

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

In the Matter of:

**PATTERSON KAHLE, LLC
ACL R8-2019-0012**

ORDER R8-2021-0018 (Proposed)

**SETTLEMENT AGREEMENT AND
STIPULATION FOR ENTRY OF
ADMINISTRATIVE CIVIL LIABILITY
ORDER**

I. Introduction

1. This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order or Order) is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board), on behalf of the Santa Ana Water Board Prosecution Team (Prosecution Team), and Patterson Kahle, LLC (Discharger)(collectively known as the Parties) and is presented to the Santa Ana Water Board, or its delegee, for adoption as an order by settlement, pursuant to California Water Code section 13323 and Government Code section 11415.60.

II. Site Background

2. The Discharger owns the property at 2810 Villa Way, Newport Beach, California, County of Orange (Site). Until 1987, the Site was owned by Mr. Clarence McCulloch. When Mr. McCulloch passed away, the Site was transferred to the McCulloch Trust where it was held until the Discharger acquired the Site in 2002.
3. Historically, Newport Plating operated a plating shop at the Site between the early 1950s and 1988. Mr. McCulloch leased the Site to Newport Plating. Newport Plating's operations included brass, cadmium (Cd), copper (Cu), chromium (Cr) or "chrome," gold (Au), nickel (Ni) and silver (Ag) plating; chrome and paint stripping; and steel passivity. After the plating operations ceased, the subsequent utilization of the building has been general office and business activities.
4. The groundwater flow from the Site is tidally influenced by the body of water in the adjacent the Rhine Channel and generally flows northwest or southeast of the Site during high and low tide, respectively. Groundwater is typically encountered at 4 feet below ground surface (bgs) and fluctuates diurnally with the Rhine Channel. The upper 2.5 feet of soil consists of man-made fill and from 4-5.5 feet bgs consists of highly permeable fine-grained to coarse sand. Due to the characteristics of the groundwater flow at the Site, there is an increased likelihood that groundwater has been, and continues to be, impacted by the

ongoing discharge of contaminants from the Site and into the underlying groundwater.

5. Several phases of soil and groundwater investigation at the Site detected "Title 22 metals" (as defined in California Code of Regulations, Title 22), and cyanide. Historic groundwater concentrations of these constituents exceeded the maximum contaminant levels (MCLs) and action levels (ALs) for drinking water, as defined by the California Department of Public Health (now the State Water Resources Control Board [State Water Board] Division of Drinking Water [DDW]). Historic soil concentrations at the Site exceed the current residential Environmental Screening Levels (ESLs), as set forth by the San Francisco Bay Regional Water Quality Control Board in 2016, for Cd, hexavalent Cr (Cr⁶⁺), Cu, Lead (Pb) and cyanide.
6. On March 17, 1987, staff from the Orange County Health Care Agency (OCHCA) observed wastewater from Newport Plating's metal finishing operation, ponded in, and leaking from an outdoor area at the Site due to inadequate secondary containment. Samples of the contaminated wastewater and soil were collected. The wastewater was considered hazardous waste, and the contaminated soil met the definition of a discharge of hazardous waste, pursuant to Title 22. Santa Ana Water Board staff later confirmed these findings during a separate inspection and identified that the floor drain in the stripping area discharged to underlying soils.
7. On May 18, 1987, the Santa Ana Water Board issued a Cleanup and Abatement Order (CAO) No. 87-83 to Junior Lee Edwards, the owner and operator of Newport Plating. CAO No. 87-111 was issued on July 11, 1987, amending CAO No. 87-83 to reflect a proposal for compliance that was submitted on behalf of Mr. Edwards.
8. On December 11, 1987, a chrome plating rinse tank at Newport Plating overflowed. Instead of containing and cleaning up the waste, the overflow from the tank was discharged to the street gutter in violation of CAO No. 87-111. This violation resulted in the issuance of Administrative Civil Liability Complaint (ACLC) No. 87-153 on December 30, 1987, assessing a \$5,000 penalty for the violation. ACLC No. 87-153 was approved on February 11, 1988 requesting that Mr. Edwards submit the \$5,000 assessment which had not been paid. On June 21, 1988, ACLC No. 88-87 was issued with a proposed assessment of \$34,800, which was later reduced to \$16,000. On September 25, 1989, Santa Ana Water Board staff sent a letter requesting payment in full by October 12, 1989. Failure to submit the payment resulted in Resolution No. 90-100, which referred ACLCs No. 87-153 and No. 88-87 to the California Attorney General for collection on June 8, 1990.
9. In 1987, a preliminary environmental assessment was conducted at the Site by Petroleum Industry Consultants (PIC). Soil samples contained Cd, Cr⁶⁺, Cu, Ni,

and Zinc (Zn); soil pH ranged from 5.4-9.0. Groundwater samples contained Cd, Cr, Cu, Ni, and Zn, and groundwater pH ranged from 7.3-8.6.

10. In 1988, Remedial Action Corporation (RAC) conducted an investigation and prepared a *“Subsurface Investigation Report.”* The investigation consisted of drilling and sampling three shallow hand-augered soil borings, and drilling four deep soil borings. The Subsurface Investigation Report concluded that migration of heavy metals from the Site may have occurred; however, because the Rhine Channel already contained elevated levels of heavy metals and cyanide, impairment of groundwater may be attributable to tidal influences.
11. In 2006, Frey Environmental, Inc. (FREY) prepared a *“Subsurface Investigation Report”* for the 20 soil borings that were advanced at 0.5, 2.5, and 5.0 feet bgs in 2005. Soil analytical results indicated that the U.S. EPA preliminary remediation goals (PRGs) (now the regional screening levels [RSLs]) for residential soil were exceeded for Cd, Cr, Cr⁶⁺, Cu, and Pb. Based on current criteria, the following soil contaminants exceed the concentrations for residential ESLs in units of milligrams per kilogram (mg/kg):

Contaminant	Soil Concentration (mg/kg)	Residential ESL (mg/kg)
Cd	413	39
Cr ⁶⁺	251	0.3
Cu	4,320	3,100
Pb	4,920	80
Cyanide	279	5.3

Pb, Cd, Cu, and Cr were also detected in groundwater at concentrations above their respective MCLs and ALs for drinking water. Because the Site is adjacent to, and tidally influenced by the Rhine Channel, the groundwater beneath the Site is not considered a source of potable water.

12. On May 24, 2006, the Executive Officer of the Santa Ana Water Board issued a no further action (NFA) letter for groundwater at the Site but requested a Work Plan to remediate soil at the Site.
13. In 2008, FREY performed off-Site soil sampling according to a Work Plan that was not reviewed or approved by Santa Ana Water Board staff. Two hand-augered soil boring samples were collected at 0.5, 2.5, and 5.0 feet bgs. FREY concluded that Pb is elevated regionally, and is not a primary constituent of concern (COC) for Site remediation.
14. In 2009, FREY submitted a Remedial Action Plan (RAP) that identified Cd as the primary COC at the Site. The report recommended excavation of 3 feet of material from areas exceeding residential PRGs for Cd, and 1 foot of material for

all other areas outside of the building. Santa Ana Water Board staff did not formally respond to the RAP; however, the RAP was considered insufficient.

15. On January 7, 2014, email correspondence between Santa Ana Water Board staff and the City of Newport Beach staff indicated that there had been several attempts to make contact with the attorney who represented the Discharger, but these efforts were not successful.

III. Allegations: Failure to Respond to 13267 Order

16. By letter dated May 1, 2018, the Santa Ana Water Board's Executive Officer issued a Water Code section 13267 Investigative Order (Investigative Order) titled "*Directive to Conduct Groundwater and Soil Investigation at Former Newport Plating, 2810 Villa Way, Newport Beach, California 92683,*" via Certified Mail to the Discharger. The Investigative Order was unclaimed or unable to be forwarded and returned to sender. The Discharger's Agent for Service of Process, Mr. Ronald Ballard, was copied on the Investigative Order and responded via e-mail on July 6, 2018, indicating that Patterson Kahle, LLC had limited funds and was suspended by the Franchise Tax Board (FTB) and would need to be revived. Mr. Ballard did not respond to the substance of the requirements contained in the Investigative Order.
17. By letter dated July 18, 2018, the Santa Ana Water Board's Executive Officer re-issued an Investigative Order via Certified Mail to Patterson Kahle, LLC. On July 18, 2018, Mr. Ballard notified the Santa Ana Water Board, via email, that the letter had been sent to an incorrect mailing address; however, could not provide an alternate address upon request. The Certified Mail return receipt showed that the notification letter was received by the Discharger on July 20, 2018.
18. The Investigative Order pursuant to Water Code Section 13267 required the Discharger to submit technical reports to the Santa Ana Water Board in order to delineate contamination in soil and groundwater and to update the RAP contingent upon the investigation results. The technical reports were due August 20, 2018, and no response was received.
19. Failure to respond to the Investigative Order is a violation of Water Code section 13267 and subject to penalties pursuant to Water Code section 13268.
20. Water Code section 13268 states: "*Any person failing or refusing to furnish technical monitoring program reports ... may be liable civilly.*" The statute goes on to provide that a regional board may impose a penalty in an amount not to exceed \$1,000 per each day of violation.
21. Pursuant to Water Code section 13327, in determining the amount of civil liability, the regional board shall take into consideration 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 the ability to continue in 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 as justice may require.

22. The *State Water Board's Water Quality Enforcement Policy* (Enforcement Policy) was adopted on 4 April 2017. The Enforcement Policy's effective date is October 5, 2017. The use of the Enforcement Policy's penalty methodology addresses the factors required to be considered when imposing administrative civil liability.
23. The details of these violations, including the factors required to be considered by Water Code section 13327, are set forth in full in the accompanying Attachment A, which is incorporated herein by this reference as if set forth in full.
24. The Parties have engaged in settlement negotiations and have agreed to the imposition of an Administrative Civil Liability of twenty-seven thousand four hundred and forty-one dollars and twenty-nine cents, \$27,441.29. This amount represents the staff costs associated with enforcement and exceeds the minimum penalty as articulated in Attachment A.
25. Staff costs in Attachment A were originally calculated to be \$23,169. In the course of settlement negotiations, Santa Ana Water Board staff identified additional enforcement related staff costs which should have been included in this calculation. Therefore, as described herein, and in additional detail in Attachment B, the total staff costs in this matter are \$27,441.29 and cover costs incurred by the Santa Ana Water Board from 2009 through July 2019. The total costs include review of various reports, including a Remedial Action Plan, drafting the Administrative Civil Liability Complaint and other enforcement orders, and correspondence and meetings with the Discharger.
26. As a material consideration of the settlement, the Discharger entered into a voluntary cleanup agreement with the Santa Ana Water Board on July 10, 2019. Substantial effort has been made by the Discharger to communicate and cooperate with the Santa Ana Water Board's requests. The Discharger continues to make the required progress towards remediating contamination at the Site. Group Delta, on behalf of the Discharger, has submitted work plans to assess soil and groundwater for California Code of Regulations, Title 22 metals (including Cr and Cr⁶⁺), cyanide, volatile organic compounds (VOCs) and Per- and Polyfluoroalkyl Substances (PFAS) both on-Site and off-Site. As of December 5, 2019, groundwater monitoring wells are sampled on a quarterly basis to account for tidal fluctuations and to monitor any discharge of contaminants from the Site during pre-remediation and future post-remediation. The Discharger continues to assess contamination in affected media in hopes of updating and submitting the RAP for Santa Ana Water Board approval.

27. Additionally, the Prosecution Team acknowledges that on June 8, 2020 the Discharger submitted a conceptual site model (CSM) to the Santa Ana Water Board. The CSM provides a framework that can be used to communicate and document key project elements, such as site characterization, exposure pathways, and remedial action decisions throughout the life of the remedial process and to Site completion. A CSM is an iterative document with written and illustrative representation of the site conditions and the physical, chemical and biological processes that control the transport, migration and potential impacts of contamination (in soil, air, groundwater, surface water and/or sediments) to human and/or ecological receptors. The development and refinement of the CSM will help identify data gaps in the characterization process and can ultimately support remedial decision making. On August 10, 2020 the Santa Ana Water Board staff requested a revised CSM to address the identified deficiencies in the report and to fill additional data gaps in the characterization phase through the installation of monitoring wells and additional step-out soil borings. The Santa Ana Water Board is anticipating the revised CSM will be submitted on February 17, 2021. The Discharger will proceed with preparing a RAP that will be subject to Santa Ana Water Board staff's approval. Following the removal action and post-remediation monitoring a request for closure will be considered.

28. The Santa Ana Water Board Prosecution Team believes that the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the violations alleged herein, and that this Stipulated Order is in the best interest of the public.

IV. Stipulations

The Parties stipulate to the following:

29. **Jurisdiction**: The Parties agree that the Santa Ana Water Board has subject matter jurisdiction over the matters alleged in this action and personal jurisdiction of the Parties to this Stipulation.

30. **Administrative Civil Liability**:

- a. The Discharger hereby agrees to the imposition of an ACL in the amount of **twenty-seven thousand four hundred and forty-one dollars and twenty-nine cents, \$27,441.29**, to resolve the violation specifically alleged in Attachment A to this Order.
- b. The Discharger agrees to pay \$27,441.29 to the *State Water Board's Cleanup and Abatement Account* and shall indicate this Order number on the check. The Discharger shall send the original check referencing this Order number to the following address:

Division of Administrative Services
ATTN: Accounting, State Water Resources Control Board
1001 I Street 18th Floor
Sacramento, California 95814

- c. A copy of the check described above shall be sent to the Prosecution Team contact listed in Paragraph 31.

31. **Compliance with Applicable Laws:** The Discharger understands that payment of administrative civil liability in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged herein may subject it to further enforcement, including additional administrative civil liability. Nothing in this Stipulated Order shall excuse the Discharger from meeting any more stringent requirements which may be imposed hereafter by changes in applicable and legally binding legislation or regulations.

32. **Party Contacts for Communications Related to Stipulated Order:**

For the Santa Ana Water Board:

Chad Nishida
3737 Main Street, Suite 500
Riverside, CA
92501-3339
951-782-3252
Chad.Nishida@waterboards.ca.gov

For the Discharger:

Thierry R. Montoya, Esq.
As counsel for Patterson Kahle LLC
AlvaradoSmith
1 MacArthur Place, Suite 200
Santa Ana, CA 92707
tmontoya@alvaradosmith.com

33. **Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

34. **Public Notice:** The Discharger understands that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the Regional Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Regional Board, or its delegee, for adoption, the Assistant Executive Officer may

unilaterally declare this Stipulated Order void and decide not to present it to the Regional Board, or its delegee. The Discharger agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

35. **Procedure:** The Parties agree that the procedure that has been adopted for the approval of the settlement by the Parties and review by the public, as reflected in this Order, will be adequate. In the event procedural objections are raised prior to this Stipulated 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 under the circumstances.
36. **No Waiver of Right to Enforce:** The failure of the Prosecution Team or Regional Board to enforce any provision of this Stipulated Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of this Stipulated Order. The failure of the Prosecution Team or Santa Ana Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order. No oral advice, guidance, suggestions, or comments by employees or officials of any Party regarding matters covered under this Stipulated Order shall be construed to relieve any Party regarding matters covered in this Stipulated Order. The Santa Ana Water Board reserves all rights to take additional enforcement actions, including without limitation, the issuance of ACL complaints or orders for violations other than those addressed by this Order.
37. **Effect of Stipulated Order:** Except as expressly provided in this Stipulated Order, nothing in this Stipulated Order is intended nor shall it be construed to preclude the Santa Ana Water Board or any state agency, department, board or entity or any local agency from exercising its authority under any law, statute, or regulation.
38. **Interpretation:** This Stipulated Order shall not be construed against the party preparing it but shall be construed as if the Parties jointly prepared it and any uncertainty and ambiguity shall not be interpreted against any one party.
39. **Modification:** This Stipulated Order shall not be modified by any of the Parties by oral representation whether made before or after the execution of this Order. All modifications must be made in writing and approved by the Santa Ana Water Board or its delegee.
40. **Integration:** This Stipulated Order constitutes the entire agreement between the Parties and may not be amended or supplemented except as provided for in this Stipulated Order.
41. **If Order Does Not Take Effect:** In the event that this Stipulated Order does not take effect because it is not approved by the Santa Ana Water Board, or its delegee, or is vacated in whole or in part by the State Water Board or a court, the

Parties acknowledge that the Prosecution Team may proceed to a contested evidentiary hearing before the Santa Ana Water Board to determine whether to assess an ACL for the underlying alleged violations, or may continue to pursue settlement. 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 any subsequent administrative or judicial proceeding or hearing and will be fully protected by California Evidence Code sections 1152 and 1154; California Government Code section 11415.60; Rule 408, Federal Rules of Evidence; and any other applicable privilege under federal and/or state law. The Parties also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to:

42. Objections related to prejudice or bias of any of the Santa Ana Water Board members or their advisors and any other objections to the extent that they are premised in whole or in part on the fact that the Santa Ana 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 any contested evidentiary hearing in this matter; or
43. Laches or delay or other equitable defenses based on the time period that the Order or decision by settlement may be subject to administrative or judicial review.
44. **Waiver of Hearing:** The Discharger has been informed of the rights provided by Water Code section 13323, subdivision (b), and hereby waives its right to a hearing before the Santa Ana Water Board.
45. **Waiver of Right to Petition:** The Discharger hereby waives the right to petition the Regional Board's adoption of the Stipulated Order as written for review by the State Water Board, and further waives the right, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
46. **Covenant Not to Sue:** Upon the effective date of this Stipulated Order, the Discharger shall and does release, discharge, and covenant not to sue or pursue any civil or administrative claims against any State Agency or the State of California, its officers, agents, directors, employees, attorneys, representatives, for any and all claims or cause of action, which arise out of or are related to this action.
47. **Water Boards Not Liable:** Neither the Santa Ana Water Board members, nor the Santa Ana Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from the negligent or intentional acts or omissions by the Discharger or its respective directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Order, nor shall the Santa Ana Water Board, its

members, staff, attorneys, or representatives be held as parties to or guarantors of any contract entered into by the Discharger, or its directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Order.

48. **Authority to Bind:** Each person executing this Stipulated 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.
49. **Necessity for Written Approvals:** All approvals and decisions of the Regional Board under the terms of this Stipulated Order shall be communicated to the Discharger in writing. No oral advice, guidance, suggestions, or comments by employees or officials of the Santa Ana Water Board regarding submissions or notices shall be construed to relieve the Discharger of its obligation to obtain any final written approval required by this Stipulated Order.
50. **No Third Party Beneficiaries:** This Stipulated Order is not intended to confer any rights or obligation on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.
51. **Severability:** This Stipulated Order is severable; should any provision be found invalid the remainder shall remain in full force and effect.
52. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Santa Ana Water Board, or its delegee, enters the Order.
53. **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.

IT IS SO STIPULATED.

California Regional Water Quality Control Board Prosecution Team
Santa Ana Region

Jayne Joy Digitally signed by Jayne Joy
Date: 2021.02.05 13:02:04
-08'00'



By: _____
Jayne Joy
Assistant Executive Officer

Date

Patterson Kahle, LLC

By: _____

Robert Mosier, Mosier & Company, Inc.
Manager of Patterson Kahle, LLC

2-5-21
Date

HAVING CONSIDERED THE PARTIES STIPULATIONS, THE SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD, BY AND THROUGH ITS EXECUTIVE OFFICER, FINDS THAT:

1. The foregoing Stipulation is fully incorporated herein and made part of this Order.
2. This is an action to enforce the laws and regulations administered by the Regional Board. The Regional Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations.
3. The Executive Officer of the Regional Board is 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.

Pursuant to Water Code section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** on behalf of the California Regional Water Quality Control Board, Santa Ana.

Hope Smythe
Executive Officer
Santa Ana Regional Water Quality Control Board

Date

Attachment A: Penalty Methodology
Attachment B: Staff Costs Invoice