

SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD

In the matter of:)	
)	SETTLEMENT AGREEMENT AND
)	STIPULATION FOR ENTRY OF
Pacific Bell Telephone Company)	ADMINISTRATIVE CIVIL LIABILITY ORDER;
Doing Business as)	ORDER NO. R2-2011-0002 (PROPOSED)
AT&T California)	
)	

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (hereafter "Stipulated Order" or "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 Staff ("Prosecution Staff") and Pacific Bell Telephone Company, doing business as AT&T California ("Discharger") (Collectively "Parties") and is presented to the Regional Water Board or its delegee (the Regional Water Board's Executive Officer), for adoption as an Order by settlement, pursuant to Government Code section 11415.60.

1. **RECITALS**

WHEREAS, at all times relevant to this matter, the Discharger was the owner and operator of the facility located at 95 Almaden Avenue, San Jose, Santa Clara County, CA 95113 ("Facility"), and was responsible for the operation thereof in accordance with applicable laws and regulations related to the management of petroleum fuel storage and the protection of water quality;

WHEREAS, on October 2, 2010, there was a discharge from the Facility of about 1,300 gallons of diesel fuel, and because the Discharger was able to recover about 303 gallons, about 997 gallons were discharged to the Guadalupe River, a water of the United States;

WHEREAS, the Assistant Executive Officer of the Regional Water Board, by and through the Prosecution Staff, investigated the circumstances of the Discharge Event;

WHEREAS, the Prosecution Staff alleges that the Discharger violated section 13376 of the California Water Code by discharging diesel fuel to the Guadalupe River in San Jose, California without first submitting a report of waste discharge to the Regional Water Board and obtaining a permit from the Regional Water Board;

WHEREAS, the Parties agree to fully settle the matter without administrative or civil litigation and by presenting this Stipulated Order 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 penalty methodology in the Water Quality Enforcement Policy. The California Water Code section 13385(e) factors and liability methodology analysis are presented in Attachment A. 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 specific violations, except as provided in this Stipulated Order, and that this Stipulated Order is in the best interest of the public.

2. **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 Stipulated Order.

3. **ADMINISTRATIVE CIVIL LIABILITY**

Within 30 days of adoption of this Stipulated Order, the Discharger shall remit, by check, TEN THOUSAND DOLLARS (\$10,000.00) to the Regional Water Board, payable to the San Francisco Bay Regional Water Quality Control Board, and shall indicate on the check the number of this Stipulated Order.

The Discharger shall send the original signed check to the San Francisco Bay Regional Water Quality Control Board, attention David Elias, 1515 Clay Street, Suite 1400, Oakland, CA 94612.

This administrative liability amount of \$10,000 penalty includes \$7,300 for the recovery of Regional Water Board staff costs to respond to the spill and to prepare this order. That statutory maximum penalty is \$10,000 pursuant to California Water Code section 13385(c).

4. **MATTERS COVERED BY THIS STIPULATED ORDER**

Upon adoption by the Regional Water Board, or its delegee, this Stipulated Order represents a final and binding resolution and settlement of all claims, violations or causes of action alleged in this Order or which could have been asserted based on the specific facts in this Stipulated Order against the Discharger as of the effective date of this Stipulated Order. The provisions of this Paragraph are expressly conditioned on the Discharger's full payment of administrative civil liability by the deadline specified in Paragraph 3.

5. **COVENANT NOT TO SUE**

Upon the effective date of this Stipulated Order, the Discharger shall and does release, discharge and covenant not to sue or pursue any civil or administrative claims against the Regional Water Board, including its officers, agents, directors, employees, contractors, subcontractors, attorneys, representatives, predecessors-in-interest, and successors and assigns for any and all claims or causes of action, of every kind and nature whatsoever, in law and equity, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, which arise out of or are related to this action.

6. **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 or its delegee for adoption. If the Regional Water Board's



Assistant Executive Officer receives significant new information that reasonably affects the propriety of presenting this Stipulated Order to the Regional Water Board or its delegee for adoption, the Regional Water Board's 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. The Discharger agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

7. **PROCEDURE**

The Parties agree that the procedure that has been adopted for the approval of the settlement by the Parties and review by the public, as reflected in this Order, will be adequate. In the event procedural objections are raised prior to this Stipulated Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.

8. **WAIVERS**

In the event that this Stipulated 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 the Prosecution Staff may proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liability for the underlying alleged violations, or may continue to pursue settlement. 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 any subsequent administrative or judicial proceeding or hearing. The Parties also agree to waive any and all objections related to their efforts to settle 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, and therefore may have formed impressions or conclusions, prior to conducting any contested evidentiary hearing in this matter; or

b. Laches or delay or other equitable defenses based on the time period that the order or decision by settlement may be subject to administrative or judicial review.

9. **APPEALS**

The Discharger hereby waives its right to appeal this Stipulated Order to the State Water Resources Control Board or a California Superior Court and/or any California appellate level court.

10. **EFFECT OF STIPULATED ORDER**

Except as expressly provided in this Stipulated Order, nothing in this Stipulated Order is intended nor shall it be construed to preclude the Prosecution Staff or any state

agency, department, board or entity or any local agency from exercising its authority under any law, statute, or regulation.

11. **WATER BOARDS NOT LIABLE**

Neither the Regional Water Board members, staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Discharger, its employees, representative agents, attorneys, or contractors in carrying out activities pursuant to this Stipulated Order, nor shall the Regional Water Board members, staff, attorneys or representatives be held as parties to or guarantor of any contract entered into by the Discharger, its employees, representative agents, attorneys, or contractors in carrying out activities required pursuant to this Stipulated Order.

12. **NO WAIVER OF RIGHT TO ENFORCE**

The failure of the Prosecution Staff or Regional Water Board to enforce any provision of this Stipulated Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of this Stipulated Order. The failure of the Prosecution Staff or Regional Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order. No oral advice, guidance, suggestions or comments by employees or officials of any Party regarding matters covered under this Stipulated Order shall be construed to relieve any Party regarding matters covered in this Stipulated Order.

13. **REGULATORY CHANGES**

Nothing in this Stipulated Order shall excuse the Discharger from meeting any more stringent requirements which may be imposed hereafter by changes in applicable and legally binding legislation or regulations.

14. **AUTHORITY TO ENTER STIPULATED ORDER**

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

15. **INTEGRATION**

This Stipulated Order constitutes the entire agreement between the Parties and may not be amended or supplemented except as provided for in this Stipulated Order.

16. **MODIFICATION OF STIPULATED ORDER**

This Order shall not be modified by any of the Parties by oral representation made before or after the execution of this Order. All modifications must be made in writing and approved by the Regional Water Board or its delegee (the Regional Water Board's Executive Officer).

17. **INTERPRETATION**

This Stipulated Order shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared it and any uncertainty and ambiguity shall not be interpreted against any one party.

18. **COUNTERPART SIGNATURES**

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

IT IS SO STIPULATED:

Regional Water Board Prosecution Staff

By: *Ryan C. Whyte*
Dyan C. Whyte, Assistant Executive Officer

March 22, 2011
Date

Pacific Bell Telephone Company, doing business as AT&T California

By: *Andrew M. Taylor*
Andrew M. Taylor, Area Manager, EH&S

MARCH 29, 2011
Date

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

19. This Order incorporates the foregoing Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order.

20. Issuance of this Stipulated Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with sections 15061(b)(3) and 15321(a)(2), of Title 14 of the California Code of Regulations.

21. In adopting this Stipulated Order, the Regional Water Board, or its delegee, has considered all the factors prescribed in Water Code section 13385(e), in accordance with the State Water Resources Control Board's Water Quality Enforcement Policy. The factors considered and their corresponding category rankings are presented in Attachment A and are hereby incorporated by reference. The consideration of these factors is based upon information and comments provided by the Parties.

22. The liability imposed by this Order is at a level that recovers the economic benefits derived from the acts that constitute the violation, in accordance with Water



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Code section 13385,(e). In addition, this settlement recovers the costs incurred by the staff of the Regional Water Board for this matter.

PURSUANT TO WATER CODE SECTION 13323 AND GOVERNMENT CODE SECTION 11415.60, **IT IS HEREBY ORDERED** ON BEHALF OF THE REGIONAL WATER BOARD.

Bruce H. Wolfe
Executive Officer

Date

Attachment – A

Specific Factors Considered – Civil Liability

Attachment – A
Stipulated Administrative Civil Liability Order No. R2-2011-0002
Specific Factors Considered
Pacific Bell Telephone Company
Doing Business as AT&T California

Each factor of the Enforcement Policy and its corresponding score for the violation are presented below:

- a) ***Specific Factor:*** Potential Harm to Beneficial Uses
Category: 5, major
- b) ***Specific Factor:*** Physical, Chemical, Biological or Thermal Characteristics
Category: 4, significant risk or threat to potential receptors
- c) ***Specific Factor:*** Susceptibility to Cleanup or Abatement
Category: 1, <50% of the discharge is susceptible to cleanup or abatement
- d) ***Specific Factor:*** Deviation from Requirement
Category: major
- e) ***Civil Liability:*** Initial Amount of Administrative Civil Liability for this Violation Based on Above Factors
Amount: \$10,000

Adjustments to Determination of Initial Liability for Violation

- f) ***Specific Factor:*** Culpability
Adjustment: 1
- g) ***Specific Factor:*** Cleanup and Cooperation
Adjustment: 1
- h) ***Specific Factor:*** History of Violations
Adjustment: 1
- i) ***Specific Factor:*** Ability to Pay and Continue in Business
Adjustment: 1

Specific Factors Considered – Stipulated Administrative Civil Liability
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- j) ***Specific Factor:*** Other factors as justice may require

Adjustment: 1

Discussion: The Regional Water Board and State Water Board prosecution staff spent an estimated 48 hours to investigate the violations and prepare this Complaint and supporting evidence. Based on an average staff cost to the State of \$150 per hour, the total staff cost is \$7,300.

- k) ***Specific Factor:*** Economic Benefit

Amount: \$0

- l) ***Civil Liability:*** Adjusted Amount of Administrative Civil Liability for this Violation

Amount: \$17,300

- m) ***Civil Liability:*** Statutory Maximum Liability Amount and Amount of Final Liability

Amount: \$10,000

