

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

In the matter of:)	
)	
CALIFORNIA WATER SERVICE COMPANY)	SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY
)	
Unauthorized discharge to Polhemus Creek and San Mateo Creek)	ORDER
)	PROPOSED
)	ORDER
)	
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Section I: INTRODUCTION

1. This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulation or Stipulation and Order) is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), on behalf of the Regional Water Board Prosecution Team (Prosecution Team), the California Department of Fish and Wildlife Office of Spill Prevention and Response (CDFW), and California Water Service Company (Cal Water or Settling Respondent) (collectively Parties), and is presented to the Regional Water Board, or its delegate, for adoption as an Order by settlement, pursuant to Government Code section 11415.60. This Stipulation resolves the violations alleged herein by the imposition of administrative civil liability against Cal Water in the amount of **\$1,020,000**.

Section II: RECITALS

2. Cal Water is a water purveyor and operates a drinking water system in San Mateo County, California. Cal Water operates and maintains a potable water main located along Polhemus Road and Polhemus Creek in the City of San Mateo. Polhemus Creek and San Mateo Creek are both waters of the State and waters of the United States.

3. On November 17, 2014, the Regional Water Board Assistant Executive Officer issued Administrative Civil Liability Complaint No. R2-2014-1030 (Complaint) to Cal Water for allegedly violating California Water Code (Water Code) section 13376, Clean Water Act section 301, and the San Francisco Bay Region’s Water Quality Control Plan by discharging approximately 8,207,560 gallons of chloraminated potable drinking water containing up to 2.6 mg/L of chlorine residual into Polhemus Creek and San Mateo Creek

(Creeks) on October 25 to 29, 2013. The Compliant proposed \$3,060,700 in administrative civil liability, including \$9,038 in staff costs, as set forth in Exhibit A to the Complaint, which is attached hereto as Attachment A and incorporated by reference.

4. On March 12, 2015, CDFW issued a Natural Resources Damage Assessment (NRDA) for the October 2013 spill, based on stream surveys conducted by Cal Water, San Francisco Public Utilities Commission, and CDFW staff in (1) Polhemus Creek from the Cal Water facility downstream to San Mateo Creek and (2) San Mateo Creek to approximately 0.37 miles above and 1.2 miles below the confluence. Two hundred and thirty-one dead fish and one dead crayfish were observed in San Mateo Creek downstream of the confluence with Polhemus Creek, whereas upstream of the confluence, numerous live fish, including trout, were observed. To compensate for this, CDFW asserted that the restoration of 0.09 linear stream-miles within the San Mateo Creek watershed or adjacent watersheds with similar species and habitat was required.

5. The Parties have engaged in settlement negotiations and agree to fully settle the alleged Water Code violations for \$1,000,000 and alleged Fish and Game Code violations for \$20,000 and 0.09 miles of restoration benefiting aquatic resources to address interim loss to the resource to be implemented by Cal Water without administrative or civil litigation and by presenting this Stipulation to the Regional Water Board, or its delegate, for adoption as an Order by settlement, pursuant to Government Code section 11415.60. The liability amount for the alleged Water Code violations is less than the liability amount calculated or asserted by the Prosecution Team using the State Water Resources Control Board's Water Quality Enforcement Policy (May 2010) (Enforcement Policy) as shown in Attachment A. During settlement discussions, Cal Water presented additional evidence to make a reasonable argument supporting its position that the violation occurred for four days and the water main leak volume was 7,264,524 gallons. Cal Water contends that about one-half to two-thirds of the volume soaked into preferential pathways of trench backfill and surrounding soils before the potable water migrated through soil into the Creeks. Cal Water further contends that only a small portion of this volume migrated to the surface and then discharged into the Creeks. In the interest of settlement, the Parties agree to reduce the discharge volume to 2,650,000 gallons. The remaining factors as provided in Attachment A remain unchanged. The settlement amount is further justified in consideration of hearing and/or litigation risks, a reduction consistent with the range of settlement considerations specified in the Enforcement Policy.

6. The Parties have additionally agreed that, in lieu of cash payment of \$495,481 of the \$1,020,000 settlement amount, Cal Water will spend at least \$600,000 on an Enhanced Compliance Action, making capital improvements beyond those required by law. In an effort to further the parties' common goal of enhancing environmental protection in the area affected by the discharge, Cal Water will replace approximately 2,000 feet of water main along Polhemus Road and the embankment of Polhemus Creek, near the confluence San Mateo Creek and Polhemus Creek. This main replacement will reduce the likelihood of potable water discharges that may adversely affect aquatic life in both creeks.

7. The liability imposed by this Order for the Water Code violations is consistent with Water Code section 13385 and a reasonable liability determination using the penalty methodology in the Enforcement Policy.

8. The Prosecution Team believes that the resolution of the alleged Water Code violations set forth herein is fair and reasonable and fulfills all of its enforcement objectives, that no further action is warranted concerning the violation, except as provided in this Stipulation, and that this Stipulation is in the best interest of the public.

Section III: STIPULATIONS

The Parties incorporate the foregoing Recitals and stipulate to the following:

9. **Administrative Civil Liability:** The Settling Respondent hereby agrees to pay **\$1,020,000** in stipulated administrative civil liability, specifically:

- a. **For the Department of Fish and Wildlife:** A total of \$20,000 shall be paid to the Party Contact for CDFW as referenced below and as follows:
 - i. The Settling Respondent shall pay \$17,500 to the Fish and Wildlife Pollution Account, a portion of which will be available to the Natural Resource Volunteer Program.
 - ii. The Settling Respondent shall pay \$2,500 to the Fish and Wildlife Pollution Account for costs associated with the investigation and damage assessment.
- b. **For the Regional Water Board:** A total of **\$1,000,000**, shall be paid as follows:
 - i. **\$504,519** shall be submitted by check made payable to the “State Water Pollution Cleanup and Abatement Account” no later than 30 days after the Regional Water Board, or its delegate, signs this Stipulation and Order. The check shall reference the Order number listed on page one of this Stipulation. The original signed check shall be sent to the following address, and notification of payment shall be sent to the Office of Enforcement (email to Paul.Ciccarelli@waterboards.ca.gov) and the Regional Water Board (email to Habte.Kifle@waterboards.ca.gov).

State Water Resources Control Board
Division of Administrative Services
Accounting Branch, 18th Floor
Attn: ACL Payment
P.O. Box 1888
Sacramento, CA 95812-1888

- ii. **\$495,481** shall be suspended pending completion of the Enhanced Compliance Action described in paragraph 11 and Attachment B.

10. **Streambed Restoration Project:** The Settling Respondent and CDFW agree that Settling Respondent will implement, or cause to implement, 0.09 linear miles of streambed restoration in San Mateo Creek in order to address interim loss to natural resources. The Settling Respondent shall submit a streambed restoration work proposal to CDFW no later than 120 days after the Regional Water Board, or its delegate, signs this Stipulation and Order for CDFW's approval. Cal Water shall implement the CDFW approved restoration plan no later than one year from the date of project proposal approval. Once the restoration project is complete, CDFW will verify adequate completion for compliance with this term.

11. **Enhanced Compliance Action:** The proposed Enhanced Compliance Action (ECA) allows Cal Water to make capital or operational improvements beyond those required by law and are separate from projects designed to merely bring Cal Water into compliance. The ECA will replace an existing water main section in an environmentally sensitive area well before its programmed replacement year. Specifically, the ECA will replace approximately 1,955 feet of existing cast iron pipe with polyvinyl chloride (PVC) pipe or polyethylene encased ductile iron pipe along Polhemus Road and the embankment of Polhemus Creek, near the confluence of San Mateo Creek and Polhemus Creek in an unincorporated area of San Mateo County. The ECA will help reduce or avoid impacts to aquatic wildlife and will protect the beneficial uses of Polhemus and San Mateo Creeks. The complete ECA description, project milestones, budget, and reporting schedule are contained in Attachment B, incorporated herein by this reference.

12. **Representations and Agreements Regarding the ECA:**

- a. As a material condition for the Regional Water Board's acceptance of this Stipulation and Order, the Settling Respondent represents that it will utilize the suspended \$495,481 (ECA Amount) to implement the ECA set forth in Attachment B. The Settling Respondent understands that its promise to implement the ECA, in its entirety and in accordance with the schedule for implementation, is a material condition of this settlement of liability between the Settling Respondent and the Regional Water Board.
- b. The Settling Respondent agrees to (1) spend the ECA Amount as described in this Stipulation and Order, (2) provide certified, written report(s) to the Regional Water Board consistent with the terms of this Stipulation and Order detailing ECA implementation, and (3) within 30 days of ECA completion, provide a certification by a responsible official, signed under penalty of perjury, that the Settling Respondent followed all applicable environmental laws and regulations in implementing the ECA, including the California Environmental Quality Act (CEQA), Porter-Cologne Act, and the federal Clean Water Act. The Settling Respondent further agrees that the Regional Water Board has the right to require a third-party audit of the funds expended to implement the ECA at the Settling Respondent's cost, and that the Settling

Respondent bears ultimate responsibility for meeting all deadlines specified in Attachment B.

13. **Publicity Associated with the ECA:** Whenever Settling Respondent or its agents or subcontractors publicize one or more elements of the ECA, they shall state in a **prominent manner** that the project is undertaken as part of a settlement to a Regional Water Board enforcement action against the Settling Respondent.

14. **Progress Reports and Inspection Authority:** The Settling Respondent shall provide reports describing progress with implementing the ECA to the Regional Water Board as described and as scheduled in Attachment B. The Settling Respondent agrees that Regional Water Board staff, or its third party oversight staff, have permission to inspect the ECA at any time without notice.

15. **Certification of ECA Completion:** On or before October 31, 2017 (ECA Completion Date), a responsible official of the Settling Respondent shall submit a final report and certified statement which documents the Settling Respondent's expenditures during the ECA completion period and documents that the Settling Respondent completed the ECA in accordance with the terms of this Stipulation and Order. 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. Documentation of ECA completion may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the Regional Water Board to evaluate ECA completion and the costs incurred. The Settling Respondent shall provide Regional Water Board staff with any additional information that is reasonably necessary to verify the Settling Respondent's ECA expenditures and completion.

16. **Regional Water Board Acceptance of Completed ECA:** Upon the Settling Respondent's satisfaction of its obligations under this Stipulation and Order, ECA Completion, and any audits, the Executive Officer will issue a "Satisfaction of Order." The Satisfaction of Order shall terminate any further obligations of the Settling Respondent under this Stipulation and Order and permanently suspend the remaining penalty amount.

17. **Failure to Expend All Suspended Funds on the Approved ECA:** If the Settling Respondent is not able to demonstrate to the reasonable satisfaction of the Executive Officer that the entire ECA Amount was spent on the completed ECA, the Settling Respondent shall pay the difference between the ECA Amount and the amount the Settling Respondent can demonstrate was actually spent on the ECA (the Difference). The Executive Officer shall issue a "Notice of Violation" that will require Settling Respondent to pay the Difference to the State Water Pollution Cleanup and Abatement Account within 30 days of the Notice of Violation's issuance date. The Settling Respondent shall submit payment consistent with the payment method described in paragraph 9.b.i. Payment of the Difference shall satisfy the Settling Respondent's obligations to implement the ECA.

18. **Failure to Complete the ECA:** If the ECA is not fully implemented by the ECA Completion Date, or if there has been a material failure to satisfy a project milestone, the Executive Officer shall issue a Notice of Violation. The amount of suspended liability owed shall be determined via a Motion for Payment of Suspended Liability before the Regional Water Board or its delegate. The Settling Respondent shall be liable to pay the entire ECA Amount, or, if shown by the Settling Respondent, some portion thereof less the value of any completed milestones as stipulated to by the Parties in writing, or as determined by the Motion for Payment of Suspended Liability. Unless the Regional Water Board or its delegate determines otherwise, the Settling Respondent shall not be entitled to any credit, offset, or reimbursement from the Regional Water Board for expenditures made on the ECA prior to the Notice of Violation's issuance date. Within 30 days of the Regional Water Board's or its delegate's determination of the suspended liability amount assessed for the Settling Respondent to pay, the Settling Respondent shall submit payment to the State Water Pollution Cleanup and Abatement Account consistent with the payment method described in paragraph 9.b.i. Payment of the assessed amount shall satisfy the Settling Respondent's obligations to implement the ECA.

19. **Water Board is not Liable:** Neither the Water Board members nor the 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, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulation and Order, nor shall the Water Board, its members or staff be held as parties to or guarantors of any contract entered into by Settling Respondent, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulation and Order.

20. **Enforcement Considerations for Unplanned Discharge(s) from ECA Replaced Main:** The Regional Water Board agrees to consider any future unplanned discharges from the ECA replaced main in light of the following factors, consistent with the 2010 Enforcement Policy notwithstanding any future revision to the Enforcement Policy:

- a. **Deviation from Requirement.** An unplanned discharge from the ECA replaced main should be considered a minor deviation from a regulatory requirement because the purpose of the ECA is to reduce the likelihood of such discharge.
- b. **Culpability.** An unplanned discharge by its very nature should be considered a non-negligent discharge except when Cal Water, or its agent(s), took action or failed to act in a manner that caused or exacerbated the unplanned discharge.
- c. **Cleanup and Cooperation.** Adherence to the terms of this Stipulation, including timely notification to all relevant agencies of an unplanned discharge and timely performance of all applicable cleanup, monitoring and assessment, should reflect a high degree of cooperation.

- d. **Economic Benefit.** Cal Water will not derive any savings or avoid any costs for an unplanned, non-negligent discharge from the ECA replaced main because Cal Water will have replaced that main substantially earlier than what would have otherwise occurred.

21. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board under the terms of this Stipulation and 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 Order.

22. **Compliance with Applicable Laws:** Settling Respondent understands that payment of administrative civil liability in accordance with the terms of this Stipulation and Order and/or compliance with the terms of this Stipulation and 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.

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

For the Regional Water Board:

Habte Kifle
San Francisco Bay Regional Water Quality
Control Board
1515 Clay Street, 14th Floor
Oakland, CA 94612
Habte.Kifle@waterboards.ca.gov
(510) 622-2371

For CDFW:

Wendy Johnson
California Department of Fish and Wildlife
Office of Spill Prevention and Response
1700 K Street, Suite 250
Sacramento, CA 95811
wendy.johnson@wildlife.ca.gov
(916) 324-5660

For Settling Respondent:

Anthony Carrasco
District Manager
California Water Service Company
341 North Delaware St,
San Mateo, CA 94401
acarrasco@calwater.com
(650) 333-6370 mobile
(650) 558-7820 office

Lynne McGhee
General Counsel
California Water Service Company
1720 North First St.
San Jose, CA 95112
lmcghee@calwater.com
(408) 367-8228

24. **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.

25. **Matters Addressed by this Stipulation:** Upon adoption of the Order incorporating the terms set forth herein, this Stipulation represents a final and binding

resolution and settlement of all claims, violations, or causes of action alleged herein. The provisions of this paragraph are expressly conditioned on Settling Respondent's full payment of the stipulated administrative civil liability, and satisfactory completion of ECA(s) in lieu of payment of the full stipulated liability amount, by the deadlines specified above.

26. **No Admission of Liability:** In settling this matter, Settling Respondent 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, with the understanding that in the event of any future enforcement actions by the Regional Water Board, the State Water Board or any other Regional Water Quality Control Board, this Stipulation and Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327 or section 13385, subdivision (e).

27. **Public Notice:** The Parties understand that this Stipulation and Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board or its delegate. In the event objections are raised during the public review and comment period, the Regional Water Board or its delegate may, under certain circumstances, require a public hearing regarding the Stipulation and Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the proposed Order as necessary or advisable under the circumstances. If significant new information is received during the public review and comment period that reasonably affects the propriety of presenting this Stipulation and Order to the Regional Water Board or its delegate for adoption, the Assistant Executive Officer may unilaterally declare this Stipulation void and decide not to present it to the Regional Water Board or its delegate.

28. **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 delegate, 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.

29. **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.

30. **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 delegate.

31. **If the Order Does Not Take Effect:** In the event that the 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 (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 violation(s), 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 the following:

- 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 violation 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.

32. **Waiver of Hearing:** 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 Order.

33. **Waiver of Right to Petition or Appeal:** Settling Respondent 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.

34. **Covenant Not to Sue:** 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 expressly addressed by this Stipulation and Order.

35. **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.

36. **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.

37. **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

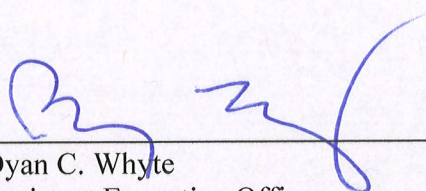
shall be deemed to be an original signature and shall be binding on such Party to the same extent as if such facsimile or electronic signature were an original signature.

38. **Effective Date:** This Stipulation is effective and binding on the Parties upon the entry of this Order by the Regional Water Board, or its delegate, which incorporates the terms of this Stipulation.

IT IS SO STIPULATED.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION, PROSECUTION TEAM**

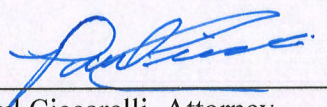
Date: June 13, 2016

By: 

Dyan C. Whyte
Assistant Executive Officer

Approved as to Form:

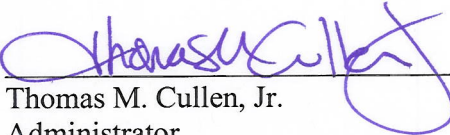
Date: June 13, 2016

By: 

Paul Ciccarelli, Attorney
State Water Resources Control Board
Office of Enforcement

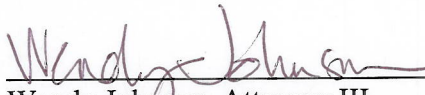
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

Date: June 13, 2016

By: 
Thomas M. Cullen, Jr.
Administrator
Office of Spill Prevention and Response

Approved as to Form:

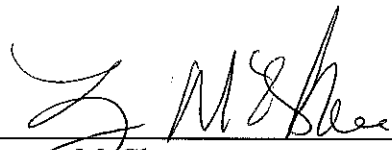
Date: June 13, 2016

By: 
Wendy Johnson, Attorney III
Office of Spill Prevention and Response

Settlement Agreement and Stipulated Administrative Civil Liability
California Water Service Company

CALIFORNIA WATER SERVICE COMPANY

Date: June 9, 2016

By: 

Lynne McGhee
VP, General Counsel

ORDER OF THE REGIONAL WATER BOARD

39. This Order incorporates the foregoing Stipulation.

40. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in Water Code section 13327 or 13385, subdivision (e), and has applied the Penalty Calculation Methodology set forth in the State Water Resource Control Board's Enforcement Policy, which is incorporated herein by this reference. The Regional Water Board's consideration of these factors and application of the Penalty Calculation Methodology 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. In addition to these considerations, this Order recovers staff costs incurred by the Regional Water Board for this matter.

41. 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 (Public Resources Code, § 21000 et seq.) in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations. Additionally, this Order generally accepts the plans proposed for the ECA(s) prior to implementation. Mere submittal of plans is exempt from CEQA as submittal will not cause a direct or indirect physical change in the environment.

42. The Stipulation and Order are severable; should any provision be found invalid the remainder shall be in full force and effect.

43. The Executive Officer of the Regional Water Board is authorized to refer this matter directly to the Attorney General for enforcement if California Water Service Company fails to perform any of its obligations under the Order.

IT IS HEREBY ORDERED pursuant to Water Code section 13323 and Government Code section 11415.60, on behalf of the California Regional Water Quality Control Board, San Francisco Bay Region.

Bruce H. Wolfe
Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region

Date

Attachment A: Administrative Civil Liability Complaint R2-2014-1030
Attachment B: Enhanced Compliance Action Description

ATTACHMENT A

**ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT R2-2014-1030**

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

**COMPLAINT R2-2014-1030
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF**

**CALIFORNIA WATER SERVICE COMPANY
UNAUTHORIZED DISCHARGE OF CHLORAMINATED POTABLE WATER TO
POLHEMUS AND SAN MATEO CREEKS
SAN MATEO COUNTY**

This complaint assesses an administrative civil liability (Complaint) pursuant to California Water Code section 13385 to California Water Service Company (hereinafter Discharger) for an unauthorized discharge of approximately 8,207,560 gallons of potable water with up to 2.6 milligrams per liter (mg/L) of residual choramines from its water main along Polhemus Road to Polhemus Creek and San Mateo Creek, located in the City of San Mateo. A \$3,060,700 liability is proposed for the alleged Water Code violation.

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) hereby gives notice that:

1. The Discharger is alleged to have violated provisions of law for which the Regional Water Board may impose civil liability pursuant to California Water Code section 13385. This Complaint is issued under Water Code section 13323 and proposes to assess \$3,060,700 in penalties for the violations cited based on the considerations described herein.
2. Unless waived, the Regional Water Board will hold a hearing on this matter on February 11, 2015, in the Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, 94612. You or your representative(s) will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of civil liability by the Regional Water Board. You will be mailed an agenda approximately ten days before the hearing date. You must submit all comments and written evidence concerning this Complaint to the Regional Water Board not later than 5 p.m. on December 17, 2014, so that such comments may be considered. Any written evidence submitted to the Regional Water Board after this date and time will not be accepted or responded to in writing.
3. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for judicial civil liability. You can waive your right to a hearing to contest the allegations contained in this Complaint by signing and submitting the waiver and paying the civil liability in full or by taking other actions as described in the waiver form.

ALLEGATIONS

4. The Discharger is a water purveyor and operates a drinking water system in San Mateo County, California. The Discharger operates and maintains a potable water main located along

Polhemus Road and Polhemus Creek, in the City of San Mateo. Polhemus Creek is a tributary of San Mateo Creek, and both are waters of the State and of the United States.

5. From October 25 through October 29, 2013, the Discharger discharged approximately 8,207,560 gallons of potable water from a cracked bell joint in a 12-inch diameter water main buried 10 to 12 feet below the west side shoulder of Polhemus Road, along the bank of Polhemus Creek. The discharge flowed laterally underground until it surfaced at the bank of Polhemus Creek. The discharge then it flowed into Polhemus Creek and downstream approximately 0.3 miles into San Mateo Creek.
6. The discharge contained up to 2.6 milligrams per liter (mg/L) of residual chloramines, which is over 100 times the U.S. Environmental Protection Agency's acute water quality criterion (0.019 mg/L). The chloraminated water killed at least 276 fish in San Mateo Creek, including 70 rainbow trout/steelhead, 94 Sacramento sucker, 96 sculpin and 16 stickle-back.
7. The dead fish were first observed in San Mateo Creek on October 29, 2013, by San Francisco Public Utilities Commission (SFPUC) biologists, about 0.8 miles downstream of the confluence of Polhemus and San Mateo Creeks (see SFPUC memo dated November 1, 2013). California Department of Fish and Wildlife (CDFW) staff collected the dead fish on October 29 and 30, and November 1, 2013. Some of the dead fish were found displaced and stranded outside of the wet channel, likely due to the temporary increase in flow resulting from the discharge. SFPUC notified the Regional Water Board of the dead fish at approximately 9:30 a.m. on October 29, 2013.
8. The discharge also caused significant bank erosion and sedimentation at the discharge site and downstream (see photographs 3-7 of Regional Water Board staff inspection report photographs dated November 1, 2013, documenting erosion and turbid water observed). The discharge rate for the chloraminated water release was approximately 2,280 gallons per minute, almost seven times higher than ambient creek flows. These increased flows eroded the stream bed and banks thereby increasing turbidity and depositing sediment downstream. High turbidity can impair the feeding ability of fish and interfere with fish respiration; excessive sedimentation can impair fish spawning and rearing habitats.
9. The discharge began at approximately 11:30 p.m. on October 25, 2013. The Discharger's automatic supervisory control and data acquisition (SCADA) system generated notifications of a suction pressure drop in the vicinity of the discharge as early as 11:51 p.m. on October 25, 2013. However, the Discharger did not thoroughly investigate the cause of this pressure drop, instead attributing it to algae clogged meter screens in the supply line owned and operated by SFPUC, which supplies the Discharger's lines near the discharge site. The Discharger did not contact SFPUC to inquire about potential algal clogging, and the discharge and SCADA notifications continued.
10. The discharge occurred along a relatively steep and heavily vegetated section of Polhemus Creek. Although visible to an observer standing on the road shoulder, the discharge may have been difficult to see from a vehicle. At least one Discharger staff member failed to observe the discharge between October 25 and October 28. A Discharger staff member finally discovered the discharge at approximately 9:00 a.m. on October 28, 2013. The Discharger closed the main

valve and stopped the discharge at approximately 9:45 a.m. on October 28, and then took steps to repair the broken water main.

11. Upon discovery of the discharge, the Discharger placed de-chlorination tablets in the path of the seeping water on the bank above Polhemus Creek, and visually inspected and collected water samples from the creek within approximately 500 yards of the discharge point.
12. The Discharger did not notify the Regional Water Board or other resource agencies until the afternoon of October 29, 2013, after being notified by SFPUC of the dead fish downstream. By that time, SFPUC had already contacted the Regional Water Board.
13. The Discharger initially indicated that the spill was less than 50,000 gallons, and occurred during one day. Regional Water Board staff responded to the Discharger on October 30, 2013, and required the Discharger to submit a spill report within 5 working days.
14. On November 1, 2013, Regional Water Board staff inspected the discharge and observed significant damage due to creek bank scouring. SFPUC prepared a report the same day documenting the scope of the fish kill.
15. On November 6, 2013, the Discharger submitted a spill report indicating the discharge to be limited to 43,200 gallons over a period of one day. Based on the magnitude of the creek bank scour observed during the November 1 site inspection, and on the documented fish kill, Regional Water Board staff asked the Discharger to thoroughly investigate its records, including flow meters and pressure gauges, and resubmit a spill report by November 14.
16. On November 18, 2013, the Discharger submitted a revised spill report stating that, based on the SCADA readings, the discharge occurred from October 25 through October 29, and totaled 8,207,560 gallons.

ALLEGED VIOLATIONS

17. The Discharger violated Water Code section 13376, Clean Water Act section 301 and the Water Quality Control Plan for the San Francisco Bay Region by discharging approximately 8,207,560 gallons of potable drinking water containing up to 2.6 mg/L of chloramine into Polhemus Creek and San Mateo Creek on October 25 to 29, 2013.

LEGAL AUTHORITY

18. Water Code section 13376 prohibits the discharge of pollutants or dredged or fill materials to navigable waters of the United States except as authorized by waste discharge requirements or dredged or fill material permits. A person who violates Water Code section 13376 is liable civilly under Water Code section 13385, subdivision (a)(1).
19. The Regional Water Board's Water Quality Control Plan for the San Francisco Bay Region, Chapter 4, Table 4-1, prohibition 1, prohibits discharges with "particular characteristics of concern to beneficial uses ... to any non-tidal water" The Regional Water Board issued the

prohibition pursuant to Water Code section 13243. A person who violates prohibitions issued pursuant to Section 13243 is liable civilly under Water Code section 13385, subdivision (a)(4).

20. Section 301 of the Federal Water Pollution Control Act (“Clean Water Act”) (33 U.S.C. § 1311) prohibits the discharge of pollutants to waters of the United States except in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit. A person who violates Clean Water Act section 301 is liable civilly under Water Code section 13385, subdivision (a)(5).
21. Water Code section 13385, subdivision (c), authorizes the Regional Water Board to impose administrative civil liability for violations of section 13385, subdivision (a), in an amount not to exceed the sum of both of the following (1) ten thousand dollars (\$10,000) for each day in which each 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.
22. Pursuant to Water Code section 13385, subdivision (e), in determining the amount of any civil liability imposed under section 13385, subdivision (c), the Regional Water Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
23. On November 17, 2009, the State Water 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. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code sections 13327 and 13385(e). The entire Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11179.pdf
24. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, Title 14, section 15321.
25. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to “actions” and “special proceedings” and are contained in the Code of Civil Procedure apply to judicial proceedings, not administrative proceeding. (See *City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, Section 405(2), p. 510.)

PROPOSED CIVIL LIABILITY

26. **Maximum Liability:** The violation occurred over 4 days, and the volume discharged but not cleaned up is estimated at 8,207,560 gallons. Therefore, the maximum administrative civil liability the Regional Water Board may impose is \$82,105,600.
27. **Minimum Liability:** According to Water Code section 13385, subdivision (e), at a minimum, liability shall be assessed at a level that recovers the economic benefit or saving, if any, derived from the violations.
28. **Proposed Liability:** Based on consideration of the above facts, after applying the Enforcement Policy penalty methodology as set forth in Exhibit A, the Assistant Executive Officer of the Regional Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of \$3,060,700.
29. Notwithstanding the issuance of this Complaint, the Regional Water Board and/or the State Water Board shall retain the authority to assess additional penalties for further unauthorized discharge for which penalties have not yet been assessed or for violations that may subsequently occur.



Dyan C. Whyte
Assistant Executive Officer

November 17, 2014

Date

Exhibit A –Factors Considered to Determine Administrative Civil Liability

EXHIBIT A

Alleged Violations and Factors Considered in Determining Administrative Civil Liability for California Water Service Company Unauthorized Discharge of Chloraminated Potable Water to Polhemus and San Mateo Creeks, San Mateo County

The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability based on the factors in Water Code sections 13327 and 13385 subdivision (e).

Each factor in the Enforcement Policy and its corresponding category, adjustment, or amount for the alleged violation is presented below.

ALLEGED VIOLATION

For five consecutive days, October 25 to October 29, 2013, the California Water Service Company (Cal Water) released approximately 8,207,560 gallons of potable water with up to 2.6 milligrams per liter (mg/L) of residual chloramines to Polhemus Creek and San Mateo Creek in violation of the Water Quality Control Plan for the San Francisco Bay Basin, Chapter 4, Prohibition 1, Water Code section 13376, and Section 301 of the Clean Water Act (33 U.S.C. § 1311). The discharge resulted from a cracked bell joint in a 12-inch-diameter water main buried 10 to 12 feet below the west side shoulder of Polhemus Road in the City of San Mateo.

ADMINISTRATIVE CIVIL LIABILITY CALCULATION STEPS

Step 1 – Potential for Harm for Discharge Violations

The “potential harm” factor considers the harm to beneficial uses that resulted, or 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).

For the violation, the potential harm to beneficial uses is **above moderate (i.e., a score of 4)**. The discharge contained up to 2.6 mg/L residual chloramine, which is over 100 times the U.S. EPA’s acute water quality criterion of 0.019 mg/L. The chloraminated water killed at least 276 fish, including 70 rainbow trout /steelhead, 94 Sacramento sucker, 96 sculpin, and 16 stickleback in San Mateo Creek. The dead fish were first observed on October 29, 2013, by San

Francisco Public Utilities Commission (SFPUC) biologists in San Mateo Creek, about 0.8 miles downstream of the confluence of Polhemus and San Mateo creeks (See Attachment A, SFPUC biologist memo dated November 1, 2013). The California Department of Fish and Wildlife warden and biologists collected the dead fish on October 29 and 30, and November 1, 2013. Some of the dead fish were found displaced and stranded outside of the wet channel likely due to the temporary increase in flow resulting from the discharge.

Additionally, the discharge also caused significant bank erosion in Polhemus Creek and subsequently sediment deposition in both Polhemus and San Mateo creeks. (See photographs 3-7 of Attachment B, Regional Water Board staff inspection report photographs dated November 1, 2013, documenting erosion and turbid water observed.) The average discharge flow rate was approximately 2,280 gallons per minute¹, which is almost seven times higher than the ambient creek flow rate². The increased discharge eroded the stream bed and banks thereby increasing turbidity and depositing sediment downstream. High turbidity can impair the feeding ability of fish and interfere with fish respiration; excessive sedimentation can impair fish spawning and rearing habitats.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics for the Discharge

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material.

For the violation, the risk or threat of the discharge is **moderate (i.e., a score of 2)**. The discharge was potable water with chloramine at concentrations up to 2.6 mg/L. Chlorine or chloramine exhibits toxicity to aquatic life even at low concentrations, and the U.S. EPA Water Quality Criterion for chlorine or chloramine to prevent acute (lethal) effects to aquatic life is 0.019 mg/L.

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.

For the violation, the discharge was **not susceptible to cleanup or abatement (i.e., factor of 1)**. The discharged material flowed into and commingled with ambient water flowing in Polhemus and San Mateo creeks. The discharge occurred at the top of the Polhemus Creek bank and less than 0.3 mile from the confluence with San Mateo Creek.

¹ Average discharge flow rate was calculated based on a total discharge volume of 8.21 million gallons occurring over a period of approximately 60 hours.

² Based on the United States Geological Survey's flow gauge data, the average water flow rate of San Mateo Creek upstream of the confluence of Polhemus Creek between October 25 and 29, 2013, was approximately 0.79 cubic feet per second or 355 gallons per minute. The creek ambient flow data was obtained at <http://waterdata.usgs.gov/ca/nwis>, USGS 11162753 San Mateo C BL LO Crystal Spring RES NR San Mateo California.

Step 2 – Assessments for Discharge Violations

When there is a discharge, the Regional Water Board determines an initial liability amount on a per-gallon and/or a per-day basis using the sum of the Potential for Harm scores from Step 1 and a determination of degree of Deviation from Requirement.

For the violation, the sum of the three factors from Step 1 is 7. The degree of Deviation for the violation is **moderate**. The requirement violated involved, among other things, a discharge of pollutants without authorization. The intent of this requirement is to allow the Regional Water Board an opportunity to issue a permit establishing discharge requirements to protect water quality and beneficial uses. The discharge was unintentional, so failure to obtain a permit only partially compromised the effectiveness of the requirement. This is because had the Discharger applied and received a permit, the discharge would have likely violated the permit. Moreover, the general prohibitions on discharges to any non-tidal water and discharges without an NPDES permit were only partially compromised, because Cal Water was not permitted and was not under specific order prohibiting the discharge. The application of the "moderate" deviation factor here is due to the unique circumstances of this case, and is not intended to be precedential.

For the violation, the Water Board Prosecution Staff used both per-gallon and per-day factors. The resulting per-gallon and per-day multiplier factor is 0.2, based on a Potential for Harm score of 7 and a "**moderate**" Deviation from Requirement.

Initial Liability Amount

The Enforcement Policy allows for an adjusted maximum per gallon assessment for "High Volume Discharge." This discharge qualifies as a high volume discharge because it is similar to recycled water and reducing the maximum amount does not result in an inappropriately small penalty. So, a maximum \$1 per gallon is used to determine the initial liability. The initial liability for the violation is calculated on a per-gallon and per-day basis as follows:

Per Gallon Liability: $(8,206,560 \text{ gallons}) \times (0.2) \times (\$1/\text{gallons}) = \$1,641,312$

Per Day Liability: $\$10,000/\text{day} \times (0.2) \times (5 \text{ days}) = \$10,000$

Total Initial Liability = \$1,651,312

Step 3 – Per Day Assessment for Non-Discharge Violations

This assessment is for a discharge violation. Step 3 applies to non-discharge violations.

Step 4 – Adjustments to Determine Initial Liability for Violation

There are three additional factors to be considered for modification of the amount of the initial liability: the violator’s culpability, efforts to clean up the discharge or cooperate with regulatory authority, and the violator’s compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used, with a higher multiplier for negligent behavior.

For the violation, the culpability multiplier is **1.2**, because Cal Water did not exercise reasonable care in reacting to a pressure drop it detected on October 25, 2013, the first day of the discharge. The discharge continued until a Cal Water operator noticed water surfacing through the road bed on Polhemus Road and took actions to stop and fix the problem. At least one Cal Water inspector failed to observe the discharge during inspections between October 25 and October 28. Moreover, Cal Water’s supervisory control and data acquisition (SCADA) system had sent notifications to its operators and managers of a suction pressure drop for pump MPS 26 beginning on October 25, 2013, at or around 11:51 p.m. Despite this notification, Cal Water did not thoroughly investigate the cause of the pressure drop and instead stated that it attributed the pressure drop to algae clogging meter screens on the supply line owned and operated by the SFPUC. Cal Water provided no evidence to support that this was a reasonable assumption to make at the time. Cal Water also did not consult with SFPUC staff at the time about its suspicion of algal growth or screen clogging within the SFPUC supply system³. Evidence shows that Cal Water staff did not contact SFPUC until October 28, 2013, after it discovered the discharge (based on Cal Water’s June 14, 2014, additional information report). SFPUC then sent crews to inspect its own system on the same day it received a call from Cal Water and found no problem within SFPUC’s system and communicated its findings to Cal Water crews working to repair the broken pipeline at the shoulder of Polhemus Road.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is used, with a higher multiplier when there is a lack of cooperation.

For the violation, the cleanup and cooperation factor multiplier is **1.4**.

Given the relative proximity of the discharge point to Polhemus and San Mateo creeks, there was little opportunity to “cleanup” or mitigate impacts to the creeks. Cal Water did deploy dechlorination tables in its response on October 28, 2013, immediately prior to closing the valve and stopping the discharge. Cal Water did not inspect far downstream on Polhemus Creek, and it

³ On August 6, 2014, Water Board asked Cal Water to provide all communication records between SFPUC and Cal Water staff between October 25 and October 28, 2013, concerning clogging of meter screens and algal bloom in SFPUC’s water supply system. Cal Water could provide no such records.

did not inspect San Mateo Creek at all, and Cal Water did not make any attempts to place dechlorination tablets in the creeks.

Overall, Cal Water's cooperation in the investigation was poor. First, it did not thoroughly review past records to accurately and timely report the incident. Second, it was not forthcoming with information to Water Board staff which impeded Water Board staff's investigation and assessment of the extent and impacts of the discharge. Details of each are as explained below:

- (1) Cal Water discovered the discharge on October 28, 2013, at or around 9:00 a.m., but did not thoroughly review its records to accurately determine the full magnitude and potential for harm from the discharge. It simply assumed the discharge occurred for only one day at 20 to 30 gallons per minute based on visual observations. Because of this incorrect assumption, its inspection of Polhemus Creek involved just the immediate area within 500 yards of the discharge point.
- (2) Cal Water did not timely notify the Water Board or other resource agencies of the discharge after it discovered the discharge. Cal Water only provided notice to the Regional Water Board 5 hours after it was notified by the SFPUC on October 29, 2013, at or around 9:30 a.m., that SFPUC biologists had discovered dead fish during a routine fish population survey in San Mateo Creek. These dead fish were about 1.1 mile downstream of the discharge point.
- (3) On October 29, 2013, at or around 2:30 p.m., Water Board staff received a telephone message from Dale Gonzales with Cal Water of the discharge indicating that the estimated volume was less than 50,000 gallons for one day, and that the SFPUC had found dead fish downstream. Water Board staff responded to Mr. Gonzales' message on October 30, 2013, and required Cal Water to submit a spill report within five working days.
- (4) On November 1, 2013, Water Board staff inspected the scene and observed significant creek bank erosion from the incident. Water Board staff asked Mr. Tony Carrasco, Cal Water's District Manager, how it determined the volume to be 43,200 gallons and duration to be only one day considering the significant amount of erosion. Mr. Carrasco said Cal Water inspects the local control system every day around 9:15 a.m. Based on this inspection routine, Mr. Carrasco indicated that Cal Water's operator, Mr. Mike Utz, inspected the local control system on Sunday, October 27, 2013, around 9:15 a.m., and Mr. Utz did not notice or observe any leak that day. Mr. Carrasco further indicated that Mr. Utz discovered the leak on Monday, October 28, 2013, around 9:15 a.m. during the routine daily inspection. Mr. Utz was not available for an interview during the scheduled site inspection for Water Board staff to verify the information.⁴ Mr. Carrasco added that Cal Water staff had spoken with Mike Weisenberger with the SFPUC about the incident.

⁴ Water Board staff later learned that Mr. Carrasco's above statement was in error. In fact, the discharge was discovered by Cal Water Operator Mr. Alex Tomaloff not Mr. Utz based on Cal Water's June 4, 2014, submittal. Mr. Utz is the local manager for the Bayshore area, and not on duty operator during the days of discharge.

Upon returning from the site inspection on November 1, Water Board staff contacted Mr. Weisenberger (SFPUC) to ask if he was contacted by Cal Water staff the week of October 20 – 25, and to ask about the nature of the communication. Mr. Weisenberger confirmed that he was contacted by Cal Water but could not remember the exact date only that it was on a weekday. Mr. Weisenberger further indicated that Cal Water staff had asked about a pressure drop in the system, and, following the Cal Water phone call, he sent his inspector to check SFPUC's system and found no problem.

- (5) On November 6, 2013, Cal Water submitted the spill report for the incident reporting it as 43,200 gallons for one day. However, based on Water Board staff inspection observation of significant creek bank scouring, the magnitude of the fish kill, and evidence from SFPUC staff that Cal Water operators had observed a pressure drop in its system, Water Board staff required Cal Water to thoroughly investigate its records, including flow meters and pressure gauges, and resubmit a spill report by November 14, 2013.
- (6) On November 18, 2013, Cal Water resubmitted a spill report that revised its discharge to approximately 8,207,560 gallons and for five days. The revised values were based on Cal Water SCADA readings.
- (7) On April 3, 2014, Water Board staff required that Cal Water provide copies of its records including its SCADA data, a chronological account of Cal Water personnel actions and communications just before and during the incident, and a narrative explanation of what happened.
- (8) On May 15, 2014, Water Board staff served Cal Water with a subpoena for the information it requested on April 3, 2014, after several reminders and waiting a reasonable time for the information and not receiving it.
- (9) On June 4, 2014, Cal Water submitted the additional information and records originally requested by Water Board staff on April 3, 2014.
- (10) On August 6, 2014, Water Board staff requested Cal Water provide clarification and additional records to substantiate some of the statements it made in its June 4 submittal.
- (11) On August 11, 2014, Cal Water provided the additional records and clarifications requested, but only after at least six reminders from Water Board staff.

History of Violations

This factor is used to increase the liability when there is a history of repeat violations using a minimum multiplier of 1.1.

For the violation, the history factor multiplier is **1.1** because Cal Water had a similar violation in the past. In 2009, the Water Board issued administrative civil liability Order R2-2009-0006

against Cal Water imposing a \$200,000 fine for an unplanned discharge of chlorinated potable water to Polhemus Creek that also resulted in a fish kill.

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.

Total Base Liability Amount

Total Base Liability = \$1,651,312 (Initial Liability) x 1.2 (Culpability Multiplier) x 1.4 (Cleanup and Cooperation Multiplier) x 1.1 (History of Violations Multiplier)

Total Base Liability = **\$3,051,625**

Step 6 – Ability to Pay and to Continue in Business

The Enforcement Policy provides that if the 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 if warranted.

In this case, the Water Board Prosecution Staff has sufficient information to suggest Cal Water has the ability to pay the proposed liability. Cal Water is the largest subsidiary of the California Water Service Group, which is the third largest investor-owned water utility in the United States. Cal Water Group has more than 490,000 customers, more than \$500 million in annual revenue, and more than \$1.5 billion in gross utility plant assets, compared to \$434 million in long-term debt, according to the corporation annual report. In 2013, Cal Water Group reported its annual net income of \$47.254 million.⁵ The proposed liability is about 6 percent of this net income.

Step 7 – Other Factors as Justice May Require

Regional Water Board prosecution staff incurred \$9,038 in staff costs to investigate this case and prepare this analysis and supporting information. This consists time spent by all members of the prosecution team based on the low end of the salary range for each classification. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing. Although the final amount for such costs cannot be determined until completion of the matter, such costs could be quite substantial when additional investigation and analysis is required or if there is a hearing on this matter before the Regional Water Board.

⁵ Financial data taken from California Water Service Group's 2013 Annual Report, page 27 (available at <http://ir.calwatergroup.com/getattachment/a2c7f9cf-bb3d-4504-a8f5-e9e849a1fc89/2013-Annual-Report>)

Step 8 – Economic Benefit

The Enforcement Policy directs the Water Board to determine any economic benefit associated with the violations and to recover the economic benefit gained plus 10 percent in the liability assessment.

We did not find evidence of significant economic benefit associated with the violation. The alleged violation was an accident without a direct cause associated with economic benefit. Reasonable diligence in investigating the cause of the pressure drop detected on October 25 would have resulted in earlier detection of the discharge, which in turn would have resulted in earlier outlay of funds to fix the break by four days and higher costs for completing the fix on a weekend. This time value savings and avoidance of higher weekend costs are negligible relative to the calculated Total Base Liability.

Step 9 – Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount*

The Enforcement Policy requires that the minimum liability amount imposed not to be below a Discharger's economic benefit plus 10 percent. The proposed liability is substantially more than Cal Water's economic benefit plus 10 percent. The mandatory minimum penalty statute does not apply to this discharge because it is unauthorized.

b) *Maximum Liability Amount*

The maximum administrative civil liability amount is the maximum amount allowed by Water Code section 13385: (1) \$10,000 for each day in which the violation occurs; and (2) \$10 for each gallons exceeding 1,000 gallons that is discharged and not cleaned up. The maximum liability for the violation is \$82,105,600.

Step 10 – Final Liability Amount

The final liability amount proposed is **\$3,060,700 (rounded)** for the discharge to Polhemus and San Mateo creeks of over 8 million gallons of chloraminated potable water on October 25 to 28, 2013. This amount is based on consideration of the penalty factors discussed above, it is the sum of the Total Base Liability plus staff costs, and it is within the maximum and minimum liability amounts.

Attachment A – SFPUC biologist memo dated November 1, 2013

Attachment B – Regional Water Board staff inspection photographs dated November 1, 2013

ATTACHMENT A

San Francisco Public Utilities Commission
Biologist Memo Dated November 1, 2013



Natural Resources and Lands Management Division
 Water Enterprise

November 1, 2013

On the morning of Tuesday, October 29th, just prior to conducting a routine fish population survey on San Mateo Creek, SFPUC biologists were notified by Britt Brown, an SFPUC CMB employee, that there were dead fish in the creek. He had noted the fish while overseeing contractors conducting routine vegetation maintenance along the creek bank, near Casey Quarry, just downstream of the CS2 transmission pipeline (Figure 1). SFPUC Biologists confirmed that there were 5 dead fish in the stream; one trout (*O. mykiss*) and four Sacramento Sucker (*C. occidentalis*) (Figure 2).

At this point, SFPUC biologists abandoned their population survey and began to survey the stream. From 0905 to 0935, SFPUC biologist Randall Renn entered the stream at Woodbridge Rd. and surveyed upstream for approximately 0.22 miles (Figure 1, Survey A). Along this reach, 19 dead fish were counted (Table 1) and five of those fish were noted as stranded on the stream bank (Figure 3). No aquatic vertebrates or invertebrates (crayfish) were noted. From 1025 to 1135, SFPUC biologist Aaron Brinkerhoff entered the stream at Crystal Springs Terrace and surveyed upstream for approximately 0.26 miles (Figure 1, Survey C). Along this reach, 30 dead fish were counted (Table 1), and no aquatic vertebrates or invertebrates (crayfish) were noted. Along both of these reaches, some fish were not intact and had appeared to be partially scavenged. Along survey reaches A and C, dead fish had also settled into debris piles at the bottom of pools.

At 1002, SFPUC biologist Randall Renn arrived at the Cal Water facility on Polhemus Rd. (Figure 1) and noted the ground appeared both saturated and recently graded (Figure 4). The creek bank just below the graded area was heavily eroded with large amounts of fine sediment observed in and around the creek and, what appeared to be, dechlorination tablets were observed placed in various locations along the eroded hillside (Figure 5). He then surveyed downstream along Polhemus Creek to the confluence of San Mateo Creek. No aquatic vertebrates or invertebrates (crayfish) were noted. He then proceeded upstream along San Mateo Creek, for a total of approximately 0.37 miles (Figure 1, Survey B), where numerous live fish, including trout, were noted.

From 1035 to 1105, SFPUC biologist Scott Taylor gathered water quality data at two locations on Polhemus Creek, up and downstream of the Cal Water Facility location, and at two locations on San Mateo Creek, up and downstream of the confluence with Polhemus Creek (Table 2).

Edwin M. Lee
 Mayor

Vince Courtney
 President

Ann Moller Caen
 Vice President

Francesca Vietor
 Commissioner

Anson Moran
 Commissioner

Art Torres
 Commissioner

Harlan L. Kelly, Jr.
 General Manager



SFPUC biologists did not inspect for aquatic insects. No reptiles or amphibians were noted within the surveyed reaches.

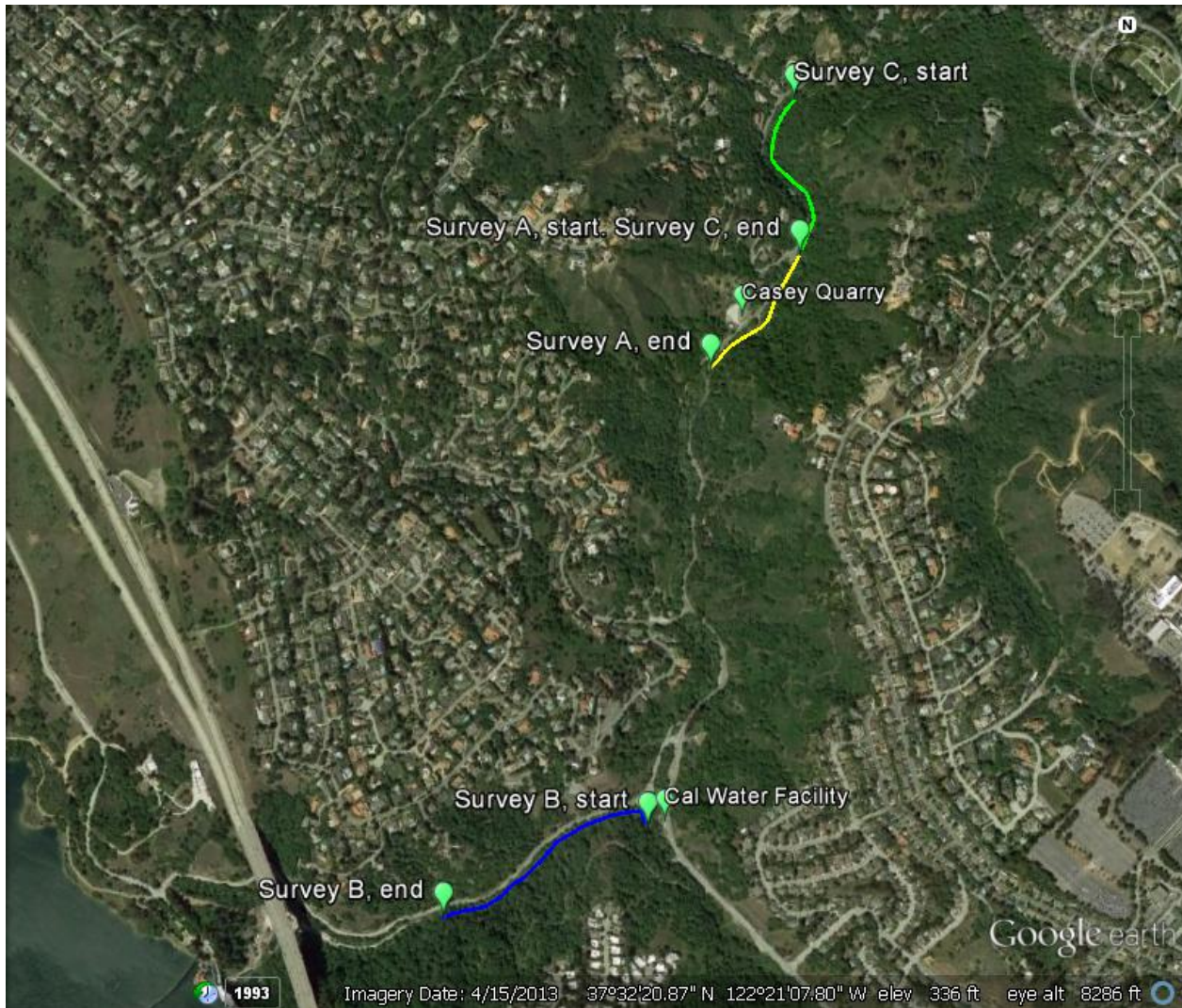


Figure 1. Locations of site incidents and survey reaches.



Figure 2. Dead fish noted by SFPUC employee Britt Brown, located just downstream of CS2 transmission line crossing San Mateo Creek.

Table 1. Total fish noted within survey reaches

Survey reach A	RTR	SSU	PSC	Total fish
mortalities	4	9	6	19
size ranges (mm)	85-175			
Survey reach C	RTR	SSU	PSC	Total fish
mortalities	10	12	8	30
size ranges (mm)	95-150			
Total mortalities observed				49



Figure 3. Dead trout (*O. mykiss*) noted stranded on the stream bank.



Figure 4. Cal Water facility on Polhemus Road, adjacent to Polhemus Creek, stream right.



Figure 5. Tablets noted in the eroded stream bank, just below the Cal Water facility on stream right of Polhemus Creek.

Table 2. Water quality data.

Time	Location	Temp	pH	DO	CL2
1035	Polhemus Creek- pool just downstream of Cal Water site	11.37	8.38	10.52	0.19
1050	Polhemus Creek- approx. 100ft. Upstream of Cal Water site				0.05
1055	San Mateo Creek- approximately 100 ft. upstream of Polhemus confluence	12.73	7.7	9.19	0.07
1105	San Mateo Creek- approximately 120 ft. downstream of Polhemus confluence	12.7	7.8	9.35	0.08

ATTACHMENT B

Regional Water Board Staff Inspection Photographs
November 1, 2013

Inspection Photographs
Chlorinated (Potable) Water Discharge to Polhemus and San Mateo Creeks
California Water Service Company

Taken by Habte Kifle on November 1, 2013

Photographs 1 and 2: The point of discharge, less than three feet from the top of Polhemus Creek bank. The green vegetation outlines the creek, and Cal Water's pump and control system that is inspected daily is right upgradient of the enclosure shown in the upper corner of photograph 2.



Photograph 3: Recent backfill of an erosion gully caused by the discharge.



Photographs 4 and 5: Recent erosion of creek banks downstream from the point of discharge (Photographs 1 and 2).



Photograph 6: A recent sediment deposition in a pool along Polhemus Creek, downstream of the point of discharge (Photographs 1 and 2).



Photograph 7: Vegetation in the flood zone flattened by the discharge.



Photograph 8: Arrows show the locations of three undissolved dechlorination tablets in the creek that were placed by a Cal Water spill response crew.



ATTACHMENT B

ENHANCED COMPLIANCE ACTION DESCRIPTION

ATTACHMENT B

**California Water Service Company
Proposal for Enhanced Compliance Action (ECA)
POL-A Polhemus Water Main Replacement Project
Project ID: POL-A**

1. **Project Title:** POL-A Polhemus Water Main Replacement Project (Project)
2. **Service Area:** Bayshore Region, San Mateo County
3. **Name of Responsible Entity:** California Water Service Company (Cal Water)
4. **Estimated Cost for Project Completion:** An overall Project estimated cost is **\$1,561,287** which includes **\$495,481** of suspended liability, provided the Project milestones are met and the Project is completed to the satisfaction of the Water Board by the specified date.

5. **Cal Water Contact Information:**

Tony Carrasco, District Manager
California Water Service Company
Bayshore District
341 North Delaware Street
San Mateo, CA 94401-1727
Tel. No.: (650) 558-7820
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6. **Project Goals and Description:** The Project involves replacing an aging water main near Polhemus Creek, with the goal of preventing potable water discharges that may adversely affect aquatic life. Cal Water will replace approximately 1,955 feet of existing cast iron pipe with polyvinyl chloride (PVC) pipe or polyethylene encased ductile iron pipe. Pipe sizes range from 8 to 16 inches. The PVC and polyethylene encased iron pipe material both have expected life span of about 100 years under normal use. Replacement of existing pipe will occur along Polhemus Road and the embankment of Polhemus Creek, near the confluence San Mateo Creek and Polhemus Creek in an unincorporated area of San Mateo County. The Project includes post-construction restoration, revegetation and stabilization of the work area to its native pre-construction condition. Completion of the Project may involve construction near and in jurisdictional water ways. Cal Water is responsible for compliance with State and/or federal regulatory permits and fees related to those jurisdictions, separate from its obligations under this ECA Project.
7. **Water Quality and Beneficial Uses:** The Project will help reduce or avoid impacts to aquatic wildlife and will protect the beneficial uses of Polhemus and San Mateo creeks. These creeks may support a variety of species, including California red-legged frog and federal endangered steelhead and rainbow trout. A leak from the pipe could damage the creek

and adjacent riparian habitat via the discharge of potable water with residual chlorine, turbidity, and sediment. The existing pipe was installed in the early and mid-1950s; over the last eight years two breaks have occurred in this section of the pipeline. The October 2013 incident is the subject of the Stipulation leading to this ECA.

- 8. Confirmation that the ECA contains only Measures that go Above and Beyond Applicable Obligations of the Discharger:** Cal Water is not under a prior obligation to replace the pipe described in this particular ECA Project, and funding for it is not included in the company's current rate case before the California Public Utilities Commission. Further, Cal Water explained that the Project does not meet standard replacement criteria for inclusion in a rate case with the California Public Utility Commission. For these reasons, the Project qualifies as an ECA.

- 9. Demonstration that the ECA Does not Directly Benefit, in a Fiscal Manner, a Water Board's Functions, its Members, or its Staff:** While the replacement of water mains in environmentally sensitive areas will advance the goals of the Regional Water Board in protecting water and riparian habitats from pollution and enhancing water quality, the funding of this ECA Project does not directly benefit, in a fiscal manner, a Regional Water Board's functions, its members, or its staff. Cal Water is funding of the Project is directly related to the alleged violations in the Water Board's Administrative Civil Liability. The Project will be implemented by Cal Water in the same region where the discharge that is the subject of this Settlement Agreement occurred. The Project does not advance a project or activity directly under the purview or under the direction of the Regional Water Board, its members, or staff, nor is it related to any abatement order or other legal or administrative mandate that was imposed upon the Regional Water Board.

- 10. Project Schedule, Milestones, and Deliverables:** Cal Water will be responsible for providing all deliverables described below for each phase of the Project.
 - a. **Pre-construction Permits:** No later than the due date indicated below, Cal Water shall provide documentation that it has applied for all appropriate permits from local, State, and federal regulatory agencies. Documentation may include but shall not be limited to grading permits from local agencies, Streambed Alteration Agreement from California Department of Fish and Wildlife, the Clean Water Act Section 401 Water Quality Certification from the Regional Water Board, and Clean Water Act Section 404 permit from the United States Army Corps of Engineers.
 - Deliverables: Copies of relevant permit applications to corresponding agencies
 - Due Date: **January 2, 2017**

- b. **Bidding and Contract Execution:** No later than the due date indicated below, Cal Water shall provide documentation of the executed contract, which shall include the following up-front work:
- i Successful project advertisement and bidding
 - ii Award of the construction contract, as approved by Cal Water's decision-making body.
 - iii CEQA exemption.

Because the Project is construction to replace existing utility systems and/or facilities that involve negligible or no expansion of capacity, the environmental clearance is anticipated to be categorical exclusion that will be processed at the time of the award of the construction contract, pursuant to CEQA Guidelines Sections 15301 – 15332, Class 2(c), or statutory exclusion pursuant to CEQA Section 21081.21.

- Deliverable: Project advertisement and bidding, CEQA exemption, and Executed Contract
 - Due Date: **March 31, 2017**
- c. **Construction:** No later than the due date indicated below, Cal Water shall provide documentation that it has issued the Notice to Proceed Construction.
- Deliverable: Notice to Proceed Construction
 - Due Date: **May 2, 2017**
- d. **Construction Schedule:** No later than the due date indicated below, Cal Water shall provide documentation that it has accepted the constructed pipe segment. The due date is based on construction work taking approximately three months.
- Deliverable: Construction acceptance
 - Due Date: **August 15, 2017**
- e. **Quarterly Progress Report:** Approximately 30 days after the end of each calendar quarter, Cal Water shall submit quarterly progress reports documenting the tasks completed during the previous quarter and an explanation for any incomplete task and a list of tasks to be completed and projected completion dates.
- Deliverable: Progress reports.
 - Due Dates: **February 1, May 2, August 1, October 31, 2017**
- f. **Final Report:** No later than the due date indicated below, Cal Water shall provide a final report documenting completion of the Project consistent with Stipulation, paragraph 15. The final report shall include a summary of all tasks completed, as-built plan(s), documentation of compliance with other applicable permits (e.g., photographs demonstrating restoration, revegetation and stabilization of work area to their native pre-construction condition), and accounting of all expenditures. The accounting must clearly document that the final cost of the ECA Project is equal to or more than the suspended liability of \$495,481. The report shall be completed under penalty of perjury.

- Deliverables: Final Report including the above information and the As-Built Plans, a Summary of Tasks Completed and Post-Construction Photographs, and the Post-Project Accounting with invoices
- Due Date: **October 31, 2017**

11. All deliverables, reports, and accounting invoices pertaining to this ECA Project must be submitted to Regional Water Board staff for review and approval.