

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

In the matter of:)	
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CALIFORNIA DEPARTMENT OF TRANSPORTATION)	Order No. R2-2011-00xx (Proposed)
)	
Administrative Civil Liability)	
Complaint No. R2-2010-0071)	Settlement Agreement and Stipulation for Entry of Order and (Proposed) Order
)	

Section I: Introduction

This Settlement Agreement and Stipulation for Order (“Stipulation”) is issued in reference to an adjudicative proceeding initiated by the issuance on July 15, 2010, of Administrative Civil Liability Complaint No. R2-2010-0071 (“Complaint”), alleging that the California Department of Transportation (“Department”) failed to comply with NPDES Municipal Stormwater Permit Order No. 99-06-DWQ, and its Clean Water Act Section 401 Water Quality Certification for the Interstate 680 Sunol/Fremont Roadway Rehabilitation Project (the “Project”). Bay Cities Paving and Grading, Inc. sought and was granted designated party status in this proceeding. The parties to this Stipulation are the Department and the San Francisco Bay Regional Water Quality Control Board (“San Francisco Bay Water Board”) Prosecution Team (collectively the “Parties”).

Section II: Recitals

1. The Department, located at 111 Grand Avenue, Oakland, Alameda County, is the permittee under and subject to the provisions of State Water Resources Control Board’s Water Quality Order No. 99-06-DWQ, National Pollutant Discharge Elimination System (“NPDES”) General Permit No. CAS000003, Statewide Stormwater Permit, Waste Discharge Requirements for State of California Department of Transportation (“Department’s Permit”); Water Quality Order No. 99-08-DWQ; Waste Discharge Requirements for Discharges of Storm Water Associated with Construction Activities (the “Construction Stormwater Permit”); and the April 16, 2008, Clean Water Act (“CWA”) Section 401 Water Quality Certification (the “Certification”) issued for the Project.

Relevant provisions alleged to have been violated include: (1) Provision H.2 of the Department’s Permit; (2) Prohibition Number 3 of the Construction Stormwater Permit; (3) Special Provisions for Construction Activity Number 2, section A of the Construction Stormwater Permit; (4) Section A, Stormwater Pollution Prevention Plan, No. 6 – Erosion Control, Second Paragraph of the Construction Stormwater Permit; and (5)

Conditional Acceptance of Stormwater Pollution Prevention Plan ("SWPPP") under the Certification.

2. The Complaint describes a proposed administrative civil liability totaling \$664,400, based on the alleged economic benefit to the Department derived from the violations of the above-referenced provisions, plus ten percent, as required by the State Water Resources Control Board's Enforcement Policy (the "Enforcement Policy"). The amount includes staff costs of \$29,400. However, after reviewing data and information provided by the Department, the Prosecution Team has determined that the economic benefit to the Department arising from the alleged violations did not exceed \$381,450, which is the recommended civil liability amount resulting from the alleged violations under the Enforcement Policy's penalty calculator, plus the staff costs. Accordingly, to resolve by consent and without further administrative proceedings those certain alleged violations of the Department's Permits, as set forth in the Complaint, the Department shall pay \$381,450 to the State Water Resources Control Board Cleanup and Abatement Account, which includes \$29,400 for staff costs. Payment is due no later than 30 days following the San Francisco Bay Water Board executing the order sought by this Stipulation ("Order").

3. The Parties believe that settlement of this matter is in the best interest of the People of the State. Therefore, to settle the Complaint, the Department hereby agrees to comply with the terms and conditions of this Stipulation.

Section III: Stipulations

4. The Parties incorporate Paragraphs 1 through 3 by this reference as if set forth fully herein, stipulate to the entry of this Stipulation as set forth below, and recommend that the San Francisco Bay Water Board issue the Order to effectuate the settlement:

5. This Stipulation is entered into by Parties to resolve by consent and without further administrative proceedings all those certain alleged violations of the Department's Permits set forth in the Complaint.

6. The Department hereby agrees to pay the administrative civil liability totaling \$381,450 as set forth in Paragraph 2 of Section II herein.

7. The Department understands that performance of its obligations in accordance with this Stipulation is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in the Complaint may subject it to further enforcement, including additional administrative civil liability.

8. Each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

9. In consideration of the Department's compliance with the Stipulation and Order, the Prosecution Team and the San Francisco Bay Water Board hereby covenant not to bring any administrative or judicial enforcement action against the Department, whether

under California or federal law, arising from or related to the facts giving rise to the violations alleged in the Complaint.

10. In settling this matter, the Department does not admit to any of the allegations of the Complaint, or that it has been or is in violation of the California Water Code or any other federal, state, or local law or ordinance.

11. The Department understands that this Stipulation must be noticed for a public review period prior to consideration by the San Francisco Bay Water Board. In the event objections are raised during the public comment period, the San Francisco Bay Water Board or the Executive Officer 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 Stipulation or Order as necessary or advisable under the circumstances.

12. The Parties agree that the procedure contemplated for adopting the Order by the San Francisco Bay Water Board and review of this Stipulation and Order 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.

13. This Stipulation shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Department is represented by counsel in this matter.

14. This Stipulation 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 by the San Francisco Bay Water Board and the Department.

15. This Stipulation may be executed in counterparts and by facsimile signature.

16. In the event that the Order does not take effect because it is not approved by the San Francisco Bay Water Board or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they will proceed to a contested evidentiary hearing before the San Francisco Bay Water Board to determine whether to assess administrative civil liabilities for the violations alleged in the Complaint, unless the Parties otherwise agree. In that event, the Parties agree that all oral and written statements and agreements made during the course of settlement discussions both before and after the filing of the Complaint, including this Stipulation and the terms thereof, will not be admissible as evidence in the hearing and further that any monies paid hereunder by the Department shall be refunded within 30 days of the date that the Order is vacated. It also is understood and agreed that in the event that the Order does not take effect, in whole or in part, this Stipulation, and any covenants or requirements contained therein, shall be of no further force or effect. The Parties further agree to waive the following objections:

a. Objections related to prejudice or bias of any of the San Francisco Bay

Water Board members or their advisors based on the fact that the San Francisco Bay 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 Complaint 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.

17. The Department has been informed of the right to a hearing within 90 days after being served with the Complaint, as provided by California Water Code section 13323, subdivision (b), and hereby waives its right to a hearing before the San Francisco Bay Water Board prior to the adoption of the Order.

18. Provided that the San Francisco Bay Water Board adopts the Order in the form attached to this Stipulation, the Department hereby waives its right to petition the San Francisco Bay Water Board's adoption of the Order for review by the State Water Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court. Such waiver shall not extend to bar the Department's right to appear before the San Francisco Bay Water Board, the State Water Board or any court if such body otherwise considers the terms of the Stipulation or the Order.

19. The Assistant Executive Officer warrants by signing below that he has the authority to execute the Stipulation on behalf of the Prosecution Team. The person signing on behalf of the Department warrants by signing below that he has the legal authority to bind the Department to the terms of the Order. The Parties hereto have caused this Stipulation to be executed by their respective officers on the dates set forth below.

20. This Stipulation is effective and binding on the Parties upon its execution.

IT IS SO STIPULATED.

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

By: 
Thomas Mumley, Assistant Executive Officer

Date: March 28, 2011

California Department of Transportation

By: Bob Finney
Bob Finney, Construction Manager Bay Area

Date: 3/17/11

DRAFT – TENTATIVE ORDER

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

In the matter of:)	
)	
CALIFORNIA DEPARTMENT)	(Tentative) Order No. R29-20110-00XX
OF TRANSPORTATION)	
)	
Complaint for Administrative)	
Civil Liability No. R2-2010-0071)	
)	

This Administrative Civil Liability Order (the "Order") is issued in reference to an adjudicative proceeding initiated by the issuance of Administrative Civil Liability Complaint No. R2-2010-0071, dated July 15, 2010 (the "Complaint"). The parties to this proceeding are the San Francisco Bay Regional Water Quality Control Board ("San Francisco Bay Water Board") Prosecution Team and the California Department of Transportation ("Department") (collectively the "Parties"). Bay Cities Paving and Grading, Inc. sought and was granted designated party status in this proceeding.

The San Francisco Bay Water Board does hereby find:

1. The San Francisco Bay Water Board incorporates the Settlement Agreement and Stipulation for Entry of Order No. R2-2011-00XX (the "Settlement Agreement") by this reference as if set forth fully herein.
2. The San Francisco Bay Water Board finds that the Recitals set forth in the Settlement Agreement are true.
3. The Settlement Agreement is approved.
4. The Department shall pay the sums agreed to under the Settlement Agreement in accordance with its terms.

5. The Settlement Agreement and Order are severable; should any provision be found invalid the remainder shall remain in full force and effect.

6. In accepting this settlement, the San Francisco Bay Water Board has considered, where applicable, each of the factors prescribed in California Water Code section 13385, and has applied the Penalty Calculation Methodology set forth in the State Water Resources Control Board's Enforcement Policy. The San Francisco Bay Water Board's consideration of the statutory factors and application of the Penalty Calculation Methodology is based upon information obtained by the San Francisco Bay Water Board's staff in investigating the allegations in the Complaint or otherwise provided to the San Francisco Bay Water Board. In addition to these considerations, this settlement recovers the costs incurred by the staff of the San Francisco Bay Water Board for this matter.

7. This is an action to enforce the laws and regulations administered by the San Francisco Bay Water Board. The San Francisco Bay 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.

8. The Executive Officer of the San Francisco Bay Water Board is authorized to refer this matter directly to the Attorney General for enforcement if the Department fails to perform any of its obligations under the Order.

9. Fulfillment of the Department's obligations under the Order constitutes full and final satisfaction of any and all liability for each claim in the Complaint in accordance with the terms of the Order.

IT IS HEREBY ORDERED pursuant to California Water Code section 13323 and California Government Code section 11415.60 on behalf of the San Francisco Bay Regional Water Quality Control Board that the Discharger shall pay \$381,450 in administrative civil liabilities.

Bruce Wolfe
Executive Officer

Date: _____