

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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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,

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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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- 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)