

**Exhibit 1****CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION*****Tentative 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 requirement 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 discharge 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 April 14, 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 (30<sup>th</sup>) 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](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.

**TENTATIVE**

---

DAVID W. GIBSON  
Executive Officer