CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY

In the matter of:	)	
	)	Order R2-2013-1002 ~~(Proposed)~~
California Department of Transportation	)	
	)	**SETTLEMENT AGREEMENT AND ORDER ~~(PROPOSED)~~**
	)	
Isabel Avenue/Interstate 580 Interchange Improvement Project, Livermore	)	
	)	

Section I: INTRODUCTION

This Settlement Agreement and Order (Stipulated Order) 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 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.

Section II: RECITALS

1. Caltrans, at all times relevant to this matter, was the owner and operator of the Isabel Avenue/Interstate 580 Interchange Improvement Project (Project) and the entity with administrative control of the contract for the Project located at the intersection of California Interstate Highway 580 and Portola Avenue in Livermore, Alameda County. The Project required the temporary diversion of Arroyo Las Positas (creek diversion). On June 15, 2010, Caltrans placed 5,800 cubic feet of gravel into Arroyo Las Positas, a water of the state and the United States, to support steel plating that allowed heavy equipment to drive over the creek diversion without damaging the diversion structure. Caltrans removed all of the fill material and restored the creek by October 12, 2010.

2. The Prosecution Team alleges that on or about and between June 15, 2010, and October 12, 2010, Caltrans violated Federal Water Pollution Control Act (Clean Water Act) section 301 (33 U.S.C. § 1311) and/or Water Code section 13376 by discharging 5,800 cubic feet of gravel into Arroyo Las Positas without coverage under a National Pollutant Discharge Elimination System (NPDES) permit.

3. Pursuant to Water Code section 13385, subdivision (a), any person who violates Clean Water Act section 301 and/or Water Code section 13376 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.

4. The Parties have engaged in settlement negotiations and agree to settle fully the 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. The amount of liability imposed by this Order is consistent with a reasonable liability determination using the methodology in the 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 alleged 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 herein, the Parties have agreed to the imposition of administrative civil liability in the amount of $31,500 against Caltrans, which includes $11,700 for Regional Water Board staff costs. Although Caltrans disputes that the Regional Water Board would have the power to impose and recover staff costs in the context of a contested adjudicatory hearing, Caltrans agrees to the inclusion of said costs in this Settlement Agreement based on the provisions of Government Code section 11415(a) and (c).

Section III: STIPULATIONS

The Parties stipulate to the following:

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

7. **Administrative Civil Liability:** No later than 30 days following the Regional Water Board's, or its delegee's, execution of this Order, Caltrans shall pay a total of $31,500, which includes, subject to the provisions of Paragraph 5 above, $11,700 in Regional Water Board staff costs, in stipulated administrative civil liability by check made payable to the "State Water Resources Control Board" to be deposited into the State Water Pollution Cleanup and Abatement Account. 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 a copy to: Ann Carroll, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812, and David Elias, San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612.

8. **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.

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

For the Regional Water Board:

David C. Elias
Senior Engineering Geologist
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, 14th Floor
Oakland, CA 94612
delias@waterboards.ca.gov
(510) 622-2509

For Caltrans:

Steven Whipple
District Division Chief
Caltrans
111 Grand Avenue
Oakland, CA 94612
Steven_b_whipple@dot.ca.gov
510-286-5001

10. **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.

11. **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 herein or which could have been asserted based on the specific facts alleged herein against Caltrans. The provisions of this Paragraph are expressly conditioned on Caltrans' full payment of administrative civil liability by the deadline specified in Paragraph 7 herein.

12. **Public Notice:** The Parties agree that the proposed Stipulated 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 receives significant new information that reasonably affects the propriety of presenting this Stipulated Order to the Regional Water Board for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present the Order to the Regional Water Board or its delegee for adoption. Caltrans agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order in its current form.

13. **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.

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 Parties are 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 by 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 (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 the following objections based on settlement communications in this matter:

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.

17. **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.

18. **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.

19. **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.

20. **Caltrans's 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.

21. **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.

22. **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.

23. **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.

24. **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 Region Prosecution Team

Date: 11/19/12 By: _____
Thomas E. Mumley,
Assistant Executive Officer

California Department of Transportation

Date: 11/15/12 By: _____
Bob Finney
Construction Manager, Bay Area

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

1. The Regional Water Board incorporates the foregoing Stipulation, set forth in Paragraphs 1 through 24 above, by this reference, as if set forth fully herein.

2. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in Water Code 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 set forth in the Stipulation, 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 Stipulation as presented in Exhibit A, Step 7: Other Factors as Justice May Require.

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

4. The Executive Officer 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.

5. 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 on behalf of the California San Francisco Bay Regional Water Quality Control Board, pursuant to Water Code section 13323 and Government Code section 11415.60, that the foregoing Stipulation is accepted in settlement of this action.

Digitally signed by Bruce H. Wolfe
Date: 2013.01.23 12:54:24 -08'00'

Bruce H. Wolfe
Executive Officer

Date

EXHIBIT A

WATER QUALITY ENFORCEMENT POLICY METHODOLOGY

Violation: The California Department of Transportation (Caltrans) is alleged to have violated Clean Water Act section 301 and/or Water Code section 13376 by discharging 5,800 cubic feet of gravel into Arroyo Las Positas, a water of the state and the United States, without coverage under a National Pollutant Discharge Elimination System (NPDES) permit on or about and between June 15, 2010 and October 12, 2010. The fill remained in Arroyo Las Positas for 122 days. Caltrans removed all of the fill material and restored the site by October 12, 2010, as alleged in the Stipulation. Therefore, liability was assessed based on days of violation only.

Step 1: Potential for Harm for Discharge Violations:

The "potential harm" factor considers the harm to beneficial uses that resulted or 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 harm or potential harm to beneficial uses; (2) 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). In this case, the Prosecution Team determined the potential harm to beneficial uses to be moderate (i.e., a score of 3).

The placement of the fill had moderate effects on the wildlife habitat (WILD) and possibly the preservation of rare and endangered species (RARE) beneficial uses of Arroyo Las Positas. Those effects consisted of the removal of habitat and construction of a barrier to longitudinal movement along the Arroyo. Once Caltrans removed the fill, however, it is likely that the impacts attenuated without appreciable chronic or acute effects.

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. In this case, the Prosecution Team assigned a score of 2. The physical, chemical, biological, or thermal characteristics of the fill material posed moderate risk to potential receptors, as there is some level of impacts to receptors associated with fill, including the smothering of vegetation and the discharge of sediment to the Arroyo.

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. In this case, Caltrans removed all of the fill material from the Arroyo, therefore a score of 0 is assigned.

Step 2: Assessments for Discharge Violations:

This step addresses liability for the discharge based on both a per-gallon and a per-day basis. Pursuant to Water Code section 13385, subdivision (c), the Regional Water Board may impose administrative civil liability on a per gallon basis 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. Because Caltrans removed all 5,800 cubic feet from Arroyo Las Positas, the per gallon assessment for discharge violations is not considered.

Per Day Assessment for Discharge Violations

Table 2 of the Enforcement Policy is used to determine a "per day factor" based on the Potential for Harm and Extent of Deviation. The Prosecution Team determined the Potential for Harm Score of 5 from the sum of the three factors in Step 1. The Prosecution Team considered the Extent of Deviation to be major because Caltrans discharged 5,800 cubic feet of gravel without obtaining the necessary permit coverage, which deviated from the requirement completely. For this particular case, the factor is 0.15.

Initial Liability Amount

The initial liability amount for the violation calculated on a per-day basis, are as follows:

Per Day Liability: $10,000 x (0.15) x (122 days) = **$18,300**

Step 3 – Per Day Assessment for Non-Discharge Violation

The Regional Water Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because the violation is related to the discharge of fill, and the liability was determined in Step 2.

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 clean up or cooperate with regulatory authority, and the violator's compliance history. Further, the Regional Water Board may consider reducing the days of violation for multiple day violations.

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. Caltrans was given a multiplier value of 1.2 based on the following: As

the administrator of the Isabel Avenue/Interstate 580 Interchange Improvement Project (Project), Caltrans had the responsibility to finalize all Regional Water Board permitting requirements, and had the knowledge that a permit was required.

Cleanup and Cooperation: This factor reflects the extent to which Caltrans voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Caltrans was given a multiplier value of 1 based on the following: Caltrans removed all of the fill placed in Arroyo Las Positas and restored the arroyo. Further, Caltrans was responsive to requests for information from the Prosecution team.

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. In this case, a multiplier of 1.1 was used because the Regional Water Board issued Notice of Violation to Caltrans, on or about December 23, 2009, for placing fill without obtaining proper permit coverage at the Project at the Interstate 580/State Route 84 Interchange. This Notice of Violation formally documented a history of this type of violation.

Days of Violation:

The Enforcement Policy provides that, for violations lasting more than 30 days, the Regional Water Board may adjust the per-day basis for civil liability if certain findings are made and if the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation. Caltrans's economic benefit is the avoided one-time cost to obtain proper permit coverage. There was not an alternative, more expensive, engineering approach that could have been implemented to complete the work within the arroyo without placing fill. Therefore, an adjustment is appropriate.

The Prosecution Team recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period. Using this approach, the total number of days is revised to 10 days of violation. This results in a revised initial liability as follows:

Revised Initial Liability Amount

Per Day Liability: $10,000 x (0.15) x (10 days) = **$15,000**

Step 5 - Determination of Total Base Liability Amount

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

Total Base Liability Amount

$15,000 (Revised Initial Liability) x 1.2 (Culpability Multiplier) x 1 (Cleanup and Cooperation Multiplier) x 1.1 (History of Violations Multiplier) = **$19,800** (Total Base Liability)

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

The Enforcement Policy provides that if the Regional Water Board has sufficient financial information 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. In this case, the Regional Water Board Prosecution Team has sufficient information to suggest Caltrans has the ability to pay the proposed liability. Caltrans is a department of the State of California with an annual budget of approximately $14 billion. The Project's total budget at the time of award was $26,888,000. These amounts are significantly greater than the proposed liability of $31,500. Accordingly, the Total Base Liability has not been adjusted.

Step 7: Other Factors as Justice May Require

Based on an average cost to the State of $150 per hour, the Prosecution Team incurred $11,700 in staff costs associated with the investigation and enforcement of the violations alleged herein and in the Stipulation. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

Step 8: Economic Benefit

The Enforcement Policy directs the Regional Water Board to determine any Economic Benefit Amount of the violation based upon the best available information. Caltrans did not receive a significant economic benefit because there was not an alternative, more expensive, engineering approach that could have been implemented to complete the work within the arroyo without placing fill. The only economic benefit they received was the modest avoided cost to obtain the appropriate permit coverage, estimated to be $1,600, which is less than the $31,500 administrative liability.

Step 9: Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385, subdivision (c), the maximum liability that may be imposed is $1,220,000.

Pursuant to Water Code section 13385, subdivision (e), the Regional Water Board shall recover, at a minimum, the economic benefits, if any, derived from the acts that constitute the violation (i.e., $1,600 as stated above). Further, the Enforcement Policy states that the Total Base Liability shall be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations—in this case, $1650. The stipulated liability amount exceeds the minimum liability the Regional Water Board must recover.

Step 10: Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the proposed administrative civil liability is **$31,500**.