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IN THE MATTER OF:

NORTH COUNTY TRANSIT DISTRICT

NONCOMPLIANCE WITH STATE BOARD ORDER NO. 99-08-DWQ

SPRINTER RAIL PROJECT
WDID NO. 9 37C322900

NCTD'S RESPONSE TO COMPLAINT NO. R9-2008-0021 FOR ADMINISTRATIVE CIVIL LIABILITY

MARCH 4, 2008

SUBMITTED: MAY 21, 2008

I. INTRODUCTION

Best Best & Krieger LLP, on behalf of the North County Transit District ("NCTD"), respectfully submits this brief and attached exhibits in response to the Administrative Civil Liability Complaint No. R9-2008-0021 ("ACL") issued by the California Regional Water Quality Control Board, San Diego Region ("Regional Board") on March 4, 2008. The ACL alleges that NCTD violated the Statewide General Permit for Storm Water Discharges Associated with Construction Activity ("Permit"), and seeks monetary penalties in the amount of $685,000. The ACL is based on the results of 10 inspections of NCTD's Sprinter construction site occurring between October 5, 2007, and January 25, 2008.

II BACKGROUND

The Sprinter Rail Project is a 22-mile light rail system being constructed by NCTD. When complete, the Sprinter will connect the Cities of Escondido, San Marcos, Vista, and Oceanside, and will provide North County residents along the Highway 78 corridor with much needed mass transit service. It will also provide North County commuters direct rail access to the north-south Coaster rail route currently linking the coastal cities in North County with downtown San Diego. The Sprinter project will further provide North County communities with a highly efficient link to the coast and ultimately, to downtown San Diego. As a mass transit project, Sprinter advances regional efforts to get commuters out of their cars and further supports the goals stated in AB32, the California Global Warming Solutions Act of 2006, which requires the reduction of green house gases to 1990 levels by 2020. With the increasing cost of gas, projects such as Sprinter are necessary and important to the 900,000 residents of North County.

The linear nature and large scale of the Sprinter site presented NCTD and its contractors with numerous sediment and erosion control challenges. The 22-mile long project crosses multiple watersheds. The nature of the site impacts require different and creative solutions, depending on the watershed and location. Storm water management solutions that are appropriate for some portions of the project site do not adequately address challenges at other parts of the site. Although NCTD believed that it was adequately addressing these issues, in March, 2007 it received a Notice of Violation ("NOV") from the Regional Board for violations observed at the Sprinter site. Before NCTD had an opportunity to respond to this first NOV, a second one was issued in early April, 2007. NCTD responded to both, and did not receive any response from the Regional Board until August, 2007, when the Regional Board issued Administrative Civil Liability Complaint No. R9-2007-0093 ("first ACL") for the violations documented in the NOVs.

As NCTD progressed with its response to the first ACL, it became apparent that storm water compliance measures at the Sprinter site were inadequate. This was documented by Regional Board staff inspections on October 5th, November 27th, and November 30th of 2007. In fact, in order to adequately assess the situation, NCTD sought assistance from the Regional Board staff regarding education of NCTD's storm water compliance management team about compliance issues. It was NCTD's belief at that time that it could, and should work collaboratively with the Regional Board to manage water quality conditions at the site.

Upon receiving the inspection reports documenting site conditions in early October and November, NCTD brought in an additional storm water compliance consultant to assist with conditions at the Sprinter site. It was intended that the new consultant would coordinate work with NCTD's existing storm water compliance team and the primary construction contractor, West Coast Rail Constructors ("WCRC") to assess, monitor and maintain compliance at the project site. This additional consultant was hired in mid November, 2007. Based on its assessment of site conditions and where NCTD resources would best be focused, NCTD decided to pay the first ACL in its entirety and work on compliance at the Sprinter site. NCTD therefore tendered full payment of the first ACL to the Regional Board prior to the hearing date of December 12, 2007.

The first ACL was presented to the Regional Board and accepted on December 12, 2007. Just two weeks after that date, on December 31, 2007, the Regional Board issued Cleanup and Abatement Order ("CAO") No. R9-2007-0226. Among other things, the CAO required NCTD to submit Site Status Reports every fifteen days describing the measures implemented in the previous two weeks, as well as include a prioritized schedule of the steps to be taken to achieve compliance at the Sprinter site. It also required NCTD to file Rain Event Reports documenting compliance efforts after each significant rainfall event.

When NCTD received the CAO, it became evident that its current storm water team was inadequately managing storm water at the Sprinter site. In order to remedy the situation as soon as possible, and to maintain compliance with the CAO, NCTD hired a new team of consultants to manage storm water compliance. The new storm water management team began work on or about January 22, 2008.

On January 24, 2008, NCTD staff met with Regional Board staff to discuss NCTD's plan to address the CAO. At that meeting, NCTD explained that it had hired a new storm water management team to handle all storm water compliance activities at the Sprinter site, and introduced the members of that team to Regional Board staff. NCTD further described its overall plan for compliance with the CAO and explained that new BMPs had already been implemented on portions of the Sprinter site.

Since January 22, 2008, NCTD has worked diligently to comply with the Permit at the Sprinter site. NCTD has maintained full compliance with the CAO since the first Status Report was due on January 31, 2008. NCTD has submitted at least 12 status and/or rain event reports between January 25, 2008 and May 1, 2008 in order to comply with the CAO. (Copies of the reports are included as Exhibit G.) Indeed, a February 27, 2008 inspection of the site resulted in a positive response from Regional Board staff. A May 8, 2008, inspection by Regional Board staff confirmed compliance with the Construction General Permit at the entire site.

Despite these substantial actions, on March 4, 2008, the Regional Board issued a second ACL assessing penalties for violations that allegedly took place at the Sprinter site between October 5, 2007, and January 25, 2008. While NCTD recognizes the challenges at the Sprinter site during the period covered by the March 4, 2008 ACL, NCTD does not believe that the ACL adequately portrays conditions on the Sprinter site or NCTD's actions in relation to the storm water issues. For the following reasons, the Regional Board should revise or rescind the ACL.

III ARGUMENT

A. THE ACL'S ALLEGATION THAT CONTINUING VIOLATIONS OCCURRED AT THE SPRINTER SITE IS UNSUPPORTED BY THE EVIDENCE.

The ACL alleges that "NCTD failed to implement BMPs in accordance with its SWPPP in violation of the Permit section C.2. for a continuous period of 112 days, from October 5, 2007 through January 25, 2008." (ACL Technical Report, 4.) As described in the ACL and its attachments, inspections of the Sprinter site took place on 10 different dates over the 112 day period. Importantly, Regional Board staff rarely returned to the same location to see if Best Management Practices ("BMP") had been updated, or discharges abated. Perhaps more importantly, Regional Board staff never returned to the same location the day after a BMP violation was observed. No back-to-back inspections were conducted during the period covered by the ACL. Thus, Regional Board staff have no way of knowing, and no way of proving that the Sprinter site was continuously out of compliance for the entire 112 day period.

Admittedly, there were storm water compliance challenges at the Sprinter site during the period covered by the ACL. Regional Board staff did observe the same alleged violation at the same location on more than one occasion. (*See e.g.* Inspection Report dated, November 30, 2007, photo 670) It is notable, however, many, if not all, of these "recurring" violations relate to the unlined earthen ditches that NCTD installed, as a requirement of the environmental mitigation for the project, or to some other subjective determination of the adequacy of a given BMP. The Draft Environmental Impact Report, CEQA State Clearing House No 1996051021 Section 4.8, Water Resources, proposed several mitigation measures to control erosion and improve water quality. In particular measure WR4 required NCTD to "use unlined drainage

channels wherever feasible to allow infiltration of site related runoff." This concept of maximizing earthen ditches was included in the Project Conceptual Wetlands Mitigation Plan and Permit application packages, which had 1.28 acres of earthen lined drainages. These materials were submitted to the resource agencies including the Regional Board as part of the environmental permitting process.

When the permits were issued by the resource agencies as a condition of receiving the respective permits, NCTD had to construct earthen lined ditches which were classified as Non Vegetated Waters of the US. Regional Board staff reviewed and approved NCTD's Wetlands Mitigation Plan when the permits were issued. Regional board Staff also received the Sprinter Water Quality plan which was submitted in accordance with the 401 Water Quality Certification for the Sprinter Project. These plans included descriptions of the earthen lined channels. It is alarming that the ACL imposes penalties on NCTD for alleged violations related to a condition that the Regional Board approved and the resource agencies required. Without belaboring the points, it takes time for the vegetation to establish within the earthen lined ditches.

The fact remains, however, that storm water violations were not observed on a daily basis by Regional Board staff at the Sprinter site. After December 31, 2007, pursuant to the CAO, NCTD was invoiced for Regional Board staff time spent inspecting or otherwise handling the NCTD matter. Regional Board staff therefore had no reason not to inspect on a daily basis if they believed violations were continuing. This failure to provide back-to-back inspection reports results in insufficient information for the Regional Board to make an informed decision on the merits of the ACL. Instead of proving continued violations, Regional Board staff, through the ACL, have assumed continuing non-compliance. A $685,000 penalty deservedly requires more than an assumption; it requires evidence.

B. THE ACL'S ALLEGATIONS THAT DISCHARGES OBSERVED AT THE SPRINTER SITE VIOLATED THE PERMIT'S DISCHARGE LIMITATION REQUIREMENTS ARE UNSUPPORTED BY THE EVIDENCE.

The Sprinter project site is located at a low point in at least two watersheds. As a result, portions of the Sprinter project site receive constant flows of storm water from adjoining properties and neighboring MS4s. The Construction General Permit requires permittees, to the best of their ability to convey, to divert run-on around the site, or to control run-on storm water flows with BMPs. (State Board Order No. 99-08-DWQ, § A.5a(2)(c).) NCTD maintains that the majority of the discharges observed at the Sprinter site originated offsite, and were caused by illicit discharges to the Sprinter Right-of-Way, or by offsite storm water entering station sites. (*See e.g.* Regional Board Inspection Report dated November 30, 2007, photos 669-674.)

What is notable about these illicit discharges and offsite waters is that the ACL does not document their sources. Neither the ACL, nor any of the supporting technical reports document the source of the water causing the discharge or its condition when it entered the Sprinter site. Moreover, no testing was conducted to confirm whether the discharges actually exceeded turbidity limits for the applicable watershed. Water may appear to be sediment laden. But in reality have a low turbidity level. In fact, it may be for that reason that the State Board includes testing requirements in the draft Construction General Permit. (See Exhibit "K".)

NCTD is not alleging that the discharges at issue did not occur. Regional Board staff clearly observed and documented water exiting portions of the Sprinter project site on at least four dates between October 5, 2007, and January 25, 2008. However, whether or not those discharges represent a violation of the Construction General Permit is debatable. NCTD has no obligation to treat offsite run-on water to a higher water quality level than when it first entered NCTD's property. By failing to document the source and condition of the discharged water, the ACL does not document that the discharges represent a violation of the Permit.

C. THE ACL VIOLATES BOTH THE WATER CODE AND THE STATE BOARD'S ENFORCEMENT POLICY. IMPOSING THE ACL WOULD BE A PREJUDICIAL ABUSE OF DISCRETION

Water Code section 13385(e) requires the Regional Boards to consider a number of factors related to an alleged violation when issuing an ACL. Among the factors to consider are the gravity of the violations alleged, the culpability of the discharger, and the ability of the discharger to pay the penalties sought. The State Board's Enforcement Policy includes the same requirements. (*See* State Water Resources Control Board, Enforcement Policy, 35-42.) (See Exhibit "L".)

The ACL mischaracterizes the material facts surrounding the alleged violations. These mischaracterizations significantly impact the gravity of the violations alleged, NCTD's culpability, and perhaps most importantly, NCTD's ability to pay the penalties sought in the ACL. Moreover, because there is insufficient evidence supporting the ACL's allegations regarding the gravity of the violations, NCTD's culpability, and NCTD's ability to pay, the Regional Board's reliance on the ACL as currently drafted would represent a prejudicial abuse of discretion.

1. *The gravity of the violations warrants a lesser penalty*

As stated above, the ACL includes numerous allegations regarding NCTD's response to compliance, and the seriousness with which NCTD approached storm water issues. The ACL implies that NCTD's payment to WCRC for services rendered demonstrates that NCTD did not hold WCRC accountable for its failure to manage storm water at the Sprinter site and that NCTD was, in fact, endorsing WCRC's actions. Specifically, the ACL states:

> On January 3, 2008, NCTD staff recommended that the NCTD Board release approximately $5 million in money that was held in retention from West Coast Rail Constructors (WCRC), their general contractor. . . In recommending the release of the retainage money, the NCTD staff found that 'satisfactory progress is being made.' . . . At the time NCTD was well aware that their construction site was far from achieving compliance with the storm water requirements of the Permit.

(ACL Technical Report, 13.)

The ACL mischaracterizes NCTD's relationship with WCRC, as well as the importance that NCTD management placed on compliance at the site in relation to completing the project. NCTD and WCRC experienced a good relationship with regard to the quality and timeliness of

the rail work done on the Sprinter Project. WCRC has performed very well in constructing Sprinter despite many design changes and change orders necessitated by the project. WCRC's performance in this regard fully justified the partial release of the retainage funds on January 3, 2008. Moreover, the portion of retainage that was released pertained to construction work already performed and money earned by WCRC. In this regard, the partial release of retention complied with California Public Contract Code section 9203.

WCRC clearly failed to maintain the Sprinter site in a manner complaint with the Permit. NCTD continues to address this issue with WCRC. The storm water issue, however, must be viewed in light of the entire contractual relationship. Consequently, NCTD's partial release of retainage funds to WCRC, despite storm water conditions at the Sprinter site, was in no way an endorsement of WCRC's failure to properly maintain the site. Further, Regional Board staff should not attempt to orchestrate or manipulate the contractual arrangement between NCTD and WCRC for purposes of alleging or establishing storm water violations. The gravity of the violations alleged is thus substantially less than that put forth in the ACL, and the penalty should be reduced accordingly.

2. *NCTD's culpability warrants a lesser penalty*

The ACL includes numerous allegations regarding NCTD's response to compliance, and the seriousness with which NCTD approached storm water issues. The ACL implies that NCTD's failure to take Permit compliance seriously creates a high degree of culpability with regard to the alleged discharges. Specifically, the ACL states:

> On December 12, 2007, the Regional Board adopted Civil Liability (ACL) Order No. R9-2007-0219 assessing a $160,000 liability against NCTD for violations of the Permit . . . The implementation of the $160,000 liability represents a ***significant punitive action that did not appear to significantly alter NCTD's behavior with regard to BMP implementation*** as shown by the inspections conducted during the 2007/08 rainy season. CAO No. R9-2007-0226 was issued on December 31, 2007, in response to continued non-compliance with the Permit and threatened impacts to beneficial uses.

(ACL Technical Report, 10 [emphasis added].)

The CAO was issued two (2) weeks after the Regional Board issued Order No. R9-2007-0219 assessing a $160,000 liability against NCTD, which NCTD paid in full. The CAO was issued on a holiday, December 31, 2007 and, therefore, it was not immediately implemented. Moreover, NCTD began improving compliance at the Sprinter site before the Regional Board issued Order No. R9-2007-0219. As early as October, 2007, NCTD began to increase oversight of WCRC's activities. Because compliance continued to be a challenge, in late November, 2007, NCTD hired an additional consultant to monitor compliance and direct WCRC on storm water issues. As evidenced in the inspection reports attached to the ACL, compliance at the Sprinter site remained an issue until late January, 2008. At that point, NCTD hired a new team of consultants to manage storm water compliance at the Sprinter site. While the previous consultants were retained for a relatively short period of time to ensure continuity and institutional knowledge, they were subsequently relieved and replaced with more than seven (7)

experienced storm water compliance inspectors, as well as an independent erosion and sediment control BMP installation contractor.

Since that time, NCTD has worked diligently and made significant gains in achieving compliance at the Sprinter site. A February 27, 2008 inspection of the site resulted in a positive response from Regional Board staff. (See Exhibit "I".) Accordingly, NCTD's gains since January, 2008 are evidence of NCTD's commitment to compliance at the Sprinter site. The fact that compliance was not immediately forthcoming in the wake of Order No. R9-2007-0219 is a function of NCTD's ability to re-build the organizational infrastructure and personnel necessary to ensure compliance at the Sprinter site. It is not in any way a reflection of NCTD's lack of concern for the Permit's requirements. Consequently, the ACL has overstated NCTD's culpability for the alleged discharges, and thereby overstated NCTD's liability.

3. *NCTD's ability to pay the fines warrants a lesser penalty*

Water Code section 13385(e) requires the Regional Board to consider a discharger's ability to pay a penalty before imposing it. The ACL states that NCTD has the resources to pay the $685,000 liability sought in the ACL stating:

> At this time, the Regional Board has no information to indicate that NCTD is unable to pay the proposed administrative civil liability (ACL) or that the penalty would affect the ability of NCTD to continue operations. The Sprinter Rail project has an estimated budget of $460 million. The proposed liability of $685,000 is less than 0.15% of the project's estimated budget.

(ACL Technical Report, 11.)

The ACL mischaracterizes NCTD's ability to pay the $685,000 fine by comparing it to the overall project cost. There is no nexus between the project cost and NCTD's ability to pay. Much of the funding for the Sprinter Project comes from the Federal Transit Administration ("FTA") and other restrictive state funding. NCTD's use of these funds is limited to the rail project itself. Consequently, these funds cannot be used to pay penalties or implement supplemental environmental projects that are not somehow associated with the project site.

As a result, any penalties paid by NCTD would have to be paid out of local funds. At this point in the construction of the Sprinter project, NCTD has nearly depleted or encumbered all remaining project funding. The remaining funds being used for project expenses are local monies that could otherwise be used for bus service. NCTD is currently experiencing an unprecedented budget shortfall, the worst in the agency's history, due to state funding cuts, sales tax revenue downturns and the huge increase in the cost of fuel.

Because of this shortfall, NCTD conducted public hearings to consider discontinuing at least 15 bus routes in North County and curtailing service along another 15 routes. A copy of the public hearing notice is attached hereto as Exhibit "M". Over 70 people appeared at the NCTD public hearing and voiced their concerns about losing their bus service. NCTD has additionally estimated it will be necessary to lay off more than 40 bus drivers and 15 management staff over the next several months. Indeed, management layoffs are now occurring. Any penalty paid from local money is money that could have otherwise provided transit service in North County to

those who need it most and/or provided enough money for NCTD to retain at least some of the lost employees.

Regional Board staff have also stated to NCTD that NCTD has the ability to recover all penalties paid from WCRC. Recovery of all penalties paid by NCTD from WCRC is speculative at best and again evidences an attempt to manipulate the contractual relationship between WCRC and NCTD. Therefore, the contractual relationship between WCRC and NCTD has no relationship to NCTD's ability to pay the penalty stated in the ACL.

D. THE ACL'S WITNESS TESTIMONY AND DOCUMENTATION IS FAULTY AND UNRELIABLE

The ACL relies on testimony and documentary evidence from unreliable witnesses, including Mr. Paul Cline of Long Beach, California. Mr. Cline is a former San Marcos resident whose property was adjacent to the Sprinter Right-of-Way. In order to proceed with the Sprinter Project, NCTD invoked its power of eminent domain to take portions of several properties along the Right-of-Way. Portions of Mr. Cline's property were taken pursuant to those powers. Mr. Cline was given approximately $90,000 for the small portion of his property that was taken for the Sprinter Project. Nevertheless, since that time Mr. Cline has taken every opportunity to oppose the Sprinter Project and NCTD.

Mr. Cline has made no secret of his motivation to damage NCTD's interests and the Sprinter Project. This motivation makes any of his allegations subjective and inherently unreliable. More telling, perhaps, is the fact that of the 900,000 people living in North County, the ACL cites the complaints of only two residents. Mr. Cline's motive is clear, and any evidence he submits is deficient. For the Regional Board staff to rely on it would be a prejudicial abuse of discretion.

As a practical matter, much of the documentary evidence provided by Mr. Cline is incapable of being corroborated, as there is no formal chain of custody for his multitude of photographs. Moreover, regardless of Mr. Cline's intentions, because he has no direct knowledge of the Sprinter site, its precise boundaries, or the requirements of its SWPPP, it is impossible to confirm whether any of the evidence he submitted accurately documents conditions at the Sprinter site. Lastly, Mr. Cline has no demonstrated expertise, whatsoever, in storm water compliance or maintenance. His testimony and documentary evidence regarding the status of the site, and the adequacy of BMPs, is irrelevant. The ACL's reliance on Mr. Cline's testimony is inappropriate, and any allegations based on it should be dismissed.

E. THE ACL'S PENALTIES EXCEED WHAT MAY LAWFULLY BE ASSESSED UNDER THE WATER CODE

State law allows the Regional Board to impose up to a $10,000 per day fine for violations of the Construction General Permit. (Water Code § 13385(c).) Discharges from multiple point sources and other violations that occur on the same day are still subject to the $10,000 limit. In other words, the $10,000 amount is a per day limit, not a per day, per violation limit. (*State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 529.)

The ACL seeks a $685,000 fine for 25 observed discharges that took place on four different days and BMP violations observed during each of the 10 inspection reports included in the ACL. The ACL allocates a $5,000 fine for each discharge and $5,000 per day for a total of 112 days that Regional Board staff have alleged the site was out of compliance. As stated above, the ACL does not provide demonstrable evidence that the site was out of compliance for the entire 112 day period. The ACL and the inspection reports show alleged BMP violations and suspect storm water discharges on the individual days that inspections were conducted. Because Regional Board staff only visited the Sprinter project site 10 times in the 112 days covered by the ACL, there is a maximum of 10 days available for enforcement.

Pursuant to Water Code section 13385(c), the maximum penalty available for violations of the Clean Water Act is $10,000 per day that a site is in violation, and $10 per gallon of discharge over 1,000 gallons. The $10,000 per day maximum applies regardless of how many violations occur on an individual day. (*State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 529-30.) Because the ACL actually documents violations on a total of 10 days, and does not seek per gallon penalties, the maximum penalty available is $100,000. Even if the Regional Board were to surmise that continuing violations occurred based on uncorrected violations observed on more than one occasion, the maximum liability would be $380,000, significantly less than what is sought in the ACL.

The penalties the ACL imposes on NCTD violate state law. Pursuant to state law, the Regional Board has no authority to impose fines exceeding $10,000 for each day that a proven violation occurred.

F. THE ACL PENALTY REPRESENTS AN UNLAWFUL PUNISHMENT OF A PUBLIC ENTITY

California Government Code section 818 provides that a public entity is not liable for "damages imposed primarily for the sake of example and by way of punishing the defendant." The penalties sought in the ACL clearly violate this requirement. The California Supreme Court has held that fines imposed for discharge violations under Water Code section 13385 (as cited in the ACL) are "not punitive damages within the meaning of Government Code section 818." (*San Francisco Civil Service Association v. Superior Court of Marin County* (1976) 16 Cal.3d 46, 51.) However, this holding is inapplicable when it comes to penalties imposed for BMP violations where no discharges occurred. (*See id.*) Moreover, penalties assessed pursuant to Water Code section 13385 are punitive damages within the meaning of Government Code section 818 if, as here, they are applied in a punitive manner. (*State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522.)

Consequently, any use of Water Code section 13385 that demonstrate an intent to punish a public agency in a manner that exceeds what is necessary to compensate the state for environmental degradation, places section 13385 in conflict with section 818, and renders the penalty unlawful. (*State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522.) Where there was no unlawful discharge, as was the case on most of the dates referenced in the ACL, there can be no harm for which compensation may be sought.

By assessing penalties far in excess of what is necessary to compensate the state for damages caused by unlawful discharges, the ACL violates Government Code section 818. Statements in the ACL indicate that the Regional Board was punishing NCTD by issuing a second ACL. (See ACL Technical Report, 10 ["the 160,000 fine . . . behavior].) Issuing this ACL in such close proximity in time to the issuance of the CAO provides ample evidence of this. The types of alleged BMP violations that were documented in the ACL and its associated inspection reports demonstrate an intent to punish NCTD. Assessing a $5,000 penalty based on a Regional Board staff member's determination that an application of soil stabilization matrix appears "light" or that a two inch gap between straw waddles exists can be nothing but punitive. (*See* Regional Board Inspection Report, November 30, 2007, 3; and Regional Board Inspection Report, October 5, 2007, photo 28.)

These subjective and overly zealous assessments of compliance are especially compelling when the size of the fine is compared to the documented discharges from the Sprinter site. The only discharge violations observed at the Sprinter site occurred on four separate days. (ACL Technical Report, 13-16.) The penalty sought in the ACL is far greater than the statutory maximum available for these violations. (*See* discussion, above.) It follows therefore, that because the penalties exceed the statutory maximum for the discharge violations, they exceed the amount necessary to compensate the state for alleged environmental degradation at the Sprinter site. The penalties sought constitute an unlawful punishment pursuant to Government Code section 818, and the Regional Board has no authority to impose them.

G. THE REGIONAL BOARD IS BARRED FROM IMPOSING THE ACL BASED ON THE DOCTRINE OF RES JUDICATA

In general, the Doctrine of Res Judicata prohibits a party who has litigated, or had an opportunity to litigate a matter in a former action in a court of competent jurisdiction, raising the same or a related claim again. (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636.) "Where the cause of action in the second action is the same as that in the first action, a final judgment in the latter upon the merits is a complete bar to the maintenance of the second action." (*Id.*, at 638.)

The ACL imposes fines based on alleged violations observed between October 5, 2007, and January 25, 2008. The CAO was issued in response to inspections on October 5, November 30, December 7 and December 19, 2007. The ACL was also issued in response to the inspections on those dates. Because the CAO represents a final administrative judgment, and it decided the same issues alleged at least in part in the ACL, those portions of ACL that are based on the inspections covered by the CAO are barred by the doctrine of Res Judicata.

H. BEST USE OF PUBLIC RESOURCES

As stated above, NCTD has made significant strides in addressing storm water discharges at the Sprinter site since it became aware that substantial challenges existed. Efforts in this direction realistically began as early as October, 2007, more than one month before the hearing on the first ACL. At that time, NCTD increased its oversight of WCRC's activities. Because compliance was still an issue, in late November, 2007, NCTD hired an additional consultant to monitor compliance and direct WCRC on storm water issues. After determining that the

consultant could not adequately manage storm water at the site, NCTD hired a new team of consultants to manage storm water compliance, as well as an independent BMP installation contractor. Since that time, NCTD has worked diligently toward compliance at the Sprinter site. NCTD has maintained full compliance with the CAO since January 31, 2008, and submitted at least 12 status and/or rain event reports between January 31, 2008 and May 1, 2008. Indeed, a February 27, 2008 inspection of the site resulted in a positive response from Regional Board staff. A subsequent May 8, 2008, inspection confirmed compliance with the Construction General Permit at the entire site.

It is against this backdrop and in anticipation of collaboration that NCTD has proceeded with compliance efforts at the Sprinter site. NCTD has an ongoing relationship with the Regional Board that it wants to maintain. NCTD believed that by meeting with Regional Board staff on January 24, 2008, and setting forth the measures NCTD planned to implement to bring the Sprinter site into compliance with the CAO, it had taken the first steps toward building a cooperative relationship with the Regional Board. NCTD was disappointed to learn that immediately following the January 24, 2008 meeting, Regional Board staff conducted an inspection on January 25, 2008 of the Sprinter site.

To bring a 22 mile linear project into full compliance a day after what NCTD believed to be a collegial, cooperative meeting to address compliance, is unrealistic and suggests a less than forthright response to the January 24, 2008 meeting. NCTD would like to work collaboratively with the Regional Board, as this is the best use of public funds. Yet, when NCTD approached Regional Board staff about resolving the ACL without the need for a hearing, NCTD was told that this was not possible. NCTD was further told that the Regional Board staff had been directed to prepare for a hearing. Consequently, both Regional Board staff and NCTD have used scarce resources to prepare for public hearing rather than cooperatively resolving the ACL.

The State of California is experiencing an historic budget shortfall. In order to address the lack of funds, the state has significantly cut funds to many state agencies, including NCTD. As a result of state funding cuts, sales tax revenue downturns, and the well documented rise in fuel costs, NCTD is experiencing an unprecedented budget shortfall, the worst in the agency's history. Severe cuts to both bus service and a reduction in management staff are being considered; management layoffs are already occurring.

Much of the funding for the Sprinter Project comes from the Federal Transit Administration ("FTA") and other restrictive state funding. NCTD's use of these funds is limited to the rail project itself. Consequently, these funds cannot be used to pay penalties or implement supplemental environmental projects that do not have some relationship with the project. Any funds used for a fine would have to be paid out of local funds. Any fines paid from local moneys will be moneys that could have otherwise provided transit service in North County, and/or provided enough funding for NCTD to retain at least some of the lost employees. In times of fiscal crisis, it is especially important for public agencies to work together toward common goals rather than move in opposite directions to the detriment of the public at large.

In light of these concerns, and considerations regarding the best use of public funds, NCTD proposes to settle the ACL in the following manner:

1) NCTD will pay, in full, all penalties imposed as a result of observed direct discharges from the Sprinter site to neighboring MS4s or Waters of the State. - $125,000

2) NCTD will fund a supplemental environmental project ("SEP") in the North County area in an amount equal to the fines imposed as a result of failure to implement BMPs at the Sprinter site. The amount paid for the SEP would not exceed $270,000, an amount that corresponds to the percentage of BMP violations where no sediment or erosion controls were in place. (*See* chart on page 8 of the Technical Report accompanying the ACL.) NCTD has at least three SEP that it would like to discuss with the Regional Board.

3) The Regional Board will hold the remainder of the penalty in abeyance pending continued compliance with the Permit at the Sprinter site, until a Notice of Termination ("NOT") is obtained. - $290,000

The total amount paid by NCTD would be $395,000. This would include the penalties paid directly to the state, and any funds used for a SEP. The Regional Board would hold $290,000 in abeyance pending continued compliance at the Sprinter site. Retaining the ability to levy this sum is incentive to maintain compliance and develop storm water plans to implement during the forthcoming rainy season in Fall 2008. If another NOV is issued before an NOT is obtained for the Sprinter site, the $290,000 would become due and payable. It is NCTD's belief that allocating the penalty sought in the ACL in this manner will achieve the Regional Board's goals of compensation for discharges, and continued compliance at the Sprinter site. It will also allow funds, that would otherwise leave the San Diego area to be beneficially used in North County's watersheds. For that reason, NCTD respectfully requests that the Regional Board adopt this allocation of the ACL penalty.

III. CONCLUSION

For the aforementioned reasons, NCTD respectfully requests that the Regional Board rescind the ACL, or in the alternative, adopt the above offered settlement option.

Sincerely,

Marguerite S. Strand
of BEST BEST & KRIEGER LLP