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9 BEFORE THE STATE OF CALIFORNIA
10 WATER RESOURCES QUALITY CONTROL BOARD

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA, acting by and through the
13 California Department of Transportation,
14 Petitioner,
15 v.
16 CALIFORNIA REGIONAL WATER QUALITY
17 CONTROL BOARD, NORTH COAST REGION

18 STATE OF CALIFORNIA
19 DEPARTMENT OF
20 TRANSPORTATION'S
21 PETITION FOR REVIEW RE
22 NORTH COAST REGIONAL
23 WATER QUALITY CONTROL
24 BOARD ADMININSTRATIVE
25 CIVIL LIABILITY ORDER NO.
26 R1-2012-0034 (CONFUSION HILL
27 BYPASS PROJECT)

28 **(1) Name, address, telephone number and email address (if available) of the petitioner:**

Petitioner is the State of California Department of Transportation (Caltrans), District 1 (1656 Union Street, Eureka, Ca., 95501, (707) 445-6600), and North Region Construction (703 B Street, P.O. Box 911, Marysville, Ca., 95901). Petitioner is represented by its counsel, deputy attorneys Ardine Zazzeron and Douglas C. Jensen (595 Market Street, San Francisco, Ca., 94105, (415) 904-5700; Ardine_Zazzeron@dot.ca.gov, Douglas_Jensen@dot.ca.gov).

(2) The specific action or inaction of the regional board which the state board is requested to review and a copy of any order or resolution of the regional board which is referred to in the petition, if available. If the order or resolution of the regional board is not available, a

1 **statement shall be included giving the reason(s) for not including the order or resolution.**

2 Petitioner respectfully requests review of North Coast Regional Water Quality Control Board
3 Administrative Civil Liability Order No. R1-2012-0034, a true and correct copy of which is attached
4 to this Petition as Exhibit A. The order directs the Petitioner to pay \$70,182 in regional board
5 Prosecution Team (PT) "staff costs" (measured by staff member hourly fees), and \$405,000 in
6 penalties. Petitioner requests review of the imposition of "staff costs" in its entirety. Of the penalty
7 amount, Petitioner requests review of the violations that were determined based solely or
8 substantially on photographs for which no foundation whatsoever was laid, and written reports which
9 are hearsay and to which no exception applies. In addition, Petitioner requests review of the
10 violations that were conceded by the Prosecution Team ahead of the hearing but reinstated by the
11 Board in its final Order.

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13 **(3) The date on which the regional board acted or refused to act or on which the regional**
14 **board was requested to act.**

15 The regional board issued the Order on March 15, 2012.

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17 **(4) A full and complete statement of the reasons the action or failure to act was inappropriate**
18 **or improper.**

19 a. The imposed recovery of prosecution "staff costs" (measured by hourly fees) is not
20 authorized by statute or regulation, and hence is inappropriate and improper. The regional board's
21 Order cites to a 2002 "Enforcement Policy" as the basis for the imposition of "cost" recovery.
22 However, the Enforcement Policy does not constitute a statute, nor can it be treated as a valid
23 regulation since it has not been promulgated under the Administrative Procedures Act (Gov. Code
24 §11340, et seq.). (See paragraph (7), below, for full points and authorities.) Moreover, even the
25 2002 Enforcement Policy itself does not authorize recovery of hourly fees, which the Order seeks to
26 impose on Caltrans in this instance. The Order also appears to rely on an isolated phrase in Water
27 Code §13385(e); however, that statute makes no mention of costs or fees, nor does the context of the
28 statute as a whole suggest a Legislative intent to allow cost or fee recovery.

1 b. Numerous violations adjudicated in the case relied in whole or significant part on
2 photographs taken by individuals who did not testify at the hearing, who were not listed as witnesses
3 by the PT, and who were not asked about the photographs by the PT before or after it filed the
4 complaint. Under basic laws of evidence applicable in administrative proceedings, testimony was
5 required from someone who had knowledge of the matters and circumstances depicted in the
6 photographs: that is, someone who saw the events depicted and could testify as to the dates and times
7 of the events, the identification of those persons participating in them, and that the photos actually
8 depicted what their proponents (the PT) claimed. Admission of the photographs into evidence, and
9 consideration of them by regional board as either a basis of liability and/or penalty enhancement was
10 improper. Without a proper foundation having been laid, the photographs were irrelevant.

11 Despite a total absence of testimony of anyone who had personal knowledge about the
12 photographs, the Order accepts as true the PT's assumptions about the dates the photographs were
13 taken, the locations where they were photographed, that the photographs intended to, and did, depict
14 violations. In short, the Order *assumes* a foundation had been laid, which is an error of law.

15 As one example of multiple instances, the charges identified as Nos. 8 and 9 ("Leaky
16 Equipment: Oil Leak on Gravel Bar") were based on a single photograph depicting two buckets of
17 rocks. (Exhibit B.) The PT's witness, who had been designated the "most knowledgeable" about the
18 charges, testified that he was not present when the photo was taken, had at no time discussed the
19 photograph with the photographer, had no personal knowledge that the August 29, 2006, date on the
20 photo was accurate, did not know whether the substance on the rocks was oil or something else,

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1 where the rocks came from, or where the rocks were collected¹. In fact, no testimony was proffered
2 indicating that the photograph was even taken at or near the job site; both the PT and the Order
3 simply assumed that it had. Notwithstanding the absence of even a fundamental foundational
4 showing, the regional board found the photograph, "relevant to show a continuing pattern" by
5 Caltrans and contractor MCM Construction, Inc., on the project. (See, Paragraph (7) for full
6 argument on this issue.) (See, also, Exhibits B-1 and B-2 (slides from Caltrans' hearing presentation)
7 as illustrative of the evidentiary voids associated with unauthenticated photographs.

8 c. Numerous violations adjudicated in the case relied in whole or significant part on reports
9 made by individuals who did not testify at the hearing, who were not listed as witnesses by the PT,
10 who were not asked at any time about the reports by the PT, and who were neither employees nor
11 agents of Caltrans, another public entity, or of contractor MCM. The findings of liability which rely
12 in whole or significant part on these reports are improper as they constitute hearsay. The regional
13 board issued a ruling which overruled objections to the hearsay evidence. The ruling discloses that
14 the regional board assumed the trustworthiness of the documents and skipped over the substantive
15 analysis required when determining application of hearsay exceptions. Thus, the ruling does not
16 comport with state law, as discussed in Paragraph (7), below.

17 d. At least three violations that were assigned liability in the Board's Final Order had been
18 withdrawn by the PT prior to the hearing. The Department relied on the PT's representation of
19 withdrawal and ceased preparing any defense to those charges. The regional board had actual
20 knowledge of the conceded charges prior to the hearing; however, at no time prior to publication of
21 the draft order did the regional board or PT notify the Department that the heretofore conceded
22 charges remained candidates for assignment of liability and penalties. The imposition of liability for
23 withdrawn charges constituted a surprise to the Department. The Order's reinstatement of conceded
24 charges should be barred by the principles of agency, estoppel, and due process.

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26 ¹ Pages 81-83 and 444-448 of the Deposition of Kason Grady (submitted with Caltrans's Case-In-Chief, Administrative
27 Record (AR) Index at G-1.) (AR Index is attached to the Order. It should be noted that said AR Index was published
28 concurrently with the Order; previously, the documents in the record had not been identified by reference to the lettering
system set forth in the Index. Because the Index is not associated with a web link whereby Petitioner could verify which
items in the record correspond to which Index category, nor does it identify individual documents within categories, this
Petition's references to records, with respect to the Index, are based on best estimates.)

1 **(5) The manner in which the petitioner is aggrieved.**

2 The Order imposes civil assessments of \$405,000 for violations and over \$70,000 in "staff
3 costs". As the only named party to the complaint, Caltrans is responsible for payment of the
4 assessments.

5 **(6) The specific action by the state or regional board which petitioner requests.**

6 Petitioner respectfully requests that the State Board order the regional board to modify the
7 Order to wholly eliminate the "staff costs" assessment, penalties based in whole or substantial part on
8 unauthenticated photographs and/or reports constituting inadmissible hearsay, and liability for
9 charges expressly withdrawn by the PT prior to the hearing, then reinstated by the Order.

10 Specifically, Petitioner seeks elimination of \$70,182 in "staff costs". It also seeks to have set
11 aside all penalty amounts associated with the following charge identification numbers, on the basis
12 they lack valid evidentiary support: 129/130², 51, 64/65, 40, 52, 72, 76, 82, 115, 58/59. Also, to the
13 extent that the regional board imposed no liability for the following charges due to lack of evidence,
14 but nonetheless appears to have considered them as a factor in assessing penalties, Petitioner seeks to
15 have them disregarded for any and all purposes: Nos. 8, 9, 53, 54, 66, 67. Finally, although the PT
16 expressly conceded and withdrew multiple charges several months prior to the hearing, the Order
17 includes an assessment of liability on three of the previously-withdrawn charges, over Caltrans' and
18 MCM's objections: Nos. 101, 104, and 112, and Petitioner seeks to have these set aside.

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20 **(7) A statement of points and authorities in support of legal issues raised in the petition,**
21 **including citations to documents or the transcript of the regional board hearing where**
22 **appropriate.**

23 a. There Exists No Legal Basis for Imposition of "Staff Costs"; As a Matter of Law, the
24 Assessment is Invalid: In this case, the PT sought over \$305,000 in "staff costs", including attorneys'
25 fees. The costs were calculated on the basis of the hourly fees attributable to the various staff
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27 ² The sequentially-numbered charges separated with a slash (" / ") are indicative of findings where while only one of the
28 enumerated sequential charges was upheld, it is not clear from the Order which was upheld and which was not. In an
abundance of caution, all pairings are listed to ensure the Petition is complete.

1 members and attorneys who worked on the case. (Prosecution Team Case-In-Chief, 29:3-18.) The
2 Order imposes a \$70,182 assessment against Caltrans for "staff costs".

3 "In civil court cases, a party can recover from an opposing party witness fees, filing fees, and
4 other costs only if expressly authorized by statute. Similarly, attorney fees are not recoverable in civil
5 court cases absent statutory or contractual authority. **The same rule applies to administrative**
6 **proceedings.** *Schneider v Medical Bd.* (1997) 54 CA4th 351 . . . ; *Wilson v Board of Retirement*
7 *(1959)* 176 CA2d 320, 322 . . . " (*California Administrative Hearing Practice*, §7.124 (C.E.B, 2012,
8 emphasis added).) "The right to an award of costs is governed wholly by statute. (*La Mesa-Spring*
9 *Valley School District v. Otsuka* (1962) 57 Cal.2d 309, 312." (*Posey v. State of California* (1986)
10 180 Cal.App.3d 836, 852].) The California Water Code and regulations governing water quality
11 enforcement do **not** contain any provision authorizing payment of PT costs or fees for administrative
12 liability enforcement.

13 Moreover, the regional board, as part of a state agency, has only those powers conferred on it
14 by law. (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41
15 Cal.App.4th 303, 319 (hereinafter "*UFWA*"), citing, *Association for Retarded Citizens v. Department*
16 *of Developmental Services* (1985) 38 Cal.3d 384, 391-392, 211 Cal.Rptr. 758, 696 P.2d 150; and,
17 *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103, 77 Cal.Rptr. 224, 453 P.2d 728.) The
18 Legislature has not bestowed upon the State or regional boards the power to award costs or fees
19 associated with administrative liability proceedings; therefore, the Order's imposition of "staff costs"
20 is invalid and void.

21 Upon receiving written Caltrans pre-hearing objections to the PT's request for the cost/fee
22 award, the Advisory Team (or, "AT") specifically directed the PT to provide, at the hearing, legal
23 authority for the imposition of costs and fees against Caltrans. The PT did not produce such
24 authority. Instead, in support of the cost/fee award the Order (§2.4, page 5) references the 2002
25 Enforcement Policy's (Policy) "Staff Costs" section. In a misquote of the statute it cites, the Order
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1 observes, "Staff costs may be one of the 'other relevant factors that justice may require'³ under Water
2 Code section 13385(e)."

3 **i. Water Code §13385(e) does not authorize recovery of costs or fees:** To the
4 extent the Order implies that Water Code section 13385(e) actually authorizes payment of costs and
5 fees to PT staff or attorneys, the language of the statute belies such a conclusion. There exists no
6 mention of costs or fees in the terms of the statute. Further, the proposition that "other factors that
7 justice may require" implicitly grants authority to impose costs and fees has not been supported by
8 case law, administrative decisions, legal treatises, or any cognizable legal source.

9 By comparison, costs (not fees) are expressly recoverable by the prevailing party in an
10 administrative writ of mandate proceedings in superior court (Code Civ. Proc. 1095.). Further, Gov.
11 Code §800 expressly provides for an award of reasonable attorneys' fees to a respondent if an
12 administrative decision resulted from the arbitrary or capricious action of a public administrative
13 agency. If the Legislature had so intended, it could have also enacted provisions to authorize PT
14 recovery of costs and fees in an ordinary ACL proceeding before a regional board, but it did not do
15 so.

16 Moreover, the regional board's interpretation of section 13385(e) does not comport with rules
17 of statutory construction. Within a statutory provision, " 'where general words follow the
18 enumeration of particular classes of persons or things, the general words will be construed as
19 applicable only to persons or things of the same general nature or class as those enumerated. The rule
20 is based on the obvious reason that if the Legislature had intended the general words to be used in
21 their unrestricted sense, it would not have mentioned the particular things or classes of things which
22 would in that event become mere surplusage. [Citations.]' " (*Peralta Community College Dist.*,
23 *supra*, 52 Cal.3d at p. 50, 276 Cal.Rptr. 114, 801 P.2d 357.) This rule of construction is known as
24 "*ejusdem generis*" and is applicable to the interpretation of §13385(e).

27 ³ It is noted here and below that in its quotation, the regional board has rewritten the statute. The actual language of
28 Water Code §13385(e) does not contain the word "relevant". The operative phrase reads, "other factors that justice may
require".

1 The intent of §13385(e) is to set forth the criteria that must be considered when calculating
2 penalty amounts in an administrative liability proceeding. The actual text reads,

3 "The regional board, the state board, or the superior court, as the case may be shall
4 take into account the nature, circumstances, extent, and gravity of the violation or
5 violations, whether the discharge is susceptible to cleanup or abatement, the degree of
6 toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect
7 on its ability to continue its business, any voluntary cleanup efforts undertaken any
8 prior history of violations, the degree of culpability, economic benefit or savings, if
9 any, resulting from the violation, and other matters that justice may require. At a
10 minimum, liability shall be assessed at a level that recovers the economic benefits, if
11 any, derived from the acts that constitute the violation."

12 As is plain from the language itself, the statute focuses on traits of the discharge and
13 the discharger. Wholly absent is any suggestion that regional board costs be *considered*,
14 much less *recovered*. The regional board's reliance on §13385(e) is insupportable.

15 In the *Peralta* case, the California Supreme Court ruled that the Fair Employment and
16 Housing Commission did not have authority under the Fair Employment and Housing Act to award
17 compensatory damages on harassment claim. (*Peralta Community College Dist., supra*, 52 Cal.3d at
18 p. 50, 51.) The Court refused to infer that the that the Legislature intended, by mere implication, to
19 grant the Commission the authority to award damages in absence of actual language conferring that
20 distinct power.

21 Likewise, in the *UFWA* case, the Agricultural Labor Relations Board interpreted Labor Code
22 §1160.3 to authorize an award of compensatory damages to be paid by labor unions to individuals
23 injured by a union boycott. Section 1160.3 authorized the ALRB, if it found a person had engaged in
24 an unfair labor practice, to "issue ... an order requiring such person to cease and desist from such
25 unfair labor practice, to take affirmative action, including reinstatement of employees with or without
26 backpay, and making employees whole, when the board deems such relief appropriate, for the loss of
27 pay resulting from the employer's refusal to bargain, *and to provide such other relief as will*
28 *effectuate the policies of this part.*" [Italics added.] The ALRB relied on the italicized language for
its statutory authority to award compensatory damages. However, the Court of Appeal unequivocally
determined that, "[t]he enumeration in section 1160.3 of corrective remedies such as reinstatement,
backpay, and employee make-whole, all of which are intended to benefit *employees*, undermines the

1 ALRB's argument the statute's provision for 'such other relief as will effectuate the policies of this
2 part' authorizes an award of compensatory damages to persons injured in their property or business
3 by a union's secondary boycott." (*UFWA, supra*, 41 Cal.App.4th at p. 325.) [Italics in original.]

4 The "such other relief" verbiage of Labor Code §1160.3 bears substantive resemblance to the
5 "other factors" terminology in §13385(e). Just as the ALRB could not validly rely on catch-all
6 language to prop up a compensatory damages award, the regional board in the *Confusion Hill* matter
7 cannot rely on the general "other matters as justice may require" language as a basis to award costs
8 and fees, where it is clear neither the language nor context of §13385(e) support such a construction.
9 Even the Order's addition of the word "relevant" to the "other matters" excerpt does not bolster the
10 Order's legal propriety, because none of the specifically-enumerated §13385(e) penalty factors have
11 any relevance whatsoever to the recovery of costs and fees.⁴

12 **ii. The Enforcement Policy does not constitute a regulation, and thus**
13 **cannot serve as the basis for assessment of PT costs or fees.** To the extent the Order relies on the
14 2002 Enforcement Policy handbook, while that manual does refer to recovery of "staff costs"
15 (although the term is not defined--see below) in the context of an ACL, such recovery has not been
16 embodied in a regulation promulgated under the Administrative Procedures Act (Gov. Code §11340,
17 et seq.) (APA). Further, Government Code § 11425.50, applicable to Water Board proceedings,
18 provides, "A penalty may **not** be based on a guideline, criterion, bulletin, manual, instruction, order,
19 standard of general application or other rule subject to Chapter 3.5 (commencing with Section [Gov.
20 Code section] 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5
21 (commencing with Section 11340)." (Emphasis added.)

22 A rule imposing costs and fees in ACL proceedings falls within the definition of a
23 "regulation" under the APA: "A regulation subject to the APA thus has two principal identifying
24 characteristics. (Citations.) First, the agency must intend its rule to apply generally, rather than in a

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26 ⁴ A recognized treatise in the field proffers that the "other matters as justice may require" category could encompass
27 factors such as whether the violator has been cooperative in its dealings with regional board staff, what enforcement the
28 board has taken in similar cases, whether there have been delays in staff action for which the violator should not be
charged, and other circumstances which have a bearing -- logical and factual -- on §13385(e)'s specifically-enumerated
considerations. (See, *2 Cal. Environmental Law and Land Use Practice*, §31.40[6][e][xi], 2011.)

1 specific case . . . Second, the rule must 'implement, interpret, or make specific the law enforced or
2 administered by [the agency], or ... govern [the agency's] procedure.'" (*Tidewater Marine Western,*
3 *Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.)

4 As further indicated by the California Supreme Court in *Tidewater Marine Western, Inc. v.*
5 *Bradshaw*, *supra*, 14 Cal.4th at pp. 568-69,

6 "One purpose of the APA is to ensure that those persons or entities whom a
7 regulation will affect have a voice in its creation (*Armistead v. State 569 Personnel*
8 *Board* (1978) 22 Cal.3d 198, 204-205 . . . , as well as notice of the law's
9 requirements so that they can conform their conduct accordingly (*Ligon v. State*
10 *Personnel Bd.* (1981) 123 Cal.App.3d 583, 588 . . .). The Legislature wisely
11 perceived that the party subject to regulation is often in the best position, and has the
12 greatest incentive, to inform the agency about possible unintended consequences of a
13 proposed regulation. Moreover, public participation in the regulatory process directs
14 the attention of agency policymakers to the public they serve, thus providing some
15 security against bureaucratic tyranny. (See *San Diego Nursery Co. v. Agricultural*
16 *Labor Relations Bd.* (1979) 100 Cal.App.3d.)"

17 The 2002 enforcement policy, under the regional board's interpretation, extends beyond the
18 mere establishment of policies and guidelines internal to the Board; it directly and substantially
19 affects the rights of all parties sued by the Board. The significance of the stakes is evidenced in this
20 case, where exposure to "staff costs" amounted to hundreds of thousands of dollars with a proposed
21 imposition of over \$70,000. A rule providing for PT "staff costs" constitutes a regulation that is
22 subject to the APA.

23 The cost recovery embraced by the Enforcement Policy has never been adopted pursuant to
24 the APA, but the regional board attempts to treat the provision as enforceable. A regulation that is
25 adopted inconsistent with the APA is an "underground regulation" (Cal.Code Regs., tit. 1, § 250) and
26 may be declared invalid by a court (Gov. Code §11350; *Morning Star Co. v. State Bd. of*
27 *Equalization* (2006) 38 Cal.4th 324, 333.) (Also see, *State Water Resources Control Bd. v. Office of*
28 *Admin. Law* (1993) 12 Cal.App.4th 697, 705 (APA requirements apply to California regulatory
agencies, including the Board). Thus, the Regional board lacks power to enforce rules regarding
"staff costs" since they constitute improper "underground" regulations.

In comparison, certain agencies do have legal authority, by statute or regulation, to include
recovery of investigation and prosecution costs as part of their decision (see, e.g., Bus & P C §125.3,

1 permitting costs to agencies within the Department of Consumer Affairs); and, 16 Cal Code Regs
2 §317.5 (relating to chiropractors), but the Board is not one of those agencies

3 It is also noteworthy that even the language of the Enforcement Policy itself does not support
4 the outcome sought by the regional board's order. That is, the Enforcement Policy's reference to
5 "staff cost" recovery is strikingly equivocal. Use of the tentative term "may" in the phrase, "Staff
6 costs *may* be one of the 'other factors that justice may require', indicates that even the Policy's
7 drafters were not convinced that the recovery of costs is clearly authorized.

8 Moreover, even the language of the 2002 policy does not support a recovery of *fees*. The
9 policy refers to "staff costs", a term which is not defined. In general civil law, recoverable "costs" do
10 not include fees (Code of Civil Procedure §1033). Moreover, typical "costs" are only recoverable by
11 the prevailing party (Code Civ. Proc. 1032). Based on the liability the PT sought and then ultimately
12 recovered, the PT in this case is not the prevailing party.

13 In sum, the Order cites no **proper** legal basis for assessment of "staff costs"⁵, and therefore
14 should be modified by the State Board to eliminate any imposition of costs, including fees.

15
16 b. The Order Should be Modified to Eliminate All Violations That Were Solely, or In
17 Substantial Part, Based on Photographs:

18 A brief factual background is pertinent to Caltrans' points and authorities regarding the
19 improper admission of photographs and biological monitoring reports.

20 Confusion Hill (named after a local attraction (which is also a California State Point of
21 Historical Interest), "Campbell Bros. World Famous Confusion Hill" (www.confusionhill.com) is
22 located just north of Leggett in the upper northern end of Mendocino County. The project purpose
23 was the permanent relocation of Highway 101 from the east side of the South Fork Eel River to its
24 west side in order to bypass a major landslide that posed safety risks and caused numerous road
25 closures and traffic detours. The bypass entailed construction of two bridges and a connecting
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27 ⁵ The Order, p. 5, refers to 23 Cal.Code Regs. §2910, although the purpose is not clear. The provision imparts a "concise
28 summary" of the Enforcement Policy. It does not provide any independent basis for imposing "staff costs" or fees, and in
fact contains no mention of them.

1 roadway in between. The south bridge is 1355-foot long cast-in-place structure, reaching 225 feet
2 above the river channel. The northern structure is a 580-foot long cast-in-place bridge that spans
3 approximately 150 feet over the river. Completion of the project took roughly three years, from the
4 summer of 2006 to summer of 2009. As the Order succinctly states on p. 1, "The completed Project
5 provides a reliable transportation route by permanently relocating the highway from an area subject
6 to chronic landslides and closures."

7 In compliance with numerous State and Federal environmental quality requirements, before
8 construction Caltrans procured permits from multiple regulatory agencies including, but not limited
9 to, California Department of Fish and Game (CDFG), National Marine Fisheries Service (NMFS)
10 and the subject regional board.

11 As set forth in the Supplemental Declaration of Terry Davis (with attachments) (AR Index at
12 G-4), and Caltrans' Responses to Pre-Hearing Instructions, (AR Index at G-5 and/or K), the NMFS
13 Incidental Take Statement (ITS) set forth a requirement that biologists be retained for the project.
14 The Department's consultant contractor, URS, subcontracted with a company (IBIS) which in turn
15 subcontracted with biologists Bradford Norman and Carl Page (a.k.a. Aquatic Resource Specialists).
16 Weekly reports were to be submitted by the biologist(s) to NMFS and CDFG. The purpose of the
17 reports was to document any unanticipated effects of work activities on salmonids and/or to
18 document any necessary fish relocation. The URS-IBIS subcontract appears to be silent with respect
19 to photographs to be taken by monitors. NMFS required that the Department submit an annual report
20 by January 15 of each construction year. The annual reporting requirement was encompassed within
21 the Department-URS contract task order, and in the URS-IBIS subcontract. The Department
22 understands that the IBIS monitors prepared substantial portions of the annual reports, submitted
23 them to URS, which reviewed and modified the reports. URS then submitted the reports to the
24 Department, which reviewed them and thereafter provided them to NMFS as required.

25 Neither the NMFS ITS, the Department's URS contract, the URS-IBIS subcontract, nor the
26 Department's correspondence with NMFS/DFG provided a mechanism for the Department to verify
27 or challenge the weekly reports. As indicated above, the Department-NMFS/DFG understanding
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1 was that the weekly reports would be submitted directly by the biologists to the agencies, and this
2 appears to have been the practice.

3 The Department was given an opportunity to "comment" on the consultant's draft of the
4 annual reports (page 4 of Department-URS task order) prior to finalization. As the Department did
5 not interpret the monitoring reports and photographs to signify facts, conditions, and conclusions
6 indicative of violations (with respect to the charges that are in dispute), the question of whether the
7 Department could (or should have) questioned or challenged reports/photographic images did not
8 appear to have arisen. In this regard, it is noted that while the monitors had the authority to shut
9 down the project, through the Resident Engineer, if they determined that adverse effects to salmonids
10 were created by the project, as to the disputed violations it does not appear from their reports that the
11 monitors made such a determination or exercised such authority.

12 Based on the complaint and testimony conducted of regional board witnesses, it became
13 evident that a large percentage the PT's charges were based on whole or large part on photographs
14 taken by the two biologists who were neither Board, Caltrans, nor MCM employees, nor who were
15 present at the Confusion Hill site for any reason connected with the regional board. Although the
16 ACL relied heavily on the photos, deposition testimony revealed that none of the Board staff/PT had
17 discussed the specific photographs with the photographers. Thus, the PT lacked not only personal
18 knowledge, but even any informed secondhand knowledge, regarding when the photographs were
19 taken, where they were taken, why they were taken, what they depicted, or whether they were true
20 and accurate representations of the violations the PT asserted they depicted.

21 In the first section of its matrix entitled "Department's Objections to Evidence" (AR, G-3),
22 Caltrans asserted the following objection to the admission of the photographs:

23 "To be relevant, photographs must be authenticated by a witness having personal
24 knowledge of what the photographed item or event is claimed to represent; the witness
25 must be able to testify that the photograph is an accurate representation of what the witness
26 saw/perceived. "Authentication is a preliminary fact necessary to establish **relevancy**, and
27 hence, the admissibility of a . . . picture." Jefferson, *Cal. Evidence Benchbook*
28 (Cont.Ed.Bar 2010) § 31.30, p. 725. [Bold emphasis added.] Relevancy is an evidentiary
requirement in formal administrative hearings. (Gov. Code §11513(c).)

"Based on the foregoing, the Department objects to admission of all photographs cited by the
PT as evidence. Sworn testimony during discovery disclosed that ACL Most Knowledgeable

1 Person Kason Grady cannot testify that the photographs accurately represent what the PT
2 claims. Grady did not take the photos, and did not verify the PT's assumptions about the
3 photographs with the photographers. Moreover, Grady cannot testify as to the accuracy of the
4 purported dates of the photographs."

5 Caltrans also objected to individual charges on the basis of their reliance on unauthenticated photos.

6 The regional board did not expressly rule on the objections prior to the hearing. The contents
7 of the draft Order, however, disclosed by implication that the objections had been overruled so
8 Caltrans requested, by way of comments submitted to the regional board by letter on February 29,
9 2012, that the regional board state in the final order the grounds for its action. The final Order in
10 relevant part includes the following statement at p.3:

11 "As explained in these rulings, certain basic requirements must be met to constitute
12 substantial evidence upon which the Regional Water Board can rely. Documents and other
13 exhibits must have some foundational support to be properly admitted; however, trial-like
14 foundation is not required. The Prosecution Team originally submitted photographs that were
15 not labeled or otherwise identified. Absent additional, corroborating evidence, random
16 photographs could lack foundation sufficient for the Regional Water Board to rest a finding
17 on. Examination of the entire record shows these photos in context with the biological
18 monitoring reports that most often included captions and explanatory text. The Regional
19 Water Board finds that generally the photographs with accompanying documents submitted
20 by the Prosecution Team have sufficient foundation for the same reason that they were found
21 sufficiently reliable in the hearsay rulings . . . Any remaining objections to evidence for lack
22 of foundation are overruled."

23 Juxtaposition of the ruling with the controlling law reveals the Order's errors.

24 "No photograph or film has any value in the absence of a proper foundation. It is necessary to
25 know when it was taken and that it is accurate and truly represents what it purports to show. It
26 becomes probative only upon the assumption that it is relevant and accurate. This foundation is
27 usually provided by the testimony of a person who was present at the time the picture was taken, or
28 who is otherwise qualified to state that the representation is accurate." *People v. Bowley* (1963) 59
Cal.2d 855, 862.

A photograph is a "writing" and "[a]uthentication of a writing is required before it may be
received in evidence." (Evid.Code, §§ 250, 1401, subd. (a).) (*People v. Beckley* (2010) 185
Cal.App.4th 509, 514

Authentication requirements apply in administrative proceedings. As indicated in *Jacobson*
v. Gourley (2000) 83 Cal.App.4th 1331, 1334, a case where the Department of Motor Vehicles' only

1 evidence against a licensee was an unauthenticated report: "Authentication of a writing is required
2 before it may be received in evidence.' (Evid.Code, § 1401, subd. (a).) 'Authentication of a writing
3 means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the
4 proponent of the evidence claims it is or (b) the establishment of such facts by any other means
5 provided by law' (*id.*, § 1400), such as by a statutory presumption (1 Jefferson, Cal. Evidence
6 Benchbook (Cont.Ed.Bar 3d ed.1999) § 30.11, p. 628; 2 Witkin, Cal. Evidence (4th ed. 2000)
7 Documentary Evidence, § 7, p. 139)."

8 Likewise, as stated in *Desert Turf Club v. Board of Supervisors* (1956) 141 Cal.App.2d 446,
9 455, "[w]hile administrative bodies are not expected to observe meticulously all of the rules of
10 evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for
11 the conduct of any hearing at which facts are to be determined. Among these are the following: the
12 evidence must be produced at the hearing by witnesses personally present, or by *authenticated*
13 documents, maps or photographs; [and] ordinarily, hearsay evidence standing alone can have no
14 weight [citations]." [Italics in original.]

15 In an administrative hearing, admission of a videotape was improper where the introducing
16 witness had not made the tape, was not present when they were made, did not know if the
17 videographer was at any particular site on any particular date, and could not state that the dates on the
18 videos were accurate. (*Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344,
19 347, disapproved on other ground by *Voices of the Wetlands v. State Water Resources Control Bd.*
20 (2011) 52 Cal.4th 499.)

21 The Order's ruling on foundation is noteworthy for what it does **not** contain. The Order sets
22 forth not one iota of a finding that any witness testified as to the elements required to lay a
23 foundation in accordance with Evidence Code §1400, et seq. Nor could the Order have done so since
24 it is undisputed in this case that no witness for the PT -- the proponent of the photographic evidence -
25 - had any knowledge whatsoever that was sufficient to lay a foundation for the photographs. The
26 absence of this indispensable evidentiary material renders the admission of, and reliance upon, the
27 photographs reversible error. The photographs constituted substantial evidence against Caltrans and
28 MCM, and were not merely illustrative of existing testimony; they provided independent bases for

1 liability and/or material support for charges also based on biologist reports. In any event, even if the
2 photographs were proffered for merely illustrative or "contextual" purposes, the satisfaction of
3 elemental foundational requirements would still have been required by law.

4 The Order appears to be based on the misapprehension that foundation for photographs can
5 be established by reference to other materials, and/or the fact that the objecting party had the photos
6 in its possession and provided them to the proponent. The "corroborating" materials cited in the
7 Order's ruling do not provide the requisite foundational details of when the photographs were taken
8 and whether they accurately showed the violative acts claimed by the PT, so hence do not satisfy
9 foundational rules of evidence. Moreover, to the extent that the Order suggests that foundational
10 evidence can be satisfied by the placement of unauthenticated labels and other identification on the
11 photographs themselves, foundational facts cannot be "bootstrapped" in such a manner. The labels
12 and identification themselves fail to provide the information necessary to authenticate the
13 photographs (e.g., who placed the labels, whether the person who placed them had sufficient personal
14 knowledge regarding the labels *vis a vis* the photos, when and why the labels were placed, etc.).
15 Even if they purported to provide the Evidence Code §1400 basics, the truth and accuracy of what
16 was shown on the unauthenticated labels could not be properly assumed, just as the existence of
17 proper foundation for the photos cannot be assumed.

18 The fact that Caltrans had the photographs in its possession does not dispense with the legal
19 requirement that a foundation be laid before they can be used as proof of charges. A parties'
20 possession and production of a particular writing does not signify that the producing party has
21 summarily conceded to an opponent's interpretation of that writing or what it depicts. Possession and
22 production of writings by a party does not eliminate the requirement that a foundation for those
23 writings be laid at a hearing. Such an approach would largely abrogate foundational requirements in
24 every administrative and judicial case, an absurd result not supported by law.

25 In sum, unauthenticated photographs do not constitute relevant materials and should have
26 been excluded, based on the authorities cited herein and on Government Code §11513(c) (evidence
27 in administrative hearings must be relevant and the sort of evidence a responsible person would rely
28 on in the conduct of serious affairs).

1 b. The Order Should be Modified to Eliminate All Violations That Were Solely, or In
2 Substantial Part, Based on Biological Monitoring Reports: Prior to the hearing, Caltrans expressly
3 admitted to 22 violations. However, the Department continued to dispute all other charges. A large
4 quantity of the disputed charges sprung from the PT's interpretation of biological monitoring reports
5 (Reports) prepared by Messrs. Norman and Page (Monitors). At no time prior to the hearing had any
6 member of the PT spoken with the biologists to verify whether the PT's interpretations of the Reports
7 were valid. The PT did not list either biologist on the witness list that was exchanged in November
8 2010. Moreover, even when the Advisory Team specifically suggested that the biologists be called
9 as witnesses and permitted the PT to amend its list to add Messrs. Norman and Page as witnesses
10 (AR at I), the PT did not do so.

11 Caltrans objected to the Reports as hearsay for which no evidentiary exception applied.
12 Hence, the Reports could not be used to support a charge in the absence of other admissible
13 evidence. (Gov. Code §11513(d).) Caltrans' objections appear in multiple forms and locations in the
14 Administrative Record (Caltrans' Response and Rebuttal to PT Case-In-Chief, including objection
15 matrix attached thereto (AR at G-3), responses to PT rebuttal (AR at G-4), and other briefing (AR at
16 G-5 and/or K). All of the Department's objections and arguments are incorporated herein by this
17 reference and thus will not be repeated in detail in this section.

18 The regional board ultimately overruled the hearsay objections in an April 27, 2011,
19 memorandum which is attached to the Order. Caltrans disputes the analysis and conclusion of that
20 ruling. The ruling established that two hearsay exceptions applied with respect to the Reports: the
21 business records exception of Evidence Code section 1271 and the official records exception of
22 Evidence Code 1280.

23 An official records exception only exists where the following is determined:
24 "(a) The writing was made by and within the scope of duty of a public employee.
25 "(b) The writing was made at or near the time of the act, condition, or event.
26 "(c) The sources of information and method and time of preparation were such as to indicate

27
28

1 its trustworthiness." (Evid. Code, § 1280)⁶

2 On its face the Order's finding of an official records exception is erroneous.

3 Under Evid. Code §1280, a "public employee", includes, "an officer, agent, or employee of a
4 public entity". (Evid. Code §§ 195, 1280.) It was undisputed that the Monitors were not officers or
5 employees of a public entity, and no evidence was ever presented that indicated the Monitors had an
6 agency relationship with any public entity. However, the regional board found that, "if anything, the
7 biological monitor would be an agent for the regulatory agencies: NMFS, DFG and perhaps the
8 Regional Water Board". This declaration is striking due to an absolute dearth in the record that, as
9 indicated above, the Monitors were *any* entity's **agents**.

10 The Civil Code defines "agent": "An agent is one who represents another, called the
11 principal, in dealings with third persons. Such representation is called agency." (Civil Code §2295.)
12 In other words, an agent, "acts for in and in the place of the principal for the purpose of bringing the
13 principle into legal relations with third persons (citations)." (3 Witkin Summary of California Law
14 §4 (10th Ed.)) However, no evidence was ever proffered, or was even intimated, that the Monitors
15 were given authority to conduct legal dealings with third parties on behalf of NMFS, CDFG,
16 Caltrans, or the regional board. The mere *assumption* of an agency relationship cannot support a
17 finding that Evid. Code §1280(a) has been satisfied. The finding of an official records exception
18 lacks support and should be set aside.

19 Furthermore, the ruling's finding of an Evidence Code §1271 business records hearsay
20 exception is not supported on its face. Under the provision, a record is not made inadmissible by the
21 hearsay rule when:

22 (a) The writing was made in the regular course of a business;

23 (b) The writing was made at or near the time of the act, condition, or event;

24 _____
25 ⁶ It is noted here that the April 27, 2011, hearsay ruling paraphrases both Evidence Code section 1271 and 1280 in a
26 sense that is materially erroneous. The paraphrasing indicates that if the respective exception elements are established,
27 then the out-of-court hearsay statement is rendered "*not hearsay*" (page 2 of ruling, emphasis added). However, the
28 exception statutes simply do not transmute hearsay into non-hearsay. Under the actual statutory language, the hearsay
statements remain hearsay even if the §§1271 and 1280 exception conditions apply, but the statutes allow for the
evidence to nonetheless be admitted. The ruling's misstatement of the application of hearsay exceptions, in the context of
an administrative adjudication subject to the rules of Gov. Code §11513, could be consequential and is noted for that
reason.

1 (c) The custodian or other qualified witness testifies to its identity and the mode of its
2 preparation; and

3 (d) The sources of information and method and time of preparation were such as to indicate
4 its trustworthiness.

5 There was absolutely no testimony that met the requirements of sections (a)--(c) with respect
6 to the Reports. However, such testimony is indispensable and essential in order for a judge or
7 administrative trier of fact, "to be able to make a finding (that can be implied from a ruling on
8 admissibility), as required by the Evidence Code section 1271, subdivision (d), that the sources of
9 information for the business-record entries and the method and time of preparation of such entries
10 were such as to indicate trustworthiness of the entries." (*People v. Shirley* (1978) 78 Cal.App.3d
11 424, 438) Here, based solely upon a reading of the documents themselves, the regional board
12 *assumed* that the requirements of the statute were met, but this approach has no legal authority. (See,
13 e.g., *Id.*, *fn 6* (the elements of section 1271 must be established by evidence other than the contents of
14 the business records sought to be admitted.)).

15 Where there is no independent evidence as to when the records were made, how they were
16 prepared, or what sources of information they were based on, there can be no conclusion of
17 trustworthiness; such writings fail to qualify for admission as business records under section 1271.
18 (*Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697, 1706-07.)

19 With respect to both §§1271 and 1280, the regional board skipped over statutory
20 requirements and assumed trustworthiness. Were the subject Order's approach to hearsay exceptions
21 extended to all cases, the exceptions would be rendered completely meaningless: to wit, many
22 business records bear dates, appear to be drafted by employees/professionals whose work appears to
23 encompass the writing of reports, could be assumed to have been drafted by public employees or
24 agents, and could be presumed to have been drafted concurrent in time with events in question. Even
25 modes of preparation and accuracy of contents could be postulated and assumed to exist based on the
26 face of the records themselves and the inclination of a judge or administrative arbiter. However, the
27 Legislature drafted the hearsay exceptions so that proponents of evidence have to prove certain
28 objective facts *before* their requisite reliability can be accepted. The regional board's ruling turns

1 this statutory requirement on its head by eliminating the need for any factual showing whatsoever
2 and adopting a presumption of admissibility. The Order's rationale is not sound and does not reflect
3 the law.

4 In sum, there existed no basis for admission of the Reports. All violations based in whole or
5 in large part on the Reports must be set aside as lacking necessary evidence.

6 **c. The Order Should Be Modified to Eliminate All Charges Previously Withdrawn**
7 **by the Prosecution Team**

8 i. Background

9 On February 15, 2012, the Board issued its Administrative Civil Liability draft Order No. R1-
10 2012-0034, for the Confusion Hill Bypass. At that time, the parties were directed by the Board to
11 submit in writing "any comments or proposed changes to the draft order they would like the Regional
12 Water Board to consider..." (Board email to Parties 2/15/12). Written comments were timely
13 submitted by the Department, MCM and the Prosecution Team.

14 Part B of the Department's written comments on the draft Order addressed a group of charges
15 that had been expressly "conceded" by the Prosecution Team several months before the hearing but
16 had nonetheless been assigned liability in the draft Order (Draft Order Page 4, Section 2.3-
17 "Previously Conceded Turbidity Violations"⁷). The Department argued that the conceded charges
18 should not be reinstated on several bases: first, the Prosecution Team's withdrawal of the charges
19 was binding on the Regional Board based on the principle of agency; second, the Regional Board
20 was estopped from reinstating the conceded charges; and third, the draft Order's surprise

21 ⁷ Section 2.3 of the draft Order, "Previously Conceded Turbidity Violations" reads as follows: "The Prosecution Team
22 conceded several alleged turbid discharge violations based upon the incorrect assumption that in-stream sediment
23 discharges could not be found to violate the 401 Certification because the sediment did not come from an outside source.
24 (AR, Exhibits F-1 at 27-28; F-3 at 3.) The record contains sufficient evidence to support civil liability for violations 15,
25 26, 99, and 102. "Discharge" means to release from confinement, custody, or care, to emit. (www.merriam-
26 webster.com) Under 401 Certification Condition 9, unauthorized waste "shall not be allowed to enter into or be
27 placed...into waters of the State." (AR, exhibit A.) Previously settled sediment hat is disturbed and subsequently
28 mobilized in the stream channel where it as not prior to the Project activity constitutes "entering" or "being placed" into
waters of the state. As a result of various activities during the construction of the Project, the release of turbid water from
dewatering activities, silt, river bottom sediment, and cementitious wastes resulted in physical and chemical alterations of
the River, and without proper Best Management Practices (BMPs) in place, were not authorized and therefore violate
Condition 9. These discharges violate conditions of the 401 Certification regardless of the source of origin, provided that
a direct link is present between the project activities and an increase over background conditions. Each of these
violations has been assessed \$10,000 liability commensurate with violations in the same category as described in the
subsequent sections."

1 reinstatement of the withdrawn charges acted to deprive the parties of due process guarantees such as
2 a full and fair hearing (Caltrans Comments, 2/29/12).

3 Subsequent to the parties' submission of written comments on the draft Order, but before the
4 adoption of the Final Order, the Board issued an updated draft Order containing strikeouts and
5 underlines (Administrative Civil Liability Order No. R1-2012-0034- Strikeout/Underline, relevant
6 portions (pp. 1-8 out of 33 pages) attached as Exhibit C). In the updated draft Order, the Board
7 struck the entirety of Section 2.3- "Previously Conceded Turbidity Violations" (page 4, section 2.3
8 Draft Order- Strikeout/Underline). The language of section 2.3 regarding reinstatement of the
9 conceded charges was completely removed from the Final Order.

10 Despite the Board's removal of language reinstating the conceded charges, the Final Order
11 still assigns liability to at least three such charges. These are Violation ID Nos. 101, 104, and 112
12 (Final Order Pg. 20, Par.4 – Pg. 21, Par. 2). Each of these violations was conceded by the PT in the
13 Prosecution Team Revised Chart (Pages 37, 38, and 41). The inclusion of these violations in the
14 final Order appears to be an oversight given the Board's removal of reinstatement language from the
15 final Order. Regardless, there is no valid legal basis for reinstating any of the PT's withdrawn
16 charges.

17 ii. Points and Authorities in Support of Eliminating Liability for Charges

18 Conceded by the PT

19 1. Agency

20 The ACL was brought by the Regional Board, and the prosecution thereof was assigned to the
21 PT, including its attorneys. It is further noted that the complaint was executed by the Regional
22 Board's Assistant Executive Director, who is also named as a member of the PT. Thus, the PT acted
23 as the express agent of the Regional Board (Civ. Code §2295), "and, as such agent, [it] has authority
24 to bind [its] client in all matters pertaining to the conduct and management of the suit. ... ". (1
25 *Witkin, Cal. Proc. 5th* (2008) Attys, § 255, p. 330, citing *Knowlton v. Mackenzie* (1895) 110 C. 183,
26 188.) Thus, when the PT expressly withdrew certain charges from further prosecution, the action
27 bound the Regional Board. Its surprise reinstatement of five of the conceded charges, to the
28 detriment of the Designated Parties, was legally prohibited.

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2. *Estoppel*

In addition or in the alternative, because the requisite elements of equitable estoppels exist in this case, the Regional Board should be estopped from assigning administrative liability for the withdrawn charges.

"A valid claim of equitable estoppel consists of the following elements: (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it. (13 Witkin, *Summary* 10th (2005) Equity, § 191, p. 527.) The estoppel doctrine can be applied against the state, its subdivisions, and other governmental agencies. (13 Witkin, *supra*, Equity, § 199, p. 540.)

A valid claim of equitable estoppel exists on the facts of this case: (a) The Board knew that the PT had conceded charges and that the Designated Parties had received actual notice of the withdrawals, but the Board did not reveal that it would treat the charges as existing and viable; (b) The Board knew that when issuing its order it would not treat the charges as having been effectively withdrawn; (c) The Designated Parties were ignorant of the fact that the Regional Board would not consider the charges to have been withdrawn; (d) When the PT (the Board's agent) in good faith conceded the charges it intended the Designated Parties to rely on that act; and, at the time of the hearing the Regional Board knew by way of the briefing and hearing presentations that the Designated Parties had acted on the withdrawal of charges, in that they had ceased to actively defend against them; and, (e) The Designated Parties were induced to act upon the PT's withdrawal and the Board's silence, and did in fact cease to present evidence and testimony (exculpatory and explanatory) regarding the conceded charges in the context of further briefing and at the hearing.

3. *Due Process*

The guarantee of a fair hearing is embedded in the statutes governing hearings before Water Boards (e.g., Gov. Code §§11425.10, 11425.20). All hearing notices in the case echoed the principles and rules discouraging surprise at Water Board proceedings, in accordance with 23 Cal. Code Regs. §648.4. However, the surprise reinstatement of the withdrawn charges acted to deprive

1 the Designated Parties of a fair hearing, and essentially resulted in the exposure of the Designated
2 Parties to charges against which they were led to believe did not require preparation of a defense.

3 In sum, the principles of agency, estoppel, and due process act as bars to the Board's
4 reinstatement of charges conceded by the Prosecution Team. It appears the Board intended to
5 remove all reinstated charges from its Final Order. Nonetheless, conceded charges are assigned
6 liability in the final Order. Based on the foregoing, the Department respectfully requests that all
7 liability for charges conceded by the PT be eliminated.

8 **Conclusion of Points and Authorities:** Petitioner respectfully requests that for the
9 foregoing reasons, the award of "staff costs", imposition of liability based on improperly considered
10 evidence, and penalties for charges that had been expressly withdrawn before the hearing, all be set
11 aside and eliminated from the order in this matter.

12
13 **(8) A statement that the petition has been sent to the appropriate regional board and to the**
14 **discharger, if not the petitioner.**

15
16 As indicated on the sworn Proof of Service attached to this Petition, Caltrans has served the
17 regional board, as well as MCM Construction, Inc.

18 **(9) A statement that the substantive issues or objections raised in the petition were raised**
19 **before the regional board, or an explanation of why the petitioner was not required or was**
20 **unable to raise these substantive issues or objections before the regional board.**

21
22 As indicated in Paragraph (7) above, and as shown in multiple locations of the Administrative
23 Record, Caltrans raised its objections before the regional board.

24 ///

25 ///

26 ///

27 ///

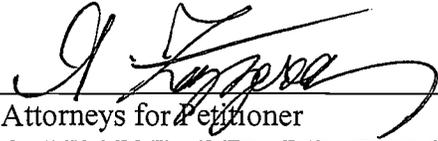
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Petitioner California Department of Transportation respectfully requests that its Petition be granted.

Respectfully submitted,

BEALS, GOSSAGE, BACA, ZAZZERON, JENSEN

By: 
Attorneys for Petitioner
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EXHIBIT A

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION**

Administrative Civil Liability Order No. R1-2012-0034

**In the Matter of
California Department of Transportation
Confusion Hill Bypass Project
Complaint No. R1-2009-0095
WDID No. 1B05153WNME**

Mendocino County

1. Executive Summary

This matter comes before the North Coast Regional Water Quality Control Board (Regional Water Board) from an Administrative Civil Liability Complaint R1-2009-0095 dated August 13, 2009 (Complaint) issued to the California Department of Transportation (Caltrans), who contracted with MCM Construction, Inc. (MCM) (hereafter collectively Dischargers). (See Administrative Record ("AR") exhibit C, Index attached to this Order as Attachment A.) The Complaint alleged violations of water quality permits for the Confusion Hill Bypass Project and proposed an administrative civil liability (ACL) in the amount of One Million Five Hundred Eleven Thousand Dollars (\$1,511,000) pursuant to Water Code section 13385. A hearing took place on June 23, 2011, in accordance with the Hearing Notice and Procedure (AR, exhibit E) and California Code of Regulations, title 23, sections 648-648.8. The Regional Water Board heard relevant evidence and testimony to decide whether to issue an ACL order assessing the proposed liability, a higher or lower amount, or to reject the proposed liability.

To help ensure the fairness and impartiality of the proceeding, the functions of those who acted in a prosecutorial role by presenting evidence for consideration by the Regional Water Board (Prosecution Team) were separated from those who advise to the Regional Water Board (Advisory Team). Members of the Prosecution Team were subject to the prohibition on ex parte communications with the members of the Regional Water Board or the Advisory Team, just like other Parties.

The Project, located in Mendocino County on Highway 101 approximately 18.5 miles south of Garberville and eight miles north of Leggett, involved relocating the highway from the east side of the South Fork Eel River (River) to the west side. (AR, exhibit H, tab 102.) This required construction of two new bridges and a new section of highway between the new bridges. The completed Project provides a reliable transportation route by permanently relocating the highway from an area subject to chronic landslides and closures.

The Project was subject to water quality certification pursuant to Clean Water Act, section 401 (401 Certification), which was issued February 16, 2006 and amended on

April 18, 2006. (AR, exhibit A.) In addition, the Project was subject to the Caltrans statewide stormwater permit (Storm Water Permit), issued by the State Water Resources Control Board (State Water Board), which regulates all storm water discharges from Caltrans' owned municipal separate storm sewer systems, maintenance facilities and construction activities. (AR, exhibit B.)

The Complaint as issued sought \$1,511,000 civil liability, which included staff costs of \$70,182. (AR, exhibit C.) During review of the evidence, Prosecution Team reduced the proposed penalty by \$222,500, but requested additional continuing staff costs of \$235,500 for administrative civil liability totaling \$1,524,000. (AR, exhibit F1 at 29.)

This Order summarizes Regional Water Board's decision and imposes penalties for violations based upon the evidence, relevant factors and conclusions presented herein. The Regional Water Board orders the following:

- Caltrans shall pay a penalty of \$405,000 and staff costs of \$70,182, for a total liability of \$475,182. A detailed explanation of the penalty costs is provided later in this Order.
- Of the total liability, \$70,182 (staff costs) must be remitted as payment to the State Cleanup and Abatement Account in accordance with Water Code section 13399.35.
- The remaining liability may either be remitted to the Cleanup and Abatement Account, or used for an environmental project which meets criteria contained in the 2002 Enforcement Policy.

The organization of this Order is as follows: Section 2 discusses several issues including the evidentiary rulings, multiple permit terms, relevant factors analysis and staff costs. Section 3 presents a detailed discussion of penalties (grouped into nine categories).

2. Issues

2.1 Evidentiary Rulings

In preparation for the hearing, Parties exchanged evidence, submitted legal argument, rebuttal, evidentiary objections and responses. The evidence provided by the Prosecution Team to support alleged violations included email and memorandum from the Caltrans Storm Water Coordinator, daily engineering reports, biological monitoring reports (including photo documentation), notices of discharge, and Regional Water Board staff inspection observations. (AR, exhibits C & M.) Dischargers requested that much of this evidence be excluded as inadmissible hearsay and for lack of foundation. (AR, exhibits G & H.) In two evidentiary rulings prior to the hearing, these objections were overruled. The biological monitoring reports were found sufficiently reliable as they

were prepared by qualified professionals hired specifically to document environmental compliance and were prepared concurrently with the activities documented therein. Evidence in the record supported the application of both official records and business records exceptions to the hearsay rule. (Evidentiary Ruling on Hearsay Objections to Biological Monitoring Reports, April 27, 2011.) Dischargers also objected to exhibits containing correspondence between Caltrans and MCM on the subject of water quality compliance as inadmissible hearsay. The Hearing Officer found that statements by Caltrans employees fell within the party admission exemption of the hearsay rule and declarations by MCM fell within the declarant liability exception to the hearsay rule. (Evidentiary Ruling on Objections to Caltrans and MCM Correspondence on Water Quality Compliance, June 3, 2011.) These two rulings are incorporated by reference into this Order and attached as Attachment B and C. (See also AR, exhibit P.)

As explained in these rulings, certain basic requirements must be met to constitute substantial evidence upon which the Regional Water Board can rely. Documents and other exhibits must have some foundational support to be properly admitted; however, trial-like foundation is not required. The Prosecution Team originally submitted photographs that were not labeled or otherwise identified. Absent additional, corroborating evidence, random photographs could lack foundation sufficient for the Regional Water Board to rest a finding on. Examination of the entire record shows these photos in context with the biological monitoring reports that most often included captions and explanatory text. The Regional Water Board finds that generally the photographs with accompanying documents submitted by the Prosecution Team have sufficient foundation for the same reason that they were found sufficiently reliable in the hearsay rulings. The biological monitoring reports were generated by professionals hired to perform environmental compliance monitoring pursuant to a specific contract and work order. Reports and communications from CalTrans and MCM also have sufficient foundation. These documents were produced by the Parties themselves, often during or near the time when events occurred. Any remaining objections to evidence for lack of foundation are overruled. All evidence was closely examined to determine whether such evidence supported the finding of a violation. In cases where it was questionable whether the elements of an alleged violation were met because the evidence was vague and/or ambiguous, a penalty was not assessed.

2.2 Violation of Multiple Permit Terms and Conditions

The Complaint alleged violations of both the 401 Certification as well as the Storm Water Permit. Prosecution Team provided evidence showing that the Dischargers violated multiple terms and conditions required for the Project. Many of the alleged violations stem from one event charged under two or more permit conditions. It may be appropriate in some cases to charge separate violations under different permit terms for a single event; however, in this Order liability is assessed for each violation event per day rather than each term or condition violated.

2.3 Relevant Factors

In determining the amount of any civil liability, pursuant to California Water Code section 13385, subdivision (e), the Regional Water Board shall take into account the nature, circumstances, extent, and gravity of the violation(s); whether the discharge is susceptible to cleanup, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, any 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. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. Relevant factors were considered in the assessment of liability for each alleged violation in the subcategories below, and are summarized more generally here.

The Project was constructed in the South Fork of the Eel River, which is listed as impaired for sediment pursuant to section 303(d) of the Clean Water Act. The River is an important salmon and steelhead spawning and rearing area. Excessive sediment is among the factors known to contribute to the documented decline of these species. In addition to salmonids, the River provides habitat for an abundance of species, including juvenile fish and frogs. Both juvenile fish and frogs were found in Isolated Pool B, the location where several unauthorized discharges occurred. Dischargers failed to comply with the requirements of both the 401 Certification and Storm Water Permit on a number of occasions for various activities. As a result, unpermitted discharges occurred within biologically sensitive areas of the River. On many occasions the discharges were not adequately monitored and therefore impacts to beneficial uses are difficult to assess. Violations for discharges to the live channel of the River, and for failure to monitor and report are assigned maximum liability per event for these reasons. Because cementitious discharges can be seriously harmful, those violation events are assigned maximum liability. In contrast, other discharges (i.e. slag) were not determined to be particularly harmful so liability is significantly reduced.

Caltrans is a public entity which represents the best interests of the people of California. Those interests include compliance with regulatory requirements and permits, including those which preserve and protect the beneficial uses of state waters. Caltrans has implemented many projects statewide and in the North Coast Region. Between March 2004 and January 2006 alone, Caltrans applied for and received 31 water quality certifications in the North Coast Region (Regional Board database). Caltrans has been regulated under its own statewide Storm Water Permit since 1999 and is fully aware of best management practices (BMPs), monitoring, and management techniques necessary to assure permit compliance and beneficial use protection. (AR, exhibit B.)

The record for this case contains evidence that is both encouraging and troubling. The Regional Water Board appreciates Caltrans taking its permitting obligations seriously as evidenced by numerous complaints and reminders to its contractors of what the rules are. Documents also show a mix of compliance and non-compliance by the contractors for which Caltrans is responsible. Many discharges associated with rubbish, debris, and

leaks from equipment were cleaned up. These cleanup activities have been taken into account and discussed in association with the applicable category below. Discharges associated with dewatering, cementitious wastes, and turbidity discharges were either not cleaned up or not susceptible to cleanup and therefore, reduction in civil liabilities for these discharge categories is not applicable.

While the Regional Water Board does not have precise information to calculate economic savings resulting from avoiding permit requirements, timely implementation of adequate BMPs and monitoring both come with considerable cost. The Confusion Hill Bypass Project cost over \$70 million. (AR, exhibit C at 19.) The civil liability assessed in this Order is small in comparison to the cost of the Project. Caltrans has not indicated an inability to pay or continue in business related to this administrative civil liability.

Caltrans has a history of water quality violations reflected in this Project and others. For the Confusion Hill Project, the Regional Water Board issued its first Notice of Violation on October 30, 2006 (AR, exhibit A-4), and a second on November 27, 2006 (AR, exhibit A-5). Many violations came to the Regional Water Board staff's attention through third party reports and photographs rather than reported directly to the Regional Water Board by Caltrans. This is problematic because water quality programs and permits rely heavily on self-monitoring and reporting requirements.

The Confusion Hill Bypass Project was successfully completed in 2009. The Regional Water Board recognizes that the Project was completed using less concrete, fewer River crossings and less access roads than originally projected; (AR, exhibit H-1 at 2-4) theoretically, this resulted in less overall impacts to water quality associated with the Project. Upon completion, the Project was awarded project of the year in 2009 from the California Transportation Association. (Id.) The magnitude of the Project and the difficulties associated with its construction were taken into account when reducing liabilities for leaky equipment and garbage violations. The Regional Water Board recognizes that a certain amount of leaks and trash can be expected for a project of this size.

These considerations are incorporated into all aspects of this Order, including the decision to not find violations for multiple permit terms, and to not assess liability when the record shows that clean up timely occurred.

2.4 Staff Costs

Staff costs may be one of the "other relevant factors that justice may require" under Water Code section 13385, subdivision (e). (See 2002 Enforcement Policy at 40; see also Cal. Code Regs., tit. 23, § 2910 [repealed and replaced by 2010 Enforcement Policy].) The Prosecution Team estimated its initial staff costs for this enforcement action at \$70,182. During review of the evidence, Prosecution Team reduced the total penalty sought by \$222,500, but requested continuing staff costs of \$235,500 for administrative civil liability totaling \$1,524,000. The Complaint did not include notice to

Dischargers that staff costs would continue to accrue. Accordingly, the Regional Water Board will only require payment for noticed staff costs of \$70,182.

3. Discussion of Penalties

The following sub-sections provide a more detailed explanation of the penalties determined by the Regional Water Board.

3.1 Organization

The Complaint included 296 alleged violations of the 401 Certification and Storm Water Permit. The Prosecution Team grouped violations into the following nine categories:

- A. Construction Dewatering
- B. Leaky Equipment
- C. Slag Discharges
- D. Turbid Discharges to the River
- E. Insufficient Turbidity Measurements
- F. Cementitious Discharges
- G. Rubbish and Debris Discharges
- H. Individual Events
- I. Storm Water Permit

Violations were listed in each category chronologically by date. Caltrans submitted a "Defense Matrix" that followed the same sequencing. (AR, exhibit G-2.) Due to the large number of alleged violations, the Advisory Team requested that Prosecution Team specify a unique identifier for each alleged violation to provide a point of reference for the Parties and the Regional Water Board. (AR, exhibit I.) In response, the Prosecution Team assigned numbers in sequence to each alleged violation in accordance with the date of occurrence (violations 1 through 296), but not chronologically within each category. (AR, exhibit N.) As a result, the numbers do not track consecutively within each section. Also, because the Prosecution Team often alleged violations for multiple permit terms, violation numbers may be grouped in twos or threes for a given event. To provide context and to maintain consistency with the Complaint and the organizational structure that followed, this Order will address each alleged violation by category, using the identification number as provided in the violation matrix.

3.2 Discharge Violations by Category

Category A Construction Dewatering

Prosecution Team recommended a penalty of \$340,000 for 34 alleged violations for construction dewatering activities. Dewatering is a common activity on construction sites

involving removal or draining groundwater or surface water, in this case from a riverbed, by pumping. Dewatering is conducted before or during excavation to lower the water table for placement of foundations and structural supports. Dewatering activities invariably require a point of disposal for the water being removed. These discharges are not just pure water, but usually contain other constituents such as sediment.

MCM disposed of dewatering wastes to at least two locations on the gravel bar of the River: (1) on the bar itself, and (2) in a temporary sedimentation basin that had been constructed and used within less than 100 feet of the live stream channel referred to as Isolated Pool B (AR, exhibit C, finding 8). These discharges occurred without proper permitting for several months, and after Caltrans staff identified this practice as a compliance deficiency on August 22, 2006 (AR, exhibit M-Tab 8). Although Caltrans' Construction Storm Water Coordinator Walt Dragaloski inspected the site in mid-August, 2006 to evaluate permit compliance, evidence in the record shows that intentional discharges to Isolated Pool B and the gravel bar persisted unpermitted into October. (AR, exhibit M-Tab 48.)

Condition 12 of the 401 Certification specified that any disposal of dewatering wastes to waters of the state would require additional permitting.¹ In addition, Condition 9 prohibited any discharge of waste to waters of the state not authorized by the permit. Condition 17 required that all activities be conducted as described in the permit and the application for the permit. Condition 7 required adequate sediment and turbidity BMPs. (AR, exhibit A.) Absent an additional permit authorizing discharges of this nature, construction dewatering events violated Conditions 7, 9, 12, and 17 of the 401 Certification. The violations alleged by Prosecution Team occur in "twos" and "threes" based on Prosecution Team proposing violations of all applicable 401 Certification conditions for one discharge event. However, the Regional Water Board has assessed civil liability in each instance for the event, rather than overlapping conditions. In light of the disregard for permit conditions, and evidence of harm to beneficial uses associated with Isolated Pool B, the maximum penalty for each event shall be imposed. Construction dewatering discharges into Isolated Pool B and onto the gravel bar warrant the maximum penalty of \$10,000 because the evidence describes and depicts intentional unpermitted discharges of waste directly to waters of the state.

As described in more detail below for each violation event, evidence in the record shows that construction dewatering wastes were discharged to Isolated Pool B and the

¹ Condition 12 provided: "If construction dewatering is found to be necessary, the applicant will use a method of water disposal other than disposal to surface waters (such as land disposal) or the applicant shall apply for coverage under the General Construction Dewatering Permit and receive notification of coverage to discharge to surface waters." A permit obtained in accordance with Condition 12 would have required among other criteria, an application to discharge, a list of alternatives available other than discharging to surface water, and compliance with Basin Plan receiving water limits, such as no increase of turbidity beyond 20% above background (Order No. 93-61).

gravel bar of the Eel River. The biological monitoring report dated September 9, 2006 describes Isolated Pool B as one of two "natural gravel bar/bedrock-formed pools at the BZ [blast zone] on the gravel bar" (AR, exhibit M-Tab 13). Photographic evidence further depicts Isolated Pool B as an unlined depression located within the gravels of the River in close proximity to the flowing channel (AR, exhibit J-4 at 6, 60, 11 & 55).

"The Isolated Pool B on the gravel bar of the Blast Zone was filled in by rock debris and gravels from the falsework footing preparation and extraction of bar gravels from the cofferdams holes in the bar itself and two juvenile yellow-legged frogs were either killed or displaced in this process. There were at least 2 frogs that resided there during transects prior this season and as recently as 27 Sept. of this last week. The pool was completely filled in by the evening of 28 Sept. 2006 (personal observation). Prior to its use as an unlined settling basin it contained an isolated school of juvenile Sacramento pikeminnow (ca. 25) and up to 6 metamorphosing yellow-legged frog juveniles. More recently, as it has been degraded over last 3-5 weeks, it usually contained a remaining 2-3 frogs on a daily basis. I believe I reported finding a dead juvenile pikeminnow there in a previous report when it was used as a settlement basin" (AR, exhibit M-Tab 28).

Caltrans argued that use of Isolated Pool B represents a discharge to a "sediment basin" on the gravel bar, and not to waters of the state in violation of condition 12 (AR, exhibit G-2). Pursuant to the 401 Certification application, a sedimentation basin at least 100 feet from the River could have been authorized for construction dewatering discharges. (AR, exhibit H-2, tab 101 at 9.) A Regional Water Board staff person testified that it probably would not matter if the sediment basin was 70 feet away from the stream rather than 100 feet away as proposed in the application. (AR, exhibit H-2, tab 108 at 54.) MCM suggests that because discharges would have been authorized 100 feet away, the unauthorized discharge 70 feet or closer should be excused.

The discharge within less than 100 feet of the live stream channel cannot be excused. First, regardless of whether a Regional Water Board employee testified that a discharge closer to the River might have been allowed, Dischargers should have sought permission to discharge waste and failed to do so. While Condition 17 does provide that activities be conducted as described in the permit and application, Condition 12 explicitly requires additional permitting before any disposal of dewatering wastes. In this case, Condition 12 is the more specific and stringent and shall control. It is possible that the proposed site would not have been appropriate or additional BMPs would have been necessary after an evaluation of the circumstances. Also, the record shows that the unauthorized discharges occurred sometimes as close as 15 feet from the active channel. Second, it appears that at least one location where unauthorized discharges occurred supported beneficial uses and would not have been approved for any waste disposal. Third, the Storm Water Permit required the application of BMP NS-2, which provides, "[a] dewatering plan is attached to this SWPPP. Dewatering will be performed during the pile construction portion of this project. Detwatered material will be pumped into tanks in order to allow sediment to settle. The material will be filtered and returned

to the river or hauled to a disposal site. All dewatering activities will conform to BMP NS-2" (AR, exhibit B-3).

Condition 9 provided: "No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or concrete washings, oil or petroleum products, or other organic or earthen material from any construction or associated activity of whatever nature, other than that authorized by this permit, shall be allowed to enter into or be placed where it may be washed by rainfall into waters of the State." (AR, exhibit A.) Under the Water Code, "waters of the state" means "any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code, §13050, subd. (e).) Isolated Pool B was located below mean high water of the river and therefore a water of the state, not a sedimentation basin (AR, exhibit M-Tab 48 at 250). Also, the characteristics of Isolated Pool B are different from the 'gravel bar' because the pool contained water prior to disposal of wastes and supported aquatic life (AR, exhibit M-Tab 13 at 95). In addition, the gravel bar also constitutes waters of the state because these areas are part of the active channel during varying times of the year dependent upon seasonal fluctuations, and therefore any unpermitted construction dewatering discharges to the gravel bar violated the 401 Certification.

On August 21, 2006, MCM discharged turbid water through a pipe into Isolated Pool B (violation 2, 3, 4) as shown through photo documentation presented in the biological monitoring reports (AR, exhibit J-4 at 2). Mr. Dragaloski documented the presence of Isolated Pool B as a temporary sedimentation basin that had been constructed and used within less than 100 feet of the live stream channel (AR, exhibit M-Tab 8). Caltrans and MCM did not dispute these violations but objected to fines under multiple permit terms (AR, exhibits T-2; H-2 tab100). A \$10,000 liability is warranted for this event.

From August 29 through August 31, 2006, violations 17-19, 22-24, and 28-30 resulted from dewatering over a three day period into Isolated Pool B during construction of the footings for the temporary trestle (AR, exhibit M-Tab 59). Prolonged dewatering at high rates and resulting discharge into Isolated Pool B overfilled Isolated Pool B and the resultant hydrostatic pressure through the gravel bar caused turbidity in the active channel on August 29th and 30th (AR, exhibit M-Tabs 11 and 64). The filling of Isolated Pool B is depicted in photo documentation presented in the biological monitoring reports (AR, exhibit J4 at 6). Waste discharges occurring between August 29th and August 31st associated with dewatering activities resulted in the temporary filling of the Isolated Pool B with loose rocks, gravel and water (AR, exhibit M-Tab 64). Any removal that may have been conducted to restore natural conditions in Isolated Pool B is not documented in the record. CalTrans and MCM did not dispute these violations but objected to certain fines under multiple permit terms. (AR, exhibits T-2; H-2 tab 100.) A \$10,000 liability is warranted for each day that this discharge activity took place.

Dewatering activities conducted for construction of the footings for the temporary trestle continued on August 31st after Isolated Pool B was filled with debris waste discharges. Dewatering waste was pumped directly onto the gravel bar adjacent to the cofferdams

resulting in violation 31-33 (AR, exhibit M-Tab 63). The section of the gravel bar used was approximately 15 feet from the active channel, maybe closer. (Id.) Caltrans objected to violation 31-33, stating that the evidence does not specify a date of violation, amount of water pumped, or length of time water was pumped (AR, exhibit G-2). The biological monitor's report (AR, exhibit M-Tab 63) states however, that the discharge of waste from dewatering activities continued on the gravel bar immediately following the description of dewatering events on August 29th through August 31st, giving a specific description of the proximity to the active channel. Therefore, it is reasonable to assess this violation on or about August 31, 2006. Failure to cite the duration and volume of the waste discharge does not apply in this instance as this violation does not depend upon those factors, but rather the intentional discharge of dewatering waste to waters of the state without a permit. A \$10,000 liability is warranted for this event.

Violation 37-39 stems from a Caltrans daily engineering report dated September 5, 2006, documenting dewatering activities associated with the B5 cofferdam (AR, exhibit M-Tab 11 at 82). The record shows that MCM discharged dewatering wastes during placement of seal coarse concrete for the footing at B5 on the rock immediately outside the cofferdam. Again, no permit was obtained as required under Condition 12 of the 401 Certification. A \$10,000 liability is warranted for this event.

Violation 55-57 stems from documentation in a September 11, 2006, Caltrans assistant resident engineer's daily report (AR, exhibit M-Tab 15). Prosecution Team alleged violations for construction dewatering to Isolated Pool B inconsistent with the 401 Certification application and without proper permits. Based upon prior and continuing dewatering activities by the Dischargers, these wastes were likely discharged to waters of the state. However, the record does not indicate the location to which waste from pumping out of the corrugated metal pipe was directed. Prosecution Team failed to establish this fact in the record. Accordingly, the Regional Water Board does not impose liability for construction dewatering on this day.

On October 3, 2006, waste was discharged from dewatering associated with dredge activities on the gravel bar within 50 feet of the active channel just outside the steel plate cofferdam (AR, exhibit M-Tab 29), resulting in violation 84-86. This waste discharge violation was identified by Caltrans staff, Rich Thompson, who required the MCM to cease and modify this activity. Mr. Thompson documented the violation on the day of occurrence on the assistant structure representative's daily report. (Id.) More than six weeks into the Project activities, Caltrans continued to correct MCM and noted an apparent disregard for proper construction dewatering BMPs. (Id.) A \$10,000 liability is warranted for this event.

Three days later during an October 6, 2006, Regional Water Board compliance inspection, staff observed dewatering wastes being discharged into Isolated Pool B, resulting in violation 93-95. Staff documented the unauthorized discharge in a photo (AR, exhibits M-Tab 48 and J-4 at 60). Staff followed the inspection with a written Notice of Violation on October 30, 2006 (AR, exhibit M-Tab 48). Caltrans and MCM did not

dispute this violation but objected to fines under multiple permit terms (AR, exhibits T-2; H-2 tab 100). A \$10,000 liability is warranted for this event.

Violation 96-98 relies upon observations of the biological monitor documented for October 7, 2006, in a weekly biological monitoring report which states, "[d]ewatering of the footings on the gravel bar caused some concern...silty water was not being deposited in the approved area 70-feet away from the river [Isolated Pool B]" (AR, exhibit M-Tab 32). While Prosecution Team staff may have correctly assumed that dewatering wastes were deposited to an area within waters of the state, documentation of this activity is not established in the evidence provided. Therefore, civil liabilities will not be imposed for this event.

During a routine inspection on November 14, 2006, the assistant resident engineer observed dewatering wastes being discharged from the drilling operation draining onto the rock within the 100 year flood plain (AR, exhibit M-Tab 57), resulting in violation 147. Caltrans staff told MCM staff that this activity was in violation of the permits. (Id.) Additional notes from a second assistant resident engineer from November 14 indicate that as of mid-November, no specific plan was in place to control water [removed] from excavations (AR, exhibit M-Tab 58). Caltrans' photo contains a handwritten note stating; "Pumping H2O directly into gravel bar documents the activity" (AR, exhibit C- Appendix C). In addition to violating Condition 9, 12 and 17, this violation event occurred after the October 31st deadline for performing work in waters of the United States as specified in 401 Certification Condition 16. This shows disregard for permit requirements and proper BMPs associated with construction dewatering.

Caltrans argued that the evidence does not meet the burden of proof because the reference to permits in the daily engineering report is ambiguous and the evidence appears to reference an activity occurring on November 13th (AR, exhibit G-2). The evidence appears to document the discharge of dewatering wastes onto the gravel bar on both November 13 and 14, 2006. The Prosecution Team had already conceded a violation for November 13th and only charges for dewatering violations on the second day. This is a reasonable approach. A \$10,000 liability is warranted for this event.

On the March 7, 2007, daily inspection, Caltrans assistant resident engineer observed dewatering wastes being discharged under an Oregon Oak Tree (AR, exhibit M-Tab 75), resulting in violation 152. The brownish water flowed overland to the Eel River side-channel discoloring the waters. (Id.) Caltrans argued that the cited evidence indicates a small discharge of native waters should be permissible according to discussion with Regional Water Board staff (AR, exhibit G-2). However, alleged discussions with Regional Water Board staff and the context were not provided. No evidence in the record indicates or suggests that Regional Water Board staff authorized discharges of turbid water to the River in any amount. A \$10,000 liability is warranted for this event.

Prosecution Team proposed liability for 34 violations associated with 12 construction dewatering events totaling a liability of \$340,000. However, upon review of the evidence, alleged violations for events occurring on September 11, and October 7, 2006

(violations 55 and 96) are charged based upon evidence in the record that is either unclear or does not adequately support the violations. **Accordingly, the Regional Water Board finds 10 violation events established in the record for a total penalty of \$100,000.**

Category B Leaky Equipment

Prosecution Team proposed liability for 28 leaky equipment violations at \$150,000. As explained below, the evidence shows that there were numerous minor leaks and spills but most of these were cleaned up quickly. Monitors were vigilant in identifying problems and implementing controls, which is what is needed and required for effective permit implementation. Some of the events charged as violations do not warrant imposing fines as small discharges can be expected and were cleaned up. There were several chronic problems that the contractor either ignored or was too slow to correct. It is appropriate to assess liability when the evidence shows deliberate and/or chronic noncompliance with the rules designed to prevent and minimize these types of discharges.

Many of the alleged violations appear in multiples stemming from one event charged under two or more permit conditions, often Certification Conditions 9 and 13. Condition 9 of the water quality certification provided: "No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or concrete washings, oil or petroleum products, or other organic or earthen material from any construction or associated activity of whatever nature, other than that authorized by this permit, shall be allowed to enter into or be placed where it may be washed by rainfall into waters of the State." Condition 13 provided: "Fueling, lubrication, maintenance, storage and staging of vehicles and equipment shall be outside of waters of the United States and shall not result in a discharge or a threatened discharge to waters of the United States. At no time shall applicant use any vehicle or equipment, which leaks any substance that may impact water quality." (AR, exhibit A.) Leaky equipment is also addressed under the Storm Water Permit. BMP NS-10 provides that leaks be repaired immediately or remove the problem vehicle from the project. (AR, exhibit B-3; F-3 tab B.) It may be appropriate to charge separate violations under different permit terms for a single event in some cases; however, here we agree with Caltrans that "double-dipping" with multiple catch-all permit conditions is not appropriate.

Violations 6 and 7 address a leaking backhoe on the river bar on August 22, 2006. This same event is tagged for storm water fine violation 294. A Caltrans email dated August 25 noted that a discharge of oil went directly on the river bar, which is an environmentally sensitive area, and there were no BMPs in place to prevent the discharged oil from reaching the river bar. Under the SWPPP, the discharge should have been reported to the RE and cleaned up immediately. (AR, exhibit M-Tab 8.) Caltrans and MCM did not dispute this violation but objected to fines under multiple permit terms. (AR, exhibits G-2; T-2; H-2 tab 100.)

Violations 8 and 9 are based on one photograph taken August 29, 2006 showing stained gravel placed in buckets. It seems inappropriate to assess a fine when the only evidence cited shows that the spill was cleaned up. Violations 53 and 54 are based on one photograph taken September 9, 2006 captioned "Photo of oil from leaky equipment." (AR, exhibit J-4 at 15.) Violations 66 and 67 are solely supported by a photo taken on September 26, 2006, captioned "dirt road with many oil stains." (AR, exhibit J-4 at 35.) While these photographs technically could document some type of discharge, we do not find sufficient evidence to support a violation warranting the liability proposed. These photos, however, are relevant to show a continuing pattern that becomes more problematic as the project went on.

The URS December 2006 Final Report noted that "[s]ome equipment seemed to suffer from chronic leaks. Those were photo-documented and presented to Caltrans inspectors (Figure 42 [showing oil leaks on trestle from crane].) Most leaks were cleaned up promptly when pointed out by the monitors." (AR, exhibit M-Tab 71 at 6-24.) Violations 70 and 71 address oil leaks on the uncontained trestle deck on September 27, supported by photos dated September 27, 2006. (AR, exhibit J-4 at 45.) Violations 86 and 87 stem from the weekly biological monitoring report for October 2-7, 2006, which noted that "oil and diesel stains on the gravel bar were identified for cleanup." (AR, exhibit M-Tab 32 at 191.) Again, there is not sufficient evidence supporting the liability proposed for these types of events.

Violations 88 and 89 stem from an inspection report by Regional Water Board staff after visiting the site on October 6, 2006. That inspection resulted in a Notice of Violation (NOV) dated October 30, 2006. (AR, exhibit A-4.) On October 6, 2006, staff observed a backhoe on the gravel bar with excessive fluid leaks. Even though absorbent rags were stuffed into crevices to control the leakage, the equipment was not in adequate condition to be used at that location. Several photographs from that day show equipment on plastic tarps. The NOV requested that Caltrans implement adequate BMPs immediately and submit a report by November 15 describing actions taken to address all areas of non-compliance. (Id. at 3.) The record shows that Caltrans did take several actions in an effort to remedy the violations (AR, exhibit M-Tab 59) although it is not entirely clear whether the final result was acceptable.

Violations 107-110 stem from a weekly biological monitoring report for October 9-14, 2006. (AR, exhibit M-Tab 34.) On October 11, the monitor found an IR compressor leaking excessively and diapers and plastic sheets were employed. The monitor also noted a leak from the Manitowoc crane. Plastic sheeting catching oil and hydraulic leaks had split on several occasions. On October 12, the monitor noted that oil and diesel stains on the gravel bar were identified for cleanup. These actions are supported by photographs taken October 12, 2006. (AR, exhibit J-4 at 67-69.) Again, evidence showing minor leaks identified for clean-up do not support the imposition of the proposed penalties.

In contrast, violations 129 and 130 stem from a disturbing weekly biological monitoring report for October 23-28, 2006. On October 27, the monitor noted: "Oil leaks continue to occur without adequate cleanup or prevention with kiddie pools and diapers. Most of the heavy equipment used on this project is old and leak constantly. Overnight oil spots are often not prevented, and often just covered up with soil by apathetic workers the next morning, if at all. The Manitowoc [sic] crane on the false bridge, the LINK man lift on the gravel bar, the CAT 350 are the worst offenders. This has been brought to the attention of MCM on many occasions, with no satisfactory resolution." (AR, exhibit M-Tab 46 at 240-241.) Leaks were also documented by photos taken on October 27. (AR, exhibit J-4 at 104-106.)

Violations 134 and 135 stem from additional photos of leaky equipment taken on October 30, 2006. (AR, exhibit J-4 at 109-113.) Violations 139 and 140 are based on a photograph taken October 31, 2006, showing equipment leaking oil onto the ground. (AR, exhibit J-4 at 124.)

Violations 142 and 143 stem from a report of a site visit conducted by a Caltrans employee reviewing storm water BMPs on November 3. (AR, exhibit M-Tab 53.) He noted that "[t]he crane is being used on the trestle has leaking fluids. This has been noted many times earlier. The contractor has attached a piece of plastic under the crane, but the plastic catches both oil leaks and storm water. There is evidence on the trestle deck that oil that [sic] has leaked off the plastic. I observed commingled oil with water on the plastic during my site visit. I recommend that the crane be repaired immediately or discontinue its use." (Id. at 286.) As summarized in the December biological monitoring report, the Manitowoc crane, the man lift on the gravel bar, and the CAT 350 were "main offenders" for oil and hydraulic leaks, and were difficult to correct. Recommendations such as placing sheets of plastic under the vehicles did not work properly. Oil leaks improved over time but remained problematic throughout the monitoring period. The contractor was told to remove the Manitowoc crane from the trestle deck at night to avoid leaks into the river at the beginning of November. (AR, exhibit M-Tab 71 at 441.) The record is not clear whether the problem with the crane was remedied.

Even when assessing liability per violation event rather than per permit condition, it can still be problematic to levy a \$10,000 fine for each drop of oil that incidentally spills. It is unrealistic to expect a project of this magnitude to not have minor leaks and discharges, and use of administrative enforcement for these types of violations may not be appropriate, especially when the photographic evidence shows clean ups in progress.

However, there were several chronic problems that the contractor either ignored or was too slow to correct. An effective storm water program requires on-the-ground responsiveness and implementation. It is appropriate to assess liability when the evidence shows deliberate and/or chronic noncompliance with the rules designed to prevent and minimize these types of discharges. The record shows an unauthorized discharge occurring on the river bar without any BMPs on August 22, 2006. In addition,

sufficient evidence supports finding violations for leaky equipment on October 6, October 27, and November 3, 2006. Violation of Condition 13 is not dependent upon the showing of an actual discharge. The record shows a chronic problem with certain equipment and a somewhat recalcitrant contractor. The record shows unwillingness by the contractor to address the problems with the crane on the uncontained trestle deck, discussed under further the Storm Water Permit as well. **Accordingly, the Regional Water Board finds four violations for a total of \$25,000 liability for leaky equipment.**

Category C Slag Discharges

Prosecution Team recommended a penalty of \$50,000 for 15 slag discharge violations from welding and steel cutting. Again the Prosecution team alleged violations in pairs for one event violating Certification conditions 9 and 12. For violations 90 and 91, Prosecution Team cited the weekly biological monitoring report for October 2-7, in which the monitor identified molten slag discharges. "Molten slag was observed dripping into the river at 2:20pm, using no bucket to catch the excess. This activity was terminated, but not before noticeable amounts of slag, small sheets of rusty metal, welding rods, and other debris had accumulated in the river channel." (AR, exhibit M-Tab 32 at 191.) That same day, Regional Board staff inspected the site and issued a Notice of Violation identifying slag discharges not having proper BMPs, and strong language to fix immediately. (AR, exhibit M-Tab 48 at 251 ["Welding slag was observed to be falling directly into the water and the adjacent gravel bar"].) The problem continued on October 26, and monitors "have to tell them day after day" to not do that. (AR, exhibit M-Tab 45.) Welding continued to fall without mitigation by October 28. (AR, exhibit M-Tab 46 at 242.) Caltrans and MCM did not dispute most of the slag discharge violations but objected to fines under multiple permit terms and the amount of proposed liability. (AR, exhibits T-2; H-2 tab 100.) Slag discharges present a low impact to water quality; however, the record shows disregard by the contractor after being repeatedly reminded to implement BMPs for this activity. For this reason, **the Regional Water Board finds that a \$5,000 penalty is appropriate for the violation that occurred on October 6, 2006, and evidence of the continuing violations cited above.**

Category D Turbid Discharges to the River

The Prosecution Team alleged 20 violations for turbid discharges to the River, resulting in a proposed penalty of \$150,000. Violation 150 is discussed in Category H Individual Events below due to the unique circumstances involved with that event. Turbidity is a measure of water clarity and how much the material suspended in water decreases the passage of light through the water. Suspended materials can include soil particles (clay, silt, and sand), algae, plankton, microbes, and other substances. Higher turbidity can increase water temperatures because suspended particles absorb heat. This, in turn, reduces the concentration of dissolved oxygen (DO) because warm water holds less DO than cold water. Suspended materials can cause adverse biological effects, such as clogging fish gills, reducing resistance to disease in fish, lowering growth rates, and affecting egg and larval development. As suspended particles settle, they can blanket

the stream bottom, especially in slower waters, and smother fish eggs and benthic macroinvertebrates (<http://water.epa.gov/type/rsl/monitoring/vms55.cfm>). Condition 7 of the 401 Certification provided: "Adequate BMPs for sediment and turbidity control shall be implemented and in place prior to, during, and after construction in order to ensure that *no silt or sediment enters surface waters.*" (AR, exhibit A [emphasis added].) In order for a BMP to be adequate, no silt or sediment must enter surface water. Condition 9 prohibited the discharge of unauthorized waste to waters of the state. Condition 17 required that activities, BMPs and associated mitigation be conducted as described in the Permit and application. (AR, exhibit A.) The Regional Water Board will not double or triple the penalty pursuant to multiple permit conditions. Category D violations apply to unpermitted turbid discharges to surface water increasing surface water turbidity for which BMPs were inadequate and therefore the maximum liability of \$10,000 is applied to each discharge event.

On September 9, 2006, violation 51 was identified by the biological monitor, Carl Page (AR, exhibit M-Tab 19). Mr. Page estimated that 2.5 gallons of fine rock debris discharged directly into the flowing channel of the river. Further, Mr. Page indicated that this same activity occurred later that same day and again two days later. (Id.) Caltrans staff identified this activity as a concern based upon the photos of drilling debris in the river around a footing (AR, exhibit M-Tab 15). Caltrans argued that the cited evidence does not correspond with the photos presented (AR, exhibit G-2). However, the record shows that the engineering diary was generated in response to activities which were plainly documented in the biological monitor report for September 9 through 15 (AR, exhibit M-Tabs 15 and 19). Nevertheless, a single violation for this series of three events was charged. Based upon the discussion in the engineering diary (AR, exhibit M-Tab 15), discharges from this activity were apparently preventable as the contractor used a baffle to keep drilling debris contained and Caltrans' follow-up investigation on September 11, 2006 of the incident revealed no further discharges. A \$10,000 liability is warranted for this event.

On September 22, 2006, violation 64 was identified by the biological monitor, Bradford Norman (AR, exhibit M-Tab 25). Crossing of the wetted channel without implementing appropriate BMPs resulted in discharge of sediment causing a plume approximately 400 feet long which lasted about 50 minutes (AR, exhibit M-Tb 25 and Tab 62). The equipment crossing was planned several days in advance. Despite ample notice and time to prepare for implementation of appropriate BMPs (AR, exhibit M-Tab 23), four large pieces of equipment crossed the channel within a span of two minutes without adequate cleaning (AR, exhibit M-Tab 25). It is unclear whether the failure to clean the equipment, the speed of the crossings, or some combination of these factors resulted in the discharge. None-the-less, BMPs used for this activity were not adequate to comply with Condition 7. Caltrans correctly asserted that heavy equipment crossings were a permitted activity. The 401 Certification contemplates and permits river crossings provided that BMPs for sediment and turbidity control are implemented as non-compensatory mitigation (AR, exhibit G-2). However, the record shows a clear disregard for proper procedures identified for the protection of water quality and that these actions

resulted in the discharge of sediment to the stream in violation of permitted activities (AR, exhibit M-Tab 24). A \$10,000 liability is warranted for this event.

On September 29, 2006, violations 73 and 75 were identified by the Caltrans assistant resident engineer (AR, exhibit M-Tab 26). During the placement of concrete for bridge footings below the flowing channel, the contractor did not provide adequate seal for concrete containment. As a result, concrete escaped the corrugated metal pipe, causing a 150 foot long plume in the river. (Id.) A second discharge of turbidity occurred while the contractor stood on the sand bags outside the corrugated metal pipe trying to reattach a concrete tremie, which had apparently come apart during the pour. It is unclear whether the second plume was the result of concrete discharges or the disturbance of river bottom deposits. Caltrans argued that the plumes may have been composed of materials other than concrete (AR, exhibit G-2). While this may be true, no monitoring data was collected to offer conclusive evidence of that fact. Regardless, the violations cited are for a turbid discharge and therefore, do not rely upon the presence or absence of concrete in the documented plumes. BMPs were inadequate to prevent these discharges. A \$10,000 liability is warranted for each of these events. After careful review of the evidence, **the Regional Water Board finds support in the record for four events involving the unauthorized turbid discharge to the river, for a total penalty of \$40,000.**

Category E Insufficient Turbidity Measurements

The Prosecution Team alleged 17 turbidity measurement violations for a proposed liability of \$170,000. Condition 19 of the 401 Certification required that "...[f]ield turbidity measurements shall be collected whenever project activity causes turbidity in the South Fork Eel River to be increased above background concentrations in order to demonstrate compliance with receiving water limitations." Condition 19 further required that "[t]he frequency of turbidity monitoring shall be a minimum of every hour during periods of increased turbidity and shall continue until turbidity measurements demonstrate compliance with receiving water limitations...." (AR, exhibit A.)

Self-monitoring and reporting is a key component used by the Regional Water Board to protect human health and the environment. The purpose of self-monitoring is to ensure that the regulated entity, in this case Caltrans, implements permit provisions and abides by permit limitations protecting water quality in accordance with applicable statutes and regulations. An appropriate self-monitoring program allows the permittee to evaluate the effectiveness of environmental management practices already in place, detect and correct potential violations in a timely manner. Self-monitoring required by the 401 Certification places the responsibility to perform systematic, documented, and objective self-review of facility operations and practices related to meeting environmental compliance on Caltrans and its contractor, MCM. As in this situation, all self-monitoring programs rely upon the integrity and capability of the permittee to implement an adequate program.

Caltrans developed a visual scale used in conjunction with digital photographs to document turbidity (AR, exhibit M-Tab 60). "This scale consisted of four possible values, 0, 1, 2, or 3 indicating the degree of sediment pluming in the South Fork mainstem." (Id.) While necessary and applicable, visual monitoring is only the first step required under Condition 19 of the 401 Certification. Once a turbidity plume has been observed, Condition 19 requires the collection of turbidity measurements to demonstrate compliance with receiving water limitations, which are presented in the Basin Plan as numeric criteria. It is not possible to comply with a numeric standard using qualitative data such as a visual scale.

As explained below, the evidence shows that Dischargers did not take the responsibility of self-monitoring seriously. Monitoring equipment was frequently not available, in a state of disrepair or not used at all. Failure to have available and maintain proper monitoring equipment is chronic throughout the period of record. This failure to allocate time and resources ensuring quality receiving water monitoring indicates an apathetic attitude towards the very core of regulatory compliance and evaluation. The maximum civil liability of \$10,000 each is applied for 10 insufficient monitoring violations. Civil liability of \$5,000 is applied to three insufficient monitoring violations (violations 16, 27, and 34) because the turbidity plumes were visually recorded, of short duration, and less than 20 feet in length. A total civil liability of \$115,000 is applied for 13 insufficient monitoring violations.

On August 29 and August 30, 2006, a turbid plume 15 ft. long and four feet wide lasting for two hours was created from unpermitted dewatering activities (AR, exhibit M-Tab 14). Although the Caltrans submission to the Regional Water Board indicated that monitoring 100 feet downstream of the plumes indicated no increase over background turbidity, no documentation of sample collection or results from said monitoring was contained in the biological monitoring report for that period. (Id.) Turbidity monitoring is required to assess compliance with receiving water limitations at the point of discharge (ie. within the heart of the plume), not 100 feet downstream. Even if samples had been collected, the results of which were not reported, sampling downstream of the plume rather than within the impacted area violated Condition 19 self-monitoring requirements resulting in violations 16 and 27 (AR, exhibit M-Tabs 22, 23, and 62). Liability is assessed for these two events.

On September 1, 2006, Caltrans submitted a notice of discharge, attachment K (notice) for the discharge of sediment disturbed on the channel floor during the placement of gravel filled bags around the outside of a steel pipe (AR, exhibit M-Tab 10). The notice indicated that the plume was 20-feet in length lasting approximately two minutes and that the biologist confirmed background turbidity levels were not increased as measured from a point 100-feet downstream. (Id.) This statement is inconsistent with the biological monitor's summary report, which shows only an observation of 1 on the visual scale (AR, exhibit M-Tab 62). In either instance, visual monitoring alone and or monitoring outside of the plume to assess receiving water compliance both result in a violation (violation 34) of self-monitoring requirements. Evidentiary review of violation 36 appears

to refer to the same incident cited under violation 34. Therefore, liability is assessed for only one of these violations.

On September 6, 2006, violation 40 occurred when Caltrans and MCM failed to monitor a plume resulting from three vehicles crossing the south side of the River (AR, exhibit M-Tab 13, and Tab 62). The weekly biological monitoring report for September 5-8, 2006 and Caltrans' turbidity memo both report a plume on a qualitative scale of 3 lasting for at least 12 minutes and extending through a habitat zone previously noted to contain fish, frogs and snakes; (Id.) yet no quantitative turbidity measurements were taken to assess return to compliance with receiving water limitations. (Id.) Liability is assessed for this event.

On September 9, 2006, a turbidity plume was observed resulting from drilling debris around trestle foundation 4 Lt, but turbidity monitoring was not conducted, resulting in violation 52 (AR, exhibit M-Tab 15, Tab 19, and Tab 62; see also Category D-Turbidity Discharge violation 51). The evidence indicates that material was discharged to the River causing a visual turbidity plume as photo documented by the biological monitor. (AR, exhibits C-Appendix A; J-4 at 13-14). Violation 52 is assessed liability because a plume was observed, given a visual rating of 2, and not followed-up with quantitative turbidity measurements (AR, exhibit M-Tab 62).

On September 22, 2006, turbid discharges resulted from planned crossings of the wetted channel. (See Category D-Turbidity Discharge violation 64.) Appendix A to the URS report shows 14 field turbidity measurement data: eleven measurements were made using a HORIBA turbidimeter (results reported in NTU's) and three measurements were made using a LaMotte Secchi CUP (results reported in JTU's). These measurements were taken on September 22nd between 08:56 and 9:04 AM in the South Fork Mainstem (AR, exhibit M-Tab 62). The HORIBA turbidity measurement data are all flagged with an asterisk " * ", which indicates inaccurate readings. A visual rating of 3 was assigned to the plume which lasted for 50 minutes, yet only one of the 14 attempted measurements was collected during the crossing and none were collected after to document a return to background conditions in the receiving water. (Id.) This shows disregard for the importance of self-monitoring as a key component to implement protection of beneficial uses. Caltrans admitted to violation 65 occurring in its initial Caltrans Defense Matrix submitted with its Case in Chief (AR, exhibit G-2). Liability is assessed for this event.

On September 28, 2006, violation 72 occurred, for inadequate monitoring of a 100 foot long plume lasting approximately four hours resulting in NTU readings between 3-5 (Tab 60 and Tab 62). Chronologically, this is a better attempt by the Dischargers to monitor impacts to water quality from turbid discharges. However, Condition 19 of the 401 Certification required that monitoring continue, "until turbidity measurements demonstrate compliance with receiving water limitations." (AR, exhibit A.) Monitoring of the plume is documented between 15:10 and 15:15, showing that this four-hour long plume was monitored for a span of only five minutes. Further, a comparison of the final

measurement of 3 NTU to a background condition of 0 NTU does not show a return to compliance with receiving water limitations (IAR, exhibit M-Tab 62). Therefore, liability is assessed for this event.

On September 29, 2006, alleged violations 74 and 76 occurred when two distinct turbidity plumes were observed in the river. No turbidity measurements were taken to assess the second plume; however, turbidity measurements were taken to assess the turbidity resulting from the cementitious discharge associated with the first plume (AR, exhibit M-Tab 62). The first plume resulted when concrete escaped from the corrugated metal pipe leaving a 150 foot long plume lasting for over an hour in the river. The second plume occurred while trying to reattach the tremie and the contractor worked around the corrugated metal pipe by standing on the sandbags (AR, exhibit M-Tabs 26, 37 and 59; see also Category D-Turbidity Discharges violation 73 and Category F-Cementitious Discharges violation 78). Appendix A of the URS report contains the data collected by a biological monitor in the plume and above the plume, however perhaps due to the nature and source of the turbidity, the Horiba turbidimeter produced unreliable data which is reported as "999*" and "5*" (AR, exhibit M-Tab 62). The biological monitor collected secondary samples using the LaMotte Secchi CUP. Secchi CUP turbidity measurements were collected and reported above, within and post plume. (Id.) Caltrans admitted to these facts in its initial Defense Matrix (AR, exhibit G-2). The Regional Water Board finds that in this instance, the Dischargers made reasonable efforts to collect turbidity samples and no liability will be assessed for violation 74. Because no measurements were taken for the second plume, liabilities are assessed for this event.

On October 2, 2006, an equipment crossing caused a 100-foot long plume lasting for a period of three minutes. URS Report Appendix A shows two data at 3:24 and 3:25 PM, the turbidity measurements of 0 NTU before the crossing increased to 2 NTU during the equipment crossing (AR, exhibit M-Tab 62). These two data are insufficient to comply with self-monitoring requirements of Condition 19, which required a minimum of hourly field turbidity measurements until the measurements demonstrate compliance with receiving water limitations. Violation 82 is assessed liability for failure to monitor the plume until measurements show a return to background conditions.

On October 7, 2006, for over a four-hour period (from 11:50-15:37), site activities generated at least two plumes of sediment in the flowing channel during excavation for footing #3 (AR, exhibit M-Tab 31 and Tab 60). Caltrans' daily engineering report indicates several attempts to communicate with the contractor on that day, which met with opposition (AR, exhibit M-Tab 31 ["Mr. Ham walked by me and would not take the memo and asked me to read it to him 'you know I'm illiterate'..."]). Visual observations of the plume(s) resulted in visual ratings of 2-3 with background rated at zero indicating a qualitative increase of 200% to 300% in turbidity (AR, exhibit M-Tab 60). It is unclear from the record if the Horiba turbidimeter used to collect samples two days prior to this incident was functional or available on-site. (Id.) Nonetheless despite the obvious in-stream conditions, neither Caltrans nor MCM conducted or reported turbidity

measurements to document potential water quality impacts on October 7th resulting in violations 101 and 104. (Id.) Liabilities are assessed for these violation events.

On October 14, 2006, the removal of a sediment retaining fence caused a sediment plume 50 feet long and lasting for five minutes in the north side of the mainstem. No turbidity sample results were reported (AR, exhibit M-Tab 70 at 380). Violation 112 is assessed liability or failure to monitor turbid discharges.

On October 16, 2006, two weeks prior to the end of the allowable in-stream construction season, a new pattern of monitoring resulted in a total of sixty eight Horiba turbidimeter and sixty seven Secchi CUP sample results. These measurements were all collected within a 45 minute period (AR, exhibit M-Tab 62). A single eight foot long plume lasting 15 minutes with visual rating of 1 is reported for the same period of record. (Id.) Likewise, 13 Horiba turbidimeter, three Secchi disk and three Secchi CUP turbidity sample results are reported for October 20, 2006 during a 62 minute timeframe. (Id.) Despite the many turbidity samples collected, violation 115 is assessed because the Dischargers failed to monitor post plume conditions to document a return to background conditions.

On October 18, 2006, the biological monitor documented a 20 foot long, 6 foot wide plume lasting for 20 minutes as a result of cofferdam construction (Tab 42, pg. 218). A turbidity plume was observed, but no upstream background turbidity measurements were taken. Nonetheless, Secchi CUP samples were collected within the plume as well as 51 minutes later. These samples showed JTU of 1 within the plume and 0 JTU almost one hour later (AR, exhibit M-Tab 62). This event represents a technical violation (violation 119) of turbidity monitoring requirements, but will not be assessed liabilities because the Dischargers monitored in-plume and post plume conditions showing a return to compliance with receiving water limitations. (Id.)

October 20, 2006, Prosecution Team alleged that violation 122 occurred for insufficient turbidity measurements. Turbidity measurements appear to correlate to simultaneous measurements for pH, conductivity, salinity, and dissolved oxygen. (Id.) No visual observation of a plume was reported during the flurry of monitoring activity on this date. (Id.) Rather, the data suggest elevated pH in the River, consistent with cementitious discharges. Nonetheless, the record does not support a violation for insufficient turbidity measurements.

Prosecution Team proposed liability for 17 insufficient turbidity monitoring violations totaling a liability of \$170,000. However, upon review of the evidence, four of the violations, for events occurring on September 1, October 14, 18, and 20, 2006 (violations 36, 74, 119, and 122) were charged based upon evidence in the record that is either unclear or does not adequately support the violations. **The Regional Water Board finds support in the record for 13 violations of insufficient turbidity measurements, for a total penalty of \$115,000.**

Category F Cementitious Discharges

The Prosecution Team alleged 11 violations for improper disposal of cement waste, resulting in a proposed liability of \$110,000. Concrete and cementitious wastewaters are caustic to both human health and aquatic environments, and are considered to be corrosive with a pH typically around 12. The Basin Plan criteria for pH in the Eel River is a range from 6.5 to 8.5 pH units. Contact with wet (unhardened) concrete, or other cementitious materials can cause skin irritation and severe chemical burns or serious eye damage. The effects of high pH on aquatic organisms may include: death, damage to gills, eyes, and skin; and an inability to dispose of metabolic wastes.

For these reasons, the Regional Water Board generally does not permit any concrete waste discharges to land unless it is fully contained, such as in a lined Basin. (See e.g. AR, exhibit M-Tab 4.) Condition 9 of the 401 Certification prohibits the unauthorized discharge of cement or concrete washings. Condition 10 requires that “[a]ll materials used for cleaning concrete from tools and equipment, and any wastes generated by this activity, shall be adequately contained to prevent contact with soil and surface water and shall be disposed of properly.” Condition 17 requires that all activities be conducted in accordance with the Permit and application. (AR, exhibit A.)

In an e-mail communication dated January 6, 2006, Regional Water Board staff clarified the requirements related to concrete management and disposal (AR, exhibit M-Tab 4):

We are not permitting any waste [concrete] discharges to land (only lined basins), ground water or surface water for this project. All the 401s... issued to CDOT contain a condition that incorporates the following language.

No cement or concrete washings, or earthen material from any construction or associated activity of whatever nature, other than that authorized by this permit, shall be allowed to enter into or be placed where it may be washed by rainfall into waters of the State.

The 401 for Confusion Hill will contain the same version of the above requirement that is in all the 401s I've issued to CDOT in the past. Other than complete containment of all concrete waste and wash water in lined basins of the types shown on the submitted plans, CDOT has not proposed any other acceptable method for disposal, reuse, etc., of the wastewater. Therefore, the only authorized discharge of concrete is the concrete that will become the bridges.” (Id.)

Caltrans responded, “Thanks for the clarification. We understand the condition and...[a]ll concrete waste and wash water will be contained.” (Id.)

Notwithstanding, the record shows at least six separate events of improper disposal of cement waste, as discussed in more detail below. Because the intent of the Regional Water Board to prohibit concrete waste disposal at the site was clear, each event associated with unpermitted concrete disposal at the site is assigned the full liability of \$10,000 allowable under the statute.

Activities associated with violation 10-11 and 49-50 occurred on August 29 and September 8, 2006 respectively. The Caltrans letter of December 13, 2006, states that on August 29, "during placing a [sic] concrete in a corrugated steel pipe within the river, the water level rose and to prevent it from overflowing into the river, the water was pumped to the dewatering basin" (AR, exhibit M-Tab 73 at 469-479). Similarly, the acting structure representative's daily report dated September 7, 2006 states that, "the next day the water was tested for pH, treated with muriatic acid then pumped into the settlement basin. I estimate about 25 gal was pumped from the Lt CSP and perhaps 50 gal pumped from the Rt CSP based on the conc[rete] placed" (AR, exhibit M-Tab 12). There is no evidence to indicate that a properly contained dewatering basin was constructed proximate to the trestle footings for concrete management at the site. Rather the evidence indicates that the 'dewatering basin' used on August 29th and September 8th was in fact Isolated Pool B, waters of the United States, or another unlined dewatering location. Photo documentation shows the pipe from the concrete within the corrugated metal pipe discharging to the unlined basin, corroborating the forgoing evidence (AR, exhibit C-Appendix C; J-4 at 11-12). Therefore, the Regional Water Board finds sufficient basis to assess liabilities for these two events (AR, exhibit M-Tab 8).

Also on August 29, 2006, violation 12-14 occurred from improper disposal of waste and materials used for cleaning concrete tools and equipment. This event is documented by statements contained in the December 13 correspondence: "After placing the concrete seal course, the contractor cleaned the hopper, tremie and shovels in a footing excavation in the river bar." (AR, exhibit M-Tab 73 at 474.) A \$10,000 liability is warranted for this event.

Violations 58-59 are based upon photographic evidence (AR, exhibit C-Appendix C; J-4 at 16) in the final URS report labeled "cement waste pour to edge of Isolated Pool B." (AR, exhibit M-Tab 70 at 371.) MCM suggested that the photo shows natural sediments of the type prevalent in the river; however, the photo caption documented by the biological monitor clearly states that the waste was cement, thereby corroborating the photograph. The photo shows a discharge of cementitious waste directly on the gravel bar of the River within waters of the United States. (Id.) A \$10,000 liability is warranted for this event.

Violations 77 and 78 are based on a written description of an unauthorized discharge of cement on September 29, 2006. (AR, exhibit M-Tab 29.) Caltrans engineering diary report No. 46.395 describes the discharge of cement to the River from concrete footing seal pour indicating that "Sandbags were then placed on the outside perimeter only, no sandbags were placed on the inside of the CMP. CONTR began placing seal coarse concrete @ 1701 hrs.... CONTR began by placing the seal coarse in the #3 FTG. During the placement, it was apparent that the contractor did not have a good seal around the CMP. Concrete escaped from the CMP leaving a plume in the river approx. 150'-0 in length." (Id.) The written description of this violation is further supported by photo documentation of the event (AR, exhibit C-Appendix C; J-4 at 49-51). Caltrans

and MCM did not dispute this violation event but objected to fines under multiple permit terms (AR, exhibit T-2; H-2 tab 100). This alleged violation event overlaps with violations 73 and 75 discussed and assessed liability in Category D, therefore, no liability is assessed in this category.

The Regional Water Board will not increase the liability pursuant to multiple permit terms for a single event. **Evidence in the record shows at least five separate events of improper disposal of cement waste, for a total penalty of \$50,000.**

Category G Rubbish and Debris Discharges

Prosecution Team recommended a penalty of \$10,000 for nine days of rubbish and debris discharges. Since the submittal of its Case in Chief, Prosecution Team is no longer alleging violations on three of those days.

The Regional Water Board has similar concerns with the proposed liability for the rubbish and debris issues as it does for leaky equipment. Prosecution Team brought charges under condition 9 of the 401 Certification. While technically trash in the river could count as a discharge, it must be viewed in context. It is not reasonable to expect that each piece of trash could trigger a penalty, particularly when evidence shows that the trash was picked up. Condition 11 of the permit shows a reasonable approach for addressing trash and project materials. It provided: "When operations are complete, any excess material or debris shall be removed from the work area and disposed of properly. No rubbish shall be deposited within 150 feet of the high water mark of any stream." (AR, exhibit A.)

Violation 61 and 63 stem from a weekly biological monitor report (September 18-22) noting the discharge of trash blowing off the trestle deck, and no closed waste receptacles to contain the trash (AR, exhibit M-Tab 24 and 25). Materials cited included sawdust, cigarette butts, plastic and paper packaging and empty water bottles, welding wire, loose nails, rust scab from recycled I-beams, welding rods, oily rags and gloves, cut wood pieces, and welding slag. Violation 61 is supported by two photos dated September 18, 2006 showing a block of wood and other trash in the water. (AR, exhibit J-4 at 17-18.) Violation 63 is supported by several photos dated September 22, 2006 showing pieces of trash in the river. (Id. at 22-24.)

Violation 68 and 69 stem from the next weekly biological monitor report (September 26-30) noting some improvement with the trash issues identified the week before, however sawdust, nails, wood and large rust flakes remained on the trestle deck (AR, exhibit M-Tab 28). Photos dated September 26 and 27 show rust flakes in the water and some floating wood. (AR, exhibit J-4 at 36-40.)

Violation 123 and 124 stem from a weekly biological monitoring report (Oct. 23-28) that noted large rust flakes accumulated on the gravel bar on October 24, but also noting that these were cleaned up (AR, exhibit M-Tab 50). On the next day the biological monitor noted that wood scraps, saw dust, rust flakes and plastics were cleaned up, and

large rust flakes from the I-beams that could easily fall into the river were cleaned up. Additional trash was targeted to be cleaned up by the end of the month.

We do not find that these violations rise to the level of a \$10,000 fine. Nothing in the documents indicates that cleanup efforts were not performed in a timely manner, in fact, the documents demonstrate that trash issues were identified and addressed.

Accordingly, the Regional Water Board finds that liability is not warranted in this violation category. Containment on the trestle deck is addressed under the Leaky Equipment and Storm Water Permit subcategories.

Category H Individual Events

The Prosecution Team alleged five individual event violations that do not fit into any specific category, for a total of proposed liability of \$41,000. The Regional Water Board finds support for four of these violations. In addition, violation 150 is discussed and assigned liability in this section instead of in Category D because of the unique circumstances of that event. Liabilities totaling \$40,000 are warranted for these five violation events.

Violation 1 stems from a small hydraulic fluid spill on August 16, 2006. A line accidentally severed on the gravel bar and was cleaned up promptly. (AR, exhibit M-Tab 5.) Prosecution Team proposed a total of \$1,000 liability for the violation. This discharge was unauthorized; however, it was small and accidental. Moreover, the record shows that it was reported properly and promptly cleaned up, which demonstrates correct implementation of the permits. The Regional Water Board declines to impose the liability proposed by the Prosecution Team for this event.

Violation 5 stems from contractor fueling equipment on the gravel bar. A SWPPP compliance inspection was conducted on August 22, 2006 where fueling on the gravel bar was observed. The inspection report stated that James Hamm acknowledged that they were fueling a compressor, generator, man-lift and backhoe (AR, exhibit M-Tab 8). Condition 13 of the 401 Certification provided that fueling of equipment and vehicles shall be outside the waters of the US. (AR, exhibit A-1.) A liability of \$10,000 is warranted for the violation of this condition.

Violation 144 stems from reports of sediment discharges on November 3, 2006. Walt Dragaloski visited the project site during a rain event to review construction storm water BMPs and observed the following: "During construction of the work platform for the south bridge Pier 2, loose soil was pushed over the edge of the bank. The soil cascaded all the way to the toe of the slope, which is below the Ordinary High Water elevation." (AR, exhibit M-Tab 53.) Mr. Dragaloski recommended that the loose soil be removed. (Id.) It is unclear whether efforts were made to clean up the problem. Condition 9 of the water quality certification prohibited unauthorized discharges of construction waste to enter into or be placed where it may be washed by rainfall into waters of the State. (AR, exhibit A-1.) The permit did not authorize pushing loose soil over a bank the stream or areas around the stream. A liability of \$10,000 is warranted for this violation.

Violation 150 was identified in early 2007 by Caltrans assistant resident engineer (AR, exhibit M-Tab 26). Caltrans staff reported the discharge of turbid water to Regional Water Board staff on February 21, 2007, five days after evidence of the discharge was discovered. The notification indicated that evidence of fine gray silt was observed in a backflow channel and on the bank below the 100-year flood plain on the west side of the river at the south bridge location during a February 16, 2007, Department of Fish and Game (DFG) site inspection. After interviewing Caltrans staff and a representative of the contractor, Caltrans staff estimated that the discharge occurred six weeks prior to discovery on, or around January 5, 2007. The discharge was thought to have been caused by a rupture of an aerial line suspended over the River. As much as 170 gallons of turbid water discharged to the river. The discharge was not reported to Caltrans staff by the contractor (AR, exhibit M-Tab 74). This violation is particularly disturbing because it was neither discovered nor reported in a timely manner. Only as a result of a DFG inspection was this discharge of sediment identified, despite that fact that it was significant enough to display identifiable residue six weeks post event. (Id.) This violation relies upon the direct observations and reporting of Caltrans staff onsite and is therefore considered reliable. Further, Caltrans and MCM did not dispute this violation event. (AR, exhibit T-2; H-2 tab 100.) A liability of \$10,000 is warranted for this violation.

Violations 152-153 stem from sandblasting of rebar which occurred on two separate occasions on May 23, 2007. Walt Dragaloski notified the Regional Water Board of the unauthorized discharge, as required by the Storm Water Permit. (AR, exhibit M-Tab 77.) "The contractor used sand to sandblast rebar which was extruding from concrete on the North Bridge at Pier 3 without the use of appropriate BMPs, without Caltrans oversight, and in disregard of the direction provided by the Resident Engineer prior to the activity." (Id.) The sand and rebar was not contained and was deposited directly onto the gravel bar in violation of 401 Certification Condition 9. A liability of \$10,000 is warranted for these two violations. The Regional Water Board will not impose any additional liability under Condition 7 of the water quality certification for this event. **The Regional Water Board finds support in the record establishing five individual violation events for a total penalty of \$40,000.**

Category I Storm Water Permit Violations

The Prosecution Team alleged 141 violations under the Storm Water Permit for a proposed penalty of \$450,000. The Regional Water Board finds the proposed penalties excessive in light of the evidence presented and in considering the liabilities already assessed for specific 401 Certification condition violations. Activities regulated by the 401 Certification largely overlap activities subject to Storm Water Permit conditions so that many violations found under the Certification could also be construed as Storm Water Permit violations. For example, unauthorized discharges under 401 Certification Condition 9 were unauthorized because proper BMPs as required under the Storm Water Permit were not in place. Many of the 401 Certification violations were documented as a result of Storm Water Permit implementation. Just as the Regional

Water Board declines to impose additional penalties for multiple permit term violations, the Regional Water Board intends to avoid imposing additional penalties under multiple permits for identical or related discharge events. However, Storm Water Permit implementation is vital for adequate water quality protection, and the record contains troubling evidence about the Dischargers' ability and willingness to comply with the Program. For this reason, and based on the evidence presented, the Regional Water Board finds \$30,000 liability appropriate for Storm Water Permit violations related to the trestle deck that are independent from 401 Certification violation events.

Federal regulations require discharges of storm water associated with construction activity that disturbs five acres or more to obtain a National Pollutant Discharge Elimination System (NPDES) permit and to implement BMPs that achieve performance standards of Best Available Technology Economically Achievable (BAT) for toxic pollutants and Best Conventional Technology (BCT) for conventional pollutants. (AR, exhibit B-1 at 3.) The Caltrans Storm Water Permit requires Caltrans to implement an *effective* Storm Water Management Plan (SWMP) (Id. at 9 [emphasis added]) that covers construction by Caltrans and construction under contract for Caltrans. (Id. at 17.) Required program elements include: 1) review of the construction site plan; 2) implementation of structural and nonstructural BMPs; 3) site inspection and enforcement; and 4) education of construction site operators. (Id. at 17-18.)

A site-specific SWPPP is developed for each construction project and Caltrans is responsible for having an *effective* SWPPP. (Id. at 19 [emphasis added].) The SWMP is an integral and enforceable component of the storm water program. The SWMP refers to BMP manuals and Standard Specifications that contain details of BMP implementation. (AR, exhibit B-2.) The permit relies on BMP implementation rather than establishing "end of pipe" effluent limitations to reduce or prevent unauthorized pollutants in discharges. Therefore, a discharger's ability to implement, monitor, and adjust BMPs is crucial for this permitting program to be effective.

The procedures for the proper use, storage, and disposal of materials and equipment on temporary construction pads include providing watertight curbs or toe boards to contain spills and prevent materials, tools, and debris from leaving the platform. (AR, exhibit B-3 at 500-11, 12, 13, M-Tab 81, Construction Site BMP Manual, NS-13.) If a leaking line cannot be repaired, the equipment must be removed from over the water. (Id.) Also, NS-10 requires immediate repair of leaking equipment and removal from the project if leaks cannot be repaired. (Id.; AR, exhibit F-3 tab 8.)

Alleged violations 154-283 are based on alleged inadequate containment of the trestle deck for the entire construction season of 2006, a total of 130 days. The evidence cited by the Prosecution Team shows the containment problem beginning August 23-29, 2006. (AR, exhibit M-Tab 47.) At that time, Dischargers tried caulking the trestle deck but heavy equipment had split the seams. Meanwhile, leaky equipment, as well as construction materials and garbage, discharged or threatened to discharge directly to the river. Dischargers attempted to patch with pieces of plywood. By October 31, 2006,

"new wood decking used to complete the false bridge fitted together tightly and sealed the decking adequately. However, the old deck mats employed directly above the river are not as flat or well sealed, and have the potential to allow debris to enter the river." (AR, exhibit M-Tab 51.) Ultimately a fabric barrier was rolled over the deck. (AR, exhibit M-Tab 76.)

Assigning a maximum penalty each day for the entire construction season seems inappropriate in this case, as the evidence shows that efforts were made to improve containment on the trestle deck. While it is true that the permit requires BMPs to be effective, it is reasonable to allow for some amount of trial and error, particularly when documents show that discharged materials were subsequently removed and cleaned up. On the other hand, such an excessive amount effort should not be required by Caltrans and others before the contractor implemented corrective measures. A site visit was conducted by a Caltrans employee reviewing storm water BMPs on November 6. (See AR, exhibit M-Tab 53.) He notes that "[t]he crane is being used on the trestle has leaking fluids. This has been noted many times earlier. The contractor has attached a piece of plastic under the crane, but the plastic catches both oil leaks and storm water. There is evidence on the trestle deck that oil that [sic] has leaked off the plastic. I observed commingled oil with water on the plastic during my site visit. I recommend that the crane be repaired immediately or discontinue its use." (Id. at 286.) MCM was directed to remove the Manitowoc crane off the deck at night in early November. (AR, exhibit M-Tab 71 at 442.) On December 1st MCM did not want the crane to continuously be moved. ARED notes "Much time has been expended with MCM on SWPP issues. It is apparent that they have ignored many of the issues for containment on the trestle." (AR, exhibit M-Tab 61.)

The SWPPP requires containment of the trestle deck and control of excessive leaking equipment. If excessively leaking equipment cannot be repaired, it must be removed. (AR, exhibit M-Tab 81.) While efforts were made to contain the trestle deck, the record shows that the contractor did not adequately respond to specific direction regarding the Manitowoc crane for over a month. This violates section H(8)(b) of the Storm Water Permit for failure to implement BMPs NS-10 and NS-13 for an extended period of time. (AR, exhibits B-1; B-3.) **Accordingly, the Regional Water Board assesses a total penalty of \$30,000 for the non-containment of the trestle deck over an extended period of time.**

The remaining alleged storm water violations 288-294 are not supported by any specifically- referenced evidence. Tab 83 of Prosecution Team's documentary evidence (AR, exhibit M) contains 88 pages of random documents with no direction about where and why they are relevant to the charges. Prosecution Team has the burden of establishing the evidence in the record to support its case and has not done so adequately for the storm water refueling violations.

4. Conclusion

The following table summarizes the total penalties for violations:

Category	Liability
A. Construction Dewatering	\$100,000
B. Leaky Equipment	\$25,000
C. Slag Discharges	\$5,000
D. Turbid Discharges to the River	\$40,000
E. Insufficient Turbidity Measurements	\$115,000
F. Cementitious Discharges	\$50,000
G. Rubbish and Debris Discharges	\$0
H. Individual Events	\$40,000
I. Storm Water Permit	\$30,000
Total Penalty for Violations	\$405,000

Section IX of the State Water Board's 2002 "Water Quality Enforcement Policy" provides that the Regional Water Board may allow a discharger to satisfy some or all of the penalties in an ACL Order by funding a Supplemental Environmental Project (SEP). Some or all of the penalties assessed in this Order shall be eligible for a SEP if approved by the Executive Officer of the Regional Water Board.

The issuance of this Order is an enforcement action to protect the environment, and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, §§ 21000-21177) pursuant to title 14, California Code of Regulations, sections 15308 and 15321, subdivision (a)(2).

Any person affected by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with section 13320 of the Water Code and title 23, California Code of Regulations, section 2050. The petition must be received by the State Water Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

IT IS HEREBY ORDERED, pursuant to Water Code section 13385, that: Caltrans is assessed penalties of \$405,000 for violations and additional liability of \$70,182 for staff costs. Caltrans shall pay a total liability of \$475,182 in one of the following manners:

- a. Pay the entire liability (\$475,182) to the State Water Pollution Cleanup and Abatement Account (CAA) within 30 days of the date of this Order; or
- b. Within 30 days of the date of this Order: 1) Pay the minimum \$70,182 staff costs and any remaining liability not proposed for a SEP to the CAA; and 2) submit a

SEP proposal to the Executive Officer to suspend all or a portion of remaining liability.

Any SEP proposal shall comply with provisions of section IX of the State Water Board's 2002 "Water Quality Enforcement Policy." If the initially proposed SEP is not acceptable, the Executive Officer may allow Caltrans an additional 30 days to submit a new or revised proposal. If the Executive Officer does not approve any proposed SEP, Caltrans shall pay the suspended penalty in full within 30 days. All payments, including money not used for the SEP, must be payable to the CAA.

Certification

I, Catherine Kuhlman, 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, North Coast Region on March 15, 2012.

Original signed by

Catherine Kuhlman
Executive Officer

**Administrative Record Index - ACL Order No. R1-2012-0034
Confusion Hill Bypass Project**

A. 401 Cert and Related Documents

- A-1 401 Certification
- A-2 Amendment Request
- A-3 401 Cert Amendment
- A-4 October 30 Notice of Violation
- A-5 November 27 Notice of violation

B. Storm Water Permit and Related Documents

- B-1 Storm Water Permit
- B-2 SWMP
- B-3 SWPPP

C. Complaint

D. Post Complaint Correspondence

E. Hearing Notice and Procedures

F. Prosecution Team Submittals

- F-1 Case in Chief and Attachments
- F-2 Mona Dougherty Declaration
- F-3 Kason Grady Declaration
- F-4 Julie Macedo Declaration
- F-5 Rebuttal and Attachments
- F-6 Response and Declarations
- F-7 PT Response to Caltrans Evidentiary Objections March 3
- F-8 PT Response to Caltrans Evidentiary Objections March 18

G. Caltrans Submittals

- G-1 Case in Chief and Attachments
- G-2 Defense Matrix
- G-3 Rebuttal and Attachments
- G-4 Caltrans Response to PT Rebuttal
- G-5 Caltrans Responses to Pre-Hearing Instructions
- G-6 Cover Letter
- G-7 Contract with MCM
- G-8 Standard Specifications 1999

Administrative Record Index - ACL Order No. R1-2012-0034
Confusion Hill Bypass Project

- H. MCM Submittals**
 - H-1 Opening Brief
 - H-2 Opening Brief Attachments
 - H-3 Rebuttal and Attachments

- I. Advisory Team Pre-Hearing Instructions and Correspondence March 9**

- J. PT Response to AT March 9 Request**
 - J-1 Cover Letter Explaining Submission
 - J-2 A-2 Chart
 - J-3 A-3 Chart
 - J-4 Photo Documents

- K. Caltrans and MCM Response to Pre-Hearing Instructions**

- L. Caltrans Response to PT's Response**

- M. Prosecution Team Documentary Evidence Binder**

- N. Prosecution Team Violation Matrix**

- O. Conceded Violations Summaries**

- P. Evidentiary Rulings and Correspondence**

- Q. Caltrans - MCM Contract**

- R. Post Hearing Notice Correspondence**

- S. PT Hearing Exhibits**

- T. Caltrans Hearing Exhibits**
 - T-1 Caltrans Power Point Presentation
 - T-2 Caltrans Summary of Accepted Violations - Revised June 23, 2011

- U. MCM Hearing Exhibits**



Linda S. Adams
Acting Secretary for
Environmental Protection

California Regional Water Quality Control Board North Coast Region

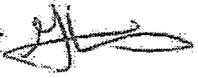
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Edmund G. Brown, Jr.
Governor

TO: Designated Parties

FROM: Geoffrey Hales, Regional Water Board Chair and Hearing Officer 

DATE: April 27, 2011

SUBJECT: EVIDENTIARY RULING ON HEARSAY OBJECTIONS TO BIOLOGICAL MONITORING REPORTS, ACL Complaint No. R1-2009-0095, Confusion Hill Bypass Project

Introduction

The Assistant Executive Officer of the North Coast Regional Water Quality Control Board (North Coast Regional Board) issued an Administrative Civil Liability (ACL) Complaint No. R1-2009-0095 pursuant to Water Code section 13323 to the California Department of Transportation (Caltrans), who contracted with MCM Construction, Inc. (MCM), alleging discharges of waste in violation of water quality certification and General Storm Water Permit. The North Coast Regional Board is scheduled to hear this matter during its June 2011, meeting. Parties have exchanged evidence, submitted legal argument, rebuttal, evidentiary objections and responses. This order addresses the evidentiary objections regarding biological monitoring reports (reports) offered as evidence by the Prosecution Team. CalTrans and MCM submit that the reports must be excluded because they are inadmissible hearsay and lack foundation. Prosecution Team responded asserting that the reports qualify under the official records exception to the hearsay rule. Prosecution Team has indicated that the reports make up a significant portion of the evidence supporting its case, and requests a ruling on this issue in advance of the hearing.

Explanation of Hearsay Evidence

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally not admissible in court because of its inherent unreliability. There are numerous exceptions to the hearsay rule based on the rationale that even though the statement is made out of court, it is still reliable.

Under the official records exemption, "evidence of a writing made as a record of an act, condition or event is [not hearsay] when offered to prove the act, condition, or event if:

- (a) The writing was made by and within the scope of duty of a public employee;
- (b) The writing was made at or near the time of the act, condition, or event; and
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.)

Under the business records exemption, "evidence of a writing made as a record of an act, condition or event is [not hearsay] when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

A court has broad discretion in determining whether a party has established foundational requirements for the admission of official records. (See *Lee v. Valverde* (2009) 178 Cal.App.4th 1069, 1075.) Similarly, a court has broad discretion in determining whether sufficient evidence is adduced to qualify as business records. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1011.)

Water Boards' Rules Governing Admission of Hearsay Evidence

Adjudicative proceedings conducted by the water boards must be in accordance with the provisions and rules of evidence set forth in Government Code section 11513. (Cal. Code Regs., tit. 23, §648.5.1.) This code section provides that this hearing need not be conducted according to technical rules relating to evidence and witnesses that would apply in a court of law. (Gov. Code, § 11513, subd.(c).) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons rely in conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. (Gov. Code, § 11513.) The Hearing Officer has flexibility to admit evidence and make determinations as to its credibility. Certain basic requirements must be met to constitute substantial evidence upon which the Regional Water Board can rely. Documents and other exhibits must have some foundational support to be properly admitted. (See *e.g. Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 350 [unauthenticated video tapes irrelevant to administrative proceeding].) However, there is no requirement under water board regulations or Chapter 4.5 of the Administrative Procedures Act that a proper trial-like foundation be made for exhibits and evidence.

Government Code section 11513 also states that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (Gov. Code, § 11513, subd. (d).)

Biological Monitoring Reports

The biological monitoring reports were prepared by a consulting firm (URS Corporation) hired by CalTrans to independently monitor and report project activities. This was pursuant to a requirement of the National Marine Fisheries Service (NMFS) permit, which provides: “A biologist shall monitor inchannel activities and performance of sediment control or detention devices for the purpose of identifying and reconciling any condition that could adversely affect salmonids or their habitat. (Prosecution Team Case in Chief, Attachment H to Declaration of Kason Grady at p. 4.) The NMFS permit further provides that CalTrans “shall retain a qualified biologist with expertise in the areas of anadromous salmonid biology....” (*Id.* at p.3.)

Under Task Order No. 34, CalTrans retained a professional biologist, whose tasks included, *inter alia*, the monitoring of “in-channel activities and performance of sediment control or detention devices for the purpose of identifying and reconciling any condition that could adversely affect salmonids or their habitat.” (See Task Order [Attachment to Supplemental Declaration of Terry Davis] at p. 2.)¹ The contract specifies that the biologist’s duties include monitoring stormwater utilizing Best Management Practices to see that appropriate erosion control measures are adequately placed and maintained. It then lists a number of water quality requirements that need to be met. (*Id.* at pp. 2-3.) The contract specifies that the biologist received copies of the permits from various government agencies, including the water quality certification from the Regional Water Board. (*Id.* at p. 5.) The contract contains a provision for meetings between CalTrans and consultant staff “as often as necessary to ensure they share a common understanding of the Task Order objectives.” (*Id.* at p. 3.)

The contract requires the Caltrans Contract Manager to approve statement of qualifications for key staff and new job classifications assigned to Task Order 34. (*Id.* at p.5.) It lists Carl Page and Bradford Norman as the biological monitors assigned to perform fish monitoring and report preparation (*Id.* at p. 12.).

¹ URS subcontracted with Ibis Environmental Inc. for the work described in Task Order 34. (See CalTrans Response to Prehearing Instructions, 4th Attachment, Work Order No. 050106-001 [URS-IBISreNMFSbiomonitor—34 WORKORDER.pdf].)

Analysis

Both the official records and business records exemptions to the hearsay rule require that the writing be made near the time of the event and that the source of information and method of preparation indicate trustworthiness. Site conditions were monitored by the biologist, and reports were made at or near the time of the conditions reported as evidenced by the dates of the photographs and reports. The trustworthiness of the reports is not in dispute. In fact, in its Case in Chief CalTrans cites the reports as evidence that project activities did not injure biological resources. (CT Opening Brief at 2 ["It is undisputed that independent biological monitors were on site virtually on a daily basis, monitoring habitat and the river itself; however, their voluminous reports reflect no observations of such injurious impacts"].) The reports were prepared as required by the state and federal endangered species acts and pursuant to the specific terms of a written contract. The biological monitors themselves were required to have certain professional credentials, including expertise in the areas of anadromous salmonid biology. The trustworthiness of the method of preparation of these reports is supported by the presumption that an official duty is regularly performed. (Evid. Code, § 664.) This presumption extends to the duty and exercise of due care of private individuals, particularly those with professional training. (See *Pasadena Research Laboratories v. U. S.* (9th Cir. 1948) 169 F.2d 375, 382 [citing *U. S. Bank v. Dandridge*, 25 U.S. 64, 69 and *Internat. Shoe Co. v. Federal Trade Com.*, 280 U.S. 291, 302 ("There is no reason to doubt that in so doing they exercised a judgment which was both honest and well informed; and if aid be needed to fortify their conclusion, it may be found in the familiar presumption of rightfulness which attaches to human conduct in general")].)

For the official records exemption, the writing must be made by and within the scope of duty of a public employee. Prosecution Team argues that the consultant must be an agent of CalTrans for the purpose of applying the exception. We think if anything, the biological monitor would be an agent for the regulatory agencies: NMFS, DFG and perhaps the Regional Water Board. The purpose of the NMFS permit requirement is to have an independent party verify project conditions. For this reason the reports might be even more reliable than if CalTrans or an agent of CalTrans were reporting.

For the business records exception, the writing must be made in the regular course of business, which is evident based on the NMFS permit requirement and the contract that details the biologist's duties. In a court of law, the business records exemption would also require a custodian or other qualified witness to testify to the record's identity and the mode of its preparation. In this case, even absent a custodian we find sufficient evidence to demonstrate the identity of these records and how they were prepared. The reports were prepared pursuant to the NMFS permit requirement and subsequent contract between CalTrans and the consultant. This provides sufficient foundational support for admission. There is no evidence indicating that they have been forged or

tampered with or could somehow not be what they are purported to be. The reports are evidence of the facts shown in them unless otherwise rebutted or contradicted. (See *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 605-07.)

While CalTrans objected to all the biological monitoring reports as hearsay, MCM submits only a specific and narrow objection that the biological monitor lacks the prerequisite knowledge of heavy equipment to be qualified to make observations. Knowledge of the function of heavy equipment is not necessary to monitor and report fluid leaks. Task Order No. 34 specifically provides that "Consultant Biologist and Resident Engineer will make sure that the contractor is taking necessary action to monitor and prevent fluid leaks in their equipment." (See Task Order No. 34 at 3.) MCM's argument appears to present a rebuttal to the evidence shown rather than a hearsay issue. Parties are allowed to dispute the content of the evidence.

Conclusion

The NMFS permit requirements, specific contract and work order, and the credentials of the hired consultant all corroborate the content of the reports. We find these reports sufficiently reliable and the evidence in the record supports the application of both official records and business records exceptions to the hearsay rule. Accordingly, the hearsay objections to the biological monitoring reports are overruled.

Please note that finding the evidence reliable and not hearsay does not necessarily mean that the evidence proves the violations as alleged in Prosecution Team's case.

110427_Evidentiary Ruling on Hearsay Objections to Biological Monitoring Reports



**California Regional Water Quality Control Board
North Coast Region
Geoffrey M. Hales, Chairman**



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Edmund G. Brown Jr.
Governor

TO: Designated Parties

FROM: Geoffrey Hales, Regional Water Board Chair and Hearing Officer

DATE: June 3, 2011

SUBJECT: **EVIDENTIARY RULING ON OBJECTIONS TO CALTRANS AND
MCM CORRESPONDENCE ON WATER QUALITY COMPLIANCE,
ACL Complaint No. R1-2009-0095, Confusion Hill Bypass Project**

Introduction

The Assistant Executive Officer of the North Coast Regional Water Quality Control Board (North Coast Regional Board) issued an Administrative Civil Liability (ACL) Complaint No. R1-2009-0095 pursuant to Water Code section 13323 to the California Department of Transportation (Caltrans), who contracted with MCM Construction, Inc. (MCM), alleging discharges of waste in violation of water quality certification and General Storm Water Permit. The North Coast Regional Board is scheduled to hear this matter on June 23, 2011. This order addresses evidentiary objections to exhibits containing correspondence between Caltrans and MCM on the subject of water quality compliance.

"New Evidence" Objections

MCM objects to a series of exhibits attached to the Declaration of Julie Macedo in the Prosecution Team's Case in Chief, specifically, Exhibits A through P, and R through Y. (MCM Evidentiary Objections, p.1, lines 20-23.) MCM's objection appears to be based in part on the premise that the deadline to submit evidence passed prior to the submittal date for Case in Chief. MCM cites to no statute, regulation, or agreement between the parties regarding close of discovery to support the position that Prosecution Team is barred from introducing additional evidence after the Complaint is issued or after the deposition of a person most knowledgeable. The issuance of a Complaint does not close the library of evidence and argument that can be submitted to support a claim. Parties are allowed time to engage in discovery after a Complaint issues, and may compile additional evidence up until the time a Case in Chief is submitted. Further, Parties are generally given additional time and ability to submit responsive evidence and argument within the scope of rebuttal. MCM's objection to "new" evidence submitted with the Prosecution Team's Case in Chief submittal is overruled.

Other objections to information submitted after the Case in Chief submittal were already addressed by the Advisory Team in a note dated March 31, 2011 [excluding Prosecution Team's "chart of similar conduct" from the record; overruling objections to new specific citations to materials already reference in the record¹]. Caltrans and MCM complained about inadequate time to evaluate new material before the hearing, (Caltrans Objections to New Evidence and New Bases for Violations at page 3); however, because the hearing was delayed, Parties have had ample time to review any additional specific citations.

Additional Hearsay Objections

MCM also objects to various declarations from Caltrans employees not listed as witnesses as inadmissible hearsay, referring again to statements, letters, events and quotes attached to the Declaration of Julie Macedo. (MCM Rebuttal, p.2, lines 3-4.) "The new letters and emails are rife with inadmissible hearsay, which a court would normally reject." (*Id.* at lines 20-21.) These exhibits contain various letters, emails and other documents between Caltrans and MCM and MCM's subcontractors regarding water quality compliance. Similarly, it appears that Caltrans objects to the introduction of declarations from MCM employees not listed as witnesses as inadmissible hearsay.² (Caltrans Response and Rebuttal, p.4, lines 19-27.) "Hearsay statements of contractor MCM cannot be used as the basis for charges against the Department." (*Id.*)

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally not admissible in court because of its inherent unreliability. If the declarant is not made available as a witness, a party will not have an opportunity to cross-examine them. There are numerous exceptions to the hearsay rule based on the rationale that even though the statement is

¹ California Code of Regulations, title 23, section 648.3 provides that referencing exhibits is allowed so long as they are in the possession of the Board and "the specific file folder or other exact location where it can be found is identified." (Cal. Code Regs., tit. 23, §648.3.)

² On May 2, 2011, Advisory Team sent a request for information as follows:

"MCM objects to various declarations from Caltrans employees not listed as witnesses as inadmissible hearsay. Similarly, Caltrans objects to the introduction of declarations from MCM employees not listed as witnesses as inadmissible hearsay. Advisory Team requests that, in no more than five (5) pages, Parties brief the issue of whether or not these statements substantially meet the party, adoptive and/or authorized admission exemptions to the hearsay rule."

This request relates to any remaining hearsay objections to Caltrans and MCM declarations, including the documents attached to the Declaration of Julie Macedo. It is not intended to address or revisit my previous ruling dated April 27, 2011, regarding Biological Monitoring Reports and other records.

made out of court, it is still reliable. For example, under the party admissions exception, "[e]vidence of a statement is not [hearsay] when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." (Evid. Code, § 1220.) The rationale for the party admission exception is that a party is not denied an opportunity to cross-examine when they can readily make themselves available to explain or deny their own statements.

Statements by Caltrans employees fall within the party admission exemption of the hearsay rule. Caltrans is the named Permittee and the named Discharger in the ACLC and is therefore a party to the action. If Caltrans wished to explain or deny purported admissions, it was free to add its own witnesses to testify at the hearing. However, statements by MCM are not party admissions because, while MCM is a designated party to this hearing, it is not named in the ACLC and therefore cannot really be considered a "party to the action" for purposes of the hearsay rule. MCM is, however, significantly associated with the "party to the action" as evidenced by its participation in the hearing and its contract provisions with Caltrans.

Section 5-1.21 of the contract between Caltrans and MCM provides: "The location of the project is within an area controlled by the Regional Water Quality Control Board. 401 Certification has been issued covering work to be performed under this contract. The Contractor shall be fully informed of rules, regulations, and conditions that may govern the Contractor's operations in the areas and shall conduct the work accordingly." Citing Caltrans' stormwater permits, Section 10-1.02 provides that "[t]he Contractor shall know and fully comply with applicable provisions of the Permits and all modifications thereto...." In addition, Section 7-1.12 (Indemnification and Insurance) of Caltrans Standard Specifications requires the Contractor to "observe and comply with all laws, ordinances, regulations, orders and decrees of bodies or tribunals having any jurisdiction or authority over the work." The Contractor must indemnify Caltrans against any claim or liability arising from or based on the violation of any law, ordinance, regulation, order or decree. (*Id.*)

Under the declarant liability exception to the hearsay rule, "[w]hen the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, ... evidence of a statement made by the declarant is admissible against the party as it would be offered against the declarant in an action involving that liability, obligation, duty or breach of duty." (Evid. Code, § 1224.) Evidence Code section 1224 recodified former Code of Civil Procedure section 1851, which allowed admission of a declarant's statements in an action where the liability of the party against whom the statements are offered is based on the declarant's breach of duty. The California Supreme Court found that "the statute contemplated those situations in which such an obligation or duty was an essential operative fact in establishing the cause of action or defense involved. Such situations may arise when

the declarant and the party have a privity of interest in the property involved or the party is one who has assumed responsibility for the obligations of the declarant....” (*Markley v. Beagle* (1967) 66 Cal.2d 951, 960 [internal citations omitted].)

Caltrans’ liability in this matter hinges in whole or part on the liability, obligation, and duty of MCM. MCM had a contractual obligation to Caltrans to implement stormwater controls and other permit conditions for the project, which is a duty and obligation. MCM must indemnify Caltrans for any permit violations, which is a liability for MCM. Accordingly, declarations by MCM fall within the hearsay exception provided under Evidence Code section 1224.

In addition, there is nothing inherently unreliable about the documents at issue. These documents were produced by the Parties themselves, often on formal letterhead. There is no evidence that they have been forged or tampered with.³ These communications occurred contemporaneously while events were occurring and not in preparation for this hearing. There is no evidence that Caltrans disputed the substantive content of MCM’s communications, which would also support the application of the authorized admission exception to the hearsay rule. Under the authorized admissions exception, “[e]vidence of a statement offered against a party is [not hearsay] if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.” (Evid. Code, § 1221.)

Finally, it is not clear whether these declarations are offered to actually prove a violation, or rather, to inform the Regional Water Board about the Dischargers’ general attitude toward permit compliance. If introduced for the latter purpose, the declarations are not hearsay because they are not introduced to prove the truth of the matters stated. Either way, they are not hearsay.

Government Code section 11513 provides that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (Gov. Code, § 11513, subd. (d).) Even if the Regional Water Board rests any finding solely on one of these documents, they are not hearsay because Caltrans statements qualify as party admissions and MCM statements fall within declarant liability exception to the hearsay rule.

The objection is overruled. The weight to give these items is for Board deliberation, and is not addressed in this ruling.

110603_Evidentiary Ruling on Objections to Caltrans and MCM Correspondence on Water Quality Compliance

³ Prosecution Team has noted that it added highlighter to certain documents.



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
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March 21, 2012

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Harrison, Temblador, Hungerford &
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P. O. Box 992750
Redding, CA 96001

Dear Parties:

Subject: Administrative Civil Liability Order No. R1-2012-0034, Confusion Hill Bypass Project

File: Confusion Hill Bypass, The California Department of Transportation, Highway 101 (Post Mile 98.9/ R 100.8)

On March 15, 2012, the Regional Water Board adopted Administrative Civil Liability Order No. R1-2012-0034, Confusion Hill Bypass Project for the California Department of Transportation (Enclosed). The Order incorporated response to comments and was

DAVID M. NOREN, CHAIR | CATHERINE KUHLMAN, EXECUTIVE OFFICER

5550 Skylane Blvd., Suite A, Santa Rosa, CA 95403 | www.waterboards.ca.gov/northcoast

adopted without changes from the tentative Order posted on the Regional Water Board website March 9, 2012.

Order No. R1-2012-0034 assesses penalties of \$405,000 for violations and additional liability of \$70,182 for staff costs. Caltrans shall pay a total liability of \$475,182 in one of the following manners:

- a. Pay the entire liability (\$475,182) to the State Water Pollution Cleanup and Abatement Account (CAA) no later than April 14, 2012; or
- b. No later than April 14, 2012: 1) submit for Executive Officer approval, a proposal to suspend all or a portion of the eligible liability to be allocated towards a supplemental environmental project (SEP); and 2) pay the minimum \$70,182 staff costs and any remaining liability not approved by the Executive Officer for the SEP to the CAA.

Any SEP proposal shall comply with provisions of section IX of the State Water Board's 2002 "Water Quality Enforcement Policy."

You may contact the Advisory Team if you have any questions regarding these procedures.

Sincerely,

Original signed by

Catherine Kuhlman
Executive Officer

120321_LMB_ConfusionHill_transmit

Certified-Return Receipt Requested

Enclosure: Administrative Civil Liability Order No. R1-2012-0034

cc: Electronic Copies sent to all Parties and Advisory Team Members

EXHIBIT B(1)



EXHIBIT B(2)

CHARGES SUPPORTED BY PHOTOGRAPHS ALONE

- Who has personal knowledge regarding what the photograph actually depicts, versus what the Prosecution Team surmises the photograph depicts?

- Who will testify with actual knowledge that the photo is a true and accurate depiction of

what the prosecution says it is?



EXAMPLE: CHARGE I.D. 8 & 9, "LEAKY EQUIPMENT: OIL LEAK ON GRAVEL BAR"



- BASIS OF VIOLATION: PHOTO "DEPICTS DISCHARGE OF AN APPARENT PETROLEUM-BASED FLUID THAT REQUIRED CLEANUP AND CONTAINMENT." (3-18-11, REVISED PROSECUTION CHART, EMPHASIS ADDED.)

- TESTIMONY OF "MOST KNOWLEDGEABLE" PT WITNESS WHEN ASKED HOW HE KNOWS IT IS PETROLEUM ON THE ROCKS:

"I DON'T KNOW EXACTLY WHAT IT IS"

TESTIMONY OF "MOST KNOWLEDGEABLE" WHEN ASKED WHERE ROCKS CAME FROM:

"I do not off the top of my head, no." ASKED IF HE KNOWS WHERE ROCKS WERE COLLECTED, AND WHERE PICTURE WAS TAKEN, BOTH ANSWERS: **"NO"**. (GRADY DEPOSITION, PP 82-83)

**Evidence upon which responsible persons are accustomed to
rely in the conduct of serious affairs?**

EXHIBIT C

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION**

Administrative Civil Liability Order No. R1-2012-0034

**In the Matter of
California Department of Transportation
Confusion Hill Bypass Project
Complaint No. R1-2009-0095
WDID No. 1B05153WNME**

Mendocino County

1. Executive Summary

This matter comes before the North Coast Regional Water Quality Control Board (Regional Water Board) from an Administrative Civil Liability Complaint R1-2009-0095 dated August 13, 2009 (Complaint) issued to the California Department of Transportation (Caltrans), who contracted with MCM Construction, Inc. (MCM) (hereafter collectively Dischargers). (See Administrative Record ("AR") exhibit C, Index attached to this Order as Attachment A.) The Complaint alleged violations of water quality permits for the Confusion Hill Bypass Project and proposed an administrative civil liability (ACL) in the amount of One Million Five Hundred Eleven Thousand Dollars (\$1,511,000) pursuant to Water Code section 13385. A hearing took place on June 23, 2011, in accordance with the Hearing Notice and Procedure (AR, exhibit E) and California Code of Regulations, title 23, sections 648-648.8. The Regional Water Board heard relevant evidence and testimony to decide whether to issue an ACL order assessing the proposed liability, a higher or lower amount, or to reject the proposed liability.

To help ensure the fairness and impartiality of the proceeding, the functions of those who acted in a prosecutorial role by presenting evidence for consideration by the Regional Water Board (Prosecution Team) were separated from those who advise to the Regional Water Board (Advisory Team). Members of the Prosecution Team were subject to the prohibition on ex parte communications with the members of the Regional Water Board or the Advisory Team, just like other Parties.

The Project, located in Mendocino County on Highway 101 approximately 18.5 miles south of Garberville and eight miles north of Leggett, involved relocating the highway from the east side of the South Fork Eel River (River) to the west side. (AR, exhibit H, tab 102.) This required construction of two new bridges and a new section of highway between the new bridges. The completed Project provides a reliable transportation route by permanently relocating the highway from an area subject to chronic landslides and closures.

The Project was subject to water quality certification pursuant to Clean Water Act, section 401 (401 Certification), which was issued February 16, 2006 and amended on April 18, 2006. (AR, exhibit A.) In addition, the Project was subject to the Caltrans

statewide stormwater permit (Storm Water Permit), issued by the State Water Resources Control Board (State Water Board), which regulates all storm water discharges from Caltrans' owned municipal separate storm sewer systems, maintenance facilities and construction activities. (AR, exhibit B.)

The Complaint as issued sought \$1,511,000 civil liability, which included staff costs of \$70,182. (AR, exhibit C.) During review of the evidence, Prosecution Team reduced the proposed penalty by \$222,500, but requested additional continuing staff costs of \$235,500 for administrative civil liability totaling \$1,524,000. (AR, exhibit F1 at 29.)

This Order summarizes Regional Water Board's decision and imposes penalties for violations based upon the evidence, relevant factors and conclusions presented herein. The Regional Water Board orders the following:

- Caltrans shall pay a penalty of ~~\$470,405,000~~ and staff costs of \$70,182, for a total liability of ~~\$540,475,182~~. A detailed explanation of the penalty costs is provided later in this Order.
- Of the total liability, \$70,182 (staff costs) must be remitted as payment to the State Cleanup and Abatement Account in accordance with Water Code section 13399.35.
- The remaining liability may either be remitted to the Cleanup and Abatement Account, or used for an environmental project which meets criteria contained in the 2002 Enforcement Policy.

The organization of this Order is as follows: Section 2 discusses several issues including the evidentiary rulings, multiple permit terms, ~~previously conceded violations~~, relevant factors analysis and staff costs. Section 3 presents a detailed discussion of penalties (grouped into nine categories).

2. Issues

2.1 Evidentiary Rulings

In preparation for the hearing, Parties exchanged evidence, submitted legal argument, rebuttal, evidentiary objections and responses. The evidence provided by the Prosecution Team to support alleged violations included email and memorandum from the Caltrans Storm Water Coordinator, daily engineering reports, biological monitoring reports (including photo documentation), notices of discharge, and Regional Water Board staff inspection observations. (AR, exhibits C & M.) Dischargers requested that much of this evidence be excluded as inadmissible hearsay and for lack of foundation. (AR, exhibits G & H.) In two evidentiary rulings prior to the hearing, these objections were overruled. The biological monitoring reports were found sufficiently reliable as they were prepared by qualified professionals hired specifically to document environmental

compliance and were prepared concurrently with the activities documented therein. Evidence in the record supported the application of both official records and business records exceptions to the hearsay rule. (Evidentiary Ruling on Hearsay Objections to Biological Monitoring Reports, April 27, 2011.) Dischargers also objected to exhibits containing correspondence between Caltrans and MCM on the subject of water quality compliance as inadmissible hearsay. The Hearing Officer found that statements by Caltrans employees fell within the party admission exemption of the hearsay rule and declarations by MCM fell within the declarant liability exception to the hearsay rule. (Evidentiary Ruling on Objections to Caltrans and MCM Correspondence on Water Quality Compliance, June 3, 2011.) These two rulings are incorporated by reference into this Order and attached as Attachment B and C. (See also AR, exhibit P.)

As explained in these rulings, certain basic requirements must be met to constitute substantial evidence upon which the Regional Water Board can rely. Documents and other exhibits must have some foundational support to be properly admitted; however, trial-like foundation is not required. The Prosecution Team originally submitted photographs that were not labeled or otherwise identified. Absent additional, corroborating evidence, random photographs could lack foundation sufficient for the Regional Water Board to rest a finding on. Examination of the entire record shows these photos in context with the biological monitoring reports that most often included captions and explanatory text. The Regional Water Board finds that generally the photographs with accompanying documents submitted by the Prosecution Team have sufficient foundation for the same reasons that they were found sufficiently reliable in the hearsay rulings. The biological monitoring reports were generated by professionals hired to perform environmental compliance monitoring pursuant to a specific contract and work order. Reports and communications from CalTrans and MCM also have sufficient foundation. These documents were produced by the Parties themselves, often during or near the time when events occurred. Any remaining objections to evidence for lack of foundation are overruled. All evidence was closely examined to determine whether such evidence supported the finding of a violation. In cases where it was questionable whether the elements of an alleged violation were met because the evidence was vague and/or ambiguous, a penalty was not assessed.

2.2 Violation of Multiple Permit Terms and Conditions

The Complaint alleged violations of both the 401 Certification as well as the Storm Water Permit. Prosecution Team provided evidence showing that the Dischargers violated multiple terms and conditions required for the Project. Many of the alleged violations stem from one event charged under two or more permit conditions. It may be appropriate in some cases to charge separate violations under different permit terms for a single event; however, in this Order liability is assessed for each violation event per day rather than each term or condition violated.

2.3 Previously Conceded Turbidity Violations

The Prosecution Team conceded several alleged turbid discharge violations based upon the incorrect assumption that in-stream sediment discharges could not be found to violate the 401 Certification because the sediment did not come from an outside source. (AR, exhibits F-1 at 27-28; F-3 at 3.) The record contains sufficient evidence to support civil liability for violations 15, 26, 99, and 102. "Discharge" means to release from confinement, custody, or care, to emit. (www.merriam-webster.com) Under 401 Certification Condition 9, unauthorized waste "shall not be allowed to enter into or be placed...into waters of the State." (AR, exhibit A.) Previously settled sediment that is disturbed and subsequently mobilized in the stream channel where it was not prior to the Project activity constitutes "entering" or "being placed" into waters of the state. As a result of various activities during the construction of the Project, the release of turbid water from dewatering activities, silt, river bottom sediment, and cementitious wastes resulted in physical and chemical alterations of the River, and without proper Best Management Practices (BMPs) in place, were not authorized and therefore violate Condition 9. These discharges violate conditions of the 401 Certification regardless of the source of origin, provided that a direct link is present between the project activities and an increase over background conditions. Each of these violations has been assessed \$10,000 liability commensurate with violations in the same category as described in the subsequent sections.

2.42.3 Relevant Factors

In determining the amount of any civil liability, pursuant to California Water Code section 13385, subdivision (e), the Regional Water Board shall take into account the nature, circumstances, extent, and gravity of the violation(s); whether the discharge is susceptible to cleanup, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, any 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. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. Relevant factors were considered in the assessment of liability for each alleged violation in the subcategories below, and are summarized more generally here.

The Project was constructed in the South Fork of the Eel River, which is listed as impaired for sediment pursuant to section 303(d) of the Clean Water Act. The River is an important salmon and steelhead spawning and rearing area. Excessive sediment is among the factors known to contribute to the documented decline of these species. In addition to salmonids, the River provides habitat for an abundance of species, including juvenile fish and frogs. Both juvenile fish and frogs were found in Isolated Pool B, the location where several unauthorized discharges occurred. Dischargers failed to comply with the requirements of both the 401 Certification and Storm Water Permit on a number of occasions for various activities. As a result, unpermitted discharges occurred within biologically sensitive areas of the River. On many occasions the discharges were not adequately monitored and therefore impacts to beneficial uses are difficult to assess. Violations for discharges to the live channel of the River, and for failure to monitor and report are assigned maximum liability per event for these reasons. Because cementitious discharges can be seriously harmful, those violation events are assigned maximum liability. In contrast, other discharges (i.e. slag) were not determined to be particularly harmful so liability is significantly reduced.

Caltrans is a public entity which represents the best interests of the people of California. Those interests include compliance with regulatory requirements and permits, including those which preserve and protect the beneficial uses of state waters. Caltrans has implemented many projects statewide and in the North Coast Region. Between March 2004 and January 2006 alone, Caltrans applied for and received 31 water quality certifications in the North Coast Region (Regional Board database). Caltrans has been regulated under its own statewide Storm Water Permit since 1999 and is fully aware of best management practices (BMPs), monitoring, and management techniques necessary to assure permit compliance and beneficial use protection. (AR, exhibit B.)

The record for this case contains evidence that is both encouraging and troubling. The Regional Water Board appreciates Caltrans taking its permitting obligations seriously as evidenced by numerous complaints and reminders to its contractors of what the rules are. Documents also show a mix of compliance and non-compliance by the contractors

for which Caltrans is responsible. Many discharges associated with rubbish, debris, and leaks from equipment were cleaned up. These cleanup activities have been taken into account and discussed in association with the applicable category below. Discharges associated with dewatering, cementitious wastes, and turbidity discharges were either not cleaned up or not susceptible to cleanup and therefore, reduction in civil liabilities for these discharge categories is not applicable.

While the Regional Water Board does not have precise information to calculate economic savings resulting from avoiding permit requirements, timely implementation of adequate BMPs and monitoring both come with considerable cost. The Confusion Hill Bypass Project cost over \$70 million. (AR, exhibit C at 19.) The civil liability assessed in this Order is small in comparison to the cost of the Project. Caltrans has not indicated an inability to pay or continue in business related to this administrative civil liability.

Caltrans has a history of water quality violations reflected in this Project and others. For the Confusion Hill Project, the Regional Water Board issued its first Notice of Violation on October 30, 2006 (AR, exhibit A-4), and a second on November 27, 2006 (AR, exhibit A-5). Many violations came to the Regional Water Board staff's attention through third party reports and photographs rather than reported directly to the Regional Water Board by Caltrans. This is problematic because water quality programs and permits rely heavily on self-monitoring and reporting requirements.

The Confusion Hill Bypass Project was successfully completed in 2009. The Regional Water Board recognizes that the Project was completed using less concrete, fewer River crossings and less access roads than originally projected; (AR, exhibit H-1 at 2-4) theoretically, this resulted in less overall impacts to water quality associated with the Project. Upon completion, the Project was awarded project of the year in 2009 from the California Transportation Association. (Id.) The magnitude of the Project and the difficulties associated with its construction were taken into account when reducing liabilities for leaky equipment and garbage violations. The Regional Water Board recognizes that a certain amount of leaks and trash can be expected for a project of this size. ~~Moreover, once completed, the Project effectively reduces a significant source of sediment that was discharged into the South Fork Eel historically from the failing portion of the road it replaced.~~

These considerations are incorporated into all aspects of this Order, including the decision to not find violations for multiple permit terms, and to not assess liability when the record shows that clean up timely occurred.

2.54 Staff Costs

Staff costs may be one of the "other relevant factors that justice may require" under Water Code section 13385, subdivision (e). (See 2002 Enforcement Policy at 40; see

also Cal. Code Regs., tit. 23, § 2910 [repealed and replaced by 2010 Enforcement Policy].) The Prosecution Team estimated its initial staff costs for this enforcement action at \$70,182. During review of the evidence, Prosecution Team reduced the total penalty sought by \$222,500, but requested continuing staff costs of \$235,500 for administrative civil liability totaling \$1,524,000. The Complaint did not include notice to Dischargers that staff costs would continue to accrue. Accordingly, the Regional Water Board will only require payment for noticed staff costs of \$70,182.

3. Discussion of Penalties

The following sub-sections provide a more detailed explanation of the penalties determined by the Regional Water Board.

3.1 Organization

The Complaint included 296 alleged violations of the 401 Certification and Storm Water Permit. The Prosecution Team grouped violations into the following nine categories:

- A. Construction Dewatering
- B. Leaky Equipment
- C. Slag Discharges
- D. Turbid Discharges to the River
- E. Insufficient Turbidity Measurements
- F. Cementitious Discharges
- G. Rubbish and Debris Discharges
- H. Individual Events
- I. Storm Water Permit

Violations were listed in each category chronologically by date. Caltrans submitted a "Defense Matrix" that followed the same sequencing. (AR, exhibit G-2.) Due to the large number of alleged violations, the Advisory Team requested that Prosecution Team specify a unique identifier for each alleged violation to provide a point of reference for the Parties and the Regional Water Board. (AR, exhibit I.) In response, the Prosecution Team assigned numbers in sequence to each alleged violation in accordance with the date of occurrence (violations 1 through 296), but not chronologically within each category. (AR, exhibit N.) As a result, the numbers do not track consecutively within each section. Also, because the Prosecution Team often alleged violations for multiple permit terms, violation numbers may be grouped in twos or threes for a given event. To provide context and to maintain consistency with the Complaint and the organizational structure that followed, this Order will address each alleged violation by category, using the identification number as provided in the violation matrix.

1 **Case Name: The State of California, Department of Transportation, Confusion Hill Bypass**
2 **Project**

3 **Case No.: R11-2009-0095**

4 **PROOF OF SERVICE**

5 I, the undersigned, say: I am, and was at all times herein mentioned, employed in the City
6 and County of San Francisco, over the age of 18 years and not a party to the within action or
7 proceedings; that my business address is 595 Market Street, Suite 1700, San Francisco, California
8 94105; that on the date set forth below, I served the within

9 **STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION'S PETITION
10 FOR REVIEW RE NORTH COAST REGIONAL WATER QUALITY CONTROL
11 BOARD ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R1-2012-0034
12 (CONFUSION HILL BYPASS PROJECT)**

13 on all parties identified below

14 (MAIL) by placing a true copy thereof enclosed in a sealed envelope for each person(s)
15 named below, addressed as set forth immediately below the respective name(s), with
16 postage thereon fully prepaid as first-class mail. I deposited the same in a mailing facility
17 regularly maintained by the United States Post Office for the mailing of letter(s) at my
18 above-stated place of business.

19 (PERSONAL SERVICE) by placing a true copy thereof enclosed in a sealed envelope, for
20 each person(s) named below, and caused such envelope to be delivered by hand to the
21 address(es) as set forth immediately below the respective name(s) pursuant to this Proof of
22 Service.

23 (FACSIMILE TRANSMITTAL) by faxing a true copy thereof as indicating by the
24 address(es), and facsimile telephone number(s) for each person(s) named below as set forth
25 immediately below the respective name(s) pursuant to this Proof of Service.

26 X (OVERNIGHT MAIL) by placing a true copy thereof enclosed in a sealed envelope and
27 deposited on the date set forth below, in a pickup facility regularly maintained for the
28 delivering of letters and packages located at my above-stated place of business.

 X (E-MAIL) by attaching a copy of the Word processing file in PDF format.

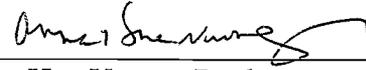
c/o Lisa Bernard
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2012, at San Francisco, California.



Anna Hue Vuong, Declarant

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
595 Market Street, Suite 1700, San Francisco, California 94105
Telephone: (415) 904-5700, Facsimile: (415) 904-2333

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