

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

STAFF REPORT

**IN RESPONSE TO
ASHBY USA, LLC'S RESPONSE TO ACL COMPLAINT NO. R9-2007-0064
DATED NOVEMBER 8, 2007**

On November 8, 2007, Ashby USA, LLC (Ashby) submitted its response to the allegations of violation contained in Administrative Civil Liability Complaint No. R9-2007-0064. Following is Regional Board staff's response to their arguments.

Allegation No. 1: Ashby disturbed Long Valley Wash from its natural condition for 202 days (between August 29, 2006 and February 20, 2007) in violation of Condition No. 8 of Water Quality Certification No. 01C-091.

Ashby requests that the number of days of violation for this allegation be reduced from 202 days to 93 days and that the per day assessment be reduced from \$550 per day to \$327 per day.

Ashby contends that two of the disturbances identified as violations in the Regional Board's November 16, 2006 inspection report, construction zone check dams upstream of bridge structures under construction, were in place solely to protect the structures, and not as storm water best management practices (BMPs). Consequently, Ashby argues they were in compliance with Condition No. 8 with regards to these violations from December 1, 2006 through March 19, 2007. Ashby also contends that Regional Board staff conceded to this idea at a September 6, 2007 meeting.

In Ashby's November 30, 2006 response to NOV R9-2006-035 (Appendix F of Technical Analysis), Ashby admits that the disturbances to Long Valley Wash documented in the Regional Board's August 29, 2006 inspection were not authorized by the Water Quality Certification and stated that they were removed by November 30, 2006. Ashby reaffirms its admission that they were in violation of the Water Quality Certification between August 29, 2006 and November 30, 2006 in its November 8, 2007 response to the Complaint.

Analysis: At the September 6, 2007 meeting, Regional Board staff did concede that it was possible that the construction zone check dams upstream of bridge structures could have been in place solely for protection of the construction project. These check dams were likely left in Long Valley Wash longer than necessary since Ashby promptly removed the check dams after the Regional Board cited them as a violation of the

Water Quality Certification during a meeting on February 27, 2007 which was based on a February 20, 2007 inspection. However, based on our discussion with Ashby on September 6, 2007, Regional Board staff is recommending that the number of days of violation for this allegation be reduced from 202 days to 93 days. Furthermore, a reduction in the per day assessment of liability is reasonable. As a result, Regional Board staff recommends that the civil liability for this violation be reduced from \$111,100 to \$30,411.

Allegation No. 2: Ashby failed to submit a mitigation plan for 569 days (Dec. 20, 2005 – July 12, 2007) in violation of Condition No. 1 of Minor Modification No. 2

Ashby requests that no assessment for the allegation be assessed.

Ashby claims that mitigation plans were submitted to the Regional Board on November 8, 2005, March 15, 2006, and October 24, 2006 but that the failure to gain approval of these mitigation plans is in part due to the regulatory agencies with jurisdiction over the project. Ashby further states that upon completion of the acquisition of additional off-site riparian habitat needed to achieve full regulatory approval, a new final revised mitigation plan can be drafted. In essence, Ashby admits that an adequate Final Revised Mitigation Plan has not been submitted as required by Minor Modification No. 2 of the Water Quality Certification.

Analysis: A meeting was held on February 27, 2007 with Ashby and all of the resource and regulatory agencies involved in the project. At that meeting, all of the agencies agreed to a conceptual plan proposed by Ashby; however, a revised mitigation plan relating to the conceptual plan has not been submitted.

Since the issuance of the Complaint, Ashby has provided Regional Board staff with limited information regarding the financial status of Ashby USA, LLC or of the Roripaugh Ranch development project. According to Ashby, a Communities Facilities District established by the City of Temecula Public Financing Authority has not released over \$1,000,000 in bond funds promised to Ashby for the installation of environmental mitigation. The City will not release the funds to Ashby until some time after June 1, 2008 due to an unreported bankruptcy by one of Ashby's investors that was not properly disclosed. In addition, Ashby has been unable to pay the debt service on the bonds due to an issue with unpaid income taxes. As a result of this bond issue and market declines, Ashby has gone into default with their primary lender, who may be contemplating foreclosure.

After an August 20, 2007 meeting, Regional Board staff provided Ashby with a list of the documentation that would be necessary for the Regional Board to perform an analysis of Ashby's ability to pay, if they were going to use that as a defense against the assessment of administrative civil liability. To date, Ashby has not provided the necessary information for an analysis to be performed. In addition, Ashby has not provided the Regional Board with adequate documentation to substantiate or further explain the project's financial situation. However, Ashby has indicated that it is diligently

attempting to seek the necessary financing to complete the development's immediate construction priorities, but would likely delay building any of the roughly 2,000 homes planned to be built until such time as the housing market recovers from its current downward trend.

Due to its dire financial situation, Ashby has indicated that they are not conducting any construction activities on the site other than stormwater BMP installation, which their lender has agreed to fund.

While some of the initial delays in submitting a final mitigation plan may be contributed to difficulties in gaining consensus among the regulatory agencies, the difficulties began after Ashby's initial mitigation plan was deemed no longer valid due to substantial change in the construction project to come into compliance with City of Temecula requirements, after impacts to Santa Gertrudis Creek and Long Valley Wash had already begun. It is suspected that prior to the last draft submittal on October 24, 2006, Ashby was aware that it was running out of money. Certainly, Ashby had run out of money to comply with the Water Quality Certification requirements around February 2007, because a new revised draft mitigation plan was never submitted after agency concurrence was obtained.

Ashby has not submitted the final revised mitigation plan that was due on December 20, 2005. The revised mitigation plan was due because Ashby was required to amend its construction project because it was not in compliance with the City of Temecula requirements. This delay had nothing to do with the resource agencies involved in approving the mitigation plan. In addition, Ashby indicates it has run out of funds to pay its consultants to produce the agreed upon plan and has indicated that it will not provide a plan until up to 120 days after funding from the Community Facilities District is distributed. This 120 day delay indicates that consultants have done very little, if any work on the revised plan to date.

Regional Board staff recommends no modification to the proposed liability of \$56,900 for this violation. However, this is an ongoing violation and the Regional Board could impose additional liability through the December 12, 2007 hearing date.

Allegation No. 3: Ashby failed to implement mitigation for 265 days (October 20, 2006 – July 12, 2007) in violation of Condition No. 2 of Minor Modification No. 2.

Ashby requests that no assessment for the allegation be assessed.

Ashby contends that if they had constructed mitigation that was initially acceptable by the Regional Board, it would have been in noncompliance with other resource and regulatory agencies. Ashby also contends that because Regional Board staff continued to work with the multi-agency team to assist in the drafting of a revised mitigation plan that it had "authorization to delay the implementation".

Analysis:

What Ashby fails to acknowledge is that, by design, approval of mitigation plans are by a multi-agency team consisting of resource, regulatory, and environmental agencies, of which the Regional Board is a member. In this case, Ashby notified the multi-agency team that its original mitigation plan could no longer be implemented because the construction project was not in compliance with City of Temecula requirements. Had construction not already begun, this change would not have resulted in a violation because impacts to waters of the United States would not have occurred yet, and therefore the requirement to mitigate within one year would not have applied. If Ashby had obtained approval from the City of Temecula before starting construction, as it should have, neither this violation nor the failure to submit a revised draft plan would have occurred.

In addition, Ashby's characterization that because Regional Board staff was working with the other agencies involved to get consensus on a revised mitigation plan it had "authorization to delay the implementation" is not accurate and has no merit whatsoever. Not only does Regional Board staff not have the authority to verbally amend the Water Quality Certification requirements, Ashby was notified by the Regional Board's August 29, 2006 inspection report of the potential for violation for failing to implement mitigation and by Notice of Violation No. R9-2006-0135 that they were in violation for failing to meet the October 20, 2006 deadline.

Currently, mitigation for the impacts to waters of the United States has not been implemented, is over one year late, and is currently an ongoing violation. Due to Ashby's financial problems and the lack of an approved plan, it is not certain if Ashby has or will have the financial means to complete the mitigation required by the impacts to waters of the United States as reflected in the Water Quality Certification.

Regional Board staff recommends no modification to the proposed liability of \$331,250 for this violation. However, this is an ongoing violation and the Regional Board could impose additional liability through the December 12, 2007 hearing date.

Allegation No. 4: Ashby had an inadequately designed detention basin for 94 days (August 29, 2006 – November 30, 2006) in violation of Condition No. 16 of Water Quality Certification No. 01C-091.

Ashby requests that the number of days of violation for this allegation be reduced from 94 days to 32 days.

Ashby contends that because construction has not been completed they are not required by install post-construction BMPs required by the Water Quality Certification. Instead, Ashby claims it is maintaining the basin with year round construction BMPs approved by the City of Temecula.

In its November 30, 2006 response to Notice of Violation No. R9-2006-0135, Ashby indicated they contracted with an engineering firm to evaluate the placement of a permanent standpipe in the basin to temporarily detain the 2 and 10 year storm events and prevent any negative down stream impacts. More recently, in its November 8, 2007 response to the Complaint, Ashby indicated that due to the project's current financial constraints they must maintain the basin with construction BMPs until financing becomes available to install a permanent standpipe system.

Analysis: This basin was the source of multiple sediment discharges to downstream residences during 2003 for which administrative civil liability was imposed by the Regional Board. The Regional Board's inspection in August 2006 was in part to respond to complaints about sediment discharges from this basin to downstream residences. While many roads have been constructed at the site, acre upon acre of bare dirt still remains for which erosion and sediment control must be installed. This basin is the final defense for discharges of sediment and increased volume of flows from the site. While Ashby contends that the basin was being maintained by BMPs approved by the City, these temporary BMPs installed in the basin only potentially provide some relief in the interim. A permanent solution needs to be constructed to provide adequate detention to ensure that future sediment discharges to downstream residences would be eliminated in the event of a substantial rainfall event. In addition, even in the interim, the BMPs that were installed during Regional Board staff inspection on September 6, 2007 were not adequate from a construction or post construction BMP standpoint.

During a meeting with Ashby at the construction site on September 6, 2007, the Regional Board again discussed its concerns with the basin. At that time, Ashby indicated that adequate BMPs were in place. Immediately after the meeting, Regional Board staff observed that there were no additional BMPs in the basin and discussed our concerns with the City of Temecula inspectors that also attended the meeting. The City inspectors agreed that the flow through design was not acceptable and the BMPs in the basin were inadequate and verbally instructed Ashby to raise the level of the outlet pipe to accommodate settling before discharge. During a subsequent inspection on November 20, 2007 the City of Temecula confirmed that a temporary standpipe structure was installed and appeared adequate until a permanent structure could be constructed. It appears that if the correct BMPs were installed in the basin as the City stated on September 30, 2006, they had been removed and replaced with inadequate BMPs prior to September 6, 2007.

Because Ashby received information from the City of Temecula on September 30, 2006 that the basin was adequately equipped with BMPs, Regional Board staff recommends that the number of days of violation be reduced from 94 days to 32 days which results in a reduction of the proposed liability from \$47,000 to \$16,000. It should be noted, however, that an additional violation at this basin was observed by the Regional Board on September 6, 2007.

Conclusion

Based on analysis of the record, Regional Board staff recommends amending the civil liability proposed in the Complaint and the assessment of civil liability in the amount of \$434,561.