NATURAL HERITAGE INSTITUTE

100 PINE STREET, SUITE 1550
SAN FRANCISCO, CA 94111
(415) 693-3000
(415) 693-3178 (FAX)
RRCOLLINS@N-H-I.ORG

OTHER OFFICES
SACRAMENTO, CA
NEVADA CITY, CA
ANCHORAGE, AK

March 28, 2006

BY EMAIL AND CERTIFIED MAIL

Claudia Cappio
Director of Community and Economic Development Agency
City of Oakland
One Frank Ogawa Plaza
Oakland, CA 94612

Raul Godinez II
Director of Public Works
City of Oakland
One Frank Ogawa Plaza
Oakland, CA 94612

David Chapman
DeSilva Gates Construction, LP
11555 Dublin Boulevard
P.O. Box 2909
Dublin, CA 94568

Re: Notice of Citizen Suit under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, for Discharges into Chimes Creek

Dear Ms. Cappio, Mr. Godinez, and Mr. Chapman:

Pursuant to Clean Water Act section 505(a), 33 U.S.C. § 1365, the Millsmont Homeowners Association (MHA) hereby provides notice of our intent to file a civil complaint, 60-days hereafter, against the City of Oakland (City) and DeSilva Gates Construction, LP (DeSilva), in U.S. District Court seeking relief for violations of the Clean Water Act (CWA), 33 U.S.C. §§ 1311, 1341, 1342, 1344, related to discharges of storm water and sewage into Chimes Creek in Oakland, California.

This Notice concerns the direct, indirect, and cumulative impacts of discharges from the City's storm water and sanitary sewer systems into Chimes Creek west of Interstate 580 in the Millsmont neighborhood. In the mid-1980s, and incident to the Ridgemont Development,

the City expanded the storm water system which discharges into Chimes Creek to collect rainfall and surface groundwater that was not naturally tributary to the creek. In 2004, the City permitted the development of Leona Quarry Project, located on Chimes Creek to the east of Interstate 580, and specifically permitted DeSilva to construct and operate a drainage system that collects and discharges rainfall and surface groundwater into the storm water system and thus into Chimes Creek. These expansions of the City's storm water system have cumulatively caused a substantial increase in turbidity, and in the magnitude and duration of peak flows, into the Delmont reach of the creek during the winter and even the dry seasons. Further, the City's sanitary sewer system discharges routinely into the creek, through lines and associated manholes located on the creek banks. This pattern of sewer discharges will worsen as a result of the Leona Quarry Project, which will eventually add wastes from several hundred new homes into these lines.

We seek a specific, implementable, and binding plan and schedule of action to correct storm water and sewage discharges which: (A) are not permitted and (B) have now significantly impaired the beneficial uses of Chimes Creek, including MHA members' use and enjoyment of their properties. We reluctantly file this Notice. We respectfully submit that, over the course of many years, the City has made and not adequately performed on prior non-binding representations that it will better regulate these discharges so as to protect these beneficial uses. We acknowledge the sincerity and hard work of city staff members who made these representations, and we recognize the budgetary and other constraints which affect their performance. We are grateful to the City for convening, and to DeSilva for attending, several meetings in 2005 to discuss MHA's concerns about impairment of Chimes Creek as a result of storm water and sewage discharges. We acknowledge that city staff has responded, by email or telephone calls, to many other such communications from MHA members. We are encouraged by the City's development of a "Draft Preliminary Work Scope Outline Chimes Creek Restoration Feasibility Study" (Nov. 2005), which will be under consideration by the Public Works Agency on March 28, 2006. While we appreciate the City's sincerity in these many communications, we seek a plan and schedule of action that definitely will be implemented to correct these storm water and sewer discharges. As shown below, the discharges have cumulatively impaired the form, function and water quality of the creek to an extent – e.g., have caused a fifteen-foot drop in the creek bed since the mid-1980s – such that the creek has reached a tipping point which cannot tolerate further delay.

We prefer to negotiate a settlement, rather than file a complaint for litigation. All of the claims are resolvable in that manner. As stated in Section VI, we seek feasible modifications to the storm water and sewage systems, as well as repair of the channel form of

Chimes Creek. We do not seek to prevent the completion of Leona Quarry Project, but we do seek to assure that its completion will not cause further harm to the creek.

This Notice is organized as follows. Section I (pp. 3-25) states the facts. Section II (p. 25) states the jurisdiction of the U.S. District Court to hear a complaint based on this Notice. Section III (p. 26) states the standing of the MHA. Section IV (pp. 26-63) states the claims. Section V (pp. 63-65) requests further information that will materially assist in the resolution of these claims. Section VI (pp. 65-66) states our requested relief. .

I.
FACTS

1. This section states the factual basis for our claims, including a physical description of Chimes Creek, as well as a description of impacts to Chimes Creek from: (1) construction activities in Leona Quarry; (2) cumulative development of hillside properties upstream of the Delmont Reach; and (3) discharges from the City's sanitary sewer system. These three categories of impacts are governed by three separate National Pollutant Discharge Elimination System Permits (NPDES): (1) NPDES General Permit No. CAS000002: Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity (1999) (General Permit); (2) NPDES Permit No. CAS0029831: Waste Discharge Requirements for the Alameda Countywide Clean Water Program (Storm Water Permit); and (3) NPDES Permit No. CA0038512: Waste Discharge Requirements for City of Oakland Sanitary Sewer Collection System (Sanitary Sewer Permit).

2. 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. The project site is bounded by Interstate 580 and Mountain Boulevard on the southwest, Campus Drive on the northeast, and private properties and open areas on the southeast. *See* City of Oakland, "Leona Quarry Project Draft Environmental Impact Report," p. III-2 (June 10, 2002) (Draft EIR); *see also* City of Oakland Museum, "Lion Creek Watershed Map" (1999), *available at* *http://www.museumca.org/creeks/21-OMLion.html*.

3. The upper headwaters of Chimes Creek are located in the northeastern portion of the site, above most of the former quarry activities. The headwaters are divided into three sub-basins, which were formed by natural forces, such as the surface topography of the site, as well as anthropogenic ones, such as quarry operations and residential development. The Quarry Sub-basin is 114 acres and extends from Mountain Boulevard to the ridge crest located

west of Campus Drive. *See* Draft EIR, p. IV.F-1. Storm water within this sub-basin flows downslope as surface water, which was collected and conveyed through drainage pipes into three smaller detention basins when the Quarry was in operation, but is now collected into one small, upper sediment pond and one large, lower detention basin. *See id.* To the northeast of the Quarry Sub-basin is the 84-acre Ridgemont Sub-basin, which drains the Ridgemont residential development. *See id.* To the south of the Quarry Sub-basin is the 76-acre Mountain Boulevard Sub-basin. *See id.*, p. IV.F-4. Storm water runoff originating from these three sub-basins is ultimately collected in a 39-inch storm drain pipe that crosses under Interstate 580 approximately 500 feet northwest of the Edwards Avenue undercrossing. *See id.*

4. Chimes Creek is culverted as it approaches the eastern shoulder of Interstate 580. Chimes Creek remains culverted, forming the main trunk of the storm drain network for the Burkhalter neighborhood, to the west of the highway. 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. 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.

5. The portion of Chimes Creek that crosses Leona Quarry formerly supported cattails and other reeds, established willows, and other vegetation. *See* Declaration of Mark Brest van Kempen, ¶ 5 (Mar. 28, 2006) (Exhibit 1). The creek also supported Pacific treefrog tadpoles, dragonfly larvae and damselfly larvae. *See id.* The City described the creek pre-construction as follows:

> "In the Undeveloped Area, Chimes Creek supports a narrow band of riparian habitat. The increased water supply along this corridor supports a few tree species not found in abundance elsewhere on the property. These are mainly California bay laurel, which is rather dense along the upper part of the stream, and California buckeye (*Aesculus californica*), which occurs towards the base of the stream, adjacent to the quarry. The stream becomes subterranean before it reaches the Lower Development Area and resurfaces near I-580.... While the creek is rather steep, a few ponded areas support typical hydrophytic herbs, including mugwort (*Artemisia douglasiana*) and umbrella sedge (*Cyperus eragrostis*)...."

Draft EIR, p. IV.B-7. This vegetation likely supported "amphibians and birds such as western toad (*Bufo boreas),* Pacific chorus frog, northern flicker, bushtit, scrub-jay, yellowrumped warbler *(Dendroica coronata),* orange-crowned warbler *(Vermivora celata),* Brewer's blackbird *(Euphagus cyanocephalus),* wrentit *(Chamaea fasciata),* and song sparrow *(Melospiza melodia).*" *Id.*, p. IV.B-9.

6. The City has acknowledged that Chimes Creek constitutes "waters of the United States." Draft EIR, p. IV.B-1.2.

A. Leona Quarry Project

7. In July 2001, DeSilva applied to the City for permits related to the development of the Leona Quarry Project. DeSilva planned to construct a residential neighborhood on the 128-acre site of the former quarry. *See* Draft EIR, p. II-1. According to the City, the "project would regrade the existing slopes to less steep slopes consistent with a revised grading plan, provide appropriate drainage for slope stabilization with a stormwater detention and treatment basin, and return a substantial portion to semi-natural conditions." *Id.* The project would include the construction of approximately 477 residential units of a variety of housing types, including townhomes and condominiums. *See* City of Oakland, "Leona Quarry Final Environmental Impact Report," p. III-1 (Sept. 23, 2002) (Final EIR). It would also include features such as a two-acre park and pedestrian trail system. *See* Draft EIR, p. II-1.

8. In June 2001, Wetlands Research Associates, Inc. (WRA), on behalf of DeSilva, conducted a study to determine the presence of any "waters of the United States" on the quarry site that were potentially subject to federal jurisdiction under section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. *See* WRA, "Delineation of Potential Jurisdictional 'Waters of the United States,'" p. 1 (June 2001) (Exhibit 2). The delineation study looked for the presence of wetland indicators used by the U.S. Army Corps of Engineers (Corps) in making a jurisdictional determination. *See id.* "The three criteria used to delineate wetlands are the presence of: (1) hydrophytic vegetation, (2) wetland hydrology, and (3) hydric soils." *Id.* WRA analyzed five topographic depressions and Chimes Creek. *See id.* According to WRA, "Wetland plants were found in [Area 5] .... Wetland hydrology indicators were present in [Area 5].... Hydric soil criteria were met only at [Area 5]." *Id.*, p. 7. However, the delineation concluded that no wetlands were present on the site. *See id.* WRA did conclude that the creek constituted jurisdictional waters. *See id.*, p. 8. The City later adopted these findings in the Draft EIR:

> "A 0.01-acre man-made depression at the northwestern edge of the property in the Undeveloped Area (Location 5 in Figure IV.B-3) supports umbrella sedge *(Cyperus eragrostis)* and hyssop loosestrife *(Lythrum hyssopifolium)* and meets all three wetland criteria used by the Corps. However, it appears to have been constructed to retain sediments and/or stormwater and may not be subject to Corps jurisdiction, as settling basins are excluded. It is within 1,000 feet of the proposed development. No fill of this depression would occur. One final depression is located roughly 100 feet from proposed development, at the point where Chimes Creek begins its subterranean flow (Location 2 in Figure IV.B-3). This depression is surrounded by a berm built to retain water from Chimes Creek and prevent overflow into areas of quarrying activity. WRA determined that this depression does not meet any of the three criteria required for federal jurisdictional wetland status, and, in any event, no fill of this depression would occur....[¶]
>
> No wetlands under the jurisdiction of the Corps or CDFG will be filled by the project. Chimes Creek is subject to Corps jurisdiction as "waters of the United States" under Section 404 of the Clean Water Act. However, all of the project construction activities would take place more than 100 feet from Chimes Creek and would not result in any fill within the creek or any indirect impact to its flow. The grading to reconstruct the berm near the base of Chimes Creek will not result in any fill within the creek or any indirect impact to its flow. Thus, a Corps permit should not be required for construction of the proposed project."

Draft EIR, p. IV.B-10, 12.

9. On July 30, 2001, the City issued "Notice of Preparation of Draft Environmental Impact Report" for the Leona Quarry Project.

10. On June 10, 2002, the City, as lead agency under the California Environmental Quality Act (CEQA), Pub. Resources Code §§ 21000 *et seq.*, issued the "Leona Quarry Draft Environmental Impact Report" (Draft EIR). We focus on the City's analysis of the impacts on hydrology and water quality for purposes of this Notice.

11. The City described the condition of the downstream storm sewer infrastructure and creek environment at the outset of its analysis:

> "Downstream of the project site, portions of storm drainage pipes that convey Chimes Creek are inadequately sized to handle peak flows. Chimes Creek is currently not capable of handling the quantity of runoff generated by large rainfall events. Flooding ... has occurred on several occasions .... Those stretches of Chimes Creek not enclosed by storm drains have unstable creek banks, suggesting that channel capacity is inadequate to handle peak flow volume. ... [I]ncreased discharge in the creek has led to erosion problems that degrade the creek environment, affect adjacent property owners, and contribute sediment that may interfere with downstream storm drain facilities."

Draft EIR, p. IV.F-7. The City went on to find that the Project would improve these conditions.

12. Based on results of the hydrologic and hydraulic modeling, the City found, "the post project runoff would be lower than existing runoff from the quarry site due to an overall increase in vegetation, less steep slopes, and slower runoff rates." *Id.*, p. IV.F-13. Further, the project would include a detention basin with storage capacity of 12.6 acre-feet, which would provide, "sufficient capacity to handle stormwater flows from the enlarged 93-acre Ridgemont Sub-basin and would reduce peak discharge flows originating from the combined Ridgemont and Quarry Sub-basins." *Id.* For example,

> "the existing combined peak discharge from the Quarry and Ridgemont Sub-basins during a 25-year storm event is 212 cfs. Under the proposed project, which includes the addition of nine acres to the Ridgemont Sub-basin, discharge would be reduced to 113 cfs. Discharge volumes from the adjoining Mountain Boulevard Sub-basin are 64 cfs during a 25-year storm event. Considered in combination, peak discharge flows, from the upper headwaters of Chimes Creek would therefore not exceed the estimated 180 cfs capacity of downstream underground storm drains that convey Chimes Creek flows during a 25-year storm event."

Id.

13. The City identified the following impacts on hydrology and water quality and measures necessary to mitigate such impacts:

TABLE 1. IMPACTS ON HYDROLOGY AND WATER QUALITY	
Environmental Impact	**Mitigation Measures**
Significant But Mitigable Impacts	
D.6: Shallow groundwater levels on the project site and the proposed detention basin could alter groundwater flow patterns, cause groundwater mounding, increase groundwater flow gradients, and ultimately result in increased groundwater seepage rates downgradient of the project site.	D.6a: The applicant shall incorporate the geotechnical recommendation for 10-foot-deep, trenched subdrains in areas where groundwater would be shallow and potentially seep to the surface after final grading (i.e., the southeast corner of the Lower Development Area). As recommended, the subdrains would be installed along the inboard edges of "E," "F," and "G" Streets.
F.1: The proposed detention basin near Mountain Boulevard could cause surrounding sediments to saturate or result in groundwater mounding during extended periods of precipitation.	F.1a: The project sponsor shall be required to line the proposed detention basin with an impermeable material to minimize leakage and contributions to local groundwater flow. F.1b: The project sponsor shall modify the existing Ridgemont Sub-basin detention basin by installing an emergency spillway.
F.2: Construction activities could result in soil erosion and increase levels of suspended sediments and contaminants in stormwater flows, resulting in adverse impacts to downstream water quality.	F.2a: The project applicant shall prepare a SWPPP prior to construction activities, as required by the SWRCB's General Permit for Construction Activities, Implementation of the plan starts with the commencement of construction and continues though [sic] the completion of the project…. F.2b: In addition to NPDES requirements, the project applicant shall also be required to comply with all City of Oakland rules and regulations.

F.3: Construction dewatering could result in discharge of sediment-laden groundwater or impacts to local groundwater gradients and flow.	F.3a: The project sponsor shall comply with all applicable regulatory agency requirements set forth by the City of Oakland Public Works, San Francisco Bay RWQCB, or EBMUD regarding disposal of groundwater generated during site dewatering activities. Prior to discharge, the applicant will be required to obtain a discharge permit from ACFC or the RWQCB. In addition, these agency requirements will be incorporated into a construction dewatering plan that will provide contractors and future site operators with guidance on groundwater and surface water disposal during construction activities. The dewatering plan shall become part of the project.
F.4: Upon completion of construction activities, the proposed project could result in a long-term increase in stormwater runoff contaminant levels, degrading downstream receiving water quality.	F.4a: To comply with provisions of the Clean Water Act, the project shall incorporate [Best Management Practices (BMPs)], including preparation of a stormwater discharge plan to minimize stormwater runoff and associated offsite migration of stormwater pollutants. F.4b: The project sponsor shall develop and implement a vegetation control and/or fertilizer management plan for the landscape areas, with the goal of reducing potential discharge of such chemicals to local waterways.
F.5: Increased sediment and pollutant loads from site development in surface runoff and storm water could decrease habitat for central California coastal steelhead and winter-run Chinook salmon in drainage courses downstream from the project site and in the	F.5a: The project sponsor shall prepare and implement a SWPPP for the project as required by the San Francisco Bay RWQCB under its NPDES General Permit. The SWPPP will be updated as needed to reflect changes in the project design and site

San Francisco Bay.	conditions.
Less Than Significant Impacts	
L.5: The proposed project would increase the amount of impervious surface on the site and could affect the ability of the City of Oakland and the Alameda County Flood Control and Water Conservation District to adequately treat and drain stormwater runoff.	None required.

Id., pp. II-18 – 22, II-32, IV.F-14.

14. On September 23, 2002, the City issued the "Leona Quarry Final Environmental Impact Report" (Final EIR). The City described a "Modified Plan" of development, which included such changes as a reduction in the size of the proposed community center and a 15% reduction in residential units. *See* Final EIR, p. III-1. The City found that the Modified Plan "would not change the overall site preparation and would have substantially similar, though mitigable, impacts related to hydrology and water quality." *Id.*, III-12. The Modified Plan allowed for an increase in the size of the detention basin from 12.6 acre-feet to 14-acre feet. *See id.* The City's "Master Response" to Hydrology and Drainage Issues addressed the detention basin design, flooding, and drainage capacity of Chimes Creek as quoted below. *See id.,* p. V-4.

Detention Basin Capacity Design

"The design of the proposed detention basin is based on results of hydrologic analysis, which … considers all sources of existing and post-project runoff that contribute to the storm drain line that crosses I-580 downstream from the site. Sources include runoff from the site plus runoff originating in the Ridgemont subdivision. … [¶] The proposed detention basin is one part of the storm water management strategy for the project that would allow [the existing storm drain system downstream of the site to adequately convey the 25-year storm] and thus markedly improve a potentially serious deficiency of the existing drainage network. …[¶] Another important goal that the detention basin would achieve is the reduction in peak discharge of storms smaller than the 25-year event, which would reduce erosion and flood risks in Chimes Creek. …

> … Per ACFC's July 2000 request, the storm water management strategy for the proposed development includes a detention basin that is capable of reducing the peak 25-year discharge to within the capacity of the storm drain lines under the I-580 freeway. … Calculations show that the detention basin is also capable of reducing the 100-year peak flow by approximately nine percent, while still providing one foot of freeboard….
>
> For moderately large storms (between 1.5 and 4.0 inches in 24-hours, e.g., up to roughly the 10-year event), runoff would exceed the capacity of the water-quality outlet and would start to back-up in the basin until the water surface rises to a second opening in the outlet structure (referred to as the detention outlet). The size of the detention outlet, though much larger than the water-quality outlet, is also chosen so that flow is restricted in leaving the basin. The large available storage area in the basin allows the outflow to be markedly less than the inflow, thereby reducing the overall peak flow rates downstream substantially….
>
> The detention basin will serve an additional role in improving the quality of runoff from the site. The floor of the basin will be set several feet lower than the elevation needed to meet the flood control objectives so the basin can have additional storage volume. This additional volume would decrease flow velocity in the basin, thereby reducing sediment and enhancing biological activity to treat storm water. This condition would occur for storm water flows typical of the most frequent storms, which drop less than 1.5 inches of rain in 24 hours. The outlet for the water-quality flows will be sized appropriately for these small storms, which actually create the majority of annual runoff, and large enough to accommodate the baseflow of the springs in the area, which will be directed to the basin. … the springs will provide a year-round source of water sufficient to support wetland vegetation along the basin floor."

Final EIR, pp. V-6 – V-9.

Flooding

> "… The mitigation measures stated in the Draft EIR … include drainage infrastructure improvements that are designed to address drainage from the project itself while also providing capacity to improve notable drainage

> problems adjacent to the proposed development including in the Leona Heights neighborhood and the Ridgemont subdivision….
>
> …The project applicant has agreed to reduce the 25-year storm discharge even though it requires the construction of an on-site detention basin. The on-site detention basin would reduce the peak 25-year discharge to significantly less than the existing discharge. The capacity of the 39-inch pipe has been analyzed using updated survey information and the capacity was found to be 172 cfs. Since the original modeling showed that peak flows for the 25-year storm would be reduced to 173 cfs, the new lower threshold can be attained with minor changes to the basin dimensions or outlet works design. Overall, there would be a significant improvement in the ability of the 39-inch line to convey the 25-year storm, which is predicted to flood the freeway and/or local streets under existing conditions.
>
> The runoff potential at Edwards and I-580 increased significantly with the completion of the Ridgemont subdivision in the 1980's due to increased impervious areas and flow directed to the quarry…. [A] storm equivalent to the 25-year design storm most likely has not occurred since the construction of the Ridgemont project, but is likely to occur in time."

Id., pp. V-9 – V-10.

Form and Function of Chimes Creek

> "General observations in comment letters are accurate in that much of the existing open creek channel downstream of I-580 is noticeably degraded, exhibiting signs of instability that date back at least several decades in some cases. Erosion and bank failures continue to occur. This type of instability is unfortunately very common in urban streams where development projects have not included appropriate mitigation. For example, there is no active storm water detention infrastructure in the entire Chimes Creek watershed despite the fact that development has occurred in recent decades. Due to this fact, the hydrologic analyses for the proposed project considered a wider range of design storms, including the 2-year storm, than are required by ACFC. In particular, it is important to note that the proposed detention basin is predicted to reduce the peak discharge for the 2-year storm even by roughly 29 percent from the existing value."

Id., pp. V-12 – V-13.

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

16. On January 14, 2004 the City issued the Final Subsequent EIR, which included revised mitigation measures for reducing impacts associated with runoff from the development to "less than significant" levels. *See* Leona Quarry Development Final Subsequent EIR, p. II-1, 5. The primary detention basin for collecting runoff was enlarged, and a surface drainage swale located along the western-most berm slope of the basin was proposed. *See id*. As with the Draft and Final EIRs the City found that the storm water management system should be "capable of maintaining peak flows from the 24-hour, 25-year design storm at or below pre-project levels," and "not fail structurally during a 100-year storm." *Id.*, p. II-1.

17. On February 17, 2004, the City Council approved the "Vesting Tentative Tract Map No. 7351" for the Leona Quarry Subdivision, subject to "Exhibit C: Conditions of Approval for Leona Quarry Project Vesting Tentative Map, Planned Unit Development Approval and Design Review." *See* Resolution No. 77544. The Conditions of Approval correspond to the mitigation measures provided in the Draft, Final, and Subsequent EIRs. Condition of Approval 23, "Hydrology and Drainage Requirements," requires,

> "The Project Applicant shall implement all of the mitigation measures described in Section F. Hydrology and Water Quality" of the [CEQA Mitigation Monitoring and Reporting Program (MMRP)]. Final grading and improvement plans for the Project shall include the following information, analysis and requirements:
>
> a. A master drainage and grading plan that: … (ii) meets the published design criteria set forth in the Alameda County publication entitled, "Hydrology and Hydraulics Criteria Summary for Western Alameda County" (1989), using the parameters recommended by [Phil Williams and Associates] as set forth in the SEIR … and (iii) is consistent with the information, standards and

requirements as set forth in the MMRP (MM #s D.6a, D.6b, F.1a and 1b, F.2a and F.2b, F.3a, F.4a and 4b, F5.a)[1]….

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

c. The final plan for the detention basin (Parcel A) shall incorporate: detailed landscaping and other specifications so that a water treatment area can be established within the basin including a planting plan based on the recommendations of a qualified hydrologist and biologist regarding contours that can support the proposed planting and not interfere with the design and detention capacity.

d. Other specifications for the detention basin (Parcel A) shall also be provided, including measures for sediment storage, design of fencing, access, and clean out and maintenance specifications, liner monitoring specifications and repair procedures. The liner monitoring specifications and repair procedures shall be prepared by a registered geotechnical engineer with expertise in impermeable liner design, construction and maintenance.

e. The site drainage plan shall include detailed measures to detain storm water run-off to the maximum feasible degree, given geotechnical and other constraints through infiltration opportunities, bio-swales or grassy swales, and creating a vegetated swale in the Village Green area.

f. A hydrologic review and confirmation of seasonal wet weather conditions for conveyance of the storm water.

g. A review and recommendations pertaining to the creation of a perennial creek through the site that drains into the lower detention basin, consistent with condition of Approval No. 19. …

---

[1] These citations to the MMRP correspond to the Mitigation Measures required in the Draft EIR, which are quoted in ¶ 13.

j. Provisions for an inspection, monitoring, certification and maintenance process throughout the course of grading, construction and post construction to assure that the approved drainage plan and other measures are functioning properly…."

18. In February 2004, DeSilva filed its Storm Water Pollution Prevention Plan (SWPPP), which included its Notice of Intent to be subject to the General Permit.

19. In April 2004, DeSilva began mass-grading activities, including regrading the quarried slopes to be less steep, constructing graded pads, and installing subdrains and detention ponds. *See* SWPPP, p. 400-1. By the end of May 2004, DeSilva had graded most of the riparian vegetation onsite. *See* Ex. 1, ¶ 9.

20. The MHA observed changed conditions in the Delmont Reach of Chimes Creek beginning in April 2004. *See* Ex. 1, ¶¶ 6-7; Declaration of Chiye Azuma, ¶ 7 (Mar. 28, 2006) (Exhibit 3). Members noted days when the flows in the reach would increase and/or cloud with sediment. *See id.* On days when these conditions were observed, the times appeared to correspond to times construction crews were working on the project site. *See* Ex. 1, ¶ 7. The cloudiness would begin around 7:30 a.m. and would start to dissipate after 5 p.m. *See id.* Members of the MHA visited the site and observed the grading and dewatering activities. *See id.*, ¶ 9. Once members of the MHA discerned this pattern of increased and/or silty flows during hours of construction, they began regularly notifying staff of the City's Public Works Agency (PWA). *See* Ex. 1, ¶ 8; Ex. 3, ¶ 7.

21. In May 2004 construction activities related to subdrain installation released the first of a series of undocumented quantities of non-storm water from the site via the City's storm drain system that outlets to Chimes Creek. *See* Engeo, Inc., "SWPPP Update and Addendum," p. 1 (Sept. 1, 2004). On May 28, 2004, DeSilva constructed a temporary sedimentation pond just south of the construction entrance in response to the MHA and City's concerns regarding the cloudiness of non-storm water releases caused by installation of the subdrain lines. *See id.*

22. MHA observed the construction of an on-site sub-drainage system parallel to the creek channel. *See* Ex. 1, ¶ 18. The subdrains appear to convey sub-surface creek flows and other sources of groundwater. The subdrains apparently discharge directly into the City's storm drain, bypassing the detention basin. *See id.*

23. On August 4, 2004, the City cited and fined DeSilva for "an illicit discharge to the Chimes Creek." Letter from Ron Ward, PWA, to DeSilva (Aug. 4, 2004). DeSilva was cited again on August 5th and 6th for "continuous illegal discharge to the City's storm drain system," which constituted a violation of the City's Creek Protection Ordinance. Letter from Ron Ward, PWA, to DeSilva (Aug. 5, 2004); *see also* letter from Ron Ward, PWA, to DeSilva (Aug. 6, 2004). The notice of violation dated August 4, 2004, stated:

> "The temporary sediment pond located at the south side of the project site is discharging turbid water into the City's storm drain. This sediment pond was addressed in a letter to you dated July 1, 2004. The improvements requested in that letter have not been implemented. This discharge could have been avoided with prudent attention to the matter by DeSilva Gates."

Id. DeSilva subsequently brought in pre-manufactured mobile filtration ("Baker tanks") to treat non-storm water runoff held in the temporary pond before being discharged into the City's storm drain.

24. Since the City issued the August 2004 notices of violation, MHA members have observed further incidents of discharge into Chimes Creek for which the City did not issue citations. *See* Ex. 1, ¶ 14; Exhibit 1.6, "Storm Sewer Discharges" (Mar. 22, 2006). The MHA reported these incidents via e-mail and in a series of letters addressed to City Council, asking the City to postpone approval of a final development plan. *See* letters from MHA to City Council (Oct. 25, 2004) (Exhibit 4), (Mar. 4, 2005) (Exhibit 5), (Apr. 15, 2005) (Exhibit 6).

25. DeSilva began roadway paving in fall 2004.

26. According to its reports to the Regional Board, DeSilva had completed construction of the permanent detention/water quality basin by early-November 2004. *See* Engeo, "SWPPP Update and Addendum No. 2" (Nov. 16, 2004). It had also installed a new temporary sediment pond in the eastern portion of the site, which drains via installed stormdrains to the permanent detention basin. *See id.* However, a SWPPP site inspection report dated November 27, 2004 stated that the filtration system was still not operational and the small sediment/detention pond was overwhelmed and spilling into the inlet. *See id.*

27. On December 7, 2004, a SWPPP inspection showed that the sediment/detention pond overflowed into the storm drain on Mountain Boulevard due to one to three inches of rain that had begun the previous afternoon. *See* Engeo, "Winter Monitoring Reports, Weeks of

November 29th and December 6th" (Dec. 15, 2004). During a subsequent inspection on December 8th, the inspector noted that check dams were needed on A-Street, the primary road through the site, to help slow the water that was entering the inlets, and measures were needed to ensure that water did not run around the inlet protection and down the middle of the street. *See id.*

28. The Alameda County Public Works' flow gage data for the storm drain at the junction of Lundholm and Oakdale Avenues, which measures Line J-1 also known as Chimes Creek, shows anomalies in flow from October 18, 2004 to February 9, 2005. *See* Ex. 3, ¶ 39. Specifically, the data show at least two distinct periods during which the flow volume would gradually increase starting at around 6 p.m., peaking at around midnight, and then gradually tapering off to a higher-than-normal baseline flow by 7 a.m. *See id.* The first period began on November 18, 2004 and lasted through December 6, 2004. *See id.* The second period was shorter, starting on January 10, 2005 and lasting for about a week. In response to inquiries from the MHA, Kent Peyton, DeSilva, stated that there had not been any unusual discharges, but that the anomalies in the flow data may have correlated with DeSilva bypassing "clear" water around the detention basin. *Id.*

29. In March 2005, members of the MHA observed that DeSilva was clearing brush, removing trees, and installing Alameda whipsnake fences within the 100 feet of the creek on the project site. *See* Ex. 1, ¶ 16; *see also* Essex Environmental, Inc., "Environmental Inspection Report" (Feb. 25, 2005, Mar. 18, 2005, and Mar. 21, 2005), *available at* http://www.oaklandnet.com/leonaquarry/lqcompliance.html.

30. According to the City, it required DeSilva to apply for a Creek Protection Permit for the construction of the Ridgemont detention basin concrete outfall structure in early 2005. *See* email from Ron Ward, PWA, to Mark Brest van Kempen (Dec. 29, 2005) (Exhibit 7). According to the City, it reviewed DeSilva's application for a "Creek Determination" in February 2005. *See id.*; *see also* Creek Protection Permit, pp. 1-2 (Aug. 18, 2005) (Exhibit 8). In April 2005, the City determined that a Category II Creek Permit was applicable to the work proposed by DeSilva. *See id.* In May 2005, the PWA required DeSilva to prepare a Creek Protection Plan in addition to its application for Creek Determination. *See id.* DeSilva submitted the Creek Protection Plan on June 8, 2005. *See id.* On July 17, 2005, DeSilva began work on the Ridgemont Basin portion of the project. *See id.* The City issued a Category II Creek Protection Permit on August 18, 2005. *See* Ex. 8. The Conditions of the Permit require:

> "d. Work shall be conducted in such manner as to minimize dust, debris, noise and impact to the watercourse….
>
> e. Permittee shall be responsible for cleaning and repair of damage to the surrounding areas resulting from the work….
>
> g. Permittee shall implement the approved creek protection plan…"

Id. Members of the MHA notified city staff that they believed the work for which the permit was requested was being performed within 100 feet of the creek and thus should be subject to federal jurisdiction and a higher category of Creek Protection Permit. *See* Ex. 1, ¶ 18.

31. On April 19, 2005, the City Council approved the final maps for tracts 7351 and 7493 for the Leona Quarry Subdivision.

32. In late summer 2005, members of the MHA observed the installation of two large pipes, one was buried in the south slope of the site and the second was buried in the north slope that descends from the Ridgemont Development. *See* Ex. 3, ¶ 41; Exhibit 10. It appears that these subdrains are installed at very steep grades and function as "solid collector pipes." *See id.* According to the Interim Subdrain Plans dated August 9, 2005, both of these pipes discharge directly into the city storm drain. *See id.*

33. In late fall 2005, it appears DeSilva widened and resurfaced a fire road near the project site described as Area 5 by WRA in the wetland study. *See* Ex. 1, ¶ 19.

34. Site grading was completed prior to December 2005. *See* email from Ron Ward, PWA, to Nancy Nadel, City Council (Dec. 29, 2005) (Exhibit 9). By late 2005 DeSilva also had completed installation of utilities and roadwork. *See* SWPPP, p. 400-3

35. During a rainstorm in late December 2005, MHA members observed, "Chimes Creek is opaque with silt again after this last storm. According to City inspector the detention pond is overflowing this morning and overflowed this past Sunday releasing extremely turbid water [480 NTU] into Chimes Creek." Email from Mark Brest van Kempen to Ron Ward, PWA (Dec. 28, 2005) (Exhibit 10). Consistent with these observations, it appears that by December 28, 2005 the City and DeSilva determined that they needed to implement additional measures to prevent erosion and sediment transport to Chimes Creek. *See* Ex. 7. In response to MHA's concerns, Ron Ward, Supervising Civil Engineer, PWA, stated: "the developer is filtering the stored water and releasing it to the storm drain with pumps at a rate of about 300

gallons per minute," but noted that "[t]he detention pond does have limits to its effectiveness." *Id.* According to the engineer, "[w]hen heavy rains fall on the area, the filters cannot keep up with the inflowing storm water, and untreated, turbid water is allowed to overflow the weir in the discharge structure." *Id.* The engineer further noted that the detention pond's use for flood control "supersede[d] the requirement for turbidity standards in the released water." *Id.* Further, in response to concerns raised by Councilwoman Nadel regarding site conditions during the storm, the city engineer noted the measures DeSilva had installed prior to the rain and noted, "Things could be much worse." Ex. 9.

36. On January 25, 2006, we reviewed the Regional Board's files on the Leona Quarry Project for reports dating from December 2005, but the reports were not on file yet. On February 2, 2006, Keith Lichten, Senior Engineer, Regional Board, notified us that Engeo, on behalf of DeSilva, had filed a "Winter Monitoring Report, December 2005," which discussed the December 2005 discharges. According to Engeo:

> "During [December 2005] the project detention basin discharged during heavy rain events. Notices of discharge were submitted for these events and sampling and analysis were undertaken of discharged water. Continued maintenance, upgrading and monitoring of project BMPs improved the quality of stormwater leaving the project site. It is our opinion that the project was in compliance with the General Permit during this time period."

Letter of Transmittal from Debra Carey, Engeo, to Bruce Wolfe, Executive Officer, Regional Board (Jan. 6, 2006). The SWPPP Site Inspection Report for December 18, 2005, which was attached to the monitoring report, documented the following problems:

> "(1) Major rilling on the upper slope. Caused by straw waddles clogging a drain.
> (2) Blankets in some localized areas on the upper slope blown/washed down the hill opened up.
> (3) Detention pond: Filters Running at about 350 GPM. Water crested over the out fall structure. The head pressure caused a failure of the block off plate causing a release of dirt down stream."

Id. According to the Notice of Discharges submitted by DeSilva,

> "The discharges were not caused by a breach or malfunction of any on-site BMP but by the intensity and duration of the rainfall that decreased to

> intermittent rain on December 31, 2005. … [¶] … The rate of stormwater entering the basin was greater than could be processed by the filtration system prior to the discharges. As a result, stormwater overwhelmed the temporary outfall wier [sic] on these four occasions and discharged into the 39-inch storm drain."

DeSilva, "Notice of Discharge: December 22nd to January 3rd, 2006 Storm Series" (Jan. 4, 2006).
Subsequent SWPPP Inspection Reports dated December 20th through 31st document DeSilva's efforts to implement additional BMPs, including covering slopes with plastic, installing additional rock bags on slopes, cleaning out inlets and u-ditches, and flushing out the 18-inch storm drain pipes on the upper slopes. *See* "Winter Monitoring Report, December 2005." According to Engeo, these measures appear to have functioned during heavy rainfall on December 31, 2005. *See id.* However, members of the MHA observed increased runoff and additional erosion of banks along the Delmont Reach of Chimes Creek on December 30th and 31st. *See* Ex. 3, ¶ 43.

37. On January 30, 2006, the MHA reported apparent storm water discharges from the project site to the Delmont Reach of Chimes Creek. *See* Ex. 1, ¶ 22. DeSilva filed with the Regional Board a notice which reported that, "[o]n three occasions during working hours on January 29 -30 and February 2, 2006, discharges of storm water from the detention basin on site were observed entering the 39-inch storm drain under 1-580 at the Project boundary." DeSilva, "Notices of Discharges: January 29th to February 2nd, 2006" (Feb. 10, 2006). Again DeSilva explained, "The rate of stormwater entering the basin following these storm events was greater than could be processed by the filtration system during the subject time period. As a result, stormwater crested the temporary outfall wier [sic] on three occasions during this period and discharged water into the 39-inch storm drain." *Id.*, p. 2.

38. On March 6, 2006, the MHA reported apparent overflow of the detention basin and increased, silty storm water discharges from the project site to the Delmont reach of Chimes Creek. *See* Ex. 1, ¶ 23.

39. The MHA reported a similar incident of storm water discharge from the detention basin on the project site on March 14, 2006. *See id.*, ¶ 24.

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

40. The City is one of several municipalities located within Alameda County that has joined to form the Alameda Countywide Clean Water Program, and thus is subject to the waste discharge requirements under the Storm Water Permit for discharge of storm water runoff from storm drains and watercourses within its respective jurisdiction. *See* Storm Water Permit. The 1997 Storm Water Permit was in effect when DeSilva initiated the Leona Quarry Project. *See id.* The Regional Board amended and reissued the Storm Water Permit in 2003; however, the 2003 amendments generally are not applicable to projects that were initiated prior to 2003.

41. Members of the MHA have observed changes in the form and function of Chimes Creek since 1985. *See* Declaration of Nancy Sidebotham, ¶ 5 (Mar. 28, 2006) (Exhibit 11). The Delmont Reach of Chimes Creek had been relatively stable since the initial development of the neighborhood early in the 1920s. *See* Ex. 6, Attachments 1-3. In the early 1980s, it was still possible to wade from the top of the creek banks across the creek, and several fences crossed the creek just above water level, in the Millsmont neighborhood. *See id.* Since 1985, the creek bed has incised more than 15 feet along the 3800 block of Delmont Avenue, from Hillmont Drive to Nairobi Place. *See* Ex. 11, ¶ 5. Passage from one bank to the other is dangerous and difficult, if not altogether impossible. *See* Ex. 6, Attachments 1-3; *see also* letter from Leila Moncharsh, Attorney for Maureen Dorsey et al., to Claudia Cappio, City Economic Development Agency (CEDA), Ex. D *incorporating* letter from Dr. Maureen Dorsey to Claudia Cappio (July 28, 2002) ("In the forty years my neighbor, Ruth Brown has lived at 6311 Hillmont Drive, she has seen the creek go from being an easily crossed stream flowing through a meadow to what is now a deep ravine, that has eroded the property to expose their sewer line, which the City has 'protected' by suspending it by ropes across the creek!").

42. The City constructed the Ridgemont Sub-basin within the Leona Quarry site in the mid-1980s to collect and drain storm water runoff from the Ridgemont Development. *See* Final EIR, p. V-9; *see also* Ex. 11, ¶ 5. DeSilva listed the basin as one of the pre-construction control measures encountered within the project site: "Surface water from Ridgemont Drive area is channeled into a detention basin currently existing on the Leona Quarry project site near the northeastern property boundary in the undeveloped area. Storm water from this detention basin subsequently discharges into the Leona Quarry area." SWPPP § 500.3.2.

43. Because the storm water system which runs under Interstate 580 and discharges into the creek had been built out by the 1960's, MHA members have reported to the City their belief that the change in flow volume beginning in 1985 relates to the City's connection of the Ridgemont Development. *See* Ex. 11, ¶¶ 5-8, 17. Further, MHA members have reported to

the City their belief that the accelerated change since 2004 relates to the City's connection of the Leona Quarry Development to the City's storm water system at the 39-inch pipe that crosses under Interstate 580. *See id.*, ¶ 23; Ex. 1, ¶¶ 7-8.

44. Currently, the Chimes Creek channel form is characteristic of a geomorphically unstable urban creek. Its banks are exposed and nearly vertical, and contribute to high levels of turbidity during storm events. The deep incision restricts high flows through the stream channel, increasing the sheer stresses on the creek banks and bed, decreasing the habitat value of the creek, decreasing the water quality and ecological benefits of over bank flooding, and adding to further instability of the creek channel. The upstream extent of the incision is controlled by an artificial concrete structure that is rapidly being undermined by erosion. Once this control point is compromised, incision will advance upstream to the next artificial control at the nearest street crossing.

45. The environmental documents for the Leona Quarry Project discuss the impacts of prior development on Chimes Creek, *see* ¶ 11, *supra*, however, these documents do not include an analysis of the natural hydrograph for the creek. In particular, the Leona Quarry EIR does not make findings with regard to duration or frequency of historic or baseline flows in Chimes Creek. It does not describe or incorporate any hydrologic analysis which the City or its consultants may have prepared for the Ridgemont Project.

46. The MHA first requested a copy of the Ridgemont EIR from the City in spring 2005. On August 18, 2005, the MHA filed a formal public records request with the City for the Ridgemont EIR. As of the date of this Notice, the City has not located an EIR or other form of CEQA document prepared for the Ridgemont development.

C. Sanitary Sewer Discharges into Chimes Creek

47. The City, through the PWA, owns, operates and maintains the local sanitary sewer collection system. The City's sewer collection system includes over 1,000 miles of pipe, the majority of which are over 65 years old. *See* Sanitary Sewer Permit, ¶ 4.

48. Wastewater overflows, or sanitary sewer overflows (SSOs) from the City's collection system are discharged to various storm water and drain systems, including natural creeks that are part of such systems and tributary to central San Francisco Bay. *See id.*, ¶ 6; Basin Plan, p. 4-24. The wastewater collection systems in the East Bay region, including the City of Oakland, originally were constructed in the early twentieth century. *See id.*, ¶ 7. Poor

construction techniques, aging sewer pipes, and landscape alterations have caused significant infiltration/inflow[2] to storm water systems during the wet weather season. *See id.* Infiltration/inflow causes the amount of water in sewer pipes and wastewater treatment systems to increase dramatically and can lead to overflows of untreated wastewater into streets, local watercourses, and the Bay. *See id.*

49. In 1976 the Regional Board first issued the Sanitary Sewer Permit to the City for wet weather discharges. *See id.*, ¶ 9. The Regional Board reissued the permit in 1984, 1989 and 1994. *See id.* The Regional Board most recently renewed the Sanitary Sewer Permit on March 17, 2004.

50. There are two sanitary sewer lines that run within the City easements between Nairobi Place and Hillmont Drive. *See* PWA, "Supplemental Report on the status of Leona Quarry Subdivision Project," p. 3 (Jan. 25, 2005); *see also* Ex. 3.16. Line N runs from Nairobi Place about 600 feet along the north side of the creek and Line S runs from Nairobi to the intersection of Hillmont Drive and Delmont, a distance of 1,000 feet along the south side of the creek. *See id.* Line "N" is 8 inches in diameter and serves about 10 homes, while Line S is 12 inches in diameter and serves all properties along the south bank of the creek and properties upstream of Delmont.[3] *See id.* There are brick manholes built at 50 to 150 feet intervals along Line S on the south bank, and at least two manholes on the north bank.

51. Line S will carry wastewater flows from the future homes in the Leona Development. *See id.* City staff analyzed the capacity of Line S and determined that "some sections outside the creek area" will need to be upsized to accommodate the additional flow from this additional flow. *Id.*

52. According to the City,

> "Both creek banks have been eroding for at least the last 20 years. This process exposed the two sewer lines in several locations and undermined its stability as well as the stability of several homes in the vicinity. On December 3, 2004, a

---

[2] Inflow is the flow of storm water directly into the sewer system, and infiltration is the flow of storm water through the soil and through the permeable walls of deteriorated sewer pipes.

[3] The sewer line that runs along the south bank of the creek apparently was constructed in the summer of 1938, using 10 inch diameter vitrified clay pipe which was buried 6 to 16 feet below the slope surface. *See* Alan Kropp &Associates, "Geotechnical Consultations Regarding Chimes Creek Landslide, Oakland, California," p.7 (August 1983). Sometime later the original 10 inch diameter vitrified clay pipe was replaced with 12 inch diameter clay pipe. *See id*

> property owner reported a disjoined sewer main along Line N and City Maintenance crews reported immediately to the site and repaired the pipe."

Id.

53. The MHA has observed and notified the City of the "disjoined sewer main along line N" behind 6301 Hillmont Drive, and the PWA has responded to such notices, on multiple occasions since the mid-1980s. *See* Ex. 11, ¶¶ 9-11; Ex. 3, ¶¶ 62-66; Exhibit 3.18, "Sanitary Sewer Discharges" (Feb. 1, 2006). In December 2005 the City reconnected the sewer pipe behind 6301 Hillmont Drive again and built a wooden frame to provide additional support. To the MHA's knowledge the City has not taken any other actions to correct for the primary cause of the line break, namely erosion of the creek bank, or to rehabilitate the sewer system as it runs through the neighborhood. *See* Ex. 11, ¶ 11.

54. On July 8, 2004, the MHA also observed a break in Line S behind 3805 Delmont Avenue which resulted in discharges of wastewater into the Delmont Reach. *See* Ex. 1, ¶ 30.

55. In addition to exposed sanitary sewer lines on both sides of the creek, there are exposed sanitary sewer manholes on the south side of the creek. Between 3829 and 3835 Delmont Avenue there is a brick manhole that is completely exposed to the creek. *See* Ex. 3, ¶ 52. There are also exposed manholes at 6120 Oakdale Avenue and 3859 Delmont Avenue. *See id.*, ¶ 53; Ex. 1, ¶ 31. Untreated wastewater discharges from the tops of these manholes during storm events; trails of toilet paper are visible long after the rain stops. *See id.,* ¶¶ 38, 52-53; Ex. 3.18; Ex. 1, ¶ 31. On December 29, 2005, wastewater continued to discharge from the manhole at 6120 Oakdale even though the rain had stopped two days previous. Further, there is often a pungent odor emanating from these manholes and exposed pipes year-round, even during summer months. *See id.*, ¶ 56; Ex. 1, ¶ 29; Ex. 11, ¶ 10.

56. On December 14, 1999, the MHA received a letter from the City, stating that repairs would be made to restore the sewer line to full functionality. *See* Ex. 11, ¶ 11. The City noticed another meeting regarding "a sewer rehabilitation project in the vicinity of Chimes Creek between Hillmont Drive, Delmont Avenue, and Nairobi Place," on January 19, 2005. Letter from Gus Amirzehni, PE, City of Oakland, to Nancy Sidebotham (Jan. 19, 2005). Yet another meeting was noticed for February 1, 2006. To date the City has not performed repairs on the sewer line, other than the temporary repair of the line located at 6301 Hillmont Avenue. *See* Ex. 11, ¶ 11; Ex. 3, ¶ 62. The City has informed Millsmont residents that it plans to undertake repairs of the sewer line in summer 2006, but to date the City has not

conducted any surveys of the banks where the lines are located, or publicly noticed the preparation of any environmental documents. *See* Ex. 3, ¶ 54.

57. The Regional Board's electronic database for SSOs is currently being upgraded. We have been unable to determine whether the City has filed reports with the Regional Board regarding sanitary sewer discharges of which it has been notified by the MHA. According to Michael Chee, Water Resources Control Engineer, Regional Board, he does not have any record of the City reporting sanitary sewer discharges. *See id.*, ¶ 61. Further, based on our review in March 2006, it does not appear that these discharges have been reported by the Director of PWA on his "Incident Reports" webpage. *See id.*; *see also* *http://www.oaklandpw.com/Page691.aspx.*

II.
JURISDICTION

58. Section 505 of the CWA, 33 U.S.C. § 1365, authorizes citizens to:

> "commence a civil action on his own behalf … against any person … governmental instrumentality or agency … who is alleged to be in violation of (A) an effluent standard or limitation … or (B) an order issued by the Administrator or a State with respect to such a standard or limitation …."

The meaning of "effluent standard or limitation" includes an unlawful act under section CWA section 301, an effluent limitation or other limitation under CWA sections 301 or 302, certifications under CWA section 401, and permits or conditions issued under CWA section 402. *See* 33 U.S.C. § 1365(f).

59. The District Court has jurisdiction "to enforce such an effluent standard or limitation, or such an order, … and to apply any appropriate civil penalties." 33 U.S.C. § 1365(a).

60. This Notice alleges that DeSilva and the City, respectively, have violated effluent standards and limitations in the construction of the Leona Quarry Project and the operation and maintenance of the sanitary and storm water sewer systems tributary to Chimes Creek.

III.
STANDING

61. The MHA 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. Within these boundaries, there are 78 properties that face onto Chimes Creek, 37 of which are located to the east of Nairobi Place, referred to herein as the Delmont Reach. MHA's membership includes several of the owners and/or occupants of these 37 properties. The actions addressed in the following claims have directly affected residents' use and enjoyment of these properties.

62. Alleged injuries include impairment of recreational use and aesthetic enjoyment due to turbid discharges which cause loss of riparian vegetation, erosion of creek banks, as well as the sight and smell of untreated wastewater in and around the Delmont Reach of Chimes Creek. The MHA asserts that these injuries are traceable to DeSilva's construction activities on the Leona Quarry Project, and the City's operation and maintenance of the storm water and sanitary sewer systems tributary to Chimes Creek. These activities are governed by sections 301, 401, 402, and 404 of the CWA.

63. MHA asserts that these injuries can be redressed by proper and adequate enforcement of the CWA, in addition to the physical restoration of Chimes Creek and repair of the storm water and sanitary sewer infrastructure located along the Delmont Reach. The District Court has jurisdiction to apply these remedies via enforcement of CWA standards and the application of civil penalties. *See* 33 U.S.C. § 1365(a).

IV.
CLAIMS

64. The claims stated below are in three categories.

Subsection A concerns the discharges of storm water resulting from the construction and operation of Leona Quarry Project. Claims 1, 2, 5, 7, 9, 10, 14, 16, 18, 20, and 22 are addressed to DeSilva. Claims 3, 4, 6, 8, 11, 12, 13, 15, 17, 19, and 21 are addressed to the City. These claims are organized by permit or other provision of law alleged to be violated. Thus, Claims 1 and 2 concern the failure of DeSilva to apply for a dredge-and-fill permit and related water quality certification, and Claim 3 concerns the failure of the City (as the general permittee for the storm water system) to require such application.

Subsection B concerns the cumulative impacts of discharges from Ridgemont and Leona Quarry Developments into Chimes Creek. Claims 23-25 are addressed to the City.

Subsection C concerns the discharges from the sanitary sewer system into Chimes Creek. Claims 26-32 are addressed to the City.

A. Construction Activities

Claim 1. DeSilva Did Not Notify the Corps of Engineers of Dredge and Fill Activity.

65. Under CWA section 301(a), 33 U.S.C. § 1311(a), pollutant discharges are prohibited absent a permit: "Except as in compliance with this section and sections [302, 306, 307, 318, 402 and 404], the discharge of any pollutant by any person shall be unlawful." The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." CWA section 404, 33 U.S.C. § 1344, requires that a discharger obtain a permit from the U.S. Army Corps of Engineers (Corps) prior to the discharge of dredged or fill material into navigable waters of the United States. *See also* 33 C.F.R. § 323.6(a).

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

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

66. The General Permit does not waive the prohibition on unauthorized discharges of fill or dredged material: "This General Permit does not authorize discharges of fill or dredged material regulated by the U.S. Army Corps of Engineers under CWA section 404 and does not constitute a waiver of water quality certification under CWA section 401."

67. In response comments to the City's Draft Subsequent EIR, the Regional Board wrote:

> "Should the [Leona Quarry] project include work in jurisdictional waters of the United States, … then it could likely require a [dredge-and-fill] permit … pursuant to Section 404 of the [CWA]. Such permits also require a project proponent to apply and receive Water Quality Certification from the Water Board pursuant to Section 401 of the CWA."

Letter from Keith H. Lichten, Regional Board, to Claudia Cappio, CEDA (Dec. 4, 2003).

68. DeSilva and the City determined that consultation with the Corps regarding a section 404 permit was not necessary because, "No wetlands under the jurisdiction of the Corps or CDFG will be filled by the project," and no fill of the jurisdiction waters of Chimes Creek would occur. Draft EIR, p. IV.B-10, 12; Final Subsequent EIR, p. IV.E.1.

69. As stated in ¶ 8, *supra*, a report prepared for DeSilva indicates that Area 5 on the project site meets all the Corps' criteria for presence of wetlands. However, DeSilva, through its consultants, made the *legal* determination that these wetlands were not subject to the Corps' permitting jurisdiction under CWA section 404. This determination was based, in part, on the assumption that DeSilva would not fill Area 5. However, as stated in ¶ 33, *supra,* it appears that DeSilva used earth-moving equipment to widen and then resurface the fire road within 25 feet of Area 5. To our knowledge DeSilva did not provide any project-specific evidence that this work would result only in "incidental fallback" to Area 5.

70. DeSilva appears to have used earth-moving equipment within Chimes Creek. According to a report prepared by Lowney Associates, DeSilva's consultants,

> "DeSilva Gates ran six Cat 657 scrapers. Two of the scrapers cut from the slope to the north and west of lot 50…. Four of the scrapers cut from the slope to the east of the former stream bed. The soils were placed as fill in the former stream bed. The soils were spread into thin lifts and compacted by a second Cat 825 sheepsfoot compactor."

Lowney Associates, Daily Field Report (July 19, 2004). Given that WRA, DeSilva, and the City concede that Chimes Creek flows through the project site, there appears to be no basis for Lowney Associates' reference to the creek bed in the past tense. Further, this statement does

not account for the connectivity of the creek with sub-surface flows. It appears that the construction of the outfall structure in the Ridgemont Basin involved earth-moving activities within 100 feet of Chimes Creek, contrary to findings in the Draft EIR that no fill would occur.

71. There are two consultation requirements that are triggered by application for a section 404 permit: (1) consultation with the Regional Board regarding water quality certification (*see* CWA § 401(a)(1)), which is discussed below; and (2) consultation with DFG regarding a Streambed Alteration Agreement, which is required in certain instances for construction projects that would impact wetlands associated with rivers, streams, or lakes (*see* Fish and Game Code §§ 1601-1603). Under Fish and Game Code § 1602, "[a]n entity may not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of any river, stream, or lake, or deposit or dispose of debris, waste, or other material … where it may pass into any river, stream, or lake, unless" the entity notifies DFG of the proposed work and consults with DFG regarding the need for a Streambed Alteration Agreement to prevent harm to fish and wildlife resources. DeSilva did not consult with the Corps to request a section 404 permit, and so did not consult with the Regional Board and DFG regarding regulatory requirements that derive from a section 404 permit.

72. DeSilva's failure to notify the Corps of the use of mechanized earth-moving equipment to conduct earth-moving activity in the immediate area of Area 5, as designated in the wetland delineation, and Chimes Creek violates the requirement in CWA section 404 that the Chief of Engineers determine whether a permit is required for such activity.

Claim 2. DeSilva Did Not Seek or Obtain Water Quality Certification from the Regional Board.

73. CWA section 401(a)(1), 33 U.S.C. § 1341(a)(1), requires:

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

74. As stated in ¶¶ 65-72, *supra*, DeSilva should have notified the Corps to seek or obtain a CWA section 404 permit for the use of mechanized earth-moving equipment to conduct earth-moving activity in the immediate area of Area 5 and Chimes Creek.

75. DeSilva argues it was not required to obtain section 401 water quality certification because it did not obtain a section 404 permit. This end-run around the law is not permitted; DeSilva may not avoid compliance with section 401 by failing to obtain the necessary federal permit that would trigger the certification requirement.

76. By failing to seek or obtain water quality certification to assure that earth-moving activities in the immediate area of Area 5 and Chimes Creek would comply with relevant water quality standards, DeSilva violates CWA section 401.

Claim 3. The City Did Not Notify the Corps of Potential Discharges of Dredge and Fill Material into Chimes Creek.

77. As stated in ¶¶ 65-72, *supra*, DeSilva should have sought to obtain a CWA section 404 permit from the Corps for the use of mechanized earth-moving equipment to conduct earth-moving activity in the immediate area of Area 5 and Chimes Creek.

78. As stated in ¶ 8, the City adopted the findings made by WRA and DeSilva in the wetlands delineation. The City found that it was not necessary for DeSilva to seek or obtain section 404 dredge and fill permit from the Corps.

79. By not notifying the Corps, or otherwise requiring DeSilva to notify the Corps, of DeSilva's earth-moving activities in Area 5 and Chimes Creek, the City violates CWA section 404 which requires that the Chief of Engineers determine whether such activity requires a permit.

Claim 4. The City Did Not Notify the Regional Board of Potential Discharges of Dredge and Fill Material into Chimes Creek.

80. As stated in ¶¶ 65-72, *supra*, DeSilva should have notified the Corps to obtain a CWA section 404 permit for the use of mechanized earth-moving equipment to conduct earth-moving activity in the immediate area of Area 5, as designated in the Wetland Delineation, and Chimes Creek. As further stated in ¶¶ 73-76, *supra*, DeSilva should have sought section 401 certification for earth-moving activities requiring a section 404 permit.

81. As stated in ¶ 8, the City adopted DeSilva's finding that it should not seek authorization under CWA section 404 from the Corps for dredge and fill activities, and consequently found that DeSilva was not required to seek section 401 certification from the Regional Board.

82. By not notifying, or otherwise requiring DeSilva to notify, the Regional Board of DeSilva's earth moving activities in Area 5 and Chimes Creek, the City violates CWA section 401 which requires that proponents of activities requiring a federal permit obtain certification from the state that such activities will comply with applicable water quality standards.

Claim 5. DeSilva Discharges Storm Water that Causes Pollution, Contamination, and Nuisance.

83. Discharge Prohibition A.3 of the General Permit requires, "Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance." Receiving Waters Limitations B.1 and B.2 describe conditions which may create pollution, contamination or nuisance:

> "1. Storm water discharge and authorized nonstorm water discharges to any surface or ground water shall not adversely impact human health or the environment.
>
> 2. The SWPPP developed for the construction activity covered by this General Permit shall be designed and implemented such that storm water discharges and authorized nonstorm water discharges shall not cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan and/or the applicable RWQCB's Basin Plan…."

84. Under CWA section 303, water quality standards consist of water quality criteria, beneficial uses, and the antidegradation policy. *See also* 40 C.F.R. §§ 131.10 – .12.

85. The Regional Board has identified beneficial uses for each significant water body in the region, organized according to the seven major watersheds within the region. *See* Water quality Control Plan (Basin Plan) for the San Francisco Bay Region (Nov. 2004), Ch. 2, *available at* http://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH2.html. The beneficial uses of any specifically identified water body generally apply to all its

tributaries.[4] *See id.* Chimes Creek is tributary to San Francisco Bay Lower. *See id.*, Fig. 2-6. The beneficial uses for San Francisco Bay Lower are Ocean, Commercial, and Sport Fishing, Estuarine Habitat, Industrial Service Supply, Fish Migration, Navigation, Preservation of Rare and Endangered Species, Water Contact Recreation, Non Contact Recreation,[5] Shellfish Harvesting, and Wildlife Habitat.[6] *See id.*, Table 2-4. The beneficial uses that are relevant to Chimes Creek are Non Contact Recreation and Wildlife Habitat.

86. States are required to adopt water quality criteria that are adequate to protect the designated uses of a given water body. *See* 40 C.F.R. § 131.11. The Regional Board has established the following water quality objective for turbidity[7] which is applicable to Chimes Creek:

> "Turbidity: Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases from normal background light penetration or turbidity relatable to waste discharge shall not be greater than 10 percent in areas where natural turbidity is greater than 50 NTU."

Basin Plan, Ch. 3 *available at* http://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH3.html

---

[4] In some cases a beneficial use may not be applicable to the entire body of water, such as navigation in Calabazas Creek or shellfish harvesting in the Pacific Ocean. *See id.* In these cases, the Regional Board's uses its judgment regarding water quality control measures necessary to protect beneficial uses. *See id.*

[5] Non contact recreation is defined as, "Uses of water for recreational activities involving proximity to water, but not normally involving contact with water where water ingestion is reasonably possible. These uses include, but are not limited to, picnicking, sunbathing, hiking, beachcombing, camping, boating, tide pool and marine life study, hunting, sightseeing, or aesthetic enjoyment in conjunction with the above activities." Basin Plan, Ch. 2.

[6] Wildlife Habitat is defined as, "Uses of waters that support wildlife habitats, including, but not limited to, the preservation and enhancement of vegetation and prey species used by wildlife, such as waterfowl." Basin Plan, Ch. 2.

[7] Turbidity is a principal physical characteristic of water and is an expression of the optical property that causes light to be scattered and absorbed by particles and molecules rather than transmitted in straight lines through a water sample. It is caused by suspended matter or impurities that interfere with the clarity of the water. These impurities may include clay, silt, finely divided inorganic and organic matter, soluble colored organic compounds, and plankton and other microscopic organisms. Runoff from watersheds, especially those that are disturbed or eroding, is a typical source of turbidity. *See* U.S. Environmental Protection Agency, "Importance of Turbidity," *available at* http://www.epa.gov/safewater/mdbp/pdf/turbidity/chap_07.pdf.

87. In instances where water quality is better than that prescribed by the objectives, the state Antidegradation Policy applies. *See id.* The Antidegradation Policy requires existing water quality to be maintained at 1968 levels or higher, and any change to water quality must not "unreasonably affect present and anticipated beneficial use[s]." State Water Resources Control Board Resolution 68-16 (Oct. 28, 1968).

88. DeSilva's construction activities at the Leona Quarry Project have resulted in discharges of storm water that increase the flow into Chimes Creek and cause the water in the creek to be turbid beyond natural background levels. We use the phrase "turbid discharges" to refer to discharges that increase volume and turbidity of flows; the phrase deals with both quantity and quality. Members of the MHA estimate that since DeSilva began construction at the quarry site in 2004, there are turbid discharges approximately seventy percent of the time during the wet season, and approximately thirty percent during the dry season. *See* Ex. 1, ¶ 7. The MHA alleges that the construction of the development is the cause of these turbid discharges because construction appears to be the only major variable to have changed since 2004. *See id.* The Millsmont neighborhood and most of the surrounding residential area have been built out for decades, and the MHA is not aware of any other major development or events that have occurred since 2004 that would be likely sources of turbid discharges. *See id.*; *see also* Ex. 11, ¶¶ 23-25.

89. On November 2, 2004, the Regional Board issued "Notice of Non-Compliance with the Statewide Construction Stormwater Permit, Leona Quarry, City of Oakland, Alameda County" to DeSilva Gates Construction. The Notice cited six specific violations of the General Permit, which Regional Board staff observed during their October 26, 2004 site inspection. *See* letter from Keith Lichten, Regional Board, to Kent Peyton, DeSilva (Nov. 2, 2004). The Regional Board directed DeSilva to address the violations by submitting (1) a technical report identifying the steps taken to protect the site from erosion and to adequately control storm water, and (2) a revised SWPPP. *See id.*, pp. 4-5.

90. On November 9, 2004, DeSilva submitted a storm water quality inspection report that confirmed the Regional Board's findings: "results indicate that the discharges are causing or contributing to further impairment" of the storm drain system, including Chimes Creek. Storm Water Quality Construction Site Inspection Checklist, p. 5 (Nov. 9, 2004). DeSilva reported turbid discharges from the project site to the creek.

91. Although DeSilva revised the SWPPP, it still did not include measures adequate to comply with the water quality standard for turbidity. The Regional Board continued to

document violations of the standard: "the results appear to suggest that there were discharges from the lower detention pond ... and turbidity exceedances, on December 7, 8, 27, 30, 31, and January 3, [2004]," and "there remain discharges of turbid water from the site." Email from Keith Lichten, Regional Board, to Julie Gantenbein, NHI (Jan. 24, 2005).

92. According to reports submitted by Engeo, Inc., DeSilva's storm water management consultants, turbid discharges continued from January to April 2005: "[T]he filtration system discharge turbidity (NTU) readings increased to approximately 217 NTU before the readings were noted during routine monitoring." Engeo, "Notice of Discharge for January 12, 2005" (Jan. 26, 2005).

93. "On March 23, 2005, from the hours of approximately 7:00 to 8:00 am, a discharge of storm water from the detention basin on site entered the 39-inch-diameter storm drain under I-580 at the Project boundary.... The turbidity measurement within the basin at the time of discharge was approximately 273 NTU." Engeo Incorporated, Notice of Discharge for March 23, 2005 (April 4, 2005).

94. MHA members have recorded turbid discharges, as well. "As you saw from the sample I had this morning, a discharge from the quarry gave Chimes Creek a turbidity reading of 568 NTU at 8:00 this morning." Email from Mark Brest van Kempen to Faustino Jun Osalbo, Senior Construction Inspector, PWA (Feb. 24, 2005). Members of the MHA have described the increased flows during major storm events as being opaque and quarry-colored — dirt on the quarry has a distinct orange-color. *See* email from Mark Brest van Kempen to Jun Osalbo, PWA (May 11, 2005).

95. As stated in ¶¶ 35-36, *supra*, similar to the events in November 2004, there appear to be clear instances of turbid discharges and non-compliance with the SWPPP when the first storms of the season hit in mid- to late December 2005.

96. As stated in ¶¶ 37-39, *supra*, there have been turbid discharges during storm events in January and March 2006 as well.

97. Turbid discharges from the project site cause a nuisance to MHA members and adversely affect the beneficial uses of Non Contact Recreation and Wildlife Habitat. Turbid discharges interfere with aesthetic enjoyment of the creek because they cause churning flows which are opaque with sediment. Turbid discharges are also an indicator of the more fundamental problem of erosion of the project site and disturbed banks of the creek caused by storm water runoff. Sediment from erosion is the primary pollutant into the San Francisco

Bay. *See* Ex. 3, ¶ 51. MHA members' recreational use and enjoyment of the creek has been impaired. *See* Ex. 1, ¶ 3; Ex. 3, ¶ 3. They have noted the reduction in wildlife that inhabit the creek. *See id.* It has become dangerous to hike or walk along the banks of the creek. *See* Ex. 11, ¶ 26. In some cases, use of their own backyards is impaired; trees, fences and footpaths have been washed away:

> "A few months ago, not only did my entire backyard, shop and basement get flooded but I also had large pieces of 4x4 torn out of the ground, the massive surge that ripped through our properties was a huge risk to anyone standing near the creek that day. So far no one has been hurt and the soil we call home is the only thing we have lost."

Email from Phillip McGill to Mark Brest van Kempen et al (Mar. 1, 2006); *see id.; see also* Ex. 3, ¶ 46.

98. By releasing turbid discharges that do not comply with water quality standards and thereby cause and contribute to pollution and nuisance, DeSilva violates General Permit Discharge Prohibition A.3.

Claim 6. The City Has Not Prevented DeSilva from Discharging Storm Water that Causes and Contributes to Violations of Receiving Water Limitations.

99. Discharge Prohibition A.2 of the Storm Water Permit requires, "The discharge of storm water from a facility or activity that causes or contributes to the violation of Receiving Water Limitations is prohibited." Receiving Water Limitations B.1 requires:

> "The discharge shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of waters of the State: …
>
> b. Alteration of temperature, turbidity, or apparent color beyond present natural background levels;…"

100. As stated in ¶¶ 83-98, *supra*, DeSilva's construction activities repeatedly have resulted in turbid discharges, thereby causing and contributing to pollution, nuisance, and adverse impacts to beneficial uses.

101. By not preventing DeSilva from releasing turbid discharges that violate Receiving Water Limitations, the City violates its obligation as permittee under the Storm Water Permit to assure that all sub-permittees comply with Discharge Prohibition ¶ A.2.

Claim 7. DeSilva Has Discharged Silt in Quantities Sufficient to Cause Turbidity in Surface Waters.

102. The Basin Plan prohibits discharges of "[s]ilt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses." Basin Plan, Table 4-1.

103. As stated in ¶¶ 83-98, *supra*, DeSilva's construction activities have resulted in discharges of silt and possibly other earthen materials in quantities sufficient to cause turbidity in the Delmont Reach of Chimes Creek. These turbid discharges unreasonably affect and threaten to affect beneficial uses.

104. By discharging silt in quantities sufficient to cause turbidity in surface waters, DeSilva violates the Basin Plan's discharge prohibitions.

Claim 8. The City Has Discharged Silt from its Storm Drain System Sufficient to Cause Turbidity in Surface Waters.

105. As stated in ¶¶ 83-98 and 102-104, *supra*, DeSilva's construction activities have resulted in turbid discharges from the Leona Quarry site. These discharges are conveyed off the site via a 39-inch storm drain, which is owned and controlled by the City and discharges into the Delmont Reach of Chimes Creek. Although DeSilva's construction activities are the source of the silt, the City's is jointly liable for the discharge of the silt via the City's storm sewer system into the Delmont Reach.

106. By discharging silt in quantities to cause turbidity in surface waters, the City violates the Basin Plan's discharge prohibitions.

Claim 9. DeSilva Has Not Developed and Implemented a SWPPP that Assures Discharges Comply with Water Quality Standards and Receiving Water Limitations.

107. Receiving Water Limitation B.2 of the General Permit requires, "The SWPPP developed for the construction activity covered by this General Permit shall be designed and

implemented such that storm water discharges and authorized nonstorm water discharges shall not cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan and/or the applicable RWQCB's Basin Plan…."

108. The General Permit further states that the SWPPP must meet the following objectives:

> "a. Identify all pollutant sources including sources of sediment that may affect the quality of storm water discharges associated with construction activity … from the construction site, and …
>
> c. Identify, construct, implement in accordance with a time schedule, and maintain Best Management Practices (BMPs) to reduce or eliminate pollutants in storm water discharges and authorized nonstorm water discharges from the construction site during construction, …"

General Permit, "Section A: Storm Water Pollution Prevention Plan."

109. As stated in ¶¶ 83-98, *supra*, the SWPPP designed, developed, and subsequently amended by De Silva has not included sediment and erosion control measures and BMPs adequate to prevent turbid discharges from the project site that exceed the turbidity standard as established in the Basin Plan.

110. DeSilva has not adequately implemented the Erosion Control Plan contained in its SWPPP. According to the Plan, as filed April 23, 2004, DeSilva was to implement the following measures between the start of construction and October 1, 2004:

> "1. All Erosion Control Measures for each construction phase shall be completed at the start of each phase.
>
> 10. All drain inlets will be protected as they are completed during the entire course of construction.
> 11. Detention, water quality and sediment ponds will be complete and functional by October 1st."

However, DeSilva did not timely implement these measures. During its October 26, 2004 site inspection the Regional Board observed the following:

- "Slopes and graded areas, including large areas of relatively steep slopes, were inadequately stabilized with a hydroseed/recycled paper hydromulch, or lacked erosion control entirely. While small areas did not include more effective erosion blankets, the much larger area that lacked effective erosion controls resulted in the erosion of site soils, including fine-grained clays, and subsequent discharge of high-turbidity runoff to the detention basin at the bottom of the site, and from the basin to the storm drain and thence to Chimes Creek;

- Large areas of the hydroseed/hydromulch mixture applied prior to the storm of October 2004, had been eroded off the slopes and had likely discharged into the detention basin at the bottom of the site, and tributary to the storm drain downstream. ... The result of both storms was to demonstrate that the use of the mixture on the site's steep slopes and relatively erosive soils, without additional measures to prevent the mix from eroding, was not appropriate. In a meeting and subsequent site inspection with you prior the rainy season, Board staff had advised you of the likely inability of the proposed mixture to control erosion on the site. Because other, more effective, measures were available to control erosion on the site, and because you had been made aware of the likely need for such measures on this challenging site prior to the rainy season, the implementation of inadequate measures constituted a violation of the Permit's requirement to implement measures to the standard required by the Permit;...

- ...During our inspection of October 26, 2004, we observed that the system was discharging turbid water from the pond immediately below the Baker tanks, through a hay bale barrier, and directly into the downstream storm drain inlet, demonstrating that it was either inadequate or not being properly managed. Additionally, the pond overflow where the discharge was taking place was inadequately protected, resulting in its erosion and additional discharge or sediment to the storm drain; ..."

Regional Board, "Notice of Non-Compliance," pp. 2-3 (Nov. 2, 2004).

111. DeSilva's repeated releases of turbid discharges over the course of one and a half years of construction show that DeSilva has not revised its SWPPP to provide for implementation of effective control measures to date. As stated by the Regional Board, "**A pollutant discharge above the benchmark level of 50 NTUs indicates that an effective SWPPP is not being implemented and that immediate investigation and corrective action are required.**"

Id., p. 4 (emphasis in original). It is DeSilva's obligation as permittee under the General Permit to design and implement an effective SWPPP from the start of construction. However, DeSilva has a history of implementing underdesigned BMPs. According to the Regional Board:

> "[I]f a project's controls were underdesigned for known site conditions, and that resulted in turbid discharges, then it would be inappropriate to simply use heavy storms as an excuse, since the underdesigned controls – a factor within the discharger's control – would have clearly contributed to the discharge. As we note below the site's BMPS – even the current BMPS – appear underdesigned."

Regional Board, "Comments on City's Draft Response to Natural Heritage Institute," p. 2 (Feb. 8, 2005) (Ex. 12). Further,

> "[T]he [General] Permit requires a level of best professional judgment, such that one cannot aim very low … and then come back later when things go bad, using that Permit approach [i.e., implement ineffective controls and then bring them up to a better condition as they failed over time,] as a shield."

Id. The Regional Board was also critical of DeSilva's delay in implementing BMPs until it received a directive from the Regional Board:

> "These statements regarding additional BMPs are correct. However, it should be noted that these BMPs were implemented only under threat of enforcement and *they replaced a series of BMPS that appeared clearly inadequate for the site*. Our view is that they should have been in place prior to the beginning of the rainy season."

Id., p. 3 (emphasis added).

112. The Regional Board has raised concerns that the sediment ponds, the primary measures to control erosion and sedimentation, are underdesigned for the project site. It has stated that the City's claim, "[t]he detention basin has the capacity to store approximately 2" to 3" of continuous rainfall before overflowing into the storm drain system leading to Chimes Creek," appears incorrect. *Id.* The Regional Board explained why it disagreed with the statement:

"We have not been able to locate information that would substantiate these numbers, and we would strongly recommend that you obtain the following information prior to making this response: the volume of the upper pond available for use to detain runoff; the volume of the lower pond available for use to detain runoff; the total area of the catchment—including the area above the site that drains down to the main basin; and, the engineering analysis used to do the lower pond's construction-stage water quality design. The Discharger's SWPPP states that there is an initial site area of 128 acres, and then a post-construction site area of 153 acres. However, it's our understanding that the total catchment contributing to the downstream basin is more like 230 to 240 acres. As far as we can tell, the detention pond detains about 3.3 acre-feet, according to our on-site discussions with the Discharger's representatives. If these numbers are correct, then the pond would detain about 0.2 inches of runoff, rather than the 2-3 inches you indicate. If we use the number stated in the Discharger's SWPPP (i.e., assume that about 120 acres drain to the basin), the pond would detain only about 0.3 inches of runoff. DeSilva assumed a site runoff coefficient of 0.45, so that translates to rainfalls of 0.4 -0.7 inches, respectively. These are substantially below the numbers you give. Your numbers appear to be calculated for the detention pond's flood flow capacity, which we understand is about 33 acre-feet. However, clearly, the pond is detaining nowhere near that kind of volume for water quality. As we discussed on the site, for public safety reasons, it is not acceptable for the water quality portion of the pond to take up the flood flow storage volume.

In its design calculations for the upper detention pond, dated September 1, 2004, the Discharger notes the Construction Stormwater Permit standard of 3,600 cubic feet of capacity per catchment. If we assume a 120-acre catchment for the lower pond, then it should have a detention volume of at least 9.9 acre-feet to meet this standard. If we assume what we understand to be the actual contributing catchment—more like 230 acres—then the lower pond would have a volume of 19 acre-feet. It might be reasonable to subtract the volume of the upper pond, but it is unclear what detention volume is regularly available in that pond—that is, the upper pond seems to pond water for extended periods of time, so that its effective detention volume may be lower than the design volume.

We know that the Discharger's implemented treatment system has a flow rate of about 350 gallons per minute, or 0.78 cfs. As such, if the lower pond is full to 3.3 acre-feet, and no more water is coming in, it would take that treatment

> system more than 2 days to empty the lower pond. Therefore, it will work effectively only when relatively small storms come along in a widely spaced manner. This pumping time, combined with the relatively low apparent pond volume relative to the upstream catchment, suggest that the pond and treatment system remain undersized."

Id. We believe that DeSilva has installed additional subdrains since the Final Subsequent EIR was adopted and the original SWPPP was filed (*see* ¶ 32, *supra*), which would be consistent with the Regional Board's analysis that the actual contributing catchment is much larger than anticipated by DeSilva and the City. We have been unable to locate any response by the City to the Regional Board's concerns.

113. By implementing a SWPPP which includes underdesigned measures and does not assure compliance with water quality standards, DeSilva violates Receiving Waters Limitation B.2 of the General Permit.

Claim 10. DeSilva Has Not Implemented Controls to Reduce Pollutants in Storm Water Discharges from Construction Sites to the BAT/BCT Performance Standards.

114. Provision C.2 of the General Construction Permit requires: "All dischargers shall develop and implement a SWPPP in accordance with Section A: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT [Best Available Technology Economically Achievable/Best Conventional Pollutant Control Technology] performance standard."

115. As stated previously in ¶¶ 107-114, *supra*, DeSilva has implemented a series of underdesigned BMPs on the site. The Regional Board's Notice of Non-Compliance described DeSilva's failure to properly implement measures in the SWPPP adequate to meet the BAT/BCT performance standard:

> "Despite two previous meetings with Water Board staff to discuss our recommendations for this project, site conditions observed and photographed are not in compliance with the above provisions and have caused and continue to threaten to cause pollution to Waters of the State. It is apparent that *the site's current control measures are ineffective and most likely have caused significant sediment discharges* during the last two storm events. The Permit and this

> Board's Basin Plan prohibit the resultant uncontrolled discharges of sediment laden storm water to the storm drain system and to Waters of the State."

Notice of Non-Compliance, p. 3 (emphasis added). The Regional Board described DeSilva's failure to properly implement BMPs to achieve the BAT/BCT performance standard even though DeSilva knew "other, more effective, measures were available to control erosion on the site, and … had been made aware of the likely need for such measures on this challenging site prior to the rainy season …" *Id.*, p. 2. The Regional Board ordered DeSilva to: "Fully implement a site-specific SWPPP consisting of best management practices for *all* pollutants, including those other than sediment." *Id.*, p. 3.

116. The "Notice of Discharges: January 29th to February 2nd, 2006" illustrates that DeSilva has continued to implement underdesigned BMPs into 2006. DeSilva has cited "rainfall in excess of what could be processed by the filtration system" as a reason for turbid discharges since December 2004, but it declined to enhance the mechanical filtration system with a 24-hour program of filtration of the detention basin water until February 2006 despite repeated discharges.

117. As stated in ¶¶ 83-98, 107-113, *supra*, DeSilva has not properly implemented BMPS adequate to achieve BAT/BCT performance standards for control of pollutants on the site to date.

118. By not implementing a SWPPP that includes controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT standard, DeSilva violates Provision C.2 of the General Permit.

Claim 11. The City Has Not Implemented Control Measures to Reduce Pollutants in Storm Water Discharges.

119. Provision C.1 of the Storm Water Permit requires,

> "The Dischargers shall comply with Discharge Prohibition A.1 and A.2 and Receiving Water Limitations B.1 and B.2 through the timely implementation of control measures and other actions to reduce pollutants in the discharge in accordance with Provisions C.2 through C.7 and the Plan and any of its modifications, revisions, or amendments developed pursuant to this Order. If adverse impacts to beneficial uses of receiving waters persist following implementation of Provisions C.2 through C.7 and the Plan, this Order will be

> reopened to require the Dischargers to identify, assign, and implement additional control measures and revise the Plan, forthwith, to ensure compliance with Discharge Prohibitions A.1 and A.2 and Receiving Water Limitations B.1 and B.2."

120. As stated in ¶¶ 83-98, 107-113, *supra*, DeSilva, the City's sub-permittee under the Storm Water Permit, repeatedly has release turbid discharges of storm water that do not comply with the Receiving Water Limitations B.1. and B.2 in violation of Discharge Prohibition A.2.

121. By not assuring that DeSilva implements control measures to assure compliance with Discharge Prohibition A.1 and A.2 and Receiving Water Limitations B.1 and B.2 of the Storm Water Permit, the City violates its obligation as permittee under the Storm Water Permit to assure all sub-permittees comply with Provision C.1.

Claim 12. The City Has Not Implemented Its Storm Water Management Plan to Assure Reduction in Storm Water Pollution to the Maximum Extent Possible.

122. Provision C.2 of the Storm Water Permit requires, "The Dischargers shall implement control measures and best management practices to reduce pollutants in storm water discharges to the maximum extent practicable. The Plan shall serve as the framework for identification, assignment, and implementation of such control measures. The Dischargers shall begin implementing forthwith the Plan and shall subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in storm water discharges to the maximum extent practicable and as required by Provisions C.1 through C.7 of this Order." The Plan developed by the City pursuant to Provision C.2 is an integral and enforceable component of the Storm Water Permit. *See* Finding ¶ 6.

123. The City's Storm Water Management Plan includes a Performance Standard for Erosion and Sedimentation Control for new development and construction sites, which provides: "As a condition of issuance of a grading permit, each agency will require developers to prepare, submit to the agency for review and approval, and implement an effective erosion and sediment control plan or similar administrative document that contains erosion and sediment control provisions."

124. As stated in ¶¶ 83-98, 107-118, *supra*, the erosion and sediment controls implemented by DeSilva have not prevented turbid discharges from the project site. DeSilva's

SWPPP, which it has submitted for approval by the City, includes erosion and sediment control measures. DeSilva has revised the SWPPP in a piecemeal fashion, adding a few erosion and sediment control measures after incidents of non-compliance. However, despite the ongoing pattern of non-compliance, the City has not required DeSilva to submit a comprehensive review and revision of the SWPPP that provides for implementation of an *effective* erosion control plan.

125. By not requiring DeSilva to implement an effective erosion and sediment control plan, the City violates its obligation as permittee under the Storm Water Permit to comply, and ensure proponents of new development comply, with performance standards in its Storm Water Management Plan, and to demonstrate the plan's effectiveness in reducing pollutants in storm water to the maximum extent practicable, as required by Provision C.2.

Claim 13. The City Has Not Required DeSilva to Design the Detention Basin to Meet the Alameda County NPDES Permit Provision C.3 Requirements.

126. Condition of Approval 23.b requires, "The Project Applicant shall meet the revised Clean Water Act requirements as established by the Regional Water Quality Control Boar ("RWQCB") in the most recent version of such requirements or, if approved as of the date the grading permit application is filed, any final version of such requirements. The detention basin shall met [sic] the new Alameda County NPDES permit provision C3 requirements."

127. By the time the City issued the Conditions of Approval, the Regional Board had reissued the "Alameda Countywide NPDES Municipal Stormwater Permit" to the Alameda Countywide Permit. *See* Regional Board, Order R2-2003-0021 (Feb. 19, 2003). Provision C.3 of the 2003 Storm Water Permit requires in part:

> "a. Performance Standard Implementation
>
> The Dischargers shall continue to implement and improve, as necessary and appropriate, the performance standards for new development and redevelopment controls detailed on Pages B-ND-1 through B-ND-6 of the July 1996 Management Plan.
>
> 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 conditions of approval in permits for applicable projects, as defined in Provision C.3.c, to ensure that stormwater pollutant discharges are reduced by incorporation of treatment measures and other appropriate source control and site design measures, and increases in runoff flows are managed in accordance with Provision C.3.f, to the maximum extent practicable. Such conditions shall, at a minimum, address the following goals.

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

d. Numeric Sizing Criteria for Pollutant Removal Treatment Systems

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

i. Volume Hydraulic Design Basis

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

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

2. The volume of annual runoff required to achieve 80 percent or more capture, determined in accordance with the methodology set forth in Appendix D of the California Stormwater Best Management Practices Handbook (1993), 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 approved by the Regional Board, shall be implemented so that post-project runoff shall not exceed estimated pre-project rates and/or durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the amount and timing of runoff. The term duration in this Provision is defined as the period that flows are above a threshold that causes significant transport and may cause excessive erosion damage to creeks and streams."

128. The Conditions of Approval were promulgated after the City had completed its environmental review of the Project. We have been unable to locate any subsequent analysis undertaken by DeSilva or the City, or any subsequent findings, to confirm that the detention basin will comply with the criteria contained in new Provision C.3.

129. The Regional Board has expressed doubt that the basin will function per the C.3 criteria:

"…given our further analysis of the detention pond for construction [*see* ¶ 112, *supra*], it is unclear to us how this pond can be expected to function adequately to treat post-construction runoff from the project site. A typical design would require the pond to treat runoff resulting from about 1 inch of rain; however, it appears that the pond's post-construction water quality volume falls well below the necessary volume. Similarly, even for small storms, runoff ponds in the basin to depths of at least several feet, rendering flow-through treatment of the kind described in the project's CEQA documents ineffective. Is it possible that the city has not yet completed an engineering review of the basin's water quality design features to ensure it would meet some basic minimum standards? This is particularly of concern, since the City appears to have determined that no other stormwater treatment BMPs will be constructed in the project (aside from the basin). When we met with you last, you indicated that the City had performed an analysis of the project to come to the CEQA-document-required conclusion

> that no other BMPs were feasible. However, you did not have that analysis handy at the time. Would it be possible for you to forward that analysis to us?"

Ex. 12, p. 9. Members of the MHA have similar concerns. Ex. 1, ¶ 28.

130. By not assuring that the detention basin meets the Provision C.3 criteria, the City violates its duty as permittee under the Storm Water Permit to assure that all sub-permittees comply with Provision C.3.

Claim 14. DeSilva's Construction Activities Have Adversely Affected Designated Uses.

131. The Antidegradation Policy requires existing water quality to be maintained at 1968 levels or higher, and any change to water quality must not "unreasonably affect present and anticipated beneficial use[s]." State Board Resolution 68-16 (Oct. 28, 1968).

132. As stated in ¶¶ 83-98, 107-113, *supra*, DeSilva's construction activities have released turbid discharges from the project site, which cause or contribute to repeated non-compliance with water quality criteria and adversely affect designated beneficial uses.

133. By not complying with water quality criteria and adversely affecting designated uses, DeSilva violates the Antidegradation Policy.

Claim 15. The City Has Permitted Activities that Adversely Affect Designated Uses.

134. The Antidegradation Policy requires existing water quality to be maintained at 1968 levels or higher, and any change to water quality must not "unreasonably affect present and anticipated beneficial use[s]." State Board Resolution 68-16 (Oct. 28, 1968).

135. As stated ¶¶ 83-98, 107-113, *supra*, DeSilva's construction activities on the Leona Quarry Project site have released turbid discharges from the project site, which cause or contribute to repeated non-compliance with water quality criteria and adversely affect designated beneficial uses.

136. By not assuring that DeSilva's activities comply with water quality criteria sufficient to protect and maintain designated uses, the City violates the Antidegradation Policy.

Claim 16. DeSilva Has Not Timely Reported Noncompliance with the General Permit.

137. Receiving Waters Limitation B.3 of the General Permit prescribes notice and reporting requirements:

> "Should it be determined by the discharger, SWRCB, or RWQCB that storm water discharges and/or authorized nonstorm water discharges are causing or contributing to an exceedance of an applicable water standard, the discharger shall:
>
> a. Implement corrective measures immediately following discovery that water quality standards were exceeded, followed by notification to the RWQCB by 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 exceedance; (2) the BMPs currently being implemented; (3) any additional BMPs which will be implemented to prevent or reduce pollutants that are causing or contributing to the exceedance of water quality standards; and (4) any maintenance or repair of BMPs. This report shall include an implementation schedule for corrective actions and shall describe the actions taken to reduce the pollutants causing or contributing to the exceedance.
>
> b. The discharger shall revise its SWPPP and monitoring program immediately after the report to the RWQCB to incorporate the additional BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring needs…."

138. The Regional Board has further specified that monitoring reports must include "[r]ecords of any corrective actions and follow-up activities that resulted from the visual observations and/or sampling results, and/or a schedule for such corrective actions and follow-up activities." Notice of Non-Compliance, p. 7.

139. While we believe that Receiving Waters Limitation B.3 is the applicable reporting provision given the Notice of Non-Compliance, we allege, based on the facts stated in ¶¶ 140-145, *infra*, that DeSilva has not complied with Special Provision C.4, should it be deemed to apply. Special Provision C.4 of the General Permit requires, "All dischargers shall develop and implement a monitoring program and reporting plan in accordance with Section B: Monitoring Program and Reporting Requirements." Monitoring Program and Reporting Requirement Provision B.5 requires,

> "Dischargers who cannot certify compliance, in accordance with [Compliance Certification] and/or who have had other instances of noncompliance excluding exceedances of water quality standards as defined in section B.3 Receiving Water Limitations Language, shall notify the appropriate RWQCB within 30 days. Corrective measures should be implemented immediately following discovery that water quality standards were exceeded. The 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. Noncompliance notifications must be submitted within 30-calendar days of identification of noncompliance."

140. As stated in ¶¶ 35-36, *supra*, it appears DeSilva released turbid discharges from the site on December 18, 2005. DeSilva did not file a reports of noncompliance within 14 days of the date of noncompliance. While the letter of transmittal is dated January 6, 2006, it includes attachments that are dated after January 6th. Further, Regional Board's date stamp indicates that they received the document on January 24, 2006.

141. As described below, DeSilva's reports of noncompliance, prepared on DeSilva's behalf by Engeo, do not describe the actions necessary to achieve compliance, provide time schedules for implementing corrective actions, or otherwise indicate when compliance will be achieved.

142. On January 12, 2005, Engeo, DeSilva's consultant, filed with the Regional Board a Notice of Discharge for discharges that occurred in December 2004 and January 2005. Engeo attributed the cause of the discharge that occurred on December 8, 2004 to rainfall in excess of what could be processed by the filtration system. Its proposed corrective actions included: "adding a small plate to the large basin outfall to gain additional storage," pumping of the basin, and polymer sampling and sampling for pH and turbidity," but Engeo did not provide a schedule for implementation of these actions. Engeo did not explain how these actions would increase the capacity of the filtration system or achieve compliance.

143. Engeo attributed the cause of the discharge that occurred on December 31, 2004 to rainfall in excess of what could be processed by the filtration system. Engeo proposed to correct the problem by maintaining the filtration system to function at full capacity, installation of an additional 12-inch weir plate, and maintaining and monitoring other BMPs under the Project SWPPP. Engeo did not provide a specific implementation schedule, saying only that

these corrective actions would be "taken during the days following the discharge." Further, Engeo did not indicate when it expected to achieve compliance.

144. Engeo attributed the cause of the discharge that occurred on January 2-3, 2005 to rainfall in excess of what could be processed by the filtration system. Engeo reported that actions to repair and maintain BMPS were taken on January 3rd to 5th for erosion control and storm water management. It further recommended the adding another Baker tank, but did not identify a schedule for this addition or otherwise provide a schedule for achieving compliance.

145. On April 5, 2005, Engeo filed a Notice of Discharge for a discharge that occurred on March 23, 2005. Once again, Engeo attributed the cause of the discharge to rainfall in excess of what could be processed by the filtration system. Apparently the previous corrective actions either were not implemented properly or did not increase the capacity of the filtration system sufficiently. Engeo proposed to continue the following actions, which DeSilva had been implementing since January 2005 and that had not prevented the April discharge: continue routine monitoring and maintenance of all BMPs, manually perform backflushing and filtration during extended storm events, and monitor the filtration system full-time during daylight hours of storm events. No further corrective actions were recommended, and no time schedule for achieving compliance was provided.

146. By not submitting reports of noncompliance that comply with Receiving Waters Limitation B.3, DeSilva violates its obligations as permittee under the General Permit.

Claim 17. The City Has Not Assured DeSilva's Timely Reporting of Noncompliance.

147. Provision C.8 of the Storm Water Permit requires, "Each of the Dischargers shall comply with all parts of the Standard Provisions contained in Appendix A of this Order."

148. Standard Provision 7 requires, "The Dischargers shall furnish the Regional Board, State Board, USEPA, or local storm water management agency within a reasonable time specified by the agencies, any requested information to determine compliance with this Permit."

149. Standard Provision 11.c requires, "The Dischargers shall report any noncompliance at the time reports are submitted. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance 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 recurrence of the noncompliance."

150. As stated in ¶¶ 137-146, *supra*, DeSilva has not filed reports of noncompliance that comply with Receiving Waters Limitation B.3. The City has not filed any reports of noncompliance on its own or on DeSilva's behalf.

151. By not assuring that DeSilva timely reports incidents of noncompliance with water quality standards, the City violates its obligations as permittee under the Storm Water Permit to assure that all sub-permittees comply with the reporting obligations required by Provision C.8 of the Storm Water Permit.

Claim 18. DeSilva Has Not Revised Its Monitoring Program To Address Additional Monitoring Needs.

152. Receiving Waters Limitation B.3 of the General Permit requires revision of the SWPPP and monitoring program following notice of non-compliance by the Regional Board:

> "Should it be determined by the discharger, SWRCB, or RWQCB that storm water discharges and/or authorized nonstorm water discharges are causing or contributing to an exceedance of an applicable water standard, the discharger shall: …
>
> b. The discharger shall revise its SWPPP and monitoring program immediately after the report to the RWQCB to incorporate the additional BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring needs…."

153. In issuing the November 2004 Notice of Non-Compliance, the Regional Board required DeSilva to revise its monitoring program, providing specific monitoring parameters, monitoring stations, monitoring frequency, monitoring methods, and monitoring reports. *See* Notice of Non-Compliance, p. 6.

154. The repeated releases of turbid discharges since 2004, *see* ¶¶ 83-98, 107-113, *supra*, shows that DeSilva has not implemented adequate monitoring to identify the source of or solution to the turbid discharges. The reports it has filed with the Regional Board, other than the report filed immediately following the Notice of Non-Compliance, do not discuss meaningful revisions to DeSilva's monitoring program despite the ongoing violations. Further, based on our review of the Regional Board's files, it does not appear that DeSilva has

submitted the results of its monitoring program on a weekly basis, as required in the Notice of Non-Compliance. *See id.*

155. By not implementing an effective monitoring program, DeSilva violates Receiving Waters Limitation B.3 of the General Permit.

Claim 19. The City Has Not Required DeSilva to Revise its Monitoring Program.

156. Provision C.4 of the Storm Water Permit requires that dischargers design their monitoring plans to achieve several objectives, including, "Evaluation of the effectiveness of representative storm water pollution prevention or control measures. The Permit further requires that monitoring programs include:

> "Provisions for conducting watershed monitoring activities including; identification of major sources of pollutants of concern; evaluation of the effectiveness of control measures and best management practices; and use of physical, chemical, and biological parameters and indicators as appropriate; …

157. The repeated releases of turbid discharges, *see* ¶¶ 83-98, 107-113, *supra*, show that DeSilva has not implemented adequate monitoring to identify the source of or solution to the turbid discharges. As stated in ¶¶ 152-155, *supra*, based on reports filed with the Regional Board, it does not appear that DeSilva's monitoring program includes identification of the source and cause of turbid discharges, or any provisions for evaluating the effectiveness of BMPs or other control measures.

158. By not assuring that DeSilva designs and implements an effective monitoring program, the City violates its obligations as permittee under the Storm Water Permit to assure that all sub-permittees comply with Provision C.4.

Claim 20. DeSilva Has Not Implemented Control Measures for Non-Storm Water Discharges from Subdrains.

159. Receiving Water Limitations B.1 and B.2 of the General Permit require:

> "1. Storm water discharges and authorized nonstorm water discharges to any surface or ground water shall not adversely impact human health or the environment.

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

160. Section A.9 of the General Permit further requires the following non-storm water management measures: "Describe all non-storm water discharges to receiving waters that are proposed for the construction project. Non-storm water discharges should be eliminated or reduced to the extent feasible. Include the locations of such discharges and descriptions of all BMPs designed for the control of pollutants in such discharges…."

161. As stated in ¶ 22, *supra*, DeSilva appears to have constructed a sub-drainage system that conveys sub-surface creek flows and other sources of groundwater directly into the City's storm drain, bypassing the detention basin.

162. On information and belief, the MHA alleges that the subdrains contribute to releases of turbid discharges from the site. Such turbid discharges cause and contribute to violations of water quality standards established in the Basin Plan, causing adverse impacts to the environment.

163. On information and belief, the MHA alleges that DeSilva has not designed and implemented a SWPPP such that nonstorm water discharges do not cause or contribute to turbid discharges. Appendices B and C of DeSilva's SWPPP do not describe or show any BMPs for the control of discharges of non-storm water discharges from these subdrains. We have been unable to locate any official documentation that the Regional Board has expressly authorized for the subdrains to discharge directly into the storm drain without first being directed to the detention basin.

164. By not designing and implementing BMPs and other control measures to assure that non-storm water discharges from the subdrains do not cause or contribute to adverse impacts on the environment, DeSilva violates Receiving Waters Limitations B.1 and B.2.

Claim 21. The City Has Not Assured that DeSilva Implements Control Measures for Non-Storm Water Discharges from Subdrains.

165. Provision C.5 of the Storm Water Permit requires the following measures for managing non-storm water discharges:

"a. Exempted Discharges

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

i. flows from riparian habitats or wetlands;
ii. diverted stream flows;
iii. springs;
iv. rising ground waters; and
v. uncontaminated groundwater infiltration.

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

b. Conditionally Exempted Discharges

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

c. The Dischargers shall identify and describe the categories of discharges … which they wish to exempt from Prohibition A.1 in periodic submissions to the Executive Officer. For each such category, the Dischargers shall identify 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 adverse impacts of such sources, procedures and Performance Standards for their

> implementation, procedures for notifying the Regional Board of these discharges, and procedures for monitoring and record management…."

166. As stated in ¶¶ 159-164, *supra*, we allege the subdrains which appear to convey sub-surface stream flows or other sources of ground water, cause or contribute to turbid discharges from the project site. We have been unable to locate any documentation that these discharges are not sources of pollutants to receiving waters. We have been unable to locate any description of control measures to reduce pollutants to the maximum extent practicable and minimize the adverse impacts of such sources.

167. By not assuring that DeSilva's non-storm water discharges do not contribute or cause turbid discharges, the City violates its obligations as permittee under the Storm Water Permit to assure that all sub-permittees comply with Provision C.5.

Claim 22. DeSilva Has Not Complied with the City of Oakland's Creek Protection Ordinance.

168. Provision C.5 of the General Permit requires, "All dischargers shall comply with the lawful requirements of municipalities, counties, drainage districts, and other local agencies regarding discharges of storm water to separate storm sewer systems or other watercourses under their jurisdiction, including applicable requirements in municipal storm water management programs developed to comply with NPDES permits issued by the RWQCBs to local agencies."

169. The City enacted the "City of Oakland Creek Protection, Storm Water Management and Discharge Control Ordinance," Oakland Municipal Code, § 13.16.010 *et seq.*, in order to,

> "… ensure the future health, safety, and general welfare of City of Oakland citizens by:
>
> A. Eliminating non-storm water discharges to the municipal separate storm sewer;
>
> B. Controlling the discharge to municipal separate storm sewers from spills, dumping or disposal of materials other than storm water;
>
> C. Reducing Pollutants in storm water discharges to the maximum extent practicable;

> D. Safeguarding and preserving Creeks and Riparian Corridors in a natural state;
>
> E. Preserving and enhancing creekside vegetation and wildlife;
>
> F. Preventing activities that would contribute significantly to flooding, erosion or
> sedimentation, or that would destroy riparian areas or would inhibit their restoration;
>
> G. Enhancing recreational and beneficial uses of Creeks;
>
> H. Controlling erosion and sedimentation;
>
> I. Protecting drainage facilities; and
>
> J. Protecting the public health and safety, and public and private property.
>
> The intent of this Chapter is to protect and enhance the water quality of our Watercourses, water bodies, and wetlands in a manner pursuant to and consistent with the federal Clean Water Act."

Oakland Municipal Code, § 13.16.020. Plainly this municipal ordinance, which addresses discharges of storm water into the City's storm sewer system and watercourses and describes measures to be implemented by the City so as to comply with the Storm Water Permit, is one with which dischargers must comply under the General Permit.

170. The Creek Protection Ordinance requires, "Non-storm water discharges or increase in flow to the City storm sewer system is prohibited." *Id.,* § 13.16.070. Further, "[a]ny non-storm water discharge or increase in flow that would result in or contribute to a violation of [the Storm Water Permit] ... is prohibited." *Id.*, § 13.16.080. The Creek Ordinance also requires that each discharger associated with construction activity shall provide Notice of Intent, comply with, and undertake all other activities required by any general storm water permit applicable to such non-storm water discharges or increase in flow. *See id.*, § 13.16.100.D. Further, "No Person shall commit or cause Development or Work within the boundaries of a Creekside property, or within the public right of way fronting a creekside

property, unless a Creek Protection Permit has first been obtained from the Chief of Building Services." *Id.,* § 13.16.120.

171. As stated in ¶¶ 83-98, *supra*, DeSilva's construction activities appear to have increased the flow into Chimes Creek, which is a component of the City's storm sewer system, in violation of § 13.16.070 of the Creek Ordinance.

172. As stated in ¶¶ 83-98, 107-118, *supra*, DeSilva has not complied fully with the General Permit's requirements that discharges not cause or contribute to pollution or nuisance, meet water quality standards, and that dischargers reduce pollutants in storm water runoff to the BAT/BCT performance standard, in violation of § 13.16.100.D of the Creek Ordinance.

173. As stated in ¶¶ 29-30, *supra*, DeSilva did not obtain a Creek Protection Permit from the City before commencing construction activities in the headwaters of Chimes Creek, in violation of § 13.16.120. Members of the MHA allege that work related to construction of an outfall structure in the Ridgemont Sub-basin was initiated in March 2005, before being stopped pending DeSilva's application for a Creek Protection Permit.

174. By not complying with the applicable provisions of the Creek Protection Ordinance, DeSilva violates its obligations under Provision C.5 of the General Permit.

B. Cumulative Impacts

Claim 23. The City Discharges Storm Water Runoff Through the Municipal Storm Drain System, Causing Nuisance and Degradation of Beneficial Uses in Chimes Creek.

175. Receiving Waters Limitation B.1 of the Storm Water Permit requires:

> "The discharge shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of waters of the State:
>
> i. Alteration of temperature, turbidity, or apparent color beyond present natural background levels;..."

176. As stated in ¶ 40, the City owns and operates the storm sewer infrastructure that is tributary to Chimes Creek.

177. As stated in ¶¶ 41-44, *supra*, the MHA has observed changes in the form and function of Chimes Creek over the last 20 years.[8] *See* Ex. 1, ¶¶ 5-11, 23-25.

178. Currently, the Chimes Creek channel form is characteristic of a geomorphically unstable urban creek. Since 1985, the creek bed has incised more than 15 feet along the 3800 block of Delmont Avenue, from Hillmont Drive to Nairobi Place. Its banks are exposed and nearly vertical, and contribute to high levels of turbidity during storm events. As stated in ¶¶ 52-54, *supra*, erosion of the creek bank has exposed a previously buried sanitary sewer line, which breaks and discharges untreated wastewater into Chimes Creek.

179. Environmental documents for the Leona Quarry Project, however, do not contain an adequate analysis of the natural hydrograph for Chimes Creek. In particular, the Final EIR and Subsequent EIR prepared by the City do not make findings regarding duration or frequency of flows – factors that contribute to erosion and consequent turbidity – in Chimes Creek. In addition to this incomplete analysis, the City has not been able to locate environmental documents prepared for the Ridgemont development. Under CEQA, and to ensure compliance with discharge requirements under the CWA, the City and developers have a duty to analyze the cumulative impacts of new construction. The fact that the Ridgemont EIR is not available suggests that neither the City nor DeSilva, referred to the Ridgemont environmental documents when preparing the Leona Quarry EIR and hydrologic analysis. Impacts from upstream development, including Ridgemont and now Leona Quarry, continue to negatively affect the quality of Chimes Creek.

180. By allowing the ongoing discharge of storm water from the municipal storm system that creates conditions of nuisance and adversely affects the beneficial uses of public waters, the City violates Receiving Water Limitations B.1 of the Storm Water Permit.

Claim 24. The City Has Not Implemented Control Measures to Achieve Compliance With Water Quality Standards.

---

[8] Dr. Maureen Dorsey reported similar observations to the City in her comments on the Draft EIR:

"I have personally noticed that some of the residential properties located along this creek have suffered from erosion along the creek banks during the 8 years that I have lived in this neighborhood. In Ruth Brown's case, [resident at 6311 Hillmont Drive,] the creek has eroded her property all the way down to the city sewer line which the City of Oakland has corrected by suspending the sewer line with ropes across the creek."

Letter from Leila Moncharsh, Attorney for Maureen Dorsey et al., to Claudia Cappio, Ex. D (July 28, 2002).

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

182. As stated in ¶¶ 175-180, *supra*, the City has not implemented control measures to ensure that operation of the storm sewer system complies with water quality standards. Despite MHA's repeated reports of apparent conditions of noncompliance, the City has not reopened its plan to identify, assign, and implement additional control measures as necessary to achieve compliance.

183. By not implementing control measures to achieve compliance with water quality criteria as necessary to protect and maintain designated uses, the City violates Provision C.1 of the Storm Water Permit.

Claim 25. The Cumulative Impacts of Development Permitted by the City Have Adversely Affected the Designated Uses of Chimes Creek.

184. The Antidegradation Policy requires existing water quality to be maintained at 1968 levels or higher, and any change to water quality must not "unreasonably affect present and anticipated beneficial use[s]." State Board Resolution 68-16 (Oct. 28, 1968).

185. As stated in ¶¶ 175-180, *supra*, the City's operation of the storm sewer system have resulted in discharges that adversely affect the designated beneficial uses of Chimes Creek, specifically Non-contact Recreation and Wildlife Habitat.

186. Development permitted by the City, including the Leona Quarry and Ridgemont Projects, has resulted in the degradation of water quality in Chimes Creek downstream of Interstate 580. Water quality in Chimes Creek has continued to decline from that baseline for almost two decades, in clear violation of California state water policy.

187. By not assuring that the cumulative impacts of upstream development does not adversely affect the designated uses of Chimes Creek, the City violates the Antidegradation Policy.

C. Sanitary Sewer Discharges

Claim 26. The City Has Not Prevented the Discharge of Untreated Wastewater from Manholes Located on Oakdale and Delmont Avenues.

188. The Sanitary Sewer Permit, Discharge Prohibition A.1, states, "[t]he discharge of untreated or partially treated wastewater to any surface water stream, natural or man-made, or to any drainage system intended to convey storm water runoff to surface waters."

189. As described in ¶ 55, *supra*, sewer manholes located on Oakdale and Delmont Avenues repeatedly have overflowed with untreated sewage during precipitation events. The sewage overflows are discharged into Chimes Creek. *See also* Ex. 3, ¶ 52-61.

190. The problem overflowing manholes was raised in comments on the Draft EIR:

> "Without more analysis there's no way to assure that the residents of Edwards Avenue, Sunnymere, and along Chimes Creek won't be subjected to raw sewage overflows running down the streets and entering the storm drain system, particularly on wet weather days, when it is already not uncommon for sanitary sewage to 'pop' manholes in this area."

Tom Cluster, "Comment on DEIR ER 01-33 SCH No. 1999042052 Impact L.3" (July 28, 2002). The City responded that its estimate of wastewater flow projections from the project included "all proposed project uses, including discharges from the proposed retail and community center establishments, as well as peaking factors (the factors (the ratio of normal generation to peak generation) and inflow and infiltration (I/I)." The City maintained its finding that "the existing sewer system 'has adequate downstream capacity' to handle project flows." However, it did not disclose the specifics of how it calculated existing and future capacity. *See* letter from Thomas Cluster to Claudia Cappio (Oct. 13, 2003) ("I talked with Allen Law of Oakland's Public Works Agency, and he stated that these calculations were not the City's, but the developer's. I asked Mr. Law about my assumptions versus those of the DEIR, and he said that he'd have to review the calculations with a colleague.... [¶] Mr. Law said that the City has some calculations on the existing load from the 1990's."). We have been

unable to locate any further explanation of the City's calculation of existing sanitary sewer capacity.

191. By not taking action to prevent the discharge of untreated wastewater from the manholes, the City violates Discharge Prohibition A.1 of the Sanitary Sewer Permit.

Claim 27. The City Has Not Prevented the Discharge of Raw Sewage from Manholes Located on Oakdale and Delmont Avenues.

192. The Basin Plan prohibits the discharge of "[r]aw sewage or any waste failing to meet waste discharge requirements to any waters of the Basin."

193. As stated in ¶¶ 188-191, *supra*, the City has discharged raw sewage from sanitary sewer manholes located on Oakdale and Delmont Avenues into the Delmont Reach of Chimes Creek.

194. By discharging raw sewage from sanitary sewer manholes into Chimes Creek, the City violates the Basin Plan's discharge prohibitions.

Claim 28. The City Has Not Prevented the Discharge of Untreated Wastewater from the Sewer Lines at 6301 Hillmont Drive and 3805 Delmont Avenue.

195. The Sanitary Sewer Permit, Discharge Prohibition A.1, states, "[t]he discharge of untreated or partially treated wastewater to any surface water stream, natural or man-made, or to any drainage system intended to convey storm water runoff to surface waters."

196. As stated in ¶¶ 52-53, *supra*, a lateral section of sanitary sewer pipe behind 6301 Hillmont Drive has been exposed by erosion and periodically breaks, discharging untreated wastewater into Chimes Creek. *See also* Ex. 3, ¶¶ 62-67.

197. As stated in ¶ 54, *supra*, the sanitary sewer line behind 3805 Delmont Avenue has also broken, discharging untreated wastewater into Chimes Creek.

198. By not taking action to prevent the discharge of untreated wastewater from the sewer line located behind 6301 Hillmont Drive and at 3805 Delmont Avenue, the City violates its obligations as permittee under the Sanitary Sewer Permit to comply with Discharge Prohibition A.1.

Claim 29. The City Has Discharged Raw Sewage from the Sewer Lines at 6301 Hillmont Drive and 3805 Delmont Avenue.

199. The Basin Plan prohibits the discharge of "[r]aw sewage or any waste failing to meet waste discharge requirements to any waters of the Basin."

200. As stated in ¶ 196, *supra*, the City has discharged raw sewage from the lateral section of sanitary sewer pipe behind 6301 Hillmont Drive into Chimes Creek.

201. As stated in ¶ 197, *supra*, the City has discharged raw sewage from the section of sanitary sewer pipe behind 3805 Delmont Avenue into Chimes Creek.

202. By discharging raw sewage from these sanitary sewer lines, the City violates the Basin Plan's discharge prohibitions.

Claim 30. The City Has Not Prevented Discharges of Untreated Wastewater that Cause Odor.

203. The Regional Board has established water quality objectives applicable to Chimes Creek, which include the following objective for tastes and odors: "Waters shall not contain taste- or odor-producing substances in concentrations that impart undesirable tastes or odors to fish flesh or other edible products of aquatic origin, that cause nuisance, or that adversely affect beneficial uses."

204. As stated in ¶ 55, *supra*, discharges from the sanitary sewer lines located along both sides of Chimes Creek cause an unpleasant odor, during the rainy and dry seasons, that is a nuisance to residents along the creek.

205. By not preventing discharges from the sanitary sewer lines, the City violates the Basin Plan's water quality objective for odor, which is an enforceable water quality standard.

Claim 31. The City Has Not Prevented Discharges of Untreated Wastewater that Adversely Affect the Designated Uses of Chimes Creek.

206. The Antidegradation Policy requires existing water quality to be maintained at 1968 levels or higher, and any change to water quality must not "unreasonably affect present and anticipated beneficial use[s]." State Board Resolution 68-16 (Oct. 28, 1968).

207. As alleged in ¶¶ 188-191, 195-198, *supra*, the City has not complied with Discharge Prohibition A.1 of the Sanitary Sewer Permit. The City's noncompliance degrades water quality in Chimes Creek.

208. By not complying with Discharge Prohibition A.1 of the Sanitary Sewer Permit, City violates the Antidegradation Policy.

Claim 32. The City Has Not Reported Discharges of Untreated Wastewater into Chimes Creek.

209. Provision D.2 of the Sanitary Sewer Permit requires, "The Discharger shall report SSOs in accordance with Standard Provisions and Reporting Requirements …"

210. Standard Provisions and Reporting Requirement E.6.d.i requires, "The discharger shall report any noncompliance that may endanger health or the environment. All pertinent information shall be provided orally within 24 hours from the time the discharger becomes aware of the circumstances. A written submission shall also be provided within five working days of the time the discharger becomes aware of the circumstances. The written submission shall contain a description of the noncompliance, including exact dates and 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." Regional Board, "Standard Provisions and Reporting Requirements for NPDES Surface Water Discharge Permits" (Aug. 1993).

211. As stated in ¶¶ 188-191, 195-198, *supra*, the City has not complied with Discharge Prohibition A.1 of the Sanitary Sewer Permit.

212. On information and belief, the MHA claims that the City has not filed reports which meet the criteria of General Reporting Requirement E.6.d.i for incidents of non-compliance of which the City has received notice from MHA. Such incidents are listed in Exhibit 3.18.

213. By not filing reports of noncompliance per General Reporting Requirement E.6.d.i, the City violates its obligations as permittee under the Sanitary Sewer Permit.

V.

REQUEST FOR FURTHER INFORMATION

214. We request that the City and DeSilva, as appropriate, provide the following information in advance of our conducting discovery in the event that we file a complaint in U.S. District Court. Such information will materially assist in the voluntary settlement of these claims.

215. As stated in ¶ 22, *supra*, there are subdrains that convey sub-surface creek flows and other groundwater directly into the City's storm drain. The bypass of the detention basin appears to be inconsistent with the analysis in the Final EIR that suggests the detention is designed to accommodate *all* flow from the site, including Ridgemont and baseflow of the springs in the area:

> "The design of the proposed detention basin is based on results of hydrologic analysis which … considers all sources of existing and post-project runoff that contribute to the storm drain line that crosses I-580 downstream from the site. Sources include runoff from the site plus runoff originating in the Ridgemont subdivision …"

Final EIR, p. V-6. Further, "… the baseflow of the springs in the area, which will be directed to the basin. …the springs will provide a year-round source of water sufficient to support wetland vegetation along the basin floor." *Id.*, p. V-9. In addition to a map of the locality of this subdrain system, we request responses to the following questions:

Was the flow from this subdrain system included in the hydrologic analysis of flows leaving the Project site and entering Chimes Creek via the 39-inch storm drain?

Has the City required, or DeSilva installed, any monitors of the discharges from these subdrains prior to discharge into the City's storm drain system?

Has the City documented, or required DeSilva to document, that discharges from these subdrains do not contribute to the turbid discharges from the project site?

216. As stated in ¶ 32, *supra*, MHA members have observed the installation of a dual-outlet subdrain system for storm water runoff on the project site. This drainage system appears to bypass the primary detention pond and connect directly to the City's storm water system, ultimately discharging into Chimes Creek on the west side of the highway. We have

been unable to locate the plans that clearly show and describe this drainage system, or any record of its approval by the City or Regional Board.

Has DeSilva installed subdrains which bypass the detention basin and discharge storm water runoff directly into the City's storm drain system? If so, are these subdrains temporary or permanent?

If so, are these subdrains included in the environmental documents?

Were the flows discharged from these subdrains in the hydrologic analysis of flows leaving the Project site and entering Chimes Creek via the 39-in storm drain?

217. The EIR states that the City operates a storm water drainage system that directs storm water runoff from the Ridgemont Development into Chimes Creek. We have been unable to determine if the City, DeSilva, or any other private parties, operate other additional storm water drainage systems tributary to Chimes Creek. We request that the City provide a map showing the locality of *all* storm water drainage systems, including those for the Ridgemont and Leona Quarry developments, tributary to Chimes Creek. We request that the City provide any permits it has issued for such systems. We further request any environmental analysis, or other hydrologic evaluation, prepared for these systems.

218. We have been unable to access the Regional Board's database of electronic SSO reporting. We request that the City provide copies of any SSO reports filed by the City in the last ten years, or confirmation that it has not filed such reports. In addition, we request responses to the following questions:

How many units, residential and commercial, currently are served by the sanitary sewer lines S located in the south bank of Chimes Creek?

Did the City consider unpermitted connections to this line in considering the line's capacity to manage additional wastewater from Leona Quarry?

How many additional units will be served by this line once the Leona Quarry Development is completed?

By what amount will the Leona Quarry units increase the current volume of wastewater carried by this line?

VI.
RELIEF TO BE SOUGHT

219. We are requesting relief necessary to prevent further degradation of the form, function, and water quality of Chimes Creek; and indeed to restore that form, function, and water quality as required by applicable law. If DeSilva does not timely correct for ongoing violations of the General Permit, and the City does not timely correct ongoing violations of the Storm Water Permit and Sanitary Sewer Permit, the MHA will file a complaint in U.S. District Court, seeking declaratory and injunctive relief, civil penalties, reasonable attorneys' and experts' fees, and costs.

220. We seek effective control of storm water discharged from the Leona Quarry Project to the Delmont Reach of Chimes Creek. We seek continuous monitoring of storm water discharges leaving the site.

221. We seek restoration of the channel of the Delmont Reach of Chimes Creek, to reverse past damages and prevent further degradation on an enforceable schedule.

222. We seek rehabilitation of the sanitary sewer Lines S and N located in the banks of Chimes Creek, as well as manholes located on Oakdale and Delmont Avenues on an enforceable schedule.

.

CONCLUSION

Please contact Richard Roos-Collins at (415) 693-3000 ext. 103, or Julie Gantenbein at (707) 931-0034, if you wish to discuss this Notice.

Sincerely,

Richard Roos-Collins
Julie Gantenbein
NATURAL HERITAGE INSTITUTE
100 Pine Street, Suite 1550
San Francisco, CA 94111
(415) 693-3000
(415) 693-3178 (fax)

Attorneys for MILLSMONT HOMEOWNERS ASSOCIATION

DECLARATION OF SERVICE

I, Rachel Golden, declare that I today served the "Sixty-Day Notice of Intent to Sue for Violations of Clean Water Act Section 1365," pursuant to 40 C.F.R. § 135.2 as follows:

By Email and Certified Mail

Claudia Cappio
Director of Community and Economic Development Agency
City of Oakland
One Frank Ogawa Plaza
Oakland, CA 94612
ccappio@oaklandnet.com

David Chapman, Project Manager
DeSilva Gates Construction, LP
11555 Dublin Boulevard
P.O. Box 2909
Dublin, CA 94568

Raul Godinez II, Director
Public Works Agency
250 Frank H. Ogawa Plaza, Suite 4314
Oakland, CA 94612
rgpdinez@oaklandnet.com

By Email and First-Class Mail

Marie A. Cooper, Attorney
Bingham McCutchen LLP
1333 North California Blvd., Suite 210
P.O. Box V
Walnut Creek, CA 94596-1270
marie.cooper@bingham.com

Dale Bowyer, Senior Water Resources Control Engineer

San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
DBowyer@waterboards.ca.gov

Ryan Broddrick, Director
California Department of Fish & Game
1416 Ninth Street
Sacramento, CA 95814
rbroddrick@dfg.ca.gov

Celeste Cantu, Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
CCantu@waterboards.ca.gov

L.T.C. Philip Feir, District Commander
Army Corps of Engineers
San Francisco District
333 Market St, Room 923
San Francisco, CA 94105

Robert Floerke, Regional Manager
California Department of Fish & Game
7329 Silverado Trail
Napa, CA 94558
rfloerke@dfg.ca.gov

Stephen L. Johnson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Shin-Roei Lee, Supervising Water Resources Control Engineer
San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400

Oakland, CA 94612
SRLee@waterboards.ca.gov

Keith Lichten, Senior Water Resources Control Engineer
San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
KLichten@waterboards.ca.gov

Bill Lockyer, Attorney General
Office of the Attorney General
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

Ann Malcolm, General Counsel
California Department of Fish & Game
1416 Ninth Street
Sacramento, CA 95814
amalcolm@dfg.ca.gov

Wayne Nastri, Regional Administrator
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105
nastri.wayne@epa.gov

John Russo, City Attorney
Office of the Oakland City Attorney
City Hall, 6th Floor
1 Frank Ogawa Plaza
Oakland, California 94612
jrusso@oaklandcityattorney.org

Mendel Stewart, Project Leader

Edwards San Francisco Bay National Wildlife Refuge
P.O. Box 524
Newark, CA 94560

Bruce Wolfe, Executive Officer
San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
BWolfe@waterboards.ca.gov

Hank Ackerman, Civil Engineer
Alameda County Flood Control Public Works Agency
399 Elmhurst Street
Hayward, CA 94544

Dated: March 28, 2006

By: _____
Rachel Golden
NATURAL HERITAGE INSTITUTE

LIST OF EXHIBITS	
Exhibit No.	**Title**
1	Declaration of Mark Brest van Kempen (Mar. 28, 2006)
2	Wetlands Research Associates, "Delineation of Potential Jurisdictional 'Waters of the United States'" (Jun. 2001)
3	Declaration of Chiye Azuma (Mar. 28, 2006)
4	Letter from MHA to City Council (Oct. 24, 2004)
5	Letter from MHA to City Council (Mar. 4, 2005)
6	Letter from MHA to City Council (April 15, 2005)
7	Email from Ron Ward, City of Oakland Public Works Agency, to Mark Brest van Kempen (Dec. 29, 2005)
8	City of Oakland, "Category II Creek Protection Permit" (Aug. 18, 2005)
9	Email from Ron Ward, City of Oakland Public Works Agency, to Nancy Nadel, City Council (Dec. 29, 2005)
10	Email from Mark Brest van Kempen to Ron Ward, City of Oakland Public Works Agency (Dec. 28, 2005)
11	Declaration of Nancy Sidebotham (Mar. 28, 2006)
12	San Francisco Regional Water Quality Control Board, "Comments on City's Draft Response to Natural Heritage Institute" (Feb. 8, 2005)