

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (Agreement) is made and entered into by William and Heidi Dickerson, Larry and Penelope L. Gunning, and Perry & Papenhausen, Inc., a California Corporation (referred to collectively as Dischargers) 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. William G. Dickerson at all relevant times has been, the owner of the real property commonly known as 501 First Street, Coronado, California, until on or around April 14, 2008, when title was transferred to Paradiso in Terra, LLC, a Limited Liability Company organized and existing under the laws of the State of California. Larry Gunning, as Trustee of the Larry Gunning and Penelope L. Gunning Revocable Trust is, and at all relevant times has been, the owner of the real property commonly known as 505 First Street, Coronado, California. Perry & Papenhausen, Inc., is a corporation organized and existing under the laws of the State of California that conducted work on the aforementioned properties that included the removal of shoreline riprap, construction of seawall and footing, and dewatering associated with construction at 501 First Street property.

B. Dischargers are represented by the law firm of Opper & Varco LLP. Opper & Varco has advised Dischargers that a real or potential conflict of interest may exist with this representation and Dischargers have made a knowing and intelligent waiver of any conflict or potential conflict that may arise from the concurrent representation.

C. On or about June 13, 2007, the Regional Water Quality Control Board, San Diego Region (Regional Board) adopted Cleanup and Abatement Order Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended, finding that the Dischargers' riprap removal and construction of a seawall and footing resulted in the unauthorized discharge of waste and threatened to cause conditions of pollution in violation of the Clean Water Act and provision of the Water Quality Control Plan for the San Diego Basin (Basin Plan) adopted by the Regional Board.

D. On September 27, 2007, Dischargers filed a petition for writ of mandate in the Superior Court of the State of California for the County of San Diego, entitled *William G. Dickerson, et al. v. The San Diego Regional Water Quality Control Board*, Case No. 37-2007-00075848-CU-WM-CTL (Writ Action). In this Writ Action, Dischargers alleged that in making the findings set forth in Cleanup and Abatement Orders R9-2006-0101 and R9-2006-0102 the Regional Board proceeded in excess of its jurisdiction and abused its discretion because the construction of a keystone block wall and the alleged destabilized beach did not qualify as a discharge of waste into waters of the state. The Dischargers and the Regional Board, through its representatives at the Attorney General's Office, have negotiated a settlement agreement in the Writ Action. The

Dischargers have agreed to pay \$67,000 in settlement of the Writ Action. Section 7 below makes this Agreement contingent upon Regional Board approval of a Writ Action settlement agreement.

E. On or about May 20, 2008, the Assistant Executive Officer issued Amended Administrative Civil Liability Complaint No. R9-2008-0019 which proposes to assess administrative civil liability of \$24,000 against William and Heidi Dickerson, and Perry & Papenhausen, Inc., for certain alleged violations of NPDES Permit No. CAG919001, General Waste Discharge Requirements Order No. R9-2000-0090 (Dewatering ACL Complaint) (Exhibit A) at 501 First Street, Coronado, California. In response, the Dischargers advanced legal arguments which claimed that the alleged NPDES dewatering violations did not violate NPDES rules. The Prosecution Staff and Dischargers subsequently entered into discussions and agreed to stay future hearings on the Dewatering ACL Complaint while related settlement discussions continued.

F. On or about November 4, 2008, the Prosecution Staff contacted representatives of the Dischargers to inform them of the Prosecution Staff's intent to pursue additional violations associated with the removal of riprap shoreline protection and the subsequent erection of a seawall. The alleged violations are detailed in Section 4 of Administrative Civil Liability Order No. R9-2009-0084 (ACL Order) attached hereto as Exhibit B and incorporated into this Agreement.

G. In response to the alleged violations detailed in the ACL Order, Dischargers have presented technical reports and legal arguments claiming that riprap removal and erection of a seawall did not qualify as a discharge of waste or contribute to a condition of pollution or nuisance, and that certain alleged violations improperly set double penalties in addition to those already agreed to be paid to the United States Army Corps of Engineers.

H. Since November 2008, the Parties conferred for the purpose of settling the Dewatering ACL and the allegations described herein without issuing an Administrative Civil Liability Complaint and conducting a formal hearing. Dischargers, therefore, enter into this Agreement without the admission of any fact including any alleged fact contained in the ACL Order attached hereto as Exhibit B. Dischargers also enter into this Agreement without the adjudication of any issue in this matter including any issue raised in the ACL Order attached hereto as Exhibit B.

I. After due consideration, the Parties, through their respective representatives, have reached a settlement agreement for the alleged violations contained in the Dewatering ACL Complaint and the ACL Order. The alleged violations and proposed penalties for those violations are provided and detailed in the ACL Order attached as Exhibit B. The Prosecution Staff has agreed to propose the ACL Order for adoption at the Regional Board's August 12, 2009, meeting, or the next available regular or special meeting. This ACL Order and Agreement 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.

J. In reaching this Agreement the Prosecution Staff considered the statutory factors for determining the appropriate amount of civil liability for the alleged violations. As detailed in the ACL Order, such consideration recognized that the Dischargers have agreed to replace riprap on the beach and to replant eelgrass pursuant to the settlement agreement between the Dischargers, the United States Army Corps of Engineers and the San Diego Unified Port District (Federal Settlement Agreement) attached hereto and incorporated herein as Attachment 2 to ACL Order (Exhibit B). Under the Federal Settlement Agreement, the Dischargers have also agreed to pay penalties totaling \$275,000 to the San Diego Unified Port District and the United States Army Corps of Engineers. In addition, the proposed penalties in this Agreement would cover staff costs as well as the economic benefit calculated by the Prosecution Staff. Further, while the Prosecution Staff concluded the degree of culpability to be high, the Dischargers had no prior history of violation and made efforts to replace riprap and eelgrass but have not been able to do so because permits were revoked in approximately September, 2006.

K. Accordingly, the general terms of the settlement are that Dischargers will, in exchange for a full and final release of all claims arising out of the specified violations, (1) pay an administrative civil liability of \$61,200 to include \$24,000 in mandatory minimum penalties as asserted in Dewatering ACL Complaint and \$37,200 for alleged Basin Plan and Clean Water Act violations detailed in the ACL Order, and (2) comply fully and completely with the riprap replacement and eelgrass mitigation requirements pursuant to the Federal Settlement Agreement attached hereto and incorporated herein as Attachment 2 to ACL Order (Exhibit B).

L. In order to facilitate the approval of the proposed settlement, and to carry out its terms, the Parties desire to enter into the following agreement.

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 ACL Order, attached hereto as Exhibit B, at the Regional Board's August 12, 2009, meeting, or the next available regular or special meeting, following public notice and comment. The ACL Order is an indivisible component of this Agreement and the Parties' settlement. For this reason, if the Regional Board fails to adopt the 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. Dischargers covenant and agree that they will not contest or otherwise challenge this Agreement, which incorporates the ACL Order, before the Regional Board, the State Water Resources Control Board (State Board), or any court. The Assistant Executive Officer likewise covenants and agrees that the Prosecution Staff will not contest or otherwise challenge this Agreement before the Regional Board, the State Board, or any court.

3. Dischargers agree to provide payment in the amount of \$61,200 to be distributed between the State Board's Cleanup and Abatement Account (54%) and the Waste Discharge Permit Fund (46%). The first payment of \$15,300 must be made **within 30 days** of receiving written notice from the Regional Board that the ACL Order is effective and no longer subject to challenge. The Discharger must make three additional payments of \$15,300 to the Regional Board in the 12 months immediately following receipt of the aforementioned notice and on or before the following dates: December 1; March 1; and June 1. The additional payments are to be distributed between the State Board's Cleanup and Abatement Account (54%) and the Waste Discharge Permit Fund (46%).
4. If Dischargers fail to make the specified payments to the State Board Cleanup and Abatement Account or the State Board Waste Discharge Permit Fund as specified above, then the remaining balance due under the ACL Order will become immediately due and payable to the Regional Board within 30 days of the missed payment due date.
5. Dischargers agree to comply fully and completely with the riprap replacement and eelgrass mitigation requirements pursuant to the Federal Settlement Agreement (Attachment 2 to ACL Order (Exhibit B)).
6. Paradiso In Terra, LLC, agrees that Dischargers will have access to the real property commonly known as 501 First Street in Coronado, California, as may be necessary for Dischargers to perform the riprap replacement and eelgrass mitigation required pursuant to the Federal Settlement Agreement. Paradiso in Terra, LLC, further agrees that it will not object to the Dischargers' performance of the riprap replacement and eelgrass mitigation required pursuant to the Federal Settlement Agreement.
7. Parties agree that this Agreement is contingent upon approval by the Regional Board of a settlement agreement in the Writ Action prior to or within 60 days after adoption of the ACL Order (Exhibit B).
8. Dischargers 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.

9. Dischargers' complete performance of its obligations under this Agreement shall effect a release and discharge of Dischargers 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 ACL Order (Exhibit B) and the Dewatering ACL (Exhibit A). Notwithstanding this section, however, the Regional Board expressly retains authority to take enforcement action in the event of any failure by Dischargers to perform their obligations under this Agreement. In addition, the Regional Board reserves its rights under Civil Code section 1542.

10. Upon execution of this Agreement by Dischargers and the Prosecution Staff, the Prosecution Staff shall promptly publish the availability of the Agreement for the purpose of accepting public comments on the Agreement for a period of 30 days. The Regional Board will consider public comments received prior to adopting the ACL Order and retains discretion to approve or reject the settlement.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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 proposed ACL Order and this Agreement will be legally sufficient. In the event that objections are raised during the public comment period for the proposed 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.

18. The Dischargers intend Perry & Papenhausen, Inc., to pay the amount set forth in paragraph 3 to this Agreement, but the other named Dischargers are jointly and severally liable for the entire amount set forth in paragraph 3 and independently responsible for performing the corrective actions on their property or on property that they previously owned. The Regional Board reserves the right to seek payment from any or all of the Dischargers.

19. 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.

20. 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.

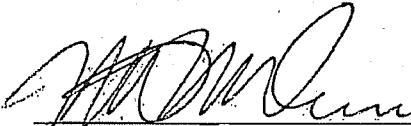
21. This Agreement may be executed as duplicate originals, each of which shall be deemed an original Agreement, and all of which shall constitute one agreement. Facsimile or electronic signatures are acceptable.


22. This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California. Each party hereby stipulates that the State and Federal courts located in the State of California shall have in personam jurisdiction and venue over each of them for the purpose of litigating any enforcement, dispute, controversy, or proceeding arising out of or related to this Settlement Agreement. Any final judgment rendered against a party in any action or proceeding shall be conclusive as to the subject of such final judgment and may be enforced in other jurisdictions in any manner provided by law.

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: 6/23/09

By:   
MICHAEL P. MCCANN  
Assistant Executive Officer

Approved as to Form:   
YVONNE WEST  
Counsel to Prosecution Staff

**For Dischargers:**

**Perry & Papenhausen, Inc.,**

Dated: \_\_\_\_\_, 2009

By: \_\_\_\_\_  
FRED PERRY

Title: \_\_\_\_\_

**Paradiso in Terra, LLC**

Dated: \_\_\_\_\_, 2009

By: \_\_\_\_\_  
WILLIAM G. DICKERSON

Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 2009

\_\_\_\_\_  
WILLIAM G. DICKERSON

Dated: \_\_\_\_\_, 2009

\_\_\_\_\_  
HEIDI DICKERSON

Dated: \_\_\_\_\_, 2009

\_\_\_\_\_  
LARRY GUNNING

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: \_\_\_\_\_

By: \_\_\_\_\_

MICHAEL P. MCCANN  
Assistant Executive Officer

Approved as to Form:

\_\_\_\_\_  
YVONNE WEST  
Counsel to Prosecution Staff

**For Dischargers:**

**Perry & Papenhausen, Inc.,**

Dated: 7-21-09, 2009

By: *Fred Perry*  
FRED PERRY

Title: *Rest*

**Paradiso in Terra, LLC**

Dated: \_\_\_\_\_, 2009

By: \_\_\_\_\_  
WILLIAM G. DICKERSON

Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 2009

\_\_\_\_\_  
WILLIAM G. DICKERSON

Dated: \_\_\_\_\_, 2009

\_\_\_\_\_  
HEIDI DICKERSON

Dated: July 3, 2009

*Larry Gunning*  
LARRY GUNNING



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: \_\_\_\_\_

By: \_\_\_\_\_  
MICHAEL P. MCCANN  
Assistant Executive Officer

Approved as to Form:

\_\_\_\_\_  
YVONNE WEST  
Counsel to Prosecution Staff

**For Dischargers:**

**Perry & Papenhausen, Inc.,**

Dated: \_\_\_\_\_, 2009

By: \_\_\_\_\_  
FRED PERRY

Title: \_\_\_\_\_

Dated: 7/14/09, 2009

**Paradiso in Terra, LLC**  
By: \_\_\_\_\_  
WILLIAM G. DICKERSON

Title: President

Dated: 7/16, 2009

\_\_\_\_\_  
WILLIAM G. DICKERSON

Dated: 7/16, 2009


\_\_\_\_\_  
HEIDI DICKERSON

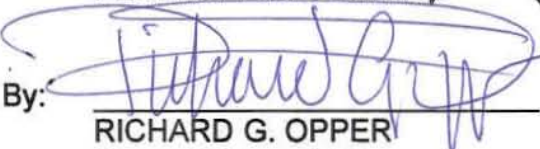
Dated: \_\_\_\_\_, 2009

\_\_\_\_\_  
LARRY GUNNING

Dated: 7/9, 2009

Approved as to Form:

  
PENELOPE L. GUNNING

  
By: RICHARD G. OPPER  
Oppen & Varco LLP

Attorneys for William G. Dickerson,  
Heidi Dickerson, Larry Gunning,  
Penelope L. Gunning, and Perry &  
Papenhausen, Inc.

## Exhibit A

Amended ACL Complaint  
No. R9-2008-0019

See Item 6b, Doc. 3 at page 18

## Exhibit B

Tentative ACL Order  
No. R9-2009-0084

See Item 6b, Doc. 3