

Item Number 6d  
Supporting Document 1

Tentative Order No. R9-2020-0028

March 5, 2020

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

**In the matter of OHL USA Inc.  
Temecula, CA**

**Settlement Agreement and Stipulation for Entry of  
Administrative Civil Liability Order No. R9-2020-0028; WDID 9 33C374007**

**Section I: Introduction**

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Order or Stipulated Order) is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), on behalf of the San Diego Water Board Prosecution Team (Prosecution Team), and OHL USA, Inc. (Discharger) (collectively, Parties). The Order is presented to the San Diego Water Board for adoption as an order by settlement pursuant to Government Code section 11415.60.

**Section II: Recitals**

1. The Discharger's construction project (Project) involved the disturbance of 20 acres in and around Murrieta Creek, within the City of Temecula (Site).
2. On September 2, 2009, the California State Water Resources Control Board (State Water Board) adopted Order No. 2009-0009-DWQ (as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ), National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (General Permit). The General Permit regulates storm water discharges to waters of the United States from construction sites that disturb one or more acres of land surface.
3. On September 10, 2015, Ayaz Uddin, Quality Control Manager and the Discharger's designated Legally Responsible Person (LRP), submitted a Notice of Intent (NOI) to comply with the General Permit requirements to the State Water Board's Stormwater Multiple Application and Report Tracking System (SMARTS) and was issued Waste Discharge Identification (WDID) No. 9 33C374007 upon permit enrollment. Construction activities commenced on September 22, 2015.
4. General Permit section V.A.2 requires the implementation of best management practices (BMPs), using best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to reduce pollution from storm water runoff from construction sites. Furthermore, General Permit section VIII requires dischargers to calculate a site's Risk Level based upon "the site's sediment risk and receiving water risk during periods of soil exposure (i.e. grading and site stabilization)."

5. The Site lies within the Murrieta Hydrologic Subarea (HSA 902.32) of the Murrieta Hydrologic Unit. Storm water runoff from the Site discharges directly into Murrieta Creek, a water of the United States and the State. Shortly downstream of the site, Murrieta Creek joins with the Temecula River to become the Santa Margarita River, which delivers freshwater and sediment to the Santa Margarita River Estuary (Estuary). Several areas of ecological significance, including the Estuary, are located downstream of the Site.
6. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for Murrieta Creek:
  - Municipal Supply (MUN)
  - Agricultural Supply (AGR)
  - Industrial Service Supply (IND)
  - Industrial Process Supply (PROC)
  - Groundwater Recharge (GWR)
  - Water Contract Recreation (REC-1)
  - Non-Contact Water Recreation (REC-2)
  - Warm Freshwater Habitat (WARM)
  - Rare, Threatened or Endangered Species (RARE)
7. On October 16, 2015, the San Diego Water Board received a citizen complaint with photographic evidence, indicating that construction was occurring within the Murrieta Creek channel without any visible BMPs. On October 21, 2015, San Diego Water Board staff contacted the Discharger's LRP via email to notify the Discharger of problems with its Storm Water Pollution Prevention Plan (SWPPP), BMPs, and run-on calculations.
8. On January 7, 2016, San Diego Water Board staff conducted an inspection of the Site after rain events and observed and documented violations of the General Permit. On January 22, 2016, San Diego Water Board staff issued the Discharger Notice of Violation (NOV) No. R9-2016-0032 for discharge, BMP, SWPPP, and Qualified SWPPP Practitioner (QSP) violations of the General Permit.
9. On February 5, 2016, San Diego Water Board staff conducted a Site inspection and concluded that the Site was in substantive compliance with the General Permit, and that only maintenance of the existing BMPs would be needed throughout the remainder of the rainy season. During an additional drive-by inspection on April 20, 2016, San Diego Water Board staff observed that the Site continued to be in substantive compliance with the General Permit.

10. On January 20, 2017, San Diego Water Board staff conducted a Site inspection and observed discharge, BMP, and SWPPP violations of the General Permit. San Diego Water Board staff documented the absence of an effective combination of erosion and sediment control BMPs throughout the Site and ineffective, or the absence of, run-on and run-off control BMPs described in the SWPPP. The inspection confirmed that the Discharger continued using un-stabilized earthen dikes as the sole means of run-on and runoff control at the Site. Staff's photographs indicated that the few BMPs observed at the Site had not been maintained and appeared to be the same BMPs implemented in January 2016. During the inspection, the staff also documented a portable concrete batch plant (pug mill) near the edge of Murrieta Creek with no visible erosion or sediment control BMPs. During February and March of 2017, San Diego Water Board staff and the Discharger corresponded and engaged in compliance assistance efforts.
11. On April 17, 2017, San Diego Water Board staff conducted a Site inspection and observed very few sediment and erosion control BMPs throughout the Site. On May 17, 2017, San Diego Water Board staff conducted another inspection with several Discharger representatives in attendance. San Diego Water Board staff again observed and documented a continued lack of an effective combination of erosion and sediment control BMPs. During follow-up drive-by inspections on July 18, 2017, October 13, 2017, and October 17, 2017, San Diego Water Board staff observed additional minor, maintenance related BMP violations. Another follow-up inspection conducted during a significant rain event on January 9, 2018, revealed that active construction at the Site had concluded with no stabilization of the remaining disturbed areas. On June 7, 2018, the Discharger filed a Notice of Termination (NOT) to end coverage under the General Permit.

The Prosecution Team alleges the following violations, set forth in full in the Technical Analysis for this Order, which describes the alleged violations and liability calculations in detail, as well as site history and compliance efforts:

12. Violation No. 1: The Discharger failed to develop and update, through its Qualified SWPPP Developer (QSD), an adequate SWPPP from September 22, 2015, to March 30, 2017, in violation of General Permit sections VIII, XIV.A.1, and XIV.A.3. The Discharger's actions resulted in 556 days of violation.
13. Violation No. 2: The Discharger failed to identify and record BMPs that failed, or could have failed to operate as intended, and failed to accurately document Site conditions from November 3, 2015 to June 9, 2017, in violation of General Permit sections G.2 and G.3. The Discharger's actions resulted in 229 days of violation.
14. Pursuant to Water Code section 13385(a)(2) and (c), a person that violates an NPDES permit requirement is subject to administrative civil liability in an amount not to exceed ten thousand dollars (\$10,000) for each day in which the violation occurs, as well as a per gallon assessment when discharges are alleged.

15. To resolve the violations alleged in this Stipulated Order, by consent and without formal administrative proceedings, the Parties have agreed to the final imposition of **seven hundred forty-one thousand four hundred and sixty-six dollars (\$741,466)** in liability against the Discharger pursuant to Water Code section 13385 and Government Code section 11415.60. The Prosecution Team calculated the administrative civil liability under Water Code section 13385 in accordance with the Water Quality Enforcement Policy. A full discussion of the penalty calculation factors can be found in the Technical Analysis.
16. Based on the information in the record, the Prosecution Team has determined that the above resolution of the alleged violations is fair and reasonable, and fulfills the enforcement objectives of Water Code sections 13000 et seq., and the Water Quality Enforcement Policy, and satisfies the objectives and requirements of the federal Clean Water Act as implemented by the foregoing, and that no further action is warranted concerning the alleged violations except as provided in this Stipulated Order, and that this Stipulated Order is in the best interest of the public.

### **Section III: Stipulations**

The Parties stipulate to the following:

17. **Administrative Civil Liability:** The Discharger hereby agrees to pay the administrative civil liability totaling **seven hundred forty-one thousand four hundred and sixty-six dollars (\$741,466)**, including \$68,066 in staff costs associated with the investigation and preparation of this enforcement action. Within thirty (30) days of the effective date of this Order, Discharger agrees to remit, by check, \$741,466, payable to the Cleanup and Abatement Account, and shall include Order No. R9-2020-0028 on the check.

The Discharger shall send the original signed check referencing this Order number to the State Water Resources Control Board Accounting Office, ATTN: ACL Payment, P.O. Box 1888, Sacramento, California 95812-1888; and shall email a redacted copy to the Prosecution Team contact at the address listed in Paragraph 21 below.

**18. Due Diligence Measures:** The Discharger has reassessed its due diligence processes to ensure that violations of a similar nature do not occur again. As a material condition to this Order, the Discharger has agreed to implement the following measures at its projects for a minimum of 5 years after this Order's effective date: (1) employ a qualified, experienced SWPPP Coordinator to oversee SWPPP implementation throughout the corporation; (2) in cases where the owner is not the LRP, the senior managers or the Executive Vice President for the Western Region shall be assigned as the LRP to ensure that non-compliance is brought to the attention of a higher authority; and (3) the QSP used at the Site when the alleged violations occurred will no longer serve as QSP or QSD on any Discharger projects in California. For the purposes of this Order, a QSP and QSD are "Qualified" if they meet the applicable requirements set forth in General Permit section VII.B, General Permit Fact Sheet section M, and they were not a QSP or QSD for the Project when the alleged violations occurred.

**19. Enforcement Considerations for Failing to Implement Due Diligence Measures:** If the Discharger fails to comply with Paragraph 18, in any future Regional Water Quality Control Board discretionary enforcement proceeding against the Discharger, for alleged violations of the Water Code, Federal Water Pollution Control Act, and/or associated permits, the Discharger agrees to not contest the application of the following Water Quality Enforcement Policy factor multiplier:

a. **Other Factors as Justice May Require.** A multiplier of at least 1.3.

**20. Compliance with Applicable Laws:** The Discharger understands that payment of administrative civil liability in accordance with the terms of this Order does not relieve the Discharger of its need to comply with applicable laws and that new violations of the type alleged herein may subject it to further enforcement, including additional administrative civil liability.

**21. Party Contacts for Communications related to the Order:**

For the Prosecution Team:

Chiara Clemente  
California Regional Water Quality Control Board  
[sandiego@waterboards.ca.gov](mailto:sandiego@waterboards.ca.gov): SM-839824:cclemente  
San Diego Region 2375 Northside Drive, Suite 100  
San Diego, California 92108

For the Discharger:

Tony Bagheri  
Wester Regional Director and Executive Vice President  
OHL USA, Inc.  
[Tony.Baheri@ohlina.com](mailto:Tony.Baheri@ohlina.com)  
1920 Main Street, Suite 310  
Irvine, CA 92516

22. **Attorney's Fees and Costs:** The Parties agree that the Discharger shall bear its own attorneys' fees and costs arising from its own counsel in connection with the matters set forth herein. The San Diego Water Board shall not seek and shall bear its own fees and costs beyond the amounts paid pursuant to this Order.
23. **Matters Addressed by Order:** Upon the San Diego Water Board's adoption of this Order, the Order represents a final and binding resolution and settlement of all the violations alleged herein and in the Technical Analysis, and all other claims, violations, or causes of action that could have been asserted against the Discharger as of the Effective Date of this Order based on the specific facts alleged in the Technical Analysis or this Order (Covered Matters). The provisions of this Paragraph are expressly conditioned on the payment of the administrative civil liability as provided above.
24. **Public Notice:** The Discharger understands that the San Diego Water Board will conduct a 30-day public review and comment period prior to consideration and adoption of the Order. If significant new information is received that reasonably affects the propriety of presenting this Order to the San Diego Water Board for adoption, the Assistant Executive Officer may unilaterally declare this Order void and decide not to present it to the San Diego Water Board. The Discharger agrees that it may not rescind or otherwise withdraw its approval of this proposed Order.
25. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for the San Diego Water Board's adoption of the settlement by the Parties and review by the public, as reflected in this Order, is lawful and adequate.
26. **No Waiver of Right to Enforce:** The failure of the Prosecution Team or the San Diego Water Board to enforce any provision of this Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of the Order. The failure of the Prosecution Team or San Diego Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Order.
27. **Procedural Objections:** The Parties agree that the procedure contemplated for adopting the Order by the San Diego Water Board and review of this Order 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.
28. **Interpretation:** This Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.
29. **Modification:** This Order shall not be modified by any of the Parties by oral representation made before or after its execution. The Parties agree to meet and confer concerning any proposed modifications, and all modifications must be in writing, signed by all Parties, and approved by the San Diego Water Board.

30. **If Order Does Not Take Effect:** In the event that this Order does not take effect because it is not approved by the San Diego Water Board or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the San Diego Water Board, on a future date after reasonable notice and opportunity for preparation, to determine whether to assess administrative civil liabilities for the underlying alleged violations, 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 such a hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:
- a. Objections related to prejudice or bias of any of the San Diego Water Board members or their advisors and 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 as a consequence of reviewing the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the complaint 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.
31. **Waiver of Hearing:** The Discharger has been informed of the rights provided by California Water Code section 13323, and hereby waives its right to a hearing before the San Diego Water Board prior to the adoption of the Order. This waiver will not apply if the Order does not take effect.
32. **Waiver of Right to Petition:** The Discharger hereby waives its right to petition the San Diego Water Board's adoption of the Order as written 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. This waiver will not apply if the Order does not take effect.
33. **Covenant Not to Sue:** Upon adoption of the Order, the Discharger covenants not to sue or pursue any administrative civil claim(s) against any State Agency or the State of California, its officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matters.
34. **Parties Not Liable:** Neither the San Diego Water Board members nor the San Diego Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Discharger, its directors, officers, employees, agents, representatives or contractors, in carrying out activities pursuant to this Order; nor shall the Discharger be liable for any injury or damage to persons or property resulting from acts or omissions of the San Diego Water Board in carrying out activities under this Order.



35. **Authority to Bind:** Each person executing this Order in a representative capacity represents and warrants that he or she is authorized to execute this Order on behalf of and to bind the entity on whose behalf he or she executes the Order.
36. **No Third-Party Beneficiaries:** Except as described in this Order, the Order 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 Order for any cause whatsoever.
37. **Effective Date:** This Order shall be effective and binding on the Parties on the date that the San Diego Water Board adopts the Order.
38. **Counterpart Signatures:** This Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.
39. **Severability:** The provisions of this Order are severable, and should any provision be found invalid, the remainder shall remain in full force and effect.

**IT IS SO STIPULATED.**

California Regional Water Quality Control Board, San Diego Region, Prosecution Team

By:

Kelly Dorsey for  


James G. Smith  
Assistant Executive Officer

Date: 1/13/2020

Order R9-2020-0028

OHL USA, Inc.

By:

A handwritten signature in black ink, appearing to read 'Cesar Pereira', written over a large, faint circular stamp or watermark.

Cesar Pereira  
General Counsel and Secretary

Date: 1/13/2020

#### **Section IV: Findings of the San Diego Water Board**

1. The San Diego Water Board incorporates the foregoing Sections I through III as if set forth fully herein.
2. In accepting this settlement, the San Diego Water Board has considered, where applicable, each of the factors prescribed in California Water Code sections 13385(e). The San Diego Water Board's consideration of these factors is based upon information obtained by the San Diego Water Board's staff in investigating the allegations in the Technical Analysis or otherwise provided to the San Diego Water Board. In addition to these factors, this settlement recovers the costs incurred by the staff of the San Diego Water Board identified in the Technical Analysis.
3. This is an action to enforce the laws and regulations administered by the San Diego Water Board. The San Diego Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.
4. The San Diego Water Board's Executive Officer is hereby authorized to refer this matter directly to the Attorney General for enforcement if the Discharger fails to perform any of its obligations under this Order.
5. Fulfillment of the Discharger's obligations under the Order constitutes full and final satisfaction of any and all liability for each claim in the Technical Analysis in accordance with the terms of the Order.
6. The Agreement between the Assistant Executive Officer and the Discharger is approved pursuant to Government Code section 11415.60 and is incorporated by reference into this Order.
7. The Board may modify the findings prior to the adoption of the Order, provided that the modifications do not change the terms of the Settlement Agreement other than as provided pursuant to Paragraph 29.

Pursuant to Water Code sections 13323 and 13385, and Government Code section 11415.60, **IT IS HEREBY ORDERED** by the California Regional Water Quality Control Board, San Diego Region.

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.

DAVID W. GIBSON  
Executive Officer

Date: