

EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

San Diego Regional Water Quality Control Board

July 18, 2016

Certified Mail – Return Receipt Requested

Article Number: 7011 0470 0002 8952 8172

The Honorable Kevin Faulconer
City of San Diego
202 C Street
San Diego, CA 92101
kevinfaulconer@sandiego.gov

In reply refer to / attn: CW-255222:rstewart

Notice of Hearing and Issuance of Complaint No. R9-2016-0155 for Administrative Civil Liability against the City of San Diego for Violations of Order No. R9-2007-0001

Mayor Faulconer:

Enclosed find Complaint No. R9-2016-0155 (Complaint) for Administrative Civil Liability against the City of San Diego (Discharger) for **\$4,614,868** for violations of *Order No. R9-2007-0001, NPDES No. CAS0108758, Waste Discharge Requirements for Discharges of 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*. The alleged violations are described in the Complaint and the attached Technical Analysis to the Complaint. Pursuant to California Water Code section 13323, the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) shall hold a hearing on the Complaint no later than ninety (90) days after it is issued.

The City and the San Diego Water Board share common interests in protecting and restoring our environmental resources. Our collective efforts to revise water quality objectives for metals and for contact recreation exemplify the positive aspects of our collaboration. The joint development of the sediment TMDL for Los Peñasquitos Lagoon is a prime example of the City Storm Water Department's commitment to water quality protection. Moving forward, I hope we can build on these relationships such that all City departments enjoy positive and cooperative interactions with the San Diego Water Board to achieve our common goals.

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 the acceptance of the assessment of civil liability 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 sign, as the Legally Responsible Person for the City of San Diego, the enclosed waiver form with Option 1 selected, and submit it to the San Diego Water Board by 5:00 p.m. on **August 17, 2016**.

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 sign the enclosed waiver form with Option 2 selected, and submit it to the San Diego Water Board no later than 5 p.m. on **August 17, 2016**.

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 **October 12, 2016**. 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 is the recommended hearing procedure for the San Diego Water Board to follow in conducting the hearing. Please note that comments on the proposed procedure are due by **July 28, 2016**, to the San Diego Water Board's advisory attorney, Catherine Hagan, at the address indicated in the hearing procedure.

Please submit all documents as Portable Document Format (PDF) files to sandiego@waterboards.ca.gov. In the subject line of any response, please include the reference number **CW-255222:rstewart**. For questions or comments please contact myself at (619) 521-3006, or Rebecca Stewart by telephone at (619) 516-1977, or by email at Rebecca.Stewart@waterboards.ca.gov.

Respectfully,



JAMES G. SMITH
Assistant Executive Officer

JGS:jh:cmc:rls

Enclosures:

1. ACL Complaint No. R9-2016-0155 with attached Technical Analysis
2. ACL Complaint Fact Sheet
3. Proposed Hearing Procedure
4. Waiver of Public Hearing Form

cc: sent via email:

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For internal use only	
PIN Number	CW-255222
WDID	9 000000510
Regulatory Measure ID	406987
Violation IDs	889367
	964457
	985712

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

In the matter of:
City of San Diego

**COMPLAINT NO. R9-2016-0155
FOR
ADMINISTRATIVE CIVIL LIABILITY**

**Violations of Order No.
R9-2007-0001**

Place ID: CW-225222

July 18, 2016

THE CITY OF SAN DIEGO IS HEREBY GIVEN NOTICE THAT:

1. The City of San Diego (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 section 13385 of the California Water Code (CWC).
2. This Administrative Civil Liability Complaint is issued under authority of CWC section 13323.
3. Discharger owns and operates a municipal separate storm sewer system (MS4) in San Diego County, California. Discharger is required to prohibit discharges from its MS4 that contain pollutants which have not been reduced to the maximum extent practicable (MEP) 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.*
4. The primary storm water pollutant at construction sites is excess sediment. Excess sediment can cloud the water, which reduces the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation in waterways. Sediment also transports other pollutants such as nutrients, bacteria, metals, organic contaminants (i.e., pesticides and PCBs) and oils and greases.
5. Provision D.2. of San Diego Water Board Order No. R9-2007-0001 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."

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City of San Diego
Violation of Order No.R9-2007-0001

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6. Provision D.2.c.(3) of San Diego Water Board Order No. R9-2007-0001 states, "Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round."
7. Provision D.2.d.(6)(b) of San Diego Water Board Order No. R9-2007-0001 states, "Inspections conducted by each Copermittee shall include assessment of compliance with Permittee ordinances and permits related to urban runoff, including the implementation and maintenance of designated minimum BMPs."
8. Provision D.2.d.(6)(c) of San Diego Water Board Order No. R9-2007-0001 states, "Inspections conducted by each Copermittee shall include assessment of BMP effectiveness."
9. Provision A.2 of San Diego Water Board 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. Provision D.2.d.(5) of San Diego Water Board Order No. R9-2007-0001 states, "Based upon inspection findings, each Copermittee shall implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with the Order."
11. Provision D.2.e of San Diego Water Board Order No. R9-2007-0001 states, "Each Copermittee shall develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permit requirements and ordinances. This enforcement process shall include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process shall include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements and/or permit denials for non-compliance."

ALLEGED VIOLATIONS

12. Discharger violated Provision D.2. of San Diego Water Board Order No. R9-2007-0001 by failing to implement a construction program that reduces construction site discharges of pollutants from the MS4 to the MEP.
13. Discharger violated section D.2.c.(3) of San Diego Water Board Order No. R9-2007-0001 by failing to require BMP implementation during the dry season that addresses rain events that may occur during the dry season.

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City of San Diego
Violation of Order No. R9-2007-0001

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14. Discharger violated section D.2.d.(6)(b) of San Diego Water Board Order No. R9-2007-0001 by failing to conduct inspections that assess compliance with ordinances and permits related to urban runoff, including the implementation and maintenance of designated BMPs at construction sites.
15. Discharger violated section D.2.d.(6)(c) of San Diego Water Board Order No. R9-2007-0001 by failing to conduct inspections that assess BMP effectiveness at construction sites.
16. Discharger violated section A.2 of San Diego Water Board Order No. R9-2007-0001 by failing to ensure that discharges from construction sites have been reduced to the MEP prior to discharging into the MS4.
17. Discharger violated section D.2.d.(5) of San Diego Water Board Order No. R9-2007-0001 by failing to implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with San Diego Water Board Order No. R9-2007-0001.
18. Discharger violated section D.2.e of San Diego Water Board Order No. R9-2007-0001 by failing to escalate enforcement to achieve prompt corrective actions at construction sites for violations of local and State ordinances.
19. 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

20. 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.
21. 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 **\$22,680,000**.

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City of San Diego
Violation of Order No. R9-2007-0001

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MINIMUM LIABILITY

22. 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.
23. As detailed in the incorporated Technical Analysis, and based on a calculated economic benefit amount of **\$4,195,335**, the minimum liability the San Diego Water Board should assess the Discharger is **\$4,614,868** (calculated economic benefit \$4,195,335 x 1.1).

PROPOSED LIABILITY

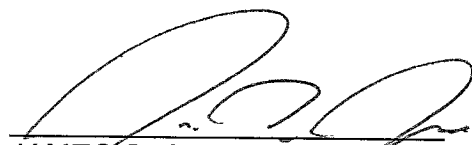
24. Pursuant to CWC section 13385, subdivision (e), in determining the amount of any civil liability, the San Diego Water Board shall consider the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges; and with respect to the Discharger, 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.
25. 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.
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 San Diego Water Board Prosecution Team recommends that the San Diego Water Board impose the minimum civil liability against the Discharger in the amount of **\$4,614,868** for the violations alleged herein and set forth in full in the accompanying Technical Analysis.

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City of San Diego
Violation of Order No.R9-2007-0001

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July 18, 2016

Dated this 18th day of July, 2016.



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

For internal use only	
PIN Number	CW-255222
WDID	9 000000510
Regulatory Measure ID	406987
Violation IDs	889367 964457 985712

Attachment 1
Discharger: City of San Diego

Penalty Methodology Decisions
ACL Complaint No. R9-2016-0155

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 2 (Discharges)	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 Discharge	Total Per Gallon Factor	
No Per Gallon Discharge Violations						

Violations	Per Day Factor				Statutory Max per Day [section 13385]
	Potential for Harm [0 - 10]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 2 (Discharges)	7	Moderate	0.2	19	\$10,000

Violations	Per Day Factor				Statutory/ Adjusted Max [section 13385]
	Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 1 (BMPs)	Major	Major	0.85	1663	\$10,000
Violation 3 (Enforcement)	Moderate	Major	0.55	586	\$10,000

Initial Liability From Steps 1 - 3	
Violation 1: $(.85) \times (1) \times (10,000) =$	\$8,500
Violation 2: $(0.2) \times (1) \times (\$10,000) =$	\$2,000
Violation 3: $(0.55) \times (1) \times (\$10,000) =$	\$5,500

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	1.5	1.2	1.2	n/a	170
Violation 2	1.5	1.2	1.2	n/a	n/a
Violation 3	1.5	1.2	1.1	n/a	25

Step 5: Total Base Liability Amount	
(Per day Factor x statutory maximum) x (Step 4 Adjustments)	
Violation 1: $(\$8,500) \times (1.5) \times (1.2) \times (1.2) =$	\$18,360
Violation 2: $(\$2,000) \times (1.5) \times (1.2) \times (1.2) =$	\$4,320
Violation 3: $(\$5,500) \times (1.5) \times (1.2) \times (1.1) =$	\$10,890

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	\$40,011
Penalty Adjustment for Violation 2	\$107,920

Step 8: Economic Benefit
\$4,195,335

Step 9: Maximum and Minimum Liability Amounts		
	Minimum	Maximum
Violation 1	\$4,614,868	\$16,630,000
Violation 2		\$190,000
Violation 3		\$5,860,000

Step 10: Final Liability Amount
(total base liability) + (other factors)
\$4,614,868

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

TECHNICAL ANALYSIS

**Proposed Administrative Civil Liability
Contained in Complaint No. R9-2016-0155**

**Against
The City of San Diego**

Noncompliance with

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

July 18, 2016

**Rebecca Stewart
Sanitary Engineering Associate**

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LIST OF ABBREVIATIONS

ACL – Administrative Civil Liability
Basin Plan – Water Quality Control Plan, San Diego Basin – Region 9
BAT – Best Available Technology Economically Feasible
BMPs – Best Management Practices
Complaint – ACL Complaint No. R9-2016-0155
City – City of San Diego
CGP – Construction General Permit
CIPs – Capital Improvement Projects
CSW – Construction Storm Water
CWA – Clean Water Act
DSD – Development Services Department
Enforcement Policy – Water Quality Enforcement Policy
FED – Field Engineering Division
JURMP – Jurisdictional Urban Runoff Management Plan
MEP – Maximum Extent Practicable
MS4 – Municipal Separate Storm Sewer System
NOAA – National Oceanic and Atmospheric Administration
NOV – Notice of Violation
NPDES – National Pollutant Discharge Elimination System
San Diego Water Board – California Regional Water Quality Control Board, San Diego
Region
SDWB – San Diego Water Board
SEL – Staff Enforcement Letter
SMARTS – Storm Water Multiple Application and Report Tracking System
SOPs – Standard Operating Procedures
State Water Board – State Water Resources Control Board
SWPPP – Storm Water Pollution Prevention Plan
TMDL – Total Maximum Daily Load
USEPA – United States Environmental Protection Agency
WPCP – Water Pollution Control Plan
WTAP – Weather Triggered Action Plan
QSP – Qualified SWPPP Professional

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A. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence that supports the findings in Administrative Civil Liability (ACL) Complaint No. R9-2016-0155 (Complaint) and the recommended assessment of administrative liability in the amount of **\$4,614,868** against the City of San Diego (City) for violations of California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Order No. R9-2007-0001.¹

The Complaint was issued because multiple departments within the City failed to adequately implement the construction component of Order No. R9-2007-0001 for both private construction projects and City capital improvement projects (CIPs). The City's noncompliance with Order No. R9-2007-0001 resulted in multiple discharges of sediment and sediment-laden storm water from the municipal separate storm sewer system (MS4) that were not reduced to the maximum extent practicable (MEP²). The violations alleged in the Complaint indicate a chronic programmatic failure that has resulted in reoccurring violations of established MS4 permit obligations. These violations have resulted in long-term degradation of receiving waters throughout the City and a long term threat to the integrity of the San Diego Water Board's MS4 program.

The key points of this enforcement action are:

- The long standing construction component of the municipal storm water requirements are not particularly challenging.
- Discharges to sediment impaired waters occurred even as the City was cooperating in multiparty efforts to address those impairments in the Los Peñasquitos Lagoon and the Tijuana Estuary.

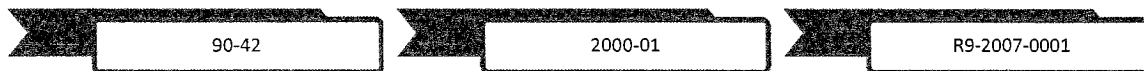
¹ Order No. R9-2007-0001, NPDES No. CAS0108758, *Waste Discharge Requirements for Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority.*

² Maximum Extent Practicable (MEP) – The technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control best management practices (BMPs). MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than the best available technology economically achievable (BAT). A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their urban runoff management programs. Their total collective and individual activities conducted pursuant to the urban runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the Regional Board, the Regional Board defines MEP.

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- The City developed good ordinances and Storm Water Standards but did not put much effort into implementation which suggests an institutional decision to sacrifice BMP oversight in order to expedite land development.
- The economic benefit realized by the City by not implementing its ordinances and Storm Water Standards was so large that it exceeds the substantial liability calculated based on the other factors of the Complaint.

B. MUNICIPAL STORM WATER REGULATIONS



In 1987, Section 402(p) was added to the Clean Water Act (CWA) requiring the United States Environmental Protection Agency (USEPA) to promulgate regulations for storm water discharges associated with MS4s. Because USEPA delegated its National Pollutant Discharge Elimination System Permit (NPDES) authority to the State of California, the San Diego Water Board issued Order No. 90-42 on July 16, 1990 prescribing waste discharge requirements for storm water and urban runoff to twenty Copermittees within San Diego County, including the City.

Order No. 90-42 required Copermittees to develop and implement programs to ensure that entities discharging storm water into the MS4 take steps to prevent, control, and reduce discharges of pollutants to waters of the United States. These programs include the development of BMPs, and require the implementation of the designated BMPs for entities that discharge storm water into the MS4. Order No. 90-42 also required Copermittees to summarize the measures implemented to control pollutants in surface runoff from construction sites and to evaluate their effectiveness. Order No. 90-42 was renewed by Order No. 2001-01 on February 21, 2001.

Order No. 2001-01 expanded on the requirements of Order No. 90-42 by requiring Copermittees to establish the legal authority to control pollutant discharges to and from the MS4 including grading ordinances for construction activities. Order No. 2001-01 also required the implementation of a jurisdictional urban runoff management plan (JURMP³) that contains a construction component to reduce pollutants in runoff from construction sites during all phases of construction. At a minimum, the construction component of the JURMP must address:

- Pollution prevention;
- Grading ordinance update;
- Modification of construction and grading approval process;

³ JURMPs are written descriptions of the specific jurisdictional urban runoff management measures and programs that each Copermittee will implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards.

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- Source identification;
- Threat to water quality prioritization;
- BMP implementation;
- Inspection of construction sites;
- Enforcement at construction sites;
- Reporting of non-compliant sites; and,
- Education focused on construction activities.

Order No. 2001-01 specified that the education requirement of the JURMP's construction component include municipal staff to ensure that its construction, building, and grading review staff and inspectors have an adequate understanding of:

- Federal, state and local water quality laws and regulations applicable to construction and grading activities;
- The connection between construction activities and water quality;
- How erosion can be prevented; and,
- How impacts to receiving waters from construction activities can be minimized.

Order No. 2001-01 was renewed by Order No. R9-2007-0001 on January 24, 2007. Order No. R9-2007-0001 contains the MS4 requirements that were applicable during the period when the violations alleged in Complaint No. R9-2016-0155 occurred and that are discussed in more detail in Section C below.

On May 8, 2013 the San Diego Water Board adopted Order No. R9-2013-0001, the current waste discharge requirements regulating discharges from MS4s in San Diego County. Due to a 24-month program implementation schedule for the 2013 Order, the requirements pertaining to the City's construction management program deficiencies addressed in this Complaint are governed by Order No. R9-2007-0001.

C. SAN DIEGO WATER BOARD ORDER NO. R9-2007-0001

Order No. R9-2007-0001 required Copermittees, including the City, to update their existing JURMPs (**Exhibit 1**). The updated JURMPs were required to include a construction component that would reduce construction site discharges of pollutants from the MS4 to the MEP and prevent construction site discharges from the MS4 from causing or contributing to a violation of water quality standards. Order No. R9-2007-0001 also required Copermittees to:

1. Review and update grading and other construction related ordinances to reduce discharges to the MEP;
2. Designate a minimum set of BMPs and require implementation of the designated minimum BMPs at construction sites;
3. Inspect construction sites for compliance with local ordinances; and,

4. Implement an escalating enforcement process that achieves prompt corrective actions.

With regard to erosion and sediment controls, Order No R9-2007-0001 specified that erosion prevention was to be used as the most important measure for keeping sediment on site during construction, but never as the single method; and sediment controls should be used as a supplement to erosion prevention.⁴ Order No. R9-2007-0001 also specified that slope stabilization must be required on all inactive slopes during the rainy season and during rain events in the dry season and on all active slopes during rain events regardless of the season.

D. STATEWIDE CONSTRUCTION GENERAL PERMIT ORDER NO. 2009-0009-DWQ

On September 2, 2009, the State Water Resources Control Board (State Water Board) issued Order No. 2009-0009-DWQ⁵ (CGP) which prescribed minimum BMPs required at construction sites that would disturb one acre or more during construction activity (**Exhibit 2**). Order No. 2009-0009-DWQ established three levels of risk for construction sites based on sediment and receiving water risks, and required BMP implementation based on the calculated risk level.

- Lower risk sites, Risk Level 1, must implement housekeeping, non-storm water management, erosion control, sediment control, and run-on/runoff control BMPs as well as a plan to inspect, maintain and repair BMPs as needed.
- Moderate risk sites, Risk Level 2, must implement the minimum BMP requirements prescribed for Risk Level 1 sites, in addition to additional sediment control BMPs to protect storm drain inlets, slope stability for areas undergoing active construction, and linear sediment control BMPs along the toe, face, and grade breaks on slopes.
- High risk sites, Risk Level 3, must implement the requirements for Risk Level 1 and 2 sites, in addition to additional sediment controls for construction traffic, access roads, entrances, and exits.

The San Diego Water Board's Order No. R9-2007-0001 required Copermitttees, including the City, to develop and require the implementation of BMPs at construction sites that are similar to the requirements of Order No. 2009-0009-DWQ. The City's Storm Water Standards, as discussed later in this document, established the minimum BMPs for construction sites within its jurisdiction.

⁴ Order No. R9-2007-0001, page 30, section D.2.(b)i.

⁵ Order No. 2009-0009-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities*.

Copermittees, including the City, must conduct inspections at construction sites to ensure compliance with their Storm Water Standards as required by Order No. R9-2007-0001. The San Diego Water Board conducts routine inspections at construction sites to ensure compliance with the CGP. If the San Diego Water Board inspectors find that a construction site is in violation of the CGP, they often evaluate the applicable Copermittee's oversight of that project to determine whether the Copermittee is complying with its MS4 requirements.

E. CITY OF SAN DIEGO JURISDICTIONAL URBAN RUNOFF MANAGEMENT PLAN

The City's 2008 JURMP, written to comply with Order No. R9-2007-0001, specifies that **all** City departments responsible for inspecting construction projects were also responsible for ensuring that adequate storm water BMPs are installed and maintained. (**Exhibit 3**). The Field Engineering Division (FED) in the Engineering and Capital Projects Department issues grading permits and conducts BMP inspections at all private construction sites during grading operations. The FED also conducts BMP inspections at all public CIPs.

Once building permits are issued at private construction sites, the Inspection Services Division in the Development Services Department (DSD) is also responsible for conducting BMP inspections throughout the construction process. If a construction site is both actively grading and has begun construction, both departments conduct BMP inspections at the site.

The Storm Water Pollution Prevention Division in the Transportation and Storm Water Department assists both departments in implementing the storm water requirements contained in Order No. R9-2007-0001. Inactive construction sites that have BMP deficiencies are referred to the Storm Water Pollution Prevention Division for enforcement of deficiencies during rain events and/or when discharges occur. If grading or construction related violations are noted those matters are referred back to either the FED or DSD for resolution.

The City's 2008 JURMP indicates that if existing or potential storm water violations are not resolved through the issuance of storm water notices by FED inspectors, stop work orders are generally issued and all work is halted except those activities necessary to bring the site into BMP compliance. Similarly, DSD inspectors are supposed to be trained to issue re-inspection notices, effectively stopping work on the site until the corrections are made and the site is re-inspected.

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F. CITY OF SAN DIEGO STORM WATER STANDARDS



On March 24, 2008, the City established Storm Water Standards, in compliance with Order No. R9-2007-0001, which contained construction storm water BMP performance standards for construction sites disturbing greater than one acre to be identified in a Storm Water Pollution Prevention Plan (SWPPP), or in a Water Pollution Control Plan (WPCP) for projects disturbing less than one acre (**Exhibit 4**). The Storm Water Standards required BMP installation in accordance with a recommended industry standard or in accordance with the CGP.

The Storm Water Standards contained requirements for the following areas:

- Site management;
- Performance standards;
- Minimum BMPs;
- Rainy season; and,
- Impaired or sensitive water bodies.

The Storm Water Standards' site management requirements required self-inspection of construction sites by a person trained in storm water pollution prevention site management and storm water BMPs, including the installation and maintenance of sediment and erosion controls. The purpose of the self-inspections was to:

- Ensure owners/contractors take responsibility for managing storm water pollution caused by their activities;
- Ensure that BMPs are properly documented, implemented, and are functioning effectively;
- Identify needed BMP maintenance and repair; and
- Ensure that builders implement their storm water management plans.

The Storm Water Standards' site management requirements also required a qualified person trained and competent in the use of BMPs to be on site daily to:

- Ensure that the SWPPP or WPCP, with respect to erosion and sediment control and other waste management regulations, was implemented;
- Monitor the weather and implementation of any emergency plans as needed; and
- Oversee site grading operations and BMP effectiveness.

The Storm Water Standards' performance standards included:

- Pollution prevention measures so that no measurable increase of pollution (including sediment) in runoff occurs from the site;
- No slope erosion;
- Preservation of natural hydraulic features and riparian buffers where possible; and
- Inactive sites must be fully protected from erosion and discharges of sediment at any time of the year.

The Storm Water Standards' minimum BMP requirements at construction sites year round included:

- Perimeter protection;
- Sediment control;
- Sediment tracking control;
- Onsite storage of standby BMPs to prevent erosion and sediment discharges;
- An approved Weather Triggered Action Plan (WTAP) and the ability to deploy standby BMPs within 24 hours of a predicted storm event;
- Physical or vegetation erosion control upon grading completion;
- Slope stabilization during rain events;
- Designated washout, storage, trash management and vehicle and equipment maintenance areas;
- Stockpiled spill control/containment materials; and
- Elimination or control of non-storm water discharges to the MEP.

Additional rainy season BMP requirements included:

- Upgraded erosion, sediment, and perimeter controls;
- Established physical or vegetation erosion controls for all graded areas with continuous maintenance;
- Prompt repair and improvement of failed BMPs;
- A maximum disturbed area limitation of five acres during the rainy season or a WTAP with a BMP Implementation Plan for graded areas larger than five acres;
- Full protection from erosion of disturbed areas that are not completed but not being actively graded.
- Erosion control in all disturbed areas that have been inactive for 7 or more calendar days.

Additional requirements for sites adjacent to impaired or sensitive water bodies included:

- Use of high performance erosion control methods such as bonded fiber matrix or anchored erosion control blankets on all exposed slopes;

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- Ensure a sufficient vegetated buffer between the grading activity and the protected water body;
- At least two lines of defense for sediment control;
- Stockpiles shall be fully protected and located a sufficient distance from the perimeter that is near the sensitive water body;
- A site drainage analysis performed by a qualified person; or
- Advanced treatment, if necessary.

On January 20, 2012, the City updated its Storm Water Standards (**Exhibit 5**). The updated standards include the standards outlined in the 2008 version, with minor revisions including a change in the definition of an inactive site from 7 days with no construction activity to 14 days which is consistent with the 2009 CGP.

G. NOTICE OF VIOLATION R9-2011-0027



On October 25, 2010 and December 22, 2010, the San Diego Water Board conducted routine inspections of construction sites within the City's jurisdiction to verify compliance with the CGP. Due to conditions encountered at the construction sites, the San Diego Water Board also conducted an assessment to determine if the City's construction management program was in compliance with the requirements of Order No. R9-2007-0001. The San Diego Water Board issued Notice of Violation (NOV) R9-2011-0017 to the City following the inspections. Below are the San Diego Water Board inspection findings for the following sites:

Casa Mira View (WDID 9 37C353628)

Casa Mira View is tributary to Los Peñasquitos Lagoon, a CWA section 303(d)-listed impaired water body for sediment impairments. The project involved construction of a 2,200 unit apartment community on roughly 40 acres along Interstate 15 north of Mira Mesa Boulevard. The City's Storm Water Standards required the site to implement its minimum BMP requirements, additional requirements for the rainy season, additional requirements for special situations, and requirements for projects discharging to impaired or sensitive water bodies.

The San Diego Water Board inspected the construction site on October 25, 2010 (**Exhibit 6**). The National Oceanic and Atmospheric Administration (NOAA) rain gauge in Miramar recorded 1.07 inches of rain between October 19, 2010 and October 22, 2010 with an additional 0.16 inches of rain on the day of the inspection.

During the inspection, the San Diego Water Board inspector observed numerous violations of the CGP and the City's Storm Water Standards, including: the absence of adequate erosion control BMPs throughout the entire site including several steep slopes susceptible to erosion; the absence of sediment control BMPs which resulted in the discharge of sediment onto the sidewalk, street and into the MS4; and unprotected stockpiles, disturbed sediment, and chemical dust in close proximity to the sidewalk. The inspector further observed construction personnel actively pumping sediment-laden water from the construction site into an offsite storm drain inlet which discharges to Los Peñasquitos Creek upstream of Los Peñasquitos Lagoon, waters of the United States.

During the inspection the San Diego Water Board inspector learned that the City inspected the site just days before the San Diego Water Board inspection, yet erosion and sediment control BMPs were clearly not adequate to reduce discharges to the MEP and were not in conformance with the City's Storm Water Standards.

The San Diego Water Board issued the developer, Scripps Mesa Developers, LLC, NOV No. R9-2010-0146 on November 3, 2010 (**Exhibit 7**). The City was also provided a copy of the NOV.

Black Mountain Ranch/Del Sur Unit 14 (WDID 9 37C328390)

Black Mountain Ranch/Del Sur Unit 14 was part of a 1,500 acre development project west of Interstate 15 and north of Highway 56. Most of the project had been mass graded and developed at the time of the Water Board inspection. Del Sur Unit 14 was approximately 30 acres of development using fill from Units 13, 14, and 15. The site is located in the San Dieguito watershed, upstream of Lusardi Creek which is tributary to the San Dieguito River and Lagoon.

Grading at Unit 14 began on November 1, 2010. Grading in this section of the development commenced during the rainy season to accommodate nesting season in adjacent habitat. The City's Storm Water Standards required the site to implement its designated minimum BMPs, additional rainy season requirements, additional requirements for special situations, and requirements for projects discharging to impaired or sensitive water bodies.

On December 22, 2010, the San Diego Water Board inspected the Del Sur Unit 14 construction site (**Exhibit 8**). The NOAA rain gauge in Poway recorded 6.37 inches of rain between December 16, 2010 and December 22, 2010. During the inspection, the San Diego Water Board observed numerous violations of the City's Storm Water Standards including no erosion control BMPs and inadequate run-on BMPs that contributed to the failure of a berm at the perimeter of the site that was being used to temporarily detain storm water. A review of the site's SWPPP indicated that the implementation of sediment basins should have been done at the onset of rough grading, and they were not. As a result, sediment laden storm water breached the berm in two places and entered Lusardi Creek, a water of the United States.

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The San Diego Water Board issued NOV No. R9-2011-0025 to the developer, Black Mountain Ranch LLC, on January 25, 2011 (**Exhibit 8**). The City was provided a copy of the NOV.

NOV R9-2011-0027

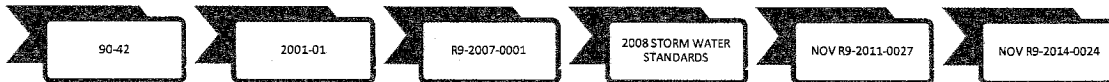
On January 27, 2011, the San Diego Water Board issued the City NOV No. R9-2011-0027 because City inspectors did not identify obvious BMP violations that contributed to discharges of sediment into and from the MS4 that were not reduced to the MEP at both the Black Mountain Ranch/Del Sur Unit 14 and Casa Mira View construction sites, including discharges of sediment tributary to a sediment sensitive water body, Los Peñasquitos Lagoon (**Exhibit 9**). The NOV required the City to provide the San Diego Water Board confirmation that the violations noted by the San Diego Water Board inspector were corrected and to provide information on institutional changes that were made within the City's FED to insure that the violations do not occur again.

On February 28, 2011, in response to the NOV, the City's FED reported that both sites achieved compliance with the City's Storm Water Standards minimum BMP requirements (**Exhibit 10**). The City provided photographs from Casa Mira View dated February 11, 2011 of corrections to the BMP deficiencies noted by the San Diego Water Board inspector and indicated that stockpiles would be protected by February 24, 2011. In addition, the City provided photographs from Black Mountain Ranch/Del Sur Unit 14 of BMP corrections from City inspections that occurred on January 14, 19, and 24, 2011 and February 2 and 22, 2011. The City also reported that it had instructed both developers to continue to install additional BMPs as needed, and warned them that if the sites became non-compliant again Stop Work Orders may be issued. The City further indicated that the Black Mountain Ranch/ Del Sur Unit 14 construction site had been inspected on a regular basis by the FED and that a December 17, 2010 inspection (five days before the San Diego Water Board inspection) indicated the site was in a compliant condition; however, photographs submitted by the City after corrections were made clearly indicate that the site lacked numerous BMPs that the City inspector failed to identify.

The City further reported that it would provide additional training and guidance on the importance of storm water compliance for its FED inspectors and supervisors and that disciplinary action may occur in the future if City staff did not enforce storm water compliance at construction sites.

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H. NOTICE OF VIOLATION R9-2014-0024



In September 2013 and January 2014, the San Diego Water Board again inspected several construction sites within the City's jurisdiction to determine whether the City had made improvements to its construction oversight program to bring it into compliance with Order No. R9-2007-0001. In March 2014, the San Diego Water Board issued NOV No. R9-2014-0024 to the City based on these inspections. Below are the San Diego Water Board inspection findings for the following sites:

Torrey Hills Unit 19 (WDID 9 37C362854)

Torrey Hills Unit 19 was a nearly nine acre construction site of residential apartment homes with a total disturbed area of just under two acres. The construction site was located east of Interstate 5 and south of Carmel Mountain Road in the Los Peñasquitos watershed, upstream of Los Peñasquitos Lagoon, a CWA section 303(d)-listed water body for sediment impairments. The City's Storm Water Standards required the implementation of its minimum BMP standards, additional requirements for special situations, and requirements for projects discharging to impaired or sensitive water bodies.

On September 20, 2013 the San Diego Water Board inspected Torrey Hills Unit 19 (**Exhibit 11**). During the inspection the San Diego Water Board inspector observed numerous violations of the City's Storm Water Standards including: the lack of adequate erosion and sediment control BMPs throughout; the site littered with trash and debris; concrete wash-out areas with no containment; entrances/exits discharging sediment to the street; storm drain inlets downstream with no protection; and inlets inside the construction site improperly protected with exposed sediment on all sides.

The lack of adequate erosion and sediment control BMPs resulted in the discharge of sediment into and from the MS4 tributary to Los Peñasquitos Lagoon, a sediment impaired water body and water of the United States.

The San Diego Water Board issued the developer, Torrey Garden Hills 1 LLC, NOV No. R9-2013-0148 on October 4, 2013 (**Exhibit 12**).

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Estates at Costa del Mar (WDID 9 37C321980)

Estates at Costa del Mar was a 20 acre construction site consisting of four residential lots with a total disturbed area of 10 acres. The site was located east of Interstate 5 and south of Highway 56 in the Los Peñasquitos Watershed, upstream of Los Peñasquitos Lagoon, a CWA section 303(d)-listed water body for sediment impairments. The City's Storm Water Standards required the implementation of its minimum BMP standards, additional rainy season BMP standards, requirements for special situations, and requirements for projects discharging to impaired or sensitive water bodies.

The San Diego Water Board inspected the site on January 7, 2014 (**Exhibit 13**). During the inspection the San Diego Water Board inspector observed numerous violations of the City's Storm Water Standards including: a general lack of erosion and sediment control BMPs; absent or deficient housekeeping BMPs; and inadequately protected storm drain inlets with sediment leading to the inlets.

Upon request, the City provided the San Diego Water Board with inspection records from October 2013 to January 2014 (**Exhibit 14**). The City indicated that the site had been inactive the entire rainy season. As a result, the City's Storm Water Standards required all slopes to be completely protected with erosion control BMPs. Due to the site's proximity to Los Peñasquitos Lagoon, the City's Storm Water Standards required enhanced erosion control BMPs at the site.

A BMP Notice dated October 28, 2013 indicated that there were gravel bags (sediment controls) that needed to be replaced and slopes that were unprotected (no erosion controls). The City subsequently issued eight consecutive BMP Notices through January 2014 indicating that the gravel bags still needed to be replaced and slopes were still unprotected. The City provided no evidence of escalated enforcement to bring the site into compliance, yet it continued to issue notice after notice for the same violations.

On January 14, 2014, the San Diego Water Board issued a Staff Enforcement Letter (SEL) to the developer, the Perl Family Trust, for the CGP violations observed during the inspection (**Exhibit 13**).

Casa Mira View (9 37C686958)

On January 9, 2014 the San Diego Water Board inspected the Casa Mira View construction site (**Exhibit 15**). The San Diego Water Board inspected this site in October of 2010 as previously described. During this inspection the San Diego Water Board inspector again observed numerous violations of the City's Storm Water Standards including: failure to implement adequate chemical storage BMPs; failure to implement trash management BMPs; failure to implement concrete washout BMPs; failure to implement erosion and sediment control BMPs; and failure to protect storm drain inlets.

After the inspection, the San Diego Water Board inspector notified the City's DSD by email that the site was "grossly in noncompliance with the CGP" and requested that the City take the appropriate measures to get the site into compliance with both local and state requirements (**Exhibit 16**). At that time, the inspector also notified the City that San Diego Water Board staff had concerns about the effectiveness of the City's construction oversight program and requested copies of all City inspection reports for Casa Mira View.

Due to the repeat nature of the violations at the Casa Mira View construction site, the San Diego Water Board conducted a follow-up inspection on January 14, 2014 (**Exhibit 15**). At the San Diego Water Board's request, two City inspectors were also present during the inspection. While a number of the violations identified on January 9, 2014 were corrected, the San Diego Water Board inspector identified several violations of the City's Storm Water Standards that were ongoing including: the lack of storm drain protection; inadequate sediment control BMPs; inadequate housekeeping BMPs; and an overall lack of stockpiled BMPs.

Review of the City's past inspection reports issued by the DSD revealed that City inspectors had inspected the site dozens of times including the day before and the day of the January 9, 2014 San Diego Water Board inspection, yet the City's inspection reports the day before and the day of the San Diego Water Board inspection indicate that the site was in compliance with the Storm Water Standards and there were no BMP deficiencies observed (**Exhibit 16**). Upon further investigation, while the DSD inspection reports prior to the San Diego Water Board inspection indicated all storm water BMPs passed inspection, FED inspection reports during the same period indicated that BMP deficiencies were noted over and over, yet no escalating enforcement occurred to correct the deficiencies repeatedly identified by the inspector.

The San Diego Water Board issued the developer, Garden Communities, NOV No. R9-2014-0018 on February 18, 2014 (**Exhibit 15**). The City was provided a copy of the NOV.

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Due to the ongoing egregious BMP violations noted by San Diego Water Board inspectors at Casa Mira View, the San Diego Water Board pursued progressive enforcement against the developer and eventually adopted Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R9-2014-0044 assessing \$286,324 in administrative penalties for the violations of the CGP documented in the San Diego Water Board inspections (**Exhibit 17**).

NOV R9-2014-0024

On March 11, 2014 the San Diego Water Board issued NOV No. R9-2014-0024 to the City for failing to require the implementation of designated BMPs at construction sites, failing to implement an escalating enforcement process, failing to report noncompliant sites to the San Diego Water Board, and failing to adequately implement its JURMP; all violations of Order No. 2007-0001 (**Exhibit 18**). The NOV was based on evidence collected during the September 2013 and January 2014 inspections noted above. At that time the San Diego Water Board notified the City that it would be conducting an audit of the City's construction management program due to the ongoing violations cited in NOVs R9-2011-0047 and R9-2014-0024.

I. APRIL 2014 CONSTRUCTION MANAGEMENT PROGRAM AUDIT

On April 8-10, 2014 the San Diego Water Board conducted an audit of the City's construction management program. The audit was conducted to identify deficiencies and corrective action still needed to address the noncompliance issues identified in NOVs R9-2011-0027 and R9-2014-0024, and to avoid further instances of noncompliance.

On April 8, 2014 the San Diego Water Board met with staff of two primary departments within the City responsible for construction management and oversight: the Public Works Department's FED; and the DSD's Inspection Services Division. Representatives from the City Attorney's office were also present. During the meeting the City presented information regarding its construction management program.

As previously mentioned, the FED was responsible for BMP inspections at private construction sites working under active grading permits and for all aspects of City CIP projects. The DSD was responsible for BMP inspections at private construction sites working under active building permits.

At the audit, the City indicated that each department maintains its own database to document inspection results, yet the DSD inspectors did not have access to the FED maintained database. This disconnect provided DSD inspectors no information regarding FED inspectors' past inspection observations, open enforcement cases, inspection history or other relevant information rendering the City unable to effectively pursue progressive enforcement in transitional cases. Additionally, in instances where construction sites have both active grading and building permits, DSD inspectors might conduct unnecessary BMP inspections because they did not know that an FED inspector had already concluded or planned to conduct, a BMP inspection to fulfill the inspection frequencies required by Order No. R9-2007-0001.

Also, the San Diego Water Board learned that the City did not maintain a watershed based inventory, also required by Order No. 2007-0001, which resulted in inspectors being unaware of sites tributary to sensitive water bodies that required more robust BMP implementation in accordance with the City's Storm Water Standards.

The City reported that, at the time of the audit, the FED was overseeing over 1,500 active grading permits with 68 Resident Engineers (FED inspectors). The City also reported that Resident Engineers were also responsible for contract management, reviewing change orders and design changes, dispute resolution, utility coordination, permanent (post-construction) BMP inspections, project closeout, and numerous other items in addition to construction storm water BMP inspections.

The City acknowledged that due to the large number of active construction sites and the number of items for which each Resident Engineer was responsible, it was challenging to meet the minimum inspection frequency required by Order No. R9-2007-0001.⁶ The City indicated in its JURMP annual reports that it had met the inspection frequency requirements of Order No. R9-2007-0001. However, review of dozens of City inspection reports for construction sites, which are documented in this enforcement action, confirmed that while the City may have met the minimum inspection frequency required, it did not fulfill the intent of the inspection requirements of Order No. R9-2007-0001 as its inspectors failed to identify and correct blatant BMP violations.

⁶ Order No. R9-2007-0001 requires Copermittees to inspect construction sites during the wet season at least biweekly if they are over 50 acres and grading will occur during the wet season, 1 acre or more and tributary to a CWA section 303(d) water body impaired for sediment or if they discharge to an environmentally sensitive area or if they are determined by the Copermittee or the Regional Board to be a significant threat to water quality. All other sites greater than one acre must be inspected monthly, and as needed for sites less than one acre. During the dry season, inspections are required on an as needed basis.

The City also explained that the DSD strived to schedule and complete customer requests for trade inspections (structural, mechanical, electrical, and plumbing) on the same day as requested to minimize construction delays for developers. As a result, each DSD Trade Inspector typically inspected 12 to 15 sites per day, looking at multiple construction elements, including storm water BMPs. Because some construction sites request multiple trade inspections per week, one construction site could have several Trade Inspectors at the site in any given week. This led to inspectors providing inconsistent feedback at construction sites, redundant inspections at small construction sites that are not in a dynamic construction stage, a lack of ownership when one inspector can sign off on another inspector's BMP Notices and, most importantly, trade inspections taking priority over BMP inspections.

San Diego Water Board Joint Inspections with the City

On April 9 and 10, 2014, twelve years after the City began its construction storm water program and six years after its Storm Water Standards were established, the San Diego Water Board inspectors shadowed City inspectors from both departments on numerous construction site inspections to evaluate the effectiveness of the City's construction program oversight. The inspections included large scale construction projects, City CIPs, and linear utility projects.

During the inspections it became evident that both FED Resident Engineers and DSD Trade Inspectors lacked understanding of the City's minimum BMP requirements and that the inspectors were not confident in making assessments of BMP adequacy or requiring implementation of additional or more effective BMPs. In many instances, the inspectors required the implementation of BMPs identified in the SWPPP, even when site conditions warranted different BMPs than those described in the SWPPP.

In addition, inspectors were not competent in identifying the need for erosion control BMPs and often confused erosion control BMPs with sediment control BMPs. They were also unaware of the City's own requirements to emphasize minimization of exposure time of disturbed areas, implementation of permanent erosion control BMPs (vegetation) for finished areas, or the need for preparation of inactive areas for future rain events. They also provided contractors with literature that was not consistent with the requirements in the City's Storm Water Standards. For example, for areas where grading was complete the literature provided to contractors emphasized temporary erosion control BMPs such as straw wattles and erosion control blankets while the City's Storm Water Standards required permanent erosion control BMPs for all completed areas.

The City's Escalating Enforcement Process

The City's Standard Operating Procedures (SOPs) for the FED instructs Resident Engineers to issue up to three BMP Inspection Notices to correct reoccurring violations (**Exhibit 19**). Because Resident Engineers did not have the authority to issue administrative citations (monetary penalties) their only recourse after the issuance of three BMP Inspection Notices was to issue a Stop Work Order. Yet, between 2007 and 2013, the City only issued five Stop Work Orders, one of which was prompted by a San Diego Water Board inspector. The City explained that Stop Work Orders were rarely issued because of potential costs to developers. Resident Engineers could, however, request assistance from the City's Neighborhood Code Compliance Department to issue administrative citations, but the process for requesting this assistance was not documented in the SOPs and the City provided no evidence that this practice had been implemented.

The FED's endless loop of repeated BMP Inspection Notice issuances to address the same noncompliance incident was apparent from inspection reports of two separate construction sites cited in NOV R9-2014-0024. FED inspection reports at both the Estates at Costa del Mar and Casa Mira View between October 2013 and January 2, 2014, showed that Resident Engineers noted BMP deficiencies at both sites on multiple visits (**Exhibits 14 and 16**). The record did not show that the contractor was given a limited amount of time to take corrective actions, that the corrections were verified, or that the continued BMP deficiencies warranted the escalation of the City's enforcement efforts to ultimately achieve compliance. As a result, necessary BMPs were routinely neglected at these two sites until San Diego Water Board inspectors conducted their own inspections and implemented follow-up enforcement processes.

In contrast, the DSD's Trade Inspectors could issue Re-inspection Notices that did not allow construction to proceed until BMP deficiencies were corrected, and they could issue a Stop Work Order immediately, but only after first consulting with and gaining approval from the City Attorney's Office. Therefore, inspectors could not "immediately" compel compliance even at the worst construction sites.

The audit concluded that the FED Resident Engineers lacked effective intermediate-level enforcement tools and the DSD Trade Inspectors lacked effective high-level enforcement tools.

San Diego Water Board Audit Findings

The San Diego Water Board issued the results of the audit on July 15, 2014 (**Exhibit 20**). In summary, the audit concluded that the City's construction management program structure, responsibilities, and staffing were inadequate to implement the construction component of Order No. R9-2007-0001. Specifically, the audit concluded that City's inspectors' workload commitments in both the FED and DSD did not allow them to conduct BMP inspections that were sufficient to comply with the requirements of Order No. R9-2007-0001 as the inspectors focused more on trade inspections giving less importance to storm water and BMP compliance. The City also failed to adequately train its inspectors to be able to identify and require appropriate BMP implementation, resulting in inspectors emphasizing trade inspections over BMP inspections rendering their storm water duties meaningless in many cases.

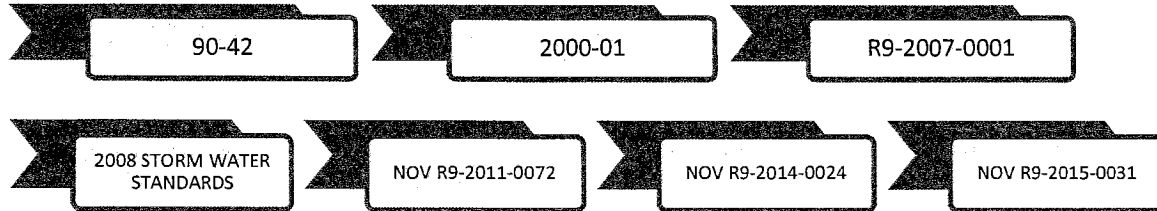
The audit also concluded that the City did not have an escalating enforcement process that achieves prompt corrective action at construction sites. With the identified workloads of both FED and DSD inspectors, there appeared to be no time available for any inspectors to follow the SOPs to compel compliance at even the most egregious construction sites. The audit also confirmed that the City's inspection and enforcement processes had not been effective in reducing discharges from construction sites to the MS4 to the MEP and that the City continued to fail to make substantial improvements to its construction management program since the issuance of NOV Nos. R9-2011-0027 and R9-2014-0024.

In short, the audit found numerous institutional barriers to complying with Order No. R9-2007-0001. This confirmed prior San Diego Water Board inspection findings that the City was not protecting creeks and lagoons from construction site pollution.

City Response to San Diego Water Board Audit Findings

In the City's response to the San Diego Water Board's audit findings, the City identified several tasks it intended to implement by September 26, 2015 including: hiring approximately 12 new inspectors and one new senior inspector; providing additional training for its inspectors; revising its inspection forms; and reviewing its procedures to continue improvements to its construction oversight program including developing a more robust progressive enforcement policy (**Exhibit 21**).

J. NOTICE OF VIOLATION NO. R9-2015-0031



Four months following the release of the audit findings, during November 2014 and December 2014, San Diego Water Board staff inspected several construction sites within the City’s jurisdiction to assess the City’s efforts in improving its construction oversight program to bring it into compliance with Order No. R9-2007-0001. In February 2015 the San Diego Water Board issued the City NOV No. R9-2015-0031 based on these inspections. Below are the San Diego Water Board inspection findings for the following sites:

Poway Road Bicycle Path (Poway Road and Sabre Springs Parkway)

The Poway Road Bicycle Path construction project was a City CIP located in the Los Peñasquitos Watershed upstream of Los Peñasquitos Lagoon, a CWA section 303(d)-listed water body for sediment impairments. The site was not required to be covered under the statewide CGP because the disturbed area was less than one acre. However, the construction site was still required to comply with the City’s Storm Water Standards’ designated minimum BMP standards, additional rainy season BMP standards, and enhanced BMPs due to its proximity to Los Peñasquitos Lagoon.

On November 14, 2014 the San Diego Water Board inspected the construction site. The inspector observed numerous violations of the City’s Storm Water Standards including: the lack of erosion controls throughout the site; the lack of temporary stabilization of exposed soils, slopes, and stockpiles; and deficient implementation and maintenance of several BMPs.

On November 17, 2014 the San Diego Water Board issued an SEL to the City identifying the deficiencies observed during the inspection and requesting a response and additional documentation (**Exhibit 22**). The FED Resident Engineer provided a response on November 19, 2014 acknowledging that erosion control BMPs were inadequate at the site (**Exhibit 22**). For the other noted deficiencies, the City indicated that the contractor overseeing construction activities at the site was responsible for being familiar with and understanding the BMP requirements.

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The City inspector provided inspection reports from September 26, October 10, October 24, and November 7, 2014 (**Exhibit 22**). The first three inspection reports indicated there were no BMP violations noted. Only the November 7, 2014 inspection record noted erosion control BMPs needed to be improved to mitigate against wind erosion, not storm water runoff erosion, and no mention was made of the need for temporary stabilization of exposed soils, slopes, and stockpiles.

Hilton Garden Inn (9 37C369598)

Hilton Garden Inn was a 2.4 acre commercial construction site, where all 2.4 acres were to be disturbed by construction activities. The site was located on Taylor Street, in the Old Town neighborhood. The site discharged to the San Diego River, a water of the United States. The site was required to implement the City's Storm Water Standards minimum BMP standards and additional rainy season BMP standards.

On November 14, 2014 the San Diego Water Board inspected the site (**Exhibit 23**). The inspector observed numerous violations of the City's Storm Water Standards including the lack of erosion control BMPs throughout the site and deficient implementation and maintenance of several BMPs. A Storm Water Notice issued by a DSD Trade Inspector was reviewed during the inspection. The City's October 16, 2014 Storm Water Notice indicated "corrections required" and all inspection checklist items were marked including: soils, debris and construction materials must be contained; sediment barriers must be installed, maintained and functioning properly; material handling, storage and maintenance areas must be kept reasonably clean; materials and equipment must be covered when not in use; exposed slopes must be protected from erosion; and stockpiled BMPs must be on site (**Exhibit 24**).

On November 17, 2014, the San Diego Water Board made a request to the DSD Trade Inspector responsible for issuing the Storm Water Notice for copies of any other construction storm water BMP inspection reports, notices, enforcement actions, or other documents from the site. On December 4, 2014 the DSD inspector provided the requested information (**Exhibit 24**). An Approval Status Report reflected the October 16, 2014 failed BMP inspection and an additional failed BMP inspection on October 20, 2014. The report also indicated that BMPs passed inspection on October 21, 2014. An additional Storm Water Notice dated November 18, 2014, four days after the San Diego Water Board inspection was also provided. That Storm Water Notice again indicated "corrections required" for all of the checklist items marked on the October 16, 2014 Notice, as well as additional corrections including: sediment barriers needed to be installed in accordance with their SWPPP; sediment BMPs needed to be maintained at all times; and the BMPs needed to be functioning properly. The Storm Water Notice did not require corrective action be taken by a specified date, but it indicated that a verbal warning was issued. In addition, no documentation was provided that indicated that the BMP violations noted in the November 18, 2014 Storm Water Notice were corrected.

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Review of the City's inspection reports revealed that the City was not effective in tracking and keeping the site in compliance with the Storm Water Standards and was content to issue BMP Notices without follow-up, ensuring correction, or escalating enforcement.

La Jolla Del Rey Phase 1 (9 37C369565)

La Jolla Del Rey Phase 1 was a 2.1 acre construction project consisting of the demolition of 4 multi-family residential buildings and the construction of 5 multi-story multi-family residential buildings, driveway and parking areas. The project was located north of Highway 52 between Interstates 5 and 805. The site discharged to San Clemente Canyon, tributary to Mission Bay, a water of the United States. The site was required to implement the City's Storm Water Standards minimum BMP standards and additional rainy season BMP standards.

On December 4, 2014 the San Diego Water Board inspected the construction site (**Exhibit 25**). According to the superintendent present during the inspection, the site had been inactive for several months. The City's Storm Water Standards required inactive sites to be fully protected from erosion and discharges of sediment. During the inspection the San Diego Water Board inspector observed numerous violations of the City's Storm Water Standards including: the complete lack of erosion control BMPs for the inactive areas; inadequate perimeter sediment controls; and inadequate run-on/runoff control BMPs which contributed to an observed sediment discharge from the construction site to the sidewalk and street leading to the MS4.

On December 12, 2014 the San Diego Water Board conducted a follow up inspection (**Exhibit 26**). This inspection occurred during a rain event on a Friday during normal business hours but no construction personnel were present. The San Diego Water Board inspector again observed multiple violations and evidence of sediment discharged along the site perimeter.

The San Diego Water Board issued the developer, WM Builders, NOV No. R9-2014-0148 on December 15, 2014 (**Exhibit 25**). The City was provided a copy of the NOV. In response, the City notified the San Diego Water Board that the site had not been issued a grading permit, and it appeared that grading may have been conducted under a demolition permit, which is inspected by the DSD, the same department that was inspecting the Phase 2 development directly across the street (**Exhibit 27**).

La Jolla Del Rey Phase 2 (9 37C368646)

La Jolla Del Rey Phase 2 was a 3.3 acre construction site located across the street from the Phase 1 site. The site discharged to San Clemente Canyon, tributary to Mission Bay, a water of the United States. The site was required to implement the City's Storm Water Standards' minimum BMP standards and additional rainy season BMP standards.

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On December 4, 2014 the San Diego Water Board inspected the construction site (**Exhibit 28**). The inspector observed numerous violations of the City's Storm Water Standards including: inadequate erosion control BMPs for several inactive areas; inadequate implementation of perimeter sediment controls; and inadequate implementation of run-on and runoff controls. The inspector also noted deficiencies in the site SWPPP. After the inspection, the San Diego Water Board inspector notified the Legally Responsible Person identified in the SWPPP of the BMP deficiencies and unauthorized sediment discharges and reiterated what was told to the on-site Qualified SWPPP Professional (QSP); that the identified BMP deficiencies must be corrected prior to the next forecasted rain event in approximately seven days.

On December 12, 2014 the San Diego Water Board conducted a follow up inspection (**Exhibit 29**). This inspection occurred during a rain event on a Friday during normal business hours but no construction personnel were present. The San Diego Water Board inspector again observed multiple violations of the City's Storm Water Standards that resulted in active sediment laden discharges along the site perimeter to the MS4.

The San Diego Water Board issued the developer, WM Builders, NOV No. R9-2014-0149 on December 15, 2014 (**Exhibit 28**).

Northwest Village Creek (9 37C369293)

Northwest Village Creek was a 5.3 acre construction project, all of which was to be disturbed by construction activities, located on the northwest corner of Market Street and Euclid Avenue. Phase 1 of the project consisted of grading of a retail pharmacy pad with associated on-grade parking and off-site improvements along Market Street and Euclid Avenue. The construction site discharged to Chollas Creek, tributary to San Diego Bay, waters of the United States. The site was required to implement the City's Storm Water Standards minimum BMP standards and additional rainy season BMP standards.

On December 4, 2014, the San Diego Water Board received a citizen complaint about a discharge from the construction site to Chollas Creek. The complainant submitted photo documentation showing the site lacked adequate erosion controls for a large stockpile or topographic feature on the site since the end of September 2014, with a pipe conveying sediment laden storm water directly to Chollas Creek (**Exhibit 30**).

The San Diego Water Board inspected the site on December 4, 2014 (**Exhibit 30**). During the inspection the San Diego Water Board inspector observed numerous violations of the City's Storm Water Standards including: inadequate implementation of perimeter sediment control BMPs; a general lack of erosion controls; and the lack of run-on/runoff management BMPs throughout the site. The inadequate BMP implementation resulted in discharges of sediment directly to Chollas Creek.

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During the inspection the San Diego Water Board inspector reviewed a Storm Water Notice issued by a DSD Trade Inspector dated September 26, 2014 and BMP Notices issued by an FED Resident Engineer dated September 5, October 2, October 30, November 26, and December 1, 2014. The September 26, 2014 Storm Water Notice was for "info only" and did not indicate any corrections were needed (**Exhibit 31**).

The September 5, October 2, October 30, and December 1, 2014 BMP Notices issued by the FED Trade Inspector indicated all existing BMPs were adequately maintained and no BMPs required improvement; yet photographic evidence provided to the San Diego Water Board clearly indicates a lack of erosion control for the large stockpile (**Exhibit 31**). The November 26, 2014 BMP Notice indicated that the site needed to be cleaned around storm drain inlets and sediment needed to be swept and cleaned from the streets and around the projects (**Exhibit 31**). The Notice also instructed the contractor to "apply BMPs to piles of dirt." There was no requirement to implement erosion controls for any part of the site prior to the storm event on December 3-4, 2014.

On December 10, 2014 the San Diego Water Board issued NOV No. R9-2014-0145 to the developer, Jacobs Center for Neighborhood Innovations, for the violations of the CGP identified during the inspection (**Exhibit 30**). The City was provided a copy of the NOV. Subsequently, the San Diego Water Board pursued progressive enforcement against the developer and eventually adopted Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R9-2015-0015 against the developer, assessing \$46,718 in administrative penalties for the violations of the CGP documented in the San Diego Water Board inspection (**Exhibit 32**).

Mission Gorge Apartments (WDID 9 37C368091)

Mission Gorge Apartments was a 10.3 acre construction site where all 10.3 acres were to be disturbed by construction activities. The site is located in the San Diego Hydrologic Unit and discharged to the San Diego River, a water of the United States. The site was required to implement the City's Storm Water Standards minimum BMP standards and additional rainy season BMP standards.

During a rain event on December 12, 2014 San Diego Water Board staff observed a discharge of sediment from the construction site to the City's MS4. Later that day, the San Diego Water Board conducted a formal site inspection (**Exhibit 33**). The San Diego Water Board inspector observed numerous violations of the City's Storm Water Standards including: several inactive slopes with no erosion control BMPs; inadequate protection for stockpiles; and the absence of adequate runoff and perimeter control BMPs.

On December 23, 2014 the San Diego Water Board issued the developer, KRN Mission Gorge LLC, NOV No. R9-2014-0154 for the statewide CGP violations observed during the inspection (**Exhibit 34**). The City was provided a copy of the NOV.

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NOV No. R9-2015-0031

On February 20, 2015 the San Diego Water Board issued the City NOV No. R9-2015-0031 because it failed to reduce discharges from construction sites to the MS4 to the MEP, failed to identify inadequate implementation of designated minimum BMPs and failed to implement an escalating enforcement process to require implementation of designated minimum BMPs at the construction sites inspected by the San Diego Water Board in November and December 2014. (**Exhibit 35**).

In its May 7, 2015 response to the NOV, the City identified several corrective measures it had or would take to correct the violations cited in NOV No. R9-2015-0031 (**Exhibit 36**). Within the FED, the City reported it had created a Construction Storm Water (CSW) Section. CSW inspectors would conduct the first inspection at CIPs and active grading sites, providing the Resident Engineer with their findings regarding storm water compliance. The Resident Engineers would take the CSW findings to the contractor and issue a BMP Notice. Resident Engineers would conduct future BMP inspection but could request assistance from the CSW section for problem sites. CSW inspectors would consult with a Resident Engineer's supervisor and Senior Engineers if disciplinary action is needed against a Resident Engineer or a contractor.

At the DSD, the City reported that an additional ten inspectors had been added since January 2014 for more thorough storm water inspections. As of May 2015, the City intended to hire an additional three inspectors and one supervisor dedicated to storm water inspections at non-compliant sites. The City had also hired a consultant to conduct an eight hour training session that would be videotaped to use as an annual refresher and to be shared with the regulated community. In addition, the City's clean water brochure was updated, and a new brochure regarding frequent violations was being developed for contractors.

Regarding its escalating enforcement process, the City indicated it was pursuing a strategy on the use of a tiered enforcement action structure to be used in combination with administrative citations and civil penalties. The City has indicated that the process should have been implemented by October 2015.

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K. DISCHARGES DOCUMENTED BY THE SAN DIEGO WATER BOARD

Between October 2010 and May 2015 the San Diego Water Board documented **nineteen (19)** unauthorized discharges of sediment laden storm water from construction sites within the City to the MS4 that, due to the lack of proper oversight from the City, were not reduced to the MEP. Some of the discharges were documented as part of assessing the City's compliance with Order No. R9-2007-0001, while others were documented by San Diego Water Board inspectors while assessing compliance at construction sites with the statewide CGP and are documented in the State Water Board's Storm Water Multiple Application and Report Tracking System (SMARTS) (**Exhibit 37**) or from citizen complaints tracked in the San Diego Water Board filing system (**Exhibit 38**). These discharges occurred throughout the City, within all watersheds inside the City's jurisdiction, as indicated in the table below. It is likely that additional undocumented discharges occurred as a result of the City's failure to implement an adequate construction oversight program.

	Date	Site Name	Receiving Water(s)	Watershed
1	October 25, 2010	Casa Mira View	Los Peñasquitos Creek/Los Peñasquitos Lagoon*	Los Peñasquitos
2	November 22, 2010	Carmel Country Highlands	Carmel Valley Creek/Los Peñasquitos Lagoon*	Los Peñasquitos
3	December 22, 2010	Black Mountain Ranch/Del Sur	Lusardi Creek, San Dieguito Lagoon	San Dieguito
4	March 21, 2011	Pacific Highlands Ranch Units 21 & 22	San Dieguito River	San Dieguito
5	December 13, 2012	Toll Brothers at Stonebridge	Los Peñasquitos Creek/Los Peñasquitos Lagoon*	Los Peñasquitos
6	December 13, 2012	Units 6 & 10 at Stonebridge	Beeler Creek/Los Peñasquitos Lagoon*	Los Peñasquitos
7	December 13, 2012	Ralphs Family Ranch	Lake Hodges	San Dieguito
8	September 20, 2013	Torrey Hills Unit 19	Los Peñasquitos Creek, Los Peñasquitos Lagoon*	Los Peñasquitos
9	November 5, 2013	Brown Field Technology Park	Tijuana River*	Tijuana
10	February 28, 2014	Kaiser Hospital	Murphy Canyon Creek/San Diego River	San Diego
11	December 4, 2014	La Jolla Del Rey Phase 1	San Clemente Canyon/Mission Bay	Los Peñasquitos
12	December 4, 2014	La Jolla Del Rey Phase 2	San Clemente Canyon/Mission Bay	Los Peñasquitos
13	December 4, 2014	Northwest Village Creek	Chollas Creek/San Diego Bay	Pueblo San Diego
14	December 12, 2014	Mission Gorge Apartments	San Diego River	San Diego
15	December 12, 2014	SVBP Building 18	Tijuana River*	Tijuana
16	December 12, 2014	Family Health Centers of San Diego	Chollas Creek	Pueblo San Diego
17	December 12, 2014	La Jolla Del Rey Phase 1	San Clemente Canyon/Mission Bay	Los Peñasquitos
18	December 12, 2014	La Jolla Del Rey Phase 2	San Clemente Canyon/Mission Bay	Los Peñasquitos
19	May 14, 2015	FY14 Concrete Street Panel Replacement	San Diego Bay	Pueblo San Diego

* CWA section 303(d) listed impaired water body for sediment impairments.

L. BENEFICIAL USES OF AFFECTED WATERS

The Water Quality Control Plan, San Diego Basin – Region 9 (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.”

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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 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 the six receiving waters⁷ affected by the City’s failure to reduce discharges from construction sites to the MEP:

Beneficial Uses/Receiving Water	San Dieguito Lagoon	Los Peñasquitos Lagoon	Mission Bay	San Diego River	San Diego Bay	Tijuana River
IND			X		X	
NAV					X	
REC1	X	X	X	X	X	X
REC2	X	X	X	X	X	X
COMM			X	X	X	X
BIOL	X	X			X	X
EST	X	X	X	X	X	X
WILD	X	X	X	X	X	X
RARE	X	X	X	X	X	X
MAR	X	X	X	X	X	X
AQUA						
MIRG	X	X	X	X	X	X
SPWN						
WARM						
SHELL			X	X	X	X

⁷ For the purposes of this report, the table only references the beneficial uses associated with the downstream receiving waters. A listing of all the beneficial uses associated within each watershed can be found in the Basin Plan.

Impaired Water Bodies

Section 303(d) of the CWA requires Water Boards⁸ to identify waters that do not 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 San Diego Water Board documented numerous sediment discharges to the Los Peñasquitos watershed upstream of Los Peñasquitos Lagoon, an impaired water body for sedimentation/siltation, which occurred because the City failed to implement an effective construction oversight program as required by Order No. R9-2007-0001.

Currently, it is estimated that approximately 469 acres of the Lagoon are impaired for sedimentation/siltation. A TMDL addressing the sedimentation impairment in Los Peñasquitos Lagoon was adopted by the San Diego Water Board in June 2012, the State Water Board in January 2014, and USEPA in October 2014. Not only is the City a named party in the Los Peñasquitos Lagoon TMDL, the City's Storm Water Division was a key contributor in the TMDL development, and the City is obligated to comply with the waste load reduction along with other responsible parties, to achieve a sixty-seven percent sediment load reduction from the Year 2000 load to the historical load. The TMDL includes a sediment numeric target to ensure that at least 246 acres of tidal and non-tidal saltmarsh are maintained and protected. Discharges of sediment from construction sites located within the Los Peñasquitos watershed have contributed to the further impairment of Los Peñasquitos Lagoon for sedimentation/siltation.

Excessive sedimentation can smother benthic communities, and/or alter the hydrologic regime, causing habitat conversion from saltwater marsh to freshwater marsh or from wetland, to upland habitats. Sediment deposition around the mouth of the lagoon results in decreased circulation and tidal flushing. This can, in turn, trigger the need for anthropogenic management of the lagoon mouth, or absent such management, can result in anoxic conditions, and subsequent fish kills. Sedimentation also proliferates invasive plant and animal species within the lagoon.

Several sediment discharges to the Tijuana River were also documented by San Diego Water Board inspectors. The lower six miles of the Tijuana River and the Tijuana River Estuary (the Tijuana River Valley) are degraded due to excessive sedimentation and are CWA section 303(d) listed water bodies. As a result, numerous beneficial uses are impaired, primarily those associated with aquatic life. The development of an alternative TMDL that involves a coordinated multi-party effort to address and mitigate water quality impairments from sediment discharges is in progress. The City is a key participant in that effort as well.

⁸ Water Boards" refers to the State Water Resources Control Board and the Regional Water Quality Control Boards.

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While the City's Storm Water Division has been working hard to address the sediment impairments in Los Peñasquitos Lagoon and Tijuana River Valley, and committing significant City resources to addressing load reductions in these water bodies, the City's deficient oversight of construction activities on behalf of FED and DSD has run counter to those efforts and has actively contributed to the continued impairment of those key water bodies.

M. ALLEGED VIOLATIONS

The City is required to conduct the necessary oversight of construction projects within its jurisdiction to ensure compliance with the requirements of Order No. R9-2007-0001. The City's inadequate oversight of the program resulted in the following alleged violations:

1. Failure to Require Implementation of Minimum BMPs Designated in the City's Storm Water Standards at Construction Sites

The City violated Provision D.2. of San Diego Water Board 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."

The City violated Provision D.2.c.(3) of San Diego Water Board Order No. R9-2007-0001 which states, "Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round."

The City violated Provision D.2.d.(6)(b) of San Diego Water Board Order No. R9-2007-0001 which states, "Inspections conducted by each Copermittee shall include assessment of compliance with Permittee ordinances and permits related to urban runoff, including the implementation and maintenance of designated minimum BMPs."

The City violated Provision D.2.d.(6)(c) of San Diego Water Board Order No. R9-2007-0001 which states, "Inspections conducted by each Copermittee shall include assessment of BMP effectiveness."

2. Failure to Comply with Discharge Prohibitions of Municipal Storm Water Permit

The City violated Provision A.2 of San Diego Water Board 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."

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3. Failure to Implement an Escalating Enforcement Process to Require Implementation of Designated Minimum BMPs at Construction Sites

The City violated Provision D.2.d.(5) of San Diego Water Board Order No. R9-2007-0001 which states, "Based upon inspection findings, each Copermittee shall implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with the Order."

The City violated Provision D.2.e of San Diego Water Board Order No. R9-2007-0001 which states, "Each Copermittee shall develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permit requirements and ordinances. This enforcement process shall include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process shall include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements and/or permit denials for non-compliance."

N. 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 may be administratively imposed by the San Diego Water Board 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 Boards 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, potential, 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.

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: Failure to Require Implementation of Minimum BMPs Designated in the City's Storm Water Standards at Construction Sites

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 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.

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

- a. Construction sites that do not implement designated minimum BMPs have a high potential for erosion and discharge of sediment to receiving waters.
- b. Sediment is a pollutant that when discharged can be lethal when it smothers benthic communities.
- c. Sediment can transport toxic materials (e.g., metals and synthetic organics) from construction sites to receiving waters.
- d. The widespread nature and magnitude of construction sites without minimum BMPs resulted in discharges of sediment to all six hydrologic units within the City’s jurisdiction that were documented by the San Diego Water Board for at least four years, suggesting a particularly egregious threat to beneficial uses.
- e. Numerous sediment discharges from construction sites were documented by the San Diego Water Board discharging to tributaries to Los Peñasquitos Creek, which is upstream of Los Peñasquitos Lagoon a federal Clean Water Act section 303(d) listed impaired water body for sedimentation/silt.
- f. Several projects were observed actively discharging sediment to waters tributary to Los Peñasquitos Lagoon. Los Peñasquitos Lagoon is a federal Clean Water Act section 303(d) listed impaired water body for sedimentation/silt and is a designated Natural Preserve by the State Park and Recreation Commission. A TMDL for sediment was adopted in June 2012 and approved by USEPA in October 2014.

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- g. Several sediment discharges to the Tijuana River were also documented by San Diego Water Board inspectors. The lower six miles of the Tijuana River and the Tijuana River Estuary (the Tijuana River Valley) are degraded due to excessive sedimentation and are CWA section 303(d) listed water bodies. As a result, numerous beneficial uses are impaired, primarily those associated with aquatic life. The development of an alternative TMDL that involves a coordinated multi-party effort to address and mitigate water quality impairments from sediment discharges is in progress. The City is a key participant in that effort.

Deviation from Requirement

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

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

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

- a. The City failed to implement a construction program that reduces construction site discharges of pollutants from the MS4 to the MEP and prevent construction site discharges from the MS4 from causing or contributing to a violation of water quality standards as required by Order No. R9-2007-0001.
- b. The City failed to require all construction sites inspected during the San Diego Water Board’s investigation to implement BMPs designated in its Storm Water Standards and other measures so that pollutants discharged from the site were reduced to the MEP and did not cause or contribute to a violation of water quality as required by Order No. R9-2007-0001.
- c. The City failed to require the minimization of exposure time of disturbed soil areas at construction sites inspected during the San Diego Water Board’s investigation as required by Order No. R9-2007-0001 and the City’s Storm Water Standards.
- d. The City failed to identify and require the need for temporary stabilization and reseeded of disturbed soil areas as rapidly as feasible at construction sites inspected during the San Diego Water Board’s investigation as required by Order No. R9-2007-0001 and the City’s Storm Water Standards.
- e. The City failed to identify the need for and require maintenance of all BMPs as required by Order No. R9-2007-0001 and the City’s Storm Water Standards.

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- f. The City failed to identify and require the need for the retention, reduction, and proper management of all pollutant discharges to the MEP standard at construction sites inspected during the San Diego Water Board's investigation as required by Order No. R9-2007-0001 and the City's Storm Water Standards.
- g. The City failed to identify and require erosion prevention which Order No. R9-2007-0001 identifies as the most important measure for keeping sediment on site during construction at sites inspected during the San Diego Water Board's investigation.
- h. The City failed to identify and require sediment controls to be used as a supplement to, not a replacement for, erosion prevention at construction sites as required by Order No. R9-2007-0001.
- i. The City failed to identify and require the need for slope stabilization at construction sites on all inactive slopes during the rainy season and during rain events in the dry season as required by Order No. R9-2007-0001 and the City's Storm Water Standards.
- j. The City failed to identify and require the need for slope stabilization on all active slopes during rain events regardless of the season as required by Order No. R9-2007-0001 and the City's Storm Water Standards.
- k. The City failed to identify and require the need for implementation of its designated minimum BMPs and any additional measures necessary at construction sites year round as required by Order No. R9-2007-0001 and the City's Storm Water Standards.
- l. The City failed to accurately assess compliance with its designated minimum BMPs at construction sites as required by Order No. R9-2007-0001.
- m. The City failed to accurately assess BMP effectiveness at construction sites as required by Order No. R9-2007-0001.

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 identify inadequate implementation of designated minimum BMPs at construction sites in Table 3 of the Enforcement Policy can be is **0.85**. Calculating the Per Day Assessment is achieved by multiplying:

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

Step 4 – Adjustment Factors**Culpability**

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

- a. The City has failed to implement an effective storm water construction management program, which was a requirement and the performance standard for municipalities within the San Diego Region since 2001.
- b. The City repeatedly failed to require the implementation of its Storm Water Standards, which were established in 2008. A reasonably prudent entity would have implemented those steps.
- c. The City has the ability to fund the acquisition and training of an adequate number of staff to implement an effective storm water construction management program but has failed to take the necessary steps to achieve that requirement of Order No. R9-2007-0001.
- d. The City was first notified of its programmatic deficiencies in 2011. The City's long-standing and continued failure to implement an effective storm water construction management program demonstrates a negligent and/or intentional disregard for the requirements of Order No. R9-2007-0001.

Cleanup and Cooperation

The Prosecution Team has assigned a cleanup and cooperation multiplier of **1.2** from a range of 0.75 to 1.5 for this violation because the City failed to demonstrate that adequate corrective measures were implemented at the time of the 2014 audit or the issuance of NOV No. R9-2015-0031. While City staff has been cooperative with regards to providing information to the Prosecution Team, the City's failure to timely bring the construction management program into compliance, after years of notification, warrants a Cleanup and Cooperation multiplier of **1.2**.

History of Violation

A minimum multiplier of 1.1 is applied where there is a history of violations. The Prosecution Team has assigned a history of violation multiplier of **1.2** for this violation because on August 13, 2014, the San Diego Water Board adopted Settlement Agreement and Stipulation for Entry of Order No. R9-2014-0017 assessing administrative penalties of \$949,634 against the City for failing to ensure that post-construction storm water treatment control BMPs were designed and implemented as required by Order No. R9-2007-0001.

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The violations addressed by ACL Order No. R9-2014-0017 also resulted from the City's various departments failing to effectively work together to implement another aspect of construction storm water oversight. In both cases, whether consciously or not, it appears that the City placed more emphasis on moving development forward than on proper education and implementation of necessary water quality BMPs.

Multiple Day Violations

The days of violation for failure to identify inadequate implementation of designated minimum BMPs at construction sites has been calculated to be:

October 25, 2010 through May 14, 2015 = 1,663 days

The days of violation begin on the first San Diego Water Board inspection cited in NOV No. R9-2011-0027 and end on May 14, 2015, when a CIP discharged sediment laden storm water to San Diego Bay because the FED failed to require implementation of the City's Storm Water Standards BMP requirements. The Prosecution Team is not implying that the violation period ended on May 14, 2015, rather that was the date the Prosecution Team closed the violation period in order to proceed with the issuance of this Complaint.

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, an adjustment can be made to reduce the days of violation for the purpose of calculating liability. In this case, failure to identify inadequate implementation of designated minimum BMPs at construction sites did not result in an economic benefit to the City that can be calculated on a daily basis. Rather, the City experienced a programmatic cost savings from failing to comply with the requirements. Therefore, in this instance the San Diego Water Board can apply an adjustment to the number of days of violation. The maximum allowable reduction under the Enforcement Policy would calculate liability based on 42, rather than 1,663 days.

The Prosecution Team however, has elected not to apply the maximum reduction allowed by the Enforcement Policy for this violation because the maximum reduction allowed results in a penalty calculation that is not adequately reflective of the severity and longevity of the violations that were known to the City since at least February 2011.

For this violation, the Prosecution Team has determined that it is appropriate to assess the Initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of the violation until the 30th day, plus an assessment for each ten (10) days of violation thereafter. This methodology proposes to reduce the number of days of violation, for penalty calculation purposes, from one thousand six hundred sixty four days (1,663) to one hundred seventy days (170).

The table below displays the Adjusted Days of Violation pursuant to the Enforcement Policy:

Alleged Violation	Days of Violation	Proposed Adjusted Days of Violation	Maximum Allowable Adjusted Days of Violation
Failure to Require Implementation of Minimum BMPs Designated in the City's Storm Water Standards at Construction Sites	1,663	170	42

Step 5 – Determination of Base Liability Amount

The Base Liability amount for failure to identify inadequate implementation of designated minimum BMPs at construction sites of **three million one hundred twenty one thousand two hundred dollars (\$3,121,200)** 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:

$$\begin{aligned} (\text{Per Day Assessment}) \times (\text{Days of Violation}) &= \text{Initial Amount of Liability} \\ (\$8,500) \times (170) &= \$1,445,000 \end{aligned}$$

$$\begin{aligned} (\text{Initial Amount of Liability}) \times (\text{Culpability}) \times (\text{Cooperation}) \times (\text{History of Violation}) &= \\ (\$1,445,000) \times (1.5) \times (1.2) \times (1.2) &= \$3,121,200 \end{aligned}$$

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

See Section O. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

See Section O. Factors Associated With All Violations

Step 8 – Economic Benefit

See Section O. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See Section O. Factors Associated With All Violations

Step 10 – Proposed Civil Liability for Violation No. 1

The proposed civil liability for failing to require implementation of minimum BMPs designated in the City's Storm Water Standards at construction sites is **three million one hundred twenty one thousand two hundred dollars (\$3,121,200)**.

VIOLATION 2: Failure to Comply with Discharge Prohibitions of Municipal Storm Water Permit

Step 1 – Potential for Harm 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 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).

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 discharges can cause acute lethal effects on the invertebrate aquatic community.
- b. Sediment can transport toxic materials (e.g., metals and synthetic organics) from construction sites to receiving waters.

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- c. The San Diego Water Board documented discharges that occurred in all six of the watersheds within the City, with the likelihood of many more discharges due to the City's poor oversight.
- d. Numerous sediment discharges documented by the San Diego Water Board discharged to tributaries to Los Peñasquitos Creek, which is upstream of Los Peñasquitos Lagoon a federal Clean Water Act section 303(d) listed impaired water body for sedimentation/silt.
- e. Numerous sediment discharges documented by the San Diego Water Board discharged to tributaries to Los Peñasquitos Lagoon, which is a federal Clean Water Act section 303(d) listed impaired water body for sedimentation/silt with a sediment TMDL that was adopted in June 2012, and is a designated Natural Preserve by the State Park and Recreation Commission.
- f. Several sediment discharges documented by the San Diego Water Board discharged to the Tijuana River, a federal Clean Water Act section 303(d) listed impaired water body for sedimentation.
- g. Sediment discharges can negatively impact Contact and Non-Contact Water Recreation (REC-1, REC-2), Warm Freshwater Habitat (WARM), Wildlife Habitat (WILD), and Rare, Threatened, or Endangered Species (RARE) beneficial uses.
- h. Due to the extensive nature of the violations, impacts on receiving waters from sediment discharges were likely substantial, causing temporary restrictions on beneficial uses.

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

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).

The Prosecution Team has assigned a score of **2 (moderate)** out of 4 to Factor 2 of the penalty calculation because sediment to receiving waters poses the following risks to potential receptors:

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

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

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 **19** documented discharge events, civil liability was only calculated on a per day basis for these violations.

Per Day Assessments for Discharge Violations

Extent of Deviation from Requirement

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

“The intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).”

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

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- a. The City allowed at least **nineteen** separate discharges of sediment from construction sites within its jurisdiction that discharged pollutants that were not reduced to the MEP into the MS4. It is likely that many more unauthorized discharges occurred throughout the City but were not documented by San Diego Water Board staff.
- 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, from at least part of the City's construction sites overseen by the FED and DSD.

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of **7** and "Deviation from Requirement" factor of "**moderate**", the "Per Day Factor" for failing to comply with the discharge prohibitions of the Order No. R9-2007-0001 is **0.200** 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:

$$\begin{aligned} (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) &= \text{Per Day Assessment} \\ (0.200) \times (\$10,000) &= \$2,000 \end{aligned}$$

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 **1.5** out of a range from 0.5 to 1.5 for these violations because:

- a. The City has failed to prohibit illegal discharges from entering into its MS4 after being regulated by municipal storm water requirements of the San Diego Water Board for over 20 years. The City fell far below the performance standards in place.

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- b. The City's failure to employ the appropriate level of staff and its failure to adequately train its inspectors has resulted in a storm water construction management program that has indirectly led to sediment discharges to waters of the United States, including discharges to water bodies that are currently impaired for sedimentation and turbidity. A reasonably prudent entity would have taken steps to avoid the illegal discharges.
- c. The City was first notified of the programmatic deficiencies that have led to the discharges in 2011. The City's long-standing and continued failure to prohibit discharges demonstrates a negligent and/or intentional disregard for the requirements of Order No. R9-2007-0001.

Cleanup and Cooperation

The Prosecution Team has assigned a cleanup and cooperation multiplier of **1.2** from a range of 0.75 to 1.5 for this violation. While the City has been cooperative with San Diego Water Board staff while investigating these discharge violations, the City had been issued multiple Notices of Violation and continued to fail to address the programmatic failures. As a result, the City allowed discharges with pollutants not reduced to the MEP into its MS4 from construction sites.

History of Violation

A minimum multiplier of 1.1 is applied where there is a history of violations. The Prosecution Team has assigned a history of violation multiplier of **1.2** for this violation because on August 13, 2014, the San Diego Water Board adopted Settlement Agreement and Stipulation for Entry of Order No. R9-2014-0017 assessing administrative penalties of \$949,634 against the City for failing to ensure that post-construction storm water treatment control BMPs were designed and implemented as required by Order No. R9-2007-0001.

The violations addressed by ACL Order No. R9-2014-0017 also resulted from the City's various departments failing to effectively work together to implement another aspect of construction storm water oversight. In both cases, whether consciously or not, it appears that the City placed more emphasis on moving development forward than on proper education and implementation of necessary water quality BMPs.

Multiple Day Violations

At this time the Prosecution Team has evidence of **nineteen (19)** discharges of sediment from construction sites within the City; therefore, a reduction for multiple days of violation does not apply to these violations.

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Step 5 – Determination of Initial Amount of Liability

The Base Liability amount for these violations of **eighty six thousand four hundred dollars (\$86,400)** 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:

$$\begin{aligned} &(\text{Per Day Assessment}) \times (\text{Days of Violation}) = \\ &(\$2,000) \times (19) = \$38,000 \end{aligned}$$

$$\begin{aligned} &(\text{Initial Liability Amount}) \times (\text{Culpability}) \times (\text{Cooperation}) \times (\text{History of Violation}) = \\ &(\$38,000) \times (1.5) \times (1.2) \times (1.2) = \$80,080 \end{aligned}$$

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

See Section O. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

Without attempting to calculate the gallons discharged from each site, the penalty calculation methodology calculates a penalty amount of \$80,080, which is entirely disproportionate to assessments made with the gallons discharged, and is not reflective of the seriousness of the violations. The City allowed (at least) twenty discharges of pollutants from construction sites not reduced to the MEP from the MS4, as documented by the San Diego Water Board. Many of these discharges were to CWA section 303(d) listed water bodies with sediment impairments. The discharges could have been avoided with the implementation of basic BMPs and oversight by the City. As a result, these nineteen documented discharges warrant the maximum per day assessment allowed by the CWC of \$10,000 per day. The recommended penalty amount for the discharge violations addressed in Violation 2 is the statutory maximum of one hundred ninety thousand dollars (\$190,000).

Step 8 – Economic Benefit

See Section O. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See Section O. Factors Associated With All Violations

Step 10 – Proposed Civil Liability for Violation No. 2

The proposed civil liability for failing to comply with the discharge prohibitions of Order No. R9-2007-0001 is **one hundred ninety thousand dollars (\$190,000)**.

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VIOLATION 3: Failure to Implement an Escalating Enforcement Process to Require Implementation of Designated Minimum BMPs at Construction Sites

Step 1 – Potential for Harm 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 Enforcement Policy defines “**moderate**” for non-discharge violations as:

The characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.

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

- a. The City’s failure to implement an escalating enforcement process at construction sites has resulted in repeated or prolonged discharges of pollutants in storm water discharges not reduced to the MEP.
- b. Sediment is a pollutant that when discharged can be lethal when it smothers benthic communities.
- c. Sediment can transport toxic materials (e.g., metals and synthetic organics) from construction sites into receiving waters.
- d. Escalating enforcement should only be necessary for a subset of noncompliant sites. It is reasonable to assume that there were some compliant sites within the City jurisdiction, and some sites that would have come into compliance without escalating enforcement, during the violation period. Therefore, since not all sites warrant escalating enforcement, a Potential for Harm score of “**moderate**,” rather than above moderate, is warranted.

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Deviation from Requirement

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).

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

- a. The City failed to implement follow-up actions at construction sites where deficiencies of its minimum BMP requirements were observed by its own staff as required by Order No. R9-2007-0001.
- b. The City failed to implement an escalating enforcement process that achieves prompt corrective actions at construction sites as required by Order No. R9-2007-0001. In many cases there was no escalation, nor any indication that escalation was even considered.

Per Day Factor and Per Day Assessment

Using a “Potential for Harm” factor of “**moderate**” and “Deviation from Requirement” factor of “**major**”, the “Per Day Factor” for failing to implement an escalating enforcement process to require implementation of designated minimum BMPs at construction sites in Table 3 of the Enforcement Policy is **0.55**. Calculating the Per Day Assessment is achieved by multiplying:

$$\begin{aligned} (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) &= \text{Per Day Assessment} \\ (0.55) \times (\$10,000) &= \$5,500 \end{aligned}$$

Step 4 – Adjustment Factors

Culpability

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

- a. The City knowingly failed to implement an escalating enforcement process, and it continued to do so after receiving a Notice of Violation from the San Diego Water Board.

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- b. The City has the ability to obtain the appropriate level of staffing and expertise to implement an effective escalating enforcement process but has failed to take the necessary steps to achieve that requirement of Order No. R9-2007-0001 and has, therefore, failed to act with the due standard of care.
- c. The City's continued failure to implement an effective escalating enforcement process demonstrates at least a negligent and/or intentional, if not knowing, disregard for the requirements of Order No. R9-2007-0001.

Cleanup and Cooperation

The Prosecution Team has assigned a cleanup and cooperation multiplier of **1.2** from a range of 0.75 to 1.5 for this violation. While the City has been cooperative with San Diego Water Board staff during investigation of its enforcement process, the City was issued multiple Notices of Violation yet continued to ignore the programmatic failures identified by the San Diego Water Board and continuously failed to escalate enforcement at construction sites with obvious and continued BMP violations.

History of Violation

The Prosecution Team assigned a history of violation multiplier of **1.1** to this alleged violation because, although the City has previously been assessed administrative penalties for construction storm water related violations, the previous violations were not related to the City's failure to implement an effective escalating enforcement program to ensure compliance with its Storm Water Standards.

Multiple Day Violations

The days of violation for failure to implement an effective escalating enforcement process at construction sites has been calculated to be:

October 6, 2013 through May 14, 2015

The days of violation were calculated based on review of City inspection reports at Estates at Costa del Mar beginning on October 6, 2013 and ending with the FY14 Concrete Street Panel Replacement CIP on May 14, 2015 (**Exhibit 38**). October 6, 2013 was the start date for the days of violation because San Diego Water Board inspectors did not request City inspection documentations relating to the City's progressive enforcement process prior to that date, although it is likely that the City failed to adequately enforce BMP requirements at construction sites prior to this date. The Prosecution Team is not implying that the violation period ended on May 14, 2015, rather that was the date the Prosecution Team closed the violation period in order to proceed with the issuance of this Complaint.

Technical Analysis
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Upon review of the findings necessary to invoke the Enforcement Policy's Multiple Day Violations reduction, an adjustment can be made to reduce the days of violation for the purpose of calculating liability. In this case, the Prosecution Team believes that the failure to implement an escalating enforcement process at construction sites did not result in an economic benefit that can be calculated on a daily basis during the **five hundred eighty six (586)** days that the alleged violations occurred. Rather, the Discharger experienced a programmatic cost savings from failing to comply with the requirements. For this violation, the Prosecution Team has elected to apply the maximum reduction allowed by the Enforcement Policy as follows:

Days of Violation = 586 days
 Maximum Reduction Allowed by Enforcement Policy = 25 days

Step 5 – Determination of Base Liability Amount

The Base Liability amount for failure to implement an escalating enforcement process at construction sites of **two hundred seventy two thousand two hundred fifty dollars (\$272,250)** 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, calculated as follows:

$$\begin{aligned} & \text{(Per Day Assessment)} \times \text{(Days of Violation)} = \\ & (\$5,500) \times (25) = \$137,500 \end{aligned}$$

$$\begin{aligned} & \text{(Initial Amount of Liability)} \times \text{(Culpability)} \times \text{(Cooperation)} \times \text{(History of Violation)} = \\ & (\$137,500) \times (1.5) \times (1.2) \times (1.1) = \$272,250 \end{aligned}$$

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

See Section O. Factors Associated With All Violations

Step 7 – Other Factors as Justice May Require

See Section O. Factors Associated With All Violations

Step 8 – Economic Benefit

See Section O. Factors Associated With All Violations

Step 9 – Maximum and Minimum Liability Amounts

See Section O. Factors Associated With All Violations

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Step 10 – Final Liability Amount for Violation No. 3

The proposed civil liability for failing to implement an escalating enforcement process to require implementation of designated minimum BMPs at construction sites is two hundred seventy two thousand two hundred fifty dollars (\$272,250).

Final Calculated Liability Amount for All Violations

Violation 1 (\$3,121,200) + Violation 2 (\$190,000) + Violation 3 (\$272,250) = \$3,583,450

O. FACTORS ASSOCIATED WITH ALL VIOLATIONS

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

According to the City's most recent Certified Audited Financial Report, as of June 30, 2015, it had \$99.6 million in the General Fund's unassigned fund balance, of which \$32.1 million is available for appropriation. In addition, the General Fund contains an additional unreserved balance of \$32.1 million, the General Fund Stability Reserve contains an unreserved balance of \$67.4 million, and the Public Liability Fund Reserve contains an unreserved balance of \$37.9 million, all of which are available for the City to use at its discretion. Based on this publicly available information, the Prosecution Team has determined that the City has the ability to pay the proposed liability without impacting its required governmental activities.

Step 7 – Other Factors as Justice May Require

In accordance with step 7 of the Enforcement Policy, the total base liability amount may be adjusted under the provision for "other factors as justice may require" if express findings are made to justify this. The cost of investigation and enforcement are considered "other factors as justice may require," and are taken into account in the total base liability amount to further deterrence. Here, the Regional Board accrued **\$40,011** in staff costs associated with the investigation and preparation of this Complaint (**Exhibit 49**). The Prosecution Team finds that it is appropriate to increase the Total Base Liability amount for the three violations to **\$3,623,461**. This increase is in consideration of the costs of investigation and enforcement relative to the Total Base Liability amount and is warranted given the totality of the circumstances and is intended to serve as a sufficient general and specific deterrent against future violations.

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Step 8 – Economic Benefit

Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute a violation. The violations described in the Complaint stem from inadequate and ineffective inspection and enforcement staffing within the City's storm water management programs. These issues were identified in the City's response to the February 20, 2015 NOV, which described the need to hire up to eleven new inspectors and one new supervisor, in addition to providing more adequate training from a professional third party. In actuality, the City hired or reassigned over 47 positions with storm water inspection responsibilities. It is the position of the San Diego Water Board that had these positions been in place and properly trained prior to the January 27, 2011 NOV, the violations identified in this Complaint may have been avoided. Therefore, the San Diego Water Board contends that the City enjoyed an economic benefit related to the avoided cost of employment and training for those positions recently assigned duties related to storm water inspection/oversight.

To compute the economic benefit, the San Diego Water Board reviewed staff information provided by the City and publically available salary information for City positions. The analysis was completed for each position identified with new storm water duties. For conservative purposes, the San Diego Water Board has assessed the noncompliance date as the January 2011 NOV for all positions. The compliance date is different for each position, and has been assumed for simplicity, to be the hiring date. The San Diego Water Board believes this to be a conservative estimate, as additional classroom/on-job training would likely be required prior to staff being prepared to evaluate storm water compliance unassisted.

In addition to staffing, the City identified a need for adequate, third party training related to storm water inspections. As part of the February 2015 NOV response, the City provided a scope of work related to professional training they were seeking for staff on storm water BMP inspections. As a result, the City secured a contract with URS Corporation to provide multiday training for their staff. Training was conducted from April to May 2015 according to attendance sheets provided by the City. The San Diego Water Board believes that ongoing, routine training is necessary to maintain quality inspectors, however, did not assess historical training inadequacies as part of this analysis.

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In summary, the City avoided approximately \$4,194,343 in annual staff expenses from 2011 to 2015. In addition, the City failed to provide adequate training to its staff until May 2015. The estimated delayed cost to the City for failing to provide such training is \$992. The BEN financial model provided by the USEPA was used to compute the total economic benefit of noncompliance. Cost estimate and other assumptions are detailed in the attached tables (**Exhibit 40**). For computational purposes, the penalty payment date was established as October 12, 2016, the date this matter is scheduled to be considered by the San Diego Water Board. Changes to this date will affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately **\$4,195,335**.

Step 9 - Maximum and Minimum Liability Amounts

Maximum Liability Amount

Pursuant to CWC section 13385 the maximum administrative civil liability that the San Diego Water Board may assess for each violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation); and when a discharge occurs, (b) ten dollars (\$10) for every gallon discharged, over one thousand (1,000) gallons discharged, that was not cleaned up. For Violation 2 (discharge violation) the Prosecution Team is proposing the assessment of civil liability for the discharge of sediment to waters of the United States only on a per day basis based on the difficulty calculating the gallons discharged for the discharges identified in ACL Complaint No. R9-2016-0155. The Maximum Liability Amount that could be assessed for each violation, therefore, is shown in the table below:

Violation Number	Violation Description	Days of Violation	Maximum Liability (CWC §13385)
1	Failure to Require Implementation of Minimum BMPs Designated in the City's Storm Water Standards at Construction Sites	1663	\$16,630,000
2	Failure to Comply with Discharge Prohibitions of Municipal Storm Water Permit	19	\$190,000
3	Failure to Implement an Escalating Enforcement Process to Require Implementation of Designated Minimum BMPs at Construction Sites	586	\$5,860,000
		TOTAL	\$22,680,000

Minimum Liability Amount

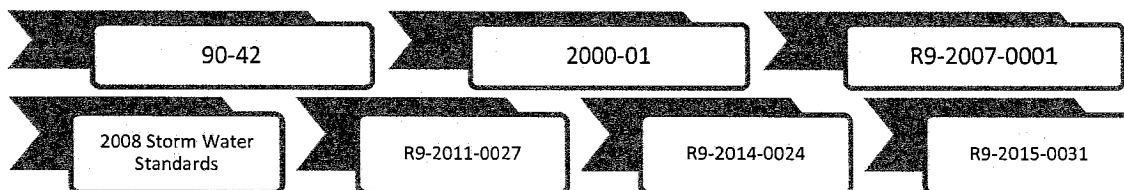
CWC section 13385, subdivision (e) requires that when pursuing administrative civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability Amount be at least ten percent (10%) higher than the Economic Benefit Amount.

The economic benefit calculated for the violations alleged in ACL Complaint R9-2016-0155 is **\$4,195,335**. The economic benefit is based on avoided costs associated with the hiring and of additional staff and the delayed costs of training of the staff necessary for the City to comply with the construction component requirements of Order No. R9-2007-0001. The three violations alleged in ACL Complaint R9-2016-0155 are a direct result of the City's failure to hire and train the appropriate number of staff to implement an effective construction management program. Therefore, the calculated economic benefit applies to all three violations. In accordance with the Enforcement Policy, the minimum liability amount for the violations alleged in ACL Complaint No. R9-2016-0155 is **\$4,614,868** (i.e. 1.1 X \$4,195,335).

P. CALCULATED LIABILITY AND FINAL LIABILITY AMOUNT

Based on the unique facts of this case and the penalty calculation methodology within Section VI, the calculated administrative civil liability amount for the violations alleged in ACL Complaint No. R9-2016-0155 is **three million six hundred twenty three thousand four hundred sixty-one dollars (\$3,623,461)**. In this instance, the economic benefit requirements of the Water Code and the Enforcement Policy require the proposed administrative civil liability for the violations alleged in ACL Complaint R9-2016-0155 to be the calculated economic benefit plus ten percent (10%), which is **four million six hundred fourteen thousand eight hundred sixty eight dollars (\$4,614,868)**.

Q. CONCLUSION



The Prosecution Team concludes that the proposed penalty amount of **\$4,614,868** is consistent with the goal of the Enforcement Policy to deter harmful conduct and achieve maximum water quality benefits. The violations addressed in this enforcement action indicate that there is, or has been, a long running programmatic failure as City leaders try to simply absorb the requirements of Order No. R9-2007-0001 into an enduring organizational structure that values approving construction permits far ahead of its own ordinances adopted to protect water quality. Unfortunately, this approach has not been protective of water quality and has resulted in frequent violations of fundamental MS4 Permit obligations. This enforcement action should compel City leadership to address the underpinnings of the City's culpability and implement a construction management program that protects the creeks, bays, and beaches.

Technical Analysis
ACL Complaint No. R9-2016-0155

July 18, 2016

R. EXHIBITS

	Document	Document Handle
1	Order No. R9-2007-0001	41956
2	Order No. 2009-0009-DWQ, amended by Order No. 2010-0014-DWQ	2311217 2311214
3	2008 JURMP	61159
4	2008 Storm Water Standards	61159, Appendix VIII
5	2012 Storm Water Standards	2329151
6	SDWB 10/25/2010 Inspection Report Casa Mira View	200801
7	SDBW 11/3/2010 NOV R9-2010-0146 Casa Mira View	200977
8	<ul style="list-style-type: none"> • SDWB 12/22/2010 Inspection Report BMR/Del Sur Unit 14 • SDWB 1/25/2011 NOV R9-2011-0025 BMR/Del Sur Unit 14 	216557
9	SDWB 1/27/2011 NOV R9-2011-0027 City	217757
10	City 2/28/2011 Response to NOV R9-2011-0047	223784
11	SDWB 9/20/2013 Inspection Report Torrey Hills Unit 19	1093127
12	SDWB 10/4/2013 NOV R9-2013-0148 Torrey Hills Unit 19	2335785
13	<ul style="list-style-type: none"> • SDWB 1/7/2014 Inspection Report Estates at Costa del Mar • SDWB 1/24/2014 SEL Estates at Costa del Mar 	1340523
14	City 10/2013 thru 1/2014 Estates at Costa del Mar Inspection Reports	2335746
15	<ul style="list-style-type: none"> • SDWB 1/9/2014 Inspection Report Casa Mira View • SDWB 1/14/2014 Inspection Report Casa Mira View • SDWB 2/18/2014 NOV R9-2014-0018 Casa Mira View 	1352259
16	<ul style="list-style-type: none"> • SDWB Email to City, Casa Mira View "Grossly in noncompliance" • City 11/2010 thru 1/2014 Casa Mira View Inspection Reports 	1354202
17	SDWB 1/29/2015 ACL Order No. R9-2014-0044 Casa Mira View	1843470
18	SDWB 3/7/2014 NOV R9-2014-0024 City	2335766
19	City's SOPs for FED Resident Engineers	2304189
20	SDWB April 8 – 10, 2014 Audit Findings Report	1436999
21	City 7/15/2014 Response to Audit	1480540
22	<ul style="list-style-type: none"> • SDWB 11/17/2014 Inspection Findings Poway Road Bicycle Path • SDWB 11/17/2014 SEL City FED • City 11/19/2014 Response to SEL • City 9/14 thru 11/2014 Inspection Reports Poway Road Bicycle Path 	1833304
23	SDWB 11/14/2014 Inspection Report Hilton Garden Inn	1755249
24	<ul style="list-style-type: none"> • City 10/16/2014 Hilton Garden Inn Storm Water Notice • City 10/2014 thru 11/2014 Inspection Reports Hilton Garden Inn 	1834279
25	• SDWB 12/4/2014 Inspection Report La Jolla Del Rey Phase 1	1773351

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	• SDWB 12/15/2014 La Jolla Del Rey Phase 1 NOV R9-2014-0148	
26	SDWB 12/12/2014 Inspection Report La Jolla Del Rey Phase 1	2304835 1833516
27	City 12/15/2014 NOV R9-2014-0148 Response	1833504
28	• SDWB 12/4/2014 Inspection Report La Jolla Del Rey Phase 2 • SDWB 12/15/2014 NOV R9-2014-0149 La Jolla Del Rey Phase 2	1773356
29	SDWB 12/12/2014 Inspection Report La Jolla Del Rey Phase 2	3338616 1833516
30	• Complaint Photographs 12/4/2014 Northwest Village Creek • SDWB 12/4/2014 Inspection Report Northwest Village Creek • SDWB 12/10/2014 NOV R9-2014-0145 Northwest Village Creek	1769979
31	• City 9/26/2014 Storm Water Notice Northwest Village Creek • City 9/5/2014, 10/2/2014, 10/30/2014, 11/26/2014, 12/1/2014 Storm Water Notices Northwest Village Creek	2338680
32	SDWB 7/7/2015 ACL Order R9-2015-0015 Northwest Village Creek	1989117
33	SDWB 12/12/2014 Inspection Report Mission Gorge Apartments	1833558
34	SDWB 12/23/2014 NOV R9-2014-0154 Mission Gorge Apartments	1785472
35	SDWB 2/20/2015 NOV R9-2015-0031 City	1860672
36	City 5/7/2015 NOV Response	1924246
37	SMARTS Violation Reports	2329344
38	Citizen Discharge Complaints	1921512 1937686 1986405
39	Staff Cost Worksheet	2335128
40	USEPA BEN Model Calculations	2329143

Administrative Civil Liability Complaint

Fact Sheet

The California State Water Resources Control Board (State Water Board) and the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) are authorized to issue complaints for civil liabilities under California Water Code (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 respond, a default order may be issued against you.** The complaint is accompanied by a transmittal letter, 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 San Diego Water Board Prosecution Team and the person(s) named in the complaint, referred to as the "Discharger(s)." The Prosecution Team is comprised of San Diego 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 a hearing, the hearing will be held before the San Diego Water Board (either the seven Governor appointed board members or the Executive Officer). Those who hear the evidence and rule on the matter act as judges. The San Diego Water Board is assisted by an Advisory Team, 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 San Diego Water Board, 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 enforcement website at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/policy.shtml

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 ninety (90) days of the issuance of the Complaint, unless the Discharger waives that requirement by signing and submitting the Waiver 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 San Diego Water Board will deliberate to decide the outcome. The San Diego Water 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 San Diego Water 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 sections 13327, 13385(e), and 13399). During the period provided to submit evidence (set forth in the Hearing Notice) and at the hearing, the Discharger may submit information that it believes supports its position regarding the complaint.

ACL Complaint Fact Sheet

If the Discharger intends to present arguments about its ability to pay it must provide reliable documentation to establish that ability or inability. The kinds of information that may be used for this purpose include:

For an individual:

1. Last three (3) years of signed federal Internal Revenue Service (IRS) 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; and
12. Other debt documentation.

For a business:

1. Copies of last three (3) years of company IRS tax returns, signed and dated;
2. Copies of last three (3) years of company financial audits;
3. Copies of last three (3) years of IRS tax returns of business principals, signed and dated; and
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 (3) years, specifically:
 - a. IRS Form 1120-C for C Corporations;
 - b. IRS Form 1120-S for S Corporations; or
 - c. IRS Form 1065 for partnerships.
2. A completed and signed IRS Form 8821. This allows the IRS to provide the State Water Board 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;
3. The following information can be substituted if income tax returns cannot be made available:
 - a. Audited Financial Statements for last three (3) 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 (3) years; and
 - f. Income from other companies and amounts for the last three (3) 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; or
 - d. Independent or publicly owned utility.
2. The following 1990 and 2000 United States Census data:
 - a. Population;
 - b. Number of persons age eighteen (18) years and above;
 - c. Number of persons age sixty-five (65) years and above;
 - d. Number of Individuals below one hundred and twenty-five percent (125%) of poverty level;
 - e. Median home value; and
 - 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; and
 - 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; and
11. Next year's budgeted/anticipated general fund expenditures plus net transfers out.

This list is provided for information only. The Discharger remains responsible for providing all relevant and reliable information regarding its 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 San Diego Water Board issues an order requiring payment, the 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 http://www.waterboards.ca.gov/public_notices/petitions/water_quality/wqpetition_instr.shtml. An order of the State Water Board, including its ruling on a petition from a San Diego 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 San Diego Water Board 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.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

PROPOSED DRAFT

HEARING PROCEDURE FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
NO. R9-2016-0155
ISSUED TO

CITY OF SAN DIEGO
CONSTRUCTION OVERSIGHT PROGRAM

SCHEDULED FOR **OCTOBER 12, 2016**

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 (Water Code) sections 13323 and 13385 against the City of San Diego (Discharger) alleging it has violated San Diego Water Board Order No. R9-2007-0001, NPDES No. CAS0108758, *Waste Discharge Requirements for Discharges of 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*. The ACL Complaint proposes that administrative civil liability in the amount of **\$4,614,868** be imposed as authorized by Water Code section 13385. Unless the Discharger waives its right to a hearing and pays the proposed liability, a hearing will be held before the San Diego Water Board on **October 12, 2016**, 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 hearing will be held at the San Diego Water Board office at 2375 Northside Drive, Suite 100, in San Diego. An agenda for the hearing will be issued at least ten (10) days before the hearing and will be posted on the San Diego Water Board's web page at: www.waterboards.ca.gov/sandiego.

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City of San Diego
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ACL Complaint No. R9-2016-0155**

July 18, 2016

Hearing Procedure

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, section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with section 648(d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in Title 23 of the California Code of Regulations, section 648(b), Chapter 5 of the Administrative Procedures Act (commencing with section 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 PROCEDURE AND DEADLINES HEREIN MAY BE AMENDED BY THE ADVISORY TEAM IN ITS DISCRETION. **ANY OBJECTIONS TO THE PROPOSED PROCEDURE MUST BE RECEIVED BY CATHERINE HAGAN, SENIOR STAFF COUNSEL, NO LATER THAN JULY 28, 2016, 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 either "designated 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 parties in this proceeding:

1. San Diego Water Board Prosecution Team; and
2. City of San Diego

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Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party, and are not already listed above, shall request party status by submitting a request in writing (with copies to the existing designated parties) no later than 5:00 p.m. on **August 9, 2016**, 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 contact 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 5:00 p.m. on **August 17, 2016**. The parties will be notified by 5:00 p.m. on **August 29, 2016**, as to whether the request has been granted or denied.

Contacts

Advisory Team:¹

Catherine Hagan, Senior Staff Counsel
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Prosecution Team:

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¹ Additional staff may be designated as advisory staff with the Final Hearing Procedures.

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Discharger:

Stacey LoMedico, Assistant Chief Operating Officer
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San Diego, CA 92101
SLoMedico@sandiego.gov

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David Graham, Deputy Chief Operating Officer, Neighborhood Services
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Kris McFadden, Director, Transportation & Storm Water
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Drew Kleis, Deputy Director, Storm Water Division
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San Diego, CA 92101
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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 Team) have been separated from those who will provide advice to the San Diego Water Board (Advisory Team). Members of the Advisory Team¹ include Catherine Hagan, Senior Staff Counsel, and Deborah Jayne, Senior Environmental Scientist. Members of the Prosecution Team are Mayumi Okomoto, Senior Staff Counsel, Naomi Kaplowitz, Staff Counsel; James Smith, Assistant Executive Officer; Jeremy Haas, Environmental Program Manager; Chiara Clemente, Senior Environmental Scientist; 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 Team 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 Team member on the other hand, unless the communication is copied to all other designated and interested

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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 sixty (60) minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have three (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 no later than **September 27, 2016**. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the San Diego Water Board (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, California Code of Regulations, 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. (Discharger only) If the Discharger intends 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 Discharger should submit supporting evidence as set forth in the "ACL Fact Sheet" under "Factors that must be considered by the Board."
6. (Discharger only) If the Discharger would like to propose a Supplemental Environmental Project (SEP) in lieu of paying some or all of the civil liability in accordance with the State Water Board's Water Quality Enforcement Policy, the Discharger shall submit a detailed SEP proposal including a specific implementation timetable.

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The Prosecution Team shall submit two (2) hard copies and one (1) electronic copy of the information to Catherine Hagan, Senior Staff Counsel, so that it is received no later than 5:00 p.m. on **August 29, 2016**.

The remaining designated parties shall submit two (2) hard copies and one (1) electronic copy of the information to Catherine Hagan, Senior Staff Counsel, so that they are received no later than 5:00 p.m. on **September 15, 2016**.

In addition to the foregoing, each designated party shall send one (1) copy of the above information to each of the other designated parties by 5:00 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 **September 28, 2016**. 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. PowerPoint 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 hearing 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 Water Code section 13228.15. A pre-hearing conference may 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 5:00 p.m. on **September 15, 2016**.

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 5:00 p.m. on **September 27, 2016**, 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

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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, California 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. Many of these documents are also posted online 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.

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ACL Complaint No. R9-2016-0155**

July 18, 2016

IMPORTANT DEADLINES

July 18, 2016	Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends proposed Hearing Procedure to Discharger and Advisory Team, and publishes Public Notice.
July 28, 2016	Objections due on proposed Hearing Procedure.
August 9, 2016	Deadline for submission of request for designated party status.
August 17, 2016	Deadline for opposition to request for designated party status.
August 18, 2016	Dischargers' deadline for waiving right to hearing.
August 29, 2016	Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above.
August 29, 2016	Advisory Team issues Hearing Procedure, and issues decision on requests for designated party status, if any.
September 15, 2016	Remaining Designated Parties' Deadline for submission of all information required under "Evidence and Policy Statements," above.
September 15, 2016	All Designated Parties' deadline for submission of request for pre-hearing conference.
September 27, 2016	All Designated Parties' deadline for submission of rebuttal evidence (if any) and evidentiary objections.
September 28, 2016	Interested Parties' deadline for submission of non-evidentiary policy statements.
October 12, 2016	Hearing.

PROPOSED

CATHERINE G. HAGAN
Senior Staff Counsel

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 San Diego (Discharger) in connection with Administrative Civil Liability Complaint No. **R9-2016-0155** (Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within ninety (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 upon approval of this settlement by the San Diego Water Board the Discharger will remit payment for the administrative civil liability imposed in the amount of **four million six hundred fourteen thousand eight hundred sixty eight dollars (\$4,614,868)** by check that references "**ACL Complaint No. R9-2016-0155**" made payable to the "**State Water Pollution Cleanup and Abatement Account.**" Payment must be received within thirty (30) days of approval by the San Diego Water Board at the following address: State Water Resources Control Board, Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento, CA 95812-1888. A copy of the check must also be received by the San Diego Water Board at 2375 Northside Drive, Suite 100, San Diego, CA 92108 within thirty (30) days of approval via U.S. Postal Service or e-mail to sandiego@waterboards.ca.gov, attention CW-255222:rstewart.
- 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 thirty (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 and issue a new complaint. I understand that this proposed settlement may be 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.

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 ninety (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 ninety (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)