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Secretary for
Environmental Protection

California Regional Water Quality Control Board San Diego Region



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9174 Sky Park Court, Suite 100, San Diego, California 92123-4353
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May 13, 2010

Certified Mail – Return Receipt
Article No. 7009 1410 0002 2347 4541

Glenn Pruiam, P.E.
Public Works Director
City of Carlsbad
1635 Faraday Avenue
Carlsbad, California 92008-7314

In reply refer to: Place ID 255223 fmelbourn

ADOPTION OF ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R9-2010-0008, ALLEGED VIOLATIONS OF SAN DIEGO MUNICIPAL STORM WATER PERMIT

Dear Mr. Pruiam:

Enclosed is Administrative Civil Liability Order No. R9-2010-0008 (Order) against the City of Carlsbad (City) that was adopted on May 12, 2010, by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board). The Order assessed a liability of \$47,647 against the City as negotiated in the joint City and San Diego Water Board settlement agreement. The City must submit a check to the San Diego Water Board in the amount of forty-seven thousand six hundred and forty-seven dollars (\$47,647) payable to the "State Water Resources Control Board" for deposit into the State Water Pollution Cleanup and Abatement Account within thirty (30) days of adoption of the Order. Failure to submit payment as required by this Order may result in the referral of this matter to the Attorney General for further enforcement.

Please contact Mr. Frank Melbourn of my staff at (858) 467-2973 or by e-mail at fmelbourn@waterboards.ca.gov if you have any questions concerning this matter. The heading portion of this letter includes a San Diego Water Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the San Diego Water Board pertaining to this matter.

Respectfully,

for James G. Smith, AEO
DAVID W. GIBSON
Executive Officer

California Environmental Protection Agency

Glenn Pruim, P.E.
ACL Order No. R9-2010-0008
Alleged Violations of Certification No. 06C-0007

Page 2 of 2

May 13, 2010

DWG:ftm

Enclosures: 1. ACL Order No. R9-2010-0008
2. Settlement Agreement

cc: Ronald Kemp, City Attorney, ronald.kemp@carlsbadca.gov
Yvonne West, Office of Enforcement, ywest@waterboards.ca.gov

File No. 18-2006007.02
CIWQS Place ID 629552
Reg. Measure No. 372975 (R9-2010-0008), 352928 (WQ Cert. No. 06C-007)
Party ID 302945
Person ID 302946

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

ORDER NO. R9-2010-0008

**IMPOSING
ADMINISTRATIVE CIVIL LIABILITY
PURSUANT TO SETTLEMENT AGREEMENT
AGAINST
CITY OF CARLSBAD
FOR ALLEGED VIOLATIONS OF
CLEAN WATER ACT § 401 WATER QUALITY CERTIFICATION ORDER
FOR TECHNICALLY-CONDITIONED CERTIFICATION
AND
WAIVER OF WASTE DISCHARGE REQUIREMENTS TO THE
CITY OF CARLSBAD
AGUA HEDIONDA CREEK EMERGENCY DREDGE PROJECT
CERTIFICATION NO. 06C-007**

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has been presented with a proposed settlement of claims for administrative civil liability against the City of Carlsbad (City). The settlement was developed during negotiations between the San Diego Water Board's Prosecution Staff and the City. This Administrative Civil Liability (ACL) Order and the attached Settlement Agreement (Agreement) resolve the alleged violations described in the August 11, 2008, Notice of Violation (NOV) No. R9-2008-0099 to the City through the payment of an administrative civil liability in the amount of \$47,647 and the compliance with certain mitigation requirements detailed herein. The NOV specifically alleged violations of Clean Water Act section 401 Water Quality Certification Order for Technically-Conditioned Certification and Waiver of Waste Discharge Requirements issued to the City for the Agua Hedionda Creek Emergency Dredge Project, dated March 2, 2006 (WQ Certification No. 06C-007).

In accepting the proposed settlement, the San Diego Water Board has considered each of the factors prescribed in Water Code section 13385, as set out more fully below. The San Diego Water Board's consideration of these factors is based upon information obtained by the San Diego Water Board in investigating the claims or otherwise provided to the San Diego Water Board, including the information and comments received from the public. Such consideration recognized that the City purchased and directed previously purchased mitigation credit from the North County Habitat Bank to fulfill the mitigation requirements for WQ Certification No. 06C-007. In addition, the administrative civil liability will allow the San Diego Water Board to recover its staff costs in investigating the claims and pursuing an enforcement action.

A Notice of Proposed Settlement has been published in the San Diego Union-Tribune, a paper of general circulation in the San Diego area, notifying the public of the review period and soliciting public comments on the terms of the settlement. The proposed settlement supports the assessment of the administrative civil liability in the amount of \$47,647 and the implementation of the specified mitigation requirements for the full and final resolution of each of the claims and alleged violations set forth herein, and is in the public interest.

HAVING PROVIDED PUBLIC NOTICE OF THE PROPOSED SETTLEMENT FOR PUBLIC COMMENT, THE SAN DIEGO WATER BOARD FINDS:

1. Alleged Violations of San Diego Water Board issued WQ Certification No. 06C-007 for Failure to Complete Mitigation Requirements

The following represents a summary of the facts and alleged violations as they appear in the files of the San Diego Water Board.

The City failed to construct and complete mitigation for all impacts that occurred during its project as required by WQ Certification No. 06C-007 for 814 days (October 1, 2007, to December 23, 2009). Specifically, the City failed to do the following:

- a. Create wetlands within the Carlsbad Hydrologic Unit at a 2:1 ratio for permanent project impacts (WQ Certification Condition C.1) (The project permanently impacted 0.5 acres. Therefore, the City was required to create 1.0 acre of wetlands.);
- b. Enhance or restore wetlands within the Carlsbad Hydrologic Unit at a 1:1 ratio for permanent project impacts (WQ Certification Condition C.1) (The City was required to enhance or restore 0.5 acres.); and
- c. Enhance waters of the U.S./State within the Carlsbad Hydrologic Unit at a 1:1 ratio for temporary project impacts (WQ Certification Condition C.2) (The project's actual temporarily impacts were 3.06 acres. Therefore, the City was required to enhance 3.06 acres.).

In response to the August 11, 2008, NOV, the City notified the San Diego Water Board that on August 16, 2007, it purchased "0.96 credit of Created/Restored wetland/riparian mitigation from the North County Habitat Bank" (NCHB) located east of Interstate 5 along the south side of Palomar Airport Road. The NCHB site is within the Carlsbad Hydrologic Unit. Furthermore, the City stated that it believed that the outstanding Project mitigation requirements would be addressed in a yet-to-be-issued San Diego Water Board Water Quality Certification for a future comprehensive dredge project by the City on Agua Hedionda Creek.

Upon further investigation by the San Diego Water Board, it was determined that 0.96 "credit" in this instance equated to 0.48 acres of created wetlands from NCHB. Accordingly, the Prosecution Team recognized the purchase of the 0.48 acres towards compliance with the 1.0 acre creation requirement.

After the Prosecution Team agreed to recommend the settlement terms contained in the Agreement, the City directed NCHB to credit the Project with 0.02 acres of creation credit from an August 16, 2007, City purchase for a total of 0.5 acres of creation credit. Although 0.5 acres of creation credit is only half of the amount required under Condition C.1 (based upon the adjusted permanent impacts of 0.5 acres), the City bought fully functional (i.e., meeting success criteria) wetland acreage from the NCHB and not newly-created wetland acreage that had not yet fulfilled success criteria.

Accordingly, the Agreement proposes accepting 0.5 acres of creation credit at NCHB to satisfy WQ Certification No. 06C-007 original mitigation requirement that 1 acre of wetlands be created within the Carlsbad Hydrologic Unit. Furthermore, the City purchased an additional 3.56 acres of enhancement credits from the NCHB on or about December 30, 2009, with the intent of satisfying the remaining mitigation requirements.

2. Administrative Civil Liability Authority

The San Diego Water Board may impose civil liability pursuant to Water Code section 13385(a) [emphasis added]:

Any person who violates any of the following shall be liable civilly in accordance with this section:

- (1) Section 13375 or 13376.
- (2) Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any *water quality certification* issued pursuant to Section 13160.
- (3) Any requirements established pursuant to Section 13383.
- (4) Any order or prohibition issued pursuant to Section 13243 or Article 1 (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under this chapter.
- (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.
- (6) Any requirement imposed in a pretreatment program approved pursuant to waste discharge requirements issued under Section 13377 or approved pursuant to a permit issued by the administrator.

Furthermore, Water Code section 13385(c) provides that:

Civil liability may be imposed administratively by the state board or regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
- (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.

The San Diego Water Board alleges that the City violated WQ Certification No. 06C-007 Condition C.9 by failing to complete the mitigation requirements by September 30, 2007. Therefore the San Diego Water Board is authorized to impose civil liability pursuant to Water Code section 13385(a)(2).

3. Maximum Civil Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this matter is ten thousand dollars (\$10,000) per day of violation. Section 13385(e) requires that when pursuing liability under Water Code section 13385 "At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

The City allegedly failed to mitigate the Project impacts from October 1, 2007, through December 23, 2009, a total of 814 days. Therefore the maximum liability that the San Diego Water Board could assess is \$8.14 million.

4. Factors Affecting the Amount of Civil Liability

Water Code section 13385(e) requires the San Diego Water Board to consider several factors when determining the amount of civil liability to impose. These factors include: "...the nature, circumstances, extent, and gravity of the violation or 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 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 violation, and other matters that justice may require." The San Diego Water Board has considered these factors in determining the amount of administrative civil liability imposed under this ACL Order.

a. The Nature, Circumstances, Extent, and Gravity of the Alleged Violations

The loss of wetlands is of a grave concern to the San Diego Water Board. It is estimated that California has lost as much as 91 percent of its original wetlands. Wetlands are valuable because they improve water quality, recharge water supplies, reduce the risk of flooding, and provide fish and wildlife habitat. Therefore, the San Diego Water Board requires creation of wetlands when projects destroy them. The City's failure to timely comply with the mitigation requirements of WQ Certification No. 06C-007 resulted in the temporary loss of valuable and much needed wetlands.

WQ Certification No. 06C-007

On March 2, 2006, the Executive Officer issued WQ Certification No. 06C-007 to the City for the Agua Hedionda Creek Emergency Dredge Project (Project). The Project removed approximately 15,000 cubic yards of accumulated sediment by backhoe and excavator from Agua Hedionda Creek and Calavera Creek to protect 210 residential units from potential flooding during a 100-year storm event. The City reported that it initiated the dredging project on March 6, 2006, and completed the project on March 25, 2006. The Certification was issued to address the anticipated environmental impacts to wetlands by requiring the City to mitigate for 0.8 acres of permanent and 4.2 acres of temporary impacts of the Project by September 30, 2007.

Condition C.1. of WQ Certification No. 06C-007 requires the City to mitigate the permanent impacts to vegetated waters of the U.S. by creating wetlands at a 2:1 ratio, and enhancement or restoration on a 1:1 ratio within the Carlsbad Hydrologic Unit.

Condition C.2. of WQ Certification No. 06C-007 requires the City to mitigate the temporary impacts to vegetated waters of the U.S. by enhancing at a 1:1 ratio of waters of the U.S./State within the Carlsbad Hydrologic Unit.

Condition C.9. of WQ Certification No. 06C-007 requires the City to complete mitigation for all impacts no later than September 30, 2007. On July 2, 2008, the San Diego Water Board inspected the proposed mitigation site at Lake Calavera within the City of Carlsbad and noted that no mitigation work had been conducted nor completed. A follow-up inspection on September 25, 2008, confirmed that no mitigation work has been conducted at Lake Calavera.

On November 17, 2008, over a year after WQ Certification No. 06C-007 required mitigation to be completed, the City reported that the actual

measured permanent impacts to wetlands in Agua Hedionda Creek due to the Project were 0.5 acres and temporary impacts to the jurisdictional streambed were 3.06 acres. Applying the adjusted after-project impact measurements to WQ Certification No. 06C-007, the City was required to complete the following mitigation by September 30, 2007:

- (1) Create 1.0 acre of wetlands (2:1) within the Carlsbad Hydrologic Unit and enhance or restore 0.5 acres of wetlands (1:1) within the Carlsbad Hydrologic Unit to address the permanent impacts; and
- (2) Enhance 3.06 acres of waters of the U.S./State (1:1) within the Carlsbad Hydrologic Unit to address the temporary impacts.

Notice of Violation of WQ Certification No. 06C-007

On August 11, 2008, the San Diego Water Board issued Notice of Violation No. R9-2008-0099 to the City for failing to construct and complete mitigation by September 30, 2007, in violation of WQ Certification No. 06C-007.

b. Whether Discharge is Susceptible to Cleanup or Abatement and Degree of Toxicity

These factors do not apply to the alleged violation.

c. Ability to Pay and Ability to Continue its Business

According to the City Finance Department, the City's Operating Budget for Fiscal Year 2009-10 totals \$191.1 million, with revenues for the year estimated at \$194.6 million. The City's revenues are projected to exceed budgeted expenses by \$3.5 million. Therefore, it appears that the City can pay the recommended civil liability for the alleged violations and continue to operate.

d. Any Voluntary Cleanup Efforts Undertaken by the City

This factor does not apply to the alleged violation.

e. Prior History of Violations

In 2006 the San Diego Water Board imposed an administrative civil liability (ACL Order No. R9-2006-0009) in the amount of \$23,900 against the City for violations of the statewide general construction storm water permit (Order 99-08-DWQ). The San Diego Water Board has also issued enforcement actions, including ACLs, against the City's Municipal Water District for violations associated with discharges of wastewater.

f. Degree of Culpability

The City has a moderate degree of culpability. The City applied for the Certification; did not contest the mitigation requirements; and completed the project that incurred environmental impacts. Then, the City made an attempt to partially satisfy some of the mitigation requirements prior to the September 2007 deadline for completion of mitigation. The City's degree of culpability was lessened due to miscommunication between the City and San Diego Water Board staff. The City made efforts to communicate desired mitigation changes to the San Diego Water Board and mistakenly interpreted a lack of written response from the San Diego Water Board as tacit approval for the changes. However, the communication from the City was at times conflicting and/or indirect.

g. Economic Benefit or Savings Resulting From the Alleged Violations

The San Diego Water Board is required to recover economic benefit as a minimum liability pursuant to Water Code section 13385(e). Furthermore, the State Board Water Quality Enforcement Policy provides that assessment of liability should at a minimum take away whatever economic savings a violator gains as a result of the violations.

The City gained an economic benefit from the delay in mitigating the environmental impacts from the Project. Prosecution staff estimates that the City could have enhanced City property for \$75,000 per acre. Thus the City enjoyed an economic benefit of approximately \$32,897 by delaying the enhancement. This estimate was calculated using the U.S. EPA BEN model.

h. Other Matters as Justice May Require

Estimated staff costs for investigation, enforcement, enforcement follow up, and preparation of this ACL Order are \$14,750.

The City did timely comply with some of the mitigation requirements. The City intended to satisfy requirements for habitat creation to offset permanent impacts by purchasing a sufficient amount of creation credits from the NCHB prior to the September 30, 2007. The insufficiency of the creation acreage actually purchased was due to NCHB's accounting practices and not intentional negligence by the City. Furthermore, as discussed in more detail above in finding 1, the City has acted quickly to satisfy the mitigation requirement of the Agreement by directing NCHB to credit the Project and purchasing additional acres of enhancement credits from the NCHB with the intent of satisfying the remaining mitigation requirements.

5. City's Waiver of Right to Petition

As provided in paragraph two of the Agreement, the City covenants and agrees that if the San Diego Water Board approves this ACL Order as specified herein, as part of the settlement, including attachments, the City will not contest or otherwise challenge this ACL Order before the State Board, or any court.

6. Notification of Interested Parties

The San Diego Water Board notified the City and interested parties of its intent to consider the proposed settlement during its meeting of May 12, 2010. The San Diego Water Board, in a public meeting, heard and considered all comments related to the proposed settlement.

7. Other Parties' Right to Petition

Any person aggrieved by this action of the San Diego Water Board may petition the State Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Board must receive the petition by 5 p.m., thirty (30) days after the date of this ACL Order, except that if the thirtieth (30th) day following the date of this ACL Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Board by 5 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions can be found on the Internet at http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml or will be provided upon request.

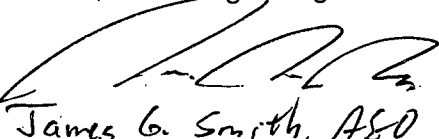
8. California Environmental Quality Act

This enforcement action is being taken by the San Diego Water Board to enforce provisions of the Water Code and as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.) in accordance with California Code of Regulations, title 14, section 15321.

IT IS HEREBY ORDERED THAT:

The attached Agreement between the Assistant Executive Officer and the City of Carlsbad is approved pursuant to Government Code section 11415.60 and is incorporated by reference into this Order.

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, San Diego Region on May 12, 2010.



for DAVID W. GIBSON
Executive Officer

CONFIDENTIAL SETTLEMENT COMMUNICATION

AGUA HEDIONDA CREEK EMERGENCY DREDGE PROJECT
SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (Agreement) is made and entered into by the City of Carlsbad (City) and the Prosecution Staff of the California Regional Water Quality Control Board, San Diego Region (Prosecution Staff) (collectively, the Parties) with reference to the following facts:

RECITALS:

- A. The City of Carlsbad is a municipal corporation duly organized and existing under the laws of the State of California. On July 21, 2008, the City became a charter city in the "Council-Manager" form of government.
- B. On February 2, 2006, the City submitted an application to the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) for a *Clean Water Act section 401 Water Quality Certification and Waiver of Waste Discharge Requirements for Discharge of Dredged and/or Fill Materials* for the Agua Hedionda Channel Dredging Project (AKA Agua Hedionda Creek Emergency Dredge Project). On March 2, 2006, the San Diego Water Board issued an *Order for Technically-Conditioned Certification and Waiver of Waste Discharge Requirements*, File No. 06C-007, for the Agua Hedionda Creek Emergency Dredge Project (WQ Certification No. 06C-007).
- C. On August 11, 2008, the San Diego Water Board by way of the Executive Officer issued Notice of Violation No. R9-2008-0099 (NOV) to the City. The NOV alleged that the City violated Condition C.9. of WQ Certification No. 06C-007 by failing to construct and complete mitigation by September 30, 2007. Details of the alleged violations are contained in tentative Administrative Civil Liability (ACL) Order No. R9-2010-0008 (Exhibit 1).
- D. The Parties subsequently entered into discussions to resolve the City's alleged non-compliance with WQ Certification No. 06C-007. Since May 2009, the Parties conferred for the purpose of settling the allegations described in tentative ACL Order No. R9-2010-0008 without issuing an ACL Complaint and conducting a formal hearing. In settling this matter, the City does not admit to any of the findings of the tentative ACL Order, and specifically denies that the City has been or is in violation of the WQ Certification No. 06C-007, the Water Code, or any other federal, state, or local law or ordinance. In the event of any future enforcement actions by the San Diego Water Board, this Agreement and adopted ACL Order may be used as evidence of a settlement consistent with Water Code sections 13327 and/or 13385.

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Mutual Release
Agua Hedionda Creek Emergency Dredge Project

E. The City, therefore, enters into this Agreement without the admission of any fact including any alleged fact contained in the tentative ACL Order. The City also enters into this Agreement without the adjudication of any issue in this matter including any issue raised in the tentative ACL Order.

F. After due consideration, the Parties, through their respective representatives, have reached a settlement agreement for the alleged violations contained in the tentative ACL Order. The alleged violations and proposed penalties for those violations are provided and detailed in the tentative ACL Order. The Prosecution Staff has agreed to propose the tentative ACL Order for adoption at the San Diego Water Board's April 14, 2010, meeting, or the next available regular or special meeting. This Agreement and attached tentative ACL Order are subject to approval by the San Diego Water Board after the public is provided with notice and an opportunity to comment on the proposed settlement as provided below.

G. In reaching this Agreement the Prosecution Staff considered the statutory factors for determining the appropriate amount of civil liability for the alleged violations. As detailed in the tentative ACL Order, such consideration recognized that the City purchased and directed previously purchased mitigation credit from the North County Habitat Bank (NCHB) to fulfill the mitigation requirements for WQ Certification No. 06C-007. In addition, the proposed penalties in this Agreement would cover San Diego Water Board staff costs as well as the estimated economic benefit calculated by the Prosecution Staff.

H. Accordingly, the general terms of the settlement are that the City will, in exchange for a full and final release of all claims arising out of the specified violations do the following:

1. Pay an administrative civil liability of \$47,647 for alleged violations of WQ Certification No. 06C-007 as detailed in the tentative ACL Order; and
2. Complete the purchase and/or dedication of the appropriate mitigation credits to offset the Project impacts as detailed below.

I. In order to facilitate the approval of the proposed settlement, and to carry out its terms, the Parties desire to enter into the following agreement.

NOW, THEREFORE, in exchange for their mutual promises and for other good and valuable consideration specified herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

Mutual Release**Agua Hedionda Creek Emergency Dredge Project**

1. The Parties agree to support, advocate for, and promote the adoption of the tentative ACL Order, attached hereto as Exhibit 1, at the San Diego Water Board's April 14, 2010, meeting, or the next available regular or special meeting, following public notice and comment. The tentative ACL Order is an indivisible component of this Agreement and the Parties' settlement. For this reason, if the San Diego Water Board fails to adopt the tentative ACL Order without modification (unless the modifications are for immaterial changes to eliminate typographical errors or are specifically agreed upon by the Parties), this Agreement is void.
2. Dischargers covenant and agree that they will not contest or otherwise challenge this Agreement, which incorporates the tentative ACL Order, before the San Diego Water Board, the State Water Resources Control Board (State Board), or any court. The Assistant Executive Officer likewise covenants and agrees that the Prosecution Staff will not contest or otherwise challenge this Agreement before the San Diego Water Board, the State Board, or any court.
3. The City agrees to provide payment in the amount of \$47,647 to be deposited into the State Water Pollution Cleanup and Abatement Account within 30 days of adoption of the tentative ACL Order.
4. The City agrees to comply fully and complete the following mitigation requirements:
 - a. Direct 0.02 acres of previously purchased NCHB U.S. Army Corps of Engineers (ACOE) Wetland Creation/Restoration credit in compliance with WQ Certification No. 06C-007 to mitigate permanent project impacts;
 - b. Purchase 0.5 acres of NCHB ACOE Riparian Enhancement credit in compliance with WQ Certification No. 06C-007 to mitigate permanent project impacts; and
 - c. Purchase 0.638 acres of NCHB ACOE Riparian Enhancement credit and 2.422 acres of NCHB California Department of Fish and Game Riparian Enhancement credit for WQ Certification No. 06C-007 to mitigate temporary project impacts.
5. The City and its respective successors and assigns, agents, attorneys, employees, officers, shareholders, and representatives hereby release and discharge the San Diego Water Board and the State Board, including each and every constituent agency, board, department, office, commission, fund or entity thereof, and successors and assigns, agents,

Agua Hedionda Creek Emergency Dredge Project

attorneys, employees, officers, shareholders and representatives of the San Diego Water Board, the State Board, and each and every constituent of the State Board from any and all claims, demands, actions, causes of action, obligations, damages, penalties, liabilities, debts, losses, interest, costs, or expenses of whatever nature, character, or description, that they may have or claim to have against one another by reason of any matter or omission arising from any cause whatsoever relating to the ACL Order and this Agreement.

6. The City's complete performance of its obligations under this Agreement shall effect a release and discharge of the City and its respective successors and assigns, agents, attorneys, employees, officers, shareholders, and representatives by the San Diego Water Board from any and all claims, demands, actions, causes of action, obligations, damages, penalties, liabilities, debts, losses, interest, costs, or expenses of whatever nature, character, or description, that it may have or claim to have against Dischargers by reason of any matter or omission arising from any cause whatsoever relating to the violations specified in the tentative ACL Order (Exhibit 1). Notwithstanding this section, however, the San Diego Water Board expressly retains authority to take enforcement action in the event of any failure by the City to perform their obligations under this Agreement. In addition, the San Diego Water Board reserves its rights under Civil Code section 1542.
7. Upon execution of this Agreement by the City and the Prosecution Staff, the Prosecution Staff shall promptly publish the availability of the Agreement for the purpose of accepting public comments on the Agreement for a period of 30 days. The San Diego Water Board will consider public comments received prior to adopting the ACL Order and retains discretion to approve or reject the settlement.
8. In the event that this Agreement is rejected in whole or in part by the San Diego Water Board, or is vacated in whole or in part by the State Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing, on a future date after reasonable notice and opportunity for preparation after such rejection or vacation, for the San Diego Water Board to determine whether to assess administrative civil liabilities for the underlying violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions, except this Agreement, will not be admissible as evidence in the hearing. The Parties also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to, objections related to prejudice or bias of any of the San Diego Water Board members or their advisors and

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any other objections that are premised in whole or in part on the fact that the San Diego 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 the contested evidentiary hearing.

9. This is an integrated Agreement. This Agreement is intended to be a full and complete statement of the terms of this Agreement between the Parties, and expressly supersedes any and all prior oral or written agreements, covenants, representations, and warranties (express or implied) concerning the subject matter of this Agreement.
10. Each person executing this Agreement in a representative capacity represents and warrants that he or she is authorized to execute this agreement on behalf of and to bind the entity on whose behalf he or she executes the agreement.
11. This Agreement shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this Agreement and any uncertainty and ambiguity shall not be interpreted against any one party.
12. If any portion of this Agreement is ultimately determined not to be enforceable, the validity of the remaining enforceable provisions shall not be adversely affected.
13. This Agreement shall not be modified by any of the Parties by oral representation made before or after the execution of this Agreement. All modifications must be in writing and signed by the Parties.
14. The Parties intend that the procedure that has been adopted for the approval of the settlement by the Parties and review by the public, as reflected by the tentative ACL Order and this Agreement will be legally sufficient. In the event that objections are raised during the public comment period for the tentative ACL Order, 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.
15. Each party to this Agreement shall bear all attorneys' fees and costs arising from that party's own counsel in connection with the matters referred to herein.


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Mutual Release
Agua Hedionda Creek Emergency Dredge Project

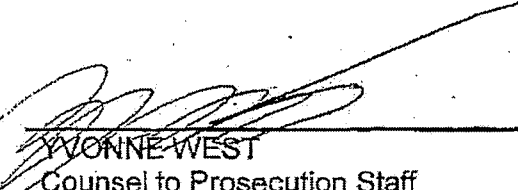
16. The Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.
17. This Agreement may be executed as duplicate originals, each of which shall be deemed an original Agreement, and all of which shall constitute one agreement. Facsimile or electronic signatures are acceptable.

This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California.


IN WITNESS WHEREOF, the signatories hereto have executed this Agreement as of the dates set forth below.


For the San Diego Water Board's Prosecution Staff:

Date: 1 Mar 10 By: 
JAMES SMITH
Assistant Executive Officer

Date: March 8, 2010 By: 
YVONNE WEST
Counsel to Prosecution Staff
(Approved as to form)

For City of Carlsbad:

Date: 3-11-10 By: 
LISA HILDABRAND
City Manager

Date: 3/11/2010 By: 
RONALD KEMP
City Attorney
(Approved as to form)



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