storm Water Permit Attachment D, sections E.1 and E.3 by failing to implement effective perimeter controls and effective erosion control BMPs in areas under active construction on September 15, 2015.
16. **Violation No. 4:** Discharger violated Construction Storm Water Permit Attachment D, section F by failing to implement effective run-on and runoff BMPs at the Project on September 15, 2015.
17. **Violation No. 5:** Discharger violated Construction Storm Water Permit Attachment D, section B.3.b by failing to implement good housekeeping for vehicles stored at the Project on September 15, 2015.
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 Water Code section 13385, subdivision (a), a person who violates either Water Code section 13376, a waste discharge requirement, a basin plan prohibition, or a requirement of section 301 of the federal Clean Water Act 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.*

(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. Due to the difficulty in accurately determining the volume of sediment laden storm water discharged during the discharges on September 15, 2015, civil liability was only calculated on a per day basis for that violation. Therefore, the maximum liability the San Diego Water Board may assess for the alleged violations listed above is \$50,000 pursuant to Water Code section 13385, subdivision (c).

MINIMUM LIABILITY

21. Water Code section 13385, subdivision (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 State Water Board 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, such that liabilities are not construed as the cost of doing business and provide a meaningful deterrent to future violators.
22. As detailed in the attached Technical Analysis, and based on a calculated economic benefit of \$565, the minimum liability amount the San Diego Water Board may assess Discharger is \$622.

LIABILITY ASSESSMENT

23. Pursuant to Water Code 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 discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge; and with respect to the Discharger, the ability to pay, the effect on the Discharger'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.
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 Technical Analysis Attachment No.1, Penalty Methodology Summary.

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25. The Prosecution Team finds that it is appropriate to increase the Total Base Liability amount in consideration of investigation and enforcement costs incurred in prosecuting this matter. Increasing the Total Base Liability amount in this manner serves to create a more appropriate deterrent against future violations.
26. Based on consideration of the above facts, the applicable law, and after applying the penalty calculation methodology in section VI of the Enforcement Policy, the Prosecution Team recommends that the San Diego Water Board impose civil liability against the Discharger in the statutory maximum amount of **\$50,000** for the violations alleged herein and set forth in full in the accompanying Technical Analysis.



JAMES G. SMITH
Assistant Executive Officer

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

Attachment: Technical Analysis

SMARTS:
PIN: SM-456294
Violation ID: 857987; 857986
WDID No. 9 37C373277
Enforcement ID: 420710