CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

In the matter of:	)	
	)	**Order R2-2012-0009**
CALIFORNIA DEPARTMENT	)	
OF TRANSPORTATION	)	**REVISED SETTLEMENT AGREEMENT**
	)	**AND STIPULATION FOR ENTRY OF**
May 25, 2011, Discharge to Route	)	**ADMINISTRATIVE CIVIL LIABILITY**
84 Bear Gulch Creek, Town of	)	**ORDER; AND ORDER**
Woodside, San Mateo County	)	

Section I: INTRODUCTION

1. This Revised Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulation") is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board San Francisco Bay Region ("Regional Water Board"), on behalf of the Regional Water Board Prosecution Team ("Prosecution Team"), and the California Department of Transportation ("Caltrans") (collectively "Parties"), and is presented to the Regional Water Board or its delegee for adoption as an Order by settlement, pursuant to Government Code section 11415.60. This Stipulation supersedes the June 19, 2012, stipulation between the Parties, and addresses comments and new information received during the public review period for the earlier stipulation.

Section II: RECITALS

2. Caltrans was the owner and operator of the Metal Beam Guard Rail Terminal Section Replacement Project ("Project"), located along Route 84 in the town of Woodside, San Mateo County. The Project required the removal and replacement of metal beam guard rail terminal sections, including railing and concrete encased posts, along Route 84 (Woodside Road). Caltrans acted by and through its contractor, Midstate Barrier, Inc. ("MBI"), to construct the Project.

3. On May 25, 2011, at shortly before 1:00 am, MBI crews attempted to excavate and remove a metal beam guard rail terminal section end post and concrete slug located on Route 84 at Post Mile 19.2 (3700 block of Woodside Road) on the north side of Bear Gulch Creek, near the Bear Gulch Creek Road intersection. During this operation, MBI was aware of a 6-inch water supply pipe owned and operated by California Water Services Company ("Cal Water"), located near the end post. While attempting to remove the concrete slug, MBI cracked the water supply pipe, causing the discharge of approximately 11,000 gallons of potable drinking water likely containing chlorine or chloramine from Cal Water treatment processes. Using hydraulic modeling, Caltrans estimates that approximately 2,346 gallons of the total discharge drained into Bear Gulch Creek. Using eyewitness accounts and staff expertise, the Regional Water Board

estimates that between 8,250 to 9,900 gallons (75% to 90%) of the total discharge drained into Bear Gulch Creek. In the interest of settlement and compromise, the Parties agree to use 8,250 gallons in the penalty calculation here without conceding the total discharge amount for any purpose beyond this Stipulation. In any event, the discharge evidently caused limited creek bank erosion and potentially caused or contributed to a fish kill noted in the creek in the days following the spill. The remaining volume was captured in vegetated areas away from the creek.

4. California Water Code section 13376 requires that a person who proposes to discharge pollutants to navigable waters of the United States shall file a report of waste discharge with the Regional Water Board at least 180 days prior to discharging said pollutants. Section 301 of the Federal Water Pollution Control Act ("Clean Water Act") (33 U.S.C. § 1311) prohibits the discharge of pollutants to waters of the United States except in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit. Potable water discharges may cause exceedance of water quality objectives in the San Francisco Bay Region Basin Plan for chlorine, pH, and sediment, and these are pollutants subject to Water Code section 13376 and Clean Water Act Section 301.

5. Pursuant to Water Code section 13385, subdivision (a), any person who violates Water Code section 13376 or Section 301 of the Clean Water Act is subject to administrative civil liability pursuant to Water Code section 13385, subdivision (c), in an amount not to exceed the sum of both of the following: (1) ten thousand dollars ($10,000) for each day in which the violation occurs and (2) 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.

6. The Prosecution Team alleges that Caltrans failed to submit a report of waste discharge and obtain an NPDES permit prior to discharging potable drinking water likely containing chlorine or chloramines residual into Bear Gulch Creek.

7. The Parties have engaged in settlement negotiations and agree to fully settle certain alleged violations set forth herein 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.

8. The liability imposed by this Order is consistent with a reasonable liability determination using the penalty methodology in the State Water Resources Control Board's ("State Water Board's") Water Quality Enforcement Policy (see Exhibit A, attached hereto and incorporated herein by this reference). The Prosecution Team believes that the resolution of the alleged violations set forth herein 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.

9. To resolve by consent and without further administrative proceedings the alleged violations set forth herein, the Parties have agreed to the imposition of administrative civil liability in the amount of **$31,250** against Caltrans, which includes $9,450 for Regional Water Board staff costs.

Section III: STIPULATIONS

The Parties stipulate to the following:

10. **Jurisdiction:** The Parties agree that the Regional Water Board has subject matter jurisdiction over the matters alleged herein and personal jurisdiction over the Parties to this Stipulation.

11. **Administrative Civil Liability:** Caltrans shall pay a total of **$31,250** in stipulated administrative civil liability by check made payable to the State Water Resources Control Board Cleanup and Abatement Fund, no later than thirty (30) days following execution of this Order by the Regional Water Board or its delegee. The check shall reference the Order number listed on page one of this Stipulation. The original signed check shall be sent in accordance with an invoice to be provided by the State Water Board, with copies to: Andrew Tauriainen, SWRCB 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.

12. **Compliance with Applicable Laws:** Caltrans 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 herein may subject it to further enforcement, including additional administrative civil liability.

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

For the Regional Water Board:	**For Caltrans:**
Brian Thompson San Francisco Bay Regional Water Quality Control Board 1515 Clay Street, 14th Floor Oakland, CA 94612 brthompson@waterboards.ca.gov (510) 622-2422	Bob Finney Deputy District Director, Construction California Department of Transportation P.O. Box 23360 Oakland, CA 94612 bob.finney@dot.ca.gov (510) 286-5896

14. **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.

15. **Matters Covered by this Stipulation:** Upon adoption of the Order incorporating the terms set forth herein, this Stipulation, represents a final and binding resolution and settlement of all claims, violations, or causes of action alleged herein or which could have been asserted against Caltrans as of the date of this Stipulation based on the specific facts alleged herein. The provisions of this Paragraph are expressly conditioned on Caltrans' full payment of administrative civil liability by the deadline specified above.

16. **Public Notice:** The Parties 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. If significant new information is received during the public review and comment period that reasonably affects the propriety of presenting this Stipulation and Order to the Regional Water Board or its delegee for adoption, the Assistant Executive Officer may unilaterally declare this Stipulation and Order void and decide not to present it to the Regional Water Board or its delegee.

17. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for adopting the Order by the Regional Water Board, or its delegee, 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.

18. **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 Parties are represented by counsel in this matter.

19. **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 or its delegee.

20. **If the Order Does Not Take Effect:** In the event that the 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 (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, 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 herein 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.

21. **No Admission of Liability:** In settling this matter, Caltrans does not admit to any of the allegations stated herein, or that it has been or is in violation of the Water Code, or any other federal, state or local law or ordinance, with the understanding that in the event of any future enforcement actions by the Regional Water Board, the State Water Board or any other Regional Water Quality Control Board, this Stipulation and Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327 or section 13385, subdivision (e).

22. **Waiver of Hearing:** Caltrans 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.

23. **Waiver of Right to Petition:** Caltrans 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.

24. **Covenant Not to Sue:** Caltrans 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.

25. **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.

26. **No Third Party Beneficiaries:** This Stipulation is 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 Stipulation for any cause whatsoever.

27. **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.

28. **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: 11/6/12 By: _____
Thomas Mumley,
Assistant Executive Officer

Approved as to form: By: _____
Andrew Tauriainen, Senior Staff Counsel
State Water Resources Control Board
Office of Enforcement

CALIFORNIA DEPARTMENT OF TRANSPORTATION

Date: 11/5/12 By: _____
Bob Finney
Deputy District Director
District 4 Construction

Approved as to form: By: _____ 11.3.12
Derek D. Wong, Deputy Attorney

Section IV: ORDER OF THE REGIONAL WATER BOARD

29. The Regional Water Board incorporates the Stipulation described above by this reference as if set forth fully herein.

30. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in Water Code section 13385, subdivision (e), and has applied the Penalty Calculation Methodology set forth in the State Water Resource Control Board's Enforcement Policy as shown in Exhibit A, which is incorporated herein by this reference. The Regional Water Board's consideration of these factors and application of the Penalty Calculation Methodology is based upon information obtained by the Prosecution Team in investigating the allegations set forth in the Stipulation, or otherwise provided to the Regional Water Board. In addition to these considerations, this Order recovers the costs incurred by Regional Water Board staff for this matter.

31. 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, § 21000 et seq.) in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations.

32. The Stipulation and Order are severable; should any provision be found invalid the remainder shall be in full force and effect.

33. The Executive Officer of the Regional Water Board is authorized to refer this matter directly to the Attorney General for enforcement if Caltrans fails to perform any of its obligations under the Order.

34. Fulfillment of Caltrans' obligations under this Order constitutes full and final satisfaction of any and all liability for the matters alleged in the Stipulation in accordance with the terms of the Order.

IT IS HEREBY ORDERED, pursuant to Water Code section 13323 and Government Code section 11415.60 on behalf of the California San Francisco Bay Regional Water Quality Control Board that Caltrans shall pay **$31,250** in administrative civil liabilities.

Bruce H. Wolfe

Digitally signed by Bruce H. Wolfe
Date: 2012.12.14 12:31:09 -08'00'

Date: _____

Bruce H. Wolfe
Executive Officer

EXHIBIT A

Specific Factors Considered to Determine Administrative Civil Liability
California Department of Transportation
May 25, 2011, Discharge to Route 84 Bear Gulch Creek

Pursuant to Water Code sections 13327 and 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.

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 sections 13327 and 13385 subdivision (e).

Each factor in the Enforcement Policy and its corresponding category, adjustment, or amount for the Bear Gulch Creek unpermitted discharge is presented below. The alleged violation by the California Department of Transportation (hereinafter Discharger) in the Stipulation and this technical analysis is a discharge violation for the purpose of applying the Enforcement Policy's penalty calculation methodology. This analysis omits step three of the calculation methodology, which addresses non-discharge violations.

Bear Gulch Creek Discharge – Unauthorized discharge of 8,250 gallons of chlorinated or chloraminated water

On May 25, 2011, the Discharger, through its contractor, caused the release of approximately 11,000 gallons of potable water likely containing chlorine or chloramines from a California Water Service Company (Cal Water)potable water main distribution system along State Route 84 in the Town of Woodside, San Mateo County. Using hydraulic modeling, the Discharger estimates that approximately 2,346 gallons of the total discharge drained into Bear Gulch Creek. Using eyewitness accounts and staff expertise, the Regional Water Board Prosecution Staff estimates that between 8,250 to 9,900 gallons (75% to 90%) of the total discharge drained into Bear Gulch Creek. In the interest of settlement and compromise, the parties agree to use 8,250 gallons in this penalty calculation without conceding the total discharge amount for any purpose beyond the proposed settlement. In any event, the discharge caused limited creek bank erosion and potentially caused or contributed to a fish kill noted in the creek in the days following

the spill. The remaining volume was captured in an open vegetated area away from the creek.

Step 1 – Potential for Harm for Discharge Violations

a) ***Factor 1***: Potential Harm to Beneficial Uses

Category: Above Moderate (4)

Discussion: The unpermitted discharge had the potential of causing or contributing to the killing of fish in Bear Gulch Creek, resulting in above moderate harm to beneficial uses. The impacts of the chlorinated water discharge and associated sediment discharge were acute but isolated to a limited reach of the receiving water, because the estimated 8,250-gallon discharge mixed with ambiend water flowing in the creek. A Cal Water inspector attempted but was unable to completely assess environmental impacts on the day of the discharge due to high turbidity in the receiving water. Turbidity cleared the next day, which is when the Cal Water inspector reported a fish kill in a pool in the creek immediately adjacent to and downstream from the point of discharge. The timing and location of the reported fish kill support a conclusion that the unpermitted discharge resulted in above moderate harm to beneficial uses.

b) ***Factor 2***: Characteristics of the Discharge

Category: Discharged material posed moderate (2) risk

Discussion: The discharge was comprised of potable water which typically has a chlorine or chloramine concentration up to 2.2 mg/L. Chlorine and chloramine exhibit toxicity to aquatic life even at low concentrations. The U.S. EPA Water Quality Criterion for chlorine is 0.019 mg/L to prevent acute (lethal) effects to aquatic life. The discharge also evidently caused erosion and sediment transportation to the creek. Since the incident happened at night, neither the Cal Water inspector nor the Discharger's contractor crews were able to test for chlorine, turbidity or pH of the receiving water at the time. The level of turbidity prevented the field inspector from completing his impact assessment on the day of the discharge. In general, chlorine degrades and dissipates rapidly in an open environment, and it does not have a bio-accumulative, persistent or chronic effect on the environment.

c) ***Factor 3***: Susceptibility to Cleanup or Abatement

Category: Less than 50% of the discharge was susceptible to cleanup or abatement

Discussion: The discharged material flowed into and quickly commingled with water flowing in Bear Gulch Creek. It was not susceptible to cleanup or abatement.

Step 2 – Assessments for Discharge Violations

a) ***Factor***: Deviation from Requirement

Category: Moderate

Discussion: The deviation from requirement was moderate. The requirement violated involved the failure to file an application for a discharge prior to commencement of such discharge. The intent of this requirement is to allow the Regional Water Board an opportunity to issue a permit establishing discharge requirements to protect water quality and beneficial uses. The discharge was unintentional so failure to apply only partially compromised the effectiveness of the requirement. This is because had the Discharger applied and received a permit, this discharge would have likely violated the permit, though the impacts may have been less severe had permit required management practices been in place.

b) ***Factor***: Volume Discharged

Total Volume: Approximately 8,250 gallons

c) ***Civil Liability***: Initial Amount of Administrative Civil Liability

Amount: $16,516

Discussion: Based on the statutory requirement of $10,000 for each day in which the violation occurs and $10 per gallon for each gallon exceeding 1,000 gallons that is discharged, the maximum liability for this discharge is $82,500. Considering the specific factors (a) through (d) above, as applied to Table 1 of the Enforcement Policy, the maximum liability is multiplied by a factor of 0.2, resulting in the above initial amount of liability.

Step 3 – Per Day Assessment for Non-Discharge Violations

Not applicable.

Step 4 – Adjustments to Determine Initial Liability for Violation

a) ***Specific Factor***: Culpability

Adjustment: 1.1

Discussion: The Discharger's contractor crews were aware of the presence of the water pipeline along the work area. The incident could have been avoided if more caution was used when removing the wood post from the concrete slug, and the effects of chlorine toxicity could have been mitigated if dechlorination tablets were available onsite and used since the work was adjacent to environmentally sensitive habitat. An increase for culpability is associated with failing to (1) anticipate how the use of a truck mounted drill to remove a wood post from a concrete anchor along a pipeline may damage the pipeline, and (2) take appropriate precautionary measures while working in a known area of sensitive fish populations.

b) ***Specific Factor***: Cleanup and Cooperation

Adjustment: 1.2

Discussion: The Discharger did not notify the Regional Water Board of this discharge or initiate spill response. The Discharger notified the Town of Woodside and Cal Water, who owns the drinking water system, soon after the incident. It was Cal Water who informed Regional Water Board staff of the incident after its survey of the creek on May 25 and 26 noted fish kill. The Discharger has subsequently been responsive to Regional Water Board staff's requests and submitted a spill report as requested.

c) ***Specific Factor***: History of Violations

Adjustment: 1

Discussion: The Discharger has no similar prior history of violations.

Step 5 – Determination of Total Base Liability Amount

a) ***Total Base Liability***: The Adjusted Total Liability

Amount: $21,800

Discussion: The adjusted liability is calculated by multiplying the initial liability by the adjustments above (i.e., ($16,516) x (1.1)(1.2)(1)), resulting the total base liability of $21,801 (rounded to $21,800).

Step 6 – Ability to Pay and to Continue in Business

a) ***Specific Factor***: Ability to Pay and Continue in Business

Discussion: The Discharger is a department of the State of California with an annual budget of approximately $14 billion. The Regional Water Board has no

evidence that the Discharger would be unable to pay the proposed liability or that payment of the proposed liability would cause undue financial hardship.

Step 7 – Other Factors as Justice May Require

a) ***Specific Factor***: Other factors as justice may require

Discussion: The staff time to prepare this Complaint and supporting information and to respond to the discharges, including site inspections and additional investigation efforts following public comments on a previous proposed settlement agreement, is estimated to be 63 hours. Based on an average cost to the state of $150 per hour, the total staff cost is estimated to be $9,450.

Step 8 – Economic Benefit

a) ***Specific Factor***: Economic Benefit

Discussion: The Discharger may have incurred minimal cost saving. The accidental discharge would have been avoided if the contractor's crews took proper precautions to identify the pipelines and took different approach to separate the wood post from the concrete slug attached to the pipeline. However, this economic benefit is below the amount of the proposed liability. Regional Water Board staff estimates that the potential economic benefit is less than $1,000.

Step 9 – Maximum and Minimum Liability Amounts

a) ***Minimum Liability Amount***

Amount: $1,100

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not to be below a Discharger's economic benefit plus ten percent. Based on the Regional Water Board Prosecution Team's estimate, the proposed liability is above this amount.

b) ***Maximum Liability Amount***

Amount: $82,500

Discussion: The maximum administrative civil liability amount is the maximum amount allowed by Water Code Section 13385: (1) ten thousand dollars ($10,000) for each day in which the violation occurs; and (2) where there is a discharge, any portion of which is not susceptible to cleanup or is 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.

Step 10 – Final Liability Amount

The total final liability amount proposed for the unpermitted discharge to Bear Gulch Creek is **$31,250**. The total proposed liability is based on the consideration of penalty factors discussed above and includes the recommended liability of $21,800 for the violation and $9,450 in staff costs.

The final liability amount proposed falls within the maximum and minimum liability amounts.