

1 Sean K. Hungerford – SBN 200268
DIEPENBROCK HARRISON
2 A Professional Corporation
3 400 Capitol Mall, Suite 1800
4 Sacramento, CA 95814-4413
5 Telephone: (916) 492-5000
6 Facsimile: (916) 446-4535

7
8 Attorneys for Designated Party,
9 MCM CONSTRUCTION, INC.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD
NORTH COAST REGION

In the Matter of:
ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT NO. R1-2009-0095

MCM CONSTRUCTION, INC.'S OPENING
BRIEF

MCM Construction, Inc., a designated party, hereby submits the following arguments and analysis in support of its Case in Chief:

INTRODUCTION

No dramatic events underlie this ACL Complaint. There were no significant spills or discharges resulting from this major bridge construction project which affected water quality in the South Fork Eel River. There were no impacts to fish, other species, or habitat. There were no toxic discharges to the river, or impacts to beneficial uses that were not minor, temporary, and fully contemplated. No cleanup or abatement has been needed. There we no blatant violations of the law or the 401 Certification issued by the Regional Board.

What did take place was a successful bridge construction, which was lauded when construction was finished in mid-2009, both for the professionalism of the build, and the environmental sensitivity of the project. Now, nearly three years after the work giving rise to the allegations, Caltrans (and its contractor, MCM) face a sprawling compendium of largely minor, hyper-technical violations, amounting to a proposed penalty of \$1,511,000.

1 Most of the allegations, as will be shown to the Regional Board, are based on weak
2 evidence. Almost none of the allegations benefited from independent investigation by the
3 Prosecution Team. Nearly all are based only on the Prosecution Team's review of Caltrans' logs
4 and photographs from the construction, from which violations are gleaned rather than proven.
5 When closely examined through depositions, many of the allegations were found not to be
6 supported, and for the minor violations that fairly exist, the proposed civil liability far outweighs
7 their gravity. MCM has provided the deposition transcripts and several excerpts to prove this
8 point.

9 More broadly, the allegations also cannot be harmonized with the nature of the project.
10 This was a major project, spanning three years and resulting in two bridges over the Eel River. It
11 was abundantly clear that heavy construction would occur in the active river channel, and
12 impacts to waters were fully expected. Many allegations involve only the usual, expected, and
13 foreseeable impacts of heavy construction in a river. By alleging civil liability for precisely the
14 types of impacts contemplated, the Complaint would nullify, or reinvent, the Certification.

15 MCM thanks the Regional Board for the opportunity to present this brief, and looks
16 forward to the full hearing on this matter.

17 BACKGROUND

18
19 The Confusion Hill Bypass Project entailed the permanent relocation of Highway 101
20 from the east side of the South Fork Eel River to the west side in Mendocino County. The
21 relocation was forced by a troubled segment of the former Highway 101 which slid every rainy
22 season, damaging the watershed, risking motorists' safety, and closing a major route for residents
23 and commerce.

24 The Project required the construction of two major bridges spanning the South Fork Eel
25 River canyon and a new section of highway to link the new bridges. The south bridge is a 1,355-
26 foot long, cast-in-place, pre-stressed box girder structure that spans 225 feet over the center of
27 the river channel. The north bridge is a 580-foot long, cast-in-place, box girder structure with
28 pier foundations spanning 150 feet above the river channel.

1 In February 2006, the Regional Board issued its Section 401 Water Quality Certification
2 (“Certification”) for the Project, which contained several conditions to protect water quality. In
3 general, the Certification required the use of best management practices (“BMPs”) referenced
4 therein and in the application materials, prohibited unauthorized discharges, and contained
5 monitoring and reporting requirements applicable to specified circumstances.

6 The construction, although fully anticipated to produce temporary impacts to waters
7 through construction activities, nonetheless included several features designed to minimize these
8 impacts:

9 • Most in-stream disturbance allowed by the Certification was avoided. The
10 Certification authorized 50 temporary piles in the live stream, involving over 4,200 cubic yards
11 of concrete. As built, only six piles were of installed and 12 cubic yards of concrete.

12 • Major construction access roads were avoided. The Certification would have
13 allowed low-crossing access roads to be 10 feet above the water. It also permitted the
14 construction of a 25-foot wide earthen ramp down the hillside into the river channel, requiring
15 more than 1,100 cubic yards of material. Avoiding this allowed 25 trees and riparian habitat to
16 be preserved.

17 • Far fewer river crossings were made than the Certification allowed, which
18 avoided the turbidity and other impacts that each crossing entails. A South Bridge trestle also
19 was authorized, but avoided during the construction process. This change saved the need for
20 approach ramps, and avoided in-river abutments, piles and foundations.

21 • A lower-level deck was not required, but was installed for additional protection.
22 Access roads to the South Bridge were also paved, although not required.

23 • To reduce the risk of fuel spills, refueling equipment was transported to the
24 peninsula to avoid an equipment crossing over the Eel River. This required a two hour, 24-mile
25 trip over back roads and unimproved logging roads.

26 • Change orders were added for additional protection. Caltrans spent more than
27 \$1.05 million for these protections (not including contractor-shared costs or supervision, i.e.,
28 biological monitors, SWPPP managers, etc.).

1 The bridges were completed in 2009 to wide praise. Among other honors, the bridges
2 received project of the year awards in 2009 from the nonprofit California Transportation
3 Association.

4 In August 2009, the Regional Board presented Caltrans with the Complaint. The
5 Complaint is premised on Water Code section 13385, which permits the Regional Board to
6 pursue civil liability based on alleged violations of Section 401 of the Clean Water Act.

7 8 **LEGAL FLAWS AFFECTING THE ENTIRE COMPLAINT**

9 At the outset, there are two problems with the way the Complaint has been written which
10 affect this entire proceeding.

11 **1. Failure to Apply Section 13385(e) Factors**

12 The Prosecution's application of Water Code section 13385, subdivision (e), is
13 inconsistent with the plain meaning of the statute. Section 13385 requires the Regional Board to
14 apply ten "adjustment" factors before determining the amount of administrative civil liability.
15 The process involves applying those factors to each violation alleged.

16 Rather than applying the adjustment factors to each individual violation, the Complaint
17 applies them to each category of violation despite that most categories hold up to twenty distinct
18 violations based on individually unique facts. The Prosecution believes that it need not account,
19 on a violation-by-violation basis, for factors such as the nature, circumstances, extent, and
20 gravity of the violation, but may instead make cursory, blanket assessments of these factors as
21 "they apply generally" to various "categories of violations." (Complaint, ¶ 21.)

22 The Prosecution Team's application of section 13385(e) is inconsistent with the plain
23 meaning of the statute, which provides:

24 In determining the amount of any liability imposed under this section, the
25 regional board, the state board, or the superior court, as the case may be,
26 shall take into account the nature, circumstances, extent, and gravity of the
27 violation or violations, whether the discharge is susceptible to cleanup or
28 abatement, the degree of toxicity of the discharge, and, with respect to the
violation, 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

1 minimum, liability shall be assessed at a level that recovers the economic
benefits, if any, derived from the acts that constitute the violation.

2 (Wat. Code, § 13385, subd. (e).)

3 The statute expressly states that the Prosecution “shall take into account” the listed
4 factors for each and every alleged discharge. The language is mandatory and singular in every
5 instance, and makes no reference to “general” or “categorical” application of the listed factors.
6 (*Ibid.*) Accordingly, to comply with the statute, the Prosecution must apply the listed factors
7 individually to each alleged violation. (*Ibid.*; see *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th
8 1494, 1503 [where “the words of a statute are reasonably free of ambiguity and uncertainty, we
9 look no further than those words to determine the meaning of that language”].)

10 The Complaint attempts to gloss over the clear problems presented by its “categorical”
11 application of the section 13385, subdivision (e), factors, by making broad assertions that “all the
12 violations” are of the same general nature; that “most discharges ...were not susceptible to
13 cleanup”; and that “many of the violations” could have been avoided. (Complaint, ¶ 21.) With
14 regard to economic benefit, the Prosecution simply makes no effort whatsoever, and “assumes...
15 substantial economic benefit” generally associated with all violations, without undertaking any
16 analysis at all. (*Ibid.*)

17 The prejudice to MCM from these omissions is substantial. The Prosecution’s failure to
18 proceed as required by section 13385(e) deprives MCM of its ability to present an adequate
19 defense, particularly in regard to factual questions concerning the nature, extent and gravity of
20 each alleged violation, susceptibility to cleanup or abatement and voluntary cleanup efforts
21 undertaken, degree of culpability, and economic benefit. (Wat. Code, § 13385, subd. (e).) The
22 Complaint effectively eviscerates the requirements of section 13385 and deprives MCM of due
23 process. (See, e.g., *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th
24 1544, 1597.) [public agency’s broad-brush assertions are insufficient where individual
25 assessment of particular evidence or other factors is required].) For these reasons, the Complaint
26 is fatally defective.

27 **2. Civil Liability Exceeding the \$10,000 Daily Maximum**

28 The Complaint asserts multiple violations of the Certification under the same facts,

1 effectively duplicating violations, in order to achieve total daily penalties exceeding the \$10,000
2 per day allowed by Section 13385, subdivision (c)(1).

3 The statutory limit on daily violations is set forth under Water Code section 13385,
4 subdivision (c), which states that daily civil liability may not exceed \$10,000 per day:

5 Civil liability may be imposed administratively by the state board or a
6 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:

- 7 (1) Ten thousand dollars (\$10,000) **for each day in which the**
8 **violation occurs.**
- 9 (2) Where there is a discharge, any portion of which is not susceptible
10 to cleanup or is not cleaned up, and the volume discharged but not
11 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.

12 (Wat. Code, § 13385, subd. (c) [emphasis added].) The Prosecution admits that this section
13 “provides that the maximum amount of administrative civil liability that may be imposed by the
14 Regional Water Board is \$10,000 per day of violation.” (Complaint, ¶ 17.) Yet the Prosecution
15 goes on to claim violations of \$20,000 or \$30,000 per day for many single events. In effect, the
16 Prosecution contends that it can draft and interpret conditions so as to bypass the legislative limit
17 on maximum fines.

18 MCM acknowledges that, under federal law, and in limited circumstances, more than one
19 violation of the Clean Water Act may be levied for a single discharge where the discharge
20 violates multiple pollutant parameters.

21 The Complaint, however, presents an entirely different situation. The conditions in the
22 Certification were written by Regional Board staff. They set forth related and sometimes
23 overlapping conditions, including the “catchall” Condition 17, which is violated in a general
24 sense every time another condition is breached. Condition 17 provides:

25 All activities, BMPs, and associated mitigation will be described in this
26 Permit and the application submitted by the applicant for this project.

27 Thus, as written, and subsequently interpreted and applied by staff, the Prosecution’s
28 approach allows staff to draft any number of overlapping conditions in a Section 401

1 certification, then allege separate violations of each, well in excess of the \$10,000 daily
2 maximum set by statute.

3 Accordingly, in cases of overlapping conditions involving Condition 17, or others, which
4 are based on the same facts, the Prosecution may not “stack” violations to create total civil
5 liability in excess of \$10,000 per day.

6 With this background in mind, we now turn to the evidentiary standards governing the
7 Complaint, and our review the individual allegations.

8 9 LEGAL STANDARDS

10 Two important legal standards guide a regional water quality control board’s enforcement
11 proceedings, including the review of an administrative civil liability complaint.

12 First, the regional water quality control board possesses the burden of proof. (See *Beck*
13 *Development Co., Inc. v. Department of Toxic Substances Control* (1996) 44 Cal.App.4th 1160,
14 1205-1206.) Thus, in this case, the Regional Board, acting through the Prosecution Team,
15 carries the burden of proving each and every one of the many violations set forth in the
16 Complaint.

17 The second rule addresses the quality of evidence. An enforcement action must be
18 predicated on “credible” and “reasonable” evidence that a discharger is responsible for a
19 violation of law:

20 [T]here must be a reasonable basis on which to name each party. There
21 must be substantial evidence to support a finding of responsibility for each
22 party named. This means credible and reasonable evidence which
indicates the named party has responsibility.

23 (*Order No. WQ 85-7 (Exxon, Co., U.S.A.)*)

24 25 INDIVIDUAL VIOLATIONS

26 Caltrans and MCM have taken the depositions of the Regional Board staff members to
27 investigate the facts supporting the Complaint. This included three days of deposition for Kason
28 Grady, who drafted the Complaint, and depositions of David Leland, Dean Prat and Mona

1 Dougherty (transcripts of each are in the appendices). Most of the allegations were found
2 lacking in evidentiary support.

3 This review is organized based on the categories of allegations listed in the Complaint. It
4 summarizes allegations where possible rather than exhaustively reviewing every violation.
5 MCM's appendices (Nos. 1 through 99) contain supporting evidence.

6 **A. Construction Dewatering**

7 The first category is "Construction Dewatering." It describes 14 different events which
8 allegedly violate the Certification. Most are not supported by the evidence. Those violations
9 established, and not, are listed in Appendix 100.

10 We begin with the allegations that have evidentiary support. These involve "Isolated
11 Pool B," a dewatering basin located 70 feet from the river where the gravel bar met bedrock.
12 The basin accepted river water that pumped from bridge footings and other work areas, rather
13 than discharging water directly back to the river. Isolated Pool B was a "BMP" (Best
14 Management Practice) which protected Eel River water quality.

15 Caltrans' Application to the Regional Board stated that such basins would be a minimum
16 of 100 feet from the river, and it was not. This made pumping to Isolated Pool B an
17 unauthorized discharge under Condition 9 of the Certification, at least on a technical level.

18 Condition 9 stated:

19 No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or
20 concrete washings, oil or petroleum products, or other organic or earthen
21 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.

22 MCM accepts that the use of Isolated Pool B did not comply with the Certification,
23 because it was not 100 feet from the river. But the proposed civil liability far exceeds the
24 magnitude of this infraction. The Complaint seeks the maximum penalty of \$10,000 per
25 violation – the highest allowed by law. In deposition, however, it became clear that the 100-foot
26 distance was not critical, and that the Regional Board would have issued the Certification even if
27 it knew the basin would be only 70 feet from the river:

28

1 Q. A few minutes ago we talked about isolated Pool B. I have a
2 couple of questions about that. If I understood your testimony
3 right, you said that there's nothing special about the 100-foot
4 distance that was included in the Application here. That was what
5 Caltrans included in the Application and the Board approved it; is
6 that right?

7 A. Yes.

8 Q. And you, also, mention that the Regional Board, in all likelihood,
9 have approved shorter distances than 100 feet in other situations?

10 A. Yes.

11 Q. Knowing that there's nothing special about the 100 foot distance
12 here, and also knowing that the Board has probably accepted less
13 than 100 feet in other situations, if, back at the time of the
14 Application, Caltrans would have said: "The furthest we could put
15 away a basin within the gravel bar in the work area is 70 feet,"
16 would there be any reason, from your standpoint, to disapprove
17 that request?

18 A. No.

19 (Deposition of Dean Prat, 53:24-54:19)

20 In seeking the maximum civil liability, the Prosecution also overlooks that this basin was
21 an effective and necessary BMP, which was placed as far away from the active river as the
22 topography allowed. Accordingly, the use of Isolated Pool B merits a very low, if any, civil
23 liability.

24 The remaining conditions in the Certification do not support the allegations. Of
25 particular note is Condition 12, which controls dewatering to "surface waters":

26 If construction dewatering is found to be necessary, the applicant will use
27 a method of water disposal other than disposal to surface waters (such as
28 land disposal)...

29 The Complaint assumes that "surface waters" includes where water is not physically
30 present, such as the gravel bars. Its plain meaning, however, indicates waters with a "surface."
31 By contrast, the Certification distinguishes disposal "to land." Nothing in the Certification gave
32 Caltrans any reason to suggest that surface water includes areas of dry land outside the river:

33 Q. Where in the certification is surface waters defined?

34 A. I've not reviewed it so thoroughly to look for a definition.

35 Q. To your knowledge, is surface waters defined anywhere in the
36 certification?

37 A. Not to my knowledge.

38 * * *

- 1 Q. Is there anything to your knowledge that would have provided
2 notice to Caltrans or any contractor working on this project that
3 surface waters included the gravel bar?
4 A. I do not know specifically.

5 (Deposition of Kason Grady, 34:19-23, 35:19-23.) A definition of “surface waters” that includes
6 dry land would also make Condition 7, which also uses the term, unworkable. Thus, Caltrans
7 and MCM are entitled to rely on the plain meaning of this term.

8 For the remaining violations, the Prosecution has not carried its burden of proof, based on
9 a lack of credible and reasonable evidence. The remaining allegations are based largely on
10 second- or third-hand conversations described in project logs.

11 Uncorroborated conversations are normally excluded as hearsay under state law, and
12 while the Regional Board is not bound to the usual rules of evidence, the fact remains that the
13 logs are too vague and imprecise to establish violations. The following testimony is illustrative,
14 and relates to an event noted in Caltrans’ logs where some unknown type of “pumping”
15 occurred:

16 Q. Turn to the September 11th event, and again we have a quote, and
17 no other photographs or documents referenced. Are you aware of
18 any other specific photographs or documents that support this
19 violation on this day?

20 A. No.

21 Q. Does the quote indicate where pumping was made to? Evidently,
22 there was some pumping done. Where was that pumped to?

23 A. It does not state, but the general practice that I’m aware of was to
24 Isolated Pool B.

25 Q. But at least based on the quote, you don’t have any evidence of
26 that?

27 A. No.

28 Q. Is it your understanding that the basis for this violation is the use of
Isolated Pool B similar to other violations we’ve discussed?

A. Correct.

Q. But as you stated, at least based on that quote, we don’t actually
know if Isolated Pool B was used on this event?

A. That’s correct.

(Deposition of Kason Grady, 48:22-49:18.) The testimony highlights the fundamental
shortcomings of the evidence used to support the Complaint.

B. Leaky Equipment

The “Leaky Equipment” category contains a single event where the evidence supports a

1 violation (summarized in Appendix 100). This August 22 event involved an uncontained
2 mechanical fluid leak from a backhoe to the gravel bar.

3 For the remaining 14 alleged violations, no discharge of equipment fluids could be
4 proven, or the record shows that leaking fluids (a nearly unavoidable reality of heavy equipment)
5 were captured with BMPs (plastic sheeting, etc.) and discharges to the river channel were
6 avoided.

7 Some of these violations involved the "trestle deck," a temporary bridge that MCM
8 erected across the river, which served as a work platform for a crane and other heavy equipment.
9 The trestle deck effectively protected the river below from equipment leaks, a fact acknowledged
10 by staff in deposition:

11 Q. Would you agree that the trestle deck provided a measure of
12 protection against spills on the riverbed beneath?

12 A. A measure of protection?

13 Q. Yes.

13 A. Sure.

14 Q. Well, not just a measure of protection. I mean, in fact, we have no
14 evidence that any spills actually made it through the trestle deck to
15 the riverbed beneath; correct?

15 A. Correct.

16 Q. And as far as you know, it's entirely possible, isn't it, that every
16 event in which a spill made it on the trestle deck was prevented by
17 the trestle deck from reaching the riverbed below; correct?

17 A. Could be. It's possible.

18 (Deposition of Kason Grady, 92:14-93:8.)

19 Mr. Grady also acknowledged that no violations could be proven where protective
20 barriers effectively contained equipment leaks. This speaks to the majority of the allegations
21 under this category:

22 Q. Well, let me start just with condition nine. Speaking just with
23 respect to condition nine, if leaks from a backhoe or other
24 equipment were completely contained by the use of BMPs such as
25 plastic sheeting but then plastic sheeting was thereafter cleaned,
26 taken away so that it didn't pose any later further threats to water
27 quality, would a violation of condition nine taken place?

25 A. No, I don't believe so. Granted –

26 Q. You can stop there.

26 A. Okay.

28

1 Q. That's fine. Turning to condition thirteen, if you have a backhoe or
2 other equipment and leaks are completely caught by BMPs such as
3 plastic sheeting and that plastic sheeting is thereafter cleaned and
4 taken away and disposed of properly such that there's no potential
5 impact to water quality, has a violation of condition thirteen taken
6 place?

7 A. Probably not.

8 * * *

9 Q. As I understand from your testimony, at least in your view, that if
10 equipment leaks are entirely contained by BMPs such as plastic
11 sheeting such that there's no discharge, then condition thirteen
12 would not be violated?

13 A. Correct.

14 (Deposition of Kason Grady, 103:2-20, 104:20-25.) Staff member David Leland agreed with this
15 view in his deposition testimony:

16 Q. Well, let's assume that we've completely captured any leaks by the
17 use of plastic sheeting which is something, just by its nature, that
18 we're going to clean up on a daily or twice-daily basis. Would that
19 then exclude that event from being a violation under condition
20 nine?

21 A. My understanding is that it would.

22 (Deposition of David Leland, 76:11-20 [objections omitted].)

23 In this regard, the record is clear that project personnel used spill containment measures
24 such as plastic sheeting and absorbent rags, corresponding to specific BMPs in Caltrans' Best
25 Management Practices Manual (NS-13):

- 26 ■ Use drip pans and absorbent materials for equipment and vehicles
27 and ensure that an adequate supply of spill cleanup materials is
28 available.
- Drip pans shall be placed under all vehicles and equipment placed
on docks, barges, or other structures over water bodies when the
vehicle or equipment is expected to be idle for more than one hour.

Finally, many allegations in this category were supported by nothing other than pictures
of unidentifiable spots on the ground, taken in 2006 by Caltrans not the Regional Board's staff.
Exactly why these pictures were taken, where they were taken from, and what exactly they
showed, is not clear. This extended passage from Mr. Grady's deposition is illustrative:

Q. Turning to the next photograph, 061030-03, it shows a track-
mounted piece of equipment; correct?

A. Yes.

1 Q. And underneath we have one small wet area and then a larger wet
2 A. Yes.
3 Q. Do you know where this picture was taken?
4 A. No.
5 Q. Does it appear to be an upland location rather than a gravel bar?
6 A. Upland.
7 Q. Do you know where in the uplands it was taken?
8 A. No.
9 Q. Do you know how far away from the river this is?
10 A. No.
11 Q. Can you verify that this particular piece of equipment made either
12 or both of the stains that are shown in the photograph?
13 A. No.
14 Q. Do you know what the chemical composition is of either of these
15 stains?
16 A. No.
17 Q. And do you know when this fluid was deposited or placed on this
18 ground surface?
19 A. No.
20 Q. Turning to the next photograph, 061030-04 –
21 A. Yeah.
22 Q. And this appears to be a roadway, correct?
23 A. Yes.
24 Q. Is the reason this photograph is included because of what looks to
25 be staining in the center of the roadway?
26 A. Yes.
27 Q. Do you know what that staining is?
28 A. No.
Q. Do you know when it was deposited there?
A. No.
Q. Do you know how far away from the river this location is?
A. I believe it's up by the resident engineer's offices.
Q. Which is how far away?
A. So in terms of distance, I don't really know. I don't know the site
enough to estimate a distance for that. You have to drive a
circuitous road down.
Q. Is this a public road?
A. I don't know. I think so.
Q. Do you know if it's project-related construction equipment that
created this discoloration on the ground?
A. I do not.
Q. It could have been a passenger vehicle; couldn't it?
A. I don't believe passenger vehicles had access to this site, well,
other than project-related passenger vehicles, but they could,
absolutely.
Q. It's possible it could have been Dean Prat's vehicle; true?
A. Is that a question? Sure.
Q. I'm not suggesting it is.
A. I don't think he was down there on that day, but –
Q. Well, good point. We don't actually know when this discoloration
occurred?
A. No.

1 (Deposition of Kason Grady, 122:7-129:2.) This clearly is not the type of credible or reasonable
2 evidence that can support civil liability.

3 **C. Slag Discharges**

4 This category of violations alleges that project personnel did not adequately contain
5 welding sparks or small weld cuttings. Three of these events (October 18, 20 and 31, 2006) are
6 not supported by the evidence, based on staff testimony that they could be duplicative of other
7 violations, or uncontextualized photographs.

8 The remaining allegations show that small amounts of sparks or cuttings fell into the river
9 from the bridge or on the gravel bar during construction. Such materials are not toxic and do not
10 impact water quality. As minor violations, these do not support the high civil liability proposed
11 (averaging \$3,333 per allegation). Low, if any, civil liability is warranted by the following:

- 12 • The evidence presented at the hearing will show that complete containment of
13 welding sparks is infeasible for exposed work at heights on the underside of the
14 bridge.
- 15 • It is not custom and practice in the construction industry to contain all welding
16 sparks and slag, given their non-toxic nature, and this requirement was
17 unexpected.
- 18 • Most sparks burn completely before striking the ground; only minutely small
19 amounts would have reached the ground.
- 20 • Once concerns were raised, new BMPs (buckets and blankets) were added to the
21 extent possible without compromising worker safety.
- 22 • A cleanup program was in place for welding slag on the gravel bar, and the record
23 shows that cleanup occurred.

24 The low impacts of welding activities were acknowledged during deposition by Mr.
25 Grady, who likened it to a sediment discharge:

- 26 Q. Do you have any information that introducing welding slag into a
27 water body would create an adverse impact on water quality in any
28 way?
A. Well, at a minimum, it would be considered sediment once it's
there.

- 1 Q. Any toxic effects that you're aware of?
A. No.
- 2 Q. Any impacts to fish or wildlife that you're aware of?
A. Other than the impacts that sediment would have, no.
- 3 Q. Do you have any sense for the total volume of welding slag that
4 might have been introduced into the riverbed as a result of this
particular day's activities?
A. No.
- 5 Q. What about collectively over the course of the project?
A. I have no idea.
- 6

7 (Deposition of Kason Grady, 139:7-25.) The facts support a substantial downward adjustment in
8 the civil liability for this category.

9 **D. Turbid Discharge**

10 This category contains 15 different events. None of them, except one, can be
11 substantiated by clear and credible evidence.

12 The only violation which may be established by the evidence is the January 5, 2007 event
13 involving a water line which froze, cracked and spilled some amount of water to the gravel bar.
14 The unexpected and isolated nature of this event merits little, if any, civil liability.

15 Of the remaining alleged violations, two (September 7, 2006 and October 7, 2006) are
16 based on second- or third-hand recorded conversations, which are not, as noted above, reliable
17 evidence.

18 The other eleven involve mostly small in-stream plumes, generated by construction
19 activities. To establish violations, the Prosecution needed to prove that these plumes were
20 caused by material other than in-stream silt or sediment. Mr. Grady testified that where a plume
21 results from silt or sediment disturbed in place, it does not violate the Certification:

- 22 Q. What is it about this crossing on this date that establishes a violation then?
23 A. The transportation of sediment into the system. If it has stirred up
24 sediments that were existing there on the bottom of the riverbed, then
there wouldn't have been a mobilization of sediment into the system from
an outside source.

25 * * *

- 26 Q. Okay. So it is your position that this violation is established because
27 there's an introduction of sediment into the river from somewhere outside
the river?
A. (Witness nods his head.)
- 28

1 MS. MACEDO: Is that a "yes"?
2 THE WITNESS: Yes. Thank you.

3 * * *

4 Q. So if, hypothetically, on this project a worker were to have, you know,
5 stood in the river and kicked up sediment, thereby, creating a plume, that
6 wouldn't establish a violation?

7 A. Well, it would trigger the need to monitor turbidity?

8 Q. Okay.

9 A. Although I wouldn't consider it triggering a violation of Condition 9.

10 (Deposition of Kason Grady, 231:25-232:6, 233:21-234:2, 236:12-20.)

11 A close examination of the eleven "plume" violations reveals that, for each, the
12 Prosecution has not proven that plumes were not simply the disturbance of in-stream silt or
13 sediment, rather than foreign material transported into the river.

14 This especially must be emphasized for those events catalogued in the Complaint as a
15 cement plume. Without exception, Mr. Grady acknowledged during deposition that these
16 plumes were not actually verifiable as cement and could just as easily have been in-stream
17 sediment.

18 **E. Insufficient Turbidity Measurements**

19 This set of violations is premised on Condition 19. Condition 19 required Caltrans to
20 monitor construction-related turbidity in the Eel River, to determine whether certain limits were
21 exceeded (i.e., if turbidity was more than 20 percent over background levels, at a distance 100
22 feet downstream of the source). Condition 19 states, in full (emphasis added):

23 Visual observations of the South Fork Eel River shall be conducted
24 whenever a project activity has the potential to mobilize sediment and
25 increase the turbidity of the South Fork Eel River. **Field turbidity**
26 **measurements** shall be collected whenever a project activity causes
27 turbidity of the South Fork Eel River to be increased above background
28 concentrations in order to demonstrate compliance with receiving water
limitations.

Whenever turbidity in the South Fork Eel River is increased above
background as a result of project activities, turbidity measurements shall
be collected upstream (within 50 feet) of project activities (background)
and downstream (within 100 feet) of the source of turbidity. The
frequency of turbidity monitoring shall be a minimum of every hour
during periods of increased turbidity and shall continue until turbidity

1 measurements demonstrate compliance with receiving water limitations
2 and turbidity levels are no longer increasing as a result of project
3 activities. If turbidity levels are greater than 20 percent above background
4 100 feet downstream of the source of turbidity, all necessary steps shall be
5 taken to install, repair, and/or modify BMPs to control the source(s) of
6 sediment and the overall distance from the source of turbidity to the
7 downstream extent of the increased turbidity (20 percent above
8 background) shall be measured.

9 Turbidity monitoring results shall be reported to appropriate Regional
10 Water Board staff by telephone within 1 hour of taking any turbidity
11 measurement that shows turbidity levels are 20 percent above background
12 100 feet or more downstream of the source of turbidity. All recorded
13 visual observation and all field turbidity measurements collected for the
14 purpose of this condition shall be submitted in a report to the Regional
15 Water Board by November 15th each year and within 45 days of project
16 completion.

17 The Prosecution believes that Condition 19 was violated because Caltrans did not use the
18 correct turbidity monitoring method. The Prosecution believes it was mandatory for Caltrans to
19 use a specific device known as an "NTU Meter" to determine if turbidity exceeded the 20
20 percent / 100-foot standard. (See Deposition of Kason Grady, Nov. 10, 2010, 201:23-202:5.)

21 The problem with this theory is that Condition 19 does not specifically require the use of
22 an NTU Meter device. It states only that "field turbidity measurements" must be collected, and
23 nowhere mentions an NTU Meter. Mr. Grady acknowledged this during deposition:

24 Q. Where in the Certification does it state that field turbidity
25 measurements must be taken by an NTU meter?

26 A. To my knowledge, there is no specific location describing that.

27 Q. Your definition that you just provided me for field turbidity
28 measurements, can you cite for me any recognized publication,
works, regulations, or other information that have that definition of
field turbidity measurements?

A. No.

Q. So I take it it is just your understanding that it is the practice in the
industry that field turbidity measurements use NTU meters?

A. Yes.

(Deposition of Kason Grady, 202:6-20.)

29 The Prosecution overlooks that other methods of field turbidity measurement exist. The
30 record shows that visual turbidity measurements were actually used during the construction. The
31 following quotes an "Attachment K" form that Caltrans submitted to the Regional Board for a
32 September 1, 2006 event:

1 The disturbance caused a plume of sediment about 20-feet in length and
2 last approximately 2-minutes. The discharge was monitored by a biologist
3 who confirmed that background turbidity levels were not increased as
measured from a point 100-feet downstream. No apparent adverse
impacts to the aquatic environment were observed.

4 (See Appendix 46, Attachment K Form.) Another construction report states that a "visual scale"
5 was used to gauge turbidity (in respect to vehicle crossings over the river):

6 For both of these crossings the value of "3" on the visual scale was
7 recorded within the plume at the crossing site, representing a high amount
of acute turbidity. The visual turbidity value 50 feet upstream of the
crossing was "0" and the value 100 feet downstream was "3".

8 (See Appendix 50.)

9
10 Mr. Grady acknowledged that, notwithstanding his belief that an NTU Meter was
11 mandatory, visual field measurements had in fact been collected, which allowed monitors to
12 determine the size of turbidity plumes:

13 Q. As you previously testified, the field turbidity measurements must
be measured using an NTU meter, right?

14 A. Yes.

15 Q. Would you agree that in this case there also appears to have been --
there is evidence of visual measurements being taken of the
turbidity created by the crossings?

16 A. Visual observations?

17 Q. Yes. And, in fact, those visual observations resulted in estimates
regarding the size, length and duration of the plume; would you
agree?

18 A. Yes.

19 (Deposition of Kason Grady, 266:5-17.) Staff member David Leland offered similar testimony:
20 "...I suppose you could call it a [field turbidity] measurement." (Deposition of David Leland,
21 87:9-13.)

22 At the hearing, MCM will introduce evidence showing that other forms of field turbidity
23 measurement exist.

24 To further complicate this issue, we note that the Prosecution makes the completely
25 unreasonable claim that an NTU Meter is required even for extremely minor turbidity events that
26 obviously would not breach the 100 foot / 20 percent turbidity standard under Condition 19:

27 Q. Let's assume that this plume was, you know, 10 feet or less, would
those measurements still be required?

28 A. Yes.

- 1 Q. Let's assume that the plume was 5 feet or less, would those
2 A. Yes.
3 Q. With an NTU meter?
4 A. Yes.

4 (Deposition of Kason Grady, 203:20-204:3.)

- 5 Q. So, hypothetically, if it was a three-foot plume that was created,
6 that also would require an NTU meter?
7 A. Yes.
8 Q. Is it any defense to a violation like this that a turbidity event may
9 be unexpected?
10 A. I don't believe so. I have to look back at Condition 19 to see if
11 there's a provision that allows for that.
12 Q. Well, let me ask this just as a mechanical issue, I suppose. Let's
13 say, hypothetically, that you know a worker working in the live
14 stream drops a beam or some other, you know, large item into the
15 river which then causes some turbidity, which is, of course, an
16 unexpected event. At that point, how would an NTU meter be
17 used under the terms of this Condition?
18 A. You would measure upstream 50 feet and downstream within 100
19 feet for the duration prescribed in Condition 19 to determine
20 compliance.
21 Q. So someone would need to go upstream 50 feet, take NTU
22 readings, and then that same person would run downstream --
23 A. It wouldn't have to be one person.
24 Q. So you might have two people with two meters, one upstream and
25 one downstream at the same point in time?
26 A. Possibly.
27 Q. But the Certification doesn't describe, exactly, how that is
28 supposed to occur?
A. Correct.

18 (Deposition of Kason Grady, 271:13-272:17.)

19 This is unrealistic. Mandating the use of an NTU Meter for every puff of turbidity,
20 however small, is impractical for work certain to generate unexpected turbidity as a matter of
21 course. Where compliance with the Certification is readily discernable by visual monitoring, an
22 NTU Meter also is unnecessary. If staff sought to require an NTU Meter under all
23 circumstances, when writing the Certification, it should have been more clearly expressed.

24 **F. Improper Disposal of Cement Waste**

25 The events under this category are not easily summarized. Accordingly, we address each
26 of them individually.

27 August 29, 2006 – minor violation. Concrete contact water was pumped to Isolated Pool
28 B, to prevent an overflow into the active river. The amount of water placed in this basin, and the

1 ph, is unknown. The violation is mitigated by the need to avoid an overflow of contact water
2 into the river.

3 August 29, 2006 (second for this date) – no violation. Tools were cleaned in a footing
4 excavation. There are no other details. Mr. Grady testified that he did not know whether the
5 tools had cement on them or whether the footing was contained.

6 August 30, 2006 – no violation. The sole evidence is a photograph of uplands and
7 possible concrete waste, an unknown distance from the river. There is no evidence regarding the
8 susceptibility for this material to enter waters of the state.

9 September 8, 2006 – minor violation. Concrete contact water was treated with muriatic
10 acid and disposed of in Isolated Pool B. The volume, circumstances, and details of this event
11 are unknown.

12 September 13, 2006 – minor violation. A photograph shows the disposal of dry concrete
13 material on a gravel bar.

14 September 29, 2006 – minor violation. Concrete contact water was pumped to Isolated
15 Pool B, to prevent an overflow into the active river. The volume of water placed in the basin is
16 unknown. This is mitigated by the need to avoid an overflow of contact water into the river.

17 September 29, 2006 (second of this date) – no violation. A log states that tools were
18 cleaned in a “glory hole.” Mr. Grady testified that he does not know if the area was contained,
19 which was critical to establishing a violation.

20 **G. Rubbish, Debris, Trash and Sediment Discharge**

21 None of these violations are supported by credible evidence. Many of the photographs
22 offered as support show nothing more than wood or debris floating in water, without
23 corroborating evidence (i.e., what the material is, its source, the circumstances of its arrival, ties
24 to the project, etc.). The following testimony is typical:

25 Q. Turning to -05, what does that show to you?

26 A. Wood waste in the river.

27 Q. Do you know where this photograph was taken in relation to the project?

28 A. Not exactly. There's some water coming into the river there. Maybe from
Red Mountain Creek. I would have to review the other photos to
definitively make that determination.

Q. Do you have any evidence that definitely links this piece of wood to

1 construction on the project?
2 A. Other than this photo, no.

3 (Deposition of Kason Grady, 358:4-15.)

4 The photographs were taken by Caltrans biological monitors in 2006. Importantly, the
5 biological monitors were not tasked with investigating violations of the Certification. Their job
6 was to observe site conditions, in the course of which they took hundreds of photographs. The
7 mere fact that a picture was taken is not evidence of a violation, or that the condition
8 photographed is attributable to the project.

9 **H. Individual Events**

10 In the final category, two of the four events cannot establish violations.

11 The August 17 photograph shows buckets and bags containing piles of rocks, which may
12 or may not be damp or stained. No evidence is offered of the circumstances. Likewise, the
13 November 3 log indicates that an unknown amount of "loose soil" cascaded down a hillside to
14 reach the ordinary high water mark. The amount of soil, where exactly it fell, and other
15 necessary details, are not in the evidence.

16 **Storm Water Permit Violations**

17 The Complaint alleges a series of violations of the Storm Water Permit. The evidence in
18 the record is not supportive. The ten days of refueling violations is based on statements taken
19 out of context; Ladd personnel were adequately trained and did, in fact, use BMPs. The
20 additional refueling violation dated August 22, 2006 is not supported by the terms of NS-9.
21 Finally, the 130 days of using the trestle deck without watertight containment misinterprets the
22 Permit requirements.

23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 Re: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R1-2009-0095
2 Confusion Hill Bypass Project, Mendocino County
3 California Regional Water Quality Control Board, North Coast Region

3 **PROOF OF SERVICE**

4 I, Gilberto J. Castro, declare:

5 I am a citizen of the United States, employed in the City and County of Sacramento,
6 California. My business address is 400 Capitol Mall, Suite 1800, Sacramento, California 95814. I
7 am over the age of 18 years and not a party to the within action.

8 I am familiar with the practice of Diepenbrock Harrison for collection and processing of
9 correspondence, said practice being that in the ordinary course of business, correspondence is
10 sealed, given the appropriate postage and placed in a designated mail collection area. Each day's
11 mail is collected and deposited in the United States Postal Service.

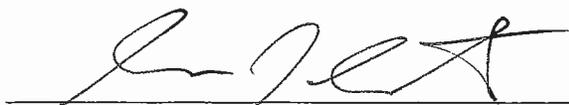
12 On February 14, 2011, I served the attached,

13 **MCM CONSTRUCTION INC.'S OPENING BRIEF**

- 14 [] (BY U.S. MAIL) I placed such sealed envelope, with postage thereon fully prepaid for first-
15 class mail, for collection and mailing at Diepenbrock Harrison, Sacramento, California,
16 following ordinary business practices as addressed as follows, and/or
- 17 [] (BY PERSONAL SERVICE) I caused each such envelope to be delivered by hand to the
18 addressees at the addresses listed below; and/or
- 19 [] (VIA FEDERAL EXPRESS) I caused each such envelope to be delivered via Federal
20 Express overnight service to the addressees at the addresses listed below; and/or
- 21 [] (VIA FACSIMILE) I caused each such document to be sent by facsimile machine number
22 (916) 446-4535 to the following persons or their representative at the addresses and the
23 facsimile numbers listed below; and/or
- 24 [X] (VIA EMAIL) I caused each such document to be sent by electronic mail to the addressees
25 at the email addresses listed below.

26 SEE ATTACHED MAILING LIST.

27 Executed on February 14, 2011, at Sacramento, California.

28 

Gilberto J. Castro

1 Re: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R1-2009-0095
2 Confusion Hill Bypass Project, Mendocino County
3 California Regional Water Quality Control Board, North Coast Region

4
5 **MAILING LIST**

6 Cristian Carrigan
7 Senior Staff Counsel
8 Office of Enforcement
9 State Water Resources Control Board
10 1001 I Street
11 Sacramento, CA 95814
12 ccarrigan@waterboards.ca.gov

13 Julie Macedo
14 Senior Staff Counsel
15 Office of Enforcement
16 State Water Resources Control Board
17 1001 I Street
18 Sacramento, CA 95814
19 jmacedo@waterboards.ca.gov

20 Samantha Olsen
21 Senior Staff Counsel
22 Office of Chief Counsel
23 State Water Resources Control Board
24 1001 I Street
25 Sacramento, CA 95814
26 solson@waterboards.ca.gov

27 David Rice
28 Staff Counsel
29 Office of Chief Counsel
30 State Water Resources Control Board
31 1001 I Street
32 Sacramento, CA 95814
33 davidrice@waterboards.ca.gov

34 Luis Rivera
35 Assistant Executive Officer
36 North Coast Water Board
37 5550 Skylane Boulevard, Suite A
38 Santa Rosa, CA 95403
39 lriviera@waterboards.ca.gov

40 Ardine Zazzeron
41 Legal Division
42 California Department of Transportation
43 595 Market Street, Suite 1700
44 San Francisco, CA 94105
45 ardine_zazzeron@dot.ca.gov

46 Doug Jensen
47 Legal Division
48 California Department of Transportation
49 595 Market Street, Suite 1700
50 San Francisco, CA 94105
51 douglas_jensen@dot.ca.gov

52 Mick Kortge
53 Ladd & Associates / Ladd Construction
54 P.O. Box 992750
55 Redding, CA 96001
56 tahocabin@aol.com

57 Lisa Bernard
58 Sanitary Engineering Associate
59 Regional Water Quality Control Board
60 5550 Skylane Blvd., Ste. A
61 Santa Rosa, CA 95043
62 LBernard@waterboards.ca.gov