

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION**

In the Matter Of:

NORTH BAY CONSTRUCTION

ORDER R1-2013-0067

**SETTLEMENT AGREEMENT AND
STIPULATION FOR ENTRY OF
ADMINISTRATIVE CIVIL LIABILITY
ORDER**

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (hereafter "Settlement Agreement" or "Stipulation") is entered into by and between the Assistant Executive Officer of the North Coast Regional Water Quality Control Board ("North Coast Water Board"), on behalf of the North Coast Water Board Prosecution Team ("Prosecution Team") and Barella-Geney Corp., a California corporation doing business as "North Bay Construction", ("North Bay" or "Settling Respondent") (collectively "Parties") and is presented to the North Coast Water Board for adoption as an Order by settlement ("Stipulated Order" or "Order"), pursuant to Government Code section 11415.60.

Section II: RECITALS

WHEREAS, in 2008 Settling Respondent contracted with the City of Sebastopol ("City") to construct the Laguna Force Main Replacement Project ("Project") (Contract No. 2008-02) per the City's plans and specifications prepared by the City's outside engineer and construction manager, Green Valley Consulting Engineers, Inc. ("Green Valley"). The Project consisted of the construction of a 14-inch sanitary sewer force main, associated valves, vaults and inter-tie structures, abandonment of existing force main/manholes, jack and bore installation under Highway 12, installation of a dissipating chamber, and environmental mitigation measures. The Project was completed and tested in November of 2008 and accepted by the City on December 5, 2008;

WHEREAS, on January 20, 2010, a leak developed in an underground portion of the Laguna Force Main that resulted in untreated wastewater escaping to the ground surface and allegedly discharging into the waters of the nearby Laguna de Santa Rosa;

WHEREAS, the City reported that an estimated 142,500 gallons of untreated wastewater had discharged into the Laguna de Santa Rosa as a result of the leak;

WHEREAS, on September 9, 2010, the Assistant Executive Officer of the North Coast Water Board issued Administrative Civil Liability Complaint No. R1-2010-0081 alleging that the City violated provisions of the Porter-Cologne Water Quality Control Act and the Clean Water Act as a consequence of the January 20, 2010, discharge;

WHEREAS, on April 12, 2011, the complaint against the City was subsequently withdrawn due to the City's allegations that North Bay improperly constructed the Laguna Force Main in 2008. North Bay denies the City's allegations and contends that the leak in the Laguna Force Main was the result of causes other than North Bay's alleged improper construction;

WHEREAS, on April 7, 2011, the Assistant Executive Officer of the North Coast Water Board issued Administrative Civil Liability Complaint No. R1-2011-0048 ("Complaint") to the Settling Respondent alleging that the Settling Respondent failed to properly construct a pipe joint within the sewer main while carrying out the Project, resulting in the discharge of 142,500 gallons of untreated wastewater to the Laguna de Santa Rosa on January 20, 2010. The Complaint alleged that the discharge violated Prohibition C.1 of State Water Resources Control Board Order No. 2006-003-DWQ, *Statewide General Waste Discharge Requirements for Sanitary Sewer Systems*, and/or Section 301 of the Clean Water Act (33 U.S.C. § 1311) and California Water Code section 13376. The Complaint is attached hereto as EXHIBIT A;

WHEREAS, North Bay has asserted rights of indemnity and/or contribution against both the City and Green Valley arising out of the allegations of the Complaint and this proceeding;

WHEREAS, the Parties have engaged in settlement negotiations and agree to fully resolve and settle the allegations made in the Complaint without administrative or civil litigation and by presenting this Stipulation to the North Coast Water Board for adoption as an Order by settlement, pursuant to Government Code section 11415.60. Although the amount of the administrative civil liability agreed to in this Settlement Agreement is less than the \$519,990 proposed in the Complaint, the reduced amount is based on the Parties' agreement that the volume of the discharge originally reported was too high. The Parties agree that the actual volume of the discharge that occurred was no greater than 9,000 gallons, as described in a report prepared by Terrain Engineering, Inc., attached hereto as EXHIBIT B. A revised calculation, based on a discharge volume of 9,000 gallons with a per gallon liability amount of \$10/gallon,¹ is attached hereto as Exhibit C; and

¹ The penalty methodology attached as Exhibit A to the Complaint reduced the maximum per gallon liability assessment from \$10 to \$4.50 based on a finding that the discharge was considered "high volume."

WHEREAS, the Prosecution Team believes that the proposed settlement and resolution of the alleged violations is fair and reasonable and fulfills all of its enforcement objectives, that no further action is warranted concerning the specific violations alleged in the Complaint, except as provided in this Stipulated Order, and that adoption of this Stipulated Order is in the best interest of the public.

Section III: STIPULATIONS

The Parties stipulate to the following:

- 1. No Admission of Liability:** This Settlement Agreement and the Stipulated Order are the result of compromise and, by entering into this Settlement Agreement, North Bay does not admit to any of the allegations in the Complaint against it, or that it has been or is in violation of the Water Code or any other federal, state, or local law or ordinance;
- 2. Administrative Civil Liability:** Within thirty (30) days of adoption and entry of the Stipulated Order, North Bay agrees to remit, by check, EIGHTY FIVE THOUSAND SEVEN HUNDRED TWENTY FIVE DOLLARS (\$85,725), payable to the *State Water Resources Control Board Cleanup and Abatement Account*, and shall indicate on the check the number of this Order. North Bay shall deliver the original signed check to the State Water Resources Control Board Division of Administrative Services, ATTN: Accounting, 1001 "I" Street, 18th Floor, Sacramento, California 95814 and shall send copies to David Leland, North Coast Regional Water Quality Control Board, 5550 Skylane Boulevard, Suite A, Santa Rosa, CA 95043 and David Boyers, State Water Resources Control Board, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812.
- 3. Compliance with Applicable Laws:** North Bay, as the Settling Respondent, understands that payment of the amount of the administrative civil liability in accordance with the terms of this Settlement Agreement and compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in the Complaint may subject it to further enforcement, including additional administrative civil liability.
- 4. Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

Because a discharge of 9,000 would not be considered high volume, a reduction from the maximum statutory per gallon liability amount of \$10 is not appropriate. (See State Water Resources Control Board Water Quality Enforcement Policy [effective May 10, 2010], Page 14.)

5. Matters Covered by Stipulation; Covenant Not to Sue: Upon adoption by the North Coast Water Board, this Stipulated Order represents a final and binding resolution and settlement of all claims, violations or causes of action, alleged in the Complaint, or which could have been asserted based on the specific facts alleged in the Complaint, against North Bay, the City of Sebastopol, Green Valley Consulting Engineers, Inc., and each of their respective officers, employees, directors, members, owners, shareholders, agents, subsidiaries, parents, insurers and sureties as of the effective date of this Stipulated Order ("Covered Matters"). Further, the North Coast Water Board covenants not to sue or to pursue any administrative or civil proceedings against the foregoing entities and/or persons for known claims arising out of the Covered Matters. The provisions of this Paragraph are expressly conditioned on full payment of the agreed amount of the administrative civil liability by the deadline specified in Paragraph 2, above.

6. Public Notice: Settling Respondent understands that this Stipulated Order must be noticed for a 30-day public review and comment period prior to consideration by the North Coast Water Board. If the North Coast Water Board Assistant Executive Officer receives significant new information that reasonably affects the propriety of presenting this Stipulated Order to the North Coast Water Board for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the North Coast Water Board. Settling Respondent agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

7. Addressing Objections Raised During Public Comment Period: The Parties agree that the procedure contemplated for the North Coast Water Board's adoption of the settlement by the Parties and review by the public, as reflected in this Stipulated Order, will be adequate. In the event procedural objections are raised prior to the Stipulated Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.

8. No Waiver of Right to Enforce: The failure of the Prosecution Team or North Coast Water Board to enforce any provision of this Stipulated Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of the Order. The failure of the Prosecution Team or North Coast Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order.

9. Effect of Stipulated Order: Except as expressly provided in this Stipulated Order, nothing in this Stipulated Order is intended nor shall it be construed to preclude the Prosecution Team or any state agency, department, board or entity or any local agency from exercising its authority under any law, statute, or regulation.

10. Interpretation: This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.

11. Modification: This Stipulated Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the North Coast Water Board.

12. If Order Does Not Take Effect: In the event that this Stipulated Order does not take effect because it is not approved by the North Coast Water Board, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the North Coast Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:

- a. Objections related to prejudice or bias of any of the North Coast Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the North Coast Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the Complaint in this matter; or
- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

13. Evidence of Prior Enforcement Action: In settling this matter, Settling Respondent agrees that in the event of any future enforcement actions by the North Coast Water Board, the Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327.

14. Waiver of Hearing: Settling Respondent has been informed of the rights provided by Water Code section 13323(b), and hereby waives its right to a hearing before the North Coast Water Board prior to the adoption of the Stipulated Order.

15. Waiver of Right to Petition: Settling Respondent hereby waives its right to petition the North Coast Water Board's adoption of the Stipulated Order as

written for review by the State Water Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

16. Settling Respondent's Covenant Not to Sue: Settling Respondent covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter.

17. North Coast Water Board is Not Liable: Neither the North Coast Water Board members nor the North Coast Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Settling Respondent or the Implementing Party, their directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order, nor shall the North Coast Water Board, its members or staff be held as parties to or guarantors of any contract entered into by the Settling Respondent or the implementing Party, their directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order.

18. Authority to Bind: Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of and to bind the entity on whose behalf he or she executes the Order.

19. No Third Party Beneficiaries. Except as expressly stated in Paragraph 5, above, this Settlement Agreement and Stipulated Order are not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.

20. Effective Date: This Stipulated Order shall be effective and binding on the Parties upon the date the North Coast Water Board enters the Order.

21. Counterpart Signatures: This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

22. Severability: This Stipulation and Order are severable; should any provision be found invalid the remainder shall remain in full force and effect.

23. Incorporation of Exhibits: Exhibits "A," "B" and "C" are hereby incorporated by reference.

IT IS SO STIPULATED.

North Coast Water Board Prosecution Team

By: Original Signed By
David Leland, Assistant Executive Officer

Date: October 11, 2013

Barella-Geney Corp., a California corporation, doing business as North Bay Construction

By: Original Signed By
Steve Geney, President

Date: October 9, 2013

Order of the North Coast Water Board

24. The North Coast Water Board incorporates Paragraphs 1 through 23 by this reference as if set forth fully herein.

25. In adopting this Stipulated Order, the North Coast Water Board has considered, where applicable, each of the factors prescribed in California Water Code section 13385(e). The consideration of these factors is based upon information and comments obtained by the North Coast Water Board's staff in investigating the allegations described in the Complaint or otherwise provided to the North Coast Water Board by the Parties and members of the public.

26. This is an action to enforce the laws and regulations administered by the North Coast Water Board. The North Coast Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

27. The Executive Officer is authorized to refer this matter directly to the Attorney General for enforcement if the Settling Respondent fails to perform any of its obligations under the Order.

Pursuant to CWC section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** on behalf of the North Coast Regional Water Quality Control Board.

Original Signed By

Matthias St. John, Executive Officer

Date: December 3, 2013

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