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Secretary for
Environmental Protection

California Regional Water Quality Control Board

San Diego Region



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May 13, 2010

Certified Mail – Return Receipt
Article No. 7009 1410 0002 2347 4534

Chandra L. Wallar
Deputy Chief Administrative Officer
County of San Diego
Land Use and Environment Group
1600 Pacific Highway, Room 212
San Diego, California 92101-2429

In reply refer to: Place ID 255223 fmelbourn

ADOPTION OF ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R9-2010-0025, ALLEGED VIOLATIONS OF SAN DIEGO MUNICIPAL STORM WATER PERMIT

Dear Ms. Wallar:

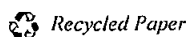
Enclosed is Administrative Civil Liability Order No. R9-2010-0025 (Order) against the County of San Diego (County) that was adopted on May 12, 2010, by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board). The Order assessed a liability of \$57,350 against the County as negotiated in the joint County and San Diego Water Board settlement agreement. The County must submit a check to the San Diego Water Board in the amount of fifty-seven thousand three hundred and fifty dollars (\$57,350) 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, ASO
DAVID W. GIBSON
Executive Officer

California Environmental Protection Agency



010N\11-11

May 13, 2010

DWG:ftm

Enclosures: 1. ACL Order No. R9-2010-0025
2. Settlement Agreement

cc: Sara Agahi, Co. of San Diego, sara.agahi@sdcounty.ca.gov
Eric Becker, CA RWQCB San Diego, ebecker@waterboards.ca.gov
Chiara Clemente, CA RWQCB San Diego, cclemente@waterboards.ca.gov
Laura Drabandt, OE, SWRCB, ldrabandt@waterboards.ca.gov
Cindy Lin, US EPA, lin.cindy@epamail.epa.gov
Cid Tesoro, Co. of San Diego, cid.tesoro@sdcounty.ca.gov
Laurie Walsh, CA RWQCB San Diego, lwalsh@waterboards.ca.gov

Order No.	R9-2007-0001 (San Diego Municipal NPDES Storm Water Permit)
NPDES No.	CAS0108758
CIWQS Place ID	255223 (County of San Diego MS4)
WDID	9 0000510S1
Reg. Measure No.	372074 (ACL Order R9-2010-0025), 214386 (R9-2007-0001 Co. of San Diego)
Party ID	39617 (County of San Diego Dept. of Environmental Health)
Person ID	515427 (Chandra Wallar)

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

ORDER NO. R9-2010-0025

**IMPOSING
ADMINISTRATIVE CIVIL LIABILITY
PURSUANT TO SETTLEMENT AGREEMENT
AGAINST**

**COUNTY OF SAN DIEGO
FOR ALLEGED VIOLATIONS OF
ORDER NO. R9-2007-0001
NPDES NO. CAS0108758**

**WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES OF URBAN RUNOFF
FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING
THE WATERSHEDS OF THE COUNTY OF SAN DIEGO, THE INCORPORATED
CITIES OF SAN DIEGO COUNTY, THE SAN DIEGO UNIFIED PORT DISTRICT, AND
THE SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY**

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 County of San Diego (County). The settlement was developed during negotiations between the San Diego Water Board's Prosecution Staff and the County. This Administrative Civil Liability (ACL) Order and the attached Settlement Agreement (Agreement) resolve the violations alleged in ACL Complaint R9-2009-0089 through the payment of an administrative civil liability in the amount of \$57,350. The ACL Complaint specifically alleged violations of the San Diego County-wide Storm Water Waste Discharge Requirements, Order No. R9-2007-0001 (Order).

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.

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 \$57,350 for the full and final resolution of each of the claims and alleged violations set forth herein, and is in the public interest.

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

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

1. Failure to Provide Adequate Legal Authority to Achieve Full Compliance with the Order
The County violated Order No. R9-2007-0001 Provision D.2.a.(1) on March 24, 2008, when it amended its storm water ordinance on March 12, 2008, by changing the definition of "Rainy Season" from "October 1 through April 30" to "November 11 through April 30" contrary to Order No. R9-2007-0001's definition of "October 1 through April 30 of each year." On August 5, 2009, the County corrected the definition by amending its ordinance. Therefore, the days of violation are 498 (March 24, 2008, to August 4, 2009).
2. Failure to Require Construction Site BMPs During the Wet Season
The County violated Order No. R9-2007-0001 Provision D.2.c.(3) by failing to require "slope stabilization on all inactive slopes during the Rainy Season" from October 1, 2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008. The Director's Letter of Instruction states that "[d]uring the Non-Rainy Season from May 1 through November 10, the Developer may opt to employ 'weathered triggered' action plans¹ in lieu of fully deployed BMPs." As a result, the County allowed Developers to leave inactive slopes unprotected from October 1 to November 10 in 2007 and 2008, if the Developer implemented a "weather triggered" action plan. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to November 10, 2008).
3. Failure to Inspect Construction Sites During the Wet Season
The County violated Order No. R9-2007-0001 Provision D.2.d.(1-3) by failing to inspect construction sites during the Wet Season from October 1, 2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008, because the County's inspection frequencies were based upon the County's Wet Season and therefore didn't begin until November 11. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to November 10, 2008).
4. Administrative Civil Liability Authority
The San Diego Water Board may impose civil liability pursuant to Water Code section 13385(a)(2) for any person who violates any waste discharge requirement issued pursuant to Water Code Chapter 5.5.

Furthermore, Water Code section 13385(c) provides that the San Diego Water Board may impose administrative civil liability pursuant to Article 2.5 of Chapter 5 in an amount not to exceed the sum of both of the following:

¹ A "weather triggered" action plan allows the developer to store on site 125% of the necessary BMP materials that are to be deployed within 48 hours of a 50% chance or greater rain event of 0.5 inches or more.

- (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 County violated the Waste Discharge Requirements of Order No. R9-2007-0001. Therefore the San Diego Water Board is authorized to impose civil liability pursuant to Water Code section 13385(a)(2).

5. 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 County allegedly failed to provide adequate legal authority to achieve full compliance with the Order from March 24, 2008, through August 4, 2009, a total of 498 days. Therefore the maximum liability that the San Diego Water Board could assess for this violation is \$4.98 million.

The County allegedly failed to require construction site BMPs during the Wet Season from October 1 to November 10, 2007, and October 1 to November 10, 2008, a total of 80 days. Therefore the maximum liability that the San Diego Water Board could assess for this violation is \$800,000.

The County allegedly failed to inspect construction sites during the Wet Season from October 1 to November 10, 2007, and October 1 to November 10, 2008, a total of 80 days. Therefore the maximum liability that the San Diego Water Board could assess for this violation is \$800,000.

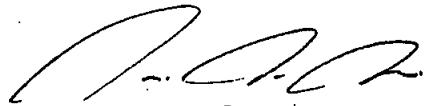
Accordingly, the total maximum liability that could be imposed by the San Diego Water Board for all of the alleged violations is \$6.58 million.

5. Factors Affecting the Amount of Civil Liability

The San Diego Water Board's consideration of the factors prescribed in Water Code section 13385(e) is based upon information available to the San Diego Water Board prior to the hearing and described in greater detail in the Technical Analysis for Complaint No. R9-2009-0089 or otherwise provided to the San Diego Water Board. The consideration of factors supports the assessment of civil liability in the amount of \$57,350. In addition to these factors, this settlement

4. If the County fails to make the specified payment to the State Water Pollution Cleanup and Abatement Account within the time limits specified in this Order, the San Diego Water Board may enforce this Order, including referring the matter to the Attorney General for collection.

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.



James G. Smith, ASO

for DAVID W. GIBSON
Executive Officer

CIWQS:
Place ID: 255223
Party ID: 39617
Regulatory Measure ID: 372074
Violation ID: 799424, 799425, 799426

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

**Settlement Agreement for Administrative Civil Liability
Complaint R9-2009-0089**

THIS SETTLEMENT AGREEMENT (Agreement) is made and entered into by the County of San Diego (County) 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 County of San Diego is a political and legal subdivision of the State of California. (See Government Code § 23000 and 23002).
- B. On January 24, 2007, the California Regional Water Quality Control Board, San Diego Region (Regional Board) adopted Order No. R9-2007-0001, NPDES No. CAS0108758, *Waste Discharge Requirements For Discharges Of Urban Runoff From The Municipal Separate Storm Sewer Systems (MS4s) Draining The Watersheds Of The County Of San Diego, The Incorporated Cities Of San Diego County, The San Diego Unified Port District, and The San Diego County Regional Airport Authority*. The County is a named Copermittee to Order No. R9-2007-0001.
- C. The County owns and operates a municipal separate storm sewer system through which it discharges urban runoff into waters of the United States within the San Diego Region pursuant to Order No. R9-2007-0001.
- D. Order No. R9-2007-0001, Provision D.2.a.(1) requires the County to do the following: "Within 365 days of adoption of this Order, each Copermittee shall review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures." (BMPs stand for Best Management Practices.) On December 12, 2007, the Regional Board adopted Addendum No. 1 to Order No. R9-2007-0001 granting the Copermittees' request for an additional 60 days to update their ordinances due to the regional wildfires of November 2007. Therefore, the ordinance review and update was to be completed no later than March 23, 2008.
- E. Order No. R9-2007-0001 Attachment C, Definitions, defines "Wet Season" as "October 1 through April 30 of each year." "Wet Season" and "Rainy Season" are used interchangeably throughout the permit.

- F. Order No. R9-2007-0001, Provision D.2.c.(3) requires the County to do the following: "Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round. However, BMP implementation requirements can vary based on Wet and Dry Seasons. Dry Season BMP implementation must plan for and address rain events that may occur during the Dry Season. Provision D.2.c.(1)(b)(iii) states that "[s]lope stabilization on all inactive slopes during the Rainy Season and during rain events in the Dry Season" is one of the designated minimum set of BMPs at construction sites.
- G. Order No. R9-2007-0001, Provision D.2.d.(1-3), stated in part, requires the County to do the following:
- (1) *During the Wet Season, each Copermittee shall inspect at least biweekly (every two weeks), all construction sites within its jurisdiction meeting the following criteria:*
 - (a) *All sites 50 acres or more in size and grading will occur during the wet season;*
 - (b) *All sites 1 acre or more, and tributary to a CWA [Clean Water Act] section 303(d) water body segment impaired for sediment or within or directly adjacent to or discharging directly to a receiving water within an ESA [Environmentally Sensitive Area]; and*
 - (c) *Other sites determined by the Copermittees or the Regional Board as a significant threat to water quality. In evaluating threat to water quality, the following factors shall be considered:*
 - i. *soil erosion potential;*
 - ii. *site slope;*
 - iii. *project size and type;*
 - iv. *sensitivity of receiving water bodies;*
 - v. *proximity to receiving water bodies;*
 - vi. *non-storm water discharges;*
 - vii. *past record of non-compliance by the operators of the construction site; and*
 - viii. *any other relevant factors.*
 - (2) *During the wet season, each Copermittee shall inspect at least monthly, all construction sites with one acre or more of soil*

disturbance not meeting the criteria specified above in section D.2.c.(1).

- (3) *During the wet season, each Copermittee shall inspect as needed, construction sites less than 1 acre in size.*
- H. On September 30, 2008, the County informed the Regional Board in its Jurisdictional Urban Runoff Management Plan, Annual Report Fiscal Year 2007-2008 that it began complying with Order No. R9-2007-0001's construction site inspection requirements on July 1, 2007.
- I. On October 18, 2000, the County's Department of Public Works issued a Director's Letter of Instruction (DLI) to provide guidance to County staff in implementing the County's storm water program including inspecting "developer and single-family grading permits and other construction activities." The DLI was revised on January 8, 2008, and is scheduled to sunset on January 8, 2014.
- J. On November 30, 2009, the Regional Board Assistant Executive Officer issued Administrative Civil Liability (ACL) Complaint No. R9-2009-0089 to the County proposing to assess an ACL for \$77,800 for alleged violations of Order No. R9-2007-0001. The ACL Complaint alleged that (1) the County failed to provide adequate legal authority when it adopted a "Wet Season" definition that did not include the first 40 days of Order No. R9-2007-0001's "Wet Season" on March 24, 2008, (2) that the County failed to require construction site Best Management Practices (BMPs) during the 40 day period of 2007 and 2008, and (3) that the County failed to inspect construction sites during the 40 day period of 2007 and 2008.
- K. After due consideration, the Parties, through their respective representatives, have reached a settlement agreement for the violations alleged in ACL Complaint No. R9-2009-0089. 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 Regional 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 Regional Board after the public is provided with notice and an opportunity to comment on the proposed settlement as provided below.
- L. In reaching this Agreement the Prosecution Staff considered the statutory factors for determining the appropriate amount of civil liability for the alleged violations. Such consideration recognized that the County corrected the "Wet Season" definition in its storm water ordinance on August 5, 2009. In addition, the proposed penalties in this Agreement

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 County's complete performance of its obligations under this Agreement shall effect a release and discharge of the County and its respective successors and assigns, agents, attorneys, employees, officers, shareholders, and representatives by the Regional 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. Notwithstanding this section, however, the Regional Board expressly retains authority to take enforcement action in the event of any failure by the County to perform their obligations under this Agreement. In addition, the Regional Board reserves its rights under Civil Code section 1542.
7. The Parties agree that the proposed tentative ACL Order, as signed by the Parties, will be noticed for a 30-day public comment period prior to being presented to the Regional Board for adoption. If the Regional Board Assistant Executive Officer or other Prosecution Staff receives significant new information that reasonably affects the propriety of presenting this tentative ACL Order to the Regional Board for adoption, the Assistant Executive Officer may unilaterally declare this tentative ACL Order void and decide not to present the Order to the Regional Board. The County of San Diego agrees that it may not rescind or otherwise withdraw its approval of this proposed tentative ACL Order.
8. In the event that this Agreement is rejected in whole or in part by the Regional 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 Regional 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 Regional Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional 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.
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 Regional Board's Prosecution Staff:

Date: 1 Mar 10


By:



JAMES SMITH
Assistant Executive Officer

Date: 2/23/10

By:



LAURA DRABANDT
Counsel to Prosecution Staff
(Approved as to form)

For County of San Diego:

JOHN J. SANSONE
County Counsel

Date: _____

By:

JAMES R. O'DAY
Senior Deputy

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature X <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (<i>Printed Name</i>) C. Date of Delivery</p>
<p>1. Article Addressed to:</p> <p>Chandra Waller County of San Diego 1600 Pacific Highway, Rm. 212 San Diego, CA 92101-2429</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (<i>Extra Fee</i>) <input type="checkbox"/> Yes</p>
<p>2. Article Number (Transfer from service label)</p>	<p>7009 1410 0002 2347 4534</p>

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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