

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**ORDER NO. R9-2009-0125
SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**

**WILLIAM AND HEIDI DICKERSON
501 FIRST STREET, CORONADO
SAN DIEGO COUNTY
FILE NO. 05C-041**

**LARRY AND PENNY GUNNING
505 FIRST STREET, CORONADO
SAN DIEGO COUNTY**

PERRY AND PAPPENHAUSEN, INC.

**AMENDED CLEANUP AND ABATEMENT ORDER
NOS. R9-2006-0101 AND R9-2006-0102
PETITION FOR WRIT OF MANDATE
WILLIAM G. DICKERSON, ET AL.**

V.

**THE SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
CASE NO. 37-2007-00075848-CU-WM-CTL**

This Order is issued in reference to the filing of a petition for writ of mandate in the Superior Court of the State of California for the County of San Diego, entitled William G. Dickerson, et al. v. The San Diego Regional Water Quality Control Board, Case No. 37-2007-00075848-CU-WM-CTL (Action). The Action was filed by William and Heidi Dickerson, Larry and Penny Gunning, and Perry and Papenhausen, Inc. (Dischargers) to contest the California Regional Water Quality Control Board, San Diego Region's (Regional Board's) issuance of Amended Cleanup and Abatement Order Nos. R9-2006-0101 and R9-2006-0102 to the Dischargers.

The Regional Board has been presented with a proposed settlement of the Action developed during negotiations between Regional Board Prosecution Staff and Dischargers (Proposed Settlement) (Attachment 1). The Proposed Settlement represents a mutually agreed upon resolution of the Action whereby the Regional Board will rescind the CAOs in exchange for the Dischargers dismissing the Action with prejudice, paying the Regional Board \$67,000 in staff costs, and compliance with certain riprap replacement and eelgrass mitigation requirements pursuant to the settlement agreement between the Dischargers, the United States Army Corps of Engineers (Corps) and the San Diego Unified Port District (Port) (Federal Settlement Agreement) attached hereto and incorporated herein as Attachment 2. The Regional Board Prosecution Staff and the Dischargers recommend adoption of this Order to

effectuate the Proposed Settlement. Having provided public notice of the Proposed Settlement and an opportunity for public comment, the Regional Board finds that:

1. William and Heidi Dickerson are, and at all relevant times have been, the owners of the real property commonly known as 501 First Street, Coronado, California. Larry and Penelope Gunning are, and at all relevant times have been, the owners of the real property commonly known as 505 First Street, Coronado, California. Perry & Papenhausen, Inc., is a corporation organized and existing under the laws of the state of California.
2. On July 28, 2005, the Regional Board issued Section 401 Water Quality Certification (File No. 05C:-041) and a Waiver of Waste Discharge Requirements (WDR) for Discharge of Dredged and/or Fill Materials to the Dickersons and Perry & Papenhausen, Inc., for proposed discharges of fill associated with the riprap removal and replacement at 501 First Street, Coronado. The project, as certified by the Regional Board, was to replace approximately 450 cubic yards of existing riprap with approximately 404 cubic yards of engineered riprap within the existing riprap footprint.
3. On or about May 1, 2006, Dischargers began removal of the existing riprap on the shoreline fronting 501 and 505 First Street using an excavator. On or about May 8, 2006, Dischargers excavated soils, natural sand and debris along the entire length of the northern property line for 501 and 505 First Street to accommodate the forms for the footing associated with the construction of an unauthorized seawall. On or about May 15, 2006, the Dischargers initiated construction of a four to five foot high stacked, mortarless, concrete block wall (seawall), and poured a concrete footing directly adjacent to the seawall within waters of the United States of America and the State of California.
4. On August 23, 2006, in response to the Dischargers' removal of riprap and construction of a seawall in front of 501 and 505 First Street, Coronado, the Regional Board issued Cleanup and Abatement Order (CAO) No. R9-2006-0101 to the Dickersons and Perry & Papenhausen, Inc., for discharges from 501 First Street, and CAO No. R9-2006-0102 to the Gunnings and Perry & Papenhausen, Inc. for discharges from 505 First Street. The Regional Board issued Addendum No. 1 to CAOs R9-2006-0101 and R9-2006-0102 on October 13, 2006.
5. On May 10, 2007, the Regional Board issued Addendum No. 2 to the CAOs to the Dischargers. The addenda were issued to clarify the appropriate jurisdictional definition for the discharge of fill associated with the removal of existing riprap and the unauthorized construction of the seawall and footing in San Diego Bay, and to update information gathered during the investigation of the matter. At the request of the Dischargers, a public hearing to contest the


issuance of the Amended CAOs was held on June 13, 2007. At the conclusion of the public hearing, the Regional Board unanimously affirmed the issuance of the Amended CAOs and found that the Dischargers' riprap removal and construction of a seawall and footing resulted in the unauthorized discharge of waste and threatened to cause conditions of pollution in violation of the Clean Water Act and provision of the Water Quality Control Plan for the San Diego Basin (Basin Plan) adopted by the Regional Board.

6. On September 27, 2007, Dischargers filed the Action alleging that the Regional Board proceeded in excess of its jurisdiction and abused its discretion in issuing the CAOs.
7. On August 19, 2008, the Dickersons, Gunnings, the Corps and the Port filed the Federal Settlement Agreement with the United States District Court for the Southern District of California to address (1) the Dischargers' removal of riprap and erection of the seawall and (2) Discharger's allegations against federal agencies and the Port that nearby dredging of San Diego Bay is causing erosion of the Dickerson and Gunning's properties. Among other things, the Federal Settlement Agreement requires the Dickersons and Gunnings to replace riprap and mitigate eelgrass damage. Under the terms of the Federal Settlement Agreement, the Dickersons and Gunnings agreed to remove the portion of the seawall's footings that lie within both the Port and Clean Water Act jurisdiction. The Dickersons and Gunnings also agreed to replace riprap removed from the beach and to mitigate the detrimental impacts caused by their activities to the eelgrass. Mitigation will be in the form of eelgrass planting at a 1:1.2 ratio in the impacted area. Finally, the Federal Settlement Agreement requires the Dickersons and Gunnings to pay \$25,000 to the Port and a civil penalty of \$250,000 to the Corps.
8. A notice of the Proposed Settlement was published on the Regional Board's website on July 2, 2009, and distributed to known interested parties notifying the public of the review period and soliciting public comments on the terms of the Proposed Settlement. The Proposed Settlement provides for the full and final resolution of the Action.
9. Issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 et seq.) pursuant to section 15321(a)(2), Chapter 3, Title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

IT IS HEREBY ORDERED that:

1. The Proposed Settlement (Attachment 1) is approved.
2. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for enforcement if the Dischargers fail to comply with the Proposed Settlement.

I, John H. Robertus, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on August 12, 2009.



JOHN H. ROBERTUS
Executive Officer

**SETTLEMENT AGREEMENT
AND RELEASE OF CLAIMS**

This Settlement Agreement and Release of Claims ("Settlement Agreement") is made and entered into by and between WILLIAM G. DICKERSON, HEIDI DICKERSON, LARRY GUNNING, PENELOPE I. GUNNING, and PERRY & PAPENHAUSEN, INC., a California Corporation (collectively, "Petitioners") and the SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD, a Public Entity ("Regional Board"). Petitioners and the Regional Board are sometimes collectively referred to in this Settlement Agreement as the "Parties." The Parties are entering into this Settlement Agreement based on their collective desire to resolve those claims between them relating to Regional Board Cleanup and Abatement Order Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended, directing Petitioners to perform certain actions at the real properties commonly known as 501 First Street and 505 First Street in Coronado, California ("First Street Properties"). In consideration of the payments described in Paragraph 3 below, and Petitioners' performance of specific tasks identified in Paragraphs 4, 5, and 6 below, the Parties agree to the following:

RECITALS

A. Petitioners William G. Dickerson and Heidi Dickerson are, and at all relevant times have been, the owners of the real property commonly known as 501 First Street, Coronado, California. Petitioners Larry Gunning and Penelope L. Gunning are, and at all relevant times have been, the owners of the real property commonly known as 505 First Street, Coronado, California. Petitioner Perry & Papenhausen is a corporation organized and existing under the laws of the state of California.

B. On September 27, 2007, Petitioners filed a petition for writ of mandate in the Superior Court of the State of California for the County of San Diego, entitled William G. Dickerson, et al. v. The San Diego Regional Water Quality Control Board, Case No. 37-2007-00075848-CU-WM-CTL (“Action”). In this Action, Petitioners alleged the Regional Board proceeded in excess of its jurisdiction and abused its discretion in issuing Cleanup and Abatement Order Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended.

C. The Regional Board is an agency of the state of California responsible for the implementation of California water quality control law set forth in the California Water Code.

D. The Parties desire to fully and finally settle and resolve all disputes and differences which exist or may exist, are known or unknown, and which were raised or could have been raised between Petitioners and the Regional Board, arising out of or in any way related to these Recitals, Cleanup and Abatement Order Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended, and Superior Court Case No. 37-2007-00075848-CU-WM-CTL, and to provide for a general release of any and all claims unless otherwise preserved herein.

E. On or about May 20, 2008, the Assistant Executive Officer issued Amended Administrative Civil Liability Complaint No. R9-2008-0019 which proposes to assess administrative civil liability of \$24,000 against William and Heidi Dickerson, and Perry & Papenhausen, Inc., for certain alleged violations of National Pollutant Discharge Elimination System (NPDES) Permit No. CAG919001, General Waste Discharge Requirements Order No. R9-2000-0090 at 501 First Street, Coronado, California. Additionally, on or about November 4, 2008, the Regional Board Prosecution Staff contacted representatives of the Petitioners to inform them of the Prosecution Staff’s intent to pursue alleged violations of the Water Quality Control

Plan for the San Diego Basin and Clean Water Act sections 301 and 401 associated with the removal of riprap shoreline protection and the subsequent erection of a seawall (referred to collectively as "Pending Regional Board Enforcement").

F. Each Party is willing to enter into this Settlement Agreement only upon the assurance that the other Party is willing to comply with its obligations, but the Regional Board's willingness to enter into this Settlement Agreement is conditioned upon approval of this Settlement Agreement at a public hearing.

THEREFORE, in consideration of the mutual promises set forth herein, the Parties, and each of them, agree to the following terms and conditions:

TERMS

1. Jurisdiction/Incorporation. This Court has jurisdiction over the subject matter of this action and the Parties to this Settlement. The Recitals are incorporated herein as though fully set forth.

2. Settlement of Claims. This Settlement Agreement is intended to be a full and complete settlement of the disputes enumerated in this Settlement Agreement between the Parties except where such claims are specifically preserved herein.

3. Reimbursement of Regional Board Expenses. Under the provisions of Water Code section 13304, Petitioners shall reimburse the Regional Board for its costs incurred in this matter in the total amount of \$67,000.00, payable as follows: on or before thirty (30) days from the Regional Board's approval of this Settlement Agreement, Petitioners will pay the sum of \$16,750 to the Regional Board. Thereafter, Petitioners will make three additional payments of \$16,750.00 to the Regional Board in 90-day intervals.

4. Replacement of Rip Rap. All rip rap must be replaced at the First Street Properties as required by the terms and conditions of the Settlement, Release and Waiver Agreement (“Agency Settlement”) entered into by and between Petitioners William Dickerson, Heidi Dickerson, Larry Gunning and Penelope Gunning on the one hand, and the United States Army Corps of Engineers (“Army Corps”), the San Diego Unified Port District (“Port”) on the other hand. A full, true, and correct copy of the Agency Settlement is attached to this Settlement Agreement as Exhibit “1”.

5. Replacement of Eel Grass. Petitioners will replace the eel grass at or adjacent to the First Street Properties as required by the Agency Settlement, Exhibit “1”.

6. Dismissal of Action. Within ten (10) days after approval of this Settlement Agreement by the Regional Board, Petitioners will file a dismissal, with prejudice, of the entire Action.

7. Preservation of Pending Enforcement Actions.
The Regional Board shall retain the right to pursue the Pending Regional Board Enforcement. Since November 2008, the Petitioners and Regional Board Prosecution Staff have conferred for the purpose of settling the Pending Regional Board Enforcement claims. It is the Parties’ intent that the Regional Board retains the right to settle or pursue the Pending Regional Board Enforcement claims and that the Regional Board’s rights in this regard are not affected by the terms of this Settlement Agreement.

8. Rescission of Cleanup and Abatement Orders

The Regional Board shall rescind Cleanup and Abatement Order Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended, in their entirety and all related addenda in existence pertaining to the Recitals in this Settlement Agreement, Cleanup and Abatement Order

Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended, and Superior Court Case No. 37-2007-00075848-CU-WM-CTL within thirty (30) days after this Settlement Agreement is approved by the Regional Board.

8. Mutual and General Releases. The following releases shall become effective upon the approval of the Regional Board of this Settlement Agreement and Release.

Release of Petitioners. Except for those obligations expressly set forth in this Settlement Agreement, including the obligations in Paragraphs 3, 4, 5, 6, and 7, the Regional Board for itself and its past and present agents, related entities, employees, fiduciaries, attorneys, successors, assigns, affiliates, directors, officers, members, representatives, successors and assigns, hereby forever releases, waives, discharges, and holds harmless Petitioners, and each of them, and their respective past and present agents, related entities, employees, subsidiaries, shareholders, partners, fiduciaries, attorneys, heirs, successors, assigns, affiliates, directors, officers, members and representatives and each of them from any and all causes of action, actions, liabilities, demands, obligations, costs, including the cost of staff, expenses, damages, rights, debts, judgments, contracts, attorneys' fees, losses or claims, of any nature whatsoever, whether known, unknown, suspected, unsuspected, fixed, contingent, liquidated, unliquidated, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured, arising under federal, state, local, or common law which relate in any way to the Recitals, Cleanup and Abatement Order Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended, and Superior Court Case No. 37-2007-00075848-CU-WM-CTL..

Petitioners' Release of the Regional Board and State Board. Except for those obligations expressly set forth in this Settlement Agreement, including the obligations in Paragraph 7, Petitioners, and each of them, for themselves and their respective past and present

agents, related, employees, fiduciaries, attorneys, heirs, successors, assigns, affiliates, directors, officers, members, representatives, successors and assigns, hereby forever releases, waives, discharges, and holds harmless the Regional Board and its past and present agents, related entities, employees, subsidiaries, shareholders, partners, fiduciaries, attorneys, successors, assigns, affiliates, directors, officers, members and representative and each of them from any and all causes of action, actions, liabilities, demands, obligations, costs, expenses, damages, rights, debts, judgments, contracts, attorneys' fees, losses or claims, of any nature whatsoever, whether known, unknown, suspected, unsuspected, fixed, contingent, liquidated, unliquidated, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured, arising under federal, state, local, or common law which relate in any way to the Recitals, Cleanup and Abatement Order Numbers R9-2006-0101, as amended, and R9-2006-0102, as amended, and Superior Court Case No. 37-2007-00075848-CU-WM-CTL.

9. Admissions, Express or Implied. This Settlement Agreement is a result of compromise and shall not at any time, for any purpose, be considered an admission of liability or responsibility by either of the Parties.

10. Scope of Settlement. This Settlement Agreement shall apply to and be binding upon each Party to this Settlement only with respect to the matters addressed in this Settlement Agreement. Specifically, this Settlement Agreement shall not limit or restrict either the Regional Board, the State Water Resources Control Board, or any other state agency, department, or entity in the continuing exercise of their respective and/or joint, continuing obligations to fulfill their statutory obligations. The Regional Board reserves its right to independently monitor Petitioners' compliance with the terms and conditions of this Settlement Agreement.

The Regional Board reserves its right to take new enforcement action, including, but not limited to, seeking cleanup and abatement orders, recovery of staff costs, and/or administrative civil liabilities, in the event of any failure by Petitioners to perform their obligations under this Settlement Agreement.

11. Binding Agreement Notwithstanding Mistake. This Settlement Agreement shall be binding upon the Parties, notwithstanding any mistake of fact or law, the risk of which is assumed by each Party to the Action, and neither Petitioners nor the Regional Board shall be entitled to allege any mistake of fact or law as grounds for setting aside this Settlement Agreement.

12. No Precedential Effect. No part of this Settlement Agreement, or the Action, including the allegations contained in the petition for writ of mandate, shall have, or be construed to have, any precedential effect with respect to any present or future litigation, application, or proceeding of any nature whatsoever, by and between Petitioners and the Regional Board.

13. Attorneys' Fees and Costs. Except as otherwise expressly provided in this Settlement Agreement, each Party to this Settlement Agreement shall bear its own respective costs and attorney's fees in connection with this matter, including costs and fees associated with negotiating this Settlement Agreement. The Regional Board expressly waives any potential claim for costs under Code of Civil Procedure section 1021.8, except any costs and attorney's fees necessary to enforce the terms of this Settlement Agreement.

14. Interpretation and Choice of Law. This Settlement Agreement shall be deemed to have been drafted equally by the Parties, and shall not be interpreted for or against any Party on the ground that any such Party drafted it. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of California.

15. Integration. This Settlement Agreement contains all of the terms and conditions agreed upon by Petitioners and the Regional Board, relating to the matters covered by this Settlement Agreement, and supersedes any and all prior and contemporaneous agreements, negotiations, correspondence, understandings, and communications of the Parties, whether oral or written, respecting the matters covered by this Settlement Agreement. This Settlement Agreement may be amended or modified only by a writing signed by the Parties to this Settlement Agreement or their authorized representatives.

16. Separateness of Settlement Provisions. Should any provision of this Settlement Agreement be declared or be determined by any court of competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity, or enforceability of the remaining parts, terms, or provisions shall not be affected thereby, and the part, term, or provision declared illegal, unenforceable, or invalid shall be deemed not to be a part of this Settlement Agreement.

17. Effect of Waiver. Failure by any of the Parties to enforce a term or condition of this Settlement Agreement does not constitute a waiver of that term or condition. Any of the Parties may only waive a term or condition of this Settlement Agreement in writing. Waiver of a term of the Settlement Agreement does not constitute waiver of any other terms or conditions in this Settlement Agreement. Waiver of a term of the Settlement Agreement with respect to one of the Parties does not constitute waiver with respect to any other of the Parties.

18. Knowing, Voluntary Agreement. Each Party to this Settlement Agreement acknowledges it has been represented by legal counsel, and that each Party has reviewed, and has had the benefit of legal counsel's advice concerning all of the terms and conditions of this Settlement Agreement.

19. Warranty of Capacity to Execute Agreement. Each Party to this Settlement Agreement represents and warrants the person who has signed this Settlement Agreement on its behalf is duly authorized to enter into this Settlement Agreement, and to bind that Party to the terms and conditions of this Settlement Agreement.

20. Assignment of Interest. The Parties mutually represent and warrant to each other that they have not assigned, subrogated, or otherwise transferred any interest in any claims that are related in any way to the subject matter of the Action or of this Settlement Agreement.

21. No Third Party Benefits. This Settlement Agreement is made for the sole benefit of the Parties, and no other person or entity shall have any rights or remedies under or by reason of this Settlement Agreement, unless otherwise expressly provided for herein.

22. Signature in Counterparts. This Settlement Agreement may be signed in counterparts.

23. Cooperation/Documentation. The Parties will, at their own cost and expense, execute such other instruments, documents, information and data as may be reasonably necessary for the purposes of and to effectuate the terms of this Settlement Agreement.

24. Assignment. Subject only to the express restrictions contained in this Settlement Agreement, all of the rights, duties and obligations contained in this Settlement Agreement shall inure to the benefit of and be binding upon the Parties, and their successors and assigns.

25. Reliance. Each of the Parties declares and represents this Settlement Agreement is being made without reliance upon any statement or representation not contained herein of any other Party, or of any agent or attorney of any other of the Parties, or of any agent or attorney of any other of the Parties. The Parties further acknowledge that the terms and conditions hereof adequately and correctly reflect each of the Parties' respective understanding of the subject

matter hereof. Each of the Parties represents to each of the other Parties that it has reviewed each term of this Settlement Agreement with its counsel and that it shall never dispute the validity of this Settlement Agreement on the ground that it did not have advice of its counsel.

26. Action to Enforce Settlement Agreement. A Party asserting a term of this Settlement Agreement has been violated shall have the right to seek specific performance of that term and/or any other proper relief, including but not limited to damages, from any court of competent jurisdiction, and the prevailing Party shall be entitled to recover reasonable costs and attorney's fees.

27. Headings and Gender References. The headings in this Settlement Agreement are used only for convenience and do not affect its interpretation or construction.

28. Effective Date. The effective date of this Settlement Agreement shall be the latest date this Settlement Agreement is executed by an authorized representative of Petitioners and the Regional Board.

29. Controlling Law; Venue. This Settlement Agreement is being made and delivered and is intended to be performed in the State of California and the execution, validity, construction, and performance of this Settlement Agreement shall be construed and enforced in accordance with the laws of California. This Settlement Agreement shall be deemed made and entered into in San Diego County, which shall be the exclusive venue for any action relating to this Agreement.

30. Warranties of Authority and Against Prior Assignment. Each person who signs this Settlement Agreement on behalf of a Party warrants and represents to every other Party that he or she has the authority to make this Settlement Agreement on behalf of the Party for which he or she signs. Each of the Parties to this Settlement Agreement represents and warrants that

Party the sole and exclusive owner of the rights, claims and causes of action herein released and has not heretofore assigned or transferred or purported to assign or transfer to any other person or entity any obligations, rights, claims, or causes of action herein released. Each Party to this Settlement Agreement shall defend and hold each other Party harmless from and against any rights, claims, or causes of action asserted by any person that, if established, would be a breach of the above representations and warranties, and any and all loss, expense, attorneys' fees, and liability arising directly or indirectly out of the breach of any of the above representations and warranties. If any action is brought which, if established, would be a breach of any of the above representations and warranties, the Party making the representation or warranty shall appear in and defend the action on behalf of the affected beneficiary or beneficiaries of the representation or warranty, at the maker's own sole cost and expense.

The undersigned, on the dates and at the place set forth below, subscribe their hands to and acknowledge their assent to, and agreement with, the terms and conditions set forth in this Settlement Agreement.

(Signatures follow on next page.)

PERRY & PAPENHAUSEN, INC.

Dated: 7-21-09, 2009

By: *[Signature]*
(Name)

Its: per P.P.

Dated: _____, 2009

WILLIAM G. DICKERSON

Dated: _____, 2009

HEIDI DICKERSON

Dated: July 3, 2009

[Signature]
LARRY GUNNING

Dated: _____, 2009

[Signature]
PENELOPE I. GUNNING

REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION

Dated: _____, 2009

By: _____
John H. Robertus
Executive Officer

APPROVED AS TO FORM AND CONTENT:

Dated: _____, 2009

By: _____
Deborah M. Fletcher
Deputy Attorney General
Attorneys for San Diego Regional Water
Quality Control Board

~~OPPER & VARCOLL~~

Dated: July 17, 2009

By: *[Signature]*
Richard G. Opper
Attorneys for Petitioners William G.
Dickerson, Heidi Dickerson, Larry Gunning,
Penelope L. Gunning, and Perry &
Papenhausen, Inc.

PERRY & PAPENHAUSEN, INC.

Dated: _____, 2009

By: _____
(Name)

Dated: 7/16/09, 2009

Its: _____

Dated: 7/14/09, 2009


WILLIAM G. DICKERSON

Dated: _____, 2009


HEIDI DICKERSON

Dated: _____, 2009

LARRY GUNNING

PENELOPE I. GUNNING

REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION

Dated: _____, 2009

By: _____
John H. Robertus
Executive Officer

APPROVED AS TO FORM AND CONTENT:

Dated: _____, 2009

By: _____
Deborah M. Fletcher
Deputy Attorney General
Attorneys for San Diego Regional Water
Quality Control Board

OPPER & VARCO LLP

Dated: _____, 2009

By: _____
Richard G. Opper
Attorneys for Petitioners William G.
Dickerson, Heidi Dickerson, Larry Gunning,
Penelope L. Gunning, and Perry &
Papenhausen, Inc.

PERRY & PAPHENHAUSEN, INC.

Dated: _____, 2009

By: _____
(Name)

Its: _____

Dated: _____, 2009

WILLIAM G. DICKERSON

Dated: _____, 2009

HEIDI DICKERSON

Dated: July 3, 2009



LARRY GUNNING

Dated: _____, 2009



PENELOPE I. GUNNING

REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION

Dated: _____, 2009

By: _____
John H. Robertus
Executive Officer


APPROVED AS TO FORM AND CONTENT:

Dated: _____, 2009

By: _____
Deborah M. Fletcher
Deputy Attorney General
Attorneys for San Diego Regional Water
Quality Control Board

~~OPPER & VARCO LLP~~

Dated: July 17, 2009


By: _____
Richard G. Opper
Attorneys for Petitioners William G.
Dickerson, Heidi Dickerson, Larry Gunning,
Penelope L. Gunning, and Perry &
Papenhausen, Inc.

PERRY & PAPENHAUSEN, INC.

Dated: _____, 2009

By: _____
(Name)

Its: _____

Dated: _____, 2009

WILLIAM G. DICKERSON

Dated: _____, 2009

HEIDI DICKERSON

Dated: _____, 2009

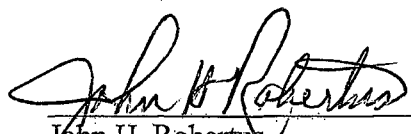
LARRY GUNNING

Dated: _____, 2009

PENELOPE I. GUNNING


REGIONAL WATER QUALITY CONTROL
BOARD, SAN DIEGO REGION

Dated: 3 August, 2009

By: 
John H. Robertus
Executive Officer

APPROVED AS TO FORM AND CONTENT:

Dated: July 29, 2009

By: 
Deborah M. Fletcher
Deputy Attorney General
Attorneys for San Diego Regional Water
Quality Control Board

OPPER & VARCO LLP

Dated: _____, 2009

By: _____
Richard G. Opper
Attorneys for Petitioners William G.
Dickerson, Heidi Dickerson, Larry Gunning,
Penelope L. Gunning, and Perry &
Papenhausen, Inc.

Exhibit 1

Agency Settlement

(35)

SETTLEMENT, RELEASE, AND WAIVER AGREEMENT

This Settlement, Release and Waiver Agreement ("Agreement") is entered into between Defendant THE SAN DIEGO UNIFIED PORT DISTRICT (hereinafter "Port"), Defendant UNITED STATES ARMY CORPS OF ENGINEERS (hereinafter "Army Corps"), and Plaintiffs Mr. Larry Gunning and Mrs. Penelope Gunning, Mr. William and Mrs. Heidi Dickerson (hereinafter "Plaintiffs"). The Port and Army Corps are sometimes referred to collectively as "Defendants". Defendants and Plaintiffs are sometimes referred to collectively as the "Parties" or singularly as "Party".

1. INTRODUCTION

Whereas, on May 23, 2005, Mr. & Mrs. Dickerson (501 First Street), applied for an Army Corps permit to remove and replace existing rip rap for improved appearance and maintenance of shoreline protection. After the application was reviewed by several other agencies, and conditions to protect essential fish habitat were added, on October 21, 2005, the Army Corps conditionally verified authorization of Nationwide Permit 3 for the rip rap maintenance and improvement project.

Whereas, during 2005 and 2006 the rip rap was removed and seawalls built bayward of properties at 501 First Street (Dickerson), and 505 First Street (Gunning), Coronado, California. The rip rap was not restored.

Whereas, the Army Corps on behalf of the United States, pursuant to the Clean Water Act, on June 26, 2006, issued a notice of alleged violations of the Clean Water Act to Plaintiffs, William "Bill" and Heidi Dickerson and Plaintiffs' construction contractor, Mr. Fred C. Perry, Perry and Papenhausen Construction, regarding the property at 501 First Street. The Army Corps on behalf of the United States and pursuant to the Clean Water Act, on June 26, 2006, also issued a notice of alleged violations of the Clean Water Act to Plaintiffs Larry and Penny Gunning, and Plaintiffs' construction contractor Mr. Fred C. Perry, Perry and Papenhausen Construction, regarding the property at 505 First Street. The seawalls were allegedly built on a location within the jurisdiction of the federal Clean Water Act without any Army Corps permit. The seawalls were also allegedly built on and encroached into property within the jurisdiction of the Port. At the time, the Dickersons had an Army Corps permit to maintain and improve the rip rap (by removing the existing rip rap and replacing it with quarry stone rip rap). The Gunnings had no permit to remove the rip rap.

Whereas, on October 18, 2006, the Army Corps advised the Dickersons that the Nationwide Permit authorization had been invalidated as a result of revocation of other required approvals.

Whereas, on August 16, 2007, the United States Department of Justice, through the United States Attorney's Office for the Southern District of California, at the request of the Army Corps, notified Plaintiffs that it may bring a federal court civil action for alleged violations of the Clean Water Act.

Whereas, on December 5, 2007, Plaintiffs filed a second amended complaint in the matter entitled *SLPR, LLC, et al. v. the San Diego Unified Port District, United States Army Corps of Engineers, United States Navy, et al.*, United States District Court, Southern District of California, Case No. 06 CV 1327 W (POR) (hereinafter "Federal Case") against the Port for Nuisance (First Cause of Action), Cal. Civ. Code section 832 (Second Cause of Action) and Inverse Condemnation (Third Cause of Action), and against the Army Corps for Administrative Procedures Act Claim re Dredging without Protective Measures (Fifth Cause of Action), Administrative Procedures Act Claim re Finding of Violation of Clean Water Act (Seventh Cause of Action), and Declaratory Relief – 28 U.S.C sections 2201, 2202 (Eighth Cause of Action). On April 4, 2008, Plaintiffs filed a case entitled *SLPR, LLC, et al., v. the San Diego Unified Port District, et al.*, San Diego Superior Court Case No. 37-2008-00079175-CU-OR-CTL, to Establish Boundary and Quiet Title, for Nuisance, Injunctive Relief and Damages under California Civil Code section 832, and Inverse Condemnation (hereinafter "State Case"). These matters, including the alleged Port jurisdiction encroachment, the alleged Clean Water Act violations, and the matters alleged by the Plaintiffs are sometimes collectively referred to as "the Actions".

Whereas, the Actions, as to these Plaintiffs only, generally involve two seawalls constructed by these named Plaintiffs on the bayside of their properties located at 501 and 505 First Street, Coronado, California ("Seawalls"), the removal and failure to replace the rip rap bayward of said properties, and alleged detrimental impacts of such construction on eelgrass in San Diego Bay.

Whereas, the Parties wish to resolve their differences and, therefore, enter into this Agreement to fully settle and discharge all disputed claims and actions arising from or related to the Seawalls, rip rap, eelgrass, Clean Water Act, and encroachment issues cited above, upon the terms and conditions set forth herein.

2. ARMY CORPS PERMITS

The Army Corps will process a Nationwide Permit 32 verification (completed enforcement actions) that will be a final agency action taken on behalf of the Secretary and not subject to further judicial review. The processing will occur upon Plaintiffs' documentation of compliance with the terms and conditions of the nationwide permit program (72 Federal Register 11092-11198 dated March 12, 2007), that allows the activities described in this Agreement, and upon receiving the required concurrences from the appropriate state and federal agencies.

This Agreement does not waive or supersede any permits required by law.

3. SEAWALLS

The Parties have agreed, so far as their power and authority extends, that they will allow the Seawalls bayward of 501 and 505 First Street to remain in their current location, after completion of Sections 4, 5 and 6 of this Agreement.

4. FOOTING OF SEAWALLS

The Plaintiffs will remove that portion of footings of the Seawalls that lie within both the Port jurisdiction and Clean Water Act jurisdiction, in substantial compliance with the specifications and map attached as Exhibit A (Technical Specifications), and Attachment 1 to Exhibit A, and incorporated herein, to the satisfaction of Port. The Port has authorized this work in Emergency Coastal Development Permits on file with the Office of the District Clerk as Document Nos. 52045 and 52046, filed on June 7, 2007, and drawings dated March 4, 2007, updated March 26, 2007, and prepared by GeoSoils, Inc., and two letters of CEQA determination dated June 4, 2007. By this Agreement, the drawings dated March 26, 2007, are superseded and replaced by the drawings attached as Exhibit A, Attachment 2. No further permits are required from the Port before the work contemplated in this Agreement may occur. This work may not be started until after the Army Corps, and any other appropriate entities, issues appropriate permit(s) for each property.

5. REPLACEMENT OF REMOVED RIP RAP WITH QUARRY STONE

The Plaintiffs will replace the rip rap that was removed from the beach with quarry stone similar or identical to the stone used by the City of Coronado at the adjacent property, at the foot of I Street, and further described in Exhibit A, ("Quarry Stone"), to the satisfaction of the Port and the Army Corps, in substantial compliance with Exhibit A and Attachment 2 to Exhibit A, incorporated herein. And, as will be more particularly described in Plaintiffs' applications to the Army Corps for verifications of Nationwide Permit 32 applicability, such details include but are not limited to coverage by the Quarry Stone to not less than 20 feet bayward of the face of the Seawalls.

The Port has authorized this work in Emergency Coastal Development Permits on file with the Office of the District Clerk as Document Nos. 52045 and 52046, filed on June 7, 2007, and drawings dated March 4, 2007, updated March 26, 2007, and prepared by GeoSoils, Inc., and two letters of CEQA determination dated June 4, 2007. By this Agreement, the drawings dated March 26, 2007, are superseded and replaced by the drawings attached as Exhibit A, Attachment 2. No further permits are required from the Port before the work contemplated in this Agreement may occur.

This work may not be started until after the Army Corps, and any other appropriate entities, issues all appropriate permit(s) for each property.

6. MITIGATION FOR LOSS OF EELGRASS HABITAT

The Plaintiffs will mitigate for any detrimental impacts to eelgrass habitat caused by the matters in the Actions, by replacing suitable eelgrass habitat to the satisfaction of

the Army Corps and under the supervision of the Port's Environmental Services Department, as more particularly described in Exhibit A, and Attachment 3 to Exhibit A, incorporated herein. In general, any eelgrass habitat mitigation occurring under this Agreement must follow the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries' Service Southern California Eelgrass Mitigation Policy and will encompass restoring eelgrass habitat to 1.2 times the area impacted by the Plaintiffs.

It is not the intent of this Agreement to make the Plaintiffs responsible for any necessary eelgrass replacement or mitigation that may be required as a result of the operation of the adjacent municipal storm drain, or that was otherwise not caused by the Plaintiffs' efforts.

7. FINAL SETTLEMENT

This Agreement is a final and complete settlement of the claims between the Plaintiffs and Defendants, as well as full, final, and complete settlement of the Actions and any or all claims Plaintiffs and Defendants may have against one another regarding the Actions, whether known or unknown, present or future, as more particularly described below in Section 13, Releases, and Section 16, Waiver of Section 1542. The Port and the Army Corps will not seek further fees, fines or legal penalties from Plaintiffs regarding the construction of the Seawalls in their current location, for the removal of the rip rap, or damage to eelgrass habitat.

This Agreement does not, however, limit or cap the expenses and costs to be born jointly and severally (and exclusively) by the Plaintiffs to effect the modification of the footings of the Seawalls, to restore the rip rap with Quarry Stone, and to restore the eelgrass habitat impacted by Plaintiffs' activities in accordance with NOAA standards.

8. AGREEMENT TO COOPERATE

The Army Corps and Port will work cooperatively with the Plaintiffs to process the necessary paperwork for issuance of any permits necessary for the work contemplated in this Agreement.

The Port will make diligent efforts to assist the Plaintiffs in reaching agreements and accommodations consistent with this Agreement with the San Diego Regional Water Quality Control Board, an agency that has asserted jurisdiction over some of the matters at issue in the Actions.

9. AGREEMENT NOT A WAIVER OF REQUIRED PERMITS

This Agreement addresses all permits required by the Army Corps and Port for the matters addressed in this Agreement. This Agreement does not waive any permits required by law or compliance with the terms and conditions of all permits. Proper permits must be obtained from all appropriate agencies before any work contemplated in this Agreement may commence. Plaintiffs acknowledge they must comply with the terms and conditions of all permits.

This Agreement is not and should not be interpreted to be a permit or modification of any existing permit issued by the Army Corps under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., or any other law. Except as specifically stated, nothing in this Agreement shall limit the Army Corps' ability to issue, modify, suspend, revoke or deny any individual permit or nationwide, or regional general permit. Nothing in this Agreement limits the Army Corps' ability to exercise its authority pursuant to the Clean Water Act and other laws in the future.

Upon completion of the terms and conditions of this Agreement, its Technical Specifications, and all applicable permits, the Plaintiffs agree to not adversely impact eelgrass restoration that may occur under this Agreement.

10. JUDGE TO RETAIN JURISDICTION TO INTERPRET AND ENFORCE THE AGREEMENT

The Parties have consented to have the District Court (through Magistrate Judge Louisa S. Porter or her successor), retain jurisdiction over his Agreement for a period of five (5) years, including, but not limited to, the resolution of disputes that may arise in the assessment of responsibility for the replacement and/or mitigation for loss of eelgrass.

11. PAYMENTS, PENALTIES, COSTS, AND EXPENSES

All obligations for payment, costs, and expenses are joint and several among the Plaintiffs.

The Plaintiffs will pay to the Port and the Port shall accept as payment, the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00). Said payment may be made by personal or cashier's check made payable to the San Diego Unified Port District. Said payment shall be received by counsel of record for the Port (Leslie FitzGerald) not later than thirty (30) days after the Effective Date of the Agreement or no later than the issuance of all permits required by the Port for the performance of all activities in this Agreement, whichever is later.

The Plaintiffs will pay a civil penalty to the United States in the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS (\$250,000.00). Said payment shall be made by cashier's check made payable to the U. S. Treasury. Said payment shall be received by counsel of record for the Army Corps (Assistant U. S. Attorney, Thomas B. Reeve, Jr.) not later than thirty (30) days after the Effective Date of the Agreement or no later than the issuance of all permits required by the Port and the Army Corps for the performance of all activities in this Agreement, whichever is later.

Such civil penalty to the United States is a penalty within the meaning of Section 162(f) of the Internal Revenue Code, 26 U. S. C. §162(f) or 26 C.F.R. § 1.126-21, and are not tax deductible expenditures for purposes of federal law.

12. LATE PAYMENTS

In the event any of the above payments are late, the recipient may seek appropriate sanctions from the Magistrate Judge. Additionally, regardless of whether sanctions are sought from the Magistrate Judge, the late party shall incur a daily-compounded interest penalty, at the rate provided in 28 U.S.C. § 1961, that will be added to the sum due.

All costs and expenses of removing the footing of the Seawalls from the Port's jurisdiction, restoration of the rip rap with Quarry Stone, and the eelgrass mitigation and monitoring shall be born by Plaintiffs, as their joint and several obligations under this Agreement.

13. RELEASES

Upon the issuance of all permits required by the Port and the Army Corps to perform all activities in this Agreement and in consideration of the terms herein, Plaintiffs do hereby fully and forever completely release, acquit, and discharge Defendants, together with any and all past and present employees, agents (whether ostensible or actual), officers and commissioners and their successors, insurance carriers, departments, or representatives, (collectively "Defendant Releasees") from any and all claims, demands, damages, wages, costs, attorneys' fees, rights or causes of action, whether known or unknown, past, present or future which Plaintiffs may have against the Defendant Releasees, or any of them, that arise from, or are directly or indirectly related to, or are connected with, any of the facts or circumstances alleged in the Actions or in any way connected with the subject matter of the Actions, including claims for violations of any federal, state or local statute, ordinances, public policy or common law.

In consideration of the terms herein, Port does hereby fully and forever completely release, acquit, and discharge Plaintiffs and their successors (collectively "Plaintiff Releasees") from any and all claims, demands, damages, wages, costs, attorneys' fees, rights or causes of action, whether known or unknown, past, present or future which the Port may have against the Plaintiff Releasees, or any of them, that arise from, or are directly or indirectly related to, or are connected with, any of the facts or circumstances alleged in the Actions or in any way connected with the subject matter of the Actions, including claims for violations of any federal, state or local statute, ordinances, public policy or common law, except as otherwise provided in this Agreement, and specifically limited to the Seawalls, footings, rip rap, and eelgrass issues resolved herein.

In consideration of the terms herein, Army Corps does hereby fully and forever completely release, acquit and discharge Plaintiff Releasees from any and all claims, demands, damages, wages, costs, attorneys' fees, rights or causes of action, whether known or unknown, past, present or future which Army Corps may have against the Plaintiff Releasees, or any of them that arise from, or are directly or indirectly related to, or are connected with, any of the facts or circumstances alleged in the notices of violations, including claims for violations of any federal, state or local statute,

ordinances, public policy or common law, except as otherwise provided in this Agreement, and specifically limited to the Seawalls, footings, rip rap and eelgrass issues resolved herein.

The Parties agree this is a specific, not a general, release. This Agreement in no way affects the rights of the United States or any of its agencies, as to any claims, defenses, causes of action, matters or issues not specifically resolved by this Agreement. This Agreement is not intended to bind any agency other than those which are signatories to it, and whatever rights and remedies that are available to the San Diego Regional Water Quality Control Board or the State Water Resources Control Board are not intended to be waived by these Parties.

14. DEFENSE AND INDEMNITY

To the fullest extent permitted by law, Plaintiffs shall defend, indemnify and hold the Defendants and their appointed officials, officers, agents and employees harmless from and against any and all claims, damages, liability, judgments, proceedings, demands, losses and expenses (including reasonable attorneys' fees) that the Defendants may sustain or incur in any manner resulting from Plaintiffs' performance of the terms of this Agreement, including the construction or presence of the Seawalls (including removal of the footing) or the installation of Quarry Stone, including but not limited to loss of or damage to property, injuries or death. This responsibility for defending against claims related to the Quarry Stone ends upon the satisfactory placement of the material as rip rap on the tidelands.

15. DISMISSALS

Plaintiffs shall cause their attorney to draft a Joint Motion for Dismissal with prejudice as to Port and Army Corps in the Federal Case and to execute and file a request for dismissal with prejudice as to Port in the State Case. Plaintiffs' counsel will provide Port counsel with a conformed copy of the dismissal in the State Case.

16. WAIVER OF SECTION 1542

As to the matters released by this Agreement, the Parties expressly waive all rights under Section 1542 of the California Civil Code and of any comparable principle of law, whether by statute or decision. Section 1542 provides as follows:

"A general release does not extend to the claims which the creditor does not know or suspect to exist in his favor at the time of the execution of the release, which if known by him must have materially affected his settlement with the debtor."

This Agreement expressly includes a discharge of all unknown and unsuspected claims, except as to the rights of the Army Corps and other federal entities, which are not waived (this provision in no way affects the rights of the United States or any federal entity as to any claims, defenses, causes of action, matters or issues for each parcel and any party not specifically resolved by this Agreement). The Parties understand and

acknowledge the consequences of this waiver. However, as stated in Section 17 of this Agreement, upon completion of the activities set forth in Sections 4, 5 and 6 of this Agreement, the Army Corps and the Port shall issue letters stating that all issues have been resolved and no further action will be taken against Mr. Fred C. Perry or Perry and Papenhausen Construction, Inc. for matters under this Agreement.

17. PERRY AND PAPHENHAUSEN CONSTRUCTION

In light of the Clean Water Act violations alleged by the Army Corps in June 26, 2006 notices of violations addressed to Mr. Fred C. Perry in addition to the Plaintiffs, the Army Corps shall issue a letter to Mr. Fred C. Perry individually and Perry and Papenhausen Construction, Inc. upon completion of the activities set forth in Sections 4, 5, and 6 of this Agreement, stating that all Clean Water Act violations alleged by the Army Corps in the notice have been resolved, that administrative closure has been achieved, and that no further enforcement action will be taken by the Army Corps against Mr. Fred C. Perry or Perry and Papenhausen Construction, Inc. for matters covered under the June 26, 2006 notices.

The Port shall issue a letter to Mr. Fred C. Perry individually and Perry and Papenhausen Construction, Inc. upon completion of the activities set forth in Sections 4, 5 and 6 of this Agreement, stating that all violations related to the Actions for alleged encroachment on to Port jurisdiction property have been resolved and no further action will be taken by the Port against Mr. Fred C. Perry or Perry and Papenhausen Construction, Inc. for matters covered under this Agreement.

Other than these letters to Mr. Fred C. Perry and Perry and Papenhausen Construction, Inc., this Agreement in no way affects the rights of the Port, the United States and the Army Corps as against any person or entity not a party to this Agreement.

18. NO PRIOR ASSIGNMENT OR TRANSFER

Each Party to this Agreement represents and warrants that there has been no assignment or other transfer of any claims or causes of action which they are releasing pursuant to the terms of this Agreement.

19. NO ADMISSION OF GUILT OR WRONGDOING

Plaintiffs enter into this Agreement in the spirit of compromise and with a desire to rectify regulatory errors they may have committed. This Agreement is not an admission of guilt or wrongdoing and rather represents a compromise resolution of alleged regulatory violations and encroachment issues in a manner that is mutually acceptable to the Parties.

20. TIMELINES FOR PERFORMANCE

The Plaintiffs shall begin immediately to prepare an eelgrass mitigation plan pursuant to Section 6 of this Agreement. The Plaintiffs' eelgrass mitigation plan shall be presented to the Army Corps and the Port within not more than 60 days after the Effective Date of this Agreement. Plaintiffs shall implement the eelgrass mitigation plan in accordance with the timeframes specified in the plan as approved by the Army Corps.

The Plaintiffs, within not more than 30 days of issuance of necessary permits (which they will forthwith and diligently pursue), shall begin the footing removal and rip rap replacement.

21. MISCELLANEOUS PROVISIONS

A. Entire Agreement

This Agreement constitutes the full and entire Agreement of the claims between the Parties, and such Parties acknowledge that there is no other claim Agreement, oral and/or written, between the Parties.

B. Authority to Enter Agreement

This Agreement is the result of arms-length negotiations. Each Party to this Agreement represents and warrants to the others that the persons executing this Agreement on behalf of such Party are duly and fully authorized to do so, and that each such Party is acting pursuant to the power and authority granted by their respective principals, and that no further approvals are required to be obtained from any persons or entities.

C. Final Agreement

The Parties to this Agreement, and each of them, acknowledge that (1) this Agreement and its reduction to final form is the result of extensive good faith negotiations; (2) counsel for the Parties has carefully reviewed and examined this Agreement before execution by said Parties, or any of them; and (3) any statute or rule of construction that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Agreement.

D. Binding Agreement

This Agreement is and shall be binding upon and shall inure to the benefit of the predecessors, affiliates, subsidiaries, successors, insurance carriers, assigns, parties, agents, officers, employees, shareholders, associates, legal representatives, heirs, executives and/or administrators of each of the Parties hereto.

E. Attorneys' Fees and Costs

All Parties shall bear their own costs and attorneys' fees in connection with the claim, the Actions, and this Agreement.

F. Interpretative Law

This Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced and governed by and under the laws of the State of California and the laws and regulations of the United States, particularly including the Clean Water Act and NOAA's Southern California Eelgrass Mitigation Policy.

G. Severability

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable for whatever reason, the remaining provisions not so declared shall nonetheless continue in full force and effect without being impaired in any manner whatsoever.

H. Modifications

This Agreement may be amended or modified only by a writing signed by all Parties to this Agreement. Modifications affecting the rights or obligations of the Port shall first be approved by the Board of Port Commissioners.

I. Paragraph Headings

Paragraph headings are for reference only and shall not affect the interpretation of any paragraph hereto.

J. No Inducement

Each of the Parties to this Agreement acknowledges for itself that it has read this Agreement and fully understands its contents and consequences and has voluntarily executed it. Each of the Parties also warrants that no promise or inducement has been made or offered by any of the Parties, except as set forth herein, and that this Agreement is not executed in reliance upon any statement or representation of any of the Parties or their representatives, concerning the nature and extent of the injuries, damages or legal liability thereof. The Parties further represent that they have been represented by legal counsel during the course of the negotiations leading to the signing of this Agreement, and that they have been advised by legal counsel with respect to the meaning of this Agreement and its legal effect.

K. Counterparts/Original Signature

This Agreement may be executed in counter-parts with the same effect as if all original signatures were placed on one document and all of which together shall be one and the same Agreement. Also, signatures received via facsimile shall have the same force and effect as an original. All Parties shall send their original signature pages to

attorney Leslie FitzGerald, deputy counsel for the Port. The Port shall retain all original signature pages.

L. Additional Documents

All Parties agree to cooperate fully to take any and all steps, perform any acts, and execute any documents consistent with the terms and conditions of this Agreement, which may be needed or required to effectuate the terms, intent, conditions, covenants, and provisions hereof.

M. Venue

Venue for enforcement of this agreement shall be in the United States District Court, Southern District of California.

N. Dispute Resolution

The Parties hereby agree that if any dispute should arise concerning the terms or enforcement of this Agreement, they promptly will refer the matter to Magistrate Judge Porter or her successor for final resolution within the five (5) years the Court has retained jurisdiction over the Federal Case.

If a dispute arises after the five (5) years, non-binding mediation shall be first attempted. The Parties shall divide equally any mediator fees and costs. If the Parties do not resolve their dispute through mediation and a subsequent court action is filed, the prevailing party in any such action shall recover such costs, fees, and expenses as are appropriate and available under the United States Code and the Federal Rules of Civil Procedure, or other applicable law and rules.

O. Drafter

No provision, principle, or other concept of law or equity wherein the terms and conditions of the Agreement are interpreted against the party who drafted the Agreement shall have any application to this Agreement.

P. Good Faith

The Agreement described herein was made "in good faith" within the meaning of California Code of Civil Procedure section 877.6.

Q. Effective Date

The Parties deem this Agreement effective as of the date when all Parties and their respective counsel have signed the Agreement.

R. Agreement Controls

The terms of this Agreement control and supersede any technical specifications, any drawing, or any notes to drawings that may be done to implement this Agreement or that were completed prior to this Agreement.

S. Execution of Agreement

No Party shall unreasonably withhold execution of the Agreement.

WE HEREBY CERTIFY THAT WE HAVE READ ALL OF THIS SETTLEMENT, RELEASE, AND WAIVER AGREEMENT AND FULLY UNDERSTAND THE SAME, AND IN WITNESS WHEREOF WE HAVE EXECUTED THIS AGREEMENT IN CALIFORNIA.

IT IS SO AGREED:

PLAINTIFFS:

Larry Gunning
LARRY GUNNING DATED: 8/13/08

Penelope Gunning
PENELOPE GUNNING DATED: 8/13/08

WILLIAM DICKERSON DATED: _____

HEIDI DICKERSON DATED: _____

R. Agreement Controls

The terms of this Agreement control and supersede any technical specifications, any drawing, or any notes to drawings that may be done to implement this Agreement or that were completed prior to this Agreement.

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No Party shall unreasonably withhold execution of the Agreement.


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IT IS SO AGREED:

PLAINTIFFS:

LARRY GUNNING DATED: _____

PENELOPE GUNNING DATED: _____



WILLIAM DICKERSON DATED: 8-12-08



HEIDI DICKERSON DATED: 8-17-08

DEFENDANTS:

SAN DIEGO UNIFIED PORT DISTRICT:



Jeffrey B. McEntee, CFO/Treasurer

DATED: 8/13/08

UNITED STATES ARMY CORPS OF ENGINEERS:

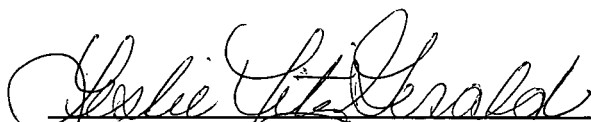
Karen P. Hewitt, United States Attorney
Thomas B. Reeve, Jr., Assistant U.S. Attorney
Beth Clukey, Assistant U.S. Attorney
Attorneys for Defendant
UNITED STATES ARMY CORPS OF ENGINEERS

DATED: _____

APPROVED AS TO FORM:

OPPER & VARCO, LLP
Richard G. Opper
Attorneys for Plaintiffs
MR. LARRY GUNNING,
MRS. PENELOPE GUNNING;
MR. WILLIAM DICKERSON,
MRS. HEIDI DICKERSON

DATED: _____



Duane E. Bennett, Port Attorney
Leslie FitzGerald, Deputy Port Attorney
Attorneys for Defendant
SAN DIEGO UNIFIED PORT DISTRICT

DATED: 8-13-08

DEFENDANTS:

SAN DIEGO UNIFIED PORT DISTRICT:

DATED: _____

UNITED STATES ARMY CORPS OF ENGINEERS:

Thomas B. Reeve, Jr.

DATED: *August 19, 2008*

Karen P. Hewitt, United States Attorney
Thomas B. Reeve, Jr., Assistant U.S. Attorney
Beth Clukey, Assistant U.S. Attorney
Attorneys for Defendant
UNITED STATES ARMY CORPS OF ENGINEERS

APPROVED AS TO FORM:

DATED: _____

OPPER & VARCO, LLP
Richard G. Opper
Attorneys for Plaintiffs
MR. LARRY GUNNING,
MRS. PENELOPE GUNNING,
MR. WILLIAM DICKERSON,
MRS. HEIDI DICKERSON

DATED: _____

DATED: *August 19, 2008*

DATED: _____

Duane E. Bennett, Port Attorney
Leslie FitzGerald, Deputy Port Attorney
Attorneys for Defendant
SAN DIEGO UNIFIED PORT DISTRICT

DEFENDANTS:

SAN DIEGO UNIFIED PORT DISTRICT:

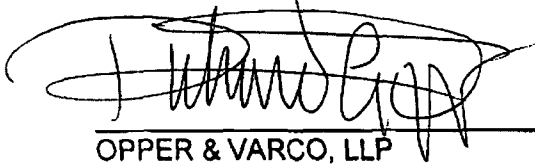
DATED: _____

UNITED STATES ARMY CORPS OF ENGINEERS:

DATED: _____

Karen P. Hewitt, United States Attorney
Thomas B. Reeve, Jr., Assistant U.S. Attorney
Beth Clukey, Assistant U.S. Attorney
Attorneys for Defendant
UNITED STATES ARMY CORPS OF ENGINEERS

APPROVED AS TO FORM:



DATED: Aug 15, 2008

OPPER & VARCO, LLP
Richard G. Opper
Attorneys for Plaintiffs
MR. LARRY GUNNING,
MRS. PENELOPE GUNNING,
MR. WILLIAM DICKERSON,
MRS. HEIDI DICKERSON

DATED: _____

Duane E. Bennett, Port Attorney
Leslie FitzGerald, Deputy Port Attorney
Attorneys for Defendant
SAN DIEGO UNIFIED PORT DISTRICT

EXHIBIT A

EXHIBIT A

TECHNICAL SPECIFICATIONS

A. FOOTING OF SEAWALLS

The Plaintiffs will remove the footing of the Seawalls that lies within Port jurisdiction, in substantial compliance with the map attached as Attachment 1. Hand shovels will be used to move sand away from the footing and sidecast or stockpiled landward of the Seawalls. A diamond-blade electric hand saw will cut a groove in the footing to substantially match the location where the footing encroaches on Port lands, as shown on the map provided as Attachment 1. Guided by the saw cut, a jackhammer will then break away the encroaching portion of the footing. The concrete pieces will be collected by hand and transported over dry lands via wheelbarrow, where they will be collected for proper disposal.

The Port will inspect and approve the removal of the part of the Seawalls shown on Attachment 1. The proper permits, including the Army Corps NWP32 verification, must be obtained before the work may be commenced. The final drawings and approved permits from the Army Corps and the Regional Water Quality Control Board must be submitted to the Port prior to construction. Before work may begin, reasonable notice, of not less than 72 hours, must be provided to the Army Corps (through Therese O'Rourke, Section Chief, Army Corps of Engineers, Regulatory Division, 760.602.4830) and the Port (through its Supervisor of Inspections, 619.686.6245). This Agreement does not waive any permits required by law.

B. PLACEMENT OF QUARRY STONE

The Plaintiffs will replace the rip rap that was removed from the beach with Quarry Stone, in substantial compliance with the plans attached as Attachment 2, the Port-issued Emergency Coastal Development Permits on file with the Office of the District Clerk as Document Nos. 52045 and 52046, filed on June 7, 2007, and any other required permits, including the Army Corps Nationwide Permit 32 verification. Rip rap replacement will consist of a filter fabric that will be attached to the Seawalls and underlie the entire revetment structure. The rip rap materials will consist of Quarry Stone (approximately 250 to 1000 pounds each) commencing at the Seawalls at a height not less than above the height of the highest high water (8.01 feet above the Mean Lower Low Water datum). The Quarry Stone will run uninterrupted along the entire length of the Seawalls (approximately 160 feet) and will extend bayward a distance of not less than 20 feet from the face of the Seawalls. At the intersection with neighboring properties, Quarry Stone will be transitioned in order to make a continuous flow with neighboring properties.

During construction, the Plaintiffs will comply with all Best Management Practices, including but not limited to storm water management Best Management Practices as will be set forth in required permits from the Regional Water Quality Control Board. Quarry Stone will be delivered to the upland area of 501 and/or 505

First Street. A mechanized "skidster" will carry stones from the upland area to a second "skidster" which will operate on the bayshore. This "skidster" will then deposit Quarry Stone along the Seawalls. In turn, construction personnel will employ "breaking bars" to further place the Quarry Stone. All work will be performed during periods of low tide and no construction equipment will work in any open water.

The proper permits must be obtained before the work may be commenced. The final drawings and approved permits from the Army Corps and the Regional Water Quality Control Board must be submitted to the Port prior to construction. Before work may begin, reasonable notice, of not less than 72 hours, must be provided to the Army Corps (through Therese O'Rourke, Section Chief, Army Corps of Engineers, Regulatory Division, 760.602.4830) and the Port (through its Supervisor of Inspections, 619.686.6245). This Agreement does not waive any permits required by law.

C. MITIGATION FOR LOSS OF EELGRASS HABITAT

The Plaintiffs will mitigate for any detrimental impacts to eelgrass habitat caused by the Plaintiffs' activities related to matters in the Actions by replacing suitable eelgrass habitat in accordance with NOAA Fisheries' Southern California Eelgrass Mitigation Policy (Revision 11), attached as Attachment 3, to the satisfaction of the Army Corps and under the supervision of the Port's Environmental Services Department.

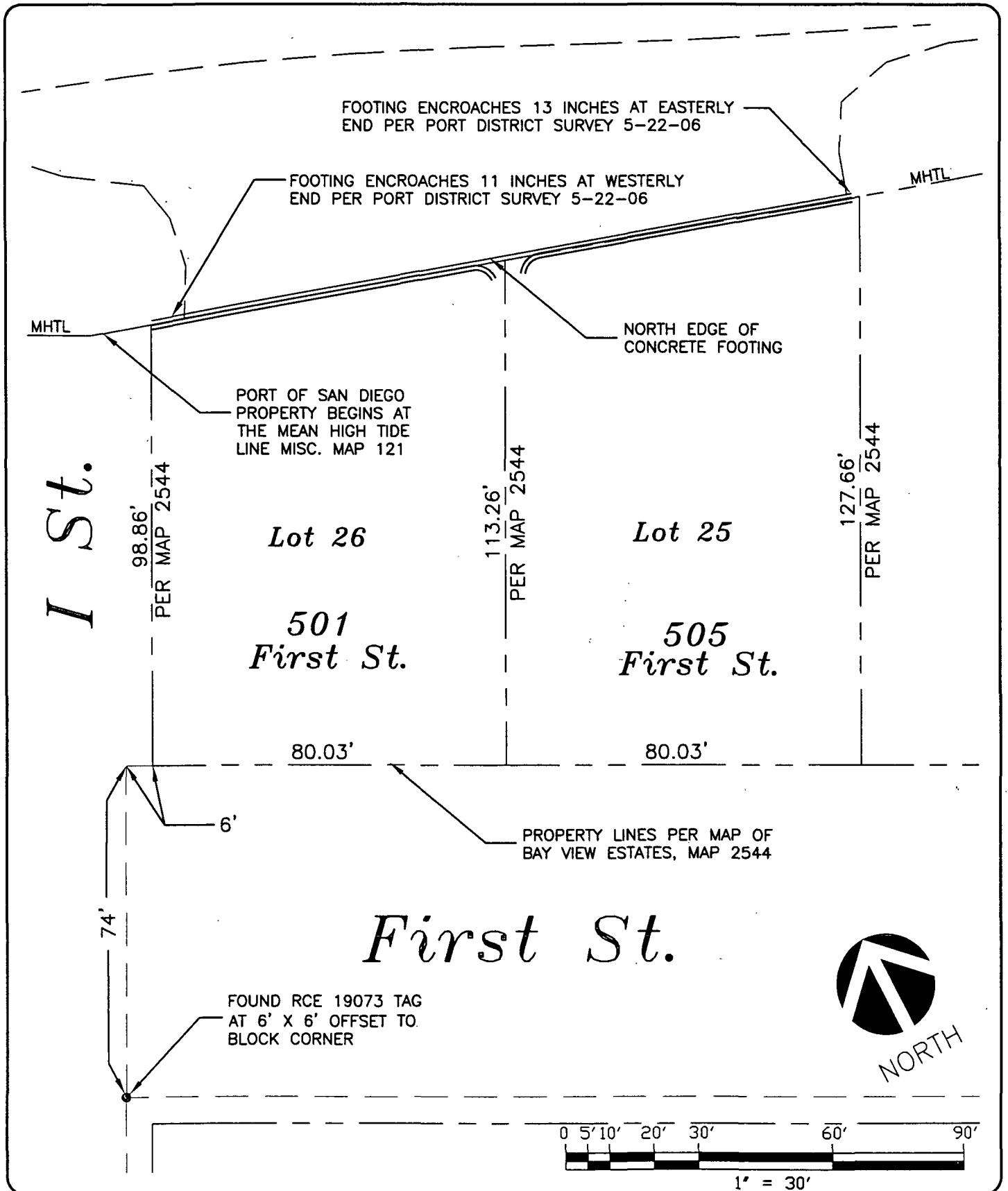
The proper permits and approvals must be obtained before the work may be commenced. This Agreement does not waive any permits required by law.

ATTACHMENT 1

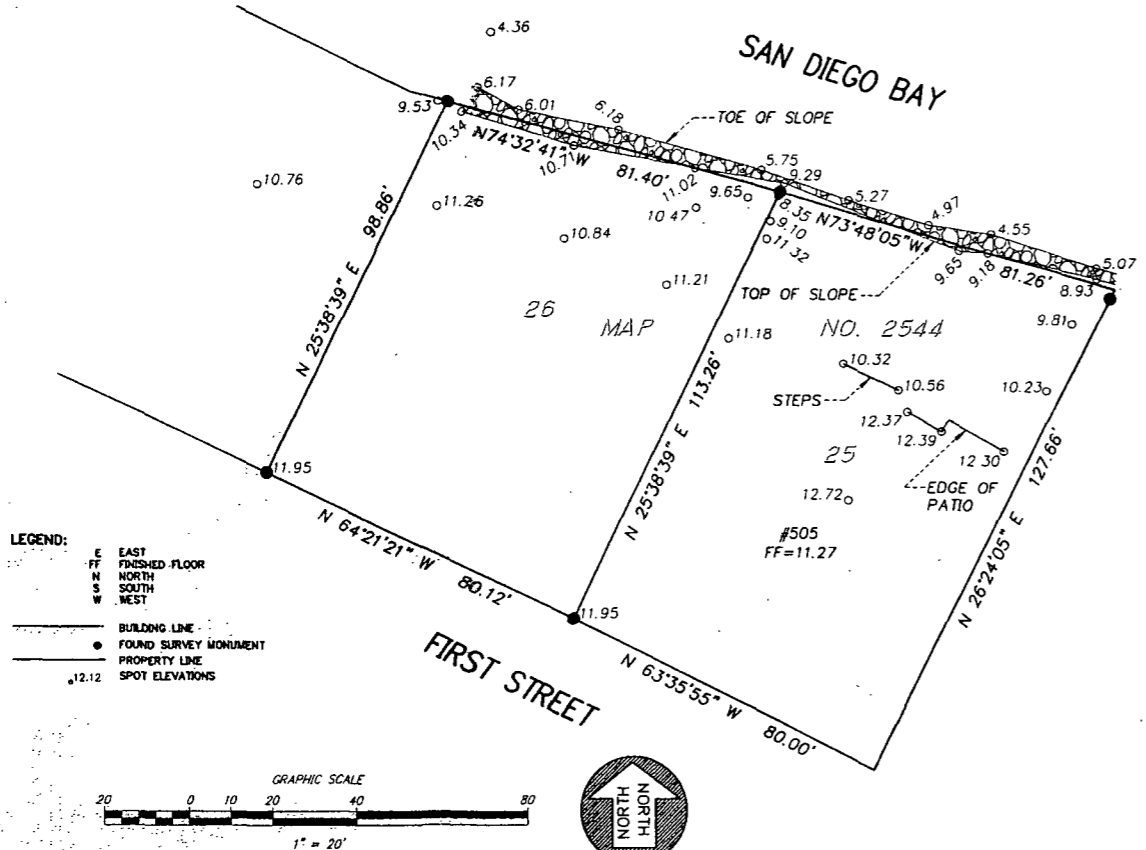


PORT OF SAN DIEGO
ENGINEERING SUPPORT
LAND SURVEYS

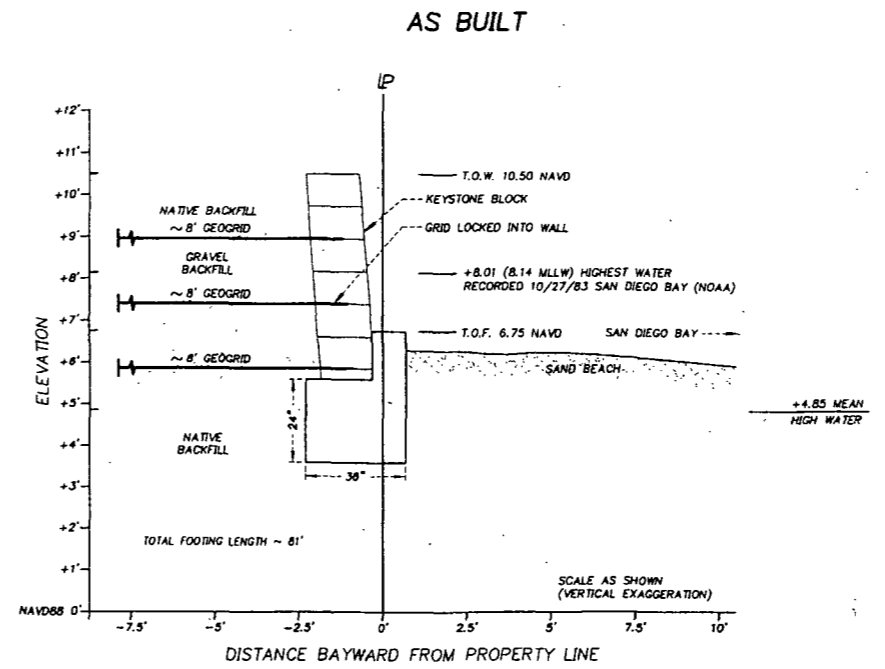
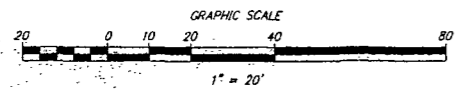
CONCRETE WALL FOOTING ENCROACHMENT
AT 501 AND 505 FIRST STREET, CORONADO
SKETCH BY C. SEFKOW 6-04-08



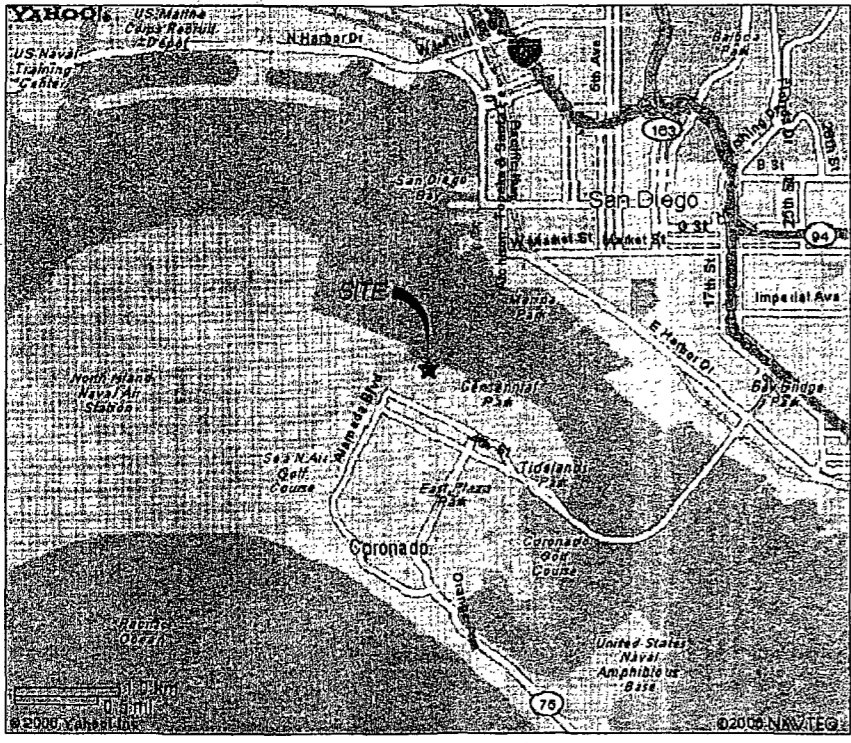
ATTACHMENT 2



LEGEND:
 E EAST
 FT FINISHED FLOOR
 N NORTH
 S SOUTH
 W WEST
 --- BUILDING LINE
 ● FOUND SURVEY MONUMENT
 --- PROPERTY LINE
 ○ SPOT ELEVATIONS



PROFILE BASED UPON
 ALBERT 10/5/06 SURVEY
 AND SITE MEASUREMENTS



VICINITY MAP
 NO SCALE

Legal Description:
 Lots 25 & 26 of Map No. 2544
Address:
 501 & 505 First Street
Bench Mark:
 SDUPD-30 PER R. of S. 16668,
 Elev: 12.430 NAVD 88

SURVEY DATE: FEBRUARY 2, 2006
ALBERT ENGINEERING, INC.
 9211 Bellagio Road
 San Diego, CA 92121
 TEL: (619) 444-2000
 FAX: (619) 444-2001
 EMAIL: albert@albertengineering.com

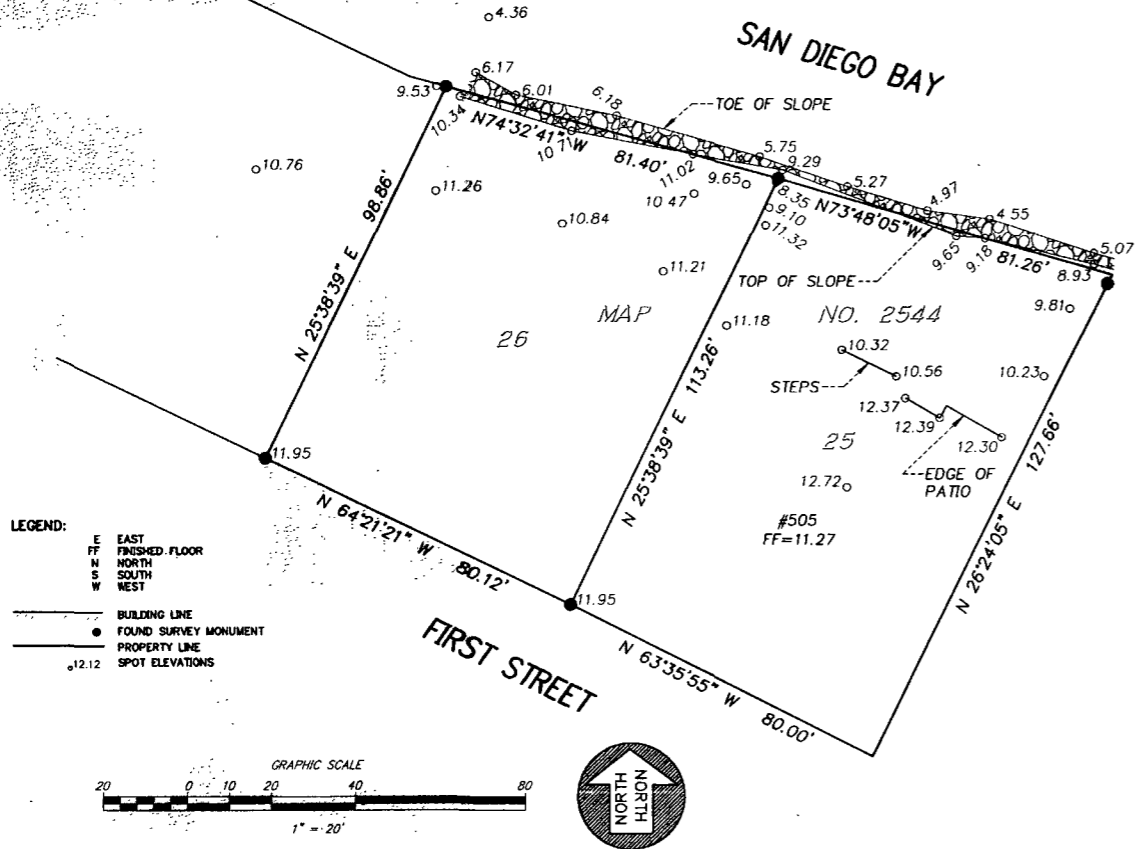
REVISED	BY
3/26/07	
6/23/08	
8/12/08	

DRAFTING BY:
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Geotechnical • Geologic • Coastal • Environmental
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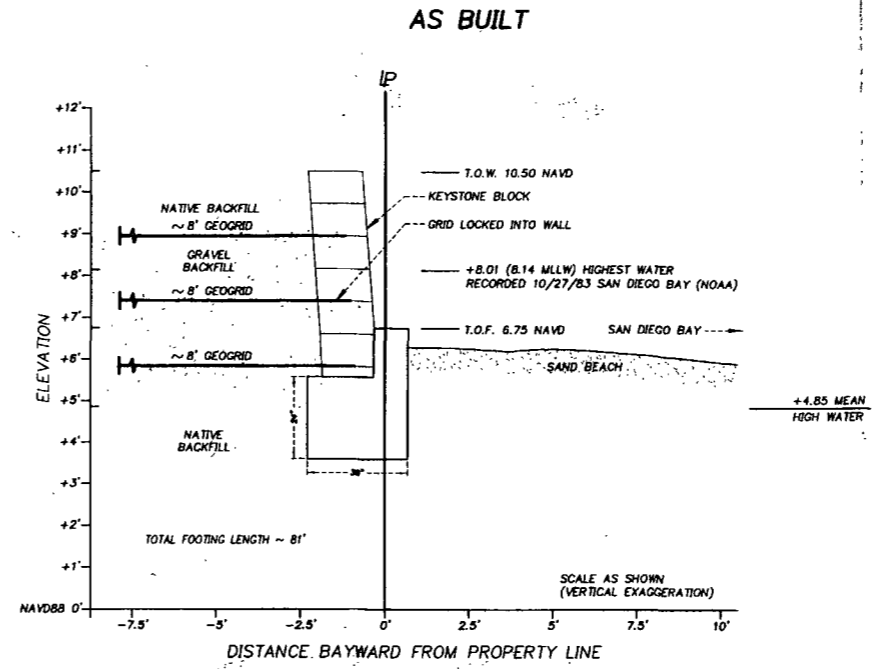
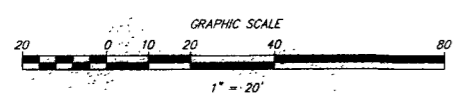
TITLE:
REVETMENT CONSTRUCTION
501 FIRST STREET, CORONADO
 CLIENT: Perry Popenthusen
 9211 Bellagio Road
 San Diego, CA 92011

DATE	3/04/07
SCALE	
JOB NO.	
SHEET	51
TOTAL SHEETS	2

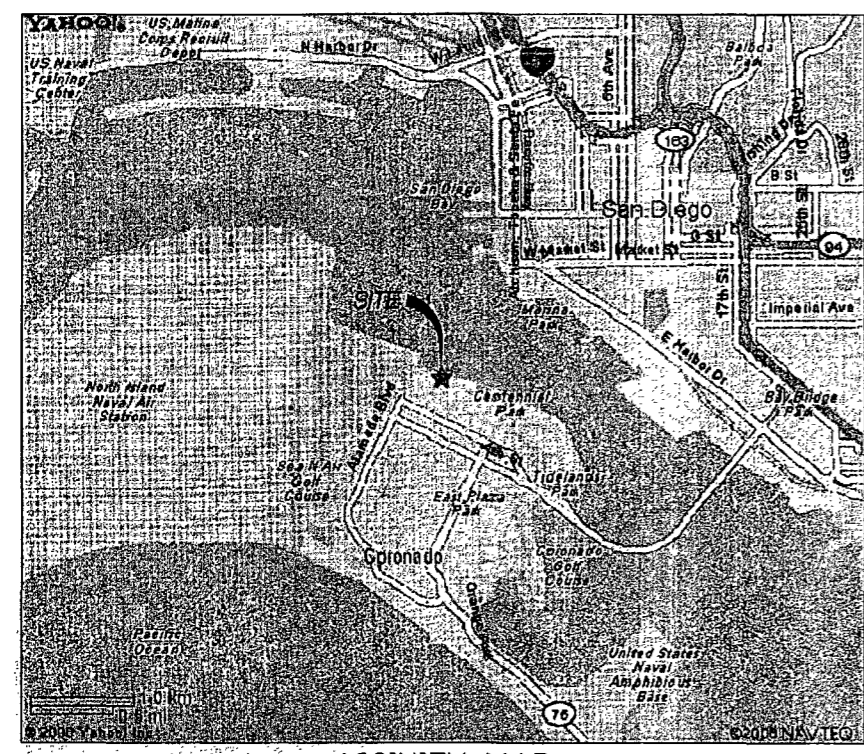


LEGEND:
 E EAST
 FT FINISHED FLOOR
 N NORTH
 S SOUTH
 W WEST

— BUILDING LINE
 ● FOUND SURVEY MONUMENT
 — PROPERTY LINE
 ○ SPOT ELEVATIONS



PROFILE BASED UPON
 ALBERT 10/5/06 SURVEY
 AND SITE MEASUREMENTS



VICINITY MAP
 NO SCALE

Legal Description:
 Lots 25 & 26 of Map No. 2544

Address:
 501 & 505 First Street

Block Map:
 SULD-32 PER R. of S. 16668,
 Elev. 12.430 NAVD 88

SURVEY DATE: FEBRUARY 2, 2006

ALBERT ENGINEERING, INC.
 200 BRUNNEN
 10000 VISTA DR #200
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REVISION	BY
3/26/07	
6/23/08	
8/12/08	

DRAFTING BY:
 SCHMAHL DRAFTING
 www.schmahldrafting.com

REGISTERED PROFESSIONAL ENGINEER
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 EXP. 12/31/09

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 DAVE SCHMAHL
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Geotechnical - Geologic - Coastal - Environmental

5741 Palmer Way, Carlsbad, CA 92010
 760-438-3155

TITLE:
REVTMENT CONSTRUCTION
505 FIRST STREET, CORONADO

CLIENT: Perry Popenhausen
 9211 Balboa Road
 San Diego, CA 92071

DRAWN
CHECKED
DATE 3/04/07
SCALE
JOB NO
SHEET S1
2

ATTACHMENT 3

SOUTHERN CALIFORNIA EELGRASS MITIGATION POLICY
(Adopted July 31, 1991)

Eelgrass (Zostera marina) vegetated areas are recognized as important ecological communities in shallow bays and estuaries because of their multiple biological and physical values. Eelgrass habitat functions as an important structural environment for resident bay and estuarine species, offering both predation refuge and a food source. Eelgrass functions as a nursery area for many commercially and recreational important finfish and shellfish species, including those that are resident within bays and estuaries, as well as oceanic species that enter estuaries to breed or spawn. Eelgrass also provides a unique habitat that supports a high diversity of non-commercially important species whose ecological roles are less well understood.

Eelgrass is a major food source in nearshore marine systems, contributing to the system at multiple trophic levels. Eelgrass provides the greatest amount of primary production of any nearshore marine ecosystem, forming the base of detrital-based food webs and as well as providing a food source for organisms that feed directly on eelgrass leaves, such as migrating waterfowl. Eelgrass is also a source of secondary production, supporting epiphytic plants, animals, and microbial organisms that in turn are grazed upon by other invertebrates, larval and juvenile fish, and birds.

In addition to habitat and resource attributes, eelgrass serves beneficial physical roles in bays and estuaries. Eelgrass beds dampen wave and current action, trap suspended particulates, and reduce erosion by stabilizing the sediment. They also improve water clarity, cycle nutrients, and generate oxygen during daylight hours.

In order to standardize and maintain a consistent policy regarding mitigating adverse impacts to eelgrass resources, the following policy has been developed by the Federal and State resource agencies (National Marine Fisheries Service, U.S. Fish and Wildlife Service, and the California Department of Fish and Game). While the intent of this Policy is to provide a basis for consistent recommendations for projects that may impact existing eelgrass resources, there may be circumstances (e.g., climatic events) where flexibility in the application of this Policy is warranted. As a consequence, deviations from the stated Policy may be allowed on a case-by-case basis. This policy should be cited as the Southern California Eelgrass Mitigation Policy (revision 11).

For clarity, the following definitions apply. "Project" refers to work performed on-site to accomplish the applicant's purpose. "Mitigation" refers to work performed to compensate for any adverse impacts caused by the "project". "Resource agencies" refers to National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and the California Department of Fish and Game (CDFG).

1. **Mitigation Need.** Eelgrass transplants shall be considered only after the normal provisions and policies regarding avoidance and minimization, as addressed in the Section 404 Mitigation Memorandum of Agreement between the Corps of Engineers and Environmental Protection Agency, have been pursued to the fullest extent possible prior to the development of any mitigation program. Mitigation will be required for the loss of

existing vegetated areas, loss of potential eelgrass habitat, and/or degradation of existing/potential eelgrass habitat. Mitigation for boat docks and/or related work is addressed in section 2.

2. Boat Docks and Related Structures. Boat docks, ramps, gangways and similar structures should avoid eelgrass vegetated or potential eelgrass vegetated areas to the maximum extent feasible. If avoidance of eelgrass or potential eelgrass areas is infeasible, impacts should be minimized by utilizing, to the maximum extent feasible, construction materials that allow for greater light penetration (e.g., grating, translucent panels, etc.). For projects where the impact cannot be determined until after project completion (i.e., vessel shading, vessel traffic) a determination regarding the amount of mitigation shall be made based upon two annual monitoring surveys conducted during the time period of August to October which document the changes in the bed (areal extent and density) in the vicinity of the footprint of the boat dock, moored vessel(s), and/or related structures. Any impacts determined by these monitoring surveys shall be mitigated per sections 3-12 of this policy. Projects subject to this section must include a statement from the applicant indicating their understanding of the potential mitigation obligation which may follow the initial two-year monitoring.

3. Mitigation Map. The project applicant shall map thoroughly the area, distribution, density and relationship to depth contours of any eelgrass beds likely to be impacted by project construction. This includes areas immediately adjacent to the project site which have the potential to be indirectly or inadvertently impacted as well as potential eelgrass habitat areas. Potential habitat is defined as areas where eelgrass would normally be expected to occur but where no vegetation currently exists. Factors to be considered in delineating potential habitat areas include appropriate circulation, light, sediment, slope, salinity, temperature, dissolved oxygen, depth, proximity to eelgrass, history of eelgrass coverage, etc.

Protocol for mapping shall consist of the following format:

1) Bounding Coordinates

Horizontal datum - Universal Transverse Mercator (UTM), NAD 83, Zone 11 is the preferred projection and datum. If another projection or datum is used, the map and spatial data must include metadata that accurately defines the projection and datum.

Vertical datum - Mean Lower Low Water (MLLW), depth in feet.

2) Units

Transects and grids in meters.

Area measurements in square meters/hectares.

3) File format

A spatial data layer compatible with readily available geographic information system software must be sent to NMFS and any other interested resource agency when the area mapped has greater than 10 square meters of

eelgrass. For those areas with less than 10 square meters, a table must be provided giving the bounding x,y coordinates of the eelgrass areas. In addition to a spatial layer or table, a hard-copy map should be included within the survey report. The projection and datum should be clearly defined in the metadata and/or an associated text file.

All mapping efforts must be completed during the active growth phase for the vegetation (typically March through October) and shall be valid for a period of 60 days with the exception of surveys completed in August - October. Surveys completed after unusual climatic events (i.e., high rainfall) may have modified requirements and surveyors should contact NMFS, CDFG, and USFWS to determine if any modifications to the standard survey procedures will be required. A survey completed in August - October shall be valid until the resumption of active growth (i.e., in most instances, March 1). After project construction, a post-project survey shall be completed within 30 days. The actual area of impact shall be determined from this survey.

4. Mitigation Site. The location of eelgrass transplant mitigation shall be in areas similar to those where the initial impact occurs. Factors such as, distance from project, depth, sediment type, distance from ocean connection, water quality, and currents are among those that should be considered in evaluating potential sites.

5. Mitigation Size. In the case of transplant mitigation activities that occur concurrent to the project that results in damage to the existing eelgrass resource, a ratio of 1.2 to 1 shall apply. That is, for each square meter adversely impacted, 1.2 square meters of new suitable habitat, vegetated with eelgrass, must be created. The rationale for this ratio is based on, 1) the time (i.e., generally three years) necessary for a mitigation site to reach full fishery utilization and 2) the need to offset any productivity losses during this recovery period within five years. An exception to the 1.2 to 1 requirement shall be allowed when the impact is temporary and the total area of impact is less than 100 square meters. Mitigation on a one-for-one basis shall be acceptable for projects that meet these requirements (see section 11 for projects impacting less than 10 square meters).

Transplant mitigation completed three years in advance of the impact (i.e., mitigation banks) will not incur the additional 20 percent requirement and, therefore, can be constructed on a one-for-one basis. However, all other annual monitoring requirements (see sections 8-9) remain the same irrespective of when the transplant is completed.

Project applicants should consider increasing the size of the required mitigation area by 20-30 percent to provide greater assurance that the success criteria, as specified in Section 10, will be met. In addition, alternative contingent mitigation must be specified, and included in any required permits, to address situation where performance standards (see section 10) are not likely to be met.

For potential eelgrass habitat, a ratio of 1 to 1 of equivalent habitat shall be created.

Degradation of existing eelgrass vegetated habitat that results in a reduction of density greater than 25 percent shall be mitigated on a one-for-one basis. For example, a 25

percent reduction in density of a 100 square meter (100 turions/meter) eelgrass bed to 75 turions/meter would require the establishment of 25 square meters of new eelgrass with a density at or greater than the pre-impact density. All other provisions of the Policy would apply.

6. Mitigation Technique. Techniques for the construction and planting of the eelgrass mitigation site shall be consistent with the best available technology at the time of the project. Donor material shall be taken from the area of direct impact whenever possible, but also should include a minimum of two additional distinct sites to better ensure genetic diversity of the donor plants. No more than 10 percent of an existing bed shall be harvested for transplanting purposes. Plants harvested shall be taken in a manner to thin an existing bed without leaving any noticeable bare areas. Written permission to harvest donor plants must be obtained from the California Department of Fish and Game.

Plantings should consist of bare-root bundles consisting of 8-12 individual turions. Specific spacing of transplant units shall be at the discretion of the project applicant. However, it is understood that whatever techniques are employed, they must comply with the stated requirements and criteria.

7. Mitigation Timing. For off-site mitigation, transplanting should be started prior to or concurrent with the initiation of in-water construction resulting in the impact to the eelgrass bed. Any off-site mitigation project which fails to initiate transplanting work within 135 days following the initiation of the in-water construction resulting in impact to the eelgrass bed will be subject to additional mitigation requirements as specified in section 8. For on-site mitigation, transplanting should be postponed when construction work is likely to impact the mitigation. However, transplanting of on-site mitigation should be started no later than 135 days after initiation of in-water construction activities. A construction schedule which includes specific starting and ending dates for all work including mitigation activities shall be provided to the resource agencies for approval at least 30 days prior to initiating in-water construction.

8. Mitigation Delay. If, according to the construction schedule or because of any delays, mitigation cannot be started within 135 days of initiating in-water construction, the eelgrass replacement mitigation obligation shall increase at a rate of seven percent for each month of delay. This increase is necessary to ensure that all productivity losses incurred during this period are sufficiently offset within five years.

9. Mitigation Monitoring. Monitoring the success of eelgrass mitigation shall be required for a period of five years for most projects. Monitoring activities shall determine the area of eelgrass and density of plants at the transplant site and shall be conducted at initial planting, 6, 12, 24, 36, 48, and 60 months after completion of the transplant. All monitoring work must be conducted during the active vegetative growth period and shall avoid the winter months of November through February. Sufficient flexibility in the scheduling of the 6 month surveys shall be allowed in order to ensure the work is completed during this active growth period. Additional monitoring beyond the 60 month period may be required in those instances where stability of the proposed transplant site is questionable or where other factors may influence the long-term success of transplant.

The monitoring of an adjacent or other acceptable control area (subject to the approval of the resource agencies) to account for any natural changes or fluctuations in bed width or density must be included as an element of the overall program.

A monitoring schedule that indicates when each of the required monitoring events will be completed shall be provided to the resource agencies prior to or concurrent with the initiation of the mitigation (see attached monitoring and compliance summary form).

Monitoring reports shall be provided to the resource agencies within 30 days after the completion of each required monitoring period and shall include the summary sheet included at the end of this policy.

10. Mitigation Success. Criteria for determination of transplant success shall be based upon a comparison of vegetation coverage (area) and density (turions per square meter) between the **adjusted project impact area** (i.e., original impact area multiplied by 1.2) and **mitigation site(s)**. Extent of vegetated cover is defined as that area where eelgrass is present and where gaps in coverage are less than one meter between individual turion clusters. Density of shoots is defined by the number of turions per area present in representative samples within the original impact area, control or transplant bed. Specific criteria are as follows:

- a. the mitigation site shall achieve a minimum of 70 percent area of eelgrass and 30 percent density as compared to the adjusted project impact area after the first year.
- b. the mitigation site shall achieve a minimum of 85 percent area of eelgrass and 70 percent density as compared to the adjusted project impact area after the second year.
- c. the mitigation site shall achieve a sustained 100 percent area of eelgrass bed and at least 85 percent density as compared to the adjusted project impact area for the third, fourth and fifth years.

Should the required eelgrass transplant fail to meet any of the established criteria, then a Supplementary Transplant Area (STA) shall be constructed, if necessary, and planted. The size of this STA shall be determined by the following formula:

$$STA = MTA \times (|A_t + D_t| - |A_c + D_c|)$$

MTA = mitigation transplant area.

A_t = transplant deficiency or excess in area of coverage criterion (%).

D_t = transplant deficiency in density criterion (%).

A_c = natural decline in area of control (%).

D_c = natural decline in density of control (%).

The STA formula shall be applied to actions that result in the degradation of habitat (i.e., either loss of areal extent or reduction in density).

Five conditions apply:

- 1) For years 2-5, an excess of only up to 30% in area of coverage over the stated criterion with a density of at least 60% as compared to the project area may be used to offset any deficiencies in the density criterion.
- 2) Only excesses in area criterion equal to or less than the deficiencies in density shall be entered into the STA formula.
- 3) Densities which exceed any of the stated criteria shall not be used to offset any deficiencies in area of coverage.
- 4) Any required STA must be initiated within 120 days following the monitoring event that identifies a deficiency in meeting the success criteria. Any delays beyond 120 days in the implementation of the STA shall be subject to the penalties as described in Section 8.
- 5) Annual monitoring will be required of the STA for five years following the implementation and all performance standards apply to the STA.

11. **Mitigation Bank.** Any mitigation transplant success that, after five years, exceeds the mitigation requirements, as defined in section 10, may be considered as credit in a "mitigation bank". Establishment of any "mitigation bank" and use of any credits accrued from such a bank must be with the approval of the resource agencies and be consistent with the provisions stated in this policy. Monitoring of any approved mitigation bank shall be conducted on an annual basis until all credits are exhausted.

12. **Exclusions.**

1) Placement of a single pipeline, cable, or other similar utility line across an existing eelgrass bed with an impact corridor of no more than 1 meter wide may be excluded from the provisions of this policy with concurrence of the resource agencies. After project construction, a post-project survey shall be completed within 30 days and the results shall be sent to the resource agencies. The actual area of impact shall be determined from this survey. An additional survey shall be completed after 12 months to insure that the project or impacts attributable to the project have not exceeded the allowed 1 meter corridor width. Should the post-project or 12 month survey demonstrate a loss of eelgrass greater than the 1 meter wide corridor, then mitigation pursuant to sections 1-11 of this policy shall be required.

2) Projects impacting less than 10 square meters. For these projects, an exemption may be requested by a project applicant from the mitigation requirements as stated in this policy, provided suitable out-of-kind mitigation is proposed. A case-by-case evaluation and determination regarding the applicability of the requested exemption shall be made by the resource agencies.

(last revised 08/30/05)

**Southern California Eelgrass Mitigation Policy
Monitoring and Compliance Reporting Summary**

PERMIT DATA:

Permit (Type, Number)	Issuance Date	Expiration Date	Agency Contact
ACOE:			
CDP:			
Other:			

EELGRASS IMPACT AND MITIGATION REQUIREMENTS SUMMARY:

Permitted Eelgrass Impact Estimate	(m ²)	
Actual Eelgrass Impact	(m ²)	(post-const. survey date)
Eelgrass Mitigation Requirement	(m ²)	(mitigation plan ref.)
Impact Site Location		(location)
Impact Site Center Coordinates		(define projection and datum)
Mitigation Site Location		(location)
Mitigation Site Center Coordinates		(define projection and datum)

PERMITTEE CONTACT INFORMATION:

Project Name	(same as permit ref.)
Permittee Information	(permittee name)
	(mailing address)
	(city, state, zip)
	(permittee contact)
Mitigation Consultant	(phone, fax, e-mail)
	(consultant contact)
	(phone, fax, e-mail)

PROJECT ACTIVITY DATA:

Activity	Start Date	End Date	Reference Info.
<i>Eelgrass Impact</i>			
<i>Installation of Eelgrass Mitigation</i>			
<i>Initiation of Mitigation Monitoring</i>			

MITIGATION STATUS DATA:

Mitigation Milestone	Scheduled Survey	Survey Date	Area (m ²)	Density (turions/m ²)	Reference Info.
<i>Requirement</i>					
<i>0-month</i>					
<i>6-month</i>					
<i>12-month</i>					
<i>24-month</i>					
<i>36-month</i>					
<i>48-month</i>					
<i>60-month</i>					

FINAL ASSESSMENT:

Was mitigation met?	
Were mitigation and monitoring performed timely?	
Was delay penalty required or were supplemental mitigation programs necessary?	