

Executive Officer's Summary Report  
9:00 a.m., March 6, 2008  
Fortuna River Lodge, Coho Room  
1800 Riverwalk Drive  
Fortuna, California

Item: 4

Subject: PUBLIC HEARING - California Department of Transportation, Confusion Hill Bypass Project, Administrative Civil Liability Order No. R1-2008-0008

On July 17, 2007, the Assistant Executive Officer issued an Administrative Civil Liability Complaint to Caltrans for violations of the Clean Water Act, Section 401 Water Quality Certification (Water Quality Certification) and the statewide 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).

The Storm Water Permit covers all municipal storm water and construction activities that require permit coverage conducted by Caltrans in California, and therefore, provides construction storm water permit coverage for the Confusion Hill Bypass project.

### **Background**

The Confusion Hill Bypass project is located on Highway 101 in Mendocino County, approximately 18.5 miles south of Garberville (Attachment 1: Location map). The purpose of the project is to provide a reliable transportation route around a landslide area by relocating Highway 101 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.

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.

Caltrans' Water Quality Certification prohibits discharge of debris, soil, silt or other organic or earthen material to waters of the State or discharge in which these wastes may be washed by rainfall into waters of the State, unless specifically allowed by the Water Quality Certification. Caltrans violated conditions of the Water Quality Certification and discharge prohibitions of the Storm Water Permit at the Confusion Hill Bypass project by discharging drilling wastewater and sediment to waters of the State and to locations where it could be washed by rainfall into waters of the State.

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 properly cleaned or capped before

dismantling and turbid wastewater discharged to the South Fork Eel River. Caltrans also failed to comply with the reporting requirements in the Storm Water Permit, which are specified in section K.3.a of the Storm Water Permit and in the Storm Water Management Plan (SWMP), which is prepared by Caltrans as required by the Storm Water Permit. This matter is being considered by the Regional Water Board in Administrative Civil Liability Order No. R1-2008-0008 (Attachment 2: ACL Order).

Staff received verbal notification from Caltrans of the pipeline discharge on May 4, 2007. It was 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.

On May 14, 2007, the Regional Water Board received a fax (Attachment 3: OES fax) from the Office of Emergency Services (OES) reporting the pipeline discharge. It was 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.

On June 11, 2007, after repeated attempts by staff to contact Caltrans's personnel by email and telephone the Regional Water Board received written notice (Attachment 4: Notice of discharge) of the pipeline discharge. The notice indicated that 15 to 25 gallons of turbid wastewater and drilling spoils were discharged to the South Fork Eel River. The written notice did not include adequate information to assess the water quality impacts of the pipeline discharge.

The Storm Water Permit requires compliance with the SWMP and the SWMP requires that Caltrans notify the Regional Water Board of violations of the Storm Water Permit and Clean Water Act Section 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.

### **Civil Liability**

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.

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

### Importance of Accurate, Timely Reporting

The Storm Water Permit and Caltrans' own SWMP require submittal of a written report of violations of permit conditions and of 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 provided by Caltrans on the day of its occurrence, information provided in the verbal notification was brief and incomplete. Staff needed the written report 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 telephone requesting submittal of the written report. Staff requests for the written report began on May 4, 2007, and continued approximately at weekly intervals until the report was submitted over a month later. The reporting schedule in the Storm Water Permit is generous, but even with that and multiple requests from Staff, Caltrans failed to submit the report on time.

Staff received conflicting and confusing reports on the pipeline discharge. It is Caltrans' responsibility to provide information clearly and accurately, with events described in detail and impacts to water quality plainly identified. Not only was the report late, but it was difficult to determine the facts of the incident from the information provided by the 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.”*

Caltrans has failed to report violations of Regional Water Board orders that occurred on other projects and these are discussed below. Staff also discovered that Caltrans failed to report other violations that occurred at the Confusion Hill Bypass project previous to the violation addressed in this ACL Order and this is also discussed further below.

### **Prior History of Violations**

#### **Confusion Hill Bypass Project Violations**

On October 30, 2006, the Regional Water Board issued Caltrans the first notice of violation (Attachment 5: October 30, 2006, 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.

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, and thus 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 without adequate BMPs to contain the unauthorized discharge.

On November 27, 2006, the Regional Water Board issued to Caltrans a combined Notice of Violation (Attachment 6: November 27, 2006, 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 submittal of a technical report. This second notice of violation included violations such as turbid discharges to the river, failure to report violations of the Water Quality Certification and Storm Water Permit, 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 violations identified in the November 27, 2006, notice of violation came to Staff's attention through reports and photographs provided by the California Department of Fish and Game. The violations had not been reported to the Regional Water Board by Caltrans.

#### 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. Staff discovered the violations of the Water Quality Certification from a citizen complaint. Caltrans had not reported the violations.

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 wastes 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 sidcasting 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 sidcasting activities.

#### **Settlement Proposed and Rejected**

In the Administrative Civil Liability Complaint issued on July 17, 2007, the Assistant Executive Officer of the Regional Water Board offered a settlement of \$20,000 to Caltrans. The settlement offer included civil liability of \$10,000 for the pipeline discharge and \$10,000 for failure to report the violation. Caltrans countered and offered to pay \$10,000 for failure to report the violation and requested a public hearing on the portion of the settlement for the pipeline discharge. Staff decided that if the matter was to be heard by the Regional Water Board, the entire ACL Order should be considered.

The terms of the settlement offered by the Assistant Executive Officer of the Regional Water Board were not separable, and required acceptance of all terms of the agreement. The Assistant Executive Officer determined that Caltrans should not be

able to accept portions of the agreement, while retaining its ability to challenge those portions of the settlement that it found less favorable.

### **Agenda Package**

Staff responded (Attachment 7: Response to comments) to the comments received from Caltrans on October 25, 2007 (Attachment 8: Comment letter from Caltrans). These comments and responses are included in the agenda package with the preliminary ACL Order and public notice.

PRELIMINARY STAFF  
RECOMMENDATION:

Adopt the ACL Order as proposed.

### **ATTACHMENTS TO THE EXECUTIVE OFFICER SUMMARY REPORT**

1. Location Map of the Confusion Hill Bypass Project
2. Administrative Civil Liability Order No. R1-2008-0008
3. Office of Emergency Services fax, received on May 14, 2007
4. Attachment K, notice of discharge, submitted by Caltrans on June 11, 2007
5. October 30, 2006, notice of violation
6. November 27, 2006, notice of violation
7. Response to CalTrans comments in letter dated October 25, 2007
8. Comment letter from Caltrans dated October 25, 2007
9. Notice of Public Hearing