

**California Regional Water Quality Control Board
San Francisco Bay Region**

**Prosecution Staff's Response to Written Comments
Settlement Agreement and Stipulation of Entry of Administrative Civil Liability
Proposed Order R2-2011-0054**

On December 2, 2011, Regional Water Board prosecution staff ("Prosecution Staff") opened the public comment period for a settlement agreement reached with the City of Napa and a proposed Stipulation and Entry of Administrative Civil Liability Order No. R2-2011-0054 ("Proposed Order") for alleged violations associated with the Trancas Crossing Park project ("Project"). The Proposed Order, if adopted by the Regional Water Board, would impose an administrative civil liability against the City of Napa (City) in the amount of \$20,000 for alleged failure to comply with the Statewide Construction Storm Water General Permit (General Permit) and the Clean Water Act Section 401 Water Quality Certification (401 Certification) issued for the Project.

The public comment period ended January 3, 2012, and staff received seven different submittals from the following Napa residents, "concerned citizens," and organization:

- Justin Anthony, Environmental Consultant – December 16, 2011
- Concerned Citizens (signatures illegible), residents – December 28, 2011
- Monique Brown, resident – December 29, 2011
- Jeff Moore, Uno Fratelli, LLC – December 30, 2011
- Mike Cooper, resident – January 2, 2012
- Steve Brown, resident – undated
- Stace Stanley, resident – undated, received January 3, 2011

All of the comments received contained similar concerns and/or objections to the Proposed Order, and a few of the comments included new information and evidence requiring further consideration by Prosecution Staff. To evaluate the new information, Prosecution Staff requested additional information from the City, including contract agreements and written communications, and scheduled a meeting on March 23, 2012, to tour the Project site and discuss issues raised with representatives of the City (pursuant to paragraphs 13 and 14 of the settlement agreement).

The City responded to all Prosecution Staff requests for more information, and it provided sufficient information and evidence for Prosecution Staff to further evaluate issues brought up during the public comment period including the following:

- City operations relative to its permit requirements;
- Day-by-day activities (via photographs and communications) associated with rain events and implementation of best management practices (BMPs); and
- Economic benefit associated with Project funding and scheduling.

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After critically reviewing all the additional information obtained during and following the public comment period, Prosecution Staff is confident that the proposed settlement is reasonable, fair, and just. Prosecution Staff summarizes its conclusions in the following responses.

Prosecution Staff identified seven main issues in the comments received warranting a response. For each response, the issue raised is shown in *italics*, with a list of the commenters who raised the issue, followed by Prosecution Staff response. For better understanding of the full substance and context of the comments, please refer to the original comment letters. Exhibits and references cited by Prosecution Staff, which are all part of the administrative record, are listed at the end of this document.

1. Comment:

Since all violations are resolved and settled in Paragraph 11, all the violations should be included in the fine, and liability should be imposed to the maximum extent of the law for each violation. The language in this paragraph should only be a binding resolution for only the claim(s) for which liability is being imposed.

Commenters:

- Monique Brown, resident – December 29, 2011
- Concerned Citizens (signatures illegible), residents – December 28, 2011
- Mike Cooper, resident – January 2, 2012

Prosecution Staff Response:

Prosecution Staff agrees that all violations covered in the Proposed Order should be considered in the penalty calculation. The violations listed in Exhibit A of the settlement agreement are based on the City's response to the June 23, 2011, Notice of Violation. Since the drafting of the settlement agreement, the City has submitted substantially more evidence and information pertaining to the alleged violations, both in response to public comments and Prosecution Staff requests.

Based on review of the additional evidence, including daily work logs, site photos, rain-event action plans and monitoring reports, Prosecution Staff retracts some of the allegations cited in the Proposed Order. This change is reflected in a Revised Proposed Order (attached). Alleged violations which have been removed, and those retained, are listed in the following tables.

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Alleged Violations Resolved and Not Part of the Revised Proposed Order
<p style="text-align:center"><u>Construction Storm Water Permit</u></p> <ul style="list-style-type: none">• Adequately maintain and document maintenance of BMPs;• Perform all required qualifying rain event inspections; and• Perform all required qualifying rain event sampling and analysis.
<p style="text-align:center"><u>401 Certification</u></p> <ul style="list-style-type: none">• Document implementation and maintenance of adequate BMPs;• Keep equipment out of flowing or standing waters;• Establish and document upstream and downstream photo-documentation points; and• Submit the annual monitoring report.

Alleged Violations Retained in the Revised Proposed Order
<p style="text-align:center"><u>Construction Storm Water Permit</u></p> <ul style="list-style-type: none">• Obtain coverage under the Construction Storm Water Permit prior to the start of construction of the Park Project*; and• Amend and certify the SWPPP and each amendment throughout the various stages of the Park Project
<p style="text-align:center"><u>401 Certification</u></p> <ul style="list-style-type: none">• Provide a dewatering plan prior to the start of construction; and• Submit the Short Form within 14 days of issuance of the Certification; (late; but submitted)

* It is important to note, new evidence revealed that the City filed its Notice of Intent (to obtain coverage under the General Permit) for the Project on September 23, 2010, (the same day the City contends that construction commenced), but it failed to include the required \$549 permit fee. The State Water Board issued a fee statement on September 23, 2010, acknowledging the submittal of the permit documents and requiring submittal of the fee by November 22, 2010 (exhibit 6 and 7).

The alleged violations that Prosecution Staff carries forward into the Revised Proposed Order are included in the penalty calculation by reference. The addition of these alleged violations to the penalty calculation would add \$5,555 to the total liability according to the

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methodology in the State Water Board Water Quality Enforcement Policy. However, given the fact that the City actually submitted a Notice of Intent on September 23, 2010, (the same day it commenced construction and not after it commenced construction), Prosecution Staff has determined that the liability in the Proposed Order is appropriate and that the imposition of a \$20,000 liability for all of the violations that remain alleged in the Revised Proposed Order is fair and consistent with the State Water Board Water Quality Enforcement Policy.

2. Comment:

The City did not comply with Mitigation Measure BIO-3, which states in part "Construction will take place during the dry season". Streambed Alteration Agreements and Certification mitigation measures required the project complete all in-channel work prior to 10/15/10 and then to complete the remainder of the project after the wet season. The in-channel work was completed by the DFG deadline of October 15, 2010; however, construction activity continued throughout the wet season, including the use of heavy equipment during rain events. The City ignored Mitigation Measure BIO-3 and realized a significant economic benefit. This should be added to the list of violations in the Settlement Agreement.

Commenters:

- Justin Anthony, Environmental Consultant – December 16, 2011
- Monique Brown, resident – December 29, 2011
- Steve Brown, resident – undated

Prosecution Staff Response:

Prosecution Staff understands how the requirements of Mitigation Measure BIO-3 (BIO-3), formerly Mitigation Measure BIO-6, could be construed at first glance to apply to the construction project as a whole. However, when considered in context of the overall construction plan, the Mitigated Negative Declaration (MND), and requirements of other regulatory permits, it becomes clear that BIO-3 was intended to apply only to in-water work, as explained in more detail below. Since Prosecution Staff did not find a violation associated with BIO-3, the allegation that the City recognized an economic benefit from such a violation is moot and therefore does not warrant a response.

The overall scope of the Project includes different types of work, such as bank stabilization, invasive species removal, revegetation of the creek corridor and upland areas, and construction of limited parking, trails, and pathway access to the park, subject to different regulations. Impacts associated with the overall Project (i.e. air, biological, hydrology and water quality, air, etc.) are identified in the MND with associated mitigation measures. Any "in-channel" work modifying jurisdictional waters is regulated by the Department of Fish

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and Game (DFG), the U.S. Army Corps of Engineers, and the Regional Water Board and subject to the Project's Mitigation and Monitoring Plan (MMP) and 401 Certification.

The MMP contains specific mitigation measures pulled from the larger associated plan, the MND, to define the annual monitoring provisions, performance standards, and success criteria for the Project. "BIO" mitigation measures address those impacts to riparian and wetland communities, including BIO-3, and these are the only mitigation measures included in the MMP. BIO-3 also is incorporated in the 401 Certification by reference under Condition No. 8.

The MND makes it clear that there is a distinction between "riparian and wetland" work, which was limited to the dry season, and other construction work, which was not limited to the dry season. BIO-3, when read in the context of the entire MND, is a measure specific to the effects on riparian and wetland communities, while other measures are intended to be applied to the entire project. The other project-wide measures, which were put in place to mitigate adverse impacts from the construction and use of the Project, do not impose winter work restrictions but, instead, specifically acknowledge that work may be conducted during the rainy season by having rainy season requirements. For example, Mitigation Measure BIO-1 requires a preconstruction survey for the western pond turtle for work performed from April to November, but the survey is not required for work from December through March, which is outside of the active nesting season (exhibit 2). Work during the rainy season is also acknowledged under Mitigation Measure Hydro-1 (exhibit 3), which requires coverage under the General Permit and the implementation of a Storm Water Pollution Prevention Plan to address potential impacts from stormwater runoff,

Other permit requirements and communications convey similar understanding and distinctions about work schedule limitations:

- The DFG Streambed Alteration Agreement states: "Work within the riparian corridor shall be confined to the period June 15 to October 15. In water work shall be confined to the period August 1 to October 15. Revegetation work is not confined to this time period." However, the agreement also has other conditions included expressly to prevent and/or reduce adverse impacts during wet weather, such as erosion control measures (exhibit 4).
- Water Board staff 401 Certification issued September 16, 2010, shows an understanding that the entire project would not be completed by the DFG deadline of October 15. Additionally, the 401 Certification does not have any conditions that expressly restrict all work to the dry season.
- Documentation submitted by the City, including but not limited to fall and winter communications with regulatory agencies, the Natural Resource Agency (grant

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administrator), and City employees (exhibit 5) shows that all permitting and granting agencies were aware of the project's non-riparian work throughout the winter and did not consider the work to be prohibited.

In Summary, the evidence supports the position that the Project's in-water work had to be finished by October 15, 2010, but that the remaining work was allowed to occur beyond this date and was scheduled as such. As stated in the terms of the settlement agreement, the City is expected to comply with the General Permit during the rainy season and implement pollution prevention measures.

- 3. Comment:** *False information was submitted to the Regional Board in technical report. The City stated that "all work was completed in accordance with project plans and the MMP"; however, evidence submitted to the Regional Board and DFG indicate that the City knowingly worked throughout the wet season in violation of the Certification.*

Commenters:

- Monique Brown, resident – December 29, 2011

Prosecution Staff Response:

Prosecution Staff has determined that the information contained in the technical report was incomplete and partly misleading. However, based on our responses to Comments 1 and 2 above, Prosecution Staff does not agree that the City intentionally submitted false information.

- 4. Comment:** *The City should be held to the same standards it imposes on contractors and developers in Napa. If this had been a private project then it would have been cited for all violations.*

Commenters:

- Monique Brown, resident – December 29, 2011
- Jeff Moore, Uno Fratelli, LLC – December 30, 2011
- Steve Brown, resident – undated
- Stace Stanley, resident – undated, received January 3, 2011

Prosecution Staff Response: Prosecution Staff agrees that the City must be held to the same standards as private contractors, and has revised the Proposed Order to address all alleged violations and evaluated the appropriateness of the proposed penalty considering all evidence. No further response is necessary.

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5. **Comment:** *The City unfairly derived an immense economic benefit when it illegally commenced construction of its Trancas Crossing Park project forty-five (45) days before obtaining permit coverage under the Construction Storm Water Permit. The City gained an economic advantage by avoiding severe economic penalties, which may have included contractor schedule delay claims and repayment of Prop 40 and Prop 50 grant funds (\$1,830,811) and Prop 50 grant funds (\$500,000), if the entire project didn't finish by Spring 2011.*

Commenters:

- Justin Anthony, Environmental Consultant – December 16, 2011
- Monique Brown, resident – December 29, 2011
- Jeff Moore, Uno Fratelli, LLC – December 30, 2011
- Steve Brown, resident – undated

Prosecution Staff Response: The evidence does not support the commenters' assertions. Economic benefit is any savings or monetary gain derived from the act, or omission to act, that constitutes the violation. With respect to the failure to obtain permit coverage prior to beginning work, it would be entirely speculative to find that the City would have lost its grant funding had it delayed construction. There are a number of possible scenarios which could have resulted in the City retaining the grant funds, including renegotiation of the grant deadlines. In addition, there is no indication that if the City lost the grant funding that it would have opted to continue with the Project and expend its funds rather than abandon the project altogether.

With respect to the claim that the City avoided a construction claim for a delay had it ceased work, and thus achieved a savings by beginning work without permit coverage, the record indicates otherwise. The contract between the City and Elite Construction provides that the contractor is responsible for complying with all environmental conditions (i.e., obtaining permit coverage), and that any days where operations are restricted due to the need to comply with environmental conditions shall not be considered in a claim for delay.

6. **Comment** *Objection to Paragraph 12 – Denial of Liability; it should be removed. Specific comment by Monique Brown includes but, not limited to:*

"...If it is established that the City violated the law (which it clearly did) through an admission or adjudication of legal liability, then there is a viable legal cause of action to compel reimbursement of Proposition 50 and 40 grant funds back to the State so that they may be awarded to a law-abiding municipality or non-profit group who entered the highly competitive grant award selection process in 2005.

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Paragraph 12 of the proposed Settlement Agreement and Stipulated Order unfairly penalizes the justice-seeking taxpayers of California (M. Brown et al.) and the City's grant competitors who are relying on the Regional Board to obtain an admission or adjudication of legal liability for the City's blatant violations of law in order to legally compel recovery of Proposition 50 and 40 grant funds. This legally significant paragraph lets the City "off the hook" for its multiple violations of law that are enforceable by the Board, thereby making it extremely difficult, if not impossible, for taxing citizens and the City's grant competitors to legally compel repayment of grant funds to the State based on the City's "unproven" violations of law. Therefore, it would give the City-violator an unfair competitive advantage over the law-abiding municipalities who applied for the same grant funds and would be inconsistent with the Water Board's Enforcement Policy, which provides that "any assessment of administrative civil liability, whether negotiated pursuant to a settlement agreement or imposed after an administrative adjudication, should fully eliminate any unfair competitive advantage obtained from noncompliance."

From a pure policy perspective, to allow the City to dispose of hundreds of thousands in legal liabilities it obtained through flagrant violations of the law, for a mere \$20,000, without any admission or adjudication of legal wrongdoing, would be patently unfair and would encourage and embolden the City-violator and other similarly situated persons in the regulated community to violate the law in the future when it is economically beneficial to do so. Again, this would be inconsistent with the Water Board's Enforcement Policy to deter the same or similar violations in future.

Therefore, the Regional Board should require an admission from the City or seek an adjudication of liability...."

Commenters:

- Monique Brown, resident – December 29, 2011
- Jeff Moore, Uno Fratelli, LLC – December 30, 2011

Prosecution Staff Response: The Prosecution Staff allowed the City to include a denial of liability as a matter of its prosecutorial discretion, and this type of statement is common in settlement agreements where there is no adjudication of the violations alleged.

7. Comment: *Penalty not high enough.*

Commenters:

- Justin Anthony, Environmental Consultant – December 16, 2011
- Concerned Citizens (signatures illegible), residents – December 28, 2011
- Monique Brown, resident – December 29, 2011
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- Stace Stanley, resident – undated, received January 3, 2011

Prosecution Staff Response: The Prosecution Staff believes the penalty amount is appropriate and consistent with the State Enforcement Policy, and is a fair and reasonable result of settlement.

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List of Exhibit and References in the Administrative Record

Exhibit	Title
1	City of Napa Construction Chronology
2	Mitigation Measure Bio-1
3	Mitigation Measure Hydro -1
4	Department of Fish and Game Streambed Alteration Agreement
5	Emails to Regional Board, Resources Agency, and Inter-City emails
6	Notice of Intent
7	State Water Board Fee Statement dated 9/23/10
8	
9	