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14 MILLSMONT HOMEOWNERS ASSOCIATION

15
16 UNITED STATES DISTRICT COURT FOR THE
17
18 NORTHERN DISTRICT OF CALIFORNIA
19

20 _____)
21 MILLSMONT HOMEOWNERS ASSOCIATION,)

22 Plaintiffs,)

23 v.)

No. _____

24 CITY OF OAKLAND and DESILVA GATES)
25 CONSTRUCTION, LLP,)

26 Defendants.)
27 _____)
28

29
30 COMPLAINT FOR DECLARATORY AND OTHER RELIEF AGAINST IMPROPER
31 DISCHARGES INTO WATERS OF THE UNITED STATES
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I.
INTRODUCTION

Plaintiffs Millsmont Homeowners Association alleges as follows.

1. Plaintiff Millsmont Homeowners Association (“MHA”) brings this complaint against City of Oakland (“City”) and DeSilva Gates Construction, L.P. (“DeSilva”) for stormwater discharges, and against the City for discharges of sewage, into Chimes Creek located in Oakland, California, in violation of Clean Water Act section 301(a), 33 U.S.C. § 1311(a); section 401(a)(1), 33 U.S.C. § 1341(a)(1); section 402(a), 33 U.S.C. § 1342(a); section 404(a), 33 U.S.C. § 1344(a); and implementing permits and other requirements issued by the State of California. These discharges cause significant adverse impacts on beneficial uses of Chimes Creek.

2. In the mid-1980s, incident to the Ridgemont Development, the City of Oakland expanded the stormwater system which discharges into Chimes Creek, to collect rainfall and surface groundwater that was naturally tributary to a different watershed, Lions Creek. In 2004, the City permitted the development of Leona Quarry Project (located downslope of the Ridgemont Development) on Chimes Creek. The City permitted DeSilva to construct and operate a drainage system that collects and discharges rainfall and surface groundwater into the stormwater system and thus into Chimes Creek. These expansions of the City’s stormwater system have cumulatively caused a substantial increase in turbidity, and in the magnitude and duration of peak flows, into the creek during the winter and even the dry seasons.

1
2 6. Because this Court has original jurisdiction over the claims brought under the
3 Clean Water Act, it may also hear the related claims brought under the California Water
4 Code pursuant to 28 U.S.C. § 1367(a), which provides:

5
6 in any civil action of which the district courts have original jurisdiction,
7 district courts shall have Tsupplemental jurisdictionT over all other claims that
8 are so related to claims in the action within such original jurisdiction that they
9 form part of the same case or controversy under Article III of the United
States Constitution. Claims are so related as to form the “same case or
controversy” when they derive from a common nucleus of operative fact.

10 *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The rationale underlying
11 Tsupplemental jurisdictionT is to promote judicial economy, convenience, and fairness to
12 litigants. *Id.* at 726.

13
14 7. Pursuant to section 505(b) of the Act, 33 U.S.C. § 1365(b), Plaintiff provided
15 written notice of its intent to sue for the violations alleged herein, by first class and electronic
16 mail. *See* “Notice of Citizen Suit under Section 505 of the Clean Water Act, 33 U.S.C. §
17 1365, for Discharges into Chimes Creek” (March 27, 2006).

18
19 8. More than sixty days have passed since Plaintiff gave notice of the alleged
20 violations.

21
22 9. Venue lies in the Northern District of California pursuant to 28 U.S.C. §
23 1391(b). “A civil action ... may be brought ... in a judicial district in which a substantial part
24 of the events or omissions giving rise to the claim occurred, or a substantial part of property
25 that is the subject of the action is situated....” All of the acts or omission giving rise to the
26 claims raised herein occurred in Alameda County which is within the jurisdiction of the
27 Northern District of California.
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III.
PARTIES

10. Plaintiff MILLSMONT HOMEOWNERS ASSOCIATION is an unincorporated association of members who reside within a largely residential area in central East Oakland, bound by Seminary Avenue to the north, Interstate 580 to the east, Edwards/Sunkist to the south, and with Hillmont/Delmont/Oakdale as its western perimeter. MHA's membership includes several of the owners or other occupants of residential properties located along Chimes Creek, as it runs east of Nairobi Place. Members of the MHA use, enjoy and benefit from Chimes Creek through non-contact recreation, wildlife observation, and aesthetic enjoyment. The water quality of Chimes Creek directly affects the recreation, aesthetic, environmental, and property interests of MHA's members.

11. Defendant DESILVA GATES CONSTRUCTION, LLP is a limited partnership registered in California. It is the project sponsor and builder of the Leona Quarry Project, and a permittee under the NPDES General Construction Permit No. CAS000002: Waste Discharge Requirements for Discharges of Stormwater Runoff Associated with Construction Activity (1999) ("General Construction Permit"). Its business address is 11555 Dublin Boulevard, Dublin, California 94568.

12. Defendant CITY OF OAKLAND located in Alameda County, is a division of the State of California. It includes the Public Works Agency which provides for the design, construction, management and maintenance of the City's infrastructure, including creeks, sewers, storm drains, and building and structures. It also includes the Community and Economic Development Agency which is responsible for planning, zoning, building services,

1 redevelopment, and housing and community development. The City is a named permittee
2 under NPDES Permit No. CAS0029831: Waste Discharge Requirements for the Alameda
3 Countywide Clean Water Program (“Municipal Stormwater Permit”), and NPDES Permit
4 No. CA0038512: Waste Discharge Requirements for City of Oakland Sanitary Sewer
5 Collection System (“Sanitary Sewer Permit”). The City’s business address is One Frank H.
6 Ogawa Plaza, Oakland, California 94612.
7
8

9
10 **IV.**
LEGAL BACKGROUND

11 **A. Water Quality Standards**

12 13. Congress enacted the Clean Water Act (“CWA” or “Act”) to “restore and
13 maintain the chemical, physical and biological integrity of the nation’s waters.” 33 U.S.C. §
14 1251(a). The Act’s goal is to eliminate “the discharge of pollutants into navigable waters,”
15 and in the interim to attain “water quality which provides for the protection and propagation
16 of fish, shellfish, and wildlife and provides for recreation in and one the water.” 33 U.S.C.
17 § 1251(a)(1) and (2).
18

19
20 14. Under section 303 of the Act, 33 U.S.C. § 1313, each state adopts water
21 quality standards. Such standards consist of narrative and numeric criteria, designated
22 beneficial uses, and an antidegradation policy. *See also* 40 C.F.R. §§ 131.10 – .12.
23

24 15. The State of California generally administers water quality standards,
25 permitting, and other requirements of the Clean Water Act for facilities or activities which
26 discharge pollutants or otherwise cause pollution in California. The Porter-Cologne Act
27 authorizes CalEPA to administer these requirements. *See* California Water Code § 13100.
28

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1 The U.S. Environmental Protection Agency (“USEPA”) has delegated the authorities at issue
2 in this complaint to the State Water Resources Control Board (“SWRCB”). *See* 54 Fed.
3 Reg. 40664 (Oct. 3, 1989). The SWRCB, through its San Francisco Regional Water Quality
4 Control Board (“Regional Water Quality Board” or “RWQCB”), administers the permits at
5 issue in this Complaint. *See* California Water Code § 13377. The Regional Water Quality
6 Board has adopted, and the SWRCB has approved, the Water Quality Control Plan (“Basin
7 Plan”) for the San Francisco Bay Region, which states the standards and related
8 programmatic requirements for regulation of water quality in the San Francisco Bay Region,
9 including Chimes Creek. *See* Basin Plan (Nov. 2004), *available at*
10 [HThttp://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH2.html](http://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH2.html)TH.

14 16. The SWRCB has designated beneficial uses for each significant water body in
15 the region, organized according to the seven major watersheds within the region. *See id. at*
16 Ch. 2. This designation occurred pursuant to CWA section 303(c), 33 U.S.C. § 1313(c),
17 and implementing State laws. USEPA has approved this Basin Plan. The beneficial uses of
18 any specifically identified water body generally apply to all its tributaries. Chimes Creek is
19 tributary to San Francisco Bay Lower. The beneficial uses that are relevant to Chimes Creek
20 are Non-Contact Recreation and Wildlife Habitat.

23 17. The Basin Plan includes water quality criteria to protect the designated uses of
24 a given water body. *See* 40 C.F.R. § 131.11. The Regional Water Quality Board has
25 established the following water quality objective for turbidity which is applicable to Chimes
26 Creek:
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1 “Turbidity: Waters shall be free of changes in turbidity that cause nuisance or adversely
2 affect beneficial uses. Increases from normal background light penetration or turbidity
3 relatable to waste discharge shall not be greater than 10 percent in areas where natural
4 turbidity is greater than 50 NTU.” Basin Plan, Ch. 3 *available at*
5 [HThhttp://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH3.html](http://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH3.html). It also
6 has established a water quality objective for tastes and odors: “Waters shall not contain taste-
7 or odor-producing substances in concentrations that impart undesirable tastes or odors to fish
8 flesh or other edible products of aquatic origin, that cause nuisance, or that adversely affect
9 beneficial uses.” *Id.*

10
11
12
13 18. The Basin Plan includes the State’s Antidegradation Policy as a water quality
14 standard. The Antidegradation Policy requires existing water quality to be maintained at
15 1968 levels or higher, and any change to water quality must not “unreasonably affect present
16 and anticipated beneficial use[s].” SWRCB, Resolution 68-16 (Oct. 28, 1968).

17
18 19. The Basin Plan also includes discharge prohibitions issued by the Regional
19 Water Quality Board under authority of California Water Code section 13243: “A Regional
20 Water Quality Board, in a water quality control plan or in waste discharge requirements, may
21 specify certain conditions or areas where the discharge of waste, or certain types of waste,
22 will not be permitted.”

23
24 **B. Discharge of Pollutants**

25
26 20. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the unpermitted
27 discharge of pollutants into waters of the United States: “Except as in compliance with this
28 section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of

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1 any pollutant by any person shall be unlawful.” The exceptions under sections 1342 and
2 1344 are relevant to this case.

3
4 **1. National Pollutant Discharge Elimination System Permit**

5 21. A discharge of pollutants from a point source into the waters of the U.S. is
6 subject to a National Pollutant Discharge Elimination System (“NPDES”) permit under
7 CWA section 402, 33 U.S.C. § 1342. “Discharge of a pollutant” means “any addition of
8 any pollutant to navigable waters from any point source.” The Regional Water Quality
9 Board administers the NPDES program for the San Francisco Bay Region.
10

11 22. There are three NPDES permits relevant to this case: a General Construction
12 Permit, which governs DeSilva’s construction activities at the Leona Quarry project site; a
13 Municipal Stormwater Permit, which governs the City’s operation and maintenance of its
14 storm sewer system; and a Sanitary Sewer Permit, which governs the City’s operation and
15 maintenance of its sanitary sewer system. The relevant terms and conditions of the permits
16 are discussed in the specific claims in Section IV below.
17

18
19 **a. General Construction Permit**

20 23. Under 40 C.F.R. Parts 122, 123, and 124, an NPDES permit for discharge
21 associated with construction activity requires implementation of Best Available Technology
22 Economically Achievable (“BAT”) and Best Conventional Pollutant Control Technology
23 (“BCT”) to reduce or eliminate stormwater pollution. The SWRCB regulates discharges
24 associated with construction activity under a state-wide permit known as the General
25 Construction Permit. To obtain authorization for proposed stormwater discharges to surface
26 waters under the General Construction Permit, a discharger must submit a Notice of Intent to
27
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1 the SWRCB prior to the commencement of construction. The permit requires a Storm Water
2 Pollution Prevention Plan (“SWPPP”).

3
4 **b. Municipal Stormwater Permit**

5 24. The City is subject to the County-wide Municipal Stormwater Permit for
6 discharge of stormwater runoff into storm drains and creeks within its jurisdiction.

7
8 25. The Municipal Stormwater Permit, issued by the Regional Water Quality
9 Board in 1997, was in effect when DeSilva initiated the Leona Quarry Project. The board
10 amended and reissued the Municipal Stormwater Permit in 2003. The 1997 provisions have
11 counterparts in the 2003 amendments that are functionally equivalent or more stringent.
12 MHA understands and alleges that discharges that commenced during the term of the 1997
13 permit are subject on a continuing basis to that permit’s provisions as continued in effect by
14 the 2003 amendments. Unless other stated, citations in the claims below are to the 1997
15 form of these provisions.
16
17

18 **c. Sanitary Sewer Permit**

19 26. The Regional Water Quality Board has issued an NPDES permit to the City
20 that regulates Sanitary Sewer Overflows. Such overflows may be caused by infiltration of
21 groundwater into the sanitary sewer system. Such overflows are discharged to various storm
22 drain systems and creeks that are tributary to the San Francisco Bay. In 1976 the Regional
23 Water Quality Board issued the first Sanitary Sewer Permit to the City for such discharges.
24 It reissued the permit in 1984, 1989 and 1994. *See id.* It most recently renewed the Sanitary
25 Sewer Permit on March 17, 2004.
26
27

28 **2. Dredge-and-Fill Permit**

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1 27. The discharge of dredged or fill material into waters of the United States is
2 subject to a permit pursuant to CWA section 404(a), 33 U.S.C. § 1344(a). A discharger
3 must obtain a permit from the Corps prior to making any such discharge. *See also* 33
4 C.F.R. § 323.6(a).

6 The term ‘discharge of fill material’ means the addition of fill material into
7 waters of the United States. The term generally includes, without limitation,
8 the following activities: Placement of fill that is necessary for the construction
9 of any structure or infrastructure in a water of the United States; the building
10 of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or
11 other material for its construction; site-development fills for recreational,
12 industrial, commercial, residential, or other uses;

13 33 C.F.R. § 323.3(f). “The Corps and [Environmental Protection Agency] regard the use of
14 mechanized earth-moving equipment to conduct land clearing, ditching, channelization, in-
15 stream mining or other earth-moving activity in waters of the United States as resulting in a
16 discharge of dredged material unless project-specific evidence shows that the activity results
17 in only incidental fallback.” *Id.* at § 323.3(d)(2)(i).

18 28. An applicant for a dredge and fill permit from the Corps must also request a
19 water quality certification under CWA section 401(a)(1), 33 U.S.C. § 1341(a)(1).

20 Any applicant for a Federal license or permit to conduct any activity
21 including, but not limited to, the construction or operation of facilities, which
22 may result in any discharge into the navigable waters, shall provide the
23 licensing or permitting agency a certification from the State in which the
24 discharge originates or will originate ... that any such discharge will comply
25 with the applicable [water quality standards].

26 \\

1 **C. California Water Code**

2 29. The California Water Code includes provisions to implement the federal Clean
3 Water Act's permitting systems to regulate the discharge of pollutants and dredged or fill
4 material to the navigable waters. *See* California Water Code § 13370.
5

6 30. California Water Code section 13376 provides in part: "The discharge of
7 pollutants or dredged or fill material or the operation of a publicly owned treatment works or
8 other treatment works treating domestic sewage by any person except as authorized by waste
9 discharge requirements or dredged or fill material permits is prohibited...."
10

11 31. California Water Code section 13385 in turn provides:

12 (a) Any person who violates any of the following shall be liable civilly in
13 accordance with this section:

14 (1) Section 13375 or 13376.
15

16 (2) Any waste discharge requirements or dredged or fill material permit issued
17 pursuant to this chapter or any water quality certification issued pursuant to
18 Section 13160.

19 (3) Any requirements established pursuant to Section 13383.

20 (4) Any order or prohibition issued pursuant to Section 13243 or Article 1
21 (commencing with Section 13300) of Chapter 5, if the activity subject to the
22 order or prohibition is subject to regulation under this chapter.

23 (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of
24 the Clean Water Act, as amended.

25 (6) Any requirement imposed in a pretreatment program approved pursuant to
26 waste discharge requirements issued under Section 13377 or approved
27 pursuant to a permit issued by the administrator.

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V.
STATEMENT OF THE FACTS

32. Chimes Creek is a natural, perennial creek that originates in headwaters located in the northeast corner, west-facing slope, of the Leona Quarry project site at 7100 Mountain Boulevard.

33. The upper headwaters of Chimes Creek are located in the northeastern portion of the site, above most of the former quarry activities.

34. Chimes Creek is culverted as it approaches the eastern shoulder of Interstate 580. A section of the creek daylights behind residential properties on Delmont Avenue, then goes underground to cross Seminary Avenue, and surfaces again on the Mills College campus. Chimes Creek then joins Horseshoe Creek to form a part of the Lion Creek watershed, which drains into San Francisco Bay.

35. Several members of the MHA own and reside in properties along the stretch of daylighted creek on Delmont Avenue (the “Delmont Reach”), between the culvert outfall below Delmont Avenue and the existing Alameda County Flood Control inlet near Nairobi Place; the creek flows by their backyards.

36. Chimes Creek constitutes waters of the United States.

A. Leona Quarry Project

37. In July 2001, DeSilva applied to the City for permits related to construct the Leona Quarry Project, a residential neighborhood on the 128-acre site of the former quarry.

38. In June 2001, DeSilva obtained a wetlands delineation study which examined the presence of any “waters of the United States” on the quarry site that were potentially

1 subject to federal jurisdiction under section 404 of the CWA, 33 U.S.C. § 1344. Although
2 wetland indicators were present in “Area 5” of the site, the delineation concluded that no
3 wetlands were present on the site. The study concluded that the creek constituted
4 jurisdictional waters. The City later adopted these findings.
5

6 39. The City, as lead agency under the California Environmental Quality Act, Pub.
7 Resources Code §§ 21000 *et seq.*, prepared an Environmental Impact Report (EIR) for the
8 project.
9

10 40. In January 2003, Maureen Dorsey, the Burkhalter Neighbors, and Citizens for
11 Oakland’s Open Space filed a Petition for Writ of Mandate, alleging that the Final EIR for
12 the Leona Quarry Project did not adequately address the potential hydrological impacts. *See*
13 *Maureen Dorsey et al. v. City of Oakland* (Alameda Superior Court No. RG 03077607).
14 The court granted the petition, issuing a Peremptory Writ of Mandate and ordering the City
15 to prepare a Subsequent EIR with regard to hydrological issues.
16
17

18 41. On January 14, 2004 the City issued the Final Subsequent EIR for the Leona
19 Quarry Project.
20

21 42. On February 17, 2004, the City Council approved the “Vesting Tentative
22 Tract Map No. 7351” for Leona Quarry Project, subject to “Exhibit C: Conditions of
23 Approval for Leona Quarry Project Vesting Tentative Map, Planned Unit Development
24 Approval and Design Review.” The Conditions of Approval correspond to the mitigation
25 measures provided in the Draft, Final, and Subsequent EIRs. Condition of Approval 23.b,
26 in particular, requires:
27
28

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1 The Project Applicant shall meet the revised Clean Water Act requirements as
2 established by the Regional Water Quality Control Board (“RWQCB”) in the
3 most recent version of such requirements or, if approved as of the date the
4 grading permit application is filed, any final version of such requirements.
5 The detention basin shall [meet] the new Alameda County NPDES permit
6 provision C3 requirements.

7 43. In February 2004, DeSilva filed its Storm Water Pollution Prevention Plan
8 (“SWPPP”), which included its Notice of Intent to be subject to the General Construction
9 Permit.

10 44. In April 2004, DeSilva began mass-grading activities on the project site,
11 including regrading the quarried slopes to be less steep, constructing graded pads, and
12 installing subdrains and detention ponds. By the end of May 2004, DeSilva had graded most
13 of the riparian vegetation onsite. While earth-moving activity onsite was ongoing in the
14 spring and summer, in July 2004 DeSilva used earth-moving equipment specifically within
15 Chimes Creek. In March 2005, members of the MHA again observed DeSilva working
16 within the 100 feet of the creek on the project site. In late fall 2005, DeSilva used earth-
17 moving equipment to widen and then resurface the fire road within 25 feet of “Area 5” as
18 described in the wetland delineation study. On July 17, 2005, DeSilva began construction of
19 the Ridgmont detention basin concrete outfall structure within the creek channel.
20
21

22 45. Stormwater runoff originating from the project site is collected in a 39-inch
23 storm drain pipe that crosses under Interstate 580 approximately 500 feet northwest of the
24 Edwards Avenue undercrossing. This storm drain eventually surfaces in open channels of
25 Chimes Creek.
26
27
28

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1 46. In spring 2004 DeSilva constructed a detention pond along the eastern
2 property boundary near Mountain Boulevard. The detention basin is intended to reduce
3 suspended sediments in stormwater flow and control discharge volumes from the project site.
4 Stormwater is collected in the detention pond before being directed to the 39-inch storm
5 drain.
6

7 47. In spring 2004 DeSilva also began installation of a network of subdrains that
8 direct surface and groundwater runoff off the project site. Most of the subdrains are
9 connected to the primary detention pond located at the bottom of the project site, but some
10 subdrains appear to bypass the detention basin and release water directly into the 39-inch
11 storm drain. In late spring 2004, MHA observed the construction of an on-site sub-drainage
12 system parallel to the creek channel. The subdrains appear to convey sub-surface creek
13 flows and other sources of groundwater directly into the City's storm drain, bypassing the
14 detention basin. In late summer 2005, members of the MHA observed the installation of two
15 large pipes, one was buried in the south slope of the site and the second was buried in the
16 north slope that descends from the Ridgmont Development. According to the Interim
17 Subdrain Plans dated August 9, 2005, both of these pipes discharge directly into the 39-inch
18 storm drain.
19

20 48. Since spring 2004, the flow in Chimes Creek, below the point of discharge of
21 the City's storm drains have been visibly turbid approximately seventy percent of the time
22 during the wet season and thirty percent of the time during the dry season.
23

24 49. Construction at the Leona Quarry was the only major construction project in
25 the area, upstream of the Delmont Reach of Chimes Creek since 2004.
26

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1 50. Beginning in May 2004, MHA has regularly notified City’s Public Works
2 Agency (“PWA”) of the increases in volume and turbidity of creek flows. They reported the
3 change in the creek from burbling, clear flows to churning, silty flows. They also reported a
4 diminishment in wildlife in and around the creek.
5

6 51. In early August 2004, the City cited and fined DeSilva for three separate
7 unpermitted discharges to Chimes Creek. DeSilva subsequently brought in pre-manufactured
8 mobile filtration (“Baker tanks”) to treat non-stormwater runoff held in the temporary pond
9 before being discharged into the City’s storm drain.
10

11 52. Since the City issued the August 2004 notices of violation, MHA members
12 have observed and reported to the City further of apparent unpermitted incidents of discharge
13 into Chimes Creek for which the City did not issue citations.
14

15 53. A SWPPP site inspection report dated November 27, 2004 stated that the
16 filtration system was still not operational and the small sediment/detention pond was
17 overwhelmed and spilling into the inlet in violation of the General Construction Permit.
18

19 54. On November 2, 2004, the Regional Water Quality Board issued “Notice of
20 Non-Compliance with the Statewide Construction Stormwater Permit, Leona Quarry, City of
21 Oakland, Alameda County” to DeSilva Gates Construction. The Notice cited six specific
22 violations of the General Construction Permit, which Regional Water Quality Board staff
23 observed during their October 26, 2004 site inspection. The Regional Water Quality Board
24 required DeSilva to revise its monitoring program, providing specific monitoring parameters,
25 monitoring stations, monitoring frequency, monitoring methods, and monitoring reports.
26
27
28 The Regional Water Quality Board directed DeSilva to address the violations by submitting

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1 (1) a technical report identifying the steps taken to protect the site from erosion and to
2 adequately control stormwater, and (2) a revised SWPPP.

3
4 55. On January 12, 2005, DeSilva, through its stormwater management
5 consultants, filed with the Regional Water Quality Board a Notice of Discharge for
6 discharges that occurred in December 2004 and January 2005. It proposed corrective
7 actions, but did not provide a schedule for implementation of these actions, explain how such
8 actions would increase the capacity of the filtration system or achieve compliance, or indicate
9 when it expected to achieve compliance.
10

11 56. Reports submitted by DeSilva to the Regional Water Quality Board show that
12 turbid discharges continued from January to April 2005.
13

14 57. The Alameda County Public Works' flow gage data for the storm drain at the
15 junction of Lundholm and Oakdale Avenues, which measures Chimes Creek, shows
16 anomalies in flow from October 18, 2004 to February 9, 2005. These discharges correlated
17 to DeSilva's discharge of water from the project site directly into the 39-inch storm drain.
18

19 58. On April 5, 2005, DeSilva filed a Notice of Discharge for an unpermitted
20 discharge that occurred on March 23, 2005. DeSilva did not propose additional corrective
21 actions or provide a schedule for achieving compliance.
22

23 59. The City required DeSilva to apply for a Creek Protection Permit for the
24 construction of the Ridgemont detention basin concrete outfall structure in early 2005. The
25 City issued a Category II Creek Protection Permit on August 18, 2005.
26

27 60. On April 19, 2005, the City Council approved the final maps for tracts 7351
28 and 7493 for the Leona Quarry Project.

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1 61. During a rainstorm in late December 2005, MHA members observed that the
2 volume and turbidity of flows in Chimes Creek had increased and the detention pond on the
3 Leona Quarry Project site was overflowing resulting in unpermitted discharges into the
4 City's storm drain system and then into Chimes Creek. Despite DeSilva's implementation of
5 additional measures to prevent erosion and sediment transport on December 28, 2005,
6 members of the MHA observed increased runoff and additional erosion of banks along the
7 Delmont Reach of Chimes Creek on December 30thP and 31stP.

10 62. DeSilva did not file a reports of noncompliance within 14 days of a release of
11 turbid discharges from the site that occurred on December 18, 2005. Further, its reports of
12 noncompliance did not describe the actions necessary to achieve compliance, provide time
13 schedules for implementing corrective actions, or otherwise indicate when compliance would
14 be achieved.

16 63. On January 30, 2006, the MHA reported unpermitted stormwater discharges
17 from the project site to the Delmont Reach of Chimes Creek. DeSilva filed with the
18 Regional Water Quality Board a notice which reported unpermitted discharges of stormwater
19 from the detention pond entering the 39-inch storm drain on January 29 - 30 and February 2,
20 2006.

23 64. On March 6 and March 14, 2006, the MHA reported overflows of the
24 detention basin and unpermitted discharges from the project site to the Delmont Reach of
25 Chimes Creek.

27 65. There are water quality monitoring stations located at the detention basin at the
28 bottom of the site, the site's main construction entrance, and inlet to the 39-inch storm drain.

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1 DeSilva is required to collect water samples at these locations at least once a day during
2 storm events. It is required to conduct visual observations before, during, and after every
3 storm events. Regional Water Quality Board, “Notice of Non-Compliance with the
4 Statewide Construction Stormwater Permit, Leona Quarry, City of Oakland, Alameda
5 County” (Nov. 2, 2004).
6

7
8 **B. Cumulative Discharge of Regulated Stormwater into Chimes Creek Since 1985**

9 66. The channel form of the Delmont Reach of Chimes Creek was relatively stable
10 since the initial development of the neighborhood early in the 1920s. In the early 1980s, it
11 was still possible to wade from the top of the creek banks across the creek, and several
12 fences crossed the creek just above water level, in the Millsmont neighborhood.
13

14 67. Members of the MHA have observed substantial changes in the channel form
15 of Chimes Creek since 1985. The creek bed has incised more than 15 feet along the 3800
16 block of Delmont Avenue, from Hillmont Drive to Nairobi Place. Passage from one bank to
17 the other is no longer feasible.
18

19 68. The stormwater system which runs under Interstate 580 and discharges into
20 the creek upstream of the Delmont Reach had been built out by the 1960’s.
21

22 69. The City constructed the Ridgemont Sub-basin within the Leona Quarry site in
23 the mid-1980s to collect and drain stormwater runoff from the Ridgemont Development.
24

25 70. The volume of peak flows in the Delmont Reach during the rainy season, and
26 the frequency of occurrence of such peak flows, have substantially increased since the mid-
27 1980s.
28

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1 71. Currently, the channel form of the Delmont Reach of Chimes Creek is
2 unstable. Since 1985, the creek bed has incised more than 15 feet along the 3800 block of
3 Delmont Avenue, from Hillmont Drive to Nairobi Place. Its banks are exposed and nearly
4 vertical, and contribute to high levels of turbidity during storm events. Erosion of the creek
5 bank has exposed a previously buried sanitary sewer line, which breaks and discharges
6 untreated wastewater into Chimes Creek.
7
8

9 72. The Leona Quarry EIR, including the supplement, discusses the impacts of
10 prior development on discharge of stormwater flows in Chimes Creek. It does not analyze
11 the natural hydrograph for the creek, or make any findings how the City's stormwater system
12 has changed that hydrograph.
13

14 73. The MHA requested a copy of the Ridgemont EIR from the City in spring
15 2005. On August 18, 2005, the MHA filed a formal public records request with the City for
16 the Ridgemont EIR. To date the City has not located an EIR or other form of CEQA
17 document prepared for the Ridgemont development, and specifically, has not located any
18 record of any finding with respect to impact on stormwater flow in the creek.
19
20

21 **C. Sanitary Sewer Discharges into Chimes Creek**

22 74. The City, through the PWA, owns, operates and maintains the local sanitary
23 sewer system.

24 75. The Regional Water Quality Board has found that construction techniques,
25 aging condition of sewer pipes, and landscape alterations of this collection system permit
26 significant infiltration and inflow of stormwater during the rainy season. Inflow is the flow
27 of stormwater directly into the sewer system, and infiltration is the flow of stormwater
28

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1 through the soil and through the permeable walls of deteriorated sewer pipes. Such
2 infiltration and inflow cause the volume of flow in sewer pipes and wastewater treatment
3 systems to increase and can cause overflows of untreated wastewater into streets, local
4 watercourses, and the Bay.
5

6 76. There are two sanitary sewer lines that run within the City easements between
7 Nairobi Place and Hillmont Drive. Line N runs from Nairobi Place about 600 feet along the
8 north side of the creek and Line S runs from Nairobi to the intersection of Hillmont Drive
9 and Delmont, a distance of 1,000 feet along the south side of the creek. Line "N" is 8
10 inches in diameter and serves about 10 homes, while Line S is 12 inches in diameter and
11 serves all properties along the south bank of the creek and properties upstream of Delmont.
12
13 There are brick manholes built at 50 to 150 feet intervals along Line S on the south bank,
14 and at least two manholes on the north bank.
15

16 77. Line S will carry wastewater flows from the future homes in the Leona
17 Development.
18

19 78. The MHA has observed and notified the City that the sewer main along line N
20 behind 6301 Hillmont Drive is suspended aboveground, as a result of erosion of the creek
21 channel. The main has broken at the location on multiple occasions since the mid-1980s. In
22 December 2005 the City reconnected the sewer pipe behind 6301 Hillmont Drive and built a
23 wooden frame to provide additional support.
24

25 79. On July 8, 2004, the MHA also observed a break in Line S behind 3805
26 Delmont Avenue. This break resulted in unpermitted discharges of untreated wastewater into
27 the Delmont Reach.
28

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1 **Subsection A** concerns the discharges of stormwater resulting from the construction
2 and operation of Leona Quarry Project. Claims 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 17, 18
3 are addressed to DeSilva. Claims 3, 10, 15, 16, 19, 20, 21 are addressed to the City. These
4 claims are organized by permit or other provision of law alleged to be violated. Thus,
5 Claims 1 and 2 concern the failure of DeSilva to apply for a dredge-and-fill permit and
6 related water quality certification, and Claim 3 concerns the failure of the City (as the
7 general permittee for the stormwater system) to require such application.
8

9
10 **Subsection B** concerns the cumulative impacts of discharges from Ridgemont
11 Development and Leona Quarry Project into Chimes Creek. Claims 22, 23, 24, 25, 26, 27
12 are addressed to the City.
13

14 **Subsection C** concerns the discharges from the sanitary sewer system into Chimes
15 Creek. Claims 28, 29, 30, 31 are addressed to the City.
16

17 **A. Construction Activities Related to Leona Quarry Project**

18 **(1). Failure to Seek or Obtain Certain Permits Required for Construction**

19 ***Claim One. DeSilva Did Not Seek or Obtain a Dredge-and-Fill Permit in Violation***
20 ***of Clean Water Act sections 301(a) and 404(a).***

21 88. CWA section 301(a) prohibits the unpermitted discharge of unlawful pollutants
22 into waters of the U.S. “Except as in compliance with this section and sections 1312, 1316,
23 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall
24 be unlawful.”
25

26 89. Section 404(a) requires that a discharger obtain a permit from the Secretary of
27 the Army, through the Corps, prior to discharging dredge or fill material into waters of the
28

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1 U.S.: “The Secretary may issue permits, after notice and opportunity for public hearings for
2 the discharge of dredged or fill material into the navigable waters at specified disposal
3 sites....”
4

5 90. The General Construction Permit incorporates the statutory prohibition on
6 unauthorized discharges of fill or dredged material. “This General Permit does not authorize
7 discharges of fill or dredged material regulated by the U.S. Army Corps of Engineers under
8 CWA section 404 and does not constitute a waiver of water quality certification under CWA
9 section 401.” General Permit at Finding ¶ 14.
10

11 91. DeSilva did not notify the Corps of its use of mechanized earth-moving
12 equipment to conduct earth-moving activity in the immediate area of Area 5, as designated in
13 the wetland delineation. It did not request that the Corps determine whether a dredge-and-fill
14 permit under CWA section 404(a) is required for such activity.
15

16 92. DeSilva violated the General Construction Permit (through the exclusion stated
17 in Finding ¶ 14), and CWA sections 301(a) and 404(a), by failing to ask the Corps to
18 determine whether a dredge-and-fill permit is required before commencing construction of
19 the Leona Quarry Project.
20

21
22 ***Claim Two. DeSilva Did Not Seek or Obtain Water Quality Certification in***
23 ***Violation of Clean Water Act section 401(a)(1) and California Water Code section***
24 ***13376.***

25 93. Under CWA section 401(a)(1), 33 U.S.C. § 1341(a)(1), any permit applicant
26 for a dredge-and-fill permit from the Corps must also obtain water quality certification.

27 Any applicant for a Federal license or permit to conduct any activity
28 including, but not limited to, the construction or operation of facilities, which
may result in any discharge into the navigable waters, shall provide the

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1 licensing or permitting agency a certification from the State in which the
2 discharge originates or will originate ... that any such discharge will comply
3 with the applicable [water quality standards].

4 94. California Water Code section 13376 provides: “The discharge of pollutants
5 or dredged or fill material or the operation of a publicly owned treatment works or other
6 treatment works treating domestic sewage by any person except as authorized by waste
7 discharge requirements or dredged or fill material permits is prohibited....”

8
9 95. DeSilva violated CWA section 401(a)(1) and California Water Code section
10 13376, by failing to seek or obtain water quality certification in the form of waste discharge
11 requirements, before commencing construction of the Leona Quarry Project.

12
13 ***Claim Three. The City Violated Provisions A.1 and A.2 of the Municipal***
14 ***Stormwater Permit, by Failing to Require DeSilva to Seek or Obtain Authorization***
15 ***under CWA sections 404(a) and 401(a) before DeSilva Commenced Construction.***

16 96. The City is a permittee under the Municipal Stormwater Permit.

17 97. The City permits DeSilva to discharge into the stormwater system under
18 authority of the Municipal Stormwater Permit.

19 98. Provisions A.1 – A.2 of the Municipal Stormwater Permit prohibit the
20 discharge of non-stormwater into the stormwater system, as well as the discharge of
21 stormwater from a facility that causes or contributes to violations of Receiving Water
22 Limitations.

23
24 99. The City violated the Municipal Stormwater Permit, Provisions A.1 – A.2, by
25 permitting DeSilva to discharge into the stormwater system without requiring that DeSilva
26 seek or obtain a dredge-and-fill permit under CWA section 404(a) or a water quality
27 certification under section 401(a), before DeSilva commenced construction.
28

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1 (2). Discharges in Violation of Applicable Water Quality Standards and
2 Related Limitations

3 *Claim Four. DeSilva Discharges Stormwater that Causes Pollution,*
4 *Contamination, and Nuisance, in Violation of Provisions A.3 and B.1 - B.2 of the*
5 *General Construction Permit.*

6 100. Discharge Prohibition A.3 of the General Construction Permit requires:

7 “Stormwater discharges shall not cause or threaten to cause pollution, contamination, or
8 nuisance.”

9 101. Receiving Waters Limitations B.1 and B.2 of that permit provides:

10 1. Storm water discharge and authorized non-stormwater discharges to
11 any surface or ground water shall not adversely impact human health or the
12 environment.

13 c. The SWPPP developed for the construction activity covered by this
14 General Permit shall be designed and implemented such that
15 stormwater discharges and authorized non-stormwater discharges shall
16 not cause or contribute to an exceedance of any applicable water
17 quality standards contained in a Statewide Water Quality Control Plan
 and/or the applicable RWQCB’s Basin Plan....

18 102. DeSilva discharges stormwater that contains sediment in sufficient quantity to
19 adversely affect the water quality of Chimes Creek.

20 103. DeSilva discharges silty stormwater that contains sediment in sufficient
21 quantity to adversely affect the human use and enjoyment of Chimes Creek for recreation and
22 other beneficial uses.

23 104. DeSilva violates General Construction Permit Provisions A.3 and B.1 - B.2,
24 by discharging stormwater which causes pollution, contamination, or nuisance in Chimes
25 Creek. These discharges thus violate Clean Water Act sections 301(a) and 402(a) and
26 California Water Code section 13376.
27
28

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1 ***Claim Five. DeSilva Discharges Stormwater that Causes a Condition of Nuisance***
2 ***in Chimes Creek, in Violation of Provision B.1 of the Municipal Stormwater***
3 ***Permit.***

4 105. Receiving Water Limitation B.1 of the Municipal Stormwater Permit provides:

5 The discharge shall not cause the following conditions to create a condition of
6 nuisance or to adversely affect beneficial uses of waters of the State: ...

7 c. Alteration of temperature, turbidity, or apparent color beyond present
8 natural background levels;...

9 106. DeSilva discharges stormwater that contains sediment in sufficient quantity to
10 cause turbidity or change the apparent color beyond natural background levels in Chimes
11 Creek.

12 107. DeSilva violates Municipal Stormwater Permit Provision B.1, by discharging
13 stormwater which creates this condition of nuisance in Chimes Creek. These discharges thus
14 violate Clean Water Act sections 301(a) and 402(a) and California Water Code section
15 13376.
16
17

18 ***Claim Six. DeSilva Discharges Stormwater that Causes or Contributes to a***
19 ***Violation of an Applicable Water Quality Standards, in Violation of Provision B.2***
20 ***of the Municipal Stormwater Permit.***

21 108. Receiving Water Limitations B.2 of the Municipal Stormwater Permit
22 provides that “the discharge shall not cause or contribute to a violation of any applicable
23 water quality standard for receiving waters.”

24 109. The Basin Plan (Table 4-1) prohibits discharges of “[s]ilt, sand, clay, or other
25 earthen materials from any activity in quantities sufficient to cause deleterious bottom
26 deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to
27 affect beneficial uses.”
28

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1 110. DeSilva discharges stormwater that contains sediment in sufficient quantity to
2 cause turbidity or discoloration of the water in Chimes Creek.

3
4 111. The Basin Plan designates Non-Contact Recreation as a beneficial use of
5 Chimes Creek.

6 112. DeSilva discharges stormwater that contains sediment in sufficient quantity to
7 adversely affect Non-Contact Recreation in Chimes Creek.

8
9 113. The Antidegradation Policy requires existing water quality to be maintained at
10 1968 levels or higher, and any change to water quality must not “unreasonably affect present
11 and anticipated beneficial use[s].” SWRCB, Resolution 68-16 (Oct. 28, 1968).

12
13 114. DeSilva discharges stormwater that contains sediment in sufficient quantity to
14 degrade the condition of water quality that existed before the commencement of construction.

15 115. DeSilva violates Municipal Stormwater Permit Provision B.2, by discharging
16 stormwater which causes turbidity, interferes with the designated beneficial use of Non-
17 Contact Recreation, and degrades the water quality that existed before commencement of
18 construction. These discharges thus violate Clean Water Act sections 301(a) and 402(a) and
19 California Water Code section 13376.
20

21
22 ***Claim Seven. DeSilva Discharges Non-Stormwater in Violation of Provisions B.1***
23 ***and B.2 and Attachment Section A.9 of the General Construction Permit.***

24 116. Receiving Water Limitations B.1-2 of the General Construction Permit
25 require:

- 26 1. Storm water discharges and authorized nonstorm water discharges to
27 any surface or ground water shall not adversely impact human health or the
28 environment.

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1 2. The SWPPP developed for the construction activity covered by this
2 General Construction Permit shall be designed and implemented such that
3 storm water discharges and authorized nonstorm water discharges shall not
4 cause or contribute to an exceedance of any applicable water quality standards
5 contained in a Statewide Water Quality Control Plan and/or applicable
6 RWQCB's Basin Plan.

7 117. Attachment Section A.9 of this permit requires the following additional
8 measures: "Describe all non-storm water discharges to receiving waters that are proposed for
9 the construction project. Non-storm water discharges should be eliminated or reduced to the
10 extent feasible. Include the locations of such discharges and descriptions of all BMPs
11 designed for the control of pollutants in such discharges...."

12 118. DeSilva discharges waters collected by the Project's subdrain system during
13 the dry season into Chimes Creek.

14 119. These discharges of non-stormwater contain sediment in sufficient quantity to
15 cause turbidity or discoloration of the water in Chimes Creek, adversely affect Non-Contact
16 Recreation in Chimes Creek, and degrade the water quality that existed before the
17 commencement of construction.

18 120. DeSilva violates Provisions B.1 - B.2 and Attachment Section A.9 of the
19 General Construction Permit, by discharging non-stormwater which causes turbidity,
20 interferes with the designated beneficial use of Non-Contact Recreation, and degrades the
21 water quality that existed before commencement of construction. These discharges thus
22 violate Clean Water Act sections 301(a) and 402(a) and California Water Code section
23 13376.
24
25
26
27

28 ***Claim Eight. DeSilva Discharges Non-Stormwater in Violation of Provision C.5 of
the Municipal Stormwater Permit.***

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1
2 121. Provision C.5 of the Municipal Stormwater Permit contains provisions for
3 management of non-stormwater discharges. These are:

4 a. Exempted Discharges

5
6 In carrying out Discharge Prohibition A.1 of this Order, the following non-
7 storm water discharges need not be prohibited unless they are identified by the
8 Dischargers or the Executive Officer as sources of pollutants to receiving
9 waters:

- 10 i. flows from riparian habitats or wetlands;
11 ii. diverted stream flows;
12 iii. springs;
13 iv. rising ground waters; and
14 v. uncontaminated groundwater infiltration.

15 If any of the above categories of discharge, or sources of such discharges, are
16 identified as sources of pollutants to receiving waters, then such categories or
17 sources shall be addressed as conditionally exempted discharges in accordance
18 with Provision C.5.b.

19 b. Conditionally Exempted Discharges

20 ... non-storm water discharges need not be prohibited if they are either
21 identified by the Dischargers or the Executive Officer as not being sources of
22 pollutants to receiving waters or if appropriate control measures to minimize
23 the adverse impacts of such sources are developed and implemented under the
24 Plan in accordance with Provision C.5.c.

25 c. The Dischargers shall identify and describe the categories of discharges
26 ... which they wish to exempt from Prohibition A.1 in periodic submissions to
27 the Executive Officer. For each such category, the Dischargers shall identify
28 and describe as necessary and appropriate to the category either documentation
that the discharges are not sources of pollutants to receiving waters or
circumstances in which they are not found to be sources of pollutants to
receiving waters. Otherwise, the Dischargers shall describe control measures
to reduce pollutants to the maximum extent practicable and minimize the

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1 adverse impacts of such sources, procedures and Performance Standards for
2 their implementation, procedures for notifying the Regional Board of these
3 discharges, and procedures for monitoring and record management....

4 122. On a continuous basis, including the dry season, DeSilva discharges waters
5 collected by the Project's subdrain system, through the City's storm drain system, into
6 Chimes Creek.

7
8 123. These discharges of non-stormwater contain sediment in sufficient quantity to
9 cause turbidity or discoloration of the water in Chimes Creek, adversely affect Non-Contact
10 Recreation in Chimes Creek, and degrade the water quality that existed before the
11 commencement of construction.

12
13 124. The Regional Water Quality Board has not identified these discharges as
14 exempt under Provision C.5(b).

15
16 125. DeSilva violates Provision C.5 of the Municipal Stormwater Permit, by
17 discharging non-stormwater which causes turbidity, interferes with the designated beneficial
18 use of Non-Contact Recreation, and degrades the water quality that existed before
19 commencement of construction. These discharges thus violate Clean Water Act sections
20 301(a) and 402(a) and California Water Code section 13376.
21

22 ***Claim Nine. DeSilva Discharges Stormwater and Non-Stormwater in Violation of***
23 ***Provision C.5 of the General Construction Permit.***

24 126. Provision C.5 of the General Construction Permit requires:

25 All dischargers shall comply with the lawful requirements of municipalities,
26 counties, drainage districts, and other local agencies regarding discharges of
27 storm water to separate storm sewer systems or other watercourses under their
28 jurisdiction, including applicable requirements in municipal storm water
management programs developed to comply with NPDES permits issued by
the RWQCBs to local agencies.

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1
2 127. This provision incorporates the lawful requirements of the “City of Oakland
3 Creek Protection, Storm Water Management and Discharge Control Ordinance,” Oakland
4 Municipal Code, §§ 13.16.010 *et seq.* This ordinance will:

5
6 ... ensure the future health, safety, and general welfare of City of Oakland
7 citizens by:

8 A. Eliminating non-storm water discharges to the municipal separate storm
9 sewer;

10 B. Controlling the discharge to municipal separate storm sewers from spills,
11 dumping or disposal of materials other than storm water;

12 C. Reducing Pollutants in storm water discharges to the maximum extent
13 practicable;

14 D. Safeguarding and preserving Creeks and Riparian Corridors in a natural
15 state;

16 E. Preserving and enhancing creekside vegetation and wildlife;

17 F. Preventing activities that would contribute significantly to flooding, erosion
18 or sedimentation, or that would destroy riparian areas or would inhibit their
19 restoration;

20 G. Enhancing recreational and beneficial uses of Creeks;

21 H. Controlling erosion and sedimentation;

22 I. Protecting drainage facilities; and

23 J. Protecting the public health and safety, and public and private property.

24 The intent of this Chapter is to protect and enhance the water quality of our
25 Watercourses, water bodies, and wetlands in a manner pursuant to and
26 consistent with the federal Clean Water Act.

27 Oakland Municipal Code, § 13.16.020.

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1 128. The Creek Protection Ordinance provides: “Non-storm water discharges or
2 increase in flow to the City storm sewer system is prohibited.” *Id.* at § 13.16.070. Further,
3 “[a]ny non-storm water discharge or increase in flow that would result in or contribute to a
4 violation of [the Municipal Stormwater Permit] ... is prohibited.” *Id.* at § 13.16.080.

5
6 129. Pursuant to Oakland Municipal Ordinance § 13.16.120, the City issued a
7 Creek Protection Permit to DeSilva on August 18, 2005. The permit does contain
8 conditions.

9
10 130. DeSilva discharges stormwater and non-stormwater through the City’s storm
11 drain system into Chimes Creek.

12
13 131. These discharges contain sediment in sufficient quantity to cause turbidity or
14 discoloration of the water in Chimes Creek, adversely affect Non-Contact Recreation in
15 Chimes Creek, and degrade the water quality that existed before the commencement of
16 construction.

17
18 132. These discharges increase the flow and degrade the water quality of Chimes
19 Creek, in violation of the prohibitions in the Creek Protection Ordinance, Oakland Municipal
20 Code, §§ 13.16.020(A)-(J). These discharges thus violate Provision C.5 of the General
21 Construction Permit and thus Clean Water Act sections 301(a) and 402(a) and California
22 Water Code section 13376.

23
24 ***Claim Ten. The City Violates Provisions A.1, A.2, B.1 and B.2 of the Municipal***
25 ***Stormwater Permit, by Permitting DeSilva’s Discharges which Violate the***
26 ***Limitations of the Municipal Stormwater and Construction Permits.***

27 133. DeSilva discharges stormwater and non-stormwater through the City’s storm
28 drain system into Chimes Creek.

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1 134. These discharges contain sediment in sufficient quantity to cause turbidity or
2 discoloration of the water in Chimes Creek, adversely affect Non-Contact Recreation in
3 Chimes Creek, and degrade the water quality that existed before the commencement of
4 construction, in violation of the limitations stated in Claim 7.
5

6 135. The City discharges stormwater originating in the Leona Quarry Project,
7 through its storm drain system, into Chimes Creek.
8

9 136. The City is the permittee responsible for operation of its storm drain system in
10 compliance with the Municipal Stormwater Permit.
11

12 137. By not taking actions adequate to correct DeSilva’s violations of limitations
13 stated in Claim 7, the City violates Provisions A.1 - A.2 and B.1 - B.2 of the Municipal
14 Stormwater Permit. The City thus violates Clean Water Act sections 301(a) and 402(a) and
15 California Water Code section 13376.
16

17 **(3). Inadequate Stormwater Plan.**

18 ***Claim Eleven. DeSilva’s SWPPP Does not Prevent Exceedances of Applicable***
19 ***Water Quality Standards, in Violation of Provision B.2 of the General Construction***
20 ***Permit.***

21 138. The General Construction Permit requires that any landowner proposing to
22 discharge stormwater into the City’s storm drain system adopt and implement a Stormwater
23 Pollution Prevention Plan (“SWPPP”). Receiving Water Limitation B.2 requires:

24 The SWPPP developed for the construction activity covered by this General
25 Construction Permit shall be designed and implemented such that stormwater
26 discharges and authorized non-stormwater discharges shall not cause or
27 contribute to an exceedance of any applicable water quality standards
28 contained in a Statewide Water Quality Control Plan and/or the applicable
RWQCB’s Basin Plan....

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1 139. Attachment Section A of the General Construction Permit states that the
2 SWPPP must contain provisions that:

3
4 a. Identify all pollutant sources including sources of sediment that may
5 affect the quality of stormwater discharges associated with construction
6 activity ... from the construction site, and ...

7 c. Identify, construct, implement in accordance with a time schedule, and
8 maintain Best Management Practices (BMPs) to reduce or eliminate pollutants
9 in stormwater discharges and authorized non-stormwater discharges from the
10 construction site during construction, ...

11 140. DeSilva has adopted, modified, and implemented a SWPPP.

12 141. Because its discharges of stormwater and non-stormwater do not comply with
13 applicable water quality standards in Chimes Creek, DeSilva violates Provision B.2 of the
14 General Construction Permit. DeSilva thus violates Clean Water Act sections 301(a) and
15 402(a) and California Water Code section 13376.

16 ***Claim Twelve. DeSilva's SWPPP Does not Include Best Available Controls for***
17 ***Sediment, in Violation of Provision C.2 of the General Construction Permit.***

18 142. Provision C.2 of the General Construction Permit requires: "All dischargers
19 shall develop and implement a SWPPP in accordance with Section A: Stormwater Pollution
20 Prevention Plan. The discharger shall implement controls to reduce pollutants in stormwater
21 discharges from their construction sites to the BAT/BCT [Best Available Technology
22 Economically Achievable/Best Conventional Pollutant Control Technology] performance
23 standard."
24

25 143. DeSilva discharges stormwater and non-stormwater, after on-site treatment,
26 via the City's storm drain system, into Chimes Creek.
27
28

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1 144. Those discharges frequently cause or contribute to exceedances of water
2 quality standards applicable to Chimes Creek.

3
4 145. MHA has provided actual notice of such exceedances to DeSilva.

5 146. DeSilva has not implemented measures adequate to meet the BAT/BCT
6 standard.

7
8 147. By not implementing measures adequate to meet the BAT/BCT standard,
9 DeSilva violates Provision C.2 of the General Construction Permit. DeSilva thus violates
10 Clean Water Act sections 301(a) and 402(a) and California Water Code section 13376.

11 ***Claim Thirteen. DeSilva's SWPPP does Not Have Adequate Capacity to Detain***
12 ***Stormwater as Required by Provision C.3 of the Municipal Stormwater Permit.***

13 148. In its Condition of Approval 23.b for the Leona Quarry Project, the City
14 required:
15

16 The Project Applicant shall meet the revised Clean Water Act requirements as
17 established by the Regional Water Quality Control Board ("RWQCB") in the
18 most recent version of such requirements or, if approved as of the date the
19 grading permit application is filed, any final version of such requirements.
20 The detention basin shall met [sic] the new Alameda County NPDES permit
21 provision C3 requirements.

22 149. Provision C.3 of the Municipal Stormwater Permit (2003) requires in part:

23 a. Performance Standard Implementation

24 The Dischargers shall continue to implement and improve, as necessary and
25 appropriate, the performance standards for new development and
26 redevelopment controls detailed on Pages B-ND-1 through B-ND-6 of the July
27 1996 Management Plan.

28 b. Development Project Approval Process

The Permittees shall modify their project review processes as needed to
incorporate the requirements of Provision C.3. Each Permittee shall include

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1 conditions of approval in permits for applicable projects, as defined in
2 Provision C.3.c, to ensure that stormwater pollutant discharges are reduced by
3 incorporation of treatment measures and other appropriate source control and
4 site design measures, and increases in runoff flows are managed in accordance
5 with Provision C.3.f, to the maximum extent practicable. Such conditions
6 shall, at a minimum, address the following goals.

7 i. Require a project proponent to implement site design/landscape
8 characteristics where feasible which maximize infiltration (where appropriate),
9 provide retention or detention, slow runoff, and minimize impervious land
10 coverage, so that post-development pollutant loads from a site have been
11 reduced to the maximum extent practicable; and ...

12 d. Numeric Sizing Criteria for Pollutant Removal Treatment Systems

13 All Permittees shall require that treatment measures be constructed for
14 applicable projects ... that incorporate, at a minimum the following hydraulic
15 sizing design criteria to treat stormwater runoff ...

16 i. Volume Hydraulic Design Basis

17 Treatment measures whose primary mode of action depends on volume
18 capacity, such as detention/retention units or infiltration structures, shall be
19 designed to treat stormwater runoff equal to:

20 1. The maximized stormwater quality capture volume for the area, based on
21 historical rainfall records, determined using the formula and volume capture
22 coefficients set forth in Urban Runoff Quality Management, WEF Manual
23 Practice No. 23/ASCE Manual of Practice No. 87, (1998), pages 175-178
24 (e.g., approximately the 85Pth percentile 24-hour storm runoff event); or

25 2. The volume of annual runoff required to achieve 80 percent or more
26 capture, determined in accordance with the methodology set forth in Appendix
27 D of the California Stormwater Best Management Practices Handbook (1993),
28 using local rainfall data.

f. Limitation

i. The permittees shall manage increases in peak runoff flow and increased
runoff volume ... where such increased flow and/or volume is likely to cause
increased erosion of creek beds and banks, silt pollutant generation, or other
impacts to beneficial uses. Such management shall be through implementation
of a Hydrograph Modification Management Plan (HMP). The HMP, once

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1 approved by the Regional Board, shall be implemented so that post-project
2 runoff shall not exceed estimated pre-project rates and/or durations will result
3 in increased potential for erosion or other significant adverse impacts to
4 beneficial uses, attributable to changes in the amount and timing of runoff.
5 The term duration in this Provision is defined as the period that flows are
6 above a threshold that causes significant transport and may cause excessive
7 erosion damage to creeks and streams.

8 150. The detention pond on the Leona Quarry Project does not have the capacity
9 required by Provision C.3(b).

10 151. The detention pond does not have the capacity to assure that discharges of
11 stormwater from the Leona Quarry Project, via the City's storm drain system, will not
12 adversely affect beneficial uses of Chimes Creek below the point of discharge.

13 152. As a result of the inadequate capacity of its detention pond, DeSilva
14 discharges stormwater in violation of Provision C.3 of the Municipal Stormwater Permit.
15 DeSilva thus violates CWA sections 301(a) and 402(a) and California Water Code section
16 13376.
17

18 ***Claim Fourteen. DeSilva Has Not Revised the SWPPP Adequately to Prevent Water***
19 ***Quality Exceedances, in Violation of Provision B.3 of the General Construction***
20 ***Permit.***

21 153. Receiving Waters Limitation B.3 of the General Construction Permit provides:

22 Should it be determined by the discharger, SWRCB, or RWQCB that
23 stormwater discharges and/or authorized non-stormwater discharges are
24 causing or contributing to an exceedance of an applicable water standard, the
25 discharger shall:

26 a. Implement corrective measures immediately following discovery that water
27 quality standards were exceeded, followed by notification to the RWQCB by
28 telephone as soon as possible but no later than 48 hours after the discharge has
been discovered. This notification shall be followed by a report within 14-
calendar days to the appropriate RWQCB, unless otherwise directed by the
RWQCB, describing (1) the nature and cause of the water quality standard

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1 exceedance; (2) the BMPs currently being implemented; (3) any additional
2 BMPs which will be implemented to prevent or reduce pollutants that are
3 causing or contributing to the exceedance of water quality standards; and (4)
4 any maintenance or repair of BMPs. This report shall include an
5 implementation schedule for corrective actions and shall describe the actions
6 taken to reduce the pollutants causing or contributing to the exceedance.

7 b. The discharger shall revise its SWPPP and monitoring program
8 immediately after the report to the RWQCB to incorporate the additional
9 BMPs that have been and will be implemented, the implementation schedule,
10 and any additional monitoring needs....

11 154. Since May 2004, DeSilva's discharges have caused exceedances of water
12 quality standards for Chimes Creek.

13 155. DeSilva has revised the SWPPP since May 2004. However, the corrective
14 measures have not been adequate to prevent exceedances of water quality standards for
15 Chimes Creek resulting from its discharges of stormwater and non-stormwater.

16 156. As a result of its failure to revise the SWPPP to comply with water quality
17 standards in Chimes Creek, DeSilva violates Provision B.3 of the General Construction
18 Permit. DeSilva thus violates CWA sections 301(a) and 402(a) and California Water Code
19 section 13376.

20 ***Claim Fifteen. The City Has Not Implemented Control Measures to Reduce***
21 ***Pollutants in Stormwater Discharges by DeSilva, in Violation of Provision C.1 of***
22 ***the Municipal Stormwater Permit.***

23 157. The City is the permittee of the Municipal Stormwater Permit for the purpose
24 of this project.

25 158. Provision C.1 of this permit requires:

26 The Dischargers shall comply with Discharge Prohibition A.1 and A.2 and
27 Receiving Water Limitations B.1 and B.2 through the timely implementation
28 of control measures and other actions to reduce pollutants in the discharge in

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1 accordance with Provisions C.2 through C.7 and the Plan and any of its
2 modifications, revisions, or amendments developed pursuant to this Order. If
3 adverse impacts to beneficial uses of receiving waters persist following
4 implementation of Provisions C.2 through C.7 and the Plan, this Order will be
5 reopened to require the Dischargers to identify, assign, and implement
6 additional control measures and revise the Plan, forthwith, to ensure
7 compliance with Discharge Prohibitions A.1 and A.2 and Receiving Water
8 Limitations B.1 and B.2.

9 159. The City has not timely implemented measures adequate to assure that
10 DeSilva's discharges of stormwater and non-stormwater via the City's storm drain system
11 comply with the water quality standards for Chimes Creek and the other limitations stated in
12 Provision C.1 of the Municipal Stormwater Permit.

13 160. As a result of not implementing measures to assure that DeSilva's stormwater
14 discharges comply with water quality standards, the City violates Provision C.1 of the
15 Municipal Stormwater Permit. The City thus violates CWA sections 301(a) and 402(a) and
16 California Water Code section 13376.

17 ***Claim Sixteen. The City Has Not Required DeSilva to Implement an Effective***
18 ***Erosion and Sedimentation Control Plan, in Violation of Provision C.2 of the***
19 ***Municipal Stormwater Permit.***

20 161. Pursuant to Provision C.2 of the Municipal Stormwater Permit, the City
21 developed a Stormwater Management Plan ("SMP") for the entirety of its storm drain
22 system.

23 The Dischargers shall implement control measures and best management
24 practices to reduce pollutants in stormwater discharges to the maximum extent
25 practicable. The Plan shall serve as the framework for identification,
26 assignment, and implementation of such control measures. The Dischargers
27 shall begin implementing forthwith the Plan and shall subsequently
28 demonstrate its effectiveness and provide for necessary and appropriate
revisions, modifications, and improvements to reduce pollutants in stormwater

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1 discharges to the maximum extent practicable and as required by Provisions
2 C.1 through C.7 of this Order.

3 162. The City's SMP is an integral and enforceable component of the Municipal
4 Stormwater Permit. *Id.*, Finding ¶ 6.

5 163. The City's SMP includes a Performance Standard for Erosion and
6 Sedimentation Control for new development and construction sites. This provides: "As a
7 condition of issuance of a grading permit, each agency will require developers to prepare,
8 submit to the agency for review and approval, and implement an effective erosion and
9 sediment control plan or similar administrative document that contains erosion and sediment
10 control provisions."
11

12 164. By not requiring DeSilva to implement an effective erosion and sediment
13 control plan, the City violates its Provision C.2 of the Municipal Stormwater Permit. The
14 City thus violates CWA sections 301(a) and 402(a) and California Water Code section
15 13376.
16

17
18
19 **(4). Inadequate Monitoring and Reporting.**

20 *Claim Seventeen. DeSilva Has Not Monitored or Reported Its Discharges Which*
21 *Exceed Water Quality Standards, in Violation of Provision B.3 of the General*
22 *Construction Permit.*

23 165. Receiving Waters Limitation B.3 of the General Construction Permit requires
24 as follows:

25 Should it be determined by the discharger, SWRCB, or RWQCB that storm
26 water discharges and/or authorized nonstorm water discharges are causing or
27 contributing to an exceedance of an applicable water standard, the discharger
28 shall: ...

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1 a. Implement corrective measures immediately following discovery that
2 water quality standards were exceeded, followed by notification to the
3 RWQCB by telephone as soon as possible but no later than 48 hours after the
4 discharge has been discovered. This notification shall be followed by a report
5 within 14-calendar days to the appropriate RWQCB, unless otherwise directed
6 by the RWQCB, describing (1) the nature and cause of the water quality
7 standard exceedance; (2) the BMPs currently being implemented; (3) any
8 additional BMPs which will be implemented to prevent or reduce pollutants
9 that are causing or contributing to the exceedance of water quality standards;
10 and (4) any maintenance or repair of BMPs. This report shall include an
11 implementation schedule for corrective actions and shall describe the actions
12 taken to reduce the pollutants causing or contributing to the exceedance.

13 b. The discharger shall revise its SWPPP and monitoring program
14 immediately after the report to the RWQCB to incorporate the additional
15 BMPs that have been and will be implemented, the implementation schedule,
16 and any additional monitoring needs....

17 166. MHA has provided actual notice to DeSilva this its discharges of stormwater
18 and non-stormwater, via the City's storm drains system, have frequently caused or
19 contributed to exceedances of water quality standards applicable to Chimes Creek.

20 167. Following receipt of such notices, DeSilva has not timely reported many such
21 exceedances to the City or the RWQCB, or taken other action to determine whether such
22 exceedances occurred.

23 168. DeSilva's monitoring program does not include sufficient monitoring stations
24 to or frequent enough sampling to provide an accurate account of onsite water quality
25 conditions during storm events.

26 169. DeSilva has not revised its monitoring program to include additional locations
27 or frequency of monitoring to determine whether its discharges cause or contribute to further
28 exceedances of water quality standards applicable to Chimes Creek.

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1 170. By not timely reporting exceedances or adequately revising the monitoring and
2 reporting provisions of its SWPPP, DeSilva violates Provision B.3 of the General
3 Construction Permit. It thus violates CWA sections 301(a) and 402(a) and California Water
4 Code section 13376.
5

6 ***Claim Eighteen. DeSilva Has Not Monitored or Reported Its Discharges Which***
7 ***Exceed Water Quality Standards, in Violation of Special Provision B.3 of the***
8 ***General Construction Permit.***

9 171. Special Provision C.4 of the General Construction Permit requires: “All
10 dischargers shall develop and implement a monitoring program and reporting plan in
11 accordance with Section B: Monitoring Program and Reporting Requirements.”
12

13 172. Monitoring Program and Reporting Requirement B.4 of the General
14 Construction Permit requires:

15 Each discharger or qualified assigned personnel listed by name and contact
16 number in the SWPPP must certify annually that construction activities are in
17 compliance with the requirements of this General Permit and the SWPPP.
18 This Certification shall be based upon the site inspections required in Item 3 of
19 this Section. The certification must be completed by July 1 of each year.

20 173. Monitoring Program and Reporting Requirement B.5 of the General
21 Construction Permit requires:

22 Dischargers who cannot certify compliance, in accordance with [Compliance
23 Certification] and/or who have had other instances of noncompliance
24 excluding exceedances of water quality standards as defined in section B.3
25 Receiving Water Limitations Language, shall notify the appropriate RWQCB
26 within 30 days. Corrective measures should be implemented immediately
27 following discovery that water quality standards were exceeded. The
28 notifications shall identify the noncompliance event, including an initial
assessment of any impact caused by the event; describe the actions necessary
to achieve compliance; and include a time schedule subject to the
modifications by the RWQCB indicating when compliance will be achieved.

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1 Noncompliance notifications must be submitted within 30-calendar days of
2 identification of noncompliance.

3 174. MHA has provided actual notice to DeSilva this its discharges of stormwater
4 and non-stormwater, via the City's storm drains system, have frequently caused or
5 contributed to exceedances of water quality standards applicable to Chimes Creek.
6

7 175. DeSilva has not notified the Regional Water Quality Board within 30 days of
8 its receipt of notice that discharges of stormwater and non-stormwater, via the City's storm
9 drain system, cause or contribute to exceedances of water quality standards in Chimes Creek.
10 It has not taken other actions in due diligence to determine whether such exceedances
11 occurred.
12

13 176. By not timely notifying the RWQCB of such exceedances, DeSilva violates
14 Special Provision C.4 of the General Construction Permit. It thus violates CWA sections
15 301(a) and 402(a) and California Water Code section 13376.
16

17 ***Claim Nineteen. The City Has Not Timely Reported that Discharges through its***
18 ***Storm Drain System Violate Water Quality Standards, in Violation of Provision***
19 ***B.2(a) of the Municipal Stormwater Permit.***

20 177. Provision B.2(a) of the Municipal Stormwater Permit provides as follows:

21 If the Executive Officer determines that continuing or recurring exceedance of
22 any Receiving Water Limitation listed above has been caused by discharge
23 from the municipal storm sewer system, or if the discharge causes a violation
24 of any applicable water quality objective for receiving waters, the following
steps shall be taken: ...

25 ii. The Executive Officer will evaluate the adequacy of the Dischargers
26 implementation of the Plan based on the Dischargers' submitted reports. The
27 Executive Officer will determine if implementation of the Plan has a
28 reasonable likelihood of preventing future exceedances of Receiving Water
Limitations....

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1 iii. If the Executive Officer determines that implementation of the Plan will
2 not have a reasonable likelihood of preventing future exceedances of
3 Receiving Water Limitations, the Dischargers shall, upon notice from the
4 Executive Officer, do the following:

5 (a) The Executive Officer may require the Dischargers to submit a report that
6 includes an evaluation of the relative contribution of the storm water
7 discharges to the exceedance of the Receiving Water Limitation. The report
8 shall address the persistence and the causes of the exceedance, and evaluate, if
9 appropriate, whether the pollutant(s) causing exceedance(s) can be controlled
10 by the Dischargers.

11 (b) The Executive Officer may require the Dischargers to submit a report
12 reviewing the Plan to determine whether it should be revised so there will be a
13 reasonable likelihood of preventing future exceedances of Receiving Water
14 Limitations, or whether revisions to achieve compliance with Receiving Water
15 Limitations cannot be made based on technical feasibility, economic studies,
16 and other pertinent factors....

17 178. MHA has provided actual notice to the City that DeSilva's discharges of
18 stormwater and non-stormwater, via the City's storm drains system, have frequently caused
19 or contributed to exceedances of water quality standards applicable to Chimes Creek.

20 179. The City has not reported to the Executive Officer of the Regional Water
21 Quality Board that such discharges of stormwater and non-stormwater, via the City's storm
22 drain system, cause or contribute to exceedances of water quality standards in Chimes Creek.
23 It has not taken other actions in due diligence to determine whether such exceedances
24 occurred.

25 180. By not timely reporting such exceedances to the Executive Officer, the City
26 violates Provision B.2(a) of the Municipal Stormwater Permit. It thus violates CWA sections
27 301(a) and 402(a) and California Water Code section 13376.

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1 ***Claim Twenty. The City Has Not Reported that DeSilva’s Discharges through its***
2 ***Storm Drain System Violate Water Quality Standards, in Violation of Provision C.8***
3 ***of the Municipal Stormwater Permit.***

4 181. Provision C.8 of the Municipal Stormwater Permit requires: “Each of the
5 Dischargers shall comply with all parts of the Standard Provisions contained in Appendix A
6 of this Order.”

7
8 182. Standard Provision 7 of the Municipal Stormwater Permit requires: “The
9 Dischargers shall furnish the Regional Board, State Board, USEPA, or local stormwater
10 management agency within a reasonable time specified by the agencies, any requested
11 information to determine compliance with this Permit.”

12 183. Standard Provision 11.c of the Municipal Stormwater Permit requires:

13
14 The Dischargers shall report any noncompliance at the time reports are
15 submitted. The written submission shall contain a description of the
16 noncompliance and its cause; the period of noncompliance and, if the
17 noncompliance has not been corrected, the anticipated time it is expected to
18 continue; and steps taken or planned to reduce, eliminate, and prevent
19 recurrence of the noncompliance.

20 184. MHA has provided actual notice to the City that DeSilva’s discharges of
21 stormwater and non-stormwater, via the City’s storm drains system, have frequently caused
22 or contributed to exceedances of water quality standards applicable to Chimes Creek.

23 185. The City has not promptly notified the Regional Water Quality Board that
24 DeSilva’s discharges of stormwater and non-stormwater, via the City’s storm drain system,
25 cause or contribute to exceedances of water quality standards in the Chimes Creek. It has
26 not taken other actions in due diligence to determine whether such exceedances occurred.
27
28

1 186. By not timely notifying the Regional Water Quality Board of such
2 exceedances, the City violates Provision C.8 of the Municipal Stormwater Permit. It thus
3 violates CWA sections 301(a) and 402(a) and California Water Code section 13376.
4

5 ***Claim Twenty One. The City Has Not Adopted a Monitoring Plan Adequate to***
6 ***Determine whether DeSilva’s Discharges Exceed Water Quality Standards, in***
7 ***Violation of Provision C.4 of the Municipal Stormwater Permit.***

8 187. Provision C.4 of the Municipal Stormwater Permit requires that the City
9 include, in its SMP, a monitoring program that “... assesses the effectiveness of the Plan....”

10 188. Provision 4 further requires that the monitoring program achieve several
11 objectives. One objective is “Evaluation of the effectiveness of representative storm water
12 pollution prevention or control measures.” The monitoring program must also include
13 “Provisions for conducting watershed monitoring activities including; identification of major
14 sources of pollutants of concern; evaluation of the effectiveness of control measures and best
15 management practices; and use of physical, chemical, and biological parameters and
16 indicators as appropriate....”
17

18 189. MHA has provided actual notice to the City that DeSilva’s discharges of
19 stormwater and non-stormwater, via the City’s storm drains system, have frequently caused
20 or contributed to exceedances of water quality standards applicable to Chimes Creek.
21

22 190. The City does not undertake any monitoring, at locations in its storm drain
23 system or in Chimes Creek, to determine whether DeSilva’s discharges cause or contribute to
24 exceedances of water quality standards in Chimes Creek.
25

26 191. By not undertaking monitoring at locations necessary to determine the
27 effectiveness of the control measures for the Leona Quarry Project, the City violates
28

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1 Provision C.4 of the Municipal Stormwater Permit. It thus violates CWA sections 301(a)
2 and 402(a) and California Water Code section 13376.

3
4 **B. Cumulative Impacts of the City’s Stormwater Discharges into Chimes Creek.**

5 *Claim Twenty-Two. The City Discharges Stormwater that Causes a Condition of*
6 *Nuisance in Chimes Creek, in Violation of Provision B.1 of the Municipal*
7 *Stormwater Permit.*

8 192. Receiving Water Limitation B.1 of the Municipal Stormwater Permit provides:

9 The discharge shall not cause the following conditions to create a condition of
10 nuisance or to adversely affect beneficial uses of waters of the State: ...

11 d. Alteration of temperature, turbidity, or apparent color beyond present
12 natural background levels;....

13 193. The City collects stormwater from Leona Quarry Project, Ridgemont
14 Development, and other locations upstream of the Delmont Reach of Chimes Creek. The
15 City discharges such stormwater from its storm drain system into Chimes Creek.

16 194. These cumulative discharges contain sediment in sufficient quantity to cause
17 turbidity or change the apparent color beyond natural background levels in Chimes Creek.

18 195. These discharges occur at flow volumes and frequencies that degrade the
19 channel form of Chimes Creek.

20 196. The City violates Municipal Stormwater Permit Provision B.1, by discharging
21 stormwater which creates this condition of nuisance in Chimes Creek. The City thus violates
22 Clean Water Act sections 301(a) and 402(a) and California Water Code section 13376.
23
24

25 *Claim Twenty-Three. The City Discharges Stormwater that Causes or Contributes*
26 *to a Violation of Applicable Water Quality Standards, in Violation of Provision B.2*
27 *of the Municipal Stormwater Permit.*

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1 197. Receiving Water Limitations B.2 of the Municipal Stormwater Permit
2 provides that “the discharge shall not cause or contribute to a violation of any applicable
3 water quality standard for receiving waters.”
4

5 198. The Basin Plan (Table 4-1) prohibits discharges of “[s]ilt, sand, clay, or other
6 earthen materials from any activity in quantities sufficient to cause deleterious bottom
7 deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to
8 affect beneficial uses.”
9

10 199. The City collects stormwater from Leona Quarry Project, Ridgemont
11 Development, and other locations upstream of the Delmont Reach of Chimes Creek. The
12 City discharges such stormwater from its storm drain system into Chimes Creek.
13

14 200. These cumulative discharges contain sediment in sufficient quantity to cause
15 turbidity or change the apparent color beyond natural background levels in Chimes Creek.
16

17 201. The Basin Plan designates Non-Contact Recreation as a beneficial use of
18 Chimes Creek.

19 202. The City’s discharges of stormwater occur at flow volumes and frequencies
20 that incise the channel form of Chimes Creek.
21

22 203. That incision in channel form adversely affect Non-Contact Recreation in
23 Chimes Creek.

24 204. The Antidegradation Policy requires existing water quality to be maintained at
25 1968 levels or higher, and any change to water quality must not “unreasonably affect present
26 and anticipated beneficial use[s].” SWRCB, Resolution 68-16 (Oct. 28, 1968).
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1 205. The City’s discharges of stormwater contain sediment in sufficient quantity,
2 and occur at sufficient flow volume and frequency, to degrade the condition of water quality
3 that existed before the commencement of construction.
4

5 206. The City violates Provision B.2 of the Municipal Stormwater Permit, by
6 discharging stormwater which causes turbidity in Chimes Creek, interferes with the
7 designated beneficial use of Non-Contact Recreation, and degrades the water quality that
8 existed in 1968. The City thus violates Clean Water Act sections 301(a) and 402(a) and
9 California Water Code section 13376.
10

11 ***Claim Twenty-Four. The City Has Not Implemented Control Measures to Reduce***
12 ***Pollutants in Its Stormwater Discharges, in Violation of Provision C.1 of the***
13 ***Municipal Stormwater Permit.***

14 207. Provision C.1 of the Municipal Stormwater Permit requires:

15 The Dischargers shall comply with Discharge Prohibition A.1 and A.2 and
16 Receiving Water Limitations B.1 and B.2 through the timely implementation
17 of control measures and other actions to reduce pollutants in the discharge in
18 accordance with Provisions C.2 through C.7 and the Plan and any of its
19 modifications, revisions, or amendments developed pursuant to this Order. If
20 adverse impacts to beneficial uses of receiving waters persist following
21 implementation of Provisions C.2 through C.7 and the Plan, this Order will be
22 reopened to require the Dischargers to identify, assign, and implement
23 additional control measures and revise the Plan, forthwith, to ensure
24 compliance with Discharge Prohibitions A.1 and A.2 and Receiving Water
25 Limitations B.1 and B.2.

26 208. The City collects stormwater from Leona Quarry Project, Ridgemont
27 Development, and other locations upstream of the Delmont Reach of Chimes Creek. The
28 City discharges such stormwater from its storm drain system into Chimes Creek.

 209. These cumulative discharges contain sediment in sufficient quantity to cause
turbidity or change the apparent color beyond natural background levels in Chimes Creek.

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1 210. These discharges occur at flow volumes and frequencies that degrade the
2 channel form of Chimes Creek.

3
4 211. The City has not adopted or implemented control measures or management
5 practices adequate to control the sediments in such discharges or otherwise prevent adverse
6 impacts on the beneficial uses of Chimes Creek.

7
8 212. By not adopting or implementing such measures or practices, the City violates
9 Provision C.1 of the Municipal Stormwater Permit. The City thus violates CWA sections
10 301(a) and 402(a) and California Water Code section 13376.

11 ***Claim Twenty-Five. The City Has Not Implemented Measures and Practices***
12 ***Adequate to Reduce Sediments in its Stormwater Discharges to the Maximum***
13 ***Extent Practicable, in Violation of Provision C.2 of the Municipal Stormwater***
14 ***Permit.***

15 213. Pursuant to Provision C.2 of the Municipal Stormwater Permit, the City
16 developed a Stormwater Management Plan (“SMP”) for the entirety of its storm drain
17 system.

18 The Dischargers shall implement control measures and best management
19 practices to reduce pollutants in stormwater discharges to the maximum extent
20 practicable. The Plan shall serve as the framework for identification,
21 assignment, and implementation of such control measures. The Dischargers
22 shall begin implementing forthwith the Plan and shall subsequently
23 demonstrate its effectiveness and provide for necessary and appropriate
24 revisions, modifications, and improvements to reduce pollutants in stormwater
discharges to the maximum extent practicable and as required by Provisions
C.1 through C.7 of this Order.

25 The 2003 amendments contain a functionally equivalent requirement at Provision C.2.

26 214. The City’s SMP is an integral and enforceable component of the Municipal
27 Stormwater Permit. *Id.*, Finding ¶ 6.

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1 215. The City collects stormwater from Leona Quarry Project, Ridgemont
2 Development, and other locations upstream of the Delmont Reach of Chimes Creek. The
3 City discharges such stormwater from its storm drain system into Chimes Creek.
4

5 216. These cumulative discharges contain sediment in sufficient quantity to cause
6 turbidity or change the apparent color beyond natural background levels in Chimes Creek.
7

8 217. These discharges occur at flow volumes and frequencies that degrade the
9 channel form of Chimes Creek.

10 218. The City has not adopted or implemented measures or practices adequate to
11 control the sediments in such discharges to the maximum extent practicable.
12

13 219. By not adopting or implementing such measures or practices, the City violates
14 Provision C.2 of the Municipal Stormwater Permit. The City thus violates CWA sections
15 301(a) and 402(a) and California Water Code section 13376.
16

17 ***Claim Twenty-Six. The City Has Not Timely Reported that Discharges through its***
18 ***Storm Drain System Exceed Water Quality Standards, in Violation of Provision***
19 ***B.2(a) of the Municipal Stormwater Permit.***

20 220. Provision B.2(a) of the Municipal Stormwater Permit provides as follows:

21 If the Executive Officer determines that continuing or recurring exceedance of
22 any Receiving Water Limitation listed above has been caused by discharge
23 from the municipal storm sewer system, or if the discharge causes a violation
24 of any applicable water quality objective for receiving waters, the following
25 steps shall be taken: ...

26 ii. The Executive Officer will evaluate the adequacy of the Dischargers
27 implementation of the Plan based on the Dischargers' submitted reports. The
28 Executive Officer will determine if implementation of the Plan has a
 reasonable likelihood of preventing future exceedances of Receiving Water
 Limitations....

1 iii. If the Executive Officer determines that implementation of the Plan will
2 not have a reasonable likelihood of preventing future exceedances of
3 Receiving Water Limitations, the Dischargers shall, upon notice from the
4 Executive Officer, do the following:

5 (a) The Executive Officer may require the Dischargers to submit a report that
6 includes an evaluation of the relative contribution of the storm water
7 discharges to the exceedance of the Receiving Water Limitation. The report
8 shall address the persistence and the causes of the exceedance, and evaluate, if
9 appropriate, whether the pollutant(s) causing exceedance(s) can be controlled
10 by the Dischargers.

11 (b) The Executive Officer may require the Dischargers to submit a report
12 reviewing the Plan to determine whether it should be revised so there will be a
13 reasonable likelihood of preventing future exceedances of Receiving Water
14 Limitations, or whether revisions to achieve compliance with Receiving Water
15 Limitations cannot be made based on technical feasibility, economic studies,
16 and other pertinent factors....

17 221. MHA has provided actual notice to the City that the cumulative discharges of
18 stormwater and non-stormwater from Leona Quarry, Ridgemont Development, and other
19 locations upstream, via the City's storm drains system, have frequently caused or contributed
20 to exceedances of water quality standards applicable to Chimes Creek.

21 222. The City has not reported to the Executive Officer of the Regional Water
22 Quality Board that such cumulative discharges of stormwater and non-stormwater, via the
23 City's storm drain system, cause or contribute to exceedances of water quality standards in
24 Chimes Creek.

25 223. The City has not taken other actions in due diligence to determine whether
26 such exceedances occurred.
27
28

1 224. By not timely reporting such exceedances to the Executive Officer, the City
2 violates Provision B.2(a) of the Municipal Stormwater Permit. It thus violates CWA sections
3 301(a) and 402(a) and California Water Code section 13376.
4

5 ***Claim Twenty-Seven. The City Has Not Adopted a Monitoring Plan Adequate to***
6 ***Determine whether the Cumulative Discharges via the Storm Drain System Exceed***
7 ***Water Quality Standards, in Violation of Provision C.4 of the Municipal***
8 ***Stormwater Permit.***

9 225. Provision C.4 of the Municipal Stormwater Permit requires that the City
10 include, in its SMP, a monitoring program that "... assesses the effectiveness of the Plan..."

11 226. Provision C.4 further requires that the monitoring program achieve several
12 objectives. One objective is "Evaluation of the effectiveness of representative storm water
13 pollution prevention or control measures." The monitoring program must also include
14 "Provisions for conducting watershed monitoring activities including; identification of major
15 sources of pollutants of concern; evaluation of the effectiveness of control measures and best
16 management practices; and use of physical, chemical, and biological parameters and
17 indicators as appropriate..."
18

19 227. MHA has provided actual notice to the City that the cumulative discharges of
20 stormwater and non-stormwater, via the City's storm drains system, have frequently caused
21 or contributed to exceedances of water quality standards applicable to Chimes Creek.
22

23 228. The City does not undertake any monitoring, at locations in its storm drain
24 system or in Chimes Creek, to determine whether such cumulative discharges cause or
25 contribute to exceedances of water quality standards in Chimes Creek.
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1 229. By not undertaking monitoring at locations necessary to determine the
2 effectiveness of the control measures for the Leona Quarry Project, Ridgemont
3 Development, and other tributary developments upstream, the City violates Provision C.4 of
4 the Municipal Stormwater Permit. It thus violates CWA sections 301(a) and 402(a) and
5 California Water Code section 13376.
6

7
8 **C. Sanitary Sewer Discharges**

9 *Claim Twenty-Eight. The City Discharges Wastewater from its Sewer Lines*
10 *Adjacent to Chimes Creek, in violation of Provision A.1 of the Sanitary Sewer*
11 *Permit.*

12 230. Discharge Prohibition A.1 of the Sanitary Sewer Permit provides: “[t]he
13 discharge of untreated or partially treated wastewater to any surface water stream, natural or
14 man-made, or to any drainage system intended to convey storm water runoff to surface
15 waters.”

16 231. The Basin Plan also prohibits the discharge of “[r]aw sewage or any waste
17 failing to meet waste discharge requirements to any waters of the Basin.”

18 232. The City operates lines of its sanitary sewer system adjacent to both banks of
19 Chimes Creek.
20

21 233. In the vicinity of 6301 Hillmont Drive, 3805 Delmont Avenue, 6120 Oakdale
22 Avenue, and the easement behind Nairobi Place, sewage frequently discharges from these
23 lines, including associated manholes, into Chimes Creek or onto riparian properties adjacent
24 to the creek.
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1 234. As a result of such discharges of wastewater directly or indirectly into Chimes
2 Creek, the City violates Provision A.1 of the Sanitary Sewer Permit. The City thus violates
3 CWA Act sections 301(a) and 402(a) and California Water Code section 13376.
4

5 ***Claim Twenty-Nine. The City's Discharges of Wastewater from its Sewer Lines***
6 ***Adjacent to Chimes Creek Cause or Contribute to Exceedances of Water Quality***
7 ***Standards, in violation of Provision C.1 of the Sanitary Sewer Permit.***

8 235. Receiving Water Limitation C.1 of the Sanitary Sewer Permit provides:

9 1. The discharges shall not cause the following conditions to exist in waters
10 of the State at any place:

11 a. Floating, suspended, or deposited macroscopic particulate matter or foam;

12 b. Bottom deposits or aquatic growths to the extent that such deposits or
13 growths cause nuisance or adversely affect beneficial uses;

14 c. Alteration of temperature, turbidity, or apparent color beyond present
15 natural background levels;

16 d. Visible floating, suspended, or deposited oil or other products of
17 petroleum origin; and...

18 2. The discharges shall not cause nuisance, or adversely affect the beneficial uses of
19 the receiving water.

20 236. The City operates lines of its sanitary sewer system adjacent to both banks of
21 Chimes Creek.

22 237. In the vicinity of 6301 Hillmont Drive, 3805 Delmont Avenue, 6120 Oakdale
23 Avenue, and the easement behind Nairobi Place, sewage frequently discharges from the
24 City's sanitary sewer lines into Chimes Creek or onto riparian properties adjacent to the
25 creek.
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1 238. Such discharges cause floating and suspended waste material, bottom deposits,
2 alteration in color in the waters of Chimes Creek.

3
4 239. Such discharges cause a nuisance which impairs the use and enjoyment of
5 Chimes Creek for Non-Contact Recreation.

6 240. As a result of such discharges of wastewater directly or indirectly into Chimes
7 Creek, the City violates Provision C.1 of the Sanitary Sewer Permit. The City thus violates
8 CWA Act sections 301(a) and 402(a) and California Water Code section 13376.
9

10 ***Claim Thirty. The City Does not Make Every Practicable Effort to Control***
11 ***Wastewater Discharges from its Sewer Lines Adjacent to Chimes Creek, in violation***
12 ***of Provision D.1 of the Sanitary Sewer Permit.***

13 241. Provision D.1 of the Sanitary Sewer Permit provides:

14 In a Sanitary Sewer Overflow (SSO) event, the Discharger shall make every
15 practicable effort to contain the SSO and prevent the SSO from entering storm
16 drains and surface water bodies. However, if it is not feasible, the Discharger
17 may use storm drains to contain the SSO by blocking the drain, and recovering
18 and cleaning up the SSO in order to prevent the SSO from being discharged to
19 an open surface water body.

20 The Discharger shall, to the maximum extent possible, take remedial action to

- 21 a. Control or limit the volume of wastewater discharged to the State water;
22 b. Terminate the wastewater discharge as rapidly as possible; and
23 c. Recover as much of the wastewater discharged as possible for proper
24 disposal, including any wash down water.

25 242. In the vicinity of 6301 Hillmont Drive, 3805 Delmont Avenue, 6120 Oakdale
26 Avenue, and the easement behind Nairobi Place, sewage frequently discharges from the
27 City's sanitary sewer lines into Chimes Creek or onto riparian properties adjacent to the
28 creek.

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1 243. The City has not controlled or limited the volume of wastewater so
2 discharged, terminated the discharge as rapidly as possible, recovered the wastewater, or
3 otherwise made every practicable effort to prevent the contamination of Chimes Creek.
4

5 244. As a result, the City violates Provision D.1 of the Sanitary Sewer Permit. The
6 City thus violates CWA Act sections 301(a) and 402(a) and California Water Code section
7 13376.
8

9 ***Claim Thirty-One. The City Does Not Report Wastewater Discharges from its***
10 ***Sewer Lines Adjacent to Chimes Creek, in Violation of Provision D.2 of the***
11 ***Sanitary Sewer Permit.***

12 245. Discharge Prohibition D.2 of the Sanitary Sewer Permit provides: “The
13 Discharge shall report SSOs in accordance with standard Provisions and Reporting
14 Requirements”

15 246. Standard Provisions and Reporting Requirement E.6.d.i requires:

16 The discharger shall report any noncompliance that may endanger health or
17 the environment. All pertinent information shall be provided orally within 24
18 hours from the time the discharger becomes aware of the circumstances. A
19 written submission shall also be provided within five working days of the time
20 the discharger becomes aware of the circumstances. The written submission
21 shall contain a description of the noncompliance, including exact dates and
22 times and, if the noncompliance has not been corrected, the anticipated time it
is expected to continue; and steps taken or planned to reduce, eliminate, and
prevent reoccurrence of the noncompliance.

23 Regional Water Quality Board, “Standard Provisions and Reporting Requirements for
24 NPDES Surface Water Discharge Permits” (Aug. 1993).

25 247. In the vicinity of 6301 Hillmont Drive, 3805 Delmont Avenue, 6120 Oakdale
26 Avenue, and the easement behind Nairobi Place, sewage frequently discharges from the
27
28

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1 City's sanitary sewer lines into Chimes Creek or onto riparian properties adjacent to the
2 creek.

3
4 248. MHA has provided notice to the City of such discharges.

5 249. The City has not reported such discharges to the Regional Water Quality
6 Board.

7
8 250. By failing to report such discharges of wastewater into Chimes Creek, the City
9 violates Provision D.2 of the Sanitary Sewer Permit. The City thus violates CWA Act
10 sections 301(a) and 402(a) and California Water Code section 13376.

11
12 **VII.**
13 **PRAYER FOR RELIEF**

14 251. Wherefore, Plaintiffs respectfully request that the Court provide the following
15 relief:

16 **Against DeSilva**

17
18 252. Declare that DeSilva, in its construction, operation and maintenance of the
19 Leona Quarry Project, has not complied with its several obligations under the General
20 Construction Permit, Municipal Stormwater Permit, CWA sections 301(a), 401(a), 402(a),
21 and 404(a) and California Water Code section 13376;

22
23 253. Order corrective measures for control, monitoring, and reporting of
24 discharges of stormwater and non-stormwater;

25
26 254. Assess civil penalties under 33 U.S.C. § 1319(g)(1), and under California
27 Water Code § 13385 pursuant to the Court's supplemental jurisdiction, against Defendant
28 City for the cumulative, unpermitted discharges of storm water into Chimes Creek.

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1 **Against the City of Oakland**

2 255. Declare that the City has not complied with its several obligations under the
3 Municipal Stormwater Permit, CWA sections 301(a) and 402(a), and California Water Code
4 section 13376, to assure that the discharges from the Leona Quarry Project, via the City's
5 storm drain system, comply with applicable limitations for the protection of Chimes Creek;
6

7 256. Declare that the City has not complied with its several obligations under
8 Municipal Stormwater Permit, CWA sections 301(a) and 402(a), and California Water Code
9 section 13376, to assure that the discharges from the Leona Quarry Project, Ridgemont
10 Development, and other locations upstream of the Delmont Reach of Chimes Creek, via the
11 City's storm drain system, comply with applicable limitations for the protection of Chimes
12 Creek;
13
14

15 257. Order corrective measures for control, monitoring, and reporting of
16 discharges of stormwater and non-stormwater;
17

18 258. Assess civil penalties under 33 U.S.C. § 1319(g)(1), and under California
19 Water Code § 13385 pursuant to the Court's supplemental jurisdiction, against Defendant
20 City for the cumulative, unpermitted discharges of storm water into Chimes Creek.
21

22 **Against Both Defendants.**

23 259. Award costs of litigation to Plaintiff, including reasonable attorney and expert
24 fees in accordance with section 33 U.S.C. § 1365(d); and
25

26 260. Provide such other relief as the Court deems just and proper.
27

28 \\
29

1 Dated: June 26, 2006

2
3 Respectfully submitted,

4 

5
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Attorneys for PLAINTIFFS MILLSMONT
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DECLARATION OF SERVICE

I, Rachel Golden, declare that I today served the “Complaint for Remedy and Schedule of Corrective Action,” pursuant to Civil L.R. 5-6(2) as follows.

By First-Class Mail

David Chapman, Project Manager
DeSilva Gates Construction, LP
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11 Bill Hogarth, Director
12 National Marine Fisheries Service
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31 California Department of Justice
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Dated: June 26, 2006

By: 

Rachel Golden
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