

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

In the matter of:)	
)	
SAN FRANCISCO PUBLIC UTILITIES COMMISSION, ALAMEDA AND SANTA CLARA COUNTIES)	SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY ORDER
)	
September 13, 2016, Discharge of 1,500 Gallons of Aquatic Pesticide Rinse Water to Calaveras Reservoir)	R2-2017-1027
)	
)	

Section I: INTRODUCTION

1. This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order) is entered into by and between the California Regional Water Quality Control Board, San Francisco Bay Region, Prosecution Team (Prosecution Team), and the City and County of San Francisco, San Francisco Public Utilities Commission (Settling Respondent) (collectively Parties), and is presented to the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), or its delegate, for adoption as an Order by settlement, pursuant to Government Code section 11415.60. This Stipulated Order resolves the violation alleged herein by the imposition of administrative civil liability against Settling Respondent in the amount of **\$15,000**.

Section II: RECITALS

2. Settling Respondent's discharges of residual algaecides and aquatic herbicide and degradation byproducts to waters of the United States from algae and aquatic weed control application are regulated under Statewide General National Pollutant Discharge Elimination System (NDPES) Permit for Residual Aquatic Pesticide Discharges to Waters of the United States from Algae and Aquatic Weed Control Application, Order No. 2013-0002-DWQ (Aquatic Pesticide Permit).
3. On September 13, 2016, Settling Respondent discharged 1,500 gallons of algaecide equipment rinse water to Calaveras Reservoir, a water of the state and of the United States, resulting in 15 dead and 4 stressed bluegill fish, as detailed in Attachment A to this Stipulated Order, hereby incorporated by reference.¹

¹ The algaecide used was GreenClean 2.0, EPA Registration No. 70299-2.

4. Since the discharge resulted in dead and stressed fish, Settling Respondent violated Aquatic Pesticide Permit section VI.G., which provides that discharges shall not result in:

Toxic pollutants to be present in the water column, sediments, or biota in concentrations that adversely affect beneficial uses; that produce detrimental response in human, plant, animal, or aquatic life; or that bioaccumulate in aquatic resources at levels which are harmful to human health.

5. Pursuant to California Water Code (Water Code) section 13385, subdivision (a)(2), a person that violates a waste discharge requirement, such as those in the Aquatic Pesticide Permit, is subject to administrative civil liability under Water Code section 13385, subdivision (c)

[I]n an amount not to exceed the sum of the following: (1) Ten thousand dollars (\$10,000) for each day in which the violations occurs. (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

6. To resolve the alleged violation in Section II, paragraphs 2 to 5, by consent and without further administrative proceedings, the Parties have agreed to the imposition of an administrative civil liability of **\$15,000** against the Settling Respondent. The administrative civil liability amount imposed for the violation (\$15,000) is the proposed liability amount the Prosecution Team calculated and asserted using Steps 1 through 10 of the State Water Resources Control Board's Water Quality Enforcement Policy (May 2010) (Enforcement Policy) as shown in Attachment A, hereby incorporated by this reference.
7. The Parties have agreed to settle the matter without administrative or civil litigation and to present this Stipulated Order to the Regional Water Board, or its delegate, for adoption as a Stipulated Order by settlement, pursuant to Government Code section 11415.60.
8. The Prosecution Team believes that the resolution of the violation is fair and reasonable and fulfills all of its enforcement objectives, that no further action is warranted concerning the violation except as provided in this Stipulated Order, and that this Stipulated Order is in the public's best interest.

Section III: STIPULATIONS

The Parties incorporate the foregoing Recitals and stipulate to the following:

9. **Administrative Civil Liability:** The Settling Respondent hereby agrees to pay the administrative civil liability totaling **\$15,000** to resolve the violation as set forth in Section II.
10. **Payment:** The Settling Respondent shall submit a check for \$15,000 no later than 30 days following the date the Regional Water Board or its delegate signs this Stipulated Order. The check shall be made payable to “*State Water Pollution Cleanup and Abatement Account*,” with reference to the Order number on page one of this Stipulated Order, and shall be submitted to:
- State Water Resources Control Board Accounting Office
Attn: ACL Payment
P.O. Box 1888
Sacramento, CA 95812-1888
- The Settling Respondent shall email a copy of the check to the State Water Resources Control Board, Office of Enforcement (Kailyn.Ellison@waterboards.ca.gov) and the Regional Water Board (Michael.Chee@waterboards.ca.gov).
11. **Compliance with Applicable Laws:** Settling Respondent understands that payment of administrative civil liability in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged herein may subject it to further enforcement, including additional administrative civil liability.
12. **Party Contacts for Communications related to this Stipulation and Order:**
- | For the Regional Water Board: | For Settling Respondent: |
|--|--|
| Michael Chee | John Roddy |
| Water Resource Control Engineer | Deputy City Attorney |
| San Francisco Bay Regional Water Quality Control Board | San Francisco City Attorney’s Office |
| 1515 Clay Street, 14th Floor | 1390 Market Street, Suite 700 |
| Oakland, CA 94612 | San Francisco, CA 94102 |
| Michael.Chee@waterboards.ca.gov | John.S.Roddy@sfgov.org |
| (510) 622-2300 | (415) 554-3986 |
13. **Attorney’s Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys’ fees and costs arising from the Party’s own counsel in connection with the matters set forth herein.
14. **Matters Addressed by this Stipulation:** Upon the Regional Water Board’s or its delegate’s adoption, this Stipulated Order represents a final and binding resolution and settlement of the alleged violation as of the effective date of this Stipulated Order. The provisions of this paragraph are expressly conditioned on the full

payment of the administrative civil liability by the deadline specified in Section III, paragraph 10.

15. **Public Notice:** The Settling Respondent understands that this Stipulated Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board or its delegate. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Regional Water Board, or its delegate, for adoption, the Prosecution Team may unilaterally declare this Stipulated Order void and decide not to present it to the Regional Water Board or its delegate. The Settling Respondent agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.
16. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for the Regional Water Board's or its delegate's adoption of the Order, and public review of this Stipulated Order, is lawful and adequate. The Parties understand that the Regional Water Board, or its delegate, has the authority to require a public hearing on this Stipulated Order. In the event that procedural objections are raised or the Regional Water Board requires a public hearing prior to the Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure and/or this Stipulated Order as necessary or advisable under the circumstances.
17. **Interpretation:** This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Parties are represented by counsel in this matter.
18. **Modification:** The Parties shall not modify this Stipulated Order by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Regional Water Board or its delegate.
19. **If the Order Does Not Take Effect:** In the event that the Order does not take effect because the Regional Water Board or its delegate does not approve it, or the State Water Resources Control Board (State Water Board) or a court vacates it in whole or in part, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violation, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to the following:
 - a. Objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement

positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the violation alleged herein in this matter; or

- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.
20. **Waiver of Hearing:** Settling Respondent has been informed of the rights Water Code section 13323, subdivision (b), provides and hereby waives its right to a hearing before the Regional Water Board prior to the Order's adoption.
21. **Waiver of Right to Petition or Appeal:** Settling Respondent hereby waives its right to petition the Regional Water Board's adoption of the Order for review by the State Water Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court. This explicit waiver of rights includes potential future decisions by the Regional Water Board or its delegate directly related to this Stipulated Order, including but not limited to time extensions and other terms contained in this Stipulated Order.
22. **Covenant Not to Sue:** Settling Respondent covenants not to sue or pursue any administrative or civil claims against any State agency or the State of California, or its officers, Board Members, employees, representatives, agents, or attorneys, arising out of or relating to any matter expressly addressed by this Stipulated Order.
23. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board under the terms of this Stipulated Order shall be communicated to the Settling Respondent in writing. No oral advice, guidance, suggestions, or comments from Regional Water Board employees or officials regarding submissions or notices shall be construed to relieve the Settling Respondent of its obligation to obtain any final written approval this Stipulated Order requires.
24. **Authority to Bind:** Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of and to bind the entity on whose behalf he or she executes the Stipulated Order.
25. **No Third Party Beneficiaries:** This Stipulated Order is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.
26. **Severability:** This Stipulated Order is severable; if any provision is found invalid, the remainder shall remain in full force and effect.
27. **Counterpart Signatures; Facsimile and Electronic Signature:** This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts

Settlement Agreement and Stipulated Administrative Civil Liability
San Francisco Public Utilities Commission

shall together constitute one document. Further, this Stipulated Order may be executed by facsimile or electronic signature, and any such facsimile or electronic signature by any Party hereto shall be deemed to be an original signature and shall be binding on such Party to the same extent as if such facsimile or electronic signature were an original signature.

28. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Regional Water Board, or its delegate, enters the Order incorporating the terms of this Stipulated Order.

IT IS SO STIPULATED.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION, PROSECUTION TEAM**

Date: June 30, 2017

By: *Dyan C. Whit*
for
Thomas Mumley
Assistant Executive Officer

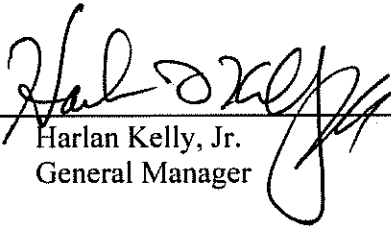
Approved as to form:

By: *Kailyn Ellison*
Kailyn Ellison, Attorney
State Water Resources Control Board
Office of Enforcement

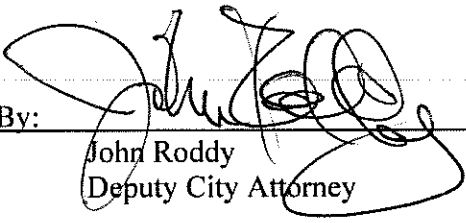
Settlement Agreement and Stipulated Administrative Civil Liability
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**CITY AND COUNTY OF SAN FRANCISCO
SAN FRANCISCO PUBLIC UTILITIES COMMISSION**

Date: 7-26-17

By: 
Harlan Kelly, Jr.
General Manager

Approved as to form:

By: 
John Roddy
Deputy City Attorney

ORDER OF THE REGIONAL WATER BOARD

29. This Order incorporates the foregoing Sections I through III by this reference as if set forth fully herein.
30. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in Water Code section 13385, subdivision (e), and has applied the Penalty Calculation Methodology set forth in the State Water Resource Control Board’s Enforcement Policy, which is incorporated herein by this reference. The Regional Water Board’s consideration of these factors and application of the Penalty Calculation Methodology is based upon information obtained by the Prosecution Team in investigating the allegations set forth in the Stipulation or otherwise provided to the Regional Water Board.
31. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, § 21000 et seq.) in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations.
32. The Executive Officer of the Regional Water Board is authorized to refer this matter directly to the Attorney General for enforcement if Settling Respondent fails to perform any of its obligations under the Order.

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

Bruce H. Wolfe
Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region

Date

ATTACHMENT A

Factors in Determining Stipulated Administrative Civil Liability

SAN FRANCISCO PUBLIC UTILITIES COMMISSION DISCHARGE OF 1,500 GALLONS OF AQUATIC PESTICIDE RINSE WATER TO CALAVERAS RESERVOIR CALAVERAS RESERVOIR, ALAMEDA AND SANTA CLARA COUNTIES

The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors required by Water Code section 13385, subdivision (e). Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount for the alleged violation is presented below. The Enforcement Policy should be used as a companion document in conjunction with this administrative civil liability assessment since the penalty methodology and definition of terms are not replicated herein. The Enforcement Policy is at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

ALLEGED VIOLATION

On September 13, 2016, the San Francisco Public Utilities Commission (Discharger) discharged 1,500 gallons of algaecide equipment rinse water to Calaveras Reservoir in violation of Statewide General NPDES Permit for Residual Aquatic Pesticide Discharges to Waters of the United States from Algae and Aquatic Weed Control Applications, Order No. 2013-0002-DWQ (Aquatic Pesticide Permit) section VI.G.² This discharge violated the Aquatic Pesticide Permit's receiving water limitation for toxicity because it resulted in 15 dead and 4 stressed fish (all bluegill).³

Prior to discharge of the rinsate, at 1:00 p.m. on September 13, 2016, the Discharger's biologist arrived onsite to monitor the algaecide application. At that time, the biologist did not observe any dead or distressed fish. At 2:15 p.m., the certified pesticide application contractor hired by the Discharger began cleaning its equipment on the shoreline near the boat ramp after the algaecide application. At 2:30 p.m., after the equipment cleaning was concluded, the biologist observed dead and struggling fish along 40 feet of the Calaveras Reservoir shoreline. Because the contractor rinsed the application equipment from a stationary location, an increased concentration of algaecide occurred in the reservoir water causing the fish kill. The contractor stated that it followed its standard rinsing procedures according to the product label, except for the fact that the discharge occurred from a stationary location. Rinsing procedures are not documented in previous versions of the Discharger's Aquatic Pesticides Application Plan (APAP); however, an updated APAP was submitted in 2017 that includes an Algaecide

² The algaecide used was GreenClean 2.0, EPA Registration No. 70299-2.

³ Stressed fish were found at the surface gulping for oxygen by the Discharger's biologist.

Application Protocol. The Discharger is subject to administrative civil liabilities pursuant to Water Code section 13385(c).

Penalty Factor	Score	Discussion
Harm or Potential Harm to Beneficial Uses for Discharge Violations	4	<p>A score of 4 (above moderate) is selected because the discharge to Calaveras Reservoir killed at least 15 fish and stressed an additional 4 fish. The environmental impacts from the rinse water discharge were observed and substantial, and posed a “more than moderate threat to beneficial uses....” (Enforcement Policy, p. 12.)</p> <p>The San Francisco Bay Water Quality Control Plan designates the following beneficial uses of Calaveras Reservoir: municipal and domestic water supply (MUN), cold freshwater habitat (COLD), rare and endangered species (RARE), fish spawning (SPWN), warm freshwater habitat (WARM), wildlife habitat (WILD), and non-contact water recreation (REC2). The beneficial use most impacted by the rinse water discharge was WARM. A selection of 4 (above moderate) is therefore appropriate.</p>
Physical, Chemical, Biological, or Thermal Characteristics (Degree of Toxicity)	4	<p>A significant toxicity risk (score of 4) is selected because the discharge “far exceed[ed] risk factors or receptor harm is considered imminent.” (<i>Id.</i> at 13.) Specifically, the discharge contained hydrogen peroxide and peroxyacetic acid as active ingredients in the algacide. The product label states that the algacide is toxic to fish and the LC50 for rainbow trout is 48 hours > 40 mg/L. The reservoir has a significant population of rainbow trout.⁴</p>
Susceptibility to Cleanup or Abatement	1	<p>The discharge was not susceptible to cleanup as it quickly comingled with the reservoir water. The Enforcement Policy requires a score of 1 when less than 50 percent of the discharge is susceptible to cleanup or abatement. (<i>Id.</i> at 13.)</p>
Per Gallon and Per Day Factor for Discharge Violations	0.800	<p>The score of 0.800 is obtained from Tables 1 and 2 of the Enforcement Policy, and is found from the sum of the above three scores (9 = 4+4+1) and the degree of deviation from requirement (major).</p> <p>A “Major” deviation from requirement is selected because the discharge caused toxicity in Calaveras Reservoir thus rendering ineffective the essential function of the Aquatic Pesticide Permit receiving water limitation that was violated. The Aquatic Pesticide Permit Receiving Water Limitation VI.G. requires that the discharge not result in “Toxic pollutants to be present...in concentrations that adversely affect beneficial uses; that produce detrimental response in human, plant, animal, or aquatic life.” However, the rinse water discharge contained toxic concentrations that produced physiological responses in aquatic life (i.e., fish kill), thus rendering the receiving water limitation ineffective.</p>
Adjustment for High Volume Discharges	none	<p>Application of a high volume adjustment for this incident is unwarranted because 1,500 gallons is not considered a high volume, and any adjustment would result in an inappropriately low penalty considering the circumstances.</p>
Initial Liability	\$12,000	<p>The initial liability is calculated as follows: [Per day factor (0.800), multiplied by the maximum per gallon amount of liability allowed (\$10/gallon), multiplied by</p>

⁴ See Zone 7 Water Agency’s website <http://www.zone7water.com/watershed-environment/36-content/54-fisheries-enhancement>.

Settlement Agreement and Stipulated Administrative Civil Liability Attachment A
 San Francisco Public Utilities Commission

Penalty Factor	Score	Discussion
		<p>the volume exceeding 1,000 gallons that is discharged and not cleaned up (1,500 gallons minus 1,000 gallons)] plus [Per day factor (0.800) multiplied by the maximum per day amount of liability allowed (\$10,000), multiplied by the number of days of violation (1), as shown below:</p> $\$12,000 = [(0.800) \times \$10/\text{gallons} \times 500 \text{ gallons}] + [(0.800) \times \$10,000/\text{day} \times 1 \text{ day}]$
Adjustments for Discharger Conduct		
Culpability	1.2	<p>A higher than neutral culpability multiplier of 1.2 is selected because the Discharger could have prevented the fish kill by implementing procedures to ensure that the concentration of the algaecide discharged in the cleaning process would not adversely affect beneficial uses or produce a detrimental response in aquatic life.</p> <p>The fish kill was caused by the application boat discharging rinse water at a stationary location, resulting in a higher concentration of algaecide than should have been introduced into the reservoir.</p> <p>The rinsing and cleaning procedures were not included in the Discharger's APAP at the time of the discharge. The algaecide label states that the pesticide is toxic to fish, and should be applied to allow fish to move to untreated areas.</p>
Cleanup and Cooperation	1.0	<p>A neutral multiplier of 1 is chosen based on the Discharger's cooperation. The Discharger complied with the 24-hour NPDES permit notification requirement by calling the State Water Board and sending an email to Regional Water Board staff and California Fish and Wildlife on September 14, 2016. The Discharger also provided a written report submitted to Regional Water Board staff within five business days.</p> <p>The Discharger responded to requests for additional information by Regional Water Board Staff in emails dated September 29, 2016 and February 2, 2017.</p> <p>The Discharger's biologist resurveyed the perimeter of the entire treatment area on the morning of September 16, 2016, and reported that no dead or stressed fish were observed.</p> <p>Cleanup was not practical because the rinse water was discharged directly to Calaveras Reservoir and quickly dissipated. No cleanup was attempted.</p> <p>The Discharger submitted an updated APAP with documentation of its cleaning, rinsing, and discharging procedure on March 2, 2017. For future pesticide applications, the Discharger plans to triple rinse their equipment and disperse the rinse water into deeper water instead of along the shoreline.</p>
History of Violations	1	<p>The Discharger has no reported history of fish kills due to its algaecide application events.</p>
Total Base Liability	\$14,400	<p>Each applicable factor, relating to the Discharger's conduct, is multiplied by the initial liability amount of \$12,000 for each violation to determine the Total Base Liability Amount, as follows:</p> $\$14,400 = \$12,000 \times 1.2 \times 1 \times 1$

Settlement Agreement and Stipulated Administrative Civil Liability Attachment A
San Francisco Public Utilities Commission

Penalty Factor	Score	Discussion
Ability to Pay and Continue in Business	No adjustment	The Discharger has not demonstrated an inability to pay the proposed amount. The Discharger reported its budgets for fiscal years 2016 and 2017 as \$88.6 million and \$91.0 million. ⁵ Regional Water Board Prosecution Staff has no evidence that the Discharger would be unable to pay the proposed liability or that the amount of the liability would cause undue financial hardship. The Discharger agrees to pay the Final Liability.
Economic Benefit	\$0	The Regional Water Board Prosecution Staff did not find a significant economic benefit associated with the violations. The discharge occurred during the Discharger's cleaning process with no known economic benefit to the Discharger.
Other Factors as Justice May Require		
Staff Costs	No adjustment	The costs of investigation and enforcement could be added to the liability amount. The Regional Water Board Prosecution Staff incurred less than \$2,000 in staff costs associated with the investigation and enforcement of the alleged violation. While this amount could be added to the penalty, it is not added at this time.
Other Factors		The total base liability of \$14,400 is too low for the observed toxicity to fish and the failure to disperse the rinsate from a non-stationary boat. Due to the fish kill, a more appropriate liability is the maximum liability of \$15,000, as described below.
Maximum Liability	\$15,000	Water Code section 13385 allows up to \$10,000 for each day in which the violation occurs; and \$10 for each gallon exceeding 1,000 gallons that is discharged and not cleaned up. The maximum liability is based on 1,500 gallons and one day of violation.
Minimum Liability	Minimal, and less than the proposed liability	Based on Water Code section 13385, civil liability must be at least the economic benefit of non-compliance. Per the Enforcement Policy, the minimum liability is to be the economic benefit plus 10 percent. There was minimal economic benefit related to the violation.
Final Liability	\$15,000	The final liability amount is the total base liability after adjusting for ability to pay, economic benefit, other factors, and maximum and minimum liabilities.

⁵ Budgets located at <http://www.sfwater.org/index.aspx?page=351>.