



REQUEST FOR PROPOSALS

Municipal Regional Stormwater NPDES Permit Inspections and Spill Response Services

**PROPOSALS
MUST BE RECEIVED BY:**

TUESDAY, DECEMBER 2, at 5:00 PM

City of Newark

Department of Public Works
37101 Newark Boulevard
Newark, CA 94560

Point of Contact:

James Scanlin
Environmental Services Manager
(510) 578-4539
james.scanlin@newark.org

REQUEST FOR PROPOSALS (RFP)
**MUNICIPAL REGIONAL STORMWATER NPDES PERMIT INSPECTIONS AND SPILL
RESPONSE SERVICES**

1. INTRODUCTION

The City of Newark (“the City”) is seeking a qualified Contractor(s) to provide professional environmental inspection services to maintain compliance with the mandates of the Municipal Regional Stormwater NPDES Permit Order No. R2-2022-0018 (MRP). The City will select one or more Contractor(s) to conduct inspections meeting the requirements of MRP Provisions C.3 and C.4 and to assist with spill response under Provision C.5 of the MRP. The Contractor(s) must be well informed about the respective MRP Provisions for which the entity is hired to assist the City. The City may elect to hire one Contractor responsible for all these services or separate Contractors for specific tasks in this RFP. The scope of work is outlined below.

2. BACKGROUND

The City of Newark is located in Southern Alameda County at the east end of the Dumbarton Bridge, 30 miles south of Oakland, 15 miles north of San Jose. Newark was incorporated as a General Law City in 1955 and has a Council/Manager form of government. Newark’s population is approximately 49,000, with an encompassed area of 13 square miles. Other information regarding the City of Newark can be found on the City’s website at www.newark.org.

3. GENERAL

The selected Contractor(s) will work under the general direction of the Environmental Services Manager or designee to perform services as they are required. Contractor selection will be at the sole discretion of the City. No Contractor is guaranteed work.

The selected Contractor(s) will enter into a Contractual Services Agreement, which will specify the billing rates, personnel to be assigned, and other terms. No monthly retainer is anticipated. Contractor work will be authorized by Task Orders issued by the City in the form of a written request. Selected Contractor(s) may be asked to submit proposals that include a scope and fee for future projects before issuance of a Task Order. Certain projects, if assigned, shall be performed pursuant to a ‘not-to-exceed’ amount. For these projects, Contractor shall prepare a detailed scope of work, payment schedule, and schedule of deliverables for review and approval by the City.

The City is requesting services for a minimum term ending on June 30, 2028, thereafter renewable for two additional one (1) year periods upon mutual consent of the City and Contractor. Approximately 60 days prior to the end of each agreement period, a meeting may be held between the Contractor(s) and City of Newark staff to conduct a performance review, revise the scope and/or language of the agreement, and submit the Contractor’s most current rate schedules. The Contractual Services Agreement requires the City Council’s approval. Extensions to the term of the agreement, as allowed, will be subject to review and approval of the Public Works Director, City Manager and/or City Council.

4. SCOPE OF SERVICES

The scope of services includes: 1) Conducting inspections to meet MRP Provision C.3.h Operations and Maintenance Verification requirements; 2) Conducting inspections to meet MRP Provision C.4 Business Inspection requirements; and 3) Providing spill and discharge response services to meet Provision C.5 requirements.

4.01. MUNICIPAL REGIONAL STORMWATER NPDES PERMIT (MRP) PROVISION C.3 OPERATIONS AND MAINTENANCE VERIFICATION INSPECTIONS

MRP Provision C.3 mandates that permittees conduct an operations and maintenance (O&M) verification program to ensure stormwater treatment and hydromodification management measures (collectively, “stormwater management measures”) remain in effective operating condition in perpetuity. Permittees must conduct O&M verification inspections according to the following formula: inspection of an average of 20%, but no less than 15% of the total number of Regulated Projects (defined in MRP C.3) per year, such that all Regulated Projects are inspected at least once every five years. Currently, the City has approximately 50 sites with installed stormwater management measures, including City-owned vault-based units. During the first contract year, the City anticipates the contractor will conduct inspections of 15-20 Regulated Projects. Out of those inspections, approximately 50% will require a second inspection, and 10-15% will require a third inspection. As the number of Regulated Projects with installed stormwater management measures increases, the number of required annual inspections will increase, with the target number of inspections equal to about one-third of the total number of Regulated Projects.

A Regulated Project may have only one stormwater management measure or may have multiple stormwater management measures. Regulated Projects may also include sites that have only full trash capture devices installed. The City’s engineers, familiar with these projects, will provide a list of anticipated inspection sites to the selected Contractor each year of the contract. As part of conducting inspections, the Contractor shall set up appointments with site locations at least three days ahead of the inspection date. Regardless of the number of stormwater management measures at a particular Regulated Project, each inspection will be billed per site inspection in a lump sum. Contractor shall provide their proposed lump sum dollar amount per inspection in their proposal, indicating how that lump sum was determined.

The Contractor will be required to use the Alameda Countywide Clean Water Program (ACCWP) ArcGIS Online Field Maps (AGOL) application. The Contractor will be required to have ESRI ArcGIS licenses for their inspectors. The Contractor shall be familiar with and follow the City’s Enforcement Response Plan for Operation and Maintenance (O&M) Inspections (**Attachment A**) when issuing enforcement actions to facilities with deficiencies in any stormwater management measure. The key tasks under this scope of services for conducting C.3.h Operations and Management Inspections will include the following:

A. First Inspections

1. In most cases, the City will send a letter to site locations to be inspected prior to Contractor contact. Once the letter has been sent, the Contractor will set up appointments with location representatives at least a few days ahead of the inspection date, setting an approximate time for the inspection. The Contractor shall review site drawings and previous inspections at the location to determine compliance history prior to going to the site.
2. Visit site and meet with the location representative. Explain the purpose of the inspection and ask questions to verify that stormwater management measures are operated and maintained adequately.
3. Ask the location representative for maintenance records for all stormwater management measures, particularly underground or proprietary management measures.

4. Fill out the inspection forms in AGOL and obtain the location representative's signature on the form. Also include the following on the form:
 - a. Comments/Remarks/Requirements Section: Indicate in the "remarks" if the on-site catch basins/area drains are labeled "No Dumping, Flows to Creek," or other relevant, specific notation. If not, require the location representative to install storm drain markers.
 - b. Take pictures of potential deficiencies to provide to City staff and the location representative.
 - c. Determine the appropriate enforcement response timeline, following the City's Enforcement Response Plan, provided in **Attachment A**, and indicate the timeline for correction in AGOL.
5. Distribute appropriate BMP handouts provided by the City to location representatives.
6. The Contractor shall refer the location representative to the City for additional questions beyond the scope of inspection.
7. When a location representative is NOT available for inspection, Contractor shall contact the City to determine the action the City would like to take.
8. If it is discovered that the site owner/operator is different than the owner/operator provided to the Contractor by the City, notify the City of the change. If the new site owner/operator occupies the location, the Contractor shall provide educational materials, as needed, and complete the inspection.
9. All first inspections shall be completed no later than May 15th of each year.
10. For site locations that have stormwater management measures with potential deficiencies, the Contractor will let the location representative know about the deficiency at the end of the first inspection. The Contractor will show the location representative the deficiencies and/or concerns and provide a timeline to cure the deficiency to the location representative. Contractor shall follow the City's Enforcement Response Plan when determining the compliance schedule.

Contractor shall take pictures of any potential problem areas and upload them to the AGOL Field Maps application. A copy of the inspection form will be emailed to the facility representative. As necessary and as outlined in the City's Enforcement Response Plan, the Contractor shall be responsible for writing warning letters, Notice of Violations, or other letters to the facility representative outlining violations or deficiencies, along with appropriate guidance to address the violations. Contractor shall notify the City by the 3rd business day of the week following the inspection of all locations that require a re-inspection.

B. Re-inspections of Stormwater Management Measures

1. Contractor shall email the City weekly (within 3 business days of the week following the inspection) a "re-inspection spreadsheet" list of all site locations that require a re-inspection.
2. The City will inform the Contractor within 3 business days following the submittal of the "re-inspection spreadsheet" if the re-inspection will be conducted by the City. In most cases, the Contractor will be expected to perform the re-inspection.
3. If the inspection is determined to be done by the Contractor, Contractor shall perform the re-inspections within the appropriate timeframe (generally, no longer than 30 days of the previous inspection, unless rain is imminent, and as indicated in the City of Newark's Enforcement Response Plan).

At the re-inspection, Contractor shall complete a new inspection form and indicate if the appropriate measures have been taken to remedy the deficiencies in the stormwater management measures. Contractor shall take pictures of the areas that were a problem at the initial inspection and email them to the City with the succeeding weekly report. If the City indicates that the deficiencies have been addressed, then the site inspection is considered complete. If a second re-inspection is required due to serious deficiencies, Contractor shall notify City staff immediately, and work with City staff to determine what action needs to be taken.

4.02. MUNICIPAL REGIONAL STORMWATER NPDES PERMIT (MRP) PROVISION C.4 BUSINESS INSPECTIONS

MRP Provision C.4 requires permittees to conduct inspections at all industrial and commercial facilities that could reasonably be considered to cause or contribute to stormwater pollution if proper best management practices are not implemented. The City anticipates that the selected Contractor(s) will be required to conduct between 50 and 100 first inspections on a yearly basis. Out of these, it is expected that approximately 10-15% will require a second inspection and approximately 5% will require a third inspection. The City's representative will provide the anticipated inspection list to the selected Contractor each year of the contract. However, the inspection list may be modified on occasion in response to business opening/closure or complaints. Each inspection will be billed on a per-inspection basis, in a lump sum. Contractor shall provide their proposed lump sum dollar amount per inspection in their proposal, indicating how that lump sum was determined.

The contractor will be required to use the Alameda Countywide Clean Water Program (ACCWP) AGOL C4 Inspection Field Maps application. The Contractor will be required to have ESRI ArcGIS licenses for their inspectors. The Contractor shall be familiar with and follow the City's Enforcement Response Plan (**Attachment B**) in the enforcement actions issued to facilities with violations. The key tasks under this scope of services for conducting C.4 Business Stormwater Inspections will include the following:

A. First Inspections

1. In most cases, the City will send a letter to businesses to be inspected prior to Contractor contact. The contractor shall review available previous inspections at the location to determine compliance history before going to the site.
2. Visit the business site and meet with a business representative. Explain the purpose of the inspection and ask questions to ascertain that operational Best Management Practices are implemented by the business to prevent stormwater pollution. For those facilities that are also Regulated Projects under Provision C.3, verify that on-site stormwater management measures are operated and maintained adequately. The inspection shall include rooftop observations, as safety allows. As applicable, the inspection shall also note the potential presence of equipment/activities that contain PCBs, mercury, copper, or polystyrene products. If such products are discovered on-site, the Contractor shall provide information on proper use/disposal of said materials.
3. Fill out the AGOL Field Map form, obtain the business representative's signature on the form, and email the form to the business representative.
 - a. Comments/Remarks/Requirements Section: Indicate in the "remarks" if the on-site catch basins/are drains are labeled "No Dumping, Flows to Creek," or other

relevant, specific notation. If not, require the business representative to install storm drain markers.

- b. Take pictures of potential violations to provide to City staff and the business representative.
 - c. Determine the appropriate enforcement response timeline, following the City's Enforcement Response Plan, and indicate the timeline in the SSFIR.
4. Distribute the appropriate BMP handouts provided by the City to business owners/managers.
 5. If an active discharge is observed during the inspection, the Contractor shall take the necessary steps to stop the discharge and immediately contact the City.
 6. Contractor shall refer businesses to contact the City for additional questions beyond the scope of the inspection.
 7. When a business representative is NOT available for inspection, Contractor shall contact the City to determine the action the City would like to take.
 8. If it is discovered that a business is no longer in operation, Contractor shall notify the City that the site is out of business. Note if a new business has moved into the facility and provide the information to the City.
 9. All first inspections shall be completed no later than June 1st of each year.
 10. For businesses that have potential or actual stormwater violations, Contractor will inform the business representative at the end of the first inspection that the business has a violation(s) that must be addressed. Contractor will indicate to the business representative all potential or actual violations and/or concerns and provide a timeline to the business representative. Contractor will follow the City's Enforcement Response Plan when determining the compliance schedule.

Contractor shall take pictures of any actual or potential problem locations. If necessary, and as outlined in the City's Enforcement Response Plan, the Contractor shall be responsible for writing a warning letter, Notice of Violations, or other letter to the business representative outlining violations or potential violations, along with appropriate guidance to address the violations. Contractor will notify the City by the 3rd business day of the week following inspection of all businesses that require a re-inspection.

B. Re-inspection of Businesses

1. Contractor shall email the City weekly (within 3 business days of the week following the inspection) a "re-inspection spreadsheet" list of all businesses that require a re-inspection.
2. The City will inform the Contractor within 3 business days following the submittal of the "re-inspection spreadsheet" if the inspection will be conducted by the City. In most cases, the Contractor will be expected to perform the re-inspection.
3. If the inspection is determined to be done by the Contractor, Contractor shall perform the re-inspections within the appropriate timeframe (generally, no longer than 10 days of the previous inspection, unless rain is imminent, and as indicated in the City of Newark's Enforcement Response Plan).

At the re-inspection, Contractor shall complete an inspection in AGOL and indicate if the business has made the appropriate corrections/changes. Contractor shall take pictures of the areas that were a problem at the initial inspection and email them to the

City with the following weekly report. If the City indicates that all potential and actual violations have been corrected and the business is subsequently in compliance, then the business inspection is considered complete. If re-inspection is required due to serious violation, Contractor shall notify City staff immediately and work with City staff to determine successive actions.

4.03. SPILL AND DISCHARGE RESPONSE

The City's Department of Public Works is responsible for spill and discharge response, investigation, cleanup, follow-up, and record keeping. The Department will utilize the Contractor to assist with spill response efforts for the City. The City will utilize the Contractor for assistance with spill and discharge response, as needed. The Contractor may be called upon to conduct investigations, develop action plans, assist with spill containment, assist with recordkeeping and time tracking, conduct follow-up work, or other activities as described in the City's Enforcement Response Plan (**Attachment B**) for C.5, Spill and Discharge Response Plan. The Contractor is required to follow this Plan, which may be updated occasionally.

The contractor will provide a qualified individual to conduct site investigations associated with any reported spills or discharges. The spill inspector will obtain the appropriate field forms and any available improvement plans and/or any GIS information identifying the location of storm drains in the immediate area.

In response to spills or illicit discharge incidents, the Contractor may use the City's Illicit Discharge Tracking Form and follow procedures as outlined in the City's Spill and Discharge Response Plan after consulting City Staff regarding how to proceed. Contractor will be responsible for retaining records of Spill and Discharge incidents that they investigate and for providing these records and relevant photo documentation to the City.

Contractor shall provide their proposed lump sum dollar amount per inspection/investigation in their proposal, indicating how that lump sum was determined per the following:

Assumptions for Spill Response Investigations

- The Contractor shall assume there will be up to 10 spill investigations needed per fiscal year.
- The Contractor shall assume a typical spill response investigation will take no more than 4 hours initially.
- The Contractor shall assume the follow-up on the incident will take no more than 1.5 hours.
- The Contractor shall assume the emergency weekend/after-hours on-call rate will be 1.5 times the normal hourly rate.
- The selected Contractor is responsible for providing the spill inspector with appropriate PPE and field equipment, including a camera and reporting materials.

In the event the Contractor is the first to arrive at an emergency situation (i.e. hazardous waste or unknown material spill), the Contractor shall, before taking other action, notify First Responders and the City of Newark in parallel to immediately resolve any unsafe or hazardous situations. For all other non-hazardous spills, the Contractor shall follow the reporting protocol as outlined by the City of Newark and the City will make all agency and responsible party potential fine notifications.

4.04. POST INSPECTION REPORTING AND DELIVERABLES

This section is applicable to both C.3 Operations and Maintenance Verification Inspections and C.4 Stormwater Business Inspections.

A. Contractor shall provide the following:

1. Weekly reports sent electronically to the City (by the 3rd day of the following business week), apprising the City with the status of inspections. The weekly reports must include a summary of the number of business inspections completed to date, the number of first inspections remaining, a list of the businesses that need re-inspection, and an updated work plan outlining when the inspections will be completed.
2. On a monthly basis, return completed originals of all inspections to the City, along with a monthly updated spreadsheet of inspection status by email to the City. Monthly reports will be due by the 15th of the following month to the City via email.
3. Additionally, on the same monthly schedule, return updated Excel spreadsheet of aggregated Spill and Discharge Response/Investigation Incident Reports.

B. City of Newark shall provide Contractor with the following:

1. Excel spreadsheet of businesses/Regulated Projects to be inspected each year.
2. BMP brochures and other literature to hand out to business representatives.
3. Inspection history and other relevant data/information.
4. Excel spreadsheet for documenting Spill and Discharge Response Incidents.

4.05. PROJECT MANAGEMENT AND QA/QC

The contractor shall provide a Project Manager for coordination and management of the Contractor team activities and communication with the City of Newark.

5. PROPOSAL FORMAT AND CONTENT

The Proposal shall be brief, precise, and shall not include unnecessary promotional material. The Proposal shall not exceed fifteen (15) pages, excluding resumes.

The Proposal shall contain the following elements in the exact order and segmentation listed below:

- a. *Cover Letter.* Describe your Contractor or team's interest and commitment in providing Stormwater Inspection and Discharge Response services to the City. The letter shall be signed by a person authorized to negotiate a contract with the City.
- b. *Staffing, Team Experience, and Understanding of Requested Services & Objectives.* Describe the qualifications and experience of the team members expected to be assigned to this project. The description shall include previous experience with similar contracts. Include an organization chart and provide a matrix showing which projects team members have worked on together in the past. Provide a discussion demonstrating the Contractor's understanding of the services to be provided and their significance to the overall City goals. Provide your Contractor or team's approach to completing this project, showing the flow of the various work tasks and demonstrating a clear understanding of the requested work.

c. *Experience providing similar services.* The Contractor must present significant evidence of successful completion of similar services provided for local government clients over the past five years.

d. *Resumes.* Include single page resumes of the Project Manager, inspectors, technicians, and other key personnel to be assigned to the Contractor team. It is expected that designated key staff will remain for the duration of the agreement. Key staff substitution will be allowed only after consultation and concurrence with the City.

e. *References.* Provide at least three references (name, agency, title, email address and telephone number) for recent similar or related work.

f. *Schedule.* Provide a projected project schedule that includes required tasks and subtasks to be performed and corresponding durations; milestones and dates of key deliverables; and overall completion date.

g. *Cost Proposal.* Submit a detailed cost proposal to provide the entire Scope of Services outlined in the Contractor's technical proposal. Cost proposal shall provide a breakdown of the major items of work and corresponding costs and number of hours anticipated for each task. In addition, provide an hourly rate/fee schedule for all staff assigned to the project. Additional administrative charges such as subcontractor mark-up, direct costs, mileage, and any other terms or conditions, shall also be included as part of the cost proposal.

h. *City's Standard Contractual Services Agreement.* A sample of the City's Standard Contractual Services Agreement (Agreement), including insurance requirements, is provided as **Attachment C**. If the interested Contractor would like to request amendments or exceptions to the Agreement and/or insurance requirements, these shall be specifically noted in the Proposal. Otherwise, confirm your firm's ability to meet the City's Standard Contractual Services Agreement and insurance requirements. Requested amendments and exceptions will be taken into consideration in evaluating the Proposal. Requests for amendments and/or exceptions to the Agreement will not be considered if not included in the submitted Proposal.

- i. *Other Relevant Information.* Provide additional relevant information that may be helpful in the selection process.
- ii.

6. SELECTION CRITERIA AND SELECTION PROCESS WITH ESTIMATED DATES

Proposals will be reviewed by a selection committee. The qualifications for the top candidates will be verified and references will be checked. In reviewing the Statements of Qualifications, the City will carefully weigh:

- Contractor's understanding of the City's desires and general approach to completing the work
- Contractor's experience with contracts of similar scope, complexity and magnitude
- Qualifications of the staff being assigned to this project
- Demonstrated ability of the Contractor to perform high-quality work, control costs, and meet time schedules

- Satisfaction of previous clients
- Proposed rate schedule

The City retains sole discretion to evaluate proposals and may make an award to the Contractor(s) the City deems to have the most responsive Proposal. Receipt of Proposals in response to this RFP does not obligate the City in any way to engage any Contractor and the City reserves the right to reject any or all Proposals, wholly or in part, at any time, without penalty. The City shall retain the right to abandon the proposal process at any time prior to the actual execution of a contract with a Contractor, and the City shall bear no financial or other responsibility in the event of such abandonment. The City reserves the right to negotiate all final terms and conditions of any agreements entered into. The City’s target dates are as follows:

Release of RFP:	October 27, 2025
Deadline for Questions:	November 3, 2025, 3:00 p.m.
Responses to Questions:	November 6, 2025
Proposal due:	December 2, 2025, by 5:00 p.m.
Interview of top Contractor(s), if required:	Week of December 8, 2025
Services Agreement scheduled for Council approval:	January 22, 2025

7. SUBMITTAL GUIDELINES

Contractors shall email an **electronic pdf file** of the Proposal with the Subject “City of Newark – Proposal for Stormwater Inspection Services” to James Scanlin at james.scanlin@newark.org. The email submittal should be less than 15 MB. Proposals must be received by **5:00 p.m. on Tuesday December 2, 2025**. You will receive a response upon the receipt of your submittal. If you do not receive confirmation of receipt within 24 hours, contact James Scanlin at james.scanlin@newark.org or (510) 578-4539.

FAX SUBMISSIONS WILL NOT BE ACCEPTED.

Any changes made by the City to the requirements in this RFP will be made by written addenda posted to the City’s website at <http://www.newark.org/departments/public-works/bid-openings-and-rfp-s>. Any written addenda issued to this RFP shall be incorporated into the terms and conditions of any resulting Agreement. The City will not be bound by any modifications to or deviations from the requirements set forth in this RFP as a result of oral instructions. The City reserves the right to revise or withdraw this RFP at any time and for any reason.

The City reserves the right to reject any and all proposals and to waive any minor informalities, irregularities, and/or non-responsiveness that does not influence the competitive nature of the proposal, to request additional information concerning any statement for purposes of clarification, to accept or negotiate any modification to any statement following the deadline for receipt of all statements, and to waive any irregularities if such would serve the best interests of the City.

All inquiries regarding the RFP should be directed to James Scanlin, Environmental Services Manager, by telephone at (510) 578-4539, or preferably by email at james.scanlin@newark.org.

Additional Submittal Information

The City assumes no responsibility for delays caused by delivery service. All costs incurred during proposal preparation or in any way associated with the Contractor's preparations, submission, presentation, or oral interview, if held, shall be the sole responsibility of the Contractor.

If awarded a contract, the Contractor shall maintain insurance coverage, including errors and omissions and workers' compensation, reflecting the minimum amounts and conditions specified by the City as outlined in the attached Contractual Services Agreement. Contractors are liable for all errors or omissions contained in their Proposal. By submitting a Proposal, interested Contractors represent that they: (1) have thoroughly examined and become familiar with the Work required under this RFP; (2) comprehend all conditions that may impact the requested scope of services; (3) have reviewed of all addenda, if any; and (4) are capable of providing the equipment, goods and services necessary to perform the requested scope of services and/or meet the specifications outlined in this RFP, in a manner that meets the City's objectives. Failure to examine the documents and inform itself shall be at Contractor's own risk. A Proposer shall have no claim against the City based upon ignorance of or misunderstanding of the RFP documents. Once the award has been made, failure of a Contractor to have read all the conditions and instructions of the RFP and/or the Agreement shall not be cause to alter any term of the Agreement, nor shall such failure provide valid grounds for a Contractor to withdraw its Proposal or to seek additional compensation.

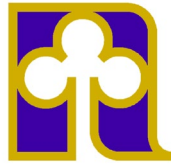
Additionally, if awarded a contract, the Contractor shall maintain a valid City of Newark business license at all times during the performance of work under the contract.

All Statements of Qualifications and rates set forth therein shall be deemed to include applicable taxes. Interested Contractors shall be appropriately licensed in accordance with the laws of the State of California for the work to be performed. The cost for any required licenses or permits shall be the responsibility of the selected Contractor(s). The selected Contractor(s) is liable for any and all taxes due as a result of the agreement.

Attachment A

Enforcement Response Plan (ERP)
for
Operation and Maintenance (O&M) Inspections
of
Pervious Pavement, Stormwater Treatment, and
Hydromodification Management Facilities

City of Newark



March 2017

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- B. Guidance for Recognizing and Remediating Common Problems
 - B.1 Bioretention Areas
 - B.2 Flow-through Planters
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 - B.8 Turf Block and Permeable Joint Pavers
 - B.9 Media Filters

Attachments

- 1. Standard Stormwater Treatment BMP Inspection Report Form
- 2. Plant List for Stormwater Measures (from Appendix B of the C.3 Technical Guidance)
- 3. Biotreatment Soil Mix (Appendix K of the C.3 Technical Guidance)

Description and Purpose of Enforcement Response Plan

This enforcement response plan (ERP) provides guidance to staff that conduct operation and maintenance (O&M) verification inspections of pervious pavement systems, stormwater treatment systems, and/or hydromodification management (HM) to achieve effective and timely compliance with the policies, codes and/or ordinances of the City of Newark listed below and the reissued Municipal Regional Stormwater Permit (MRP 2) adopted by the San Francisco Bay Regional Water Quality Control Board (Water Board) on November 19, 2015, and any successor permits. This ERP was developed to comply with the following section of MRP 2:

- Operation and Maintenance of Stormwater Treatment Systems Provision C.3.h.ii.(7)

The selection of an appropriate enforcement action and the escalation of enforcement are based on the seriousness of the problem and the response by the property owner or representative to the City of Newark's previous attempts to achieve compliance. The ERP includes suggested amounts of time to allow for the correction of problems based on the goal stated in MRP 2¹. The nature of a specific problem may require tailoring of the timeframes for correction and/or the use of temporary measures to promptly address a problem before a permanent solution may be implemented.

The City of Newark has authority to enforce municipal stormwater control requirements under the following policies, codes, and/or ordinances:

- City of Newark Municipal Code (NMC) Chapter 8.36 – Stormwater Management and Discharge Control

2. Roles and Responsibilities

Table 1 identifies the titles of the positions that perform roles in implementing the ERP. The positions that perform these roles may vary depending on whether the property requiring inspection² is a private property or publicly-owned property.

¹ Provision C.3.h.ii.(7)(c) of MRP 2 states that corrective actions shall be implemented no longer than 30 days after a problem is identified by an inspector. Corrective actions can be temporary and more time may be allowed for permanent corrective actions. If more than 30 days are required for compliance, a rationale shall be recorded in the electronic database or equivalent tabular system.

² In accordance with Provision C.3.h.ii.(6), properties requiring inspection include the following types of properties on which construction has been completed for facilities requiring inspection: Regulated Projects, offsite locations, joint projects, and/or Regional Projects.

Table 1 Assignment of Roles for ERP Implementation				
Project Types	Enforcement Official	Decision Maker	Inspector	Inspection Tracking Staff
Private Projects	Assistant City Engineer	Assistant City Engineer Assistant Engineer	Assistant Engineer	Assistant Engineer
Public Roads	Assistant City Engineer	Assistant City Engineer Assistant Engineer	Assistant Engineer	Assistant Engineer
Public Parks	Assistant City Engineer	Assistant City Engineer Assistant Engineer	Assistant Engineer	Assistant Engineer
Public Buildings and Structures	Assistant City Engineer	Assistant City Engineer Assistant Engineer	Assistant Engineer	Assistant Engineer

The responsibilities for each role identified in Table 1 are listed below.

Enforcement Official

- a. Supervise the enforcement response program.

Decision Maker

- a. Reviews violations when Inspectors have had no success in obtaining compliance using Enforcement Levels 1, 2, and/or 3, to determine whether escalation beyond the standard enforcement level progression is appropriate, and authorizes the use of Enforcement Level 4 (legal action, resolution at owner's expense, or referral to other agencies).
- b. Ensures that compliance actions taken are consistent and timely.
- c. Communicates and coordinates with State and federal agencies and legal counsel.

Inspector

- a. Conducts site inspections and reviews documentation to identify problems.
- b. Issues Verbal and Written Warnings to responsible parties.
- c. Reviews compliance history reports and prepares compliance reports.

- d. Enters all inspection reports and enforcement actions into Provision C.3.h inspection tracking database.
- e. Escalates enforcement using guidance provided in Table 3.
- f. Verifies responsible party has responded, in a timely manner, to Verbal and Written Warnings, and other enforcement actions.

Inspection Tracking Staff

- a. Enters inspection results in the C.3.h database or equivalent tabular format.

3. Enforcement Procedures

The following describes the enforcement agency's procedures from the discovery of problems through the confirmation of implementation of enforcement actions.

1. Schedule O&M Verification Inspections in accordance with the agency's O&M Inspection Plan, which the agency maintains and implements as required in Provision C.3.h.ii.(6) of MRP 2.
2. Prior to entering the property requiring inspection, the Inspector shall obtain and review the Regulated Project documents, to identify the specific location(s) of all facilities requiring O&M verification inspection³. Applicable Regulated Project documents are anticipated to consist of the approved Maintenance Plan for stormwater facilities included in the Regulated Project, or in the approved project plan sheets.
3. Upon arrival at the property requiring inspection, the Inspector shall complete a Standard Stormwater Treatment BMP Inspection Report Form (Attachment 1). The Inspector shall take photographs of all pervious pavement systems, stormwater treatment facilities, and/or HM facilities that are found to have problems. The photographs shall clearly represent the problems.
4. The Inspector shall review each facility requiring O&M verification inspection to verify whether the facilities are in place in accordance with Regulated Project documents and whether there are any problems requiring corrective action. The Inspector may refer to information provided in Appendix B, Guidance for Recognizing and Remediating Common Problems, when inspecting facilities to identify any problems. The Inspector shall complete the Standard Stormwater Treatment BMP Inspection Report Form (Attachment 1).
5. If there are no problems noted on the Standard Stormwater Treatment BMP Inspection Report Form, the Inspector shall file a copy in the project file, and provide a copy to the Inspection Tracking Staff to enter inspection results in the C.3.h database or equivalent tabular format.

³ In accordance with Provision C.3.h.ii.(6) the facilities requiring O&M verification inspection include: pervious pavement systems that total 3,000 square feet or more (excluding private-use patios for single family homes, townhomes, or condominiums), stormwater treatment systems, and HM controls.

6. If one or more problems are noted on the Standard Stormwater Treatment BMP Inspection Report Form, the Inspector shall issue an enforcement action to the property owner of record, and any other responsible party identified for the Regulated Project. The enforcement action document shall identify the problem, the required corrective action, and the timeframe for completing the corrective action. The Inspector shall refer to Table 3, to identify the proper enforcement action and timeframe. The Inspector shall file a copy of the Standard Stormwater Treatment BMP Inspection Report Form and a copy of the enforcement action documentation in the project file, and provide a copy to the Inspection Tracking Staff to enter inspection results in the C.3.h database or equivalent tabular format.
7. The Inspector shall re-inspect the property to verify whether corrective actions identified on the enforcement action document are implemented and no additional problems exist. The Inspector shall complete a new Standard Stormwater Treatment BMP Inspection Report Form for each re-inspection performed, file a copy in the project file, and provide a copy to the Inspection Tracking Staff to enter inspection results in the C.3.h database or equivalent tabular format.
8. If corrective actions have NOT been adequately implemented by the date and time stated on the enforcement action notice for Level 3 enforcement actions, Inspector shall refer the Regulated Project to the Decision Maker. The Decision Maker will cause a Level 4 enforcement action to be issued to the property owner of record, and any other responsible party identified for the Regulated Project.
9. If the corrective actions have been implemented as required by the enforcement action document and no additional problems exist, the Decision-Maker shall issue notification to the property owner of record, and any other contact person identified for the Regulated Project, that the problem has been corrected to the satisfaction of the City of Newark. The Decision Maker shall file a copy of the notification in the project file, and provide a copy to the Inspection Tracking Staff to enter inspection results in the C.3.h database or equivalent tabular format.

4. Types of Enforcement Actions

This ERP describes a range of enforcement options available for use to encourage prompt correction of problems identified during O&M verification inspections. As shown in Table 2, there are administrative and judicial (civil and criminal) remedies in the stormwater ordinance and other parts of the City of Newark Municipal Code that provide a range of enforcement options. Table 2 lists and describes available enforcement actions, provides examples of their use, and lists suggested time schedules for compliance.

Table 2 Enforcement Options Allowed under Code of Ordinances		
Categories of	Specific Types of Enforcement	Section of Code

Enforcement	Options	
Administrative Penalties / Cost Recovery	<ul style="list-style-type: none"> • Administrative Fine or Penalty • Abatement Cost Recovery • Falsifying information • Site Inspection Fines • Misdemeanor Code Fines • Infractions Code Fines 	<ul style="list-style-type: none"> • NMC Chapter 7.08.030 • NMC Chapter 7.20.010 • NMC Chapter 7.20.030 • NMC Chapter 7.20.020 • NMC Chapter 8.36.170
Administrative Remedies	<ul style="list-style-type: none"> • Administrative Nuisance Abatement • Summary Abatement • Illicit Discharge prohibition • Reduction of Pollutants in SW • BMP compliance • Cease and Desist Order • Notice to Correct • Public Nuisance Appeals • Abatement 	<ul style="list-style-type: none"> • NMC Chapter 7.16 • NMC Chapter 7.14 • NMC Chapter 8.36.100 • NMC Chapter 8.36.110 • NMC Chapter 8.36.110.C • NMC Chapter 8.36.250.A • NMC Chapter 8.36.250.B • NMC Chapter 8.36.220
Citation	<ul style="list-style-type: none"> • Administrative Citation 	<ul style="list-style-type: none"> • NMC Chapter 7.18 • NMC Chapter 7.20.040
Administrative Order Hearing	<ul style="list-style-type: none"> • Administrative Hearing 	<ul style="list-style-type: none"> • NMC Chapter 7.22
Civil and Criminal Penalties		<ul style="list-style-type: none"> • NMC Chapter 7.12.070

5. Levels of Enforcement Actions and Their Use

The appropriate enforcement response to problems identified during inspections depends on the magnitude of the problem, the duration and history of non-compliance, the good faith efforts of the property owner to achieve compliance, and whether the problem may interfere with the agency's compliance with MRP 2. Table 3 categorizes the available enforcement actions according to five levels – ranging from the lowest (Level 1) to the highest (Level 5) level of enforcement. Table 3 also provides field scenarios, and identifies the approach for assigning due dates for corrective actions.

Table 3
Levels of Enforcement Action, Field Scenarios, and Time for Correction

Level	Enforcement Action	Sub-categories	When to Use the Enforcement Action	Field Scenarios	Time for correction
1	Verbal Warning Verbal warnings are documented on the inspection checklist.	None	If a responsible party is present at the site, a verbal warning may be given regarding conditions that must be corrected while inspector is on-site, or that do not pose an immediate problem, but, if continued, have potential to result in problems.	<ul style="list-style-type: none"> a. Trash or debris has accumulated in the facility. b. Vegetation is overgrown but does not pose a threat to the proper functioning of the facility. c. Divots d. Dead Vegetation/Weeds e. May include items below under Level 2. 	Due date be determined by the inspector. Consider a target of one to 7 days.
2	Written Warning Written Warnings are documented on the inspection checklist.	Notice of Non-Compliance, Notice of Code Violation	Failure to correct Level 1 problem; evidence that proper maintenance is not occurring; or deficiencies in the facility that require repair, but there is no imminent threat to water quality.	<ul style="list-style-type: none"> a. Accumulated debris or overgrown vegetation block the inlet to the facility and could prevent runoff from entering the facility. b. Evidence of erosion or scouring. The condition does not prevent the facility from functioning. c. Accumulation of sediment, indicating the facility may not receive sufficient maintenance to prevent excessive sediment from entering the facility and potentially clogging biotreatment soil or pervious pavement. d. Structural damage, such as a cracked wall of a flow-through planter. Structural damage does not prevent the facility from functioning. 	Due date be determined by the inspector, depending on complexity of repairs needed. No longer than 30 days from problem identification to achieve corrective action. Temporary corrective action may be taken, while a permanent correction is pursued.

Table 3
Levels of Enforcement Action, Field Scenarios, and Time for Correction

Level	Enforcement Action	Sub-categories	When to Use the Enforcement Action	Field Scenarios	Time for correction
3	Notice to Comply with NO Monetary Penalty or Cost Recovery	Clean and Abate Order, Cease and Desist Order Inspection Checklist and Letter to Property Owner	Failure to correct Level 2 problem, evidence of an actual illicit discharge, or a major problem that requires prompt attention to allow the facility to function.	<ul style="list-style-type: none"> a. Discharge observed that poses imminent threat to storm drain system or receiving water. b. Structural damage that prevents functioning of the facility, such as the collapse of a wall of a flow-through planter. c. Standing water remains in a bioretention area more than five days after a rain event. 	Due date be determined by the inspector. No longer than 30 days from problem identification to achieve corrective action. Temporary corrective action may be taken, while a permanent correction is pursued.
4	Notice to Comply WITH Monetary Penalty or Cost Recovery	Notice to Abate, Resolution at Owner's Expense Letter to Property Owner and Administrative Citation	Failure to correct Level 3 problem	<ul style="list-style-type: none"> a. After receiving a Level 3 enforcement action, the responsible party fails to correct the problem AND fails to provide a satisfactory temporary corrective action while pursuing a permanent corrective action. 	Due date be determined by the inspector. No longer than 30 days to achieve corrective action.

**Table 3
Levels of Enforcement Action, Field Scenarios, and Time for Correction**

Level	Enforcement Action	Sub-categories	When to Use the Enforcement Action	Field Scenarios	Time for correction
5	Legal Action	Refer to City Attorney, State Water Resources Control Board, Alameda County District Attorney for civil and criminal prosecution	Failure to correct Level 4 problem.	<ul style="list-style-type: none"> a. After receiving a Level 4 enforcement action, the responsible party fails to correct the problem AND fails to pay the monetary penalty or cost recovery fee. b. City will plan to perform the necessary corrections through a contractor of choice at the owner’s expense. If the work to make the corrections is not paid by the property owner at the completion of work, the fee amount will be made a lien on the property per Stormwater Treatment Measures Maintenance Agreement and City of Newark Municipal Code. 	Develop time schedule based on case-specific information. If corrective action is not taken 30 days after problem was identified, provide documentation as required in Provision C.3.h.ii.(7).

6. Escalation of Enforcement Actions

This ERP incorporates a progressive enforcement response policy that is designed to maintain a fair and equitable system for enforcement to ensure that enforcement actions are proportionate to the violations, to provide maximum flexibility and effectiveness of enforcement actions, and to provide a system of escalating enforcement actions to encourage prompt compliance. The stormwater ordinance and other municipal codes allow for a degree of enforcement flexibility and a range of enforcement options that are needed to most efficiently gain compliance. An enforcement action may be upgraded or escalated depending on the circumstances of the case.

7. Procedures for Assigning Due Dates

As required by the MRP, corrective actions shall be implemented no longer than 30 days after a problem is identified by an inspector. Inspectors have the flexibility to set a near-term target date for corrective action, when feasible depending on the type of corrective action required, so that corrective action may be accomplished within 30 days, even if corrective action has not been achieved during the initial follow-up inspection. Enforcement action shall be escalated immediately after a failed follow-up inspection to the next enforcement level identified in Table 3.

The Inspector will take progressively stricter responses to achieve compliance if the responsible party does not implement appropriate corrective actions in the time frame specified. This ERP incorporates an enforcement response policy that is designed to maintain a fair and equitable system for enforcement to ensure that enforcement actions are proportionate to the violations and effective, and to provide a system of escalating enforcement actions to encourage prompt compliance.

In some cases, escalated enforcement over the standard may be necessary. When an enforcement action is escalated beyond the standard enforcement level progression, written documentation will detail the reasons for the increased enforcement action. The five criteria for evaluating the degree of non-compliance are:

a. Magnitude of the Violation

Generally an isolated instance of non-compliance can be met with an enforcement response listed in Table 3. However, even an isolated violation may threaten public health and the environment or damage public and/or private property. The enforcement response to this type of violation may be escalated to higher level of initial enforcement action, such as Levels 3 or 4.

b. Duration of the Violation

The failure to correct a problem over a long duration, such as exceeding the time frame specified by the Inspector during the initial inspection, will subject the responsible party to escalated enforcement actions. The agency's response will be to prevent extended periods of non-compliance from recurring.

c. Effect of the Problem on the Receiving Water

Any problem with the O&M of facilities subject to O&M inspection requirements that results in significant environmental harm will be met with an escalated enforcement response. A minimum response to these types of violations would be a Level 3 response. In emergencies situations, the City may choose to resolve the problem at owner's expense (Level 5). In addition, the City may pursue civil action to recover from the responsible party any fines and penalties paid (Level 5).

d. Compliance History

When evaluating the level of enforcement action to be taken for a violation, the compliance history of the responsible party shall be reviewed. If a pattern of recurring problems, combined with a failure to take corrective action within the 30-day timeframe specified by the MRP, is noted, then an escalated enforcement action may be warranted. As an example: if a responsible party failed to provide corrective action within 30 days of a problem being identified during the most recent O&M Verification Inspection, and a related problem is identified during the current O&M Verification inspection, then the appropriate enforcement action should be to escalate to Level 3.

e. Good Faith Effort

The responsible party's "good faith" effort in correcting its non-compliance is a factor in determining which enforcement action to take. "Good faith" may be defined as the responsible party's honest intention to remedy its non-compliance, coupled with actions that give support to this intention. However, good faith does not eliminate the necessity of an enforcement action. The Inspector shall use their best judgment in selecting the appropriate level of enforcement action in the event of "good faith efforts."

9. Follow-up Inspections

When a problem is identified, there is a need to perform follow-up inspection(s) to verify that the problem has been corrected. The facility will be re-inspected on the scheduled compliance date or shortly thereafter to confirm that compliance is achieved (see Table 3 for Time Schedules for Compliance). Additional enforcement actions and inspections shall be conducted until the violation is corrected.

Appendix A

Glossary of Terms

Facilities requiring O&M verification inspection – Pervious pavement systems that total 3,000 square feet or more (excluding private-use patios for single family homes, townhomes, or condominiums), stormwater treatment systems, and HM controls (SFBRWQCB 2015).

Hydromodification Management (HM) Control – A facility designed to meet the HM Standard defined in Provision C.3.g.ii of the MRP. Types of HM controls are listed in Provision C.3.g.iv (SFBRWQCB 2015).

Joint project site – The property on which a one or more stormwater treatment systems were constructed to treat the combined runoff from two or more Regulated Projects located adjacent to each other (SFBRWQCB 2015).

O&M – Operation and maintenance.

Maintenance plan – A plan detailing operation and maintenance requirements for stormwater treatment systems and/or HM controls (Clean Water Program 2016). The Clean Water Program’s Model Stormwater Treatment Measures and Hydromodification Management Controls Maintenance Agreement (“model maintenance agreement”) includes a requirement to attach a maintenance plan to the executed agreement.

Municipal Regional Stormwater Permit (MRP) – The Phase I municipal stormwater NPDES permit under which discharges are permitted from municipal separate storm sewer systems throughout Alameda County and other NPDES Phase 1 jurisdictions within the San Francisco Bay Region (Clean Water Program 2015). The current version of the MRP is Order No. R2-2015-0049, NPDES Permit No. CAS612008, issued by the Regional Water Quality Control Board on November 19, 2015.

Offsite location – The property on which one or more stormwater treatment systems were constructed to provide alternative compliance with Provision C.3.b for a Regulated Project, in accordance with MRP Provision C.3.e.i.(1), Option 1: LID Treatment at an Offsite Location (SFBRWQCB 2015).

Properties requiring inspection -- The following types of properties on which construction has been completed for facilities requiring O&M verification inspection: Regulated Project sites, offsite locations, joint project sites, and/or Regional Projects (SFBRWQCB 2015).

Regional Project – A regional or municipal stormwater treatment facility that discharges into the same watershed that the Regulated Project does (SFBRWQCB 2015).

Regulated Project – A development project that meets the criteria for a Regulated Project as defined in Provision C.3.b.ii of the MRP (SFBRWQCB 2015).

Regulated Project documents – Documents pertaining to a Regulated Project, such as the project’s approved Maintenance Plan for facilities requiring O&M verification inspections or plan sheets from the approved project plans.

Responsible party – The current property owner or a person who has been authorized, in a written document signed by the property owner, to act as an agent representing the property owner.

Stormwater treatment system - Any engineered system designed to remove pollutants from stormwater runoff by settling, filtration, biological degradation, plant uptake, media absorption/ adsorption or other physical, biological, or chemical process. This includes landscape-based systems such as grassy swales and bioretention units as well as proprietary systems (SFBRWQCB 2015).

Appendix B

Guidance for Recognizing and Remediating Common Problems

This appendix provides guidance to assist inspectors conducting O&M verification inspections in recognizing and remediating common problems with nine types of stormwater facilities, included in Sections B.1 through B.9 of this Appendix, as follow:

- B.1. Bioretention Areas
- B.2. Flow-through Planters
- B.3. Tree Well Filters
- B.4. Vegetated Swales
- B.5. Infiltration Trenches
- B.6. Extended Detention Basins
- B.7. Pervious Concrete and Asphalt
- B.8. Turf Block and Permeable Joint Pavers
- B.9. Media Filters

Attachment 1

Standard Stormwater Treatment BMP Inspection Report Form

Attachment 2

Plant List for Stormwater Measures

(from Appendix B of the C.3 Technical Guidance)

Attachment 3

Biotreatment Soil Specifications

(from Appendix K of the C.3 Technical Guidance)

Attachment B



**City of Newark
Enforcement Response Plan for the Municipal Stormwater Program**

Dated March 30, 2010

Description and Purpose of Enforcement Response Plan

This Enforcement Response Plan (ERP) provides guidance to inspection staff to assist them to take consistent actions needed to achieve effective and timely compliance with the City of Newark's stormwater ordinance and other enforcement authorities allowed by the City's municipal code. The ERP was developed to comply with the following sections of the municipal regional stormwater permit (MRP):

- Industrial and Commercial Site Controls – ERP (Provision C.4.c);
- Illicit Discharge Detection and Elimination – ERP (Provision C.5.b); and
- Construction Site Control – ERP (Provision C.6.b).

As shown in Appendix A these different MRP sections contain similar, but not identical requirements for developing and implementing an ERP. The City's ERP outlines the guidelines and procedures to be utilized by City staff when implementing enforcement actions related to stormwater violations under the MRP and the City's Stormwater Management and Discharge Control Ordinance. This ERP integrates the requirements from these three different MRP provisions into one ERP to facilitate consistent enforcement response within the City.

The selection of an appropriate enforcement action and the escalation of enforcement are based on the seriousness of the violation and the violator's response to the agency's previous attempts to achieve compliance. The ERP includes suggested amounts of time to allow for the correction of violations based on the goal stated in the MRP¹. The Enforcement Actions Overview in this ERP provides the appropriate level of enforcement actions(s) to be taken for a given violation. The nature of a specific violation may require tailoring of the timeframes for correction and/or the use of temporary measures to promptly address a violation before a permanent solution may be implemented. Enforcement actions may be initiated at any level depending on the circumstances and seriousness of the violation, at the discretion of the inspector or enforcement officer. As required by the MRP, this ERP also describes when it may be appropriate to refer violations to another agency, such as the San Francisco Bay Regional Water Quality Control Board (Water Board) or other appropriate agencies for additional enforcement.

The City of Newark has authority to enforce municipal stormwater control requirements under the following sections of the Newark Municipal Code (NMC):

NMC Title 8, Chapter 36 – Stormwater Management and Discharge Control Ordinance
NMC Title 7, Chapters 4 through 22 – Community Preservation and Nuisance Abatement
NMC Title 1, Chapters 16 through 20 – General Provisions
NMC Title 15, Chapter 50 – Grading and Excavation Ordinance

¹ The MRP states that violations must be corrected in a timely manner with a goal of correction before the next rain event, but not longer than 10 business days after discovery unless agency staff document reasons why a longer period is needed in the agency's database or equivalent

Enforcement Actions² Overview (continued)

Types of Enforcement Actions and Their Use

This ERP describes a range of enforcement options available for use to encourage prompt correction of violations and the prevention of conditions that pose a threat to cause future violations. There are administrative and judicial (civil and criminal) remedies in the stormwater ordinance and other parts of Newark's code that provide a range of discretionary options for responding appropriately to a given violation depending on the magnitude of the violation, the duration and history of non-compliance, the good faith efforts of the violator to achieve compliance, and whether the violation may interfere with the City's compliance with the MRP. The following table lists and describes available enforcement actions, provides examples of their use, and lists suggested time schedules for compliance.

<i>Type of Enforcement</i>		<i>Code Sections</i>
<i>Administrative Penalties / Cost Recovery</i>	<i>Damage to City Facilities Falsifying information Site Inspection Fines Sampling Fines Misdemeanor Code Fines Infractions Code Fines</i>	<i>§8.36.070; 8.36.110 Newark Municipal Code §8.36.200 Newark Municipal Code §7.20.020; 8.36.130 Newark Municipal Code §7.20.020; 8.36.140 Newark Municipal Code §8.36.180; §1.16.010 Newark Municipal Code §8.36.170; §1.16.010 Newark Municipal Code</i>
<i>Administrative Remedies</i>	<i>Illicit Discharge prohibition and Illicit Connection prohibition Reduction of Pollutants in SW Watercourse Protection BMP compliance Emergency Correction Submission of Compliance Schedules Public Nuisance Appeals</i>	<i>§8.36.100 Newark Municipal Code §8.36.110 Newark Municipal Code §8.36.120 Newark Municipal Code §8.36.110(E.) Newark Municipal Code §8.36.50; §8.36.70; §8.36.90 NMC §8.36.50; §8.36.70; §8.36.90 NMC §8.36.220; 7.08.030 Newark Municipal Code §7.22.010 to §7.22.040 Newark Municipal Code</i>
<i>Administrative Enforcement Powers</i>	<i>Cease and Desist Order Notice to Clean Authority to Arrest</i>	<i>§8.36.250 (A.) Newark Municipal Code §8.36.250 (B.) Newark Municipal Code §8.36.260 Newark Municipal Code</i>
<i>Citation</i>	<i>Administrative Citation Criminal Citation Misdemeanors</i>	<i>§7.18.010 Newark Municipal Code §1.16.040 Newark Municipal Code §1.16.010 Newark Municipal Code</i>
<i>Administrative Order Hearing</i>	<i>Civil liability judgment & order</i>	<i>§7.22.010 to §7.22.040; 8.36.230-240 Newark Municipal Code</i>
<i>Civil and Criminal Penalties</i>		<i>§1.16.040 Newark Municipal Code; 54740 California Government Code</i>

Enforcement Actions² Overview

Enforcement Actions	Enforcement Sub-categories	Use	Examples			Time Schedule to Achieve Compliance
			Industrial/Commercial Business (C.4)	Illicit Discharge (C.5)	Construction Site (C.6)	
Level 1 - Warning Verbal	None	For <u>threatened violations</u> due to inadequate housekeeping, lack of appropriate BMPs to prevent pollution, or threatened non-stormwater discharges disallowed by MRP.	Inappropriate storage of material out-of-doors that may contribute to pollutants in stormwater during rainfall, such as lids on dumpster being left open.	A wash area is present where washwaters may flow to MS4 based on the configuration, operational procedures, or evidence of a possible discharge.	Lack of an updated erosion control plan that reflects current conditions at a construction site.	Before the next rainfall event, but not longer than 10 business days, unless more timely compliance is feasible or other exceptions apply ³ .
Level 2 - Written Warning/ Notice of Violation	None	Issue for <u>minor violations</u> or if the response to a verbal warning is inadequate. A written warning may be in the form of a written inspection report, such as a completed Standard Stormwater Facility Inspection Report Form; letter; or checklist that describes violations, expected corrections, and schedule for correction.	Use of best management practices that are almost effective, but do not achieve the maximum extent practicable standard, for the pollutant generating activity they are intended to control.	A non-stormwater discharge that is not specifically allowed by the MRP, but might be if adequate documentation and procedures had been followed to verify the adequate control of pollutants and obtain necessary approvals.	Lack of having a copy of the Stormwater Pollution Prevention Plan at the construction site.	Before the next rainfall event, but not longer than 10 business days, unless more timely compliance is feasible or other exceptions apply ² .

² Where allowed by local municipal code, enforcement actions may include cost recovery for municipal staff time and associated expenses to initiate and track enforcement, conduct recordkeeping, collect and test samples, and verify a return to compliance.

³ The MRP states that violations must be corrected in a timely manner with a goal of correction before the next rain event, but not longer than 10 business days after discovery unless agency staff document reasons why a longer period is needed in the agency's database or equivalent.

Enforcement Actions² Overview (continued)

Enforcement Actions	Enforcement Sub-categories	Use	Examples			Time Schedule to Achieve Compliance
			Industrial/Commercial Business (C.4)	Illicit Discharge (C.5)	Construction Site (C.6)	
Level 3 - Notice to Comply	Without Monetary Penalty and/or Cost Recovery	Issue for <u>major violations</u> or if the response to written warning is inadequate. A notice to comply may be in the form of a cease and desist order ⁴ , notice to clean ² , notice to abate ⁵ , an administrative citation, a stop work order, a permit revocation, or a letter that describes violations, expected corrections, and schedule for correction.	Use of best management practices that are ineffective for the pollutant generating activity they are intended to control.	Discharge of non-stormwater discharges to MS4 that contain soap or other pollutants.	Inadequate use of BMPs to control sediment runoff from a construction site.	Before the next rainfall event, but not longer than 10 business days, unless more timely compliance is feasible or other exceptions apply ² . If more time is needed than provided above, consider issuing a stop work order for construction sites, or requiring the immediate cessation of pollutant or illicit discharge generating activities until long-term remedies may be implemented.

⁴ The model stormwater ordinance provides that an authorized enforcement official may issue cease and desist orders and notices to clean.

⁵ The model stormwater ordinance provides that any condition caused or permitted to exist in violation of the stormwater ordinance is a nuisance and may be summarily abated and/or restored by any enforcement official.

Enforcement Actions² Overview (continued)

Enforcement Actions	Enforcement Sub-categories	Use	Examples			Time Schedule to Achieve Compliance
			Industrial/Commercial Business (C.4)	Illicit Discharge (C.5)	Construction Site (C.6)	
Level 3 - Notice to Comply	With Monetary Penalty and/or Cost Recovery	Issue for <u>major violations</u> or if the response to written warning is inadequate. A notice to comply may be in the form of a cease and desist order ⁶ , notice to clean ² , notice to abate ⁷ , an administrative citation, a stop work order, a permit revocation, or a letter that describes violations, expected corrections, and schedule for correction.	Use of best management practices that are ineffective for the pollutant generating activity they are intended to control.	Discharge of non-stormwater discharges to MS4 that contain soap or other pollutants.	Inadequate use of BMPs to control sediment runoff from a construction site.	Same as above.
Level 4 - Legal Action	None	Pursue for the most serious violations including where the response to the notice to comply is inadequate. These types of violations are referred to city attorney or County District Attorney for civil and criminal prosecution.	Lack of use of best management practices for pollutant generating activity, such as storing wastes in a way that allows pollutants to be mobilized by rainfall and stormwater runoff.	Discharge of hazardous wastes to MS4.	Violations that affect the agency's ability to comply with the MRP's requirements.	The time schedule for compliance will need to be determined based on case-specific information. This information will be documented as required by the MRP.

⁶ The model stormwater ordinance provides that an authorized enforcement official may issue cease and desist orders and notices to clean.

⁷ The model stormwater ordinance provides that any condition caused or permitted to exist in violation of the stormwater ordinance is a nuisance and may be summarily abated and/or restored by any enforcement official.

Escalation of Enforcement Actions

This ERP incorporates a progressive enforcement response policy that is designed to maintain a fair and equitable system for enforcement to ensure that enforcement actions are proportionate to the violations, to provide maximum flexibility and effectiveness of enforcement actions, and to provide a system of escalating enforcement actions to encourage prompt compliance. The stormwater ordinance and other municipal codes allow for a degree of enforcement flexibility and a range of enforcement options that are needed to most efficiently gain compliance. An enforcement action may be upgraded or escalated depending on the circumstances of the case.

The Enforcement Actions Overview table above provides details for the various levels of escalating enforcement actions along with examples for C.4, C.5., and C.6 compliance and required timeliness of corrective actions. In general, the initial enforcement action level selected will be dependent on the nature and severity of the issue and potential harm to the stormwater system and downstream receiving waters. Most initial actions would likely be at Levels 1 or 2, but violations that are severe enough in terms of potential impact could escalate to higher levels immediately. Other factors to consider in selecting the appropriate level of enforcement actions will be ongoing history with the individual business/contractor and demonstrated level of effort to resolve the issue at hand.

Roles and Responsibilities

This section describes the duties of agency staff that are responsible for implementing enforcement actions described in this ERP. With all fire services recently having transferred from the City of Newark to the Alameda County Fire Department, the Engineering Division of the Public Works Department will now have full responsibility for implementation of the City's Stormwater Program, including all roles and responsibilities associated with this ERP. Staff members directly involved in the City's Stormwater Program include the Engineering Division's Senior Civil Engineer, Assistant Engineer, Public Works Inspector, and Engineering Technician I. The Public Works Director, City Attorney, and City Manager may be involved with certain higher level enforcement actions.

Site inspections under C.4, C.5, and C.6 may involve any combination of the Senior Civil Engineer, the Assistant Engineer, the Public Works Inspector, and the Engineering Technician I. Tracking and reporting of inspections will be the responsibility of the Senior Civil Engineer and Assistant Engineer. Decisions on the appropriate level of enforcement actions under this ERP will be the primary responsibility of the Senior Civil Engineer and Assistant Engineer. Engineering Division staff should coordinate all potential Level 3 and Level 4 enforcement actions with the Public Works Director, City Attorney, and City Manager.

Joint Compliance Inspections

In some situations it is appropriate to have joint compliance inspections with other agencies because the nature of the violation or because the violations are ongoing or repeated violations and may benefit from the enforcement options provided by other environmental statutes. Using the results of a joint compliance inspection, the regulatory agencies will be able to decide how to most efficiently achieve compliance. Joint compliance inspections could potentially be

Enforcement Actions² Overview (continued)

performed with the Union Sanitary District, Alameda County Water District, Alameda County Flood Control and Water Conservation District, Alameda County Environmental Health Department, Alameda County Fire Department, the Alameda Countywide Clean Water Program and the California Regional Water Quality Control Board.

Referral to Other Agencies

The MRP states that where enforcement tools are inadequate, the violations should be referred to the Regional Water Board, district attorney, or other relevant agencies for additional enforcement (Provision C.4.c). The legal enforcement action may include referral to the Alameda County District Attorney Environmental Crimes Unit. Referrals may also be made to the California Department of Fish and Game and possibly to the U.S. Environmental Protection Agency, if the Regional Water Board staff is unable to provide effective assistance.

Appendix A
Comparison of Municipal Regional Stormwater Permit's Enforcement Response Plan Requirements

Task Description	Provision C.4 Industrial/Commercial	Provision C.5 Illicit Discharge Detection/Elimination	Provision C.6 – Construction Site Control
Overall Description	Develop and implement ERP that serves as <u>inspection staff's</u> reference document to take <u>consistent actions to achieve timely and effective</u> compliance.	Develop and implement an ERP that will serve as guidance for <u>inspection staff</u> to take <u>consistent actions to achieve timely and effective</u> abatement of illicit discharges.	Develop and implement ERP that serves as <u>inspection staff's</u> reference document to take <u>consistent actions to achieve timely and effective</u> compliance. {identical to Prov. C.4}
Required Enforcement Actions/Recommended Responses	<u>Include timeframes for correction of various field violation</u> scenarios and <u>provide guidance</u> on appropriate use of various <u>enforcement tools</u> , such as verbal and written notices, <u>citations</u> , <u>cleanup requirements</u> , <u>administrative</u> and <u>criminal penalties</u> .	<u>Include timeframes for correction of various types and degree of violations</u> . ERP will <u>provide guidelines</u> on when to employ the range of <u>regulatory responses</u> from warnings, <u>citations and cleanup</u> and cost recovery, to <u>administrative</u> or <u>criminal penalties</u> .	<u>Include timeframes for correction of problems for various field violation</u> scenarios.
Timely Correction of Violations	States <u>violations</u> as a <u>goal</u> should be <u>corrected before the next rain event</u> , but <u>no longer than 10 business days after discovery unless reasons are recorded in Permittee's database or equivalent</u> . Include appropriate time periods for each level of corrective action. Describe permittee's procedures for follow up inspections, enforcement actions, and referral to another agency.	<u>Goal of correcting violations before the next rain event but not longer than 10 business days after discovery unless rationale is recorded in database or equivalent</u> . Immediate correction can be temporary and short-term if a long-term, permanent correction will involve significant resources and construction time. An example of replumbing a wash area is described.	All violations much be corrected in a timely manner with <u>goal of correcting them before the next rain event but no longer than 10 business days after the violations are discovered</u> . If more than 10 business days are required for compliance, a <u>rationale shall be recorded in database or equivalent</u> .
Escalation of Enforcement/Referrals	Enforce stormwater ordinances as necessary to achieve compliance. Where enforcement tools are inadequate, <u>refer the case to the Water Board, district attorney or other relevant agencies</u> for additional enforcement.	If corrective actions are not implemented promptly or if there are repeat violations, permittees shall <u>escalate responses</u> as needed to achieve compliance, including <u>referral to other agencies</u> where necessary.	Take <u>progressively stricter responses</u> to achieve compliance. ERP shall include structures for progressively stricter responses & various violation scenarios that evoke progressively stricter responses.

Task Description	Provision C.4 Industrial/Commercial	Provision C.5 Illicit Discharge Detection/Elimination	Provision C.6 – Construction Site Control
Recordkeeping	Maintain adequate records to demonstrate compliance and appropriate follow-up enforcement responses. Lists specific information that should be tracked regarding business inspections; list includes type of enforcement and problem resolution.	All incidents or discharges reported to the complaint/spill system that might pose a threat to water quality shall be logged to track follow up and response through problem resolution. Data collected shall be sufficient to demonstrate escalating responses to repeated problems, and inter/intra-agency coordination, where appropriate. Specific spill and discharge complaint tracking information requirements are listed in Provision C.5.f.ii.	Specific information required for each inspection and problems found and resolved is listed in Provision C.6.e.ii.(4).
Reporting	Lists information for inclusion in the annual report including number and percent of violations resolved within 10 working days or otherwise resolved in a longer but still timely manner. Frequency and types/categories of violations observed. Frequency and type of enforcement. Summary of types of violations by business category.	Number of discharges reported; number of discharges reaching storm drains and/or receiving waters; number and percentage of discharges resolved in a timely manner; and summary of major types of discharges and complaints.	Reporting of inspection results is required in Provision C.6.e.iii. Agencies must report the number and percentage of each type of enforcement action listed in its ERP.
Time Frame for Development and Implementation of ERP	April 1, 2010	April 1, 2010	April 1, 2010

Attachment C

**CONSULTING SERVICES AGREEMENT BETWEEN
THE CITY OF NEWARK
AND
[NAME OF CONSULTANT]
FOR [SERVICES]**

This Agreement for consulting services (“Agreement”) is made by and between the City of Newark, a municipal corporation, (“City”) and _____, a _____ (corporation / limited liability company / sole proprietor), with offices located at _____, (“Consultant”), (together referred to as the “Parties”) as of _____, 20____ (the “Effective Date”).

Section 1. Services. Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A and incorporated herein, at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

1.1 Term of Services. The term of this Agreement shall begin on the Effective Date and shall end on _____, and Consultant shall complete the work described in Exhibit A on or before that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City’s right to terminate the Agreement, as referenced in Section 8. **[INCLUDE IF TERM WILL OVERLAP FISCAL YEARS:** Funding for services beyond the current fiscal year will be included in future City budgets but is subject to City Council approval of annual appropriations.]

1.2 Standard of Performance. Consultant shall perform all services required pursuant to this Agreement according to the standards observed by a competent practitioner of the profession in which Consultant is engaged and in the geographical area in which Consultant practices its profession.

1.3 Assignment of Personnel. Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.

1.4 Time is of the Essence. Time is of the essence. Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to timely finish the Scope of Work, to meet the standard of performance provided in Section 1.1 and 1.2 above and to satisfy Consultant’s obligations hereunder.

Section 2. COMPENSATION. City hereby agrees to pay Consultant a sum not to exceed [**Spell out amount**] _____, (\$ _____) notwithstanding any contrary indications that may be contained in Consultant’s proposal for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Consultant’s proposal, attached as Exhibit A, regarding the amount of compensation, the Agreement shall prevail. City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner

specified herein. Except as specifically authorized by City in writing, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

[NOTE TO STAFF: THE FOLLOWING PROVISIONS OF THIS SECTION MAY BE ALTERED AS NECESSARY TO FIT THE CIRCUMSTANCES OF A PARTICULAR AGREEMENT.]

2.1 Invoices. Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred prior to the invoice date. Invoices shall contain the following information, unless waived by the Contract Administrator:

- Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;
- Project name & number if applicable;
- Purchase Order number to expedite payment;
- The beginning and ending dates of the billing period;
- A task summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion;
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder;
- The Consultant's signature;
- Consultant shall give separate notice to the City when the total number of hours worked by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours within a 12-month period.

2.2 Monthly Payment. City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant.

2.3 Final Payment. City shall pay the last 10% of the total sum due pursuant to this Agreement within 60 days after completion of the services and submittal to City of a final invoice, if all services required have been satisfactorily performed.

2.4 Total Payment. City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment.

2.5 Hourly Rate/Fees. Unless the services provided are for a lump sum or flat fee, fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on the compensation cost proposal attached hereto as Exhibit B. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit B, the Agreement shall prevail.

2.6 Reimbursable Expenses. Reimbursable expenses are specified in Exhibit B, attached hereto and incorporated herein. Reimbursable expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses shall not include a mark-up and are billed as a direct costs. In no event shall expenses be advanced by the City to the Consultant. Reimbursable expenses are included in the total amount of compensation provided under this Agreement that shall not be exceeded.

2.7 Payment of Taxes. Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.

2.8 Payment upon Termination. In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets to verify costs incurred to that date.

2.9 Authorization to Perform Services. The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of authorization from the Contract Administrator.

2.10. Business License. The Consultant is not authorized to perform services or incur costs whatsoever under the terms of this Agreement until Consultant applies for and has been issued a business license from the City pursuant to Title 5 of the Newark Municipal Code.

[NOTE TO STAFF: SECTION 3 MAY BE MODIFIED AS NECESSARY FOR THE TYPE OF WORK.]

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the

services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, long-distance telephone or other communication charges, vehicles, and reproduction facilities.

Section 4. INSURANCE REQUIREMENTS. Before beginning any work under this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be included in the Consultant's bid. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence that such insurance is in effect to City. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

4.1 Required Coverage. Consultant shall maintain all required insurance listed herein for the duration of this Agreement.

<u>COVERAGE</u>	<u>TYPE OF INSURANCE</u>	<u>MINIMUM LIMITS</u>
A	Commercial General Liability Premises Liability; Products and Completed Operations; Contractual Liability; Personal Injury and Advertising Liability	\$2,000,000 per occurrence; Bodily Injury and Property Damage \$4,000,000 in the aggregate; Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis
B	Commercial or Business Automobile Liability All owned vehicles, hired or leased vehicles, non-owned, borrowed and permissive uses. Personal Automobile Liability	\$1,000,000 per occurrence; Any Auto; Bodily Injury and Property Damage. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability

	is acceptable for individual contractors with no transportation or hauling related activities	form CA 0001 (most recent edition), Code 1 (any auto). No endorsement shall be attached limiting the coverage.
C	Workers' Compensation (WC) and Employers Liability (EL) Required for all contractors with employees	WC: Statutory Limits EL: \$100,000 per accident for bodily injury or disease. Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. The insurer shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement
D	Professional Liability/Errors & Omissions Includes endorsements of contractual liability	\$2,000,000 per occurrence \$4,000,000 policy aggregate; Any deductible or self-insured retention shall not exceed \$150,000 per claim

4.2 Additional requirements. Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

a. All required insurance shall be maintained during the entire term of the Agreement with the following exception: Insurance policies and coverage(s) written on a claims-made basis shall be maintained during the entire term of the Agreement and until three (3) years following termination and acceptance of all work provided under the Agreement, with the retroactive date of said insurance (as may be applicable) concurrent with the commencement of activities pursuant to this Agreement

b. All insurance required above with the exception of Professional Liability, Personal Automobile Liability, Workers' Compensation and Employers Liability, shall be endorsed to name as additional insured: City of Newark, its City Council, and all City officers, agents, employees, volunteers and representatives.

c. For any claims related to this Agreement or the work hereunder, the Consultant's insurance covered shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.

d. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.

e. **Certificates of Insurance:** Before commencing operations under this Agreement, Consultant shall provide Certificate(s) of Insurance and applicable insurance endorsements, in form and satisfactory to City, evidencing that all required insurance coverage is in effect. The City reserves the rights to require the Consultant to provide complete, certified copies of all required insurance policies.

f. **Subcontractors:** Consultant shall include all subcontractors as an insured (covered party) under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

g. **Claims-made limitations.** The following provisions shall apply if the professional liability coverage is written on a claims-made form:

i. The retroactive date of the policy must be shown and must be before the date of the Agreement.

ii. Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the Agreement or the work, so long as commercially available at reasonable rates.

iii. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant must purchase an extended period coverage for a minimum of three (3) years after completion of work under this Agreement.

iv. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

4.3 All Policies Requirements.

a. **Acceptability of insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII. Insurance shall be maintained through an insurer with a minimum A.M. Best Rating of A- or better, with deductible amounts acceptable to the City. Acceptance of Consultant's insurance by City shall not relieve or decrease the liability of Consultant hereunder. Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Consultant.

b. **Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

c. **Wasting Policies.** No policy required by this Section 4 shall include a “wasting” policy limit (i.e. limit that is eroded by the cost of defense).

d. **Waiver of Subrogation.** Consultant hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Consultant agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation. The Workers’ Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the consultant, its employees, agents, and subcontractors.

4.4 Remedies. In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant’s breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

Section 5. INDEMNIFICATION AND CONSULTANT’S RESPONSIBILITIES.

Consultant shall indemnify, defend with counsel acceptable to City, and hold harmless City and its officers, officials, employees, agents and volunteers from and against any and all liability, loss, damage, claims, expenses, and costs (including without limitation, attorney’s fees and costs and fees of litigation) (collectively, “Liability”) of every nature arising out of or in connection with Consultant’s performance of the Services or its failure to comply with any of its obligations contained in this Agreement, except such Liability caused by the sole negligence or willful misconduct of City.

The Consultant’s obligation to defend and indemnify shall not be excused because of the Consultant’s inability to evaluate Liability or because the Consultant evaluates Liability and determines that the Consultant is not liable to the claimant. The Consultant must respond within 30 days, to the tender of any claim for defense and indemnity by the City, unless this time has been extended by the City. If the Consultant fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Consultant under and by virtue of this Agreement as shall reasonably be considered necessary by the City, may be retained by the City until disposition has been made of the claim or suit for damages, or until the Consultant accepts or rejects the tender of defense, whichever occurs first.

With respect to third party claims against the Consultant, the Consultant waives any and all rights of any type to express or implied indemnity against the Indemnitees.

Notwithstanding the forgoing, to the extent this Agreement is a “construction contract” as defined by California Civil Code Section 2782, as may be amended from time to time, such duties of consultant to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Section 6. STATUS OF CONSULTANT.

6.1 Independent Contractor. At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3; however, otherwise City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.

6.2 Consultant Not an Agent. Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

Section 7. LEGAL REQUIREMENTS.

7.1 Governing Law. The laws of the State of California shall govern this Agreement.

7.2 Compliance with Applicable Laws. Consultant and any subcontractors shall comply with all laws applicable to the performance of the work hereunder.

7.3 Other Governmental Regulations. To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.

7.4 Licenses and Permits. Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.

7.5 Nondiscrimination and Equal Opportunity. Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, genetic information, marital status, sex, sexual orientation, gender, or gender identity, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the Contract Administrator or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

8.1 Termination. City may cancel this Agreement at any time and without cause upon written notification to Consultant. Consultant may cancel this Agreement upon thirty (30) days' written notice to City and shall include in such notice the reasons for cancellation.

In the event of termination, Consultant shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Consultant delivering to City any or all work product, including, but not limited to documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

8.2 Extension. City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Contract Administrator, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

8.3 Amendments. The Parties may amend this Agreement only by a writing signed by all the Parties.

8.4 Assignment and Subcontracting. City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors noted in the proposal, without prior written approval of the Contract Administrator.

8.5 Survival. All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.

8.6 Options upon Breach by Consultant. If Consultant materially breaches any of the terms of this Agreement, City's remedies shall include, but not be limited to, the following:

- 8.6.1** Immediately terminate the Agreement;
- 8.6.2** Retain the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement;
- 8.6.3** Retain a different consultant to complete the work described in Exhibit A not finished by Consultant; or
- 8.6.4** Charge Consultant the difference between the cost to complete the work described in Exhibit A that is unfinished at the time of breach and the amount that City would have paid Consultant pursuant to Section 2 if Consultant had completed the work.
- 8.6.5** No remedy mentioned in this Agreement is intended to be exclusive of any other right, power, or remedy, permitted by law. Neither the failure nor the delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of any such right or remedy.

Section 9. KEEPING AND STATUS OF RECORDS.

9.1 Records Created as Part of Consultant's Performance. All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City upon termination of the Agreement and City may use, reuse or otherwise dispose of the documents without Consultant's permission. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released to third parties without prior written consent of both parties.

9.2 Consultant's Books and Records. Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of 3 years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement. All such records should be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible.

9.3 Inspection and Audit of Records. Any records or documents that Section 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds \$10,000.00, the Agreement shall be subject to the examination and audit of the

State Auditor, at the request of City or as part of any audit of the City, for a period of 3 years after final payment under the Agreement.

Section 10 MISCELLANEOUS PROVISIONS.

10.1 Attorneys' Fees. If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.

10.2 Venue. In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Alameda or in the United States District Court for the Northern District of California.

10.3 Severability. If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

10.4 No Implied Waiver of Breach. The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.

10.5 Successors and Assigns. The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the parties.

10.6 Use of Recycled Products. Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.

10.7 Conflict of Interest. Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Sections 1090 *et seq.* Consultant hereby warrants that it is not now, nor has it been in the previous 12 months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous twelve months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of Government Code § 1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of Government Code § 1090 and, if applicable, will be disqualified from holding public office in the State of California.

10.8 Solicitation. Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.

10.9 Contract Administration. This Agreement shall be administered by the City Manager, or his designee, identified as [REDACTED] ("Contract Administrator"). All correspondence, meeting documentation, invoices and project deliverables shall be directed to or through the Contract Administrator.

10.10 Notices. Any notice, demand, request, consent or approval that either party is required to give the other pursuant to this Agreement, shall be in writing and may be given by either (i) personal service, (ii) delivery by reputable overnight delivery service (e.g. Federal Express) which provides a receipt showing date and time of delivery, (iii) certified United States mail, postage prepaid, return receipt requested, or (iv) by email transmission. Notice shall be effective upon personal delivery or delivery to the addresses specified below, as reflected on the receipt of delivery or return receipt, as applicable.

Any written notice to Consultant shall be sent to:

[INSERT CONSULTANT CONTACT INFORMATION HERE]

All other written notices to City shall be sent to:

_____		Kristopher J. Kokotaylo,
_____		City Attorney
City of Newark		City of Newark
37101 Newark Blvd.	<u>with a copy to</u>	37101 Newark Blvd.
Newark, CA 94560		Newark, CA 94560

10.11 Professional Seal. Where applicable in the determination of the contract administrator, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation. The stamp/seal shall be in a block entitled "Seal and Signature of Registered Professional with report/design responsibility," as in the following example.

_____ Seal and Signature of Registered Professional with report/design responsibility.
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10.12 Integration. This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A and B [ENSURE THAT THE CORRECT EXHIBITS ARE LISTED] represent the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

<u>Exhibit A</u>	Scope of Services
<u>Exhibit B</u>	Cost Proposal

10.13 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

SIGNATURES ON FOLLOWING PAGE

The Parties have executed this Agreement as of the Effective Date.

CITY OF NEWARK

[CONSULTANT]

_____, CITY MANAGER

Title: _____

ATTEST:

_____, CITY CLERK

APPROVED AS TO FORM:

KRISTOPHER J. KOKOTAYLO
CITY ATTORNEY

5638310.1
Version 3.2.21

EXHIBIT A
SCOPE OF SERVICES

EXHIBIT B
COMPENSATION SCHEDULE

