

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

In the Matter of:

**City of Merced
Merced Wastewater Treatment Facility
Merced County**

ORDER R5-2017-0533

**SETTLEMENT AGREEMENT AND
STIPULATION FOR ENTRY OF
ADMINISTRATIVE CIVIL LIABILITY ORDER**

Introduction

1. This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order or Order) is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board), on behalf of the Central Valley Water Board Prosecution Team (Prosecution Team), and the City of Merced (Discharger)(collectively known as the Parties) and is presented to the Central Valley Water Board, or its delegee, for adoption as an order by settlement, pursuant to Government Code section 11415.60.

Recitals

2. The City of Merced owns and operates the Merced Wastewater Treatment Facility (Facility). The Facility discharges treated wastewater to Hartley Slough, a water of the United States. Hartley Slough is an ephemeral, effluent dominated water body that flows to Owens Creek and then to the San Joaquin River via a network of natural and artificial channels. The Facility is at 10260 Gove Road in Merced.
3. On March 14, 2008, the Central Valley Water Board adopted Waste Discharge Requirements (WDRs) Order No. R5-2008-0027, NPDES Permit No. CA0079219 that prescribed waste discharge requirements for the Discharger's Facility.¹
4. WDRs Order No. R5-2008-0027 contained a time schedule to comply with final effluent limitations by May 18, 2010.
5. The Discharger requested additional time to complete treatment upgrades to the Facility and on May 18, 2010, the Executive Officer issued Time Schedule Order (TSO) R5-2010-0904 for the Facility. The TSO included interim effluent limitations for total coliform organisms, as well as other constituents, until September 30, 2011 or when the Discharger was able to come into compliance with final effluent limitations, whichever was sooner. (TSO, p. 7, Order No. 3.)

¹ Prior to WDRs Order No. R5-2008-0027, discharges from the Facility were regulated under WDRs Order No. 5-00-246 and Cease and Desist Order No. 5-00-247. WDRs Order No. R5-2008-0027 rescinded Order No. 5-00-246. Cease and Desist Order No. 5-00-247 was rescinded by Order No. R5-2008-0028.

6. On May 16, 2011, the Discharger certified that it completed necessary treatment upgrades, meaning the Discharger was now required to satisfy the final effluent limitations in WDRs Order No. R5-2008-0027.
7. WDRs Order No. R5-2008-0027, section IV.A.1.h. contains final effluent limitations for total coliform organism concentrations at Discharge Points 001 and 002, with compliance measured at Monitoring Location M-001, of:
 - i. 2.2 MPN/100 mL as a seven-day median
 - ii. 23 MPN/100 mL more than once in any 30-day period; and
 - iii. 240 MPN/100 mL at any time.
8. The May 17, 2013 to June 30, 2014 total coliform exceedances identified in Attachment A, hereby incorporated by reference, were all subject to the effluent limitations identified in paragraph 7 above.
9. On August 8, 2014, the Central Valley Water Board adopted Order No. R5-2014-0097 rescinding TSO R5-2010-0904.
10. On August 8, 2014, the Central Valley Water Board adopted Waste Discharge Requirements (WDRs) Order No. R5-2014-0096, NPDES Permit No. CA0079219 that prescribed new waste discharge requirements for the Discharger's Facility. WDRs Order No. R5-2014-0096 rescinded WDRs Order No. R5-2008-0027, except for enforcement purposes.
11. WDRs Order No. R5-2014-0096, section IV.A.1.a. contains an average monthly final effluent limitation of 10 mg/L for Nitrate + Nitrite as Nitrogen at Discharge Point 002, with compliance measured at Monitoring Location M-001.
12. The November 30, 2014 Nitrate + Nitrite as Nitrogen effluent limitation violation identified in Attachment A was subject to the effluent limitation contained in WDRs Order No. R5-2014-0096, as identified in paragraph 11 above.
13. The effluent limitation violations identified in Attachment A are subject to mandatory minimum penalties (MMPs) under Water Code section 13385 subdivision (i).

Regulatory Considerations

14. Water Code section 13385, subdivision (i) requires assessment of mandatory penalties and state, in part, the following:

Water Code section 13385, subdivision (i)(1) states:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations:

- A) Violates a waste discharge requirement effluent limitation.
- B) Fails to file a report pursuant to Section 13260.
- C) Files an incomplete report pursuant to Section 13260.
- D) Violates a toxicity effluent limitation contained in the applicable waste discharge requirements where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

Settlement

- 15. The Parties have engaged in confidential settlement negotiations and agree to settle the matter without administrative or civil litigation by presenting this Stipulated Order to the Central Valley Water Board, or its delegee, for adoption as an order by settlement pursuant to Government Code section 11415.60. To resolve the violations by consent and without further administrative proceedings, the Parties have agreed to the imposition of an ACL in the amount of fifty-seven thousand dollars (\$57,000) in MMPs against the Discharger.
- 16. The Central Valley Water Board Prosecution Team believes that the resolution of the alleged violation is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the violations alleged herein and that this Stipulated Order is in the best interest of the public.

Stipulations

The Parties stipulate to the following:

- 17. **Administrative Civil Liability:** The Discharger hereby agrees to the imposition of an ACL in the amount of fifty-seven thousand dollars (\$57,000) to the Central Valley Water Board to resolve the alleged Water Code violations. The ACL shall be paid to the *State Water Pollution Cleanup and Abatement Account*. Payment shall be made no later than thirty (30) days after the entry of an Order approving this Settlement Agreement by the Central Valley Water Board, or its delegee, by check payable to the *State Water Pollution Cleanup and Abatement Account*. The Discharger shall indicate on the check the number of this Order. The Discharger shall send the original signed check to the Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento, California 95812-1888. A copy of the check shall be sent to Kailyn Ellison, Attorney, State Water Resources Control Board, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812 and Dale Harvey, Supervisor, Compliance/Enforcement Section, Regional Water Quality Control Board, Central Valley Region, 1685 E Street Fresno, CA 93706.
- 18. **Compliance with Applicable Laws and Regulatory Changes:** The Discharger understands that payment of an ACL in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that additional violations of the type alleged may subject it to further enforcement, including additional ACLs. 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.

19. **Party Contacts for Communications Related to Stipulated Order:**

For the Central Valley Water Board:

Dale Harvey, Supervisor
Compliance and Enforcement Section
Central Valley Regional Water Quality Control Board
1685 E Street Fresno, CA 93706
Dale.Harvey@waterboards.ca.gov
(559) 445-6190

For the Discharger:

Stephanie Dietz, Assistant City Manager
City of Merced
1776 Grogan Ave.
Merced, CA 95340
DietzS@cityofmerced.org

20. **Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
21. **Matters Addressed by Stipulation:** Upon adoption by the Central Valley 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 alleged in this Stipulated Order against Dischargers as of the effective date of this Stipulated Order. The provisions of this Paragraph are expressly conditioned on Discharger's full payment of the ACL by the deadline specified in paragraph 17.
22. **Public Notice:** The Discharger understands that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the Central Valley Water Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Central Valley Water Board, or its delegee, for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the Central Valley Water Board, or its delegee. The Discharger agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.
23. **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.
24. **No Waiver of Right to Enforce:** The failure of the Prosecution Team or Central Valley 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 Team or Central Valley 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. The Central Valley Water Board reserves all rights to take additional enforcement actions, including without limitation the issuance of ACL complaints or orders for violations other than those addressed by this Order.

25. **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 Team or any state agency, department, board or entity or any local agency from exercising its authority under any law, statute, or regulation.
26. **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.
27. **Modification:** This Stipulated Order shall not be modified by any of the Parties by oral representation whether made before or after the execution of this Order. All modifications must be made in writing and approved by the Central Valley Water Board or its delegee.
28. **If Order Does Not Take Effect:** In the event that this Stipulated Order does not take effect because it is not approved by the Central Valley Water Board, or its delegee, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that the Prosecution Team may proceed to a contested evidentiary hearing before the Central Valley Water Board to determine whether to assess an ACL 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 and will be fully protected by California Evidence Code sections 1152 and 1154; California Government Code section 11415.60; Rule 408, Federal Rules of Evidence; and any other applicable privilege under federal and/or state law. 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 Central Valley Water Board members or their advisors and any other objections to the extent that they are premised in whole or in part on the fact that the Central Valley 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.

29. **Waiver of Hearing:** The Discharger has been informed of the rights provided by Water Code section 13323, subdivision (b), and hereby waives its right to a hearing before the Central Valley Water Board.
30. **Waiver of Right to Petition:** The Discharger hereby waives the right to petition the Central Valley Water Board's adoption of the Stipulated Order as written for review by the State Water Board, and further waives the rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
31. **Covenant Not to Sue:** Upon the effective date of this Stipulated Order, Discharger shall and does release, discharge, and covenant not to sue or pursue any civil or administrative claims against any State Agency or the State of California, its officers, agents, directors, employees, attorneys, representatives, for any and all claims or cause of action, which arise out of or are related to this action.
32. **Authority to Bind:** 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.
33. **No Third Party Beneficiaries:** This Stipulated Order is not intended to confer any rights or obligation on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.
34. **Severability:** This Stipulated Order is severable; should any provision be found invalid the remainder shall remain in full force and effect.
35. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Central Valley Water Board, or its delegee, enters the Order.
36. **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.

California Regional Water Quality Control Board Prosecution Team
Central Valley Region

By: Clay Rodgers
Clay Rodgers
Assistant Executive Officer

Date: 7/31/2017

City of Merced

By: Stephanie Dietz
Stephanie Dietz
Assistant City Manager

Date: 7/21/17

ATTEST:
CITY CLERK

[Signature]
BY: _____
Assistant/Deputy City Clerk

APPROVED AS TO FORM:

[Signature]
Jeffrey S. Kantman
Interim City Attorney

300402 DO#: 127487
FUNDS/ACCOUNTS VERIFIED

[Signature]
for FINANCE OFFICE DATE

Funds Available, as of 7/19/17
553-1108-532-17-00 v17480
\$ 57,000.00



HAVING CONSIDERED THE PARTIES STIPULATIONS, THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD, BY AND THROUGH ITS EXECUTIVE OFFICER, FINDS THAT:

1. This is an action to enforce the laws and regulations administered by the Central Valley Water Board. The method of compliance with this enforcement action consists entirely of payment of amounts for ACL. As such, the Central Valley Water Board finds that issuance of this Order is not considered subject to the provisions of the California Environmental Quality Act (CEQA) as it will not result in a direct or reasonably foreseeable indirect physical change in the environment and is not considered a "project" (Public Resources Code 21065, 21080(a); 15060(c)(2),(3); 150378(a), Title 14, of the California Code of Regulations). In addition, 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.
2. The foregoing Stipulation is fully incorporated herein and made part of this Order.

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

ORIGINAL SIGNED BY

PAMELA C. CREEDON, Executive Officer

9/22/2017

Date

**MANDATORY MINIMUM PENALTIES
FOR
CITY OF MERCED**

The following table lists violations for which the Discharger is subject to mandatory minimum penalties pursuant to Water Code section 13385(i).

Date	Parameter	Units	WDR Limit	Measured	Period	Remarks	CIWQS
05/17/2013	Total Coliform	MPN/100 ml	240	1600	Not to exceed at any time	3	950386
05/23/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	3	950388
05/24/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	3	950385
05/25/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	950394
05/26/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	950390
05/27/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	950389
05/28/2013	Total Coliform	MPN/100 ml	2.2	3	7-Day Median	4	950391
05/29/2013	Total Coliform	MPN/100 ml	2.2	3	7-Day Median	4	950387
05/30/2013	Total Coliform	MPN/100 ml	23	90	Not to exceed more than once in a 30-day period	4	950393
05/30/2013	Total Coliform	MPN/100 ml	2.2	3	7-Day Median	4	950392
05/31/2013	Total Coliform	MPN/100 ml	2.2	3	7-Day Median	4	950395
06/01/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	952248
06/02/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	952245
06/03/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	952249
06/04/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	952250
06/05/2013	Total Coliform	MPN/100 ml	2.2	8	7-Day Median	4	952246
06/06/2013	Total Coliform	MPN/100 ml	2.2	7	7-Day Median	4	952247

Date	Parameter	Units	WDR Limit	Measured	Period	Remarks	CIWQS
06/26/2014	Total Coliform	MPN/100 ml	2.2	5	7-Day Median	3	973591
06/27/2014	Total Coliform	MPN/100 ml	23	30	Not to exceed more than once in a 30-day period	3	973588
06/27/2014	Total Coliform	MPN/100 ml	2.2	13	7-Day Median	3	973593
06/28/2014	Total Coliform	MPN/100 ml	2.2	17	7-Day Median	4	973594
06/29/2014	Total Coliform	MPN/100 ml	23	30	Not to exceed more than once in a 30-day period	4	973589
06/29/2014	Total Coliform	MPN/100 ml	2.2	23	7-Day Median	4	973595
06/30/2014	Total Coliform	MPN/100 ml	2.2	23	7-Day Median	4	973590
11/30/2014	Nitrite plus Nitrate (as N)	mg/L	10	13.25	Average Monthly	4	983594

Remarks:

1. Serious Violation: For Group I pollutants that exceed the effluent limitation by 40 percent or more.
2. Serious Violation: For Group II pollutants that exceed the effluent limitation by 20 percent or more.
3. Non-serious violation falls within the first three violations in a 180-day period, thus is not subject to mandatory minimum penalties. Penalties that may be assessed for this violation are discretionary.
4. Non-serious violation subject to mandatory minimum penalties.

SUMMARY OF VIOLATIONS:

Group I Serious Violations:	1
Group II Serious Violations:	0
Non-Serious Violations Not Subject to MMPs:	6
<u>Non-serious Violations Subject to MMPs:</u>	<u>18</u>
Total Violations Subject to MMPs:	19

Mandatory Minimum Penalty = (19 Violations Subject to MMPs) x \$3,000 = \$57,000