

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION

In the matter of:	)	
	)	Order No. R1-2016-0038
STEPHEN KISTLER	)	Administrative Civil Liability
	)	
	)	Settlement Agreement and Stipulation for
	)	Entry of Order; Order
	)	

Section I: Introduction

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulation," "Stipulated Order," or "Settlement Agreement") is entered into by and between the North Coast Regional Water Quality Control Board Prosecution Staff ("Prosecution Staff") and Stephen Kistler ("Settling Respondent") (collectively "Parties") and is presented to the North Coast Regional Water Quality Control Board ("Regional Water Board") for adoption as an Order, by settlement, pursuant to California Government Code section 11415.60.

Section II: Recitals

1. The Settling Respondent is the owner of the property located at 14701 Bodega Highway in Valley Ford, California (the "Property"), identified as Sonoma County Assessor's Parcel Number (APN) 026-120-006. The Property is situated within the Salmon Creek watershed, which is a coastal tributary watershed within the Central California Coast Evolutionarily Significant Unit designated by the National Oceanic and Atmospheric Administration and National Marine Fisheries Service.
2. The Property is subject to the requirements set forth in federal Clean Water Act sections 301 and 401 (33 U.S.C. §§ 1311, 1341), California Water Code section 13376, and waste discharge prohibitions specified by the Water Quality Control Plan for the North Coast Region ("Basin Plan"). Section 301 of the Clean Water Act (33 U.S.C. § 1311) prohibits the discharge of any pollutant by any person except in compliance with the law.
3. The Settling Respondent is alleged to have violated section 301 of the Clean Water Act by discharging approximately 739,910 gallons of highly turbid water into the Salmon Creek watershed by pumping a pond on his property into a second pond, which overflowed into a stream April 9 to April 10, 2013 ("Discharge Violation").

The Discharge Violation is described in the Regional Water Board May 22, 2013 staff report ("Attachment B"). The Regional Water Board is authorized to impose administrative civil liability for this violation pursuant to Water Code section 13385, subdivisions (a)(5) and (c).

4. To resolve by consent and without further administrative proceedings the Discharge Violation of the California Water Code, the Parties have agreed to the imposition of \$580,000 against the Settling Respondent. Payment of \$322,498 to the *State Water Resources Control Board Cleanup and Abatement Account* is due no later than thirty (30) days following the Regional Water Board executing this Stipulated Order. The remaining \$257,502 in penalties shall be suspended upon completion of a Supplemental Environmental Project ("SEP"), which consists of the Rainwater Catchment Project and the Gully Stabilization and Erosion Control Project described in Section III of this Stipulated Order and SEP Proposal ("Attachment C").
5. The administrative civil liability amount was determined using a factors analysis consistent with Water Code section 13385 and the State Water Resources Control Board Water Quality Enforcement Policy (May 2010)("Enforcement Policy"). The Prosecution Staff's application of the Enforcement Policy methodology is shown in Attachment A.
6. The Parties have engaged in settlement negotiations and agree to settle the matter without administrative or civil litigation and by presenting this Stipulated Order to the Regional Water Board for adoption as an Order pursuant to Government Code section 11415.60. The liability imposed by this Stipulated Order is less than the liability determined using the penalty methodology in the Enforcement Policy, as described in Attachment A. Both parties wish to avoid the uncertainties and risks associated with an administrative hearing and potential litigation. Based on these settlement considerations, the settlement amount is justified pursuant to Enforcement Policy section VI.B.
7. The Prosecution Staff contends that the resolution of the alleged violation is fair and reasonable and fulfills its enforcement objectives, that no further action by the Regional Water Board is warranted concerning the specific Discharge Violation except as provided in this Stipulated Order, and that this Stipulated Order is in the best interest of the public.

Section III: Stipulations

The Parties stipulate to the following:

8. **Administrative Civil Liability:** The Settling Respondent hereby agrees to the imposition of an administrative civil liability totaling FIVE HUNDRED AND EIGHTY THOUSAND DOLLARS (\$580,000) to resolve the violation alleged in Paragraph 3 of Section II.

Within thirty (30) days of the Regional Water Board's execution of this Stipulated Order, the Settling Respondent agrees to remit by check THREE HUNDRED TWENTY-TWO THOUSAND FOUR HUNDRED AND NINETY-EIGHT DOLLARS (\$322,498) payable to the *State Water Resources Control Board Cleanup and Abatement Account (CAA)*. The check shall reference this Order number and be submitted to:

Accounting Office
Attn: ACL Payment
State Water Resources Control Board
P.O. Box 1888
Sacramento, CA 95812-1888

A copy of the check shall be provided to Stormer Feiler ("Designated Water Board Representative") at Stormer.Feiler@waterboards.ca.gov or:

North Coast Regional Water Quality Control Board
Attn: Stormer Feiler
5550 Skyland Blvd., Ste. A
Santa Rosa, CA 95403

The Parties agree that TWO HUNDRED FIFTY-SEVEN THOUSAND FIVE HUNDRED AND TWO DOLLARS (\$257,502) of the administrative civil liability shall be suspended ("Suspended Liability") pending completion of a SEP as set forth in Paragraph 9 of Section III and in Attachment C.

9. **Supplemental Environmental Project (SEP):** The Settling Respondent shall pay the Suspended Liability (\$257,502) to the Gold Ridge Resource Conservation District ("Implementing Party"), for use toward the Salmon Creek SEP. The Salmon Creek SEP is comprised of two projects designed to conserve water and improve water quality in Salmon Creek and its tributaries, for the benefit of the coho salmon and steelhead trout that spawn and spend the freshwater portion of their life cycle in these streams. A more complete description of the SEP, including an implementation schedule, milestone dates, and a budget, is contained in Attachment C.

Payment of the Suspended Liability (\$257,502) shall be made to the "Gold Ridge Resource Conservation District" and submitted to the following address within 30 of the Regional Water Board's execution of this Stipulated Order:

Gold Ridge Resource Conservation District
2776 Sullivan Rd.
Sebastopol, CA 95472

a. Settling Respondent Agrees to Implement the SEP

The Settling Respondent represents that: (1) it will spend the SEP amount as described in this Stipulated Order; (2) it will provide the certified, written reports required by Paragraphs b. and d. to the Regional Water Board detailing implementation of the SEP set forth in Attachment C. The Settling Respondent agrees that the Regional Water Board has the right to require an audit of the funds expended by it to implement the SEP, in accordance with Paragraph d. below.

b. SEP Progress Reports and Final Completion Date

The Settling Respondent (or the Implementing Party on behalf of the Respondent) shall provide quarterly reports of progress on the SEP the Designated Water Board Representative commencing on September 30, 2016 and continuing through the Certification of Completion described in Paragraph d.ii., below. If no activity occurred during a particular quarter, a quarterly report so stating shall be submitted. The SEP shall be completed by June 30, 2020.

c. Publicity Associated with SEP

If the Settling Respondent or its agents or the Implementing Party publicize one or more elements of the SEP, they shall state in a **prominent manner** that the project is being undertaken as part of the settlement of an enforcement action by the Regional Water Board against the Settling Respondent.

d. Audits and Certification of SEP

i. Certification of Expenditures

On or before sixty days after completion of the SEP, Settling Respondent shall submit to the Designated Water Board Representative a certified statement by himself and the Implementing Party documenting the expenditures by Settling Respondent and the Implementing Party during the completion period for the SEP. In making such certification, the signatories may rely upon normal organizational project tracking systems that capture employee time expenditures and external payments to outside vendors such as environmental and information technology contractors or consultants. Settling Respondent shall provide any additional information requested by the Regional Water Board staff which is reasonably necessary to verify Settling Respondent's SEP expenditures.

ii. Certification of Completion

On or before June 30, 2020 the Settling Respondent (or the Implementing Party on behalf of the Respondent) shall submit a final report, submitted under penalty of perjury, stating that the SEP has been completed in accordance with the terms of this Stipulated Order.

Such documentation may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the Regional Water Board to evaluate the completion of the SEP and the costs incurred by the Settling Respondent. The Certification of Completion shall be submitted to the Designated Water Board Representative.

iii. Third Party Audit

At the written request of the Assistant Executive Officer, the Settling Respondent, at its sole cost, shall submit a report prepared by an independent third party acceptable to the Regional Water Board Assistant Executive Officer. The report shall provide such party's professional opinion that the Settling Respondent and Implementing Party have expended money in the amounts claimed by the Settling Respondent. In the event of such an audit, the Settling Respondent agrees that he will provide the third party auditor with access to all documents which the auditor requests. Such information shall be provided to the Designated Water Board Representative no later than three months of written notice from the Assistant Executive Officer that a third party audit is required.

e. **Regional Water Board Acceptance of Completed SEP**

Upon the Settling Respondent's satisfaction of its obligations under this Stipulated Order, the completion of the SEP and any audits, the Regional Water Board will issue a "Satisfaction of Order." The issuance of the Satisfaction of Order shall terminate any further obligations of the Settling Respondent under this Stipulated Order.

f. **Failure to Expend All Suspended Administrative Civil Liability Funds on the Approved SEP**

In the event that the Settling Respondent is not able to demonstrate to the reasonable satisfaction of the Regional Water Board staff that it and/or the Implementing Party has spent the entire SEP Amount for the completed SEP, Settling Respondent shall pay the difference between the Suspended Administrative Civil Liability and the amount that the Settling Respondent can demonstrate was actually spent on the SEP, as an administrative civil liability to the *State Water Pollution Cleanup and Abatement Account* within thirty (30) days pursuant to the procedures identified in Paragraph 8 of this Stipulation after the service of a Regional Water Quality Control Board's determination. Upon confirmation of payment, Regional Water Board will issue a Satisfaction of Order.

g. **Failure to Complete the SEP**

If the SEP is not fully implemented within the time period required by this Stipulated Order, the Settling Respondent shall pay the entire Suspended Liability or some portion thereof less the value of the completion of any portion of the SEP.

The Rainwater Catchment Project time period is August, 15, 2016 -June 30, 2020; the Erosion Prevention Project time period is October 15, 2016 –June 30, 2020. Unless otherwise ordered, the Settling Respondent shall not be entitled to any credit, offset, or reimbursement from the Regional Water Board for expenditures made on the SEP. Upon a determination by the Regional Water Board of the amount of the Suspended Liability assessed, the amount owed shall be paid to the *State Water Pollution Cleanup and Abatement Account* within thirty (30) days pursuant to the procedures identified in Paragraph 8 of this Stipulation after the service of the Regional Water Quality Control Board's determination. Payment of the assessed amount will satisfy the Settling Respondent's obligations to implement the SEP. Upon confirmation of payment, Regional Water Board will issue a Satisfaction of Order.

10. Regional Water Board is Not Liable

Neither the Regional Water Board members nor the Regional Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by Settling Respondent or the Implementing Party's directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order, nor shall the Regional Water Board, its members or staff be held as parties to or guarantors of any contract entered into by Settling Respondent, its officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order.

11. No Admission of Liability: In settling this matter, the Settling Respondent does not admit to any of the violations alleged in Attachment B or this Stipulated Order.

12. Compliance with Applicable Laws: The Settling Respondent understands that payment of administrative civil liability in accordance with the terms of this Stipulated Order or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged herein may subject them to further enforcement, including additional administrative civil liability.

13. 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.

14. Matters Addressed by Stipulation: Upon adoption by the Regional Water Board as an Order, this Stipulation represents a final and binding resolution and settlement of the alleged violation based on the specific facts alleged in this Stipulated Order.

The provisions of this paragraph are expressly conditioned on the full payment of the administrative civil liability by the deadlines specified in Section II, Paragraph 4, and the Settling Respondent's full satisfaction of the obligations described in Section III, Paragraphs 8 and 9.

15. **Public Notice:** The Settling Respondent understands that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board or its delegate. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Regional Water Board, or its delegate, for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the Regional Water Board or its delegate. The Settling Respondent agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.
16. **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 Stipulated Order by the public is lawful and adequate. In the event procedural objections are raised prior to the 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.
17. **Interpretation:** This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Settling Respondent is represented by counsel in this matter.
18. **Modification:** This Stipulated 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 delegate.
19. **If Stipulated Order Does Not Take Effect:** In the event that this Stipulated Order does not take effect because it is not approved by the Regional Water Board, or its delegate, 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 Stipulated Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the violations 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.

20. **Waiver of Hearing:** The Settling Respondent 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 Stipulated Order.

21. **Waiver of Right to Petition:** The Settling Respondent hereby waives its right to petition the Regional Water Board's adoption of the Stipulated Order for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

22. **Settling Respondent's Covenant Not to Sue:** The Settling Respondent 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 covered by this Stipulated Order.

23. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board under the terms of this Order shall be communicated to the Settling Respondent in writing. No oral advice, guidance, suggestions or comments by employees or officials of the Regional Water Board regarding submissions or notices shall be construed to relieve the Settling Respondent of its obligation to obtain any final written approval required by this Stipulated Order.

24. **Authority to Bind:** Each person executing the Settlement Agreement and Stipulation for Entry of Order in a representative capacity represents and warrants that he or she is authorized to bind the entity on whose behalf he or she executes the Stipulation for Entry of Order.

25. **Effective Date:** The obligations under this Stipulated Order are effective and binding on the Parties only upon the entry of an Order by the Regional Water Board, which incorporates the terms of this Settlement Agreement for Entry of Order.

26. **Severability:** This Stipulated Order is severable; should any provision be found invalid the remainder shall remain in full force and effect.

27. **Counterpart Signatures:** 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.

28. **Incorporation of Attachments:** Attachments A, B, and C are hereby incorporated by reference.

IT IS SO STIPULATED.

California Regional Water Quality Control Board Prosecution Staff
North Coast Region

By: _____
Shin-Roei Lee, Assistant Executive Officer

Date: _____

Settling Respondent

By:  _____
Stephen Kistler

Date: 9-26-16

Order of the Regional Water Board

29. This Order incorporates the foregoing Settlement Agreement and Stipulated for Entry of Order.

30. In accepting the foregoing Settlement Agreement and Stipulated for Entry of Order, 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 Regional Water Board staff in investigating the allegation contained herein or otherwise provided to the Regional Water Board. In addition to these factors, this settlement recovers the costs incurred by the staff of the Regional Water Board for this matter.

31. This is an action to enforce the laws and regulations administered by the Regional Water Board. The method of compliance with this enforcement action consists entirely of payment of amounts for administrative civil liability. As such, the Regional Water Board finds that issuance of this Stipulated 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 sections 21065, 21080, subdivision (a); sections 15060, subdivisions(c)(2) and (3); 15378, subdivision (a), Title 14, of the California Code of Regulations). In addition, the Regional Water Board finds that issuance of this Order is also exempt from the provisions of CEQA in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations as an enforcement action by a regulatory agency and there are no exceptions that would preclude the use of this exemption.

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

Matthias St. John
Executive Officer

Date: _____

Attachments:

- A – Administrative Civil Liability Methodology for Discharge Violation
- B – Regional Water Board Inspection Report dated May 22, 2013
- C – Supplemental Environmental Project Description