

**SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD**

In the matter of:	)	
	)	Order R2-2011-00XX (Proposed)
<b>Alameda County</b>	)	
<b>[Castro Valley Library Project]</b>	)	<b>SETTLEMENT AGREEMENT AND</b>
	)	<b>STIPULATION FOR ENTRY OF</b>
	)	<b>ADMINISTRATIVE CIVIL LIABILITY</b>
	)	<b>ORDER; ORDER (PROPOSED)</b>
	)	

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**Section I: INTRODUCTION**

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (“Stipulation”) is entered into by and between the Assistant Executive Officer of the San Francisco Bay Regional Water Quality Control Board (“Regional Water Board”), on behalf of the Regional Water Board Prosecution Staff (“Prosecution Staff”) and Alameda County. (Collectively “Parties”) and is presented to the Regional Water Board, or its delegee, for adoption as an Order by settlement, pursuant to Government Code section 11415.60.

**Section II: RECITALS**

1. Alameda County (the “County”), at all times relevant to this matter, was the owner and operator of the Castro Valley Library (“Library”) and its associated 2.94-acre site (Site), located at 3600 Norbridge Avenue, Castro Valley, in unincorporated Alameda County.
2. The County was a Permittee under the Alameda Countywide National Pollutant Discharge Elimination System (“NPDES”) Municipal Storm Water Permit, Order No. R2-2003-0021 (NPDES Permit No. CAS0029831) (“Municipal Permit”), which required the County to implement a program to ensure that all construction projects within the County’s jurisdiction, including County and non-County sponsored projects, comply with the provisions of the NPDES General Permit for Storm Water Discharges Associated with Construction Activity, State Water Resources Control Board (“State Water Board”) Order 99-08-DWQ (“Construction General Permit”).
3. The Construction General Permit regulates storm water discharges from construction activities that result in soil disturbance of at least one acre of total land area. It is the responsibility of the landowner to obtain coverage under the Construction General Permit prior to commencement of construction activities, by filing a Notice of Intent (“NOI”) for each construction site. The landowner must also develop and implement a Storm Water Pollution Prevention Plan (“SWPPP”). The SWPPP must contain site-specific best management practices (“BMPs”), including erosion and sediment control measures, that will reduce pollutants in storm water discharges to the Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) performance standards. The County received coverage for the Library’s construction under the Construction General Permit on June 13, 2008.
4. The Prosecution Team alleges that the County failed to obtain coverage under the Construction General Permit prior to the commencement of construction of the Library and failed to properly implement and maintain an effective combination of erosion and sediment controls during

construction of the Library, including, but not limited to, material/waste management best management practices (BMPs) to appropriately control and minimize the discharge of pollutants to waters of the State and United States in violation of the Construction General Permit. The Prosecution Team's allegations are described in Exhibit A, attached hereto and incorporated herein by this reference.

5. The Parties have engaged in settlement negotiations and agree to fully settle the alleged violations set forth in Exhibit A without administrative or civil litigation and by presenting this Stipulation to the Regional Water Board, or its delegee, for adoption as an Order by settlement, pursuant to Government Code section 11415.60. The liability imposed by this Order is consistent with a reasonable liability determination using the liability methodology in the Water Quality Enforcement Policy. (See Exhibit B, attached hereto and incorporated herein by this reference). The Prosecution Team believes that the resolution of the alleged violations set forth in Exhibit A is fair and reasonable and fulfills all of its enforcement objectives, that no further action is warranted concerning those violations, except as provided in this Stipulation, and that this Stipulation is in the best interest of the public.

6. The Regional Water Board Prosecution Team alleged violations associated with two projects constructed by the County, the Fairview Pathway Project and the Library project, in Amended Administrative Civil Liability Complaint No. R2-2010-0061 ("Amended Complaint"). Order No. R2-2011-0039 resolved the alleged violations associated with the Fairview Pathway Project. The alleged violations associated with the Library project are presented herein as Exhibit A and shall be resolved upon the adoption of this Order. Thus, the Amended Complaint shall be rescinded upon the date the Regional Water Board, or its delegee, executes this Order.

7. To resolve by consent and without further administrative proceedings the alleged violations set forth in Exhibit A, the Parties have agreed to the imposition of administrative civil liability in the amount of \$35,000 against the County, which includes \$10,900 for staff costs.

### **Section III: STIPULATIONS**

The Parties stipulate to the following:

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

9. **Administrative Civil Liability:** The County shall pay a total of \$35,000.00 in stipulated administrative civil liability by check made payable to the "San Francisco Bay Regional Water Quality Control Board" for deposit in the State Water Resources Control Board Cleanup and Abatement Account, which includes \$10,900 in staff costs, no later than 30 days following the Regional Water Board, or its delegee, executing this Order. The check shall reference the Order number listed on page one of this Stipulation. The original signed check shall be sent to the San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612, with copies to: Ann Carroll, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812, and Keith Lichten, San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612.

10. **Compliance with Applicable Laws:** The County understands that payment of administrative civil liability in accordance with the terms of this Order and/or compliance with the terms of this Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in Exhibit A may subject it to further enforcement, including additional administrative civil liability.

11. **Party Contacts for Communications related to this Stipulation and Order:**

**For the Regional Water Board:**

Keith H. Lichten, Senior WRCE  
San Francisco Bay Regional Water  
Quality Control Board  
1515 Clay Street, 14th Floor  
Oakland, CA 94612  
[KLichten@waterboards.ca.gov](mailto:KLichten@waterboards.ca.gov)  
(510) 622-2380

**For the County:**

Aki Nakao, Director  
General Services Agency  
County of Alameda  
1401 Lakeside Drive, 10th Floor  
Oakland, CA 94612  
(510) 208-9700

12. **Attorney's Fees and Costs:** Each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

13. **Matters Covered by this Stipulation:** Upon adoption by the Regional Water Board, or its delegee, as an Order, this Stipulation represents a final and binding resolution and settlement of all claims, violations or causes of action alleged in Exhibit A or which could have been asserted based on the specific facts alleged in Exhibit A against the County. The provisions of this Paragraph are expressly conditioned on the County's full payment of administrative civil liability by the deadline specified in Paragraph 9 herein.

14. **Denial of Liability:** In settling this matter, the County expressly denies the allegations described in Exhibit A and makes no admission or representation as to the appropriateness of the liability determination under the Water Quality Enforcement Policy as set forth in Exhibit B. Neither this Stipulation nor any payment pursuant to the Order shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgement of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule, or regulations. However, this Stipulation and/or any actions of payment pursuant to the Order may constitute evidence in actions seeking compliance with this Stipulation. This Order may be used as evidence of a prior enforcement action in future actions by the State Water Resources Control Board or the Regional Water Board against the County.

15. **Public Notice:** The County and the Regional Water Board Prosecution Team understand that this Stipulation and Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board, or its delegee. In the event objections are raised during the public review and comment period, the Regional Water Board or its delegee may, under certain circumstances, require a public hearing regarding the Stipulation and Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the proposed Order as necessary or advisable under the circumstances.

16. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for adopting the Order by the Regional Water Board and review of this Stipulation by the public is lawful and adequate. In the event procedural objections are raised prior to

the 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.

17. **Interpretation:** This Stipulation and Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The County is represented by counsel in this matter.

18. **Modification:** This Stipulation and Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved the Regional Water Board or its delegee.

19. **If the Order Does Not Take Effect:** In the event that this Order does not take effect because it is not approved by the Regional Water Board, or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. 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 the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:

- a. Objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the violations alleged in Exhibit A in this matter; or
- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

20. **Waiver of Hearing:** The County has been informed of the rights provided by CWC section 13323, subdivision (b), and hereby waives its right to a hearing before the Regional Water Board prior to the adoption of the Order.

21. **Waiver of Right to Petition:** The County hereby waives its right to petition the Regional Water Board's adoption of the Order for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

22. **The County's Covenant Not to Sue:** The County covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by this Stipulation and Order.

Settlement Agreement and Stipulated Administrative Civil Liability Order  
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23. **Authority to Bind:** Each person executing this Stipulation in a representative capacity represents and warrants that he or she is authorized to execute this Stipulation on behalf of and to bind the entity on whose behalf he or she executes the Stipulation.

24. **Counterpart Signatures; Facsimile and Electronic Signature:** This Stipulation 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 Stipulation 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.

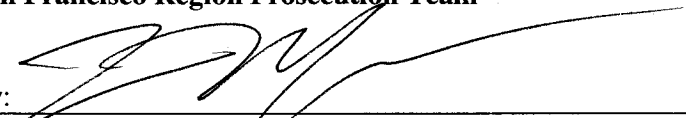
25. **Effective Date:** This Stipulation is effective and binding on the Parties upon the entry of this Order by the Regional Water Board or its delegee, which incorporates the terms of this Stipulation.

**IT IS SO STIPULATED.**

**California Regional Water Quality Control Board,  
San Francisco Bay Region Prosecution Team**


**California Regional Water Quality Control Board,  
San Francisco Region Prosecution Team**

Date: 10/25/11

By:   
Thomas E. Mumley,  
Assistant Executive Officer

**Alameda County**

Date: 10/17/11

By:   
Andrew J. Massey  
Deputy County Counsel,  
Office of the County Counsel

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**HAVING CONSIDERED THE ALLEGATIONS AND THE PARTIES' STIPULATIONS,  
THE REGIONAL WATER BOARD, OR ITS DELEGEE, FINDS THAT:**

26. The Regional Water Board incorporates the foregoing Stipulation, set forth in Paragraphs 1 through 25 above, by this reference, as if set forth fully herein.

27. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in CWC sections 13327 and 13385(e). The Regional Water Board's consideration of these factors is based upon information obtained by the Prosecution Team in investigating the allegations in Exhibit A, or otherwise provided to the Regional Water Board. This settlement recovers the costs incurred by the Prosecution Team in investigating and pursuing enforcement of the allegations set forth in Exhibit A as "other matters as justice may require."

28. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

29. The Executive Officer is authorized to refer this matter directly to the Attorney General for enforcement if the County fails to perform any of its obligations under the Order.

Pursuant to CWC section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** on behalf of the California San Francisco Bay Regional Water Quality Control Board.

\_\_\_\_\_  
Bruce H. Wolfe  
Executive Officer

Date: \_\_\_\_\_

## EXHIBIT A

### REGIONAL WATER BOARD PROSECUTION STAFF'S ALLEGATIONS

Alameda County (the "County") is the owner of the Library and its associated 2.94-acre site (Site), located at 3600 Norbridge Avenue, Castro Valley, in unincorporated Alameda County.

1. The County was a Permittee under the Alameda Countywide National Pollutant Discharge Elimination System ("NPDES") Municipal Storm Water Permit, Order No. R2-2003-0021 (NPDES Permit No. CAS0029831) ("Municipal Permit"), which became effective on April 10, 2003. The Municipal Permit required the County to implement a program to ensure that all construction projects within the County's jurisdiction, including County and non-County sponsored projects, comply with the provisions of the NPDES General Permit for Storm Water Discharges Associated with Construction Activity, State Water Resources Control Board ("State Water Board") Order 99-08-DWQ ("Construction General Permit").
2. The Construction General Permit regulates storm water discharges from construction activities that result in soil disturbance of at least one acre of total land area. It is the responsibility of the landowner to obtain coverage under the Construction General Permit prior to commencement of construction activities, by filing a Notice of Intent ("NOI") for each construction site. The landowner must also develop and implement a Storm Water Pollution Prevention Plan ("SWPPP"). The SWPPP must contain site-specific best management practices ("BMPs"), including erosion and sediment control measures, that will reduce pollutants in storm water discharges to the Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) performance standards. The County received coverage for the Library's construction under the Construction General Permit on June 23, 2008.
3. The County commenced construction of the Library on April 21, 2008, 53 days prior to submitting an NOI to obtain coverage under the Construction General Permit.
4. On May 27, 2008, Regional Water Board staff ("Staff") inspected the Site and observed that the County had graded the site without any erosion and sediment control measures in place. A portable toilet was improperly sited immediately adjacent to a restored reach of Castro Valley Creek. Further, Staff determined from the Regional Water Board's records that the County had not obtained coverage under the Construction General Permit for the Library Project.
5. Staff telephoned Gerald Loper, a Supervising Architect with the County of Alameda General Services Agency, the same day as the inspection, and informed him of the Construction General Permit violations observed during the inspection. Staff requested that the County (1) prepare and submit an NOI and SWPPP; (2) remove accumulated sediment from the street adjacent to the project site; and, (3) immediately implement appropriate erosion control, sediment control, and site management measures. Mr. Loper stated that he would work on the Construction General Permit requirements and remove the accumulated sediment.
6. On May 29, 2008, two working days later, Staff re-inspected the Site and observed no change in its condition. Staff observed that the County continued to grade the site without proper erosion and sediment control measures in place and failed to implement BMPs. Staff further observed continued sediment tracking into the adjacent street and that the portable toilet was still located next to the creek.

7. On May 29, 2008, the Regional Water Board's Watershed Division Chief issued a Notice of Violation ("NOV") to the County, which required the County to implement appropriate erosion and sediment control measures consistent with the Construction General Permit by June 3, 2008. Under the authority of CWC section 13267, the NOV required the County to submit a technical report by June 20, 2008, that included documentation of the following: (1) proof of coverage under the Construction General Permit; (2) development of a site-specific SWPPP; and (3) implementation of the SWPPP. Additionally, the NOV required the County to submit a list of all public projects disturbing one acre or more of land and proof of coverage under the Construction General Permit for those projects.

8. On June 20, 2008, the Regional Water Board received a letter from the County that stated that the Library Project is the only current or "upcoming in the near future" public project disturbing one acre or more of land. The County attached to the letter the NOI and SWPPP filed with the State Water Board for the Library Project. The County failed to include any documentation of SWPPP implementation.

9. Staff e-mailed Mr. Loper on July 25, 2008, and acknowledged that the County's June 20, 2008, response provided documentation of coverage under the Construction General Permit and development of a SWPPP, but failed to include documentation of SWPPP implementation at the Library Project. The County submitted the required information on July 31, 2008. After reviewing the complete submittal, Staff notified Mr. Loper on August 15, 2008, that the site's SWPPP was incomplete and not site-specific, and that the site photographs provided by the County indicated improper BMP implementation (e.g., incorrect use of wattles). Staff reinforced the need for full implementation of BMPs prior to the rainy season.

10. On February 18, 2009, Board staff conducted a compliance inspection of the Site and found that the County was again in violation of the Construction General Permit requirements. The violations included unprotected soil stockpiles; unprotected graded areas; insufficiently protected storm drain inlets that contained sediment, which demonstrated that sediment had discharged into the storm drain and likely into a downstream receiving water; a complete lack of sediment control measures at the site perimeter; and sediment tracking onto Norbridge Avenue. As a result, the Regional Water Board issued a second NOV on May 19, 2009.

11. After receiving the May 19, 2009, NOV, the County implemented additional BMPs. Based on the February 18, 2009, inspection findings and the County's online webcam photographs, it is evident that an effective project-specific SWPPP was not implemented for the entire 2008-2009 rainy season, from at least October 15, 2008 (beginning of the rainy season), through May 19, 2009 (issuance of the second NOV).<sup>1</sup>

12. Given that the County is a Permittee under the Municipal Permit, and has had permit coverage continuously since October 16, 1991, the County had adequate notification of the

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<sup>1</sup> Staff obtained photographs from the County's online webcam that the County published on the internet at <http://www.flickr.com/photos/castrovalleylibrary/archives/>. Two-week increments of photographs from October 31, 2008 to May 20, 2009 are included in the administrative record for this matter.



Exhibit A  
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Construction Permit Requirements, prior to staff's telephone notification on May 27, 2008.<sup>2</sup> Therefore, the County failed to file an NOI and conducted construction activities without coverage under the Construction General Permit for at least 53 days, from April 21, 2008 (start of construction), to June 13, 2008 (NOI filing date), in violation of Construction General Permit Provision C.1 and CWC section 13260.

13. The County failed to prepare and implement an adequate SWPPP in accordance with Construction General Permit Section A for at least 48 days (from June 13, 2008, to July 31, 2008 [date of complete response to NOV]), and failed to reduce or eliminate the discharge of sediment and other pollutants during storms using Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology for at least 217 days (from October 15, 2008, to May 19, 2009) in violation of Construction General Permit Provision C.2.

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<sup>2</sup> SWQMP, July 2001 – June 2008, Alameda Countywide Clean Water Program; Section 5 Performance Standards; New Development and Construction Site Controls; subsection V. State General Permit.

## EXHIBIT B

### WATER QUALITY ENFORCEMENT POLICY METHODOLOGY

1. Pursuant to CWC section 13260, any person who is discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state shall file a report of discharge. A person who fails to file a report of discharge when so requested by the Board, may be civilly liable pursuant to CWC Section 13261(a) and (b)(1) on a daily basis, not to exceed \$1,000 for each day in which a violation occurs.
2. Water Code section 13385(a) provides that civil liability may be administratively imposed by the Regional Water Board against any person that violates any waste discharge requirements issued pursuant to Chapter 5.5 of Division 7 of the Water Code. NPDES Permit No. CA0005240, Waste Discharge Requirements Order No. R2-2007-0032 was issued to the County pursuant to Chapter 5.5 of Division 7 of the Water Code.
3. Water Code section 13385(c) provides that the civil liability may be imposed by the Regional Water Board in an amount not to exceed the sum of both the following:
  - a. Ten thousand dollars (\$10,000) for each day in which the violation occurs.
  - b. Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.
4. The County is exposed to liability pursuant to sections 13261 and 13385(c) by failing to do the following: (1) file an NOI and conducted construction activities without coverage under the Construction General Permit for at least 53 days, from April 21, 2008 (start of construction), to June 13, 2008 (NOI filing date), in violation of Construction General Permit Provision C.1 and CWC section 13260; (2) prepare and implement an adequate SWPPP in accordance with Construction General Permit Section A for at least 48 days (from June 13, 2008, to July 31, 2008 [date of complete response to NOV]); and (3) reduce or eliminate the discharge of sediment and other pollutants during storms using Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology for at least 217 days (from October 15, 2008, to May 19, 2009) in violation of Construction General Permit Provision C.2, as alleged in Exhibit A.

#### Enforcement Policy Methodology:

5. Pursuant to Water Code sections 13327 and 13385(e), the Regional Water Board is required to consider the following factors in determining the amount of civil liability, including the nature, circumstances, extent, and gravity of the violations; whether the discharge is susceptible to cleanup or abatement; the degree of toxicity of the discharge; and with respect to the violator, the ability to pay; the effect on the ability to continue in business; voluntary cleanup efforts; prior history of violations; the degree of culpability; economic benefit or savings, if any, resulting from the violation; and other matters that justice may require. Water Code section 13385, subdivision (e) requires that, at a minimum, the liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

6. On November 17, 2009, the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in Water Code sections 13327 and 13385(e). An analysis of the Enforcement Policy methodology for the violations alleged in Exhibit A is set forth below:

1. **Step 1. Per Day Assessment for Non-Discharge Violations**

Violation 1: Failure to obtain Construction General Permit Coverage

The per day factor is 0.3. This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements.

The potential for harm to the environment associated with the alleged violation is minor because during the period of violation, there were approximately two days with measurable rainfall. As a result for the period in question, potential harm to the environment was limited largely to illicit discharges, tracking, and similar impacts from the unpermitted project.,

The deviation from requirements is major because the County initiated construction of the Library Project on April 21, 2008, without obtaining Construction General Permit coverage. The County filed an NOI on June 13, 2008—53 days late.

Violation 2: Failure to prepare and implement an adequate SWPPP, and to reduce or eliminate the discharge of sediment and other pollutants during storms using Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology

The per day factor is 0.2. This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements.

The potential for harm to the environment associated with the alleged violation is moderate because the Site includes a restored stretch of Castro Valley Creek on-site and sediment-laden storm water discharges from the Site may have had significant adverse impacts to the creek's newly planted riparian corridor. Although Castro Valley Creek is largely underground in its lower reaches in the city of Castro Valley, with more natural reaches toward the headwaters, it is also part of the San Lorenzo Creek Watershed, which is known to support migrating fish populations. To Staff's knowledge, specific observations of potential discharges to downstream receiving waters were not made.

The deviation from requirements is minor because beginning June 13, 2008, as a permittee of the Construction General Permit, the County was required to comply with its provisions, and the County did implement some, but not all, necessary BMPs to reduce or eliminate the discharge of sediment and other pollutants during storms using Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology.

Use of the Alternative Approach to Liability Calculations for Multiple Day Violations:

The alternative approach for calculating liability for multiday violations is applicable because neither Violation 1 nor Violation 2 (1) caused daily detrimental impacts to the regulatory program; or (2) resulted in an economic benefit that can be measured on a daily basis. The requirement to file an NOI is not a daily requirement. The failure to implement measures in the SWPPP to reduce or eliminate the discharge of sediment and other pollutants during storms using Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology did not result in a daily detriment to the environment. Furthermore, the County only received an economic benefit for the delayed costs of implementing BMPs, or for the one time action of filing an NOI, and not for the entire period of violation. In general, while BMPs require an initial cost to implement and a subsequent operation and maintenance cost to inspect and maintain, they are not required to be installed each day. Similarly, while daily—or more frequent—inspections can be important, and even required, for BMPs to be effective on many sites, this project did not necessarily require the level of effort that would have resulted in a daily economic benefit.

Based on the alternative approach, Violation 1 is assessed per day penalties based on 7 days of violation.

For purposes of settlement, and without any adjudicated factual basis, the Prosecution Team considered 48 days of violation for the failure to prepare and implement an adequate SWPPP in accordance with Construction General Permit (from June 13, 2008, to July 31, 2008) and 90 days of violations for the failure to reduce or eliminate the discharge of sediment and other pollutants during storms using BAT/BCT (from October 15, 2008, to February 18, 2009 [date of Staff's inspection]) in violation of Construction General Permit Provision C.2.

Thus, Violation 2 is assessed per day liability based on 10 days of violation.

Applying the per day factor to the number of days of violation yields an initial liability as follows:

Violation 1: \$2,100 (number of days of violation x per day factor x maximum statutory liability per day of violation).

Violation 2: \$20,000 (number of days of violation x per day factor x maximum statutory liability per day of violation).

2. **Step 2. Adjustments to Determination of Initial Liability**

Culpability:

The County's culpability factor for Violation 1 is 1 because the County knew, or should have known, of the requirement to obtain coverage under the Construction General Permit for the Library Project. The County has been a Permittee under the Municipal Permit continuously since October 16, 1991.

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The County's culpability factor for Violation 2 is 1.1 because knew, or should have known, of the requirement to comply with the Construction General Permit for the reason stated above, and because the County was repeatedly notified of the inadequacy of the implementation of the SWPPP and BMPs at the Site.

Cleanup and Cooperation:

Cleanup is not addressed because the alleged violations address non-discharge violations.

The County's cooperation factor for Violation 1 is 1. The County complied with the May 29, 2008 NOV by obtaining coverage under the Construction General Permit.

The County's cooperation factor for Violation 2 is 1. The County's contractor promptly implemented additional BMPs upon notification from the County that the prior BMPs undertaken were inadequate.

History of Violations: The County's history of violations factor for Violation 1 and Violation 2 is 1. The Regional Water Board has not issued other formal enforcement actions against the County for violations similar to Violations 1 and 2.

3. **Step 3. Determination of Total Base Liability Amount**

The Total Base Liability is determined by applying the adjustment factors from Step 2 to the Initial Liability Amount determined in Step 1. Total Base Liability = (Initial Liability) x (Culpability Multiplier) x (Cleanup and Cooperation Multiplier) x (History of Violations Multiplier)

Violation 1:  $\$2,100 \times 1 \times 1 \times 1 = \$2,100 = \text{Total Base Liability}$

Violation 2:  $\$20,000 \times 1.1 \times 1 \times 1 = \$22,000 = \text{Total Base Liability}$

Combined Total Base Liability = \$24,100

**Steps 4 through 8 apply to the Combined Total Base Liability Amount.**

4. **Step 4. Ability to Pay and Ability to Continue in Business**

Based on the following, it is believed that the County has the ability to pay the proposed liability and continue in business. In 2004, the State awarded the County a \$13.96 million California Public Library Grant to help build the Library.<sup>3</sup> The total Library Project budget was more than \$22 million.<sup>4</sup> Additionally, the County's proposed budget for the 2009-2010 fiscal year totals

<sup>3</sup> Alameda County Library, Castro Valley Library, New Library Facts, <[http://www.library.ca.gov/pressreleases/pr\\_041130.html](http://www.library.ca.gov/pressreleases/pr_041130.html)> (as of Feb. 9, 2011).

<sup>4</sup> California Public Library Grant Awards Announced, (Nov. 30, 2004) California Public Library Grant Awards Announced, <<http://www.aclibrary.org/branches/csv/>> (as of Feb. 9, 2011).

\$2.4 billion. This is an increase of \$9.3 million from the budget for the 2008-2009 fiscal year. Accordingly, the Combined Total Base Liability is not adjusted.

5. **Step 5. Other Factors as Justice May Require**

Staff has incurred \$10,900 in staff costs and publication costs associated with the investigation and enforcement of Violation 1 and Violation 2. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

$$\$24,100 + \$10,900 = \$35,000$$

6. **Step 6. Economic Benefit**

During the period of violation addressed by this Complaint, the County realized an economic benefit by not expending funds to implement BMPs, to appropriately modify and maintain BMPs that were implemented, and to prepare and revise as necessary a site-specific SWPPP for the project. BMP-related sources of economic benefit likely included the cost of materials, maintenance costs, personnel costs (hourly wage or salary, time and money spent to train site personnel), and the time to conduct routine monitoring required by the Construction General Permit and the Municipal Permit. The County's staff also indicated that stopping the progress of the Library Project was not desirable for the County because it would delay the opening of the Library for the residents, which may have contributed to its unwillingness to slow construction in order to address BMP implementation.

For construction activity in California, approximately \$2,000 to \$6,000 per acre is needed to provide the necessary erosion and sediment control measures for construction sites depending on the slope and soil type. Additionally, the application of straw mulch, alone, is approximately \$2,000 per acre.<sup>5</sup> The Library Project site is approximately 2.94 acres. Given its proximity to creeks and storm drains, an effective combination of both erosion and sediment control BMPs was critical to protect the Site. Limited BMPs were implemented. Therefore, the economic benefit received by the County by not installing and maintaining an effective combination of erosion and sediment control BMPs is estimated to be approximately \$2,000 per acre. The entirety of the project site was not disturbed during construction. Staff conservatively estimated that erosion and sediment control may have been necessary on a total of 1.75 acres for the project, resulting in a minimum estimated cost savings of approximately \$3,500 for not fully implementing and maintaining necessary BMPs. Based on this estimation, the proposed civil liability likely fully recovers and exceeds the County's economic benefit resulting from the alleged violations.

7. **Step 7. Maximum and Minimum Liability Amounts**

Pursuant to CWC section 13261 and 13385(c), the maximum liability that may be imposed for Violation 1 and Violation 2, is \$3,180,000.

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<sup>5</sup> Soil Stabilization BMP Research for Erosion and Sediment Controls; Cost Survey Technical Memorandum; California Department of Transportation; July 2007.

Exhibit B  
Settlement Agreement and Stipulated Administrative Civil Liability Order  
Alameda County

The minimum liability that must be assessed for the violations alleged herein, is estimated to be \$3,850 (economic benefit + 10%).

The proposed liability falls within these maximum and minimum liability amounts.

8. **Step 8. Final Liability Amount**

Based on the foregoing analysis, and consistent with the Enforcement Policy, the proposed administrative civil liability is **\$35,000**.