

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

In the matter of:	)	
	)	Order R2-2010-00XX (Proposed)
<b>Alameda County</b>	)	
<b>[Fairview Avenue Pathway Project]</b>	)	<b>SETTLEMENT AGREEMENT AND</b>
	)	<b>STIPULATION FOR ENTRY OF</b>
	)	<b>ADMINISTRATIVE CIVIL LIABILITY</b>
	)	<b>ORDER; ORDER (PROPOSED)</b>
	)	

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**Section I: INTRODUCTION**

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

**Section II: RECITALS**

1. Alameda County (the “County”), at all times relevant to this matter, was the owner and operator of the Fairview Avenue Pathway Project (“Pathway Project”) located on Fairview Avenue between the 24600 and 24500 blocks, in unincorporated Alameda County, near Hayward, along the northeastern border of the Lone Tree Cemetery. The Pathway Project site was approximately 530 feet long and between 8 and 12 feet wide. The Pathway Project included installing a new storm drain system and a pedestrian walkway along the western side of the roadway. The storm drains discharge into Sulphur Creek, approximately 0.35 miles downstream of the Pathway Project. The County contracted with Ghilotti Construction Company, Inc. to perform the construction of the Pathway Project.
2. The County was a Permittee under the Alameda Countywide National Pollutant Discharge Elimination System (“NPDES”) Municipal Storm Water Permit, Order No. R2-2003-0021 (NPDES Permit No. CAS0029831) (“Municipal Permit”), which required the County to implement a program to ensure that all construction projects within the County’s jurisdiction, including County and non-County sponsored projects, comply with the provisions of the NPDES General Permit for Storm Water Discharges Associated with Construction Activity, State Water Resources Control Board (“State Water Board”) Order 99-08-DWQ (“Construction General Permit”).
3. The Prosecution Team alleges that the County failed to properly implement and maintain an effective combination of erosion and sediment controls at the Pathway Project site, including material/waste management best management practices (BMPs) to appropriately control and minimize the discharge of pollutants to waters of the State and United States in violation of the Municipal Permit. The Prosecution Team’s allegations are described in Exhibit A, attached hereto and incorporated herein by this reference.

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

5. To resolve by consent and without further administrative proceedings certain alleged violations set forth in Exhibit A, the Parties have agreed to the imposition of administrative civil liability in the amount of \$20,720.00 against the County, which includes \$13,800 for staff costs.

### **Section III: STIPULATIONS**

The Parties stipulate to the following:

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

7. **Administrative Civil Liability:** The County shall pay a total of \$20,720.00 in stipulated administrative civil liability by check made payable to the "San Francisco Bay Regional Water Quality Control Board" for deposit in the State Water Resources Control Board Cleanup and Abatement Account, which includes \$13,800 in staff costs, no later than 30 days following the Regional Water Board, or its delegee, executing this Order. The check shall reference the Order number listed on page one of this Stipulation. The original signed check shall be sent to the San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612, with copies to: Ann Carroll, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812, and Keith Lichten, San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612. The check may be authored by Ghilotti Construction Company, Inc. and submitted on the County's behalf.

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

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

**For the Regional Water Board:**

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

**For the County:**

William Lepere, Deputy Director  
County of Alameda  
Public Works Agency  
399 Elmhurst Street  
Hayward, CA 94544  
(510) 670-5480

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

11. **Matters Covered by this Stipulation:** Upon adoption by the Regional Water Board, or its delegee, as an Order, this Stipulation represents a final and binding resolution and settlement of all claims, violations or causes of action alleged in Exhibit A or which could have been asserted based on the specific facts alleged in Exhibit A against the County. The provisions of this Paragraph are expressly conditioned on the County's full payment of administrative civil liability by the deadline specified in Paragraph 7 herein.

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

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

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

such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.

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

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

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

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

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

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

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

21. **Authority to Bind:** Each person executing this Stipulation in a representative capacity represents and warrants that he or she is authorized to execute this Stipulation on behalf of and to bind the entity on whose behalf he or she executes the Stipulation.

22. **Counterpart Signatures:** This Stipulation may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

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

**IT IS SO STIPULATED.**

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

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

Date: May 6, 2011

By:

**Thomas E. Mumley,  
Assistant Executive Officer**

**Alameda County**

Date: May 6, 2011

By:

**Andrew J. Massey  
Deputy County Counsel,  
Office of the County Counsel**

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

24. The Regional Water Board incorporates the foregoing Stipulation, set forth in Paragraphs 1 through 23 above, by this reference, as if set forth fully herein.

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

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

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

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

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

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

## EXHIBIT A

### REGIONAL WATER BOARD PROSECUTION STAFF'S ALLEGATIONS

1. Alameda County (the "County") is the owner and operator of the Fairview Avenue Pathway Project ("Pathway Project") located on Fairview Avenue between the 24600 and 24500 blocks, in unincorporated Alameda County, near Hayward, along the northeastern border of the Lone Tree Cemetery. The Pathway Project site was approximately 530 feet long and between 8 and 12 feet wide. The Pathway Project included installing a new storm drain system and a pedestrian walkway along the western side of the roadway. The storm drains discharge into Sulphur Creek, approximately 0.35 miles downstream of the Pathway Project. The County contracted with Ghilotti Construction Company, Inc. to perform the construction of the Pathway Project.
2. The County was a Permittee under the Alameda Countywide National Pollutant Discharge Elimination System ("NPDES") Municipal Storm Water Permit, Order No. R2-2003-0021 (NPDES Permit No. CAS0029831) ("Municipal Permit"), which became effective on April 10, 2003. The Municipal Permit required the County to implement a program to ensure that all construction projects within the County's jurisdiction, including County and non-County sponsored projects, comply with the provisions of the NPDES General Permit for Storm Water Discharges Associated with Construction Activity, State Water Resources Control Board ("State Water Board") Order 99-08-DWQ ("Construction General Permit").
3. Pursuant to Provision C.2. of the Municipal Permit, the County "shall implement control measures/BMPs to reduce pollutants in storm water discharges to the maximum extent practicable." Further, the County shall implement and subsequently demonstrate the effectiveness of the Alameda Countywide Clean Water Program—Storm Water Quality Management Plan ("SWQMP"), which serves as the "framework for identification, assignment, and implementation of such control measures/BMPs" and contains performance standards that address construction site controls. The Municipal Permit incorporates by reference the SWQMP, which includes performance standards for all public and private new development projects and is an enforceable component of the permit.<sup>1</sup>
4. On February 9, 2009, Staff received a complaint that adequate erosion and sediment controls were not being implemented on the Pathway Project site. Staff inspected the site on February 10, 2009, and documented inadequate site controls and evidence of sediment-laden discharges to the storm drain. Subsequently, a concerned citizen sent numerous reports and photographs to Regional Water Board staff (and to the County), documenting sediment-laden water discharging from the site and entering storm drains during storm events, as well as deposits of sediment on streets and sidewalks.<sup>2</sup>

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<sup>1</sup> Municipal Permit; Finding 10. "The Management Plan, including the Performance Standards, is incorporated in the Permit by reference and enforceable as such, and is considered an enforceable component of this Order."

<sup>2</sup> All e-mail copies and photos taken by the concerned citizen and Regional Water Board staff are contained in the Administrative Record for this matter, which is located at the Regional Water Board Office in Oakland, CA.

5. In an e-mail dated February 10, 2009, Staff directed the County to implement effective erosion and sediment controls, and to remove any accumulated sediment from the streets and sidewalks prior to the next rain and submit documentation demonstrating compliance by February 20, 2009.

6. The County submitted photographs of implemented BMPs on February 19, 2009, but did not submit information demonstrating it had removed the sediment from the streets, sidewalks, and inlets. Subsequent inspections by Staff found that the County had not removed the accumulated sediment and that the implemented BMPs were not sufficient to prevent sediment discharges from the Pathway Project site.

7. Staff conducted compliance inspections on February 17, 18, and 24, 2009, and March 3, 2009, respectively. During each of these inspections, Staff observed the following:

a. Erosion control BMPs consisted of gravel-bag check dams intended to capture sediment traveling along the graded earthen pathway, limited use of erosion control matting intended to keep graded soil in place, and filter bags installed in the storm drains to prevent sediment discharges. Significant areas of the project site remained exposed and unprotected, which caused the existing measures to be overwhelmed and allowed sediment-laden storm water to discharge directly into nearby storm drains.

b. Sediment discharged from the project site filled the check dams and rendered them ineffective. Failure to remove the sediment from the check dams prior to subsequent rain events caused sediment-laden water to overflow the check dams and discharge to the storm drain.

c. The County failed to maintain existing BMPs and/or those BMPs were ineffective, as evidenced by large amounts of sedimentation on adjacent streets, private property, and accumulated on the erosion control matting.

Staff communicated these violations to the County via e-mail on February 17, 2009, February 24, 2009, and March 3, 2009, respectively.

8. On March 4, 2009, the County submitted photographs showing it had removed the sediment from the streets and cleaned out the filter bags in the storm drains. The photographs also showed piles of sediment remaining behind the check dams, which should have been removed in preparation for the next rain. The County did not include information showing any corrective actions on the exposed and unprotected areas of the project site and did not evaluate why the site was continuing to erode and discharge sediment, or what corrective actions would be taken to address that problem.

9. On March 11, 2009, at the monthly Regional Water Board meeting, a concerned citizen submitted photographs of the Pathway Project taken on March 6, 2009. The photographs showed unmaintained check dams with significant amounts of sediment accumulated behind them and that no erosion control BMPs had been implemented on the exposed sloped areas. Although the County repeatedly indicated that they had implemented additional erosion and

sediment-control measures, Staff never observed adequate and effective control measures sufficient to meet permit standards implemented at the Pathway Project.

10. On April 1, 2009, the Regional Water Board's Watershed Division Chief issued a Notice of Violation (NOV) to the County for its failure to implement an effective combination of erosion and sediment control BMPs and to maintain the BMPs implemented, between February 7, 2009, and March 6, 2009. These failures violated the County's Municipal Permit. Specifically, the SWQMP Performance Standards for New Development and Construction Site Controls state, "each agency will ensure that storm water quality requirements are included in plans and contract specifications for municipal construction projects,"<sup>3</sup> and require municipal inspectors to "require proper implementation and maintenance of erosion sediment controls and material/waste management BMPs ... to minimize the discharge of pollutants".<sup>4</sup> Within seven days of receipt, the NOV required the County to submit a pollution prevention and control plan for the project. The County did not respond to the NOV. The Pathway Project is now complete.

11. The County failed to properly implement and maintain an effective combination of erosion and sediment controls, including material/waste management BMPs, in order to appropriately control and minimize the discharge of pollutants to waters of the State and United States, for at least 28 days from February 7, 2009 (date of first photographs), through March 6, 2009 (date of last photographs), in violation of the Municipal Permit and SWQMP.

12. The County violated applicable sections of its Municipal Permit, and discharged sediment-laden storm water and polluted non-storm water while being out of compliance with that permit. These are violations for which the Board may impose administrative civil liability pursuant to CWC Section 13385(a)(2) and (c), on a daily basis, not to exceed \$10,000 for each violation for each day in which the violation occurs. The authority and process for imposing civil liability are set forth in CWC Section 13323.

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<sup>3</sup> SWQMP, July 2001 – June 2008, Alameda Countywide Clean Water Program; Section 5 Performance Standards; New Development and Construction Site Controls; subsection I.,3.

<sup>4</sup> SWQMP, July 2001 – June 2008, Alameda Countywide Clean Water Program; Section 5 Performance Standards; New Development and Construction Site Controls; subsection VI.6.d.

## EXHIBIT B

### WATER QUALITY ENFORCEMENT POLICY METHODOLOGY

1. Water Code section 13385, subdivision (a) provides that civil liability may be administratively imposed by the Regional Water Board against any person that violates any waste discharge requirements issued pursuant to Chapter 5.5 of Division 7 of the Water Code. NPDES Permit No. CA0005240, Waste Discharge Requirements Order No. R2-2007-0032 was issued to the County pursuant to Chapter 5.5 of Division 7 of the Water Code.
2. Water Code section 13385, subdivision (c) provides that the civil liability may be imposed by the Regional Water Board in an amount not to exceed the sum of both the following:
  - a. Ten thousand dollars (\$10,000) for each day in which the violation occurs.
  - b. Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.
3. The County is exposed to liability pursuant to section 13385, subdivision (c) by violating the Municipal Permit by failing to properly implement and maintain an effective combination of erosion and sediment controls, including material/waste management BMPs, in order to appropriately control and minimize the discharge of pollutants to waters of the State and United States for at least 28 days from February 7, 2009 (date of first photographs), through March 6, 2009 (date of last photographs), as alleged in Exhibit A.

#### Enforcement Policy Methodology:

4. Pursuant to Water Code section 13385, subdivision (e), the Regional Water Board is required to consider the following factors in determining the amount of civil liability, including the nature, circumstances, extent, and gravity of the violations; whether the discharge is susceptible to cleanup or abatement; the degree of toxicity of the discharge; and with respect to the violator, the ability to pay; the effect on the ability to continue in business; voluntary cleanup efforts; prior history of violations; the degree of culpability; economic benefit or savings, if any, resulting from the violation; and other matters that justice may require. Water Code section 13385, subdivision (e) requires that, at a minimum, the liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.
5. On November 17, 2009, the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in Water Code Section 13385 (e). An analysis of the Enforcement Policy methodology for the violations alleged in Exhibit A is set forth below:

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

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

The potential for harm to the environment associated with the alleged violation is minor. Storm water from the Pathway Project discharged to storm drains approximately 0.5 miles upstream of the Sulphur Creek Nature Center, which is located on a restored stretch of Sulphur Creek. This area of the creek contains rich aquatic habitat that is routinely studied and observed at the nature center. Excess sediment in storm water likely had deleterious effects on such habitat, but none were observed. The County's construction activities and associated permit violations took place between February 7, 2009 and March 6, 2009, causing or threatening to cause a condition of pollution with each storm event during that time period.

The deviation from requirements is moderate. During the Pathway Project, the County engaged in public construction activity without adequate and effective erosion and sediment control measures (BMPs) in place. Although the County indicated that it had implemented additional erosion and sediment control measures at the Pathway Project, Staff did not observe a timely, adequate, or effective combination of control measures sufficient to meet permit standards.

The Prosecution Team alleges that the County violated its Municipal Permit for a period of 28 days. Applying the per day factor to the number of days of violation yields an initial liability of \$56,000 (number of days of violation x per day factor x maximum statutory liability per day of violation).

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

Culpability: The County is a Permittee under the Municipal Permit, and has had that permit coverage continuously since October 16, 1991. The County failed to implement adequate erosion and sediment control measures for the Pathway Project, causing and/or threatening to adversely impact the waters of the state it is charged to protect as a permittee under the Municipal Permit. Under its Municipal Permit, the County is responsible for educating the general public regarding storm water pollution prevention, including regulatory requirements for construction activity and water quality protection. However, the County failed to hold itself to the same standards for its public projects. The County did not voluntarily seek to come into compliance with permit requirements in the absence of communications from Staff, including the issuance of an NOV, to which the County failed to respond. Thus, the degree of culpability is a multiplier of 1.

Cleanup and Cooperation: Cleanup is not considered because the alleged violations are non-discharge violations. With respect to cooperation, the County repeatedly proposed and claimed to have taken actions to prevent future violations; however, the violations remained when Regional Water Board Staff conducted subsequent inspections. Further,

these steps are not considered voluntary, as they are necessary to comply with the Municipal Permit, and may have only occurred in response to Regional Water Board enforcement. A multiplier of 1 is appropriate.

History of Violations: Given the County's lack of a history of repeat violations, a multiplier of 1 is appropriate.

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

The Total Base Liability is determined by applying the adjustment factors from Step 2 to the Initial Liability Amount determined in Step 1.

(Initial Liability) x (Culpability Multiplier) x (Cleanup and Cooperation Multiplier) x (History of Violations Multiplier) = Total Base Liability

$\$56,000 \times 1 \times 1 \times 1 = \$56,000.00$ .

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

The County's proposed budget for the 2009-2010 fiscal year totals \$2.4 billion. This is an increase of \$9.3 million from the budget for the 2008-2009 fiscal year. Prosecution Staff believe that the County has the ability to pay the proposed liability and continue in business. Accordingly, the Total Base Liability is not adjusted.

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

The Prosecution Team believes that the following reasons warrant the significant reduction of the Total Base Liability as "other matters as justice may require": (1) the Pathway Project had a very modest area of disturbed earth; (2) the County did not have a huge budget for the Project. (3) The project implemented some BMPs; and (3) while there were discharges, and obviously these and the failure to comply were problematic, the "per-day factor" that results, was out-of-scale with the project-specific nature and impact of the violations. Thus, the Adjusted Total Base Liability is \$6,920.00.

The Regional Water Board has incurred \$13,800 in staff costs associated with the investigation and enforcement of the violations alleged herein. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

$\$6,920.00 + \$13,800.00 = \$20,720.00$

11. **Step 6. Economic Benefit**

During the period the alleged violations occurred, the County realized an economic benefit by not expending funds to implement BMPs and/or to appropriately modify and maintain BMPs that were implemented. BMP-related sources of economic benefit likely included the cost of materials, maintenance costs, personnel costs (hourly wage or salary,

time and money spent to train site personnel), and the time to conduct routine monitoring required by the Municipal Permit.

For construction activity in California, approximately \$2,000 to \$6,000 per acre is needed to provide the necessary erosion and sediment control measures for construction sites depending on the slope and soil type. Additionally, the application of straw mulch, alone, is approximately \$2,000 per acre.<sup>5</sup> The Pathway Project site was approximately 6,360 square feet in size. Given the site's proximity to creeks and storm drains, an effective combination of both erosion and sediment control BMPs was critical to protect the site. Limited BMPs were implemented. Therefore, the economic benefit received by the County is estimated to be approximately \$2,000 per acre. Further, the entirety of the site was not disturbed during construction. Thus, Staff conservatively estimated that the County received an economic benefit of approximately \$500 for the Pathway Project.

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

Pursuant to CWC section 13385(c), the maximum liability that may be imposed for the violations alleged is \$280,000. Pursuant to the Enforcement Policy, the minimum liability that must be assessed for the violations alleged is \$550.00 (economic benefit + 10%).

The stipulated administrative civil liability falls within these maximum and minimum liability amounts.

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

The stipulated administrative civil liability amount is **\$20,720.00**, which includes \$13,800 for staff costs.

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