NORTH COAST REGIONAL WATER QUALITY CONTROL BOARD

In the matter of:	)	
	)	
Steve Rector and	)	**Order No. R1-2013-0045 (Proposed)**
Anne Carol Frocteau	)	
APN # 125-280-73	)	**Settlement Agreement and Stipulation for**
	)	**Entry of Administrative Civil Liability Order;**
	)	**Order (Proposed)**
	)	

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulation") is entered into by and between the North Coast Regional Water Quality Control Board, Prosecution Staff ("Prosecution Staff"), the California Department of Fish and Wildlife ("Fish and Wildlife"), and Mr. Steve Rector and Ms. Ann Carol Frocteau ("Dischargers" or "Settling Respondents") (collectively "Parties") and is presented to the North Coast Regional Water Quality Control Board ("Regional Water Board") for adoption as an Order, by settlement, pursuant to Government Code section 11415.60.

As discussed in greater detail below, it is alleged that Settling Respondents violated laws and regulations for which the Regional Water Board, State Water Resources Control Board ("State Water Board"), and Fish and Wildlife can seek administrative and judicial penalties. The alleged violations resulted from and/or are related to the Settling Respondents construction of an on stream reservoir without obtaining any permits or authorization from the necessary regulatory agencies.

Section II: RECITALS

1. The Dischargers own land located at 25820 Comptche-Ukiah Road, Comptche, in Mendocino County, identified as Mendocino County Assessor's Parcel Number (APN) 125-28-073 ("Property"). The Property is situated within the Navarro River watershed. Drainage from the Site discharges into an unnamed tributary to Johnson Creek. Johnson Creek is a tributary to John Smith Creek, which flows to the Navarro River. The Property is subject to the requirements set forth in Clean Water Act sections 301 and 401, California Water Code section 13376, waste discharge prohibitions specified by the Water Quality Control Plan for the North Coast Region ("Basin Plan"), and Cleanup and Abatement Order No. R1-2010-0048.

2. Section 301 of the Clean Water Act (33 U.S.C. § 1311) and Water Code section 13376 prohibit the discharge of dredge and fill materials to surface waters except in

compliance with an Army Corp of Engineers section 404 dredge and fill permit and a section 401 water quality certification from the State Water Board.

3. On March 20, 1975, the Regional Water Board adopted the *Water Quality Control Plan for the North Coast* Region ("Basin Plan") and amended the Basin Plan on March 25, 1976 and in January 2007. The Basin Plan establishes water quality objectives, designates beneficial uses, and contains discharge prohibitions. The Basin Plan's Action Plan for Logging, Construction, and Associated Activities contains the following discharge prohibitions:

   Prohibition 1 - The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.

   Prohibition 2 - The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could be passed into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.

4. On May 10, 2010, the Regional Water Board adopted Cleanup and Abatement Order No. R1-2010-0048 ("CAO") requiring the Settling Respondents to clean up and abate the effects of the discharge of earthen materials to water of the state and provide certain technical and monitoring reports. The CAO requires all work required under the order, including the removal of the impoundment and restoration of the stream channel, to be completed by October 15, 2010.

5. California Water Code, section 1052 prohibits the diversion or use of water subject to Division 2 of the Water Code, other than as authorized in that Division, and defines such unauthorized diversion or use as a trespass for which the State Water Board can impose civil liability in an amount not to exceed $500 for each day that a trespass occurs. Water Code sections 5100-5107 establish a program requiring persons (with some limited exceptions not relevant here) who divert water from a surface stream to file a statement of Water Diversion and use. Specifically Water Code section 5101 requires:

   Each person who after December 31, 1965 diverts water shall file with the board, prior to July 1 of the succeeding year, a statement of his or her diversion and use . . .

6. California Fish and Game Code section 5650 generally makes it unlawful to deposit deleterious materials into state waters or place deleterious materials where they can pass into state waters. State Waters are defined pursuant to Fish and Game Code section 89.1 as "waters of the state" found in California Water Code section

13050 which are defined as surface water or groundwater within the boundaries of the state.

7. California Fish and Game Code section 1602 generally makes it unlawful to substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of any river, stream, or lake or deposit or dispose of debris, waste, or other material where it may pass into any river, stream, or lake without proper notification and procedures identified in the Fish and Game Code.

8. Settling Respondents are alleged to have violated Section 301 of the Clean Water Act, Water Code section 13376 and Basin Plan Prohibitions by discharging sediment while conducting excavation and construction activities in the stream bed in order to construct the earthen dam. Based on information submitted by the Settling Respondents in an application for a Water Quality Certification submitted after this enforcement action was initiated, Settling Respondents placed 71.1 cubic yards of fill into the stream bed within the banks of an unnamed tributary to Johnson Creek and excavated 59.3 cubic yards of soil from the streambed. It is estimated that using a John Deere 200 CLC excavator with a 4-foot bucket, as the Settling Respondents have indicated in their subsequent Water Quality Certification, it would have taken approximately 62 bucket loads to excavate and place fill from the streambed. Accordingly, a minimum of 62 discharge events occurred in violation of Clean Water Act Section 301, Water Code section 13376 and Basin Plan Prohibitions during the construction of an earthen dam that created the unauthorized reservoir. These discharge events are referred to as "Discharge Violations." The Regional Water Board is authorized to impose administrative civil liability for this violation pursuant to Water Code section 13385.

9. The Settling Respondents are alleged to have violated Water Code sections 1052 and 5101, for which the State Water Board may impose civil liability. Specifically, the reservoir constructed by the Settling Respondents is alleged to be an unauthorized diversion of water which constitutes a trespass against the State for which the State Water Board may impose civil liability in an amount not to exceed $500 for each day that the unauthorized diversion or use of water occurs. It is further alleged that Settling Respondents failed to timely file a Statement of Diversion and Use as required by Water Code section 5101, a violation for which the State Water Board may impose administrative civil liability of $1,000 plus $500 per day for each additional day on which the violation continues if the person fails to file within 30 days after receiving notice of the violation. These violations are referred to as "State Water Board Violations." The Regional Water Board is not authorized to impose administrative civil liability for these violations, nevertheless the State Water Board, Division of Water Rights incurred costs in the investigation of these violations and Settling Respondents agree to pay liability to the State Water Board in accordance with this Stipulation.

10. The Settling Respondents are alleged to have violated Fish and Game Code section 5650 and 1602 by discharging sediment while conducting excavation and construction activities in the unnamed tributary to Johnson Creek and creating an earthen dam, placing substantial quantities of earthen fill into the stream and creating an unpermitted/unlicensed diversion/obstruction and reservoir. These violations are referred to as "Fish and Wildlife Violations." The Regional Water Board is not authorized to impose administrative civil liability for these violations; nevertheless, the Parties agree to settle these matters in accordance with this Stipulation. Any person who discharges or deposits any substance deleterious to fish, plant life, bird life, or animal life, or their habitat, or which enters waters the state is liable civilly to the department for all actual damages to fish, plant, bird, or animal life or their habitat pursuant to Fish and Game Code section 12016. The Department of Fish and Wildlife has determined the following impacts from the above referenced activities: (1) Interruption in downstream flow during periods in which the pond fills, (2) Loss of pool and channel habitat, and (3) reduction in in-stream complexity. The results of a Resource Equivalency Analysis reflect that the public may be compensated for the resource injuries by the implementation of restoration projects that restore .089 mile of stream habitat. The cost for a restoration project for small rock stream habitat is approximately $79,114 per stream-mile, causing a .089 mile project to cost approximately $7,000, which is DFW's estimate of damages.

11. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy ("Enforcement Policy"). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The Prosecution Staff considered the methodology set forth in the Enforcement Policy for Discharge Violations, as shown in Exhibit A, which is attached hereto and incorporated by reference as though fully set forth herein.

12. The Parties have engaged in settlement negotiations and agree to settle the matter without administrative or civil litigation by presenting this Stipulation to the Regional Water Board for adoption as an Order by settlement, pursuant to Government Code section 11415.60. To resolve the violations alleged by consent, the Parties have agreed to the imposition of $30,000 in liability against the Settling Respondents. The amount of administrative civil liability imposed pursuant to this Stipulation and Order is less than the amount calculated by the Prosecution Staff using the State Water Board's Enforcement Policy, however, it is over and above estimated economic benefit and staff costs. The reduction in liability is justified considering the risks associated with proceeding to hearing, financial documentation submitted by the Respondents asserting an inability to pay the full liability amount of $125,530 without selling the Property, and a determination that an expeditious settlement of this matter at the amount proposed will provide for recovery of staff cost and/or liability by the Regional Board, Fish and Wildlife, and State Water Board Division of Water Rights while the Settling Respondents conduct

the work necessary to come into compliance. Accordingly, the Prosecution Staff believes that the resolution of the alleged violations is fair and reasonable and fulfills all of its enforcement objectives, that no further action is warranted concerning the Discharge Violations, except as provided in this Stipulation and Order, and that this Stipulation and Order is in the best interest of the public.

Section III: STIPULATIONS

The Parties stipulate to the following:

13. **Recitals Incorporated:** The preceding Recitals are incorporated herein.

14. **Administrative Civil Liability:** The Settling Respondents hereby agree to the imposition of an administrative civil liability totaling **$30,000**. Recovery of this liability amount includes and is in excess of the estimated costs incurred by the Regional Water Board staff ($13,000), DFW ($3,800), and State Water Board ($2,000) to investigate and prosecute this action, as well as estimated natural resource damages ($7,000). The allocation and payment of liability is discussed in greater detailed in section 15 below.

15. **Payment of Administrative Civil Liability:** The Settling Respondents agrees to pay a total of $30,000 in administrative civil liability. Of this amount:

    a. **For the North Coast Regional Board:** A total of $17,200 shall be paid to the State Water Resource Control Board Cleanup and Abatement Account for Regional Water Board staff costs and penalties. Payment shall be made no later than 30 days from issuance of this Order by check payable to the *State Water Resources Control Board Cleanup and Abatement Account* mailed to David Leland, Acting Assistant Executive Officer, North Coast Regional Water Quality Control Board, 5550 Skylane Boulevard, Suite A, Santa Rosa, California 95403; Copies of check shall be provided to Yvonne West, State Water Resources Control Board, Office of Enforcement, 1001 I Street, 16th Floor, Sacramento, CA 95814.

    b. **For the Department of Fish and Wildlife:** A total of $10,800 shall be paid as follows: (1) $3,800 by check payable to the *Department of Fish and Wildlife, Fish and Wildlife Pollution Account,* P.O. Box 944209 Sacramento, CA 94244-2090 on or before December 31, 2013; and $7,000 by check payable to the National Fish and Wildlife Foundation, P.O. Box 944209 Sacramento, CA 94244-2090 in three payments. The first payment of $3,000 is due on or before June 30, 2014, the second payments of $2,000 is due on or before December 31, 2014, and the third and final payment of $2,000 due on or before June 30, 2015.

    c. **For the State Water Resources Control Board, Division of Water Rights:** A total of $2,000 payable to the *State Water Board Water Rights Fund* shall be

made no later than 30 days from issuance of this Order and mailed to State Water Resources Control Board, Division of Water Rights, Attn: John O'Hagan, P.O. Box 2000, Sacramento, CA 95812-2000. Copies of the check shall be provided to Yvonne West, State Water Resources Control Board, Office of Enforcement, 1001 I Street, 16th Floor, Sacramento, CA 95814.

16. **Stipulation for Future Compliance or Removal**: The Parties jointly stipulate and agree to the following terms and that those terms shall be enforceable as a Cease and Desist Order issued in accordance with California Water Code section 13301:

    a. Settling Respondents agree to diligently pursue all necessary permits, registrations and other applicable agency approvals for the reservoir and water diversion and use on the Property, including but not limited to a 401 Water Quality Certification from the State Water Board, a Stream Bed Alteration Agreement with Fish and Wildlife, and the Registration of small domestic use appropriation with the Division. Diligent pursuit of said approvals includes providing the required information and payment of all necessary fees in the applicable time periods.

    b. Since the inception of settlement discussions and as of November 15, 2012, Settling Respondents have submitted the following:

        1) Statement of past diversion and use for 2009 to the State Water Board;
        2) Required supplemental information for a 401 Water Quality Certification application to the State Water Resources Control Board;
        3) Required supplemental information for a notification for Lake or Streambed Alteration (Fish and Game code section 1600 permit), and Small Domestic Use registration to the DFW; and
        4) Required supplemental information for Section 404 application to the Army Corps of Engineers

    c. The responsible agencies are now in the process of reviewing the above submissions and Settling Respondents agree to diligently pursue the above authorizations and provide any additional information requested by responsible agencies within a reasonable time period as provided by the responsible agency requesting additional information.

    d. Within 30 days of Settling Respondents receiving either additional terms and conditions or clearance from DFW on the Small Domestic Use registration, the Settling Respondents shall provide the State Water Board with a completed Small Domestic Use Registration form and copy of DFW terms and conditions or clearance.

17. **Stay of Cleanup and Abatement Order Deadlines:** The deadlines and requirements of Cleanup and Abatement Order No. R1-2010-0048 are stayed so long as Settling Respondents are in compliance with this Settlement Agreement and the Regional Water Board will not bring any further enforcement action regarding the failure to comply with the CAO while Settling Respondents pursue compliance with the permits and authorizations discussed above in Section 16. If Settling Respondents obtain all necessary authorizations and provide copies of those authorizations to the Regional Water Board, then the CAO will be revoked in accordance with the terms of this agreement.

    If at any point the Settling Respondents receive a final determination denying a permit or authorization necessary to bring the Reservoir into compliance with applicable laws ("Date of Denial"), including, but not limited to, the permits and authorizations discussed above in Section 16, then Settling Respondents must come into compliance with the following CAO directives in accordance with deadlines provided below:

    a. CAO Directive No. 2, Restoration Work Plan– within 45 days of Date of Denial.

    b. CAO Directive No. 3, Monitoring and Reporting Plan – within 45 days of Date of Denial.

    c. CAO Directive No. 4, Restoration Monitoring Plan – within 45 days of Executive Officer approval of the Restoration Work Plan submitted in compliance with Directive No. 2.

    d. CAO Directive No. 6 and 7, Long Term Restoration Work– All necessary long term clean up and abatement work shall be completed, with the exception of continuing monitoring requirements, by October 15th of the year designated by the Executive Officer when approving the Restoration Work Plan and Monitoring and Reporting Plan. No remediation work involving grading or soil disturbance shall be conducted during the rainy season (October 15 – May 1st).

    e. CAO Requirement No. 8, final report – within 30 days of completing the long term restoration work in compliance with CAO requirements 6 and 7, a final report must be submitted in accordance with CAO Requirement No. 8.

    If the Settling Respondents violate the Settlement Agreement, including but not limited to, a determination by the Regional Water Board that they have failed to diligently pursue the permits and authorizations discussed above in Section 16, then the Regional Water Board reserves the right to file actions to enforce any CAO violations and Settling Respondents reserve any rights to assert any defenses thereto.

18. **Compliance with Applicable Laws:** The Settling Respondents understand that payment of administrative civil liability in accordance with the terms of this Stipulation and Order or compliance with the terms of this Stipulation and Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged herein may be subject to further enforcement, including additional administrative civil liability.

19. **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.

20. **Matters Addressed by Stipulation:** Upon adoption by the Regional Water Board as an Order, this Stipulation represents a final and binding resolution and settlement of all claims, violations or causes of action for the Discharge Violations alleged herein, or which could have been asserted against the Settling Respondents, as of the date this stipulation is signed. The provisions of this Paragraph are expressly conditioned on the full payment of the administrative civil liability by the deadlines specified in Paragraphs 14 and 15, and the Settling Respondents full satisfaction of the obligations described in Paragraphs 16 and 17.

21. **Public Notice:** The Parties agree that this Stipulation and Proposed Order, as signed by the Parties, will be noticed for a 30-day public comment period prior to being presented to the Regional Water Board for adoption. If the Regional Water Board Assistant Executive Officer or other Prosecution Staff receives significant new information that reasonably affects the propriety of presenting this Stipulation to the Regional Water Board for adoption as an Order by settlement, the Assistant Executive Officer may unilaterally declare this Stipulation void and decide not to present the Order to the Regional Water Board. Settling Respondents agree that they may not rescind or otherwise withdraw approval of this proposed Stipulation and Order.

22. **Addressing Objections Raised During Public Hearing:** The Parties agree that the procedure contemplated for adopting the Order by the Regional Water Board and review of this Stipulation by the public is lawful and adequate. In the event procedural objections are raised prior to the 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.

23. **Interpretation:** This Stipulation and Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Settling Respondents are represented by counsel in this matter.

24. **Modification:** This Stipulation and 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 Regional Water Board.

25. **If Order Does Not Take Effect:** In the event that this Order does not take effect because it is not approved by the Regional Water Board, or its delegate, 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 Regional 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:

    a. Objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional 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 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.

26. **Regional Water Board, State Water Board and Fish and Wildlife Shall Not Enforce on Each Other's Behalf:** The Regional Water Board, State Water Board and Fish and Wildlife are each responsible for enforcing this Order with respect to the matters falling under their respective jurisdiction.

27. **Waiver of Hearing:** The Settling Respondents has been informed of the rights provided by California Water Code section 13323, subdivision (b), and hereby waive their right to an evidentiary hearing before the Regional Water Board prior to the adoption of the Order. The Stipulation and Order will be heard as a settlement agreement before the Regional Water Board, but the hearing will not be an evidentiary hearing.

28. **Waiver of Right to Petition:** The Settling Respondents hereby waive their right to petition the Regional Water Board's adoption of the Order for review by the State Water Board, and further waive their rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

29. **Settling Respondents' Covenant Not to Sue:** The Settling Respondents covenant 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 this Stipulation and Order.

30. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board under the terms of this Order shall be communicated to the Settling Respondents in writing. No oral advice, guidance, suggestions or comments by employees or officials of the Regional Water Board regarding submissions or notices shall be construed to relieve the Settling Respondents of their obligation to obtain any final written approval required by this Order.

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

32. **Effective Date**: The obligations under Paragraph 14 and Paragraphs 15 through 17 of this Stipulation are effective and binding only upon the entry of an Order by the Regional Water Board, which incorporates the terms of this Stipulation.

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

34. **Counterpart Signatures:** This Stipulation 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.

IT IS SO STIPULATED.

North Coast Water Quality Control Board Prosecution Staff
North Coast Region

By: _____
David Leland
Assistant Executive Officer (Acting)

Date: 26 June 2013

Department of Fish and Wildlife

By: _____
Thomas Cullen
Administrator
Office of Spill Prevention and Response

Date: 6/20/13

Settling Respondents

By: _____
Steven Rector

Date: 6 - 10 - 2013

By: _____
Ann Carol Frocteau

Date: 6-17-2013

Order of the North Coast Water Regional Water Board

1. This Order incorporates the foregoing Stipulation.

2. In accepting the foregoing Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in California Water Code section 13385, subdivision (e). The Regional Water Board's consideration of these factors is based upon information obtained by the Regional Water Board's staff in investigating the Discharge Violations or otherwise provided to the Regional Water Board. In addition to these factors, this settlement recovers the costs incurred by the staff of the Regional Water Board for this matter.

3. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional 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.

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

_____

Matthias St. John
Executive Officer

_____

Date:

Exhibits:

A. Administrative Civil Liability Methodology for Discharge Violations

EXHIBIT A

NORTH COAST REGIONAL WATER QUALITY CONTROL BOARD (Regional Water Board)
PROSECUTION STAFF'S ALLEGATIONS
AND
WATER QUALITY ENFORCEMENT POLICY METHODOLOGY
FOR DISCHARGE VIOLATIONS

Synopsis

Steven Rector and Ann Carol Frocteau ("Dischargers" or "Settling Respondents") constructed an instream impoundment on their property located at 25820 Comptche-Ukiah Rd. (APN# 125-80-73). The instream impoundment was constructed over an approximate 30 day period July-August of 2007. The impoundment construction included the excavation and placement of 1,670 yards^3 of earthen materials, which were used to build the impoundment. The excavation and construction included the excavation and filling of approximately 130.4 cubic yards[1] of soil within the streambed. The impoundment construction buried approximately 106 feet (.02 miles) of stream channel. These impacts resulted in the burial and inundation of a surface stream connected to the Navarro River via the head water stream buried and an Unnamed Class II stream flowing to Johnson Creek which, in turn, flows to John Smith Creek. Both Johnson and John Smith Creeks are Class I streams providing habitat for anadromous and resident species of salmonids and trout.

The discharge violations consist of the instream construction excavation resulting in the dredging and filling of a surface stream in the Navarro River watershed. The Settling Respondents conducted dredge and fill activity without applying for or obtaining the necessary authorization, which is in violation of section 301 of the Federal Clean Water Act and therefore is subject to enforcement in accordance with section 13385 of the Porter Cologne Water Quality Control Act. The narrative submitted by Christopher Watt of LACO and Associates, the Settling Respondents representative, indicates that a total of 1670 cubic yards were excavated and placed to construct the unpermitted impoundment. To calculate the gallons of fill discharged into the waters of the United States for purposes of potential maximum liability, however, a conservative estimate based on the excavation and placement of fill below the ordinary high water mark was used. [2]

Step 1 – Potential for Harm for Discharge Violations

The "potential harm to beneficial uses" factor considers the harm to beneficial uses that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2)

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[1] The estimate of soil excavated from the streambed and placed in the streambed if taken from application for State Water Resources Control Board 401 Water Quality Certification submitted on November 14, 2012 on behalf of the Settling Respondents.
[2] See footnote 1 above.

the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). For the Discharge Violations, the potential harm to beneficial uses was determined to be moderate (i.e., a score of **3**).

The Settling Respondents dredged from and discharged into an unnamed tributary to Johnson Creek and the Navarro River in order to construct an unpermitted impoundment. The designated beneficial uses of the Navarro River Watershed that could be impacted by the unauthorized discharge include freshwater replenishment; commercial & sport fishing; cold freshwater habitat; wildlife habitat; rare, threatened or endangered species; migration of aquatic organisms; and spawning, reproduction and/or early development.

The discharge of sediment associated with the construction of the impoundment and placed to form the impoundment itself resulted in **moderate harm** to the beneficial uses of the Navarro River. The Enforcement Policy defines moderate as:

> *Moderate threat to beneficial uses (i.e. impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable or chronic effects).*

The earthen instream dam contains approximately 1,670 cubic yards of sediment placed in a steep headwater stream upstream of the Class II/Class III channel transition line. The Navarro River watershed is federal Clean Water Act Section 303(d) listed for sediment and temperature, and a Total Maximum Daily Load for Sediment and Temperature was promulgated by the USEPA for the Navarro River in 2000. The TMDL identifies the potential impacts associated with sediment and recommends means for controlling the unauthorized release of sediment to receiving waters in the Navarro River. Sediment potentially causes impacts to beneficial uses through mortality to fish during the spawning and development stage associated with reproduction, growth and survival of salmonids while in fresh water. Sediment potentially impacts instream macroinvertebrate communities as well likely reducing the availability of prey for salmonid species and potentially impacts downstream domestic supplies and other beneficial uses of water. The actual project area impacts include the destruction of approximately 0.02 miles of upper watershed stream through complete and permanent alteration and inundation as a result of the instream impoundment. Additional downstream impacts have not been documented but are reasonably anticipated due to the discharge of fine sediment associated with the unauthorized dredging and filling that occurred during the construction of the impoundment. In this case where an instream dam made out of earthen fill materials is constructed without authorization and without the benefit of a construction plan, design or review by any registered/certified professionals then catastrophic failure of the feature is also a potential harm and a consideration in regard to sediment impacts. In the event of

catastrophic failure, the instream sediment can result in a debris flow and complete loss of all instream habitat in downstream reaches as the scouring action from the debris flow or torrent results in the eradication and burial of instream structures and aquatic habitat. Additionally, the storage of water in the impoundment may also reduce water availability at different times of year in downstream receiving waters. This lack of water availability in downstream receiving waters could potentially translate to impacts on beneficial uses of water.

Based on the circumstances described above, a score of **3** (three) is assigned to Factor 1 of the calculation methodology.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. For The Discharge Violations, a score of **2** was assigned. A score of 2 means that the chemical and/or physical characteristics of the discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristic of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection).

The characteristics of sediment are such that in steeper headwater streams it is easily transported to downstream receiving waters through the effect of gravity and slope gradient on the sediments deposited in the stream and can result in a surficial covering or smothering of instream aquatic habitat, which can negatively affect water quality. Instream aquatic habitat is necessary for spawning and rearing of anadromous and other fish species. The destruction or reduction of aquatic habitat impacts the health of aquatic macro-invertebrates, which, in turn, can result in a reduction of health and survivability of anadromous and resident fish species through a lack of food. Suspended sediments can affect feeding of salmonids, and the availability and effective use of available oxygen in the water column by fish and macro-invertebrates, increasing physiological stress, and reducing feeding efficiency and overall health of aquatic organisms. These facts suggest that characteristics of sediment are a moderate risk to potential receptors.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. For The Discharge Violations, the earthen materials placed in stream during dam construction are entirely susceptible to clean up. To that end a Clean Up and Abatement Order was issued to remedy the potential failure of the earthen materials, which would result in delivery of a large sediment load to downstream, receiving waters. As the earthen material deposited is entirely susceptible to clean up and abatement this score is a (0).

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, **a final score of 5** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties for the discharge based on a per-day basis for each violation. Water Code section 13385(c) allows civil liability to be assessed in an amount up to $10,000 per day of violation, and up to $10 per gallon discharged but not cleaned up in excess of 1,000 gallons.

1. Per Day Assessments for Each Discharge Event

When there is a discharge, the North Coast Water Board is to determine an initial liability amount on a per day basis using the Potential for Harm score and the Extent of Deviation from Requirement of the violation. The Potential for Harm Score was determined in Step 1 above, and is a 5.

The Extent of Deviation is considered Major. Section 301 of the Federal Water Pollution Control Act (33 U.S.C. § 1311) (Clean Water Act) and Water Code section 13376 prohibit the discharge of pollutants to waters of the United States except in compliance with a Waste Discharge Permit or Waiver of Waste Discharge Requirements permit.
In this case as the waters are waters of the state and United States, an Army Corps of Engineers federal Clean Water Act section 404 and State Water Quality section 401 Water Quality Certification would have been required to construct the Project after the California Environmental Quality Act compliance requirements were met. The Discharger violated section 301, 401 and 404 of the federal Clean Water Act, and the Porter Cologne Water Quality Control Act by constructing an earthen dam in an unnamed tributary to Johnson Creek in the Navarro River watershed, and through continued failure to comply with terms and conditions of the CAO.

The calculation methodology defines a major deviation as,

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

Conducting construction activities in a stream bed, which included dredging and placing fill in waters of the United States without first obtaining a Clean Water Act section 404 permit and State Water Quality section 401 Water Quality Certification rendered the requirement to obtain such authorization ineffective and violates the Clean Water Act section 301's prohibition on discharging pollutants to waters of the United States without such authorization. The prohibition would be effective only if no discharge had occurred.

A total number of 62 discharge events/violations were determined based on the reported excavation and placement of 130.4 cubic yards of soil into the streambed below the ordinary high water mark using John Deere 200 CLC excavator with a 4-foot bucket to create the impoundment. Accordingly, the days of violation attributed to the dredging and filling within the streambed are defined as 62 days of violation at 10,000.00 per day. Table 1 of the Enforcement Policy is used to determine a "per day factor" based on the Potential for Harm and Extent of Deviation. For The Discharge Violations, here the factor is **0.150**.

Initial Liability Amount

The initial liability amounts for the violations calculated on a per-gallon and per-day basis, are as follows:

Per Day Liability:

(0.150) x (62 day) x ($10,000/day) = $93,000

Total Initial Liability = **$ 93,000**

Step 3 – Per Day Assessment for Non-Discharge Violations

This factor does not apply because the violations alleged are discharge violations.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Dischargers were given a multiplier value of **1.1** because they intentionally and/or negligently constructed the unauthorized impoundment without obtaining the necessary authorizations.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used. A lower multiplier is for situations where there is a high degree of cleanup and/or

cooperation and a higher multiplier is for situations where cleanup and/or cooperation is minimal or absent. The Dischargers are assessed a value of **1.1** for failure to return to compliance.

Initially, the Dischargers made no more than a minimal attempt to abate the discharge in accordance with CAO requirement(s), nor has any attempt been made to bypass flow while Discharger attempts to obtain necessary authorization for the impoundment. More recently, the Dischargers have submitted additional documentation, including a geotechnical assessment of the stability of the impoundment, to multiple permitting agencies. Those agencies are in the process of determining the adequacy of that documentation.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. Because the Dischargers have no prior history of non-compliance no multiplier was used.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

The Discharge Violations - Total Base Liability Amount

($93,000) x (1.1) x (1.1) x (1) = $112,530

Total Base Liability = **$112,530**

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

The Enforcement Policy provides that if the North Coast Water Board has sufficient financial information necessary to assess the violator's ability to pay the Total Base Liability or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability Amount may be adjusted downward.

The Settling Respondents' have raised an inability to pay defense and have provided the Prosecution Staff with information that suggests that Settling Respondents do not have the ability to pay the total base liability amount without selling the Property. This conclusion is based upon Settling Respondents' submission of most recently available information on an "Individual Ability To Pay Claim" form which is signed under penalty of perjury and supporting documentation.

The Settling Respondents, however, are known to cultivate marijuana and Prosecution Staff has no independent means of verifying whether or not the Settling Respondents have a source of income that is under reported or not otherwise reported in the Settling Respondents' financial submittals.

While this asserted inability to pay has been a consideration in settling this matter at the liability proposed, Prosecution Staff does not feel that they have sufficient financial information to accurately adjust the Total Base Liability amount based on the Settling Respondents ability to pay.

Step 7 – Other Factors As Justice May Require

The Enforcement Policy provides that if the Regional Water Board believes that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express findings are made. In addition, the costs of investigation should be added to the liability amount according to the Enforcement Policy.

The Prosecution Staff believes that the Total Base Liability amount determined using the above factors is appropriate. In addition, the costs of investigation and enforcement are "other factors as justice may require," and should be added to the liability amount.

The Regional Board has incurred **$13,000** in investigative costs to date associated the Discharge Violations. This amount is calculated based on an average hourly wage of $150 multiplied by 87 hours of staff time, which does not include all of the time spent on this case. The hourly estimate is a base estimate of time spent on inspections and report writing only. If this matter proceeds to hearing, the Regional Water Board Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred during the issuance of this Complaint through hearing. These costs should be added to the liability amount.

Step 8 – Economic Benefit

Pursuant to Water Code section 13385, subdivision (e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation. The Enforcement Policy directs the Regional Water Board to determine any economic benefit of the violations based on the best available information.

Prosecution Staff believe that, at a minimum, the Settling Respondents have realized economic benefit through delaying costs of complying with applicable laws. It is estimated that the cost of obtaining the necessary authorizations and permits in 2007 prior to constructing the Reservoir would have cost approximately $50,000. Accordingly, the total estimated economic benefit for delaying those costs until recently is **$ 10,000**.

Step 9 – Maximum and Minimum Liability Amounts

The Enforcement Policy directs the Regional Water Board to consider the maximum or minimum liability amounts set forth in the applicable statutes.

The maximum and minimum amounts for the violations are shown below. The Enforcement Policy requires that the minimum liability amount imposed must account for the economic benefit derived plus ten percent. The maximum administrative liability amount is the maximum allowed by Water Code section 13385: (1) $10,000 for each day of violation, and (2) on a per gallon basis in an amount not to exceed $10 per gallon of waste discharged but not cleaned up in excess of 1,000 gallons. The proposed liability falls within the maximum and minimum amounts.

a) Maximum Liability Amount: $1,885,000

b) Minimum Liability Amount: $11,000

Step 10 – Final Liability Amount

The final liability amount consists of the total base liability, with any allowed adjustments, provided the amounts are within the statutory minimum and maximum amounts. The final liability amount proposed for the alleged Water Code violations was performed as follows:

(Total Base Liability Amount) + (Staff Costs) = (Final Liability Amount)

Final Liability Amount = ($112,530) + ($13,000) = $125,530