

**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 Copermitttee 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 Copermitttee 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 Copermitttees 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 Copermitttee 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 Copermitttee 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

would cover Regional Board staff costs as well as the estimated economic benefit calculated by the Prosecution Staff.

- M. Accordingly, the general terms of the settlement are that in exchange for a full and final release of all claims arising out of the specified violations in ACL Complaint No. R9-2009-0089, the County will pay an administrative civil liability of \$57,350 for alleged violations of Order No. R9-2007-0001 as detailed in the tentative ACL Order and Complaint.

NOW, THEREFORE, in exchange for their mutual promises and for other good and valuable consideration specified herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The Parties agree to support, advocate for, and promote the adoption of the tentative ACL Order No. R9-2010-0025, which incorporates this Agreement, at the Regional Board's April 14, 2010, meeting, or the next available regular or special meeting, following public notice and comment. The tentative ACL Order is an indivisible component of this Agreement and the Parties' settlement. For this reason, if the Regional Board fails to adopt the tentative ACL Order without modification (unless the modifications are for immaterial changes to eliminate typographical errors or are specifically agreed upon by the Parties), this Agreement is void.
2. The County agrees to provide payment in the amount of \$57,350 to be deposited into the State Water Pollution Cleanup and Abatement Account within 30 days of adoption of the tentative ACL Order.
3. This settlement agreement is entered into by the Parties to resolve by consent and without further administrative proceedings the alleged violations set forth in the Complaint. The Parties believe that settlement of this matter is in the best interest of the People of the State.
4. The County covenants and agrees that it will not contest or otherwise challenge this Agreement, which incorporates the tentative ACL Order, before the Regional Board, the State Water Resources Control Board (State Board), or any court.
5. The County and its respective successors and assigns, agents, attorneys, employees, officers, shareholders, and representatives hereby release and discharge the Regional Board and the State Board, including each and every constituent agency, board, department, office, commission, fund or entity thereof, and successors and assigns, agents, attorneys, employees, officers, shareholders and representatives of the Regional Board, the State Board, and each and every constituent of the State 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 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.

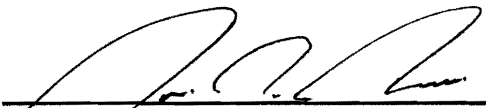
Settlement Agreement
ACL No. R9-2009-0089
Tentative ACL Order No. R9-2010-0025

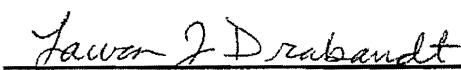
17. This Agreement may be executed as duplicate originals, each of which shall be deemed an original Agreement, and all of which shall constitute one agreement. Facsimile or electronic signatures are acceptable.

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

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By: _____
JAMES SMITH
Assistant Executive Officer

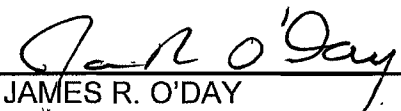
Date: _____

By: _____
LAURA DRABANDT
Counsel to Prosecution Staff
(Approved as to form)

For County of San Diego:

JOHN J. SANSONE
County Counsel

Date: 2-26-2010

By: 
JAMES R. O'DAY
Senior Deputy