

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

IN THE MATTER OF:

**LEWIS LAND DEVELOPERS, LLC;
INDEPENDENCE AT LINCOLN**

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

ORDER NO. R5-2020-0500

SECTION I: INTRODUCTION

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

SECTION II: BACKGROUND

2. On September 2, 2009, the State Water Resources Control Board (State Water Board) adopted the Construction General Storm Water Permit (Permit). The Permit became effective on July 1, 2010 and was amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ. The Permit authorizes discharges of storm water associated with construction activity so long as the dischargers comply with all requirements, provisions, limitations and prohibitions in the permit. Pursuant to federal statutes and regulations, the Permit requires the implementation of the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to reduce or eliminate pollutants in storm water runoff and imposes additional requirements necessary to implement applicable water quality standards.
3. Entities that have obtained coverage under the Permit (dischargers) are required to implement controls, structures, and management practices (a.k.a. Best Management Practices or BMPs) to comply with the Permit's requirements. Based upon each site's sediment transport and receiving water risk level (Risk Level) the Best Management Practices are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 C.F.R. § 122.2). The Permit requires different BMPs, monitoring and reporting to achieve and demonstrate BAT and BCT.

4. Dischargers identify the appropriate Risk Level and are required to have a State-certified Qualified SWPPP Developer (QSD) prepare a site-specific Storm Water Pollution Prevention Plan (SWPPP) prior to construction (Permit, Sections VIII and XIV, A.). The Permit requires Qualified SWPPP Practitioners (QSPs) to implement BMPs required by the Permit (Permit, Section VII, B.3.).
5. Sites identified as a “Risk Level 2” or “Risk Level 3” must implement heightened requirements under the Permit due to an increased risk to water quality (see Permit, Attachments D and E).
6. Sites that fail to implement one or more of the requirements contained in Attachments C, D or E, as applicable, are not in compliance with BAT and BCT requirements. Discharges of storm water or non-storm water from sites where BMPs have not been implemented to achieve BAT and BCT, as required by the Permit, are unauthorized discharges.
7. The Discharger owns the site identified as “Independence at Lincoln,” located at Nicolaus Road and Waverly Drive in Lincoln, California, and are in the process of developing the site into a 575 residential lot subdivision, hereinafter referred to as the “Project.” The QSD uploaded the Permit Required Documents, which were certified and submitted by Phillip Rodriguez (Vice President for Lewis Land Developers LLC) on 29 June 2018. The Project obtained Permit coverage under Waste Discharger Identification Number 5S31C383901 on 9 July 2018.
8. On 21 November 2018, Central Valley Water Board staff inspected the Project and observed that silt fencing had been installed along the perimeter but erosion control BMPs had not been deployed on disturbed soil areas prior to a predicted rain event.
9. On 21 November 2018, Central Valley Water Board staff reviewed the SWPPP. The SWPPP correctly identified the Project as a Risk Level 2 project, but the SWPPP was not updated by the Project’s QSD/QSP, Mark Hicks with Rubicon WSP (QSP), with the Project’s current site conditions or the Project’s Waste Discharger Identification WDID number.
10. On 2 December 2018, Central Valley Water Board staff notified the Discharger by email of the deficiencies with the SWPPP. The Discharger responded by email on 14 December 2018, notifying Central Valley Water Board staff that the SWPPP had been updated to reflect the perimeter control, all weather access, and other erosion and sediment controls that had been installed. The Discharger’s email also informed Central Valley Water Board staff that the Project was storing water onsite and that due to storage capacity limitations, the Discharger intended to dispose of storm water to the former City of Lincoln wastewater treatment plant spray field located on the Discharger’s property. The Discharger’s email noted that the QSP for the project was responsible for updating the SWPPP uploaded into the SMARTS system. An updated SWPPP was uploaded into SMARTS by the QSP on 22 January 2019.

11. On 16 January 2019, prior to a forecasted rain event, Central Valley Water Board Staff conducted a follow up inspection. Central Valley Water Board staff observed that the disturbed soil areas of the Project were inactive and did not have erosion control BMPs installed. Consistent with the Discharger's 14 December 2018 email, the Project was storing large volumes of turbid storm water in two basins and that impounded storm water was being pumped to the portion of the property once used as a spray field during operations of the former municipal waste water treatment facility on site. Some of that storm water was flowing to the west and discharging into a storm water drop inlet. One of the basins had very little freeboard to accommodate additional storm water.
12. Following the inspection, Central Valley Water Board staff reviewed the SWPPP uploaded by the QSP into the Project's SMARTS account. The SWPPP did not yet contain information that was described on 14 December 2018 in the Discharger's email to Central Valley Regional Water Board staff related to the discharge of storm water to the former spray field nor did it identify the storm water drop inlet or sampling required for this discharge. Central Valley Water Board staff contacted the Discharger by email on 17 January 2019 and requested to meet the Discharger onsite to discuss the Discharger's storm water management strategy.
13. On 17 January 2019, the Discharger called Central Valley Water Board staff, scheduled a site meeting for 18 January 2019, and notified Board staff that a levee containing one of the basins had breached late in the evening of 16 January 2019 by reason of a major storm event that had occurred that evening which discharged a large volume of turbid storm water to Markham Ravine, but also informed staff that this levee was promptly repaired on the morning of 17 January 2019.
14. On 18 January 2019, Board staff re-inspected the Project. During the inspection, Central Valley Water Board staff and the Discharger inspected the drop inlet west of the spray field discharge location and discussed discharge monitoring in this location. Central Valley Water Board staff also observed the location of the levee failure and evidence of the turbid discharge along the flow path into Markham Ravine. Despite Discharger's use of the on-site storage basins and its pumping of storm water from those basins to the former municipal wastewater treatment plant spray field to protect against off-site stormwater dischargers, the Project did not have sufficient erosion control BMPs installed on inactive disturbed soils, in violation of the Permit.
15. On 22 January 2019, the Discharger's QSP uploaded a SWPPP amendment to the SMARTS system.

SECTION III: STATUTORY AND REGULATORY CONSIDERATIONS

16. Water Code section 13385(a) provides, in relevant part, “A person who violates any of the following shall be liable civilly in accordance with this section: ... (5) A requirement of Section 301...of the federal Clean Water Act (33 USC Sec. 1311...), as amended...”
17. Water Code section 13385(c) states: “Civil liability may be imposed administratively by...the regional board pursuant Article 2.5 (Commencing with Section 13323) of Chapter 5...” The penalty shall not exceed the sum of ten thousand dollars (\$10,000) for each day in which the violation occurs and ten dollars (\$10) per gallon for each gallon in excess of the first one thousand (1,000) gallons discharged.
18. Pursuant to Water Code section 13327, in determining the amount of discretionary civil liability, the Central Valley Water Board is required to take into consideration the nature, circumstance, 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 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.
19. In this case, application of the Enforcement Policy for a discretionary penalty results in a Final Liability of **two hundred thirteen thousand, three hundred and sixty dollars (\$213,360)** on a per-gallon and per-day discharged basis as detailed in Attachment A.

SECTION IV: SETTLEMENT

20. The Parties have engaged in confidential settlement negotiations and agree to settle the matter without administrative or civil litigation by presenting this Stipulated Order to the Central Valley Water Board, or its delegee, for adoption as an order by settlement pursuant to Government Code section 11415.60. To resolve the violations by consent and without further administrative proceedings, the Parties have agreed to the imposition of administrative civil liability in the amount of **two hundred thirteen thousand, three hundred and sixty dollars (\$213,360)** in administrative civil liability against the Discharger.
21. The Central Valley Water Board Prosecution Team has determined that the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the violations alleged herein and that this Stipulated Order is in the best interest of the public.

SECTION V: STIPULATIONS

The Parties stipulate to the following:

22. **Administrative Civil Liability:** Without admitting the truth of any violations alleged in this Stipulated Order, the Discharger hereby agrees to the imposition of **two hundred thirteen thousand, three hundred and sixty dollars (\$213,360)** in administrative civil liability to the Central Valley Water Board to resolve the violations alleged in this Stipulated Order. The Discharger agrees to pay the following amounts:
- a. **One hundred eighty-three thousand three hundred and sixty dollars (\$183,360)** shall be paid to the State Water Pollution Cleanup and Abatement Account. Payment shall be made no later than thirty (30) days after adoption of an order approving this Stipulated Order by the Central Valley Water Board, or its delegee, by check payable to the State Water Pollution Cleanup and Abatement Account. The Discharger shall indicate on the check the number of this Stipulated Order (R5-2020-0500). The Discharger shall send the original signed check to the Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento, California 95812-1888. A copy of the check shall be sent to Nickolaus Knight, Attorney, State Water Resources Control Board, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812 and Howard Hold, Acting Enforcement Coordinator, Central Valley Water Board, 11020 Sun Center Drive, #200, Rancho Cordova, California 95670-6114.
 - b. **Thirty thousand dollars (\$30,000)** shall be permanently suspended upon completion of the Supplemental Environmental Project (SEP) described in Attachment B of this Order, hereby incorporated by reference. Failure to complete all aspects of the SEP shall result in the Discharger's payment of the entire suspended penalty amount to the State Water Pollution Cleanup and Abatement Account, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim milestone.
23. **Supplemental Environmental Project (SEP):** The remaining \$30,000 in suspended administrative civil liability shall be satisfied through the implementation of the SEP described in Attachment B, incorporated herein by reference, and summarized below. The Discharger proposes to implement the following SEP:

- a. **Construction General Permit Compliance Training for Developers and Homebuilders:** The Discharger will develop and present a series of training presentations for the purpose of educating local developers and homebuilders on compliance with the Construction General Permit and storm water discharges. The programs will give some emphasis to the specific challenges encountered in the Central Valley foothills region during periods of heavy precipitation. The training will consist of a four-hour program with interactive participation and will be presented on three separate occasions to local developers and home builders, with no cost to the participants. The goal of the program will be to reduce the number of unpermitted storm water discharges from construction sites and improve the protection to local surface waters through the education of the builder community.
24. **SEP Completion Deadlines:** The Discharger shall complete all the SEP requirements within one (1) year of the effective date of this Order. Additionally, the Discharger shall submit a Final Report upon the completion of the SEP declaring such completion and detailing fund expenditures and goals achieved. The Final Report submission deadlines are outlined below.
25. **Audits and Certification of Supplemental Environmental Project:**
- a. **Certification of Completion:** Within thirty (30) days of completion of the SEP, but not later than one (1) year from issuance of this settlement agreement, the Discharger shall submit a certified statement of completion of the SEP ("Certification of Completion"). The Certification of Completion may be submitted with the Discharger's Final Report for the Project. The Discharger's authorized representative shall submit the Certification of Completion under penalty of perjury to the Designated Central Valley Water Board contact. The Certification of Completion shall include the following:
 - i. **Certification of Expenditures:**

Certification documenting all expenditures by the Discharger. The expenditures may include external payments to outside vendors or contractors implementing the SEP. The Discharger shall provide any additional information requested by the Central Valley Water Board staff that is reasonably necessary to verify SEP expenditures. The certification need not address any costs incurred by the Central Valley Water Board for oversight.

ii. **Certification of Performance of Work:**

Certification that the SEP has been completed in accordance with the terms of this Stipulated Order. Such documentation may include photographs, invoices, receipts, certifications, and other material reasonably necessary for the Central Valley Water Board to evaluate the completion of the SEP and the costs incurred by the Discharger.

iii. **Third Party Audit:**

If the designated Central Valley Water Board contact obtains information that causes the representative to reasonably believe that the Discharger has not expended money in the amounts claimed, or has not adequately completed any of the work in the SEP, the designated Central Valley Water Board contact may require, and the Discharger shall submit, at its sole cost, a report prepared by an independent third party (or parties), stating that in its professional opinion, the Discharger has or has not expended money in the amounts claimed. In the event of such an audit, the Discharger agrees that they will provide the third-party auditor with access to all documents which the auditor requests. Such information shall be provided to the designated Central Valley Water Board contact within three months of the completion of the Discharger's SEP obligations. The audit need not address any costs incurred by the Central Valley Water Board for oversight.

- b. **Failure to Expend All Suspended Administrative Civil Liability Funds on the Approved SEP:** In the event that the Discharger is not able to demonstrate to the reasonable satisfaction of the designated Central Valley Water Board contact that the entire SEP Amount pursuant to Paragraph 22 have been spent for the completed SEP, the Discharger shall pay the difference between the SEP Amount and the amount the Discharger can demonstrate was actually spent on the SEP, as an administrative civil liability to the State Water Pollution Cleanup and Abatement Account.
- c. **Failure to Complete the SEP:** If the SEP is not fully implemented by the SEP Completion Deadline required by this Stipulated Order, the designated Central Valley Water Board contact shall issue a Notice of Violation. As a consequence, the Discharger shall be liable to pay the entire Suspended Liability or some portion thereof.

26. **Compliance with Applicable Laws and Regulatory Changes:** The Discharger understands that payment of an 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 additional violations of the type alleged may subject it to further enforcement, including additional ACLs. Nothing in this Stipulated Order shall excuse the Discharger from meeting any more stringent requirements which may be imposed hereafter by changes in applicable and legally binding legislation or regulations. Further, except as expressly set forth in this Stipulated Order, nothing in this Stipulated Order releases or waives any claims that either the Central Valley Water Board or Discharger may have against any persons or entities that are not parties to this Stipulated Order, including but not limited to the QSP.

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

For the Central Valley Water Board:

Kari Holmes

Enforcement Coordinator, Central Valley Water Board

11020 Sun Center Drive, Suite 200

Rancho Cordova, CA 95670-6114

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28. **Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
29. **Matters Addressed by this Stipulated Order:** Upon adoption by the Central Valley Water Board, or its delegee, this Stipulated Order represents a final and binding resolution and settlement of all claims, violations, or causes of action alleged in this Stipulated Order or which could have been asserted based on the specific facts alleged in this Stipulated Order against the Discharger as of the effective date of this Stipulated Order. The provisions of this paragraph are expressly conditioned on the Discharger's full payment of the ACL by the deadline specified in Paragraph 22.a and completion of the SEP referenced in Paragraph 22.b or full payment of the associated suspended liability.
30. **Public Notice:** The Discharger understands that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the Central Valley Water Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Central Valley Water 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 Central Valley Water Board, or its delegee. The Discharger agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.
31. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for the Central Valley Water Board's or its delegate's adoption of the Order, and public review of this Stipulated Order is lawful and adequate. The Parties understand that the Central Valley Water Board, or its delegate, have the authority to require a public hearing on this Stipulated Order. In the event procedural objections are raised or the Central Valley Water Board requires a public hearing prior to the Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to mutually revise or adjust the procedure and/or this Stipulated Order as necessary or advisable under the circumstances.
32. **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 Stipulated 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.

33. **No Waiver of Right to Enforce:** The failure of the Prosecution Team or Central Valley Water 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 Central Valley Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order. No oral advice, guidance, suggestions, or comments by employees or officials of any Party regarding matters covered under this Stipulated Order shall be construed to relieve any Party regarding matters covered in this Stipulated Order. The Central Valley Water Board reserves all rights to take additional enforcement actions, including without limitation the issuance of ACL complaints or orders for violations other than those addressed by this Stipulated Order.
34. **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 Prosecution Team or any state agency, department, board or entity or any local agency from exercising its authority under any law, statute, or regulation.
35. **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.
36. **Publicity:** Whenever the Discharger or its agents or subcontractors publicize one or more elements of the SEP, they shall state in a prominent manner that the Project is being undertaken as part of the settlement of an enforcement action by the Central Valley Water Board against the Discharger.
37. **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 Stipulated Order. All modifications must be made in writing and approved by the Central Valley Water Board or its delegee and the Discharger.
38. **If Stipulated Order Does Not Take Effect:** In the event that this Stipulated Order does not take effect because it is not approved by the Central Valley Water Board, or its delegee, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that the Discharger's waivers in Sections 40 and 41 shall cease to apply and the Prosecution Team may proceed to a contested evidentiary hearing before the Central Valley Water Board to determine whether to assess an ACL for the underlying alleged violations, or may continue to pursue settlement.

The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in any subsequent administrative or judicial proceeding or hearing and will be fully protected by California Evidence Code sections 1152 and 1154; California Government Code section 11415.60; Rule 408, Federal Rules of Evidence; and any other applicable privilege under federal and/or state law. The Parties also agree that each Party retains all rights and defenses in any such future action. The Parties further 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 Central Valley Water Board members or their advisors and any other objections to the extent that they are premised in whole or in part on the fact that the Central Valley Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions, and therefore may have formed impressions or conclusions, prior to conducting any contested evidentiary hearing in this matter; provided however, that objections intended to preserve Discharger's due process rights are not waived by this section; or
 - b. Laches or delay or other equitable defenses based on the time period that the Stipulated Order or decision by settlement may be subject to administrative or judicial review.
39. **No Admission of Liability:** In settling this matter, Discharger does not admit to any of the allegations herein, or that it has been or is in violation of the Water Code or any other federal, state, or local law or ordinance.
40. **Waiver of Hearing:** The Discharger has been informed of the rights provided by Water Code section 13323, subdivision (b), and provided that this Stipulated Order is approved by the Central Valley Water Board or its delegee, hereby, subject to Section 38, waives its right to a hearing before the Central Valley Water Board.
41. **Waiver of Right to Petition or Appeal:** The Discharger hereby waives the right to petition the Central Valley Water Board's adoption of the Stipulated Order as written for review by the State Water Board, and further waives the rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
42. **Covenant Not to Sue:** Upon the effective date of this Stipulated Order, Discharger shall and does release, discharge, and covenant not to sue or pursue any civil or administrative claims against any State Agency or the State of California, its officers, agents, directors, employees, attorneys, representatives, for any and all claims or cause of action, which arise out of or are related to this action.

43. **Water Boards Not Liable:** Neither the Central Valley Water Board members nor the Central Valley Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from the negligent or intentional acts or omissions by Discharger or its respective directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Stipulated Order including the SEP described above, nor shall the Central Valley Water Board, its members or staff be held as parties to or guarantors of any contract entered into by Discharger, or its directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Stipulated Order including the SEP.
44. **Discharger not Liable:** Neither the Discharger, its directors, officers, employees, agents, representatives of contractors shall be liable for any injury or damage to persons or property resulting from acts or omissions by the members, employees, representatives, agents or attorneys of the Central Valley Water Board or State Water Resources Control Board arising out of or relating to any matter expressly addressed by this Stipulated Order including the SEP described above.
45. **Authority to Enter Stipulated Order:** Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of and to bind the entity on whose behalf he or she executes the Stipulated Order.
46. **Necessity for Written Approvals:** All approvals and decisions of the Central Valley Water Board under the terms of this Stipulated Order shall be communicated to the Discharger in writing. No oral advice, guidance, suggestions or comments by employees or officials of the Central Valley Water Board regarding submissions or notices shall be construed to relieve the Discharger of its obligation to obtain any final written approval required by this Stipulated Order.
47. **Site Inspections:** The Discharger shall permit Central Valley Water Board's staff to inspect during normal business hours any location where the SEPs are being implemented as well as review any documents associated with implementation of the SEP(s) at any time during normal business hours.
48. **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.
49. **Severability:** This Stipulated Order is severable; should any provision be found invalid the remainder shall remain in full force and effect.

50. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Central Valley Water Board, or its delegee, enters the Stipulated Order.
51. **Counterpart Signatures; Facsimile and Electronic Signature:** This Stipulated 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. Further, this Stipulated Order may be executed by facsimile or electronic signature, and any such facsimile or electronic signature by any Party hereto shall be deemed to be an original signature and shall be binding on such Party to the same extent as if such facsimile or electronic signature were an original signature.
52. **Incorporation of Exhibits:** Attachments A and B are hereby incorporated by reference.

[SIGNATURES FOLLOW IMMEDIATELY ON NEXT PAGE]

Settlement & ACL Order R5-2020-0500
Lewis Land Developers; Independence at Lincoln

IT IS SO STIPULATED.

California Regional Water Quality Control Board
Central Valley Region Prosecution Team

By: Original signed by
Stewart Black
Acting Assistant Executive Officer

Date: 12 March 2020

Settlement & ACL Order R5-2020-0500
Lewis Land Developers; Independence at Lincoln

IT IS SO STIPULATED

LEWIS LAND DEVELOPERS, LLC
a Delaware limited liability company

By: Lewis Management Corp.,
a Delaware corporation - Its manager

By: Original Signed by
Doug Mull, Authorized Agent

Date: 2 March 2020

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

1. This Order incorporates the foregoing Sections I through V by this reference as if set forth fully herein.
2. In adopting this Stipulated Order, the Central Valley Water Board, or its delegee, has considered, where applicable, each of the factors prescribed in Water Code sections 13327, 13351, and 13385(e). The consideration of these factors is based upon information and comments obtained by the Central Valley Water Board's staff in investigating the allegations concerning the Discharger discussed herein or otherwise provided to the Central Valley Water Board or its delegee by the Parties and members of the public.
3. This is an action to enforce the laws and regulations administered by the Central Valley Water Board. The method of compliance with this enforcement action consists entirely of payment of amounts for ACL and successful completion of the SEP. As such, the Central Valley Water Board finds that issuance of this Stipulated Order is not considered subject to the provisions of CEQA as it will not result in a direct or reasonably foreseeable indirect physical change in the environment and is not considered a "project" (Public Resources Code 21065, 21080(a); 15060(c)(2),(3); 150378(a), Title 14, of the California Code of Regulations). In addition, issuance of this Stipulated Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with sections 15061(b)(3) and 15321(a)(2), of Title 14 of the California Code of Regulations.
4. The Executive Officer of the Central Valley Water Board is authorized to refer this matter directly to the Attorney General for enforcement if the Discharger fails to perform any of its obligations under the 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, Central Valley Region that the Stipulated Order is approved.

Original signed by
Patrick Pulupa
Executive Officer
Central Valley Regional Water Quality Control Board

21 May 2020
Date

Attachment A: Penalty Calculation Methodology
Attachment B: Supplemental Environmental Project

**Attachment A - PENALTY CALCULATION METHODOLOGY
FOR
LEWIS LAND DEVELOPERS LLC
INDEPENDENCE AT LINCOLN
PLACER COUNTY**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at: [Enforcement Policy](#)

Violation 1 – Failure to minimize or prevent pollutants in storm water discharges

During a 21 November 2018 site inspection, staff from the Central Valley Water Board (Board Staff) observed that silt fencing had been installed along the perimeter of the project but that erosion control Best Management Practices (BMPs) had not been deployed on disturbed soil areas of the project immediately prior to a rain event. During a follow-up inspection on 16 January 2019, Board Staff determined that the graded areas of the project were inactive, were still not protected with erosion control BMPs going into another storm event, and consistent with a 14 December 2018 email from the Discharger to Board Staff turbid storm water was being impounded onsite in two large basins. On 17 January 2019, Board staff received notification from the Discharger that a levee failure caused one of the basins to discharge turbid storm water into a tributary to Markham Ravine late in the evening of 16 December 2018 which levee was properly repaired on 17 December 2018. The Prosecution Team alleges the discharge of sediment-laden storm water from the levee failure without installing appropriate erosion control BMPs across the site that meet the Best Available Technology Economically Achievable/Best Conventional Pollutant Control Technology (BAT/BCT) standard is a violation of the General Permit. Attachment D, section A.1.b, Effluent Standards, in the General Permit states: *Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.*

PENALTY FACTOR	VALUE	DISCUSSION
Physical, chemical, biological, or thermal characteristics of the discharge	2	Discharges of turbidity can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat.
Harm or potential for harm to beneficial uses	3	The Project is located within a high-risk receiving watershed as defined by the General Permit. Discharge from the Project flows to an unnamed channel which discharges to Markham Ravine. Markham Ravine discharges to the North Canal and Cross Canal which discharge to the Sacramento River. The discharge was expected to have a moderate potential for harm which the Enforcement Policy defines as having reasonably expected potential impacts, but harm or potential harm to beneficial uses is moderate and likely to attenuate without appreciable medium or long term acute or chronic effects.
Susceptibility to cleanup or abatement	1	The sediment from the turbid discharge was deposited over a long distance and cleanup or abatement of 50% or more of the material would not be possible.
Per gallon and per day factor for discharge violations	0.28	The “Deviation from Requirement” is major because the Discharger did not implement required erosion control BMPs rendering the permit’s BAT/BCT effluent standard ineffective. The value of 0.28 was determined from Table 1 of the Enforcement Policy.
Volume discharged	n/a	The Prosecution Team did not calculate the volume of discharge at this time. The Prosecution Team reserves the right to include the volume discharged in the penalty calculation should this matter proceed to hearing.
Adjustment for high volume discharges	n/a	The Prosecution Team is choosing not to calculate the volume of discharge at this time. The Prosecution Team reserves the right to assess penalties for the volume discharged should this matter proceed to hearing.

PENALTY FACTOR	VALUE	DISCUSSION
Days of discharge	1	The levee broke causing the discharge sometime during the night of 16/17 January 2019. Based on conditions observed during the Board's 18 January 2019 inspection, the duration of the discharge was short and assumed to have occurred over the course of hours, not days. Therefore, Board Staff alleges that discharges from the Project occurred on one day during this period when BMPs did not meet the General Permit's BAT/BCT standard.
Initial Liability for Violation #1	\$2,800	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (\$10,000/day).
Adjustments for Discharger Conduct Culpability	1.2	Failure of levee which caused the discharge was not expected. However, the Discharger began a mass grading project in late October at the start of the rainy season and was aware of the requirement to implement erosion control BMPs prior to a rain event. The Project's SWPPP identifies that <i>Risk Level 2 dischargers are required to implement appropriate soil stabilization BMPs in conjunction with sediment control BMPs for areas under active construction</i> ; however, no erosion control BMPs were installed going into the late November 2018 rain events. Following the initial rain events, the Project's disturbed soil areas were saturated, and the Discharger could not apply erosion controls due to ground conditions. The Discharger did take actions to store and pump water from onsite basis to an onsite spray field for onsite retention and recharge but did not take actions in accordance with General Permit conditions; therefore, Board Staff is assigning a culpability adjustment factor of 1.2.
Adjustments for Discharger Conduct History of Violations	1.0	Board staff are not aware of previous violations by the Discharger related to the General Permit. Therefore, Board Staff is assigning a neutral History of Violations adjustment factor of 1.0 to this violation.

PENALTY FACTOR	VALUE	DISCUSSION
Adjustments for Discharger Conduct Cleanup and Cooperation	1.0	The Discharger contacted Board Staff to report the discharge the day that it was discovered and scheduled an inspection to discuss the incident for the following day. Since the discharge, the Discharger has exhibited the level of cleanup and cooperation expected. Therefore, Board Staff is applying a neutral cleanup and cooperation adjustment factor to this violation.
Total Base Liability for Violation #1	\$3,360	The base liability is calculated as the initial liability multiplied by each of the above three factors.

Violation 2 – Failure to implement erosion control BMPs on inactive areas

During the site inspection on 21 November 2018, Water Board Staff observed that the Risk Level 2 Project had large areas of disturbed soil without erosion control BMPs going into a storm event. The site became inactive following the storm event and as of 1 March 2019, still did not have erosion control BMPs on all disturbed soil areas. Board Staff is electing to stop the days of violation on 1 March 2019 for calculation purposes. Attachment D, section D.2, Erosion Control, in the General Permit states: *Risk Level 2 dischargers shall provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.* Using the dates above, Board Staff alleges that the Discharger was in violation of this requirement for a period of 58 days.

PENALTY FACTOR	VALUE	DISCUSSION
Discharge violations	n/a	This step is not applicable because the violation is not a discharge violation.
Potential for harm	Moderate	The Discharger’s failure to implement erosion control BMPs caused the storm water impounded in the Project’s ponds to have a higher turbidity that if erosion control BMPs had been applied. Therefore, not applying erosion control BMPs to disturbed soil areas had a moderate potential for harm to beneficial uses.
Deviation from requirement	Major	The “Deviation from Requirement” is major because the Discharger did not implement erosion control BMPs rendering the permit requirement ineffective.
Per day factor	0.5	The value of 0.5 was determined from Table 3 in the Enforcement Policy. A value below the middle value was chosen.

PENALTY FACTOR	VALUE	DISCUSSION
Days of violation	35	The violation was first identified during a Board Staff inspection on 21 November 2018. Although erosion control BMPs were still not implemented as of 1 March 2019, Board Staff elected to stop the days of violation on 17 January 2019 for calculation purposes. Using the dates above yields 58 days of violation. Water Board staff have the discretion to collapse multiple day violations in accordance with the method contained in the Enforcement Policy if certain conditions are met. Board Staff are electing to compress days using this method which reduces the days of violation to 35.
Initial Liability for Violation #2	\$175,000	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (\$10,000/day).
Adjustments for Discharger Conduct Culpability	1.2	The SWPPP for the Project list several potential erosion control BMPs planned to be used on the Project. The Discharger was aware of the requirement but continued to work into the initial rain events without protecting the site with erosion control BMPs except for silt fencing around the perimeter of the project. Following the initial rain events, the Project's disturbed soil areas were saturated, and the Discharger could not apply erosion controls due to ground conditions. The Discharger did take actions to store and pump water from onsite basis to an onsite spray field for onsite retention and recharge but did not take actions in accordance with General Permit conditions; therefore, Board Staff is assigning a culpability adjustment factor of 1.2.
Adjustments for Discharger Conduct History of Violations	1.0	Board staff are not aware of previous violations by the Discharger related to the General Permit. Therefore, Board Staff is assigning a neutral History of Violations adjustment factor of 1.0 to this violation.

PENALTY FACTOR	VALUE	DISCUSSION
Adjustments for Discharger Conduct Cleanup and Cooperation	1	Following the levee break, the Discharger contacted Board staff immediately to discuss the situation and joined Board staff on an inspection the following day. The Discharger cooperated with Board staff and responded to follow-up communications as expected. Therefore, Board Staff is applying a neutral cleanup and cooperation adjustment factor of 1 to this violation.
Total Base Liability for Violation #2	\$210,000	The base liability is calculated as the initial liability multiplied by each of the above three factors.

Other Factor Considerations

Total Base Liability for all violations is \$213,360. The Enforcement Policy states that five other factors must be considered before obtaining the final liability amount.

OTHER FACTORS	VALUE	CONSIDERATIONS
Ability to pay and continue in business	No adjustment	Lewis Land Developers LLC is a part of the Lewis Group of Companies (Company). According to the Lewis Group of Companies website, the Company has developed 21,000 residential lots, built 57,000 homes, owns and manages 11,000 apartments, developed 19,500,000 square feet of retail, office, and commercial real estate. In addition, the Independence at Lincoln project proposes to develop 575 single family residential lots. A company of this size has the ability to pay the penalty and remain in business.
Economic benefit	\$175,680	Board staff estimated the economic benefit for each violation. The avoided cost of applying and maintaining erosion control BMPs which would have avoided the violations were considered when calculating the economic benefit. See the attached Economic Benefit spreadsheet for details.

OTHER FACTORS	VALUE	CONSIDERATIONS
Other factors as justice may require	No adjustment	The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. The Central Valley Water Board has incurred over \$5,000 in staff costs associated with the investigation and enforcement of the alleged violations. While this amount could be added to the penalty, it is not added at this time.
Maximum liability	Over \$590,000	Based on California Water Code section 13385, the maximum liability is \$10,000 per day per violation and \$10 per gallon. The Prosecution Team reserves the right to include the volume discharged in the penalty calculation should this matter proceed to hearing.
Minimum liability	\$193,248	Based on California Water Code section 13385, civil liability must be at least the economic benefit of non-compliance. Per the Enforcement Policy, the minimum liability is to be the economic benefit plus 10%.
Final Liability	\$213,360	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability but cannot exceed the maximum liability.

Attachment: Economic Benefit Calculation

Economic Benefit Calculation Independence at Lincoln

Erosion Control Violation

Assume avoided cost of temporary controls for 1 event and avoided maintenance.

Avoided Cost - Temp EC Application

Assume should have been installed prior to first rain event. Disturbed area listed in SMARTS is 122 acres, NOV response states grading was approx. 75% complete at time of first rain event.

Acres needing Temp EC

91.5

Temp EC \$/acre

\$1,600 Flat site, assume hydraulic mulch would have been sufficient, cost from CASQA cut sheet

Total Avoided Application Cost

\$155,550

Avoided Cost - BMP Maintenance

Acres needing re-application/repair

9.15 Assume 10% of area would need to be re-applied every 6 weeks.

Number of 6-week periods

2 Between 21 Nov 2018 and 1 March 2019

Total acres to reapply

18.3

Cost per acre to reapply

\$1,600

Total Avoided Maintenance Cost

\$31,110

Total Avoided Cost

\$175,680

Attachment B: Supplemental Environmental Project
Construction General Permit Compliance Training for Developers and Homebuilders

TOPIC - Industry-specific training by Gerald Montgomery of SWPP Queen (in coordination with Phil Rodriguez, Vice President, Lewis Planned Communities and current North State BIA Board Chairman) for developers and builders who use outside consultants for QSD/QSP Services - How to manage these services successfully and avoid common pitfalls.

TARGET AUDIENCE - Developers and Homebuilders and their field employees, consultants and contractors operating in Northern California. Specifically, Project Managers, Construction Managers, LRPs, Environmental Personnel, Civil, Soils and Environmental Engineers, Grading and Landscape Contractors, including all Lewis project employees.

EVENTS - Hosted for free by Lewis Management Corp in 3 locations, including two at the BIA (North State) headquarters in Roseville, two in Sacramento, and one additional site TBD. Lewis will handle all arrangements (advertising, location, logistics) and will work in conjunction with the BIA.

WHEN - Develop Training in 2020, Deliver Training within 12 months of the effective date of the Stipulated Order.

GOAL - To educate on CGP compliance overview, how to select, contract, and manage QSD/QSP services, Regional Water Board concerns/expectations, implementing an internal compliance program and procedures.

PROPOSED CURRICULUM - 1/2 DAY AGENDA (4 HOURS TOTAL) TOTALLY FREE TO ALL PARTICIPANTS:

1. INTRODUCTIONS (5 MINS)
2. LEWIS INDEPENDENCE AT LINCOLN STORY (by Phil Rodriguez) (20 MINS)
3. WATER BOARD CONCERNS/EXPECTATIONS (25 MINS)
4. CGP OVERVIEW BY RISK (75 MINS)
5. BREAK (10 MINS)
6. SMARTS OVERVIEW/DEADLINES/REQUIREMENTS (60 MINS)
7. LRP ROLES/RESPONSIBILITIES/MANAGEMENT TECHNIQUES (25 MINS)
8. HOW TO DEVELOP A SUCCESSFUL INTERNAL COMPLIANCE PROGRAM (20 MINS)

Settlement & ACL Order R5-2020-0500
Lewis Land Developers; Independence at Lincoln

COSTS - Estimated at \$30,000 (\$6,000 per session) to include:

1. Consultant development of material
2. Travel costs for Consultant
3. Training materials for students
4. Venue rentals and refreshments
5. Consultant presentation delivery
6. One session will be videotaped and made available to seminar attendees for use at their offices for orientation of new employees
7. Consultant/Lewis to prepare certificates and report to the Board on the attendance and costs of each session