

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2009-0541  
IN THE MATTER OF

MADERA COUNTY RESOURCE MANAGEMENT AGENCY,  
MADERA COUNTY ROAD DEPARTMENT  
MADERA COUNTY

This Administrative Civil Liability Complaint (Complaint) is issued to the Madera County Resource Management Agency, Madera County Road Department (hereafter Discharger), pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability (ACL), and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that the Discharger violated provisions of the federal Clean Water Act (CWA), the CWC, and the National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity Order 99-08-DWQ (NPDES No. CAS000002)(Construction General Permit).

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds, with respect to the Discharger's acts, or failure to act, the following:

1. The Discharger began construction of Phase I of the Road 200 Widening Project (hereafter Project) from Spring Valley School to Leprechaun Lane (the Site) on 7 July 2008, and continued activities through the summer and fall of 2008. The Site is in the Sierra foothills, approximately 30 miles from the City of Madera, and 2 miles northeast of the intersection of State Highway 41 and Road 200, along a 3.4 mile long section of Road 200. The Site is within Sections 16, 21, and 29 of Township 9 South, Range 21 East, and Section 14 of Township 9 South, Range 21 East, MDBM.

The Project is comprised of an 80-foot wide right-of-way with a 40-foot paved section, for a total of 34 acres, including approximately 16 acres of soil disturbed during construction activities. The Project crosses numerous tributaries to Willow Creek, which drains to Millerton Lake, an impoundment of the San Joaquin River. The San Joaquin River and its tributaries are waters of the United States.

2. On 19 August 1999, the State Water Resources Control Board issued the Construction General Permit, which implements Waste Discharge Requirements for storm water discharges associated with construction activity.
3. The Construction General Permit requires that those who discharge storm water associated with construction activity to surface waters (a) file a Notice of Intent to obtain coverage under the Construction General Permit and (b) use best available technology

economically achievable and best conventional control technology to reduce storm water pollution. The Construction General Permit authorizes non-storm water discharges only where they do not cause or contribute to a violation of any water quality standard and are controlled through implementation of appropriate Best Management Practices (BMPs) for elimination or reduction of pollutants.

4. CWC section 13376 states, in relevant part,

Any person discharging pollutants or proposing to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or any person discharging dredged or fill material or proposing to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with the procedures set forth in Section 13260...

Construction activities disturbing one or more acres of land, such as the Project, result in the discharge of pollutants. Under the terms of the federal CWA, CWC section 13376, and the Construction General Permit itself, the Discharger was required to obtain coverage under the Construction General Permit prior to commencing construction activities.

5. The Central Valley Water Board's Water Quality Certification program regulates dredge and fill activities that result in discharges to waters of the U.S. These projects require federal permits pursuant to CWA section 404. Section 401 of the CWA requires any applicant for a federal license or permit for activities that may result in discharge into waters of the U.S. to obtain a certification (Water Quality Certification) from the respective State that the project will meet water quality standards.

The Discharger's activities included moving fill materials within waters of the U.S., which required a permit pursuant to CWA section 404. In order to obtain this permit, the Discharger was required to obtain a Water Quality Certification from the Central Valley Water Board prior to initiating construction activities.

6. The Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin, Fourth Edition, Revised October 2007, (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation programs for achieving objectives, and incorporates by reference, plans and policies adopted by the State Water Resources Control Board. Drainages and waters of the U.S. within the Project site are tributaries to Millerton Lake, an impoundment of the San Joaquin River. The beneficial uses of the San Joaquin River above Millerton Lake as identified in Table II-1 of the Basin Plan are: municipal and domestic supply; agricultural supply; hydropower generation; water contact recreation; non-contact water recreation; warm freshwater habitat; cold freshwater habitat; and wildlife habitat.

7. The Construction General Permit states, in part, the following:

A. DISCHARGE PROHIBITIONS

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3. Storm water discharges shall not cause or threaten to cause pollution, contamination or nuisance.

C. SPECIAL PROVISIONS FOR CONSTRUCTION ACTIVITY:

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2. All dischargers shall develop and implement a SWPPP in accordance with Section A: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard.
3. Discharges of non-storm water are authorized only where they do not cause or contribute to a violation of any water quality standard and are controlled through implementation of appropriate BMPs for elimination or reduction of pollutants...

SECTION A: STORM WATER POLLUTION PREVENTION PLAN

6. At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season.

8. The attached Chronology (Attachment A) is a part of this Order and provides a more detailed historical account of project activities. The following summarizes pertinent portions of the Chronology:

- a. On 28 October 2002, Madera County approved a Mitigated Negative Declaration (MND) for the Project. Based on comments from the U.S. Army Corps of Engineers (Corps) and Board staff, the MND included mitigation measures that required the Discharger to, among other things:
  - i. Obtain a CWA Section 404 permit from the Corps;
  - ii. Obtain a CWA Section 401 Water Quality Certification from the Central Valley Regional Water Quality Control Board; and
  - iii. Obtain coverage under the General Permit.
- b. The Discharger began Project construction on 7 July 2008.
- c. On 1 August 2008, Board staff inspected the Project in response to a complaint. Board staff observed construction activity taking place, which included filling and excavation activities in various surface waters within the work area. Board staff observed that several hundred feet of tributary drainages had been excavated, filled, re-routed, or otherwise disturbed. Several acres of graded slopes adjacent to drainages were vulnerable to erosion. Board staff did not observe soil stabilization measures or other storm water Best Management Practices (BMPs) implemented on disturbed areas of the site. The Discharger had not obtained coverage under the General Permit, and had not obtained a CWA Section 401 Water Quality Certification for site dredge and fill activities. During the inspection and in a

subsequent 7 August 2008 telephone conversation, Board staff informed the Discharger that it was in violation of CWC section 13376 for failure to obtain coverage under the General Permit, and was likely in violation of Section 401 of the CWA for failing to obtain a Water Quality Certification for dredging and discharging fill to waters of the U.S.

- d. The Discharger subsequently obtained coverage under the General Permit, and was assigned WDID No. 5F20C353019 on 14 August 2008.
- e. Board staff transmitted the results of the inspection in a 26 August 2008 Notice of Violation. The NOV informed the Discharger that, at the time of the inspection, it was in violation of the CWA sections 401 and 404 and CWC section 13376 for discharging fill to waters of the U.S. and for failing to obtain coverage under the General Permit. The NOV directed the Discharger to install BMPs to stabilize disturbed areas and to submit a complete application for federal CWA Section 401 Water Quality Certification.
- f. On 4 November 2008, Board staff, accompanied by County staff, re-inspected the Project after a rain event and observed straw wattles buried in sediment, straw wattles placed longitudinally in drainages, six-foot to ten-foot sections of silt fence that appeared to be randomly placed on site, and many slopes without erosion protection. Slopes adjacent to waters showed erosion rills, sediment laden water was discharging off-site, and sediment was being deposited in waters downstream of ineffective BMPs. Board staff also observed areas where fill had been discharged into waters of the U.S. Board staff notified the Discharger during the inspection that many BMPs on site were ineffective, and directed it to stabilize disturbed areas.
- g. The Discharger then submitted an application for a CWA Section 401 Water Quality Certification that did not accurately describe impacts to waters of the U.S. During the 4 November 2008 inspection, Board staff described to the Discharger how to accurately report the impacted waters of the U.S. in a revised application.
- h. Board staff transmitted the 4 November 2008 inspection results in a 25 November 2008 Notice of Violation. The NOV instructed the Discharger to stabilize disturbed areas and to submit a restoration plan for waters of the U.S. impacted by construction activities.
- i. On 17 February 2009, Board staff re-inspected the "completed" Project site during a storm event and observed sediment-laden water discharging off the site and many erosion rills on unstabilized slopes. BMPs such as silt fencing and straw wattles were compromised and/or buried in several areas. Board staff measured up to six inches of sediment accumulated on the bed of tributary drainages, and measured erosion gullies that exceeded two feet in depth and width. Disturbed areas of the Project site, which comprised approximately 16 acres, remained unstabilized and threatened to continue discharges of sediment off site and to waters of the State and waters of the U.S.

- j. On 3 April 2009, Board staff re-inspected the Project site and observed that no further work had been done to stabilize disturbed areas.
  - k. On 29 April 2009, Board staff re-inspected the Project site and observed that no further work had been done to stabilize disturbed areas.
  - l. On 24 June 2009, Board staff re-inspected the Project site and observed that no further work had been done to stabilize disturbed areas.
  - m. On 8 September 2009, the Discharger submitted past-due information required for a complete Water Quality Certification application.
9. The soil, sediment, and earthen material transported by erosion and discharged to the tributaries of Willow Creek by the Discharger constitutes “waste” as defined in CWC section 13050. Based on Board staff observations, the Discharger’s construction activities discharged waste, (e.g., soil, sediment, and earthen material), directly into surface waters. The Discharger, through this activity, has caused waste to be discharged where it has caused a condition of pollution or nuisance, and continues to threaten to cause a condition of pollution or nuisance, by increasing levels of sediment, settleable materials, suspended material, and turbidity in surface waters.
10. Findings Nos. 8 and 9 show the Discharger violated CWC section 13376; Section 401 of the CWA; and the Construction General Permit.
11. CWC section 13323 states, in relevant part:
- Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.
12. CWC section 13385 states, in relevant part:
- (a) Any person who violates any of the following shall be liable civilly in accordance with this section:
- (1) Section 13375 or 13376.
  - (2) Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.
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- (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.

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(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

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(e) In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, 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 its ability to continue its 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 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.

13. **Potential Maximum Civil Liability.** Per CWC section 13385(c), liability may be assessed at \$10,000.00 per violation per day.

As illustrated by Findings Nos. 8.b and 8.d, and the attached Chronology, the Discharger operated for 38 days (7 July 2008 through 14 August 2008) without obtaining coverage under the Construction General Permit, as required by CWC section 13376. The Discharger's maximum liability in this regard is \$380,000.00.

On 8 September 2009, the Discharger submitted past-due information required for a complete Water Quality Certification application. The Discharger operated for 429 days (7 July 2008 through 8 September 2009) without obtaining Water Quality Certification for dredge and fill activities, which is required pursuant to CWC section 13376. The Discharger's potential liability in this regard is \$4,290,000.00.

As illustrated by Finding No. 8 and the attached Chronology, the Discharger operated in violation of the Construction General Permit, by failing to have an effective combination of BMPs, for 242 days during the rainy season (1 October 2008 through 30 May 2009). The Discharger's failure to maintain an effective combination of BMPs violates numerous terms in the Construction General Permit. Although the Board may count each discreet violation of the General Permit as a separate violation, and may therefore multiply the number of violations by the number of days, for the purposes of this Complaint the maximum penalty is calculated as one violation for each day. No runoff

calculation was performed that would lead to a per-gallon assessment under CWC section 13385(c)(2). The Discharger's potential liability in this regard is \$2,420,000.00.

The Discharger's total potential liability as calculated for this Complaint is \$7,090,000.00.

14. **Minimum Civil Liability.** Per CWC section 13385(e), the minimum liability shall be assessed at a level that recovers the economic benefit or savings, if any, derived from the acts that constitute the violations. The Discharger 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 Discharger should have prepared and implemented a mitigation plan for the re-constructed areas of surface waters. The Discharger 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:

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 controls 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.

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 a Water Quality Certification prior to the commencement of dredge and fill activities conducted 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 submitted on 8 September 2009, prior to beginning work on the project.

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

15. On 10 March 2009, Teichert Construction staff sent an email to Board staff stating that \$230,044 was spent on "erosion control type activities." It is unclear where this money was spent, as many of the BMPs were installed incorrectly or not at all and most were largely ineffective. Because of this, Board staff estimates the Discharger saved at least \$456,860.95 for failing to properly implement the BMPs and for failing to submit a complete application for, and obtain, a Water Quality Certification.
16. Board staff costs have amounted to 358 hours at \$150.00 per hour for a total of \$53,700.00.
17. CWC section 13385 states, in relevant part:
  - (n) (1) Subject to paragraph (2), funds collected pursuant to this section shall be deposited in the State Water Pollution Cleanup and Abatement Account.
  - (2) (A) Notwithstanding any other provision of law, moneys collected for a violation of a water quality certification in accordance with paragraph (2) of subdivision (a) or for a violation of Section 401 of the Clean Water Act (33 U.S.C. Sec. 1341) in accordance with paragraph (5) of subdivision (a) shall be deposited in the Waste Discharge Permit Fund and separately accounted for in that fund.

It is appropriate to split the assessed amount of liability for CWA Section 401 and other CWC section 13385 violations between the Waste Discharge Permit Fund (WDPF) and State Water Pollution Cleanup and Abatement Account (SWPCAA) based on the percentage of the Discharger's maximum potential liability associated with federal CWA section 401 violations and other CWC section 13385 violations. This equates to 61% going to the WDPF and 39% going to the SWPCAA.

18. The factors in CWC section 13385(e), as cited in Attachment B, were considered and a \$510,600.00 Administrative Civil Liability is appropriate.
19. Issuance of this Complaint is exempt from the provisions of the California Environmental Quality Act (Public Resources Code § 21000, et seq.), in accordance with California Code of Regulations, title 14, section 15321.

**MADERA COUNTY IS HEREBY GIVEN NOTICE THAT:**

1. The Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an administrative civil liability in the amount of \$510,600.00. The amount of the proposed liability is based upon a review of the factors cited in CWC section 13385(e), as well as the State Water Resources Control Board's Water Quality Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled on **9/10/11 December 2009**, unless either of the following occurs by **26 October 2009**:
  - a) The Discharger waives the hearing by completing the attached form (checking off the box next to Option #1) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of \$311,466.00 to the *Waste Discharge Permit Fund* and \$199,134.00 to the *State Water Pollution Cleanup and Abatement Account*; or
  - b) The Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking off the box next to Option #2 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed; or
  - c) The Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking off the box next to Option #3 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed.
3. If a hearing on this matter is conducted, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, which may

include raising the monetary value of the civil liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

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PAMELA C. CREEDON, Executive Officer

\_\_\_\_\_  
25 September 2009

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Date