

SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD

In the matter of:	)	
	)	Order R2-2011-00XX (Proposed)
C&H SUGAR COMPANY, INC.	)	
	)	
	)	SETTLEMENT AGREEMENT AND
	)	STIPULATION FOR ENTRY OF
	)	ADMINISTRATIVE CIVIL LIABILITY ORDER;
	)	ORDER (PROPOSED)

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 C&H Sugar Company, Inc. (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.

1. RECITALS

WHEREAS, at all times relevant to this matter, C&H Sugar Company, Inc. ("C&H") was the owner and operator of the C&H Sugar Refinery ("Refinery"), located at 830 Loring Avenue, Crockett, CA 94525, and was responsible for the operation thereof in accordance with National Pollution Discharge Elimination System ("NPDES") Permit No. CA0005240, Waste Discharge Requirements Order No. R2-2007-0032 ("NPDES Permit" or "Permit");

WHEREAS, on February 19, 2011, there was a discharge from the Refinery of approximately 170,000 to 228,000 gallons of process water from a corroded pipe to the Carquinez Strait, a water of the United States ("the Discharge Event");

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 Discharge Event resulted in the violation of the Permit's Discharge Prohibition III.A and was caused by a corroded pipe, in violation of the Proper Operation and Maintenance Federal Standard Provision of the NPDES Permit, which states, in part, that "The Discharger shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Discharger to achieve compliance with the conditions of [the Permit]." The alleged violations are described in Exhibit A, attached hereto;

WHEREAS, the Parties have engaged in settlement negotiations and 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 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 alleged in Exhibit A, 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, C&H shall remit, by check, THREE HUNDRED SEVENTY NINE THOUSAND TWO HUNDRED DOLLARS (\$379,200.00) to the Regional Water Board, payable to the *State Water Resources Control Board Cleanup and Abatement Account*, and shall indicate on the check the number of this Stipulated Order.

C&H shall send the original signed check to the San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612, with copies sent to: David Boyers, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812, and Myriam Zech, San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612.

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 alleged in Exhibit A or this Stipulated Order against C&H as of the effective date of this Stipulated Order. The provisions of this Paragraph are expressly conditioned on C&H's full payment of administrative civil liability by the deadline specified in Paragraph 3.

5. **DENIAL OF LIABILITY**

In settling this matter, C&H expressly denies the allegations described in Exhibit A and this Stipulated Order and makes no admission or representation as to the appropriateness of the liability determination under the Water Quality Enforcement Policy as set forth in Exhibit A. Neither this Stipulated Order nor any payment pursuant to the Order shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgement of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule, or regulations. However, this Order and/or any actions of payment pursuant to the Order may constitute evidence in actions seeking compliance with this Order. This Order may be used as evidence of a prior enforcement action in future actions by the State Water Resources Control Board or the Regional Water Board against C&H.

6. **COVENANT NOT TO SUE**

Upon the effective date of this Stipulated Order, C&H 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.

7. **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 Regional Water Board Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present the Order to the Regional Water Board. C&H agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

8. **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.

9. **WAIVERS**

In the event that this Stipulated Order does not take effect because it is not approved by the Regional Water Board, 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.

10. **APPEALS**

C&H 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.

11. **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.

12. **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 C&H, 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 C&H, its employees, representative agents, attorneys, or contractors in carrying out activities required pursuant to this Stipulated Order.

13. **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.

14. **REGULATORY CHANGES**

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

15. **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.

16. **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.

17. **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 Executive Officer.

18. **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.

19. **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.

20. **INCORPORATION OF EXHIBITS**

Exhibit "A" is incorporated by reference.

IT IS SO STIPULATED:

Regional Water Board Prosecution Staff

By: _____
Thomas E. Mumley, Assistant Executive Officer

August 4, 2011

Date

C&H
By:  _____
Michael Seither, Senior Vice President

7/20/11

Date

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

21. 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.

22. 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 consideration of these factors is based upon information and comments provided by the Parties and by members of the public.

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

24. The terms of the foregoing Stipulation are fully incorporated herein and made part of this Order of the Regional Water Board.

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

Bruce H. Wolfe
Executive Officer

Date

**EXHIBIT A – REGIONAL WATER BOARD PROSECUTION STAFF’S ALLEGATIONS AND
WATER QUALITY ENFORCEMENT POLICY METHODOLOGY**

1. C&H Sugar Company, Inc. (“C&H” or “Discharger”) is the owner and operator of the C&H Sugar Refinery (“Refinery”) located at 830 Loring Avenue, Crockett, CA 94525, and is responsible for the operation thereof in accordance with National Pollution Discharge Elimination System (“NPDES”) Permit No. CA0005240, Waste Discharge Requirements Order No. R2-2007-0032 (“NPDES Permit”);
2. Discharge Prohibition III.A. of the NPDES Permit states, “The discharge of any wastewater at a location or in a manner different from that described in this Order is prohibited.”
3. The Proper Operation and Maintenance Federal Standard Provision of the NPDES Permit, states, in part, that “The Discharger shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Discharger to achieve compliance with the conditions of [the Permit].”
4. On February 19, 2011, there was a discharge from the Refinery of approximately 170,000 to 228,000 gallons of process wastewater to the Carquinez Strait, a water of the United States, as defined under the Clean Water Act, 33 U.S.C. §§ 1251 et seq. (“the Discharge Event”);
5. The Discharge Event resulted in a violation of Discharge Prohibition III.A. In addition, the Discharge Event was caused by a corroded pipe, in violation of the Proper Operation and Maintenance Federal Standard Provision.
6. The Discharge Event was not susceptible to cleanup and not cleaned up as those terms are used under Water Code Section 13385(c).

POTENTIAL MAXIMUM CIVIL LIABILITY

7. Water Code section 13385, subdivision (a) provides that civil liability may be administratively imposed by the Regional Water Board against any person that violates any waste discharge requirements issued pursuant to Chapter 5.5 of Division 7 of the Water Code. NPDES Permit No. CA0005240, Waste Discharge Requirements Order No. R2-2007-0032 was issued to C&H pursuant to Chapter 5.5 of Division 7 of the Water Code.
8. Water Code section 13385, subdivision (c) provides that the civil liability may be imposed by the Regional Water Board in an amount not to exceed the sum of both the following:
 - a. Ten thousand dollars (\$10,000) for each day in which the violation occurs.
 - b. 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.

9. C&H is exposed to liability pursuant to section 13385, subdivision (c) by failing to comply with its NPDES Permit on February 19, 2011, when there was a discharge from the Refinery of approximately 170,000 to 228,000 gallons of process water to the Carquinez Strait, a water of the United States.

10. The maximum liability for the violation described above, pursuant to section 13385, subdivision (c) of the Water Code is:

PENALTY CATEGORY	CALCULATION	TOTAL
Failure to comply with Discharge Prohibition III.A	One day (February 19, 2011) x \$10,000	\$10,000
Failure to comply with Proper Operation and Maintenance Federal Standard Provision	One day (February 19, 2011) x \$10,000	\$10,000
Additional liability for volume of discharge over 1,000 gallons which is not susceptible to cleanup or which is not cleaned up.	227,000 gallons x \$10/gallon	\$2,270,000
Potential Maximum Penalty		\$ 2,290,000

CONSIDERATION OF FACTORS

11. Pursuant to Water Code section 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.

12. 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 Section 13385 (e).

13. The Prosecution Staff is proposing discretionary liability for violations associated with the failure to comply with Discharge Prohibition III.A and the Proper Operation and Maintenance Federal Standard Provision resulting in the discharge of between 170,000 and 228,000 gallons of process water and has conducted an analysis of the methodology for assessing liability in the Enforcement Policy, as shown below:

a. **Step 1. Potential for Harm for Discharge Violations**

The potential for harm to the environment associated with the Discharge Event is 5. This is determined by the sum of the factors for:

(a) The potential for harm to beneficial uses is 1 (minor) [impacts are observed or reasonably expected; harm to beneficial uses is minor]. The discharge consisted of between 170,000 to 228,000 gallons of process water with a pH of between 10.4 and 11. The discharge occurred in an area near the mouth of Edwards Creek over an estimated time period of 11.5 hours. There were no impacts observed by the Discharger after discovery of the incident. Given the high flows in the Carquinez Strait, minor impacts to beneficial uses are reasonably expected to occur.

(b) The physical, chemical, biological or thermal characteristics of the discharge is 3 (above moderate risk) because the discharge had a pH between 10.4 and 11 and contained approximately 2,800 lbs of sugar. The water quality objective for pH in the Basin Plan is a maximum of 8.5. Levels of pH above 8.5 can be immediately toxic to fish and other aquatic organisms. Moreover, pH is a logarithmic scale so that the discharge at a pH of 10.4 is nearly 100 times greater than the water quality objective of 8.5. The toxicity of sugar, although relatively minor in comparison to the toxicity of pH at 10.4, is also harmful to aquatic organisms due to oxygen depletion in the water column.

(c) The susceptibility to cleanup or abatement is 1 (less than 50% susceptible to cleanup) because the discharge was to the Carquinez Strait and could not be recovered.

b. **Step 2. Assessment for Discharge Violations**

Per Gallon Assessment

The deviation from requirements is major. Discharge Prohibition III.A. prohibits the discharge of any wastewater at a location or in a manner different from that described in the Permit. The discharge that occurred on February 19, 2011, was from a corroded pipe and was not in a location or manner prescribed in the Permit. Therefore, the prohibition was rendered completely ineffective. In addition, the Proper Operation and Maintenance Federal Standard Provision of the NPDES Permit requires that the discharger, at all times, properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) in order to achieve compliance with the conditions of the Permit. The pipe that corroded was a 10" ductile iron pipe which runs

parallel to Edwards Creek, directly south of the Refinery. The pipe is above water except during high tides, when the pipe may come into contact with sea water. This environment is highly corrosive for iron given that all of the conditions existed for accelerated corrosion: aeration, moisture, and salt. The pipe should have been routinely inspected for signs of corrosion and maintained as necessary to prevent failure. The fact that corrosion caused the pipe to fail indicates that there was a major deviation from the requirement to properly maintain the facility in order to achieve compliance.

Because the deviation from requirements is major, in accordance with Table 1-Per Gallon Factor for Discharges on Page 14 of the Enforcement Policy, a multiplier of 0.150 is appropriate.

Per Day Assessment

The deviation from requirements is major, for the same reason as stated above.

Therefore, in accordance with Table 2-Per Day Factor For Discharges on Page 15 of the Enforcement Policy, a multiplier of 0.150 is appropriate.

High Volume Discharge

Because the Discharge Event was not a high volume sewage spill or release of storm water, a maximum per gallon liability of less than \$10 is not appropriate.

INITIAL LIABILITY AMOUNT

The Initial Liability Amounts for the violation calculated on a per gallon (using the low end of the estimated volume discharged) and a per day basis, is as follows:

Per Gallon Liability
 $(169,000 [170,000 - 1,000]) \times (.15) \times (\$10) = \$253,500$

Per Day Liability
 $(10,000) \times (.15) = \$1,500$

Total Initial Liability = \$255,000

c. **Step 3. Per Day Assessments For Non-Discharge Violations**

This step is not applicable because the violation is a discharge violation.

d. **Step 4. Adjustment Factors**

- (a) Culpability: The degree of culpability is based on a determination that the C&H's conduct constitutes negligence. That is, C&H did not anticipate what a reasonable person would have. Specifically, a reasonable person would have routinely inspected the pipe for signs of corrosion given that the pipe was in a highly corrosive environment. The appropriate multiplier is 1.2.

- (b) Cleanup and Cooperation: The Discharge Event was not susceptible to cleanup, however, C&H did timely report the event and returned to compliance. This type of response is expected and required by the Permit and therefore no adjustment is warranted. A multiplier of 1 is appropriate.

History of Violations: The Discharger has had a number of violations in recent years. Violations from July 1, 2005, to March 1, 2009, were addressed in Orders R2-2008-0100 and R2-2009-0058. Violations reported by C&H on October 16, 2009 and June 21, 2010 were addressed in Order R2-2011-0001. Violations have been routine occurrences resulting from leaky equipment, poor operating decisions, and ineffective equipment monitoring and repair. In self-monitoring reports relating to the incidents, C&H has repeatedly committed to increasing inspections of equipment, improving cleaning practices, updating or enhancing operator training, enhancing inspection and leakage testing procedures, and making needed repairs and implementing better equipment maintenance. While most of the past violations were due to operator errors and equipment failures that are not similar to a pipe failing due to corrosion, the history does indicate a pattern that C&H has failed to adequately maintain or replace aging equipment.

Given the history of violations, a multiplier of 1.2 is appropriate.

e. **Step 5. Determination of Total Base Liability Amount**

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

(Initial Liability) X (Culpability Multiplier) X (Cleanup and Cooperation Multiplier) X (History of Violations Multiplier) = Total Base Liability

$\$255,000 \times 1.2 = \$306,000 \times 1 = \$306,000 \times 1.2 = \mathbf{\$367,200}$

f. **Step 6. Ability to Pay and Ability to Continue in Business**

C&H is a major corporation and its Refinery processes over 700,000 tons of cane sugar annually. C&H has the ability to pay the proposed liability and continue in business. Accordingly, the Combined Total Base Liability is not adjusted.

g. **Step 7. Other Factors as Justice May Require**

The Regional Water Board has incurred \$12,000 in staff costs associated with the investigation and enforcement of the violations alleged herein. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

$\$367,200 + \$12,000 = \mathbf{\$379,200}$

h. **Step 8. Economic Benefit**

The violations discussed above did not result in any economic benefit to the Discharger.

i. **Step 9. Maximum and Minimum Liability Amounts**

As discussed above, the maximum liability that may be imposed for the violations alleged herein, including the BOD effluent limitation violations is \$2,290,000.

There is no minimum liability.

The proposed liability falls within these maximum and minimum liability amounts.

j. **Step 10. Final Liability Amount**

The final liability amount proposed is \$379,200.