

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

In the Matter of:

ORDER R8-2021-0031 (Proposed)

**EXETER PROPERTY GROUP, LLC
AND EXETER ALESSANDRO LAND,
LLC
ALESSANDRO COMMERCE CENTER**

**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 (Regional Board), on behalf of the Regional Board Prosecution Team (Prosecution Team), and Exeter Property Group, LLC and Exeter Alessandro Land, LLC (Dischargers)(collectively known as the Parties) and is presented to the Regional 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. Exeter Alessandro Land, LLC is an indirect affiliate of Exeter Property Group, LLC. The Dischargers' construction project (Project) involved the development of the Alessandro Commerce Center located southwest of the intersection of Alessandro Boulevard and Brown Street, in Riverside, California (Site).
3. 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.
4. On November 7, 2017, Thomas Wang, principal and the 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. 8 33C381914 upon permit enrollment.

5. 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. The General Permit prohibits all discharges except for storm water and non-storm water discharges specifically authorized by the General Permit or another NPDES permit. (General Permit, III.B.)
6. Runoff from the Site flows to an ephemeral basin on the adjacent property and then potentially through another basin that drains to Sycamore Creek by way of several tributaries that are a combination of storm drains and natural drainage. Sycamore Creek then becomes Tequesquite Arroyo, which then flows to the Santa Ana River, Reach 3. The pollutants in the runoff from the Site have the potential to impact the beneficial uses of the ephemeral pond; Sycamore Creek; Tequesquite Arroyo; the Santa Ana River, Reach 3; and those in the tributaries upstream to the river.
7. The beneficial uses of Sycamore Creek and Tequesquite Arroyo include Groundwater Recharge; Water Contact Recreation and Non-contact Water Recreation; Warm Freshwater Habitat; Wildlife Habitat; Rare, Threatened, or Endangered Species; and Spawning, Reproduction and Development. The Beneficial Uses of the Santa Ana River, Reach 3 include Agriculture Supply; Groundwater Recharge; Water Contact Recreation; Non-contact Water Recreation; Warm Freshwater Habitat; Wildlife Habitat; Rare, Threatened, or Endangered Species; and Spawning, Reproduction and Development. As tributaries, the ephemeral pond and the upstream channels have the same beneficial uses as Santa Ana River, Reach 3.
8. During Site inspections in April of 2020, Regional Board staff observed General Permit violations. On April 14, 2020, Regional Board staff conducted a Site inspection following a rain event and observed a lack of effective erosion controls, sediment controls, or perimeter controls at discharge locations. On April 17, 2020, Regional Board staff conducted another inspection and observed ongoing noncompliance. On April 21, 2020, Regional Board staff again conducted a Site inspection and observed that perimeter controls BMPs along Alessandro Boulevard were still inadequate or missing. In addition, Regional Board staff observed sediment-laden stormwater being discharged from a water utility excavation onto Alessandro Boulevard without the implementation of BMPs.
9. On May 19, 2020, Regional Board staff issued a Notice of Violation to the Dischargers describing the General Permit violations observed during the April 2020 Site inspections. Additional inspections were conducted in May and July of 2020.

10. Construction at the Site concluded by July 9, 2020, and a Notice of Termination was filed on or about November 11, 2020.

III. General Permit Violations

11. Violation 1—Discharges of Sediment-Laden Stormwater and Non-Stormwater on April 13, 14, and 21, 2020: The General Permit prohibits all discharges except for storm water and non-storm water discharges specifically authorized by the General Permit or another NPDES permit. (General Permit, III.B.) On April 13, 2020, during a rain event, sediment-laden storm water discharged from the Site. On April 14, 2020, sediment-laden storm water was again discharged from the Site during the pumping of two excavations, for which controls were missing or ineffective. On April 21, 2020, the Dischargers pumped sediment-laden non-storm water from a utility excavation, which discharged from the Site without the requisite controls. None of these discharges were specifically authorized by the General Permit, a waiver, or other waste discharge requirements.
12. Violation 2—Missing and Ineffective Perimeter Controls: The General Permit requires dischargers at Risk Level 2 sites to establish and maintain effective perimeter controls and stabilize all construction entrances and exits to sufficiently control erosion and sediment discharges from the Site. (General Permit, Attachment D, Section E.1.) Overall, perimeter controls were missing at various locations on the Site for at least 4 days.
13. Violation 3—Missing and Ineffective Erosion Control BMPs: The General Permit requires dischargers at Risk Level 2 sites to apply linear erosion controls along the toe, the faces, and at the grade breaks of exposed slopes. (General Permit, Attachment D, Section E.4.) Flow lengths are not to exceed the distances shown in Table 1 in the General Permit. For areas under active construction, the General Permit also requires dischargers at Risk Level 2 sites to implement appropriate erosion control best management practices (BMPs) in conjunction with sediment control BMPs. (General Permit, Attachment D, Section E.3.) The General Permit defines active construction as areas undergoing land surface disturbance. This includes construction activity during the preliminary stage, mass grading stage, streets and utilities stage, and the vertical construction stage. The Dischargers failed to apply erosion control BMPs for at least 84 days, from April 14, 2020 through July 6, 2020, at various locations at the Site.
14. Violation 4—SWPPP Missing Sediment Controls for Brown Street Area: The General Permit requires dischargers to ensure that SWPPPs are designed so that all pollutants and their sources are controlled. (General Permit, XIV.A.1.) The Dischargers failed to specify erosion, sediment, or perimeter controls for the Brown Street construction area in the Site SWPPP. A review of the SWPPP that was submitted with the Notice of Intent (NOI) showed that the SWPPP does not specify erosion, sediment, or perimeter controls for the Brown Street construction

area. This violation began on June 1, 2018, the construction start date reported by the Dischargers, and runs until at least May 21, 2020. Thus, there are 721 days of violation.

15. 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.
16. 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.
17. The *State Water Board's Water Quality Enforcement Policy* (Enforcement Policy) was adopted on April 4, 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.
18. 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.
19. The Parties have engaged in settlement negotiations and have agreed to the imposition of an Administrative Civil Liability of **five hundred sixty-five thousand three hundred and four dollars (\$565,304)** in liability against the Dischargers pursuant to Water Code section 13385 and Government Code section 11415.60.
20. 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.

IV. Stipulations

The Parties stipulate to the following:

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

22. **Administrative Civil Liability:**

- a. The Dischargers hereby agree to the imposition of an Administrative Civil Liability (ACL) in the amount of **five hundred sixty-five thousand three hundred and four dollars, \$565,304** to resolve the violations alleged in Attachment A to this Order.
- b. The Dischargers agree to pay **five hundred sixty-five thousand three hundred and four dollars, \$565,304** to the *State Water Board's Cleanup and Abatement Account* and shall indicate this Order number on the check. The check shall be submitted within 30 days following adoption of this Order by signature of the Executive Officer. The Dischargers 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 23.

Compliance with Applicable Laws: The Dischargers understand that payment of the ACL 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.

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

For the Regional Board:
Adam Fischer, Chief, Inland Stormwater Unit
Adam.Fischer@waterboards.ca.gov
951 320-6363

For the Dischargers:
Eric Deo, Regional Property Manager
edeo@exeterpg.com
510-899-9650

24. **Attorneys' 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.
25. **Public Notice:** The Dischargers understand 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 Dischargers agree that they may not rescind or otherwise withdraw their approval of this proposed Stipulated Order.
26. **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.
27. **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 Regional Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order.
28. **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 Regional Board or any state agency, department, board, or entity or any local agency from exercising its authority under any law, statute, or regulation.
29. **Matters Addressed by Order:** Upon the effective date of this Order, the Order represents a full, final, and binding resolution and settlement of all the violations alleged herein, and all other claims, violations, or causes of action that could have been asserted against the Dischargers as of the effective date of this Order based on the specific facts alleged herein. The provisions of this paragraph are expressly conditioned on the payment of the administrative civil liability as provided above.
30. **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.

31. **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 Regional Board or its delegee.
32. **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.
33. **If Order Does Not Take Effect:** In the event that this Stipulated Order does not take effect because it is not approved by the Regional 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 Regional 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:
- a. Objections related to prejudice or bias of any of the Regional 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 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 any contested evidentiary hearing in this matter; or
 - b. 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.
34. **Waiver of Hearing:** The Dischargers have been informed of the rights provided by Water Code section 13323, subdivision (b), and hereby waive their right to a hearing before the Regional Board.
35. **Waiver of Right to Petition:** The Dischargers hereby waive 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.

36. **Covenant Not to Sue:** Upon the effective date of this Stipulated Order, the Dischargers shall and do 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 causes of action, which arise out of or are related to this action.
37. **Water Boards Not Liable:** Neither the Regional Board members, nor the Regional 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 Dischargers or their respective directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Order, nor shall the Regional Board, its members, staff, attorneys, or representatives be held as parties to or guarantors of any contract entered into by the Dischargers, or their directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Order.
38. **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.
39. **Necessity for Written Approvals:** All approvals and decisions of the Regional Board under the terms of this Stipulated Order shall be communicated to the Dischargers in writing. No oral advice, guidance, suggestions, or comments by employees or officials of the Regional Board regarding submissions or notices shall be construed to relieve the Dischargers of their obligation to obtain any final written approval required by this Stipulated Order.
40. **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.
41. **Severability:** This Stipulated Order is severable; should any provision be found invalid the remainder shall remain in full force and effect.
42. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Regional Board, or its delegee, enters the Order.
43. **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.

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 Dischargers fail to perform any of their 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