SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD

In the matter of:	)	
	)	Order R2-2012-0007 - A
Alameda County	)	
Administrative Civil Liability	)	**SETTLEMENT AGREEMENT AND**
Complaint No. R2-2010-0055	)	**STIPULATION FOR ENTRY OF**
	)	**ADMINISTRATIVE CIVIL LIABILITY**
	)	**ORDER; ORDER No. R2-2012-0007 - A**
	)	

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulation) is entered into by and between the Assistant Executive Officer of the San Francisco Bay Regional Water Quality Control Board (Regional Water Board), on behalf of the Regional Water Board Prosecution Staff (Prosecution Staff), and Alameda County (collectively Parties) in reference to an adjudicative proceeding initiated by the issuance of Administrative Civil Liability Complaint No. R2-2010-0055, dated April 15, 2010, (the Complaint). This Stipulation is presented to the Regional Water Board, or its delegee, for adoption as an Order by settlement, pursuant to Government Code section 11415.60.

Section II: RECITALS

1. Alameda County (the County), at all times relevant to this matter, had jurisdiction over and/or maintenance responsibility for a municipal separate storm drain system (MS4) and/or watercourses in Alameda County regulated by the Alameda Countywide National Pollutant Discharge Elimination System (NPDES) Municipal Storm Water Permit, Order No. R2-2003-0021 (NPDES Permit No. CAS0029831) (Municipal Permit). The Regional Water Board adopted the Municipal Permit on February 19, 2003, which became effective on April 10, 2003.

2. The Complaint, as issued on April 15, 2010, recommended imposing an administrative civil liability, in accordance with the 2002 State Water Resources Control Board (State Water Board) Water Quality Enforcement Policy, totaling $522,429, which includes staff costs of $30,300. Pursuant to California Water Code (Water Code) section 13385, subdivision (e), the Prosecution Team based the proposed liability amount on its belief that the County had realized an economic benefit of up to $492,129 by not employing a Planner I staff person to oversee and implement the Municipal Permit requirements under Provisions C.3.j.ii and C.3.k.

3. Based on information received subsequent to the issuance of the Complaint and without adjudicated factual bases, the Prosecution Team no longer believes that the County realized an economic benefit of $492,129, as alleged in the Complaint. Also based on information received subsequent to the issuance of the Complaint and without adjudicated factual bases, the Prosecution Team believes the following:

a. Based on Prosecution Team staff's review of the County's 2008/2009 Annual Report, the County implemented some of the requirements set forth in Provision C.3.j.ii in a number of its projects.

b. The County required appropriate source controls in accordance with Provision C.3.k of the Municipal Permit on a project-by-project basis, with only limited exceptions.

Therefore, for the purposes of settlement, the Prosecution Team dismisses with prejudice 365 days of the 1,324 days of violation of Provision C.3.j.ii of the Municipal Permit alleged in the Complaint (from July 1, 2008 through June 30, 2009) and the allegations set forth in the Complaint that the County violated Provision C.3.k of the Municipal Permit.

4. The Parties have engaged in settlement negotiations and agree to fully settle the alleged violations set forth in the Complaint without administrative or civil litigation and by presenting this Stipulation to the Regional Water Board, or its delegee, for adoption as an Order by settlement, pursuant to Government Code section 11415.60. The liability imposed by this Order is consistent with a reasonable liability determination using the methodology in the 2009 State Water Board Water Quality Enforcement Policy (2009 Enforcement Policy), as explained in detail in Exhibit A. Exhibit A is attached hereto and incorporated herein by this reference. The Prosecution Team believes that the resolution of the alleged violations set forth in the Complaint is fair and reasonable and fulfills all of its enforcement objectives, that no further action is warranted concerning those violations, except as provided in this Stipulation, and that this Stipulation is in the best interest of the public.

5. To resolve by consent and without further administrative proceedings the alleged violations set forth in the Complaint, the Parties have agreed to the imposition of administrative civil liability in the amount of $67,300 against the County, which includes $30,300 for staff costs.

Section III: STIPULATIONS

The Parties stipulate to the following:

6. **Administrative Civil Liability:** The County shall pay a total of $67,300 in stipulated administrative civil liability by check made payable to the "State Water Resources Control Board Cleanup and Abatement Account," which includes $30,300 in staff costs, no later than thirty (30) days following the Regional Water Board, or its delegee, executing this Order. The check shall reference the Order number listed on page one of this Stipulation. The original signed check shall be sent to the San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612, with copies to: Ann Carroll, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812, and Brian Thompson, San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612.

7. **Compliance with Applicable Laws:** The County understands that payment of administrative civil liability in accordance with the terms of this Order and/or compliance with

the terms of this 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.

8. **Party Contacts for Communications related to this Stipulation and Order:**

For the Regional Water Board:	**For the County:**
Brian Thompson, Senior Engineering Geologist San Francisco Bay Regional Water Quality Control Board 1515 Clay Street, 14th Floor Oakland, CA 94612 BRThompson@waterboards.ca.gov (510) 622-2460	William Lepere, Deputy Director County of Alameda Public Works Agency 399 Elmhurst Street Hayward, CA 94544 (510) 670-5480

9. **Attorney's Fees and Costs:** Each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

10. **Matters Covered by this Stipulation:** Upon adoption by the Regional Water Board, or its delegee, as an Order, this Stipulation 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 the County. The provisions of this Paragraph are expressly conditioned on the County's full payment of administrative civil liability by the deadline specified in Paragraph 6 herein.

11. **Denial of Liability:** In settling this matter, the County expressly denies the allegations described in the Complaint and makes no admission or representation as to those allegations or to the appropriateness of the liability determination under the 2009 Enforcement Policy, as explained in detail in Exhibit A. With respect to the County, neither this Stipulation nor any payment pursuant to the Order shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgement of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule, or regulations. However, this Stipulation and/or any actions of payment pursuant to the Order may constitute evidence in actions seeking compliance with this Stipulation. This Order may be used as evidence of a prior enforcement action, but not a finding or adjudication, in future actions by the State Water Board or the Regional Water Board against the County.

12. **Public Notice:** The County and the Regional Water Board Prosecution Team understand that this Stipulation and Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board, or its delegee. In the event objections are raised during the public review and comment period, the Regional Water Board or its delegee may, under certain circumstances, require a public hearing regarding the Stipulation and Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the proposed Order as necessary or advisable under the circumstances.

13. **Addressing Objections Raised During Public Comment Period:** 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.

14. **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 County is represented by counsel in this matter.

15. **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 the Regional Water Board or its delegee.

16. **If the 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 delegee, or is vacated in whole or in part by the State Water Resources Control 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, but not limited to:

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 on the violations alleged in Exhibit A 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.

17. **Waiver of Hearing:** The County has been informed of the rights provided by Water Code section 13323, subdivision (b), and hereby waives its right to a hearing before the Regional Water Board prior to the adoption of the Order.

18. **Waiver of Right to Petition:** The County hereby waives its right to petition the Regional Water Board's adoption of the Order 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.

19. **The County's Covenant Not to Sue:** The County 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 matter expressly addressed by this Stipulation and Order.

20. **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.

21. **Counterpart Signatures; Facsimile and Electronic Signature:** 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. Further, this Stipulation may be executed by facsimile or electronic signature, and any such facsimile or electronic signature by any Party hereto shall be deemed to be an original signature and shall be binding on such Party to the same extent as if such facsimile or electronic signature were an original signature.

22. **Effective Date**: This Stipulation is effective and binding on the Parties upon the entry of this Order by the Regional Water Board or its delegee, which incorporates the terms of this Stipulation.

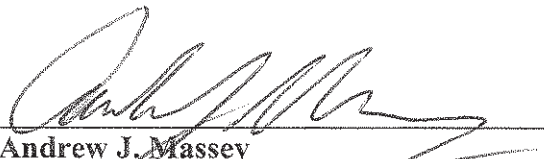
IT IS SO STIPULATED.

California Regional Water Quality Control Board,
San Francisco Bay Region Prosecution Team

Date: March 12, 2012 By:

Thomas E. Mumley,
Assistant Executive Officer

Alameda County

Date: 3/12/12 By: 

Andrew J. Massey
Deputy County Counsel,
Office of the County Counsel

HAVING CONSIDERED THE ALLEGATIONS AND THE PARTIES' STIPULATIONS, THE REGIONAL WATER BOARD, OR ITS DELEGEE, FINDS THAT:

23. The Regional Water Board incorporates the foregoing Stipulation, set forth in Paragraphs 1 through 22 above, by this reference, as if set forth fully herein.

24. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in Water Code section 13327 and section 13385, subdivision (e). The Regional Water Board's consideration of these factors is based upon information obtained by the Prosecution Team in investigating the allegations in the Complaint, or otherwise provided to the Regional Water Board. This settlement recovers the costs incurred by the Prosecution Team in investigating and pursuing enforcement of the allegations set forth in the Complaint as "other matters as justice may require."

25. 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 (Pub. Resources Code § 21000 et seq.), in accordance with section 15321, subdivision (a)(2), title 14, of the California Code of Regulations.

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

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

Digitally signed by Bruce Wolfe
Date: 2012.05.04 12:58:59 -07'00'

Date: _____

Bruce H. Wolfe
Executive Officer

EXHIBIT A

STATE WATER RESOURCES CONTROL BOARD
WATER QUALITY ENFORCEMENT POLICY METHODOLOGY

1. California Water Code (Water Code) section 13385, subdivision (a) provides that civil liability may be administratively imposed by the Regional Water Board against any person that violates any waste discharge requirements issued pursuant to Chapter 5.5 of Division 7 of the Water Code. NPDES Permit No. CAS0029831, Waste Discharge Requirements Order No. R2-2003-0021 (Municipal Permit) was issued to the County of Alameda (the County) pursuant to Chapter 5.5 of Division 7 of the Water Code.

2. Water Code section 13385, subdivision (c) provides that the civil liability may be imposed by the Regional Water Board in an amount not to exceed the sum of both the following:

   a. Ten thousand dollars ($10,000) for each day in which the violation occurs.

   b. Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars ($10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

3. Pursuant to its authority under sections 13323 and 13385, the Regional Water Board has alleged in Administrative Civil Liability Complaint No. R2-2010-0055 (the Complaint), as amended by the foregoing Stipulation, that the County violated Provision C.3.j.ii.3 of the Municipal Permit for a period of 959 days (November 15, 2005, through June 30, 2008) by having failed to review, revise, and fully implement the revised standards and guidance in its new development and significant redevelopment project approval process.

Enforcement Policy Methodology:

4. Pursuant to Water Code section 13385, subdivision (e), the Regional Water Board is required to consider the following factors in determining the amount of civil liability, including the nature, circumstances, extent, and gravity of the violations; whether the discharge is susceptible to cleanup or abatement; the degree of toxicity of the discharge; and with respect to the violator, the ability to pay; the effect on the ability to continue in business; voluntary cleanup efforts; prior history of violations; the degree of culpability; economic benefit or savings, if any, resulting from the violation; and other matters that justice may require. Water Code section 13385, subdivision (e) requires that, at a minimum, the liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

5. On November 17, 2009, the State Water Resources Control 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. Use of the methodology addresses the factors in Water Code section 13385, subdivision (e). An analysis of the Enforcement Policy methodology for the violations alleged in the Complaint as amended by the Stipulation is set forth below:

6. **Step 1. Per Day Assessment for Non-Discharge Violations**

The per day factor is 0.1. This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements.

The potential for harm to the environment associated with the alleged violation is minor. Based on Regional Water Board staff's review of the County's files, the Regional Water Board staff believes that the County generally required incorporation of site design and pollutant source control measures as part of its project approval although the County did not develop required design guidance review and improvement. The County did require implementation of some site design measures on projects within its jurisdiction, thus reducing storm-water runoff volumes and pollutant loads from those projects.

The deviation from requirements is minor. Given the actual implementation of measures on projects within the County's jurisdiction (even in the absence of permit-required guidance review and improvement), the intended effectiveness of the requirement remained generally intact

Use of the Alternative Approach to Liability Calculations for Multiple Day Violations: The alternative approach for calculating liability for multiday violations is applicable because the alleged violations did not result in an economic benefit to the County on a daily basis. As noted later, the County benefitted minimally by not obtaining the required guidance and review of its approval process for redevelopment projects. This benefit occurs only with the County's review of each project, and does not continue to accrue daily after County approval of the project.

The Prosecution Team alleges that the County violated its Municipal Permit for a period of 959 days. Based on the alternative approach, liability is assessed based on 37 days of violation. Applying the per-day factor to the number of days of violation yields an initial liability of $37,000 (number of days of violation x per day factor x maximum statutory liability per day of violation).

7. **Step 2. Adjustments to Determination of Initial Liability**

Culpability: The County is a Permittee under the Municipal Permit, and has had that permit coverage continuously since October 16, 1991. Based on Regional Water Board staff's review of the County's files, the Regional Water Board staff believes that the County was requiring inclusion of design measures, pollutant source control measures, and permanent treatment measures in projects. Even though the County did not complete the required standards and guidance review, County staff was still requiring measures in projects to protect water quality. Thus, the degree of culpability is a multiplier of 1.

Cleanup and Cooperation: The Complaint alleges non-compliance with permit requirements that are non-discharge violations so cleanup is not at issue. The County was reasonably cooperative during investigation of the alleged violations. Thus, the degree of cleanup and cooperation is a multiplier of 1.

History of Violations: The County was previously issued a Notice of Violation of alleged violations of Municipal Permit Provisions C.3.b and C.3.e, but has not been the subject of prior administrative civil liability complaints. Thus, the history of violations is a multiplier of 1.

8. **Step 3. Determination of Total Base Liability Amount**

The Total Base Liability is determined by applying the adjustment factors from Step 2 to the Initial Liability Amount determined in Step 1.

(Initial Liability) x (Culpability Multiplier) x (Cleanup and Cooperation Multiplier) x (History of Violations Multiplier) = Total Base Liability

$37,000 x 1 x 1 x 1 = **$37,000.00**.

9. **Step 4. Ability to Pay and Ability to Continue in Business**

The County's proposed budget for the 2009-2010 fiscal year totals $2.4 billion. This is an increase of $9.3 million from the budget for the 2008-2009 fiscal year. Prosecution Staff believes that the County has the ability to pay the proposed liability and continue in business. Accordingly, the Total Base Liability is not adjusted.

10. **Step 5. Other Factors as Justice May Require**

The Regional Water Board has incurred $30,300 in staff costs associated with the investigation and enforcement of the violations alleged herein. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

$37,000 + $30,300 = **$67,300**

11. **Step 6. Economic Benefit**

The County received a minimal economic benefit by not obtaining the required guidance and review of its approval process for new and significant redevelopment projects within the County's jurisdiction. Given the actual implementation of measures on projects within the County's, the County did not receive an economic benefit as alleged in the Complaint.

12. **Step 7. Maximum and Minimum Liability Amounts**

Pursuant to Water Code section 13385, subdivision (c), the maximum liability that may be imposed for the violations alleged is $959,000. Pursuant to the Enforcement Policy, the minimum liability that must be assessed for the violations alleged is the economic benefit received + 10 percent, which is found to be negligible.

The stipulated administrative civil liability falls within these maximum and minimum liability amounts.

13. **Step 8. Final Liability Amount**

The stipulated administrative civil liability amount is **$67,300**, which includes $30,300 for staff costs.