

California Regional Water Quality Control Board
North Coast Region

Administrative Civil Liability Complaint No. R1-2007-0059

for

Violations of Clean Water Act, Section 401, Water Quality Certification
and Municipal Storm Water Permit

In the Matter of
California Department of Transportation
Confusion Hill Bypass Project
WDID No. 1B05153WNME

Mendocino County

The Executive Officer of the California Regional Water Quality Control Board, North Coast Region (hereinafter the Regional Water Board), hereby gives notice that:

1. On July 15, 1999, the State Water Resources Control Board (SWRCB) adopted a National Pollutant Discharge Elimination System (NPDES) Permit for Storm Water Discharges from the State of California, Department of Transportation Properties, Facilities and Activities, Order No. 99-06-DWQ (Storm Water Permit).
2. Municipal separate storm sewer systems (MS4s) serving a population of 100,000 or more are required to have storm water permits. The United States Environmental Protection Agency considers MS4s to include road systems owned by states which are in an area with a population greater than 100,000. The road system, roadway rights-of-way, roadside drainage conveyance systems, and storm water outfall structures are all considered an interconnected storm sewer system, and therefore subject to the MS4 permitting program. At the California Department of Transportation's request, the SWRCB adopted a single NPDES permit for storm water discharges from all its properties, facilities, and activities that would cover both the MS4 requirements and the statewide Construction General Permit requirements. Thus, the Storm Water Permit covers all municipal storm water and construction activities that require permit coverage conducted by the California Department of Transportation (Caltrans) in California. The Storm Water Permit authorizes storm water and authorized nonstorm water discharges from Caltrans properties, facilities, and activities, and prohibits discharges of pollutants and material other than storm water (nonstorm water discharges) that are not authorized by the Storm Water Permit. The Storm Water Permit provides construction storm water permit coverage for the Confusion Hill Bypass project.
3. On February 16, 2006, the Regional Water Board Executive Officer issued a Clean Water Act, Section 401, Water Quality Certification to Caltrans for the Confusion Hill Bypass project.

4. The project is located on Highway 101 in Mendocino County, approximately 18.5 miles south of Garberville and 8 miles north of Leggett. Highway 101 currently crosses an active landslide in the area known as Confusion Hill. The purpose of the project is to provide a reliable transportation route around the landslide area by relocating the highway from the east side of the South Fork Eel River to the west side. Relocating the highway requires construction of two new bridges and a new section of highway between the new bridges.
5. The project includes drilling and excavation activities that result in turbid wastewater and sediment that is transported from one side of the South Fork Eel River to the other for disposal through a two-inch diameter water pipe.
6. On May 4, 2007, Caltrans' contractor dismantled the transport pipe and pulled it from one side of the river to the other. The pipe was not capped before dismantling and turbid wastewater discharged to the South Fork Eel River (hereafter referred to as "the pipeline discharge").
7. The Regional Water Board received verbal notification of the pipeline discharge from Walt Dragolowski of Caltrans on May 4, 2007. Mr. Dragolowski reported that the pipe had not been flushed with clean water nor capped before being dismantled and pulled to the other side of the river. Mr. Dragolowski directed the contractor to clean the discharged wastewater from the rocks on the gravel bar by hand without mechanized equipment.
8. On May 14, 2007, the Regional Water Board received a fax from the Office of Emergency Services (OES) reporting the pipeline discharge. OES had received notification from Karen Maurer, a California Department of Fish and Game warden. Ms. Maurer reported that 170 gallons of gray slurry with sediment was discharged to the South Fork Eel River when the pipe was dismantled and dragged through the river.
9. On June 11, 2007, Regional Water Board staff (Staff) received the written notice of the pipeline discharge. The notice of discharge was written by the contractor and submitted to the Regional Water Board by Caltrans personnel. The contractor estimated that 15 to 25 gallons of turbid wastewater and drilling spoils were discharged to the South Fork Eel River.
10. Soon after the pipeline discharge occurred on May 4, 2007, Karen Spliethof, a Caltrans employee, performed turbidity monitoring in the South Fork Eel River approximately 50 feet upstream of the discharge and 50 feet downstream of the discharge. The monitoring at both locations resulted in readings of 1 NTU. This establishes the background level of turbidity in the river at the time of the discharge. Approximately three hours later, the contractor performed turbidity monitoring in the South Fork Eel River and measured 4.52 NTU at a location

near the discharge and 3.76 NTU at a location approximately 100 feet downstream. This demonstrates a turbidity increase in excess of the Basin Plan water quality objective for turbidity. The Basin Plan prohibits a turbidity increase 20 percent above background levels and is described in finding 11.e.ii of this Administrative Civil Liability Complaint (Complaint),

11. The following facts are the basis for the alleged violations in this matter:
 - a. Caltrans' Water Quality Certification prohibits discharge of debris, soil, silt or other organic or earthen material to waters of the State unless specifically allowed by the Water Quality Certification. The conditions of the Water Quality Certification that were violated by the pipeline discharge include:
 - i. Additional Condition 7. Adequate best management practices for sediment and turbidity control shall be implemented and in place prior to, during, and after construction in order to ensure that no silt or sediment enters surface waters.
 - ii. Additional Condition 9. No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or concrete washings, oil or petroleum products, or other organic or earthen material from any construction or associated activity of whatever nature, other than that authorized by this permit, shall be allowed to enter into or be placed where it may be washed by rainfall into waters of the State.
 - iii. Additional Condition 14. Project activities shall comply with provisions in the North Coast Region Water Quality Control Plan (Basin Plan).
 - b. The Water Quality Certification does not provide permission for the May 4, 2007 pipeline discharge.
 - c. The pipeline discharge also violated several discharge prohibitions included in the Caltrans Storm Water Permit. The Storm Water Permit requires that Caltrans notify the Regional Water Board of noncompliance, such as violations of the Storm Water Permit and Clean Water Act 401 Water Quality Certifications, verbally within five working days, with written follow-up within thirty days of identification of noncompliance. Caltrans notified Staff verbally of the discharge the same day as the discharge, however, the required written notification was not submitted in a timely manner. As the discharge occurred on May 4, 2007, to comply with the Storm Water Permit, Caltrans needed to submit written notification of the violation by June 3, 2007. Caltrans submitted the written notification on June 11, 2007.
 - d. Conditions of the Storm Water Permit that were violated include the following:

- i. General Discharge Prohibition A.1. Any discharge from Caltrans rights-of-way or Caltrans properties, facilities, and activities within those rights-of-way that is not composed entirely of storm water to waters of the United States is prohibited unless authorized pursuant to Section B of the NPDES Permit.
- ii. General Discharge Prohibition A.4. The dumping, deposition, or discharge of waste by Caltrans directly into waters of the State or adjacent to such waters in any manner that may allow its being transported in the waters is prohibited unless authorized by the RWQCB¹.
- iii. General Discharge Prohibition A.6. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity, or discoloration in waters of the State or which unreasonably affect or threaten to affect beneficial uses of such waters, is prohibited.
- iv. Program Evaluation and Reporting Provision K. Caltrans shall implement the program specified in its Storm Water Management Plan (SWMP). The SWMP and Provision K.3.a of the Storm Water Permit require that Caltrans notify the Regional Water Board verbally within five days and in writing within thirty days after discovery of these violations.

Caltrans identifies non-compliance events that must be reported under provisions of the SWMP and Provision K.3.a as those discharges that result in violations of narrative and numeric prohibitions and limitations of the permit, discharges that violate requirements of the CWA, 404 permits and 401 certifications, and discharges that result in violations of narrative and numeric standards and requirements specified in Regional Board Basin Plans.

e. Provisions of the Basin Plan that are applicable to this project are as follows:

- i. Discharge Prohibitions:

The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.

¹ RWQCB is an acronym used by the State Water Resources Control Board to refer to the Regional Water Quality Control Boards.

The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.

ii. Objectives for Inland Surface Waters, Enclosed Bays and Estuaries:

Turbidity shall not be increased more than 20 percent above naturally occurring background levels. Allowable zones of dilution within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.

Turbidity monitoring conducted by both Caltrans and its contractor's personnel indicate that the pipeline discharge increased turbidity from 1 NTU to 3.76 NTU 100 feet downstream of the pipeline discharge location, violating the turbidity water quality objective in the Basin Plan.

12. California Water Code section 13385, subdivision (a)(1), (2), and (4) provides the basis for civil liability. Subdivision (a)(1) provides for civil liability against any person who violates California Water Code section 13376, which requires a person discharging pollutants or dredged or fill material into navigable waters of the United States to file a report of waste discharge. Subdivision (a)(2) provides for civil liability against any person who violates any NPDES permit or water quality certification. Subdivision (a)(4) provides for imposition of civil liabilities against any person who violates any Basin Plan prohibition issued pursuant to California Water Code section 13243 for a Basin Plan or order for administrative enforcement issued pursuant to Article 1 of Chapter 5 of Division 7 of the California Water Code. As detailed above, Caltrans violated the discharge prohibitions and requirements of the Water Quality Certification, Storm Water Permit, and Basin Plan. California Water Code section 13385, subdivision (c) provides that the maximum amount of civil liability that may be imposed by the Regional Water Board is \$10,000 per day of violation.
13. Where there is discharge in excess of 1,000 gallons that is not susceptible to cleanup or cannot be cleaned up, an additional liability may be assessed. Although the Regional Water Board received conflicting reports of the volume of wastewater that was discharged on May 4, 2007, both wastewater volumes reported were well under 1,000 gallons.
14. The maximum civil liability that could be imposed against Caltrans in this matter is calculated as follows:

Violation	Number of Days (at \$10,000/day)	Maximum Civil Liability
wastewater discharge	1 (May 4, 2007)	\$10,000
failure to submit written report due June 3, 2007	4 (June 5 – June 8, 2007)	\$40,000
Total Potential Civil Liability		\$50,000

15. In determining the amount of any civil liability, pursuant to California Water Code section 13385, subdivision (e), the Regional Water Board is required to take into account the nature, circumstances, extent, and gravity of the violation; and, with respect to the violator, the ability to pay, 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. The Regional Water Board is also required to consider the requirement in this section that states that, 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.

- a. **Nature, circumstances, extent and gravity of the violation:** The wastewater discharge could have been easily avoided through more careful draining and cleaning of the pipeline and capping the pipeline before it was pulled across the South Fork Eel River. As the Regional Water Board received two conflicting reports of the volume of wastewater discharged, Staff was unable to determine the total volume discharged. The volume of wastewater discharged to the South Fork Eel River was, however, sufficient to significantly increase the turbidity of the river according to monitoring performed by Caltrans and its contractor.

The United States Environmental Protection Agency established a total maximum daily load (TMDL) for the South Fork Eel River in 1999 for sediment and temperature. The TMDL confirmed the adverse effects to the beneficial uses of the South Fork Eel River from sediment and that discharges of sediment have a deleterious effect to the river.

The South Fork Eel River is within the habitat range of coho salmon (*Oncorhynchus kisutch*), Chinook salmon (*Oncorhynchus tshawytscha*) and steelhead (*Oncorhynchus mykiss*), each listed under the federal Endangered Species Act or the California Endangered Species Act. Populations of salmonids in California have declined substantially in the last century. Elevated sediment loads are known to adversely affect salmonids. Sediment delivery to watercourses is known to have substantially increased in this watershed as a result of human activities. Beneficial uses related to aquatic life, including salmonids, are the most sensitive to sediment discharges.

The Storm Water Permit and Caltrans' own SWMP require submittal of a written report of violations of permit conditions and of 401 Water Quality

Certification conditions within thirty days of identification of the noncompliance. Caltrans discovered the pipeline discharge on May 4, 2007, but failed to submit the written report until June 11, 2007. Although a verbal report of the pipeline discharge was given by Caltrans on the day of its occurrence, information contained in the written report was necessary to evaluate the significance of water quality impacts from the pipeline discharge and to initiate enforcement, if needed. Staff contacted Caltrans personnel twice by email and several times by phone requesting submittal of the written report.

As recognized by the SWRCB Water Quality Enforcement Policy (Enforcement Policy), accurate, honest reporting of violations is a cornerstone to the State's water quality program. The Enforcement Policy states that:

"The foundation of the State's regulatory program relies on dischargers to accurately and honestly report information required by the Boards. Knowingly falsifying or knowingly withholding such information that would indicate violations of requirements contained in board orders, plans and policies, erodes the State's regulatory program and places the health of the public and the environment at risk. The SWRCB views these violations as very important and strongly encourages the RWQCBs to respond to any instance of falsification or withholding of required information in accordance with this policy.

"The discharger is responsible for compliance with orders and reporting of required information, including violations, to the SWRCB or RWQCB. The discharger is also responsible for ensuring that any employees, agents, or contractors acting on its behalf report required information truthfully, accurately and on time.

"Enforcement of statutes pertaining to falsification or withholding of required information should be a high priority."

- b. **Susceptibility to Cleanup or Abatement and Voluntary Cleanup Efforts Undertaken:** Caltrans directed the contractor to clean any rocks on the gravel bar of sediment that could be cleaned by hand without mechanized equipment.
- c. **Violator's ability to pay:** Staff understands that the Confusion Hill Bypass project will cost between \$70 million and \$77 million, the proposed \$20,000 civil liability is small in comparison to the cost of the project. Staff has no information to indicate that Caltrans would be unable to pay any imposed administrative civil liability.

d. Prior history of violations:

Confusion Hill Bypass Project Violations

On October 30, 2006, the Regional Water Board issued Caltrans the first notice of violation for the Confusion Hill Bypass project. The violations identified included turbid water discharges to the South Fork Eel River on August 29, and August 30, 2006, and a discharge of concrete wastewater to an unlined basin within waters of the State on September 29, 2006.

Additionally, the October 30, 2006 notice of violation described violations discovered by Staff on an inspection of the site on October 6, 2006, including a basin used routinely to settle turbid water within 100 feet of the active channel in violation of the Water Quality Certification. During the October 6, 2006 inspection, Staff was informed that the same unlined basin was routinely used to dispose of concrete wastewater, another violation of the Water Quality Certification. Also during the inspection, Staff witnessed welding and cutting activities occurring within waters of the State on the gravel bar and above waters of the State on the trestle bridge without the use of containment best management practices (BMPs). Steel cuttings, welding slag and other debris littered the gravel bar and were allowed to fall into the river from the trestle bridge. This violated Additional Condition nine of the Water Quality Certification. Finally, also in violation of the Water Quality Certification, Staff observed heavy equipment on the gravel bar leaking excessive fluid and without adequate BMPs to contain the unauthorized leakage.

On November 27, 2006, the Regional Water Board issued to Caltrans a combined notice of violation for violations of the Confusion Hill Bypass project Water Quality Certification and Storm Water Permit and California Water Code section 13267 Order requiring a technical report. This second notice of violation included violations such as turbid discharges to the river, inadequate BMPs to control turbid discharges and the inappropriate uses of BMPs, for example using a silt fence within the flowing water of the river to control a turbid plume that appeared to be caused by heavy equipment pushing gravel and silt into the river.

The California Water Code section 13267 Order required Caltrans to submit a technical report to the Regional Water Board regarding these violations and others. Staff is currently evaluating these additional violations that are not included in this Complaint, and may initiate supplementary enforcement actions in the future.

Other Relevant Violations

On November 1, 2005, the Regional Water Board issued a Cleanup and Abatement Order to Caltrans for the Dry Creek bridge replacement project. Caltrans violated the Water Quality Certification issued for the project by allowing equipment staging, material stockpiles and refuse disposal within waters of the State without a permit.

On December 28, 2005, the Regional Water Board issued an Administrative Civil Liability Complaint to Caltrans for violations of the Van Duzen River bridge replacement project Water Quality Certification. The violations included turbid discharges to the Van Duzen River, inadequate BMPs to protect water quality, leaks and spills of petroleum products within waters of the State, the unauthorized discharge of fill materials to waters of the State, failure to comply with the authorized work schedule required to protect wildlife and endangered species, and failure to report these violations as required by the Water Quality Certification. Caltrans paid an administrative civil liability of \$101,000.

On April 7, 2006, the Regional Water Board issued a California Water Code section 13267 Order to Caltrans to require the submittal of information related to the disposal of landslide material into the South Fork Eel River at Confusion Hill. Caltrans failed to apply for a permit for these activities or to notify the Regional Water Board of the discharges until Staff discovered the sidestepping activities. The Regional Water Board received a complaint from a downstream water supply system that water quality monitoring revealed anomalous turbidity readings in the South Fork Eel River that may have been related to the sidestepping activities.

- e. **Degree of culpability:** Staff has worked closely with Caltrans on the Confusion Hill Bypass project, attempting to ensure compliance with the Water Quality Certification and the Storm Water Permit. Staff has spent considerable time providing assistance to Caltrans on the project by amending the Water Quality Certification at Caltrans' request, performing inspections, and providing guidance for compliance by email and telephone. Staff also issued two written notices of violation and a California Water Code section 13267 Order to address previous violations associated with the project.

The violations included in this Complaint were easily avoidable through the use of adequate BMPs and timely reporting of the violation. Caltrans had been warned by the two previous notices of violation that many of the BMPs utilized at Confusion Hill were inadequate and had resulted in violations of the Water Quality Certification and Storm Water Permit.

Staff contacted Caltrans at least two times by email and three times by telephone to request submittal of the written notification of the May 4, 2007 pipeline discharge required by the Storm Water Permit. Even though the report was dated May 7, 2007, it was not submitted until June 11, 2007.

Caltrans personnel contacted Staff by telephone the day of the pipeline discharge. And although the written report was four business days late, Staff recommends that the civil liability be reduced to penalize only one day of violation for failing to submit the report on time as Caltrans completed the verbal notification on time.

- f. **Economic benefit:** Staff assumes that Caltrans or its contractor received economic benefit by failing to implement adequate BMPs, but that the economic benefit gained was small. Staff estimates the economic benefit gained by the violations to be \$300 for staff time and equipment to properly flush and cap the pipeline before dismantling.
 - g. **Other matters that justice may require:** Staff costs are estimated to be \$7,437.
16. The issuance of this Complaint is an enforcement action to protect the environment and is, therefore, exempt from provisions of the California Environmental Quality Act (Public Resources Code sections 21000 et seq.) pursuant to title 14, California Code of Regulations, sections 15308 and 15321, subdivision (a)(2).

CALTRANS IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Regional Water Board proposes that Caltrans be assessed an administrative civil liability in the amount of \$20,000.
2. A hearing shall be conducted on this Complaint by the Regional Water Board on September 12-13, 2007, unless Caltrans waives the right to a hearing by signing and returning the waiver form attached to this Complaint. By doing so, Caltrans agrees to pay \$20,000 in full to the State Water Pollution Cleanup and Abatement Account within thirty days of the date of this Complaint.
3. If Caltrans waives the hearing and pays the liability, the resulting settlement will become effective on the next day after the public comment period for this Complaint is closed, provided that there are no significant comments received during the public comment period. If there are significant public comments, the Executive Officer may withdraw this Complaint, and reissue a new complaint, or take other appropriate action.

4. If a hearing is held, the Regional Water Board may impose an administrative civil liability in the amount proposed or for a different amount; decline to seek civil liability; or refer the matter to the Attorney General to have a Superior Court consider enforcement.
5. Regulations of the United States Environmental Protection Agency require public notification of any proposed settlement of the civil liability occasioned by violation of the Clean Water Act, including NPDES Permit violations, which includes violations of the Storm Water Permit. Accordingly, interested persons will be given thirty days to comment on any proposed settlement of this Complaint.
6. Notwithstanding the issuance of this Complaint, the Regional Water Board shall retain the authority to assess supplementary penalties for additional violations of Caltrans' Water Quality Certification, Storm Water Permit, and Water Quality Control Plan for the North Coast Basin.

Ordered by _____

Catherine E. Kuhlman
Executive Officer

July 19, 2007