

## ATTACHMENT B

### CONSIDERATION OF SECTION 13385(e) FACTORS MADERA COUNTY ROADS DEPARTMENT ROAD 200 PROJECT MADERA COUNTY

California Water Code (CWC) section 13385 (e) states: *“In determining the amount of civil liability, the regional board...shall take into consideration the nature, circumstance, extent and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as 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.”*

In preparing the Administrative Civil Liability Complaint, Central Valley Regional Water Quality Control Board (Board) staff considered the following:

#### **1) The nature, circumstances, extent, and gravity of the violation or violations.**

**Nature:** Madera County (County) operated for 38 days (7 July 2008 through 14 August 2008) without obtaining required coverage under the *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002 for Storm Water Discharges Associated With Construction Activity, Water Quality Order No. 99-08-DWQ* (Construction General Permit) even though it said it would do so in the Mitigated Negative Declaration prepared under the California Environmental Quality Act (CEQA). The County only obtained coverage after being notified of the requirements by Board staff investigating a complaint about the project.

After obtaining coverage, the County repeatedly violated the Construction General Permit by failing to implement an effective combination of sediment and erosion control Best Management Practices (BMPs).

The County completed the project without obtaining the required federal Clean Water Act (CWA) water quality certification for dredge and fill activities in known waters of the U.S. After being directed by Board staff to submit a federal CWA water quality certification application, the County submitted an incomplete application. (Contrary to the Mitigated Negative Declaration and Board staff observations, and without any supporting evidence, the application package states there are no temporary or permanent impacts to waters of the U.S.) After being directed by Board staff to correct the application, the County submitted a revised application that was incomplete because it did not provide a description of measures to stabilize and restore temporarily impacted waters of the U.S., and it did not include the appropriate fee. The County finally provided the required items to comprise a complete application on 8 September 2009, almost one year after its initial application.

**Circumstances:**

Board staff inspected the site before the rainy season and repeatedly during the rainy season. Board staff repeatedly encouraged the County to implement adequate storm water BMPs and obtain the required water quality certification. If the County had complied with the Construction General Permit, implemented appropriate storm water BMPs, and obtained and complied with the water quality certification, it could have prevented unauthorized discharges of sediment and fill to waters of the State and waters of the U.S.

**Extent:**

As documented in Board staff inspection reports, erosion of the 16 acres of disturbed soils on the site was extensive, as were the resulting violations. Two culverts passing under the road were almost completely filled with sediment, as were several waters of the State and waters of the U.S. Sediment discharged to waters of the State and waters of the U.S. exceeded six inches in depth in the stream channels.

The County specifically violated:

1. The federal CWA, section 401, for failing to obtain a water quality certification prior to dredge and fill activities in waters of the U.S.
2. California Water Code section 13376, for failing to obtain coverage under the Construction General Permit prior to construction. Once the County obtained coverage under the Construction General Permit, it violated the following sections thereof: Section A.2 (which prohibits discharges of material other than storm water) and Section C.2 (which requires implementation of controls to reduce pollutants in storm water discharges from construction sites to the standards of Best Available Technology Economically Achievable for toxic and non-conventional pollutants and Best Conventional Pollutant Control Technology for conventional pollutants).

**Gravity:**

The gravity of the violations is significant. At first, the County did not obtain the appropriate permits. Then, the site was operated in violation of Construction General Permit requirements and without appropriate erosion protection BMPs during the entire rainy season, resulting in discharges of turbid water and sediment to waters of the State and waters of the U.S. Waters of the U.S. were modified without water quality certification, resulting in unauthorized discharges of fill to waters of the U.S. As a result, significant site erosion resulted in the discharges of turbid water and large amounts of sediment and fill into waters of the State and waters of the U.S. These discharges likely caused exceedances of applicable water quality objectives for turbidity, sediment, settleable and suspended material, and toxicity. As a result, the discharges likely adversely impacted the beneficial uses of warm freshwater habitat (WARM) and wildlife habitat (WILD) of the receiving waters.

**2) Whether the discharge is susceptible to cleanup or abatement.**

Discharges to the County's easement are susceptible to cleanup, and the Executive Officer issued Cleanup and Abatement Order (CAO) No. R5-2009-0703 on 30 June 2009. The Order requires the County to clean up and abate the discharge to the extent practicable.

Discharges of turbid water and sediments off-site are not generally susceptible to cleanup.

**3) The degree of toxicity of the discharge.**

Toxic can be defined as "capable of causing injury or death..." (American Heritage College Dictionary). Discharges of excessively turbid or sediment laden water can cause injury or death to aquatic organisms by blocking light, clogging gills and respiratory structures, blocking feeding structures, smothering eggs and organisms, scouring organisms from anchorages, and filling spawning and hiding areas. Given the sediment and fill depths observed during Board staff inspections, discharges from the site certainly caused injury and/or death of aquatic species using the waters.

**4) County's ability to pay and continue in business.**

The County is not a business. Nevertheless, the Board does not have any evidence that the County cannot pay the proposed amount.

**5) Any voluntary cleanup efforts undertaken.**

The County did employ some BMPs on the site; however, the BMPs were installed incorrectly and were large ineffective. As a result and as mentioned above, the Executive Officer issued CAO No. R5-2009-0703 on 30 June 2009. The CAO requires the County to stabilize the site by 21 August 2009. The County waited until 19 August 2009, to hire a contractor to begin erosion control work and to date, continues to work on stabilizing the site. The County is otherwise generally complying with the CAO.

**6) Any prior history of violations.**

The County has no applicable prior history of violations on other County sites.

**7) Degree of culpability.**

The County is fully culpable for the violations. The Construction General Permit has been around in some form since 1992; municipalities are fully aware they are required to obtain coverage under the Construction General Permit prior to initiating construction projects of one acre or more. The County's own CEQA document acknowledges its obligation to obtain coverage under the Construction General Permit. Yet the County only obtained coverage under the Construction General Permit after Board staff inspected the site in response to a complaint, a month after it started construction, and notified the County that it was violating the

federal CWA for failing to obtain Construction General Permit coverage. Despite several subsequent inspections and contacts by Board staff, the County continued to violate the Construction General Permit once it obtained coverage by failing to install an effective combination of storm water BMPs and stabilizing disturbed areas, resulting in sediment discharges to surface waters.

Similarly, the requirement to obtain State water quality certification has been around for decades, and the County's own CEQA document acknowledges its obligation to secure federal CWA 401 water quality certification for its proposed work in waters of the U.S. However, the County only submitted an application for water quality certification after a site inspection by Board staff and notification that it was in violation of the federal CWA. Subsequently, the County submitted an application that said there were no waters of the U.S. to impact, again contradicting its CEQA document. The County completed the project without obtaining water quality certification.

**8) Economic benefit or savings, if any, resulting from the violation.**

The County should have installed an effective combination of storm water BMPs, and should have stabilized disturbed areas to prevent the discharge of sediment to surface waters. The County should have prepared and implemented a mitigation plan for the re-constructed areas of surface waters. The County should have prepared a complete application for section 401 water quality certification and obtained such certification prior to beginning work to dredge or fill in waters of the U.S. Projected costs associated with these activities are presented as follows:

- a) Board staff has reviewed the Discharger's SWPPP and a cost estimate prepared by Compliance One Solutions, Inc., the firm hired by the Discharger to install erosion control in response to the Cleanup and Abatement Order, and estimates that it would cost at least \$254,648.95 to properly implement erosion and sediment control storm water BMPs throughout the project site.
- b) Wetland delineation drawings prepared on 21 May 2009 indicate the project includes 763 linear feet of jurisdictional channels that should have been stabilized before, during, and after construction. It also includes 1,556 linear feet of streams that were filled. Provisions to mitigate for these permanent impacts should have been addressed by the Discharger during construction. The Discharger now proposes to reconstruct/recreate 665 linear feet of tributary streams and pay \$44,250.00 into a mitigation account to compensate for the 1,556 linear feet of permanent impacts.

For the 665 linear feet of created streams, the Discharger should have installed BMPs such as brush mattresses, live stakes, rock toe revetments, rock weirs, etc., to stabilize the reconstructed bed and bank and provide an environment for the natural re-vegetation and re-establishment of the riparian ecosystem. Board staff estimates it would have cost \$168.00 per linear foot to implement ecological

restoration to the streams. Based on this, the Discharger should have spent \$111,720.00 to recreate/restore these streams.

For the 763 linear feet of temporarily impacted channels, it would have been appropriate to install BMPs such as straw matting along the bank, and rock toe revetment or fiber rolls with plant plugs at the toe of the bank. Board staff estimates it would have cost \$20.00 per linear foot to install these treatments. Based on this, the Discharger should have spent \$15,260.00 to restore the temporarily impacted channels.

The Discharger should have obtained Water Quality Certification prior to the commencement of dredge and fill activities in waters of the U.S. The Discharger should have paid the application fee of \$15,982.00 prior to beginning work on the project. Board staff estimates a consultant would have charged \$150.00 per hour for professional services to prepare an application package for a Water Quality Certification, and would have needed 100 hours to update the wetland delineation drawings and renew the expired jurisdictional determination, prepare the application package, and design an appropriate compensatory mitigation and restoration plan. Based on this, the Discharger should have spent \$15,000.00 prior to beginning work on the project.

The Discharger should have offset permanent losses to waters of the U.S. by paying into a mitigation fund for any losses not offset by on-site creation of waterways. The Discharger should have spent the \$44,250.00 proposed in the mitigation plan, prior to beginning work on the project.

The total economic savings the Discharger realized by these violations is \$456,860.95.

- c) Board staff costs have amounted to 358 hours at \$150.00 per hour for a total of \$53,700.00.

#### **9) Other matters that justice may require.**

Madera County has a small population base of 152,331 (January 2009). The unemployment rate as of August 2009 was 12.1% compared to the State rate of 13.3%. The median household income, as of 2007, was 73.9% of the State median household income.