

July 19, 2012

Habte Kifle
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612
hkifle@waterboards.ca.gov
Submitted via electronic mail

Re: Comments on the Proposed Settlement and Stipulated Order for Administrative Civil Liability against the California Department of Transportation

Dear Mr. Kifle:

Thank you for the opportunity to comment on the proposed Settlement Agreement and Stipulated Order (“Settlement”) for administrative civil liability against the California Department of Transportation (“Caltrans”) for its unauthorized May 25, 2011 discharge to Bear Gulch Creek. San Francisco Baykeeper (“Baykeeper”), a 501(c)(3) nonprofit organization with the mission of protecting and enhancing the San Francisco Bay for the health of its ecosystems and surrounding communities, submits these comments on behalf of our 2,300 members. Baykeeper believes that the \$13,200 fine for discharging 2,346 gallons of chlorinated water into Bear Gulch Creek, which resulted in a notable fish kill, is not an adequate penalty for such dramatic water quality impacts. Please consider our following comments to ensure that the Caltrans Settlement imposes a penalty that accurately reflects the scope of the harm caused by this discharge event.

1. The Proposed Settlement Underestimates the Harm to Beneficial Uses.

The State Water Board Water Quality Enforcement Policy¹ (“Enforcement Policy”) mandates the Regional Board to begin its calculations for discharge violations by determining the actual or threatened impact to beneficial uses (see Step 1, Factor 1), but the Regional Board did not conduct a full assessment of the harm caused by the discharge at issue. The Regional Board concluded that the Caltrans discharge resulted in “above moderate” harm to beneficial uses because a third party reported a fish kill in Bear Gulch Creek in an area immediately adjacent to and downstream from the discharge point during the days following the spill. Proposed Settlement, Exhibit A, Page 2. This conclusion is reasonable, but it does not paint the full picture of the May 24, 2011 spill – the spill also eroded the creek bank, an occurrence that was not considered in the Board’s calculations. Proposed Settlement, Section II: Recital 3, Page 1. San Francisquito Creek, the waterway formed after Bear Gulch Creek merges with Corte Madera Creek, is listed as impaired by sedimentation under section 303(d) of the Clean Water

¹ State Water Resources Control Board, Water Quality Enforcement Policy (May 20, 2010), *available at* http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

Act,² and the Enforcement Policy requires the Regional Board to adjust liability for reasons such as existing impairment (see Settlement Considerations, Number 5). Also, the Regional Board should have factored the bank erosion into its penalty calculation because Bear Gulch Creek has a wide range of beneficial uses that are harmed by excessive sediment in the water column.³ All of these circumstances show that the discharge caused a “high threat to beneficial uses,” which warrants labeling the impact to beneficial uses as “major” (Level 5), rather than “above moderate” (Level 4). Enforcement Policy, Page 12. This would result in Caltrans being liable for a higher and more appropriate penalty.

In addition, the Regional Board does not provide any evidence or analysis of the scale or duration of the fish kill, making it difficult to fully grasp the harm to beneficial uses. Instead, the proposed Settlement should include a full discussion of the fish kill that estimates how many fish were impacted by the discharge event, which species were impacted, and how long the Creek was impaired by the presence of chlorinated water.

2. The Proposed Settlement is Based on an Inaccurate Assessment of the Discharge’s Characteristics.

After assessing harm to beneficial uses, the Enforcement Policy requires the Regional Board to consider the physical, chemical, biological, or thermal characteristics of the discharge (see Step 1, Factor 2). Under this factor, the Regional Board concluded that the Caltrans discharge posed only a “moderate” (Level 2) risk to beneficial uses without an accurate and complete analysis of the characteristics of the discharge. According to the proposed Settlement, the discharge contained up to 2.2 mg/L of chlorine or chloramine, where the U.S. Environmental Protection Agency (“EPA”) water quality standard for chlorine is 0.019 mg/L to prevent lethal effects to aquatic life. Exhibit A, Page 2. Since the level of chlorine in the discharge far exceeded the EPA’s water quality standard and the discharge did, in fact, result in lethal effects, the discharged material posed more than a mere moderate risk to beneficial uses. The proposed Settlement should be revised to calculate a penalty that is based on a “significant” (Level 4), or at least an “above-moderate” (Level 3) risk, due to the physical characteristics of the discharge at issue.

² CWA Section 303(d) List of Water Quality Limited Segments Requiring TMDLs (2006), available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/planningtmdls/basinplan/web/tab/tab_2-01.pdf.

³ Bear Gulch Creek is designated as having the following beneficial uses: agricultural supply, municipal and domestic supply, freshwater replenishment, commercial and sport fishing, shellfish harvesting, cold freshwater habitat, estuarine habitat, marine habitat, fish migration, preservation of rare and endangered species, fish spawning, warm freshwater habitat, wildlife habitat, water contact recreation, noncontact water recreation, navigation. Water Quality Control Plan for the San Francisco Bay Basin (“Basin Plan”), Table 2-1, available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/planningtmdls/basinplan/web/tab/tab_2-01.pdf.

3. The Proposed Settlement Should Use Higher Adjustment Factors that Accurately Reflect Caltrans's Conduct.

The Regional Board should use higher adjustment factors to ensure that the penalty is appropriate, considering Caltrans's faulty conduct before and after the discharge violation. First, the proposed Settlement clearly indicates that the incident would have been completely avoided if Caltrans exercised more caution during its construction activities. Exhibit A, Page 3. Second, the proposed Settlement also indicates that Caltrans failed to directly notify the Regional Board or initiate any response after the discharge occurred, both of which could have significantly reduced the impacts of the discharge. Exhibit A, Page 3. Since these facts show that Caltrans did not exercise its best judgment before and after the spill, the Board should impose the maximum adjustment multiplier, 1.5, for both of these factors. Enforcement Policy, Table 4, Page 17.

4. The Penalty Should Be Raised to \$23,460.

As noted in the proposed Settlement, the Water Code permits the Regional Board to impose a penalty of up to \$23,460 for this administrative civil liability. The Enforcement Policy requires the Board to consider the violator's ability to pay and continue its business (Step 6) along with other factors as justice may require (Step 7) when determining the appropriate penalty. Caltrans is one of the most significant dischargers in the state of California – it is a statewide agency with an annual budget of approximately 14 billion dollars that manages the entire state highway system and all of the pollutants resulting from this system. Considering the huge scope of Caltrans's operations, a higher penalty would serve as a deterrent to other dischargers in the state. Even more, this maximum penalty is just a small fraction of the agency's annual budget, showing its ability to pay. For all of these reasons and the reasons discussed in comments 1 through 3, the Regional Board should raise the penalty in the proposed Settlement to \$23,460.

Thank you for your careful consideration of Baykeeper's comments. If you have any questions, please feel free to contact Abigail Blodgett at (415) 856-0444, extension 109.

Sincerely,



Abigail Blodgett
Associate Attorney, San Francisco Baykeeper