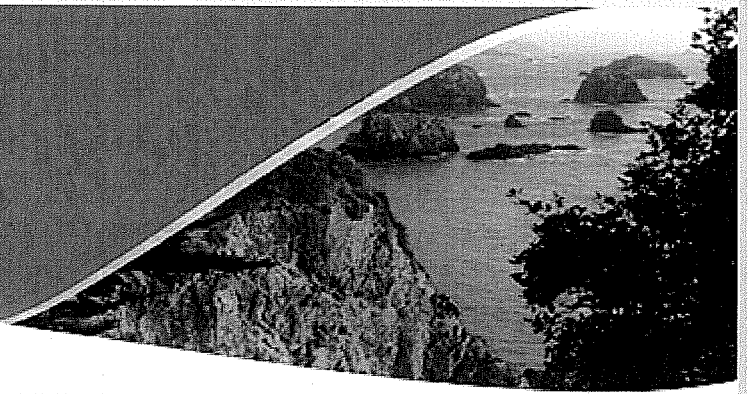


Prosecution Team Case in Chief

Confusion Hill Bypass Project

February 14, 2011

- Written Submission
- Declaration and Supporting Exhibits:
 - 1) Mona Dougherty
 - 2) Kason Grady
 - 3) Julie Macedo



BINDER CONTENTS

- Prosecution Team – Case in Chief;
Brief of Factual and Legal Argument
- Witness Statement
- Declaration of Mona Dougherty
and Supporting Exhibits
- Declaration of Kason Grady
and Supporting Exhibits
- Declaration of Julie Macedo
and Supporting Exhibits

Prosecution Brief

**Prosecution Team Case-in-Chief
Confusion Hill Bypass Project**

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BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD
NORTH COAST REGION

14 In the Matter of:) ACLC Order No. R1-2007-0095
15 CALIFORNIA DEPARTMENT OF)
16 TRANSPORTATION,) PROSECUTION TEAM'S BRIEF,
17 CONFUSION HILL BYPASS PROJECT,) CASE-IN-CHIEF
18 WDID No. 1B05153WNME)
19) Declarations of Kason Grady, Mona
20) Dougherty, and Julie Macedo submitted
21) herewith

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1 **PROSECUTION TEAM LEGAL AND FACTUAL ANALYSIS**

2 **I. INTRODUCTION – OVERVIEW OF CONFUSION HILL PROJECT**

3 The California Department of Transportation (“Caltrans”) contracted with MCM
4 Construction, Inc. (“MCM”; Caltrans and MCM are sometimes collectively referred to as
5 the “Dischargers”) to construct the Confusion Hill Bypass Project, (the “Project”) located in
6 Mendocino County. The purpose of the Project was to relocate a portion of Highway 101,
7 accomplished by relocating the highway from the east side of the South Fork Eel River to
8 the west side. The Project required construction of two new bridges and a new section of
9 highway.

10 Caltrans submitted its application for a 401 certification in 2005, and the
11 certification was issued February 16, 2006. The Project commenced on June 19, 2006
12 and the Administrative Civil Liability Complaint (“ACLC”) was issued in 2007 after several
13 site inspections, two Notices of Violations (“NOVs”) and an Investigatory Order pursuant to
14 Water Code §13267. The Complaint seeks administrative liabilities for violations that
15 occurred between August 17, 2006 and June 1, 2007, although the Project continued until
16 2009. After 2007, the Regional Board staff turned its efforts to enforcement.¹

17 Caltrans and MCM will argue that this Project was an example of swift and
18 responsible construction. While swift, the Project was fraught with violations, and the
19 penalties sought by the ACLC are conservative and undervalue the Project’s true
20 environmental harm and the Dischargers’ sometimes **intentional** disregard for the
21 regulatory system. The Project resulted in unauthorized discharges of toxic concrete
22 wastewater, sediment and other pollutants to a sensitive, sediment-impaired water that is
23 a known habitat for endangered species. The Regional Board staff exercised its
24

25 _____
26 ¹ In reviewing evidence gathered from the Dischargers to prepare for this hearing, the
27 Prosecution Team has discovered many additional violations that were committed after
28 June 1, 2007, both discharge and reporting. The Prosecution Team is considering further
enforcement action, and a description of the additional violations is provided, *infra*.

1 discretion throughout the complaint, in choosing which violations to pursue and how to
2 value those violations, and the ultimate fine sought is conservative. The staff considered
3 the 13385 factors and often reduced the proposed civil liability recommended from the
4 potential maximum penalty for specific violations. The penalty recommended in the ACLC
5 is just over half of the maximum. This number is fair and should not be decreased²,
6 despite the Dischargers' arguments. The Dischargers' argument that this Project was
7 environmentally friendly rings hollow in light of the following problems:

- 8 • The SWPPP manager was replaced mid-project for failure to consistently be
9 effective, onsite, and update the SWPPP to reflect the current Project
10 conditions;³
- 11 • The Resident Engineer was replaced mid-project;⁴
- 12 • An additional consultant, Joe Cartwright, was hired to assist with SWPPP
13 compliance, with the cost divided between MCM and Caltrans;⁵
- 14 • Caltrans issued an administrative retention of funds for poor SWPPP
15 performance;⁶
- 16 • Caltrans issued work stoppages and complained to MCM several times about
17 its poor understanding of best management practices ("BMPs") and attitude
18 toward compliance;⁷

22 _____
23 ² The Prosecution Team is willing to forego seeking penalties for a limited number of
24 violations where it is willing to consider the possibility that the violation date may be
25 duplicative of another date or is related to in stream sediment. See Section VIII, *infra*.

26 ³ See Declaration of Julie Macedo ("Macedo Decl."), Exhibits A and B.

27 ⁴ See Declaration of Mona Dougherty ("Dougherty Decl."), ¶2.

28 ⁵ See Macedo Decl., Exhibit C.

⁶ See Macedo Decl., Exhibits D, E, and F.

⁷ See Macedo Decl., Exhibits G and H regarding work stoppages; for examples of Caltrans' frustration with MCM related to environmental compliance, see C, I, J, K, Q..

- At least two meetings were held among the Dischargers where environmental compliance was discussed and Caltrans expressed frustration with MCM for failure to respect the permit requirements;⁸
- Caltrans questioned in writing whether MCM's conduct in failing to observe permit requirements was intentional;⁹
- This Board has already fined Caltrans \$20,000 for a discrete violation on this Project, which was ultimately split between Caltrans and MCM;¹⁰
- There is evidence of MCM and Caltrans controlling information and deliberately preventing information related to discharges from getting to regulatory agencies, including the Regional Board.¹¹

Correspondence between Caltrans and MCM documents MCM's refusal to make appropriate expenditures for BMPs, and Caltrans' insistence that more BMPs were needed for regulatory compliance. Ultimately, Caltrans and MCM are complicit in their combined failure to report violations, including the discharge violations that occurred as a result of failing to install and maintain BMPs. Many of these discharges could have been easily avoided with minimal effort.¹² If efforts were not going to be taken, the appropriate response would be to contact the Regional Board prior to a rain event for a permit amendment of some kind¹³, or to quickly report a discharge and work to resolve it with the

⁸ See Macedo Decl, Exhibits I and J.

⁹ See Macedo Decl, Exhibit K.

¹⁰ The previous Confusion Hill ACLC is attached as Exhibit A to the Dougherty Decl.

¹¹ See Macedo Decl, Exhibit L.

¹² See August 20, 2008 email from Sebastian Cohen, Caltrans Resident Engineer to MCM's Evan Paine: "As usual, a majority of the issue[s] are easily achievable with only a little effort and forethought on the part of the Contractor(s)..."; Macedo Decl., Exhibit C; *see also* June 13, 2007 MCM correspondence to Caltrans re: sandblasting waste: "In some cases this additional work may be no more than spreading out a piece of visquene...". See Macedo Decl., Exhibit M.

¹³ Caltrans is familiar with requesting a 401 permit amendment on construction projects; it requested two amendments for this Project. See Declaration of Kason Grady ("Grady Decl."), Exhibit A.

1 Regional Board. The evidence provided by the Dischargers to the Regional Board
2 through the discovery process shows that this is not what occurred; instead, MCM
3 objected to Caltrans to what it considered overly stringent permit requirements so it did
4 what it wanted without Regional Board guidance and often against express direction from
5 Caltrans and permit language. Often, when Caltrans and MCM were aware of discharges,
6 they decided not to notify the Regional Board. Caltrans and MCM are both ultimately
7 liable for their conduct and the Board needs to issue an Order to make it clear to Caltrans
8 and its contractors, MCM and others, what is expected in this environmentally-rich region.

9 **II. OVERVIEW OF REGULATORY SCHEME – PERMITS AND GOVERNING** 10 **DOCUMENTS**

11 **A. The Permits that Apply to the Project**

12 The governing documents for the Confusion Hill Project are the NPDES permit
13 issued to Caltrans, Order No. 99-06-DWQ (the “Storm Water Permit”), the Clean Water
14 Act section 401 Certification (the “401 permit”), the Project SWPPP and the Basin Plan.
15 The Project must comply with the more stringent requirement of the two permits, one of
16 which is applicable statewide, and one which is project specific.¹⁴

17 **B. The Regulatory Process and the Role of the Regional Board – From 401** 18 **Application to Enforcement**

19 The Clean Water Act (federal) and California Water Code (state) guide regulatory
20 environmental compliance. A 401 certification is based on the Clean Water Act, and will
21 also include waste discharge requirements that are based on compliance with a region’s
22 Basin Plan. The Basin Plan describes how to achieve water quality compliance through
23 identification of beneficial uses, narrative and numeric water quality objectives intended to
24 protect those beneficial uses, and action plans to achieve water quality objectives and
25

26 ¹⁴ The applicable permits are referenced in the Declarations of Kason Grady and Mona
27 Dougherty; the specific sections giving rise to violations are cited in the ACLC and are not
28 repeated in their entirety here. The Confusion Hill ACLC is Exhibit B to the Kason Decl.

1 beneficial use protection. The Basin Plan is available in both hard copy and electronic
2 form (the latter via the North Coast Region's website). Regional Board staff regularly rely
3 on the Basin Plan as a key regulatory document, and have cited it specifically in 401
4 certifications, including certifications for Caltrans projects.

5 The development of the terms and conditions of a 401 certification for a specific
6 Caltrans project begins with the submittal by Caltrans of a 401 application. Regional
7 Board staff review this application and prepare comments for Caltrans on whether and the
8 extent to which the project as described in the application complies with water quality
9 regulations. Caltrans can and does rely during this application review step on BMPs
10 included and documented in Caltrans' BMP manuals for describing how Caltrans intends
11 to conduct the project and achieve water quality compliance. The culmination of this
12 process is a Caltrans 401 Application and Project Description that has been approved by
13 Regional Board staff because it protects water quality, ***if executed precisely as***
14 ***described***. This approved Project Description forms the basis for the findings and
15 conditions included in the 401 certification and for issuance of the certification.

16 It is Regional Board staff's expectation that the project as approved and
17 conditioned will form the basis for project design, bid and execution, since the project
18 described in the Application is the project that has been permitted through the certification
19 process. It is staff's further expectation that Caltrans will bring to the Regional Board's
20 attention any deviations of the project as designed and bid from the project as previously
21 approved and certified.

22 Regional Board staff often attend pre-construction meetings that involve Caltrans
23 and, depending on the timing, its selected contractor. For the Confusion Hill Project, Dean
24 Prat hosted a meeting between Caltrans and the Regional Board on November 29, 2005
25 and attended a construction meeting in Garberville on June 8, 2006 with MCM and
26
27
28

1 Caltrans.¹⁵ During construction, Regional Board staff are available for consultation with
2 Caltrans and contractor staff, but also conduct inspections and coordinate with other
3 regulatory agencies regarding a project. Significant water quality compliance problems
4 may result in issuance of a Notice of Violation or Section 13267 letter. Enforcement is not
5 taken on every project, given the Regional Board's limited resources. However, violations
6 for this Project were significant in terms of the area affected, the impacted waterways, and
7 the sheer number of violations identified before and after the ACLC was issued.

8 **C. The Dischargers' Mistaken Approach Underlying All of the Violations – The**
9 **Regional Board Has the Authority to Modify the Permits, Not the Dischargers**

10 A single theme underlies all of the Dischargers' violations. MCM and Caltrans
11 failed to include the Regional Board in decision making, instead choosing what was best
12 for either or both of them. The evidence shows MCM and Caltrans repeating this theme
13 over and over throughout the Project. What to do if the permits do not allow certain
14 discharges? Simply do not report them. What to do if Caltrans wants BMPs installed and
15 those cost money? Do the work without proper BMPs when the Resident Engineer is not
16 present. This "self-help" approach to compliance harms the environment with each
17 individual discharge, but it also runs counter to the entire regulatory structure.

18 (i) The Project permits set the boundaries of what is allowed. MCM disregards this
19 basic tenet – in correspondence and in statements made to the Regional Board, it was
20 clear that MCM took liberties with the permit language and thought if it did something that
21 it considered "environmentally friendly" in one aspect of implementing the Project, it could
22 disregard requirements in another. Nowhere in the Caltrans permit or the Project 401
23 certification is such a trading concept either stated or implied. For example, Caltrans
24 submitted its application for the Project and contemplated 12-15 temporary trestle
25 footings, which were permitted. MCM has indicated it utilized fewer trestle footings.

26
27 ¹⁵ See Grady Decl., Exhibits E and F.
28

1 MCM's position seems to be that this "savings" on permitted intrusions into the stream
2 could be "spent" by intruding into the stream in other ways, or elsewhere. The permits
3 provide the exclusive guidance as to what is permitted, and staff believes that they were
4 fair and reasonable, especially when compared to other construction projects.¹⁶

5 (ii) MCM's opinion is not determinative of what is a water quality concern. MCM's
6 perspective about what qualifies as a water quality concern was stated by Mr. Paine:
7

8 [I]t is somewhat arbitrary on what constitutes a water quality concern. The
9 Confusion Hill slide that cascaded into the river only a couple of weeks after the
10 date of the activities listed in this NOV, that turned the entire river brown and
11 saturated the water with silt and sedimentation for weeks, would seem to qualify
12 as a water quality concern. Activities expected and approved, that may have
13 minor impacts measured in minutes, do not qualify as water quality concerns.
14 ... The activities listed in the NOV are well within the scope of the permit and do
15 not qualify as water quality concerns.¹⁷

16 However, water quality concerns are not arbitrary. They are articulated in the Basin Plan,
17 and enforced through the Water Code. If MCM, or any member of the regulated
18 community, were responsible for determining when it had to report a violation, or what a
19 discharge was based on its opinion of water quality concerns, only the most visible and
20 blatant discharges would be regulated. This Project is a prime example of how the self-
21 reporting nature of environmental regulations can lead to abuses, as it did here in at least
22 two obvious examples: (1) turbidity monitoring was not done correctly, preventing
23 Regional Board staff from determining whether turbidity violations had occurred, and (2)
24 discharges were not reported, leading to reporting violations. Both result in the Regional

25 ¹⁶ Often construction projects are prohibited from using sedimentation basins. See
26 Dougherty Decl., ¶15, referring to the 101 Widening Project (Sonoma) and the Trinity River
27 Bridge Project. Conversely, sedimentation basins can be used for the intended purpose
28 (only for dewatering flows and sediment, not concrete wastewater) and result in no turbid
discharges. Dougherty Decl., *id.*, referring to the Mad River Project, and Exhibit B.

¹⁷ See Macedo Decl., Exhibit N.

1 Board's inability to respond to real water quality concerns.

2 (iii) Caltrans and MCM were complicit in preventing information from getting to the
3 Regional Board. In addition to reporting violations that have now become apparent, it also
4 appears that Ron Den Heyer limited the information related to SWPPP problems from
5 being more widely circulated within Caltrans, and ultimately the State and Regional
6 Boards. See infra, Section VI(D).

7 8 **III. VIOLATIONS IN THE ACLC**

9 As outlined in the complaint, staff grouped the violations into distinct categories for
10 ease of reference.

11 **A. Construction Dewatering**

12 Caltrans refers to "Isolated Pool B" throughout the Project documents. Isolated
13 Pool B is not a sedimentation basin, but in fact a part of the South Fork Eel River, with the
14 associated beneficial uses, that has been isolated from the live channel during the dry
15 season low flow period. For the construction dewatering violations, staff analyzed the use
16 of Isolated Pool B (the unlined dewatering basin) on the gravel bar. Use of this basin was
17 an intentional and direct violation of the Application/Certification and substantially and
18 directly impacted water quality. Department of Fish & Game informed the Regional Board
19 that Isolated Pool B provided habitat for threatened amphibians and that the habitat was
20 damaged by the unauthorized discharges.¹⁸ Staff recommended the maximum penalty for
21 these 39 violations due to the high degree of culpability associated with these violations,
22 including significant economic benefit to the contractor when it discharged directly to the
23 gravel bar a mere 15 feet from the river channel. The Dischargers knew using Isolated
24 Pool B was a direct violation of the 401 permit, yet chose to use it anyway to save time
25
26
27
28

1 and money. These construction dewatering violations resulted in discharges of wastes to
2 waters of the State.

3 4 **B. Leaky Equipment**

5 The Biological Monitor repeatedly noted problems with leaky equipment. Drill Tech,
6 a subcontractor, was “called out” for using excessively old and leaky equipment. The
7 Biological Monitor provided details about specific equipment that should have been taken
8 out of service or, at a minimum, should have had BMPs in place. While MCM constantly
9 lamented that “all equipment leaks; that’s just the way it is”¹⁹ and it is unreasonable for the
10 Regional Board to regulate a “natural occurrence,” there is evidence that often there were
11 no BMPs in place and/or BMPs were ineffective and left to deteriorate and become
12 ineffective.²⁰ The recommended civil liability for this category of violations is conservative
13 in the sense that staff DID NOT include violations in the ACLC for leaks where the
14 evidence indicated it was properly cleaned up. See fn. 4 of the ACLC. This demonstrates
15 a reasonable position by Board staff and a practical resolution to the problem of leaky
16 equipment – quickly clean up leaks and often no civil liability will be imposed. However,
17 where the BMPs were required, requested by staff or Caltrans and consistently not
18 installed or properly implemented, or when specifically-identified leaky equipment was not
19 replaced, the reasonable inference to be drawn is that MCM just did not care about
20 compliance. To incentivize compliance and prevent these types of discharges, civil
21 liabilities should be imposed. For 28 violations, the staff recommended a penalty of
22 \$150,000. This reflected the consideration that MCM or its subcontractors sometimes
23 made efforts to clean up leaky equipment, but that this problem was pervasive and
24 discharges of extremely harmful wastes, such as hydraulic fluid and fuels, reached waters

25
26 ¹⁸ See Dougherty Decl., ¶16.

27 ¹⁹ See Grady Decl., Exhibit G.

28 ²⁰ See Macedo Decl, Exhibit O.

1 of the State.

2 **C. Slag/Welding Discharges**

3 Controlling slag discharges appears to have been an afterthought by MCM,²¹ and
4 only after being notified by Caltrans that BMPs should be in place were they installed, and
5 sometimes not even then. This category of violations was subject to an escalating degree
6 of culpability because containment was often not installed after being requested by
7 Caltrans. Therefore, in addition to not following the permit language, the contractor
8 ignored the directives of Caltrans to minimize slag discharges. Of the 15 violations and
9 maximum \$150,000 in penalties, the staff recommended \$50,000 in violations, finding an
10 appropriate balance between MCM's disregard of the requirements despite having been
11 notified by Caltrans they were needed, and the characteristics of the discharge.

12 **D. Discharges to the River**

13 The turbid discharges described in the complaint are likely significantly
14 underreported (see the next category) due to MCM's position about determining when to
15 report this information and when and how to take turbidity measurements. The Project
16 occurred in an environmentally sensitive area, as the South Fork Eel watershed is listed
17 on the 303(d) list of water bodies impaired for sediment and temperature, and is spawning
18 and rearing grounds for Coho salmon, Chinook salmon, and Steelhead, each listed under
19 the federal and/or California Endangered Species Act. Turbid discharges impair the
20 beneficial uses of the river, and staff believes that the discharges were easily avoidable by
21 minimal effort of the contractor. For the 20 violations and a maximum penalty of
22 \$200,000, staff recommends \$150,000 in this instance.

23 **E. Insufficient Turbidity Measurements**

24 Turbidity measurements were a problem on this project. The Certification is clear
25 that the Discharger must monitor turbidity, and Caltrans' "Construction Site Storm Water
26

27 _____
28 ²¹ See Macedo Decl, Exhibit P.

1 Quality Sampling Guidance Manual” describes an NTU unit as the appropriate unit of
2 measurement.²² The industry standard for turbidity monitoring is laboratory testing of a
3 sample or field monitoring equipment with equivalent accuracy. This is supported by the
4 Construction General Permit and indeed by Caltrans’ own Construction Site Storm Water
5 Quality Sampling Guidance Manual. Only these methodologies provide data that is
6 reliable, accurate and precise enough to verify compliance with the Basin Plan turbidity
7 water quality objective. Any attempt to manufacture another method or scale of
8 measurement to assess turbidity does not have a scientific foundation and appears to be
9 an attempt to obfuscate data and prevent Regional Board staff from being able to
10 determine compliance with permit requirements. While these violations could have easily
11 been avoided, due to the lack of direct harm to beneficial uses, staff recommended half of
12 the allowable maximum for the 22 violations known at the time of drafting the complaint.

13 **F. Improper Disposal of Concrete Wastewater**

14 Concrete wastewater is toxic. The certification process for this Project specifically
15 involved a dialogue between Regional Board staff and Caltrans regarding the use of
16 unlined basins that could become contaminated with concrete wastewater, and Condition
17 9 expressly prohibited the placement of concrete wastewater in a way that could be
18 deposited into waters of the State directly or where it could be washed by rainfall into
19 waters of the State.²³ As described above in the construction dewatering violation, at no
20 time should sediment-laden water, let alone untreated concrete wastewater, have been
21 discharged to this pool. The high alkalinity of concrete wastewater is particularly toxic to
22 the endangered species that live in the South Fork Eel River. Staff felt the maximum
23 penalty was appropriate for this conduct, and suggested a \$160,000 penalty for 16
24 violations of clear permit language.

25
26 ²² See Dougherty Decl., ¶7 and Exhibit C.

27 ²³ See Grady Decl., Exhibit E, where the topic of concrete wastewater was discussed at
28 length during a pre-Project meeting.

1 **G. Rubbish and Debris Discharges**

2 Debris was often left haphazardly around the job site, without regard for the
3 potential for it to make it to the waters of the State. While trash seems innocuous,
4 depending on the type of rubbish, it could create a barrier, foster bacteria, or introduce
5 chemicals into the river in addition to being a nuisance. These types of violations are
6 rarely the subject of enforcement actions, but were part of an overall disregard for the
7 environment and regulations by MCM, and keeping trash out of waterways is a
8 controllable factor that could prevent water quality degradation as described in the Basin
9 Plan. There was evidence that people were specifically tasked with trash removal, and yet
10 there are a variety of documents that indicated trash sat for days untouched. These
11 discharges are easy to cleanup and if they had been timely cleaned up, staff may not
12 have included them in the ACLC, and cleanup would have been a mitigating factor in the
13 consideration of a recommended penalty. While nine violations were included in the
14 complaint, with a maximum civil liability of \$90,000, staff recommended a penalty of only
15 \$10,000.

16 **H. Individual Events**

17 There were a handful of violations that did not fall neatly within the above
18 categories and repeated violations of certain conditions of the permit, certification, basin
19 plan or SWPPP. Of these five "individual event" violations, four were deserving of the
20 maximum penalty of \$10,000. One hydraulic fluid spill that was cleaned up immediately
21 resulted in a suggested fine of \$1,000. This reduction shows that staff is reasonable and
22 applies the factors in a consistent manner (the suggested penalties for leaks of hydraulic
23 fluid in category B were also significantly reduced from the statutory maximum). MCM's
24 refueling of equipment on the gravel bar, discharge of soil to the bank within the bankfull
25 width, and sandblasting without BMPs were in violation of clear directives and permit
26 guidelines. The soil was placed so that it was likely to be discharged by rainfall to waters
27 of the state. The sandblasting discharge was not susceptible to cleanup and directly
28 contributed to the preexisting sediment impairment of the river.

1 **IV. THE RECOMMENDED PENALTY**

2 **A. Consideration of 13385 Factors**

3 13385 factors were analyzed as to each set of violations (see pgs. 18-26 of the
4 ACLC). Staff exercised its discretion in a manner consistent with other enforcement
5 actions, taking into account the characteristics of the discharge (cement vs. trash, for
6 example) and factors specific to the Dischargers, Caltrans and MCM. There was a
7 significant history of violations that was summarized in the ACLC, and staff felt that
8 reflected a chronic disregard for environmental regulation on these types of projects.

9 **B. Calculation of Penalty**

10 The ACLC contains violations of both the Storm Water permit and the 401 permit
11 conditions. When several 401 permit conditions were violated, the staff determined the
12 number of violations according to the number of conditions violated. This is the approved
13 State Water Resources Control Board ("SWRCB") method, as noted in previous SWRCB
14 memoranda to counsel, case law under Water Code 13385 and recently affirmed in the
15 SWRCB Enforcement Policy, adopted on November 19, 2009 and approved by the Office
16 of Administrative Law on May 20, 2010. Water Board 13385(c)(1) creates a "per violation
17 per day" penalty scheme, rather than "one violation a day" as the Dischargers may argue.

18 In California, the Regional Boards follow this approach and rely on the analogous
19 analysis of a similar provision in the Clean Water Act.

20
21 Far from double counting, the district court's decision to treat each violation
22 of the 1992 Permit as a separate infraction for purposes of penalty
23 calculation makes sense. This structure gives courts considerable flexibility
24 to tailor penalties to the unique facts of the case... [T]his method of counting
25 violations creates the proper incentives for polluters to comply. For example,
26 if the maximum penalty that could be levied against a violator on a single day
27 was \$25,000, no matter how many different Permit effluent violations were
28 violated, the permittee would have a strong disincentive to comply with the
other permit limitations.

United States v. Smithfield Foods, Inc., 191 F.3d 516, 527-28 (4th Cir. 1999); *see also U.S.*
Allegheny Ludlum Corp., 366 F.3d 164, 187-88; *adopting Chesapeake Bay Foundation,*
Inc. v. Gwaltney of Smithfield, Ltd. (disapproved of on other grounds), 791 F.2d 304,

1 313-14; *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d
2 810, 817-818 (2001); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897
3 F.2d 1128, 1139 (11th Cir. 1990). The Prosecution Team's method of calculation is also
4 supported by the Enforcement Policy: "A single act may violate multiple requirements, and
5 therefore constitute multiple violations." Policy, pp. 17-18.²⁴

6 Staff exercised its discretion at several steps in the enforcement process: what
7 violations to pursue, whether to count each permit violation as a violation with a maximum
8 liability, and finally the consideration of section 13385 factors to determine how to value
9 each violation. The staff's recommendations are fair, conservative, and ultimately
10 necessary to deter the type of conduct that occurred on the Confusion Hill Project from
11 happening repeatedly throughout the region and state.

12 **C. Reliance on Documents and Admissions by Dischargers**

13 In developing the complaint, Kason Grady, Water Resources Control Engineer,
14 relied largely on the Biological Monitor's reports and photographs, and documents
15 submitted by Caltrans in response to a §13267 order. This is reliable evidence of actual
16 Project conditions, and Regional Board staff confirmed the Project conditions on several
17 site inspections.²⁵ Statements made by Caltrans and MCM that reflect violations on their
18 face are statements against interest, admissions, or statements by a co-defendant.
19 Conditions as reflected by the Storm Water Coordinator are reliable because as a
20 Caltrans employee, he is responsible for inspecting jobsites and BMPs for compliance
21 with storm water permit requirements. The Biological Monitors are agents of Caltrans,
22 and hired as a condition of the permit with the National Marine Fisheries Service.²⁶ These
23 types of documents and photographs from the regulated community are evidence that is
24

25 ²⁴ See Macedo Decl., Exhibit Q.

26 ²⁵ Dean Prat conducted 5 onsite inspections, in October 2006, January 2007, October
27 2007 (2), and January 2008.

28 ²⁶ See Grady Decl., Exhibit H.

1 customarily relied upon by responsible persons at the Regional Board.²⁷

2 At the time the ACLC was issued and the depositions of the Regional Board staff
3 (notably Mr. Grady, who was questioned as to the evidence upon which he relied in
4 developing the complaint), the evidence generated by Caltrans and its employees and
5 agents, including that generated by the Biological Monitor, were all that was available to
6 the Regional Board. However, through the hearing and discovery process, MCM and
7 Caltrans both produced documents from their Project files. These documents do nothing
8 to exculpate MCM and Caltrans; instead, they paint a vivid picture of the tension between
9 Caltrans and MCM, and Caltrans' frustration with MCM in terms of environmental
10 compliance. The Board is entitled to consider all evidence at the hearing in support of the
11 ACLC allegations, including what was produced by the Dischargers after the ACLC was
12 issued.

13 **V. CALTRANS' AND MCM'S CONDUCT DURING THE PROJECT REPRESENTS A**
14 **FUNDAMENTAL MISUNDERSTANDING (UNINFORMED OR DELIBERATE) OF**
15 **WHAT THE PERMITS REQUIRE**

16 **A. Actions "Authorized by the Permit" are Not Whatever is Needed to Build the**
17 **Project**

18 MCM articulated a position, unheard of by the Regional Board prior to this Project,
19 that the permits authorize "whatever is needed to complete the project."²⁸ This is a gross
20 overstatement and a deliberate misunderstanding of the permit process. The 401 permit
21 process (described above) commences with an application by Caltrans²⁹, and the ultimate
22

23 ²⁷ Government Code §11513(c), which applies to this hearing, provides: The hearing need
24 not be conducted according to technical rules relating to evidence and witnesses except
25 as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of
26 evidence on which responsible persons are accustomed to rely in the conduct of serious
27 affairs, regardless of the existence of any common law or statutory rule which might make
improper the admission of the evidence over objection in civil actions. (Emphasis added.)

27 ²⁸ See Macedo Decl., Exhibit N.

28 ²⁹ Caltrans' 401 application is also provided to the Contractor to allow the Contractor to

[Footnote continued on next page.]

1 permit issued allows construction activities that would otherwise be prohibited. For the
2 Confusion Hill Project, this means that the temporary footings for the trestle are temporary
3 impacts to the river, but ones deemed necessary and appropriate. It does not mean that
4 BMPs are not required or that there are not reasonable constraints on the construction
5 efforts taken to erect the trestle. The permits act as the constraints, and while the permits
6 provide as much flexibility as possible while protecting water quality, they only work if there
7 is dialogue among Caltrans, its contractor, and the Regional Board.

8
9 Caltrans seemed to understand this. In responding to MCM early on in the
10 construction, Caltrans disagreed with MCM's approach:

11 Your stated position that all impacts as a result of the work of the project, which
12 are necessary to construct the project, are permitted, without any containment
13 measures in place, is not concurred with. It is necessary and expected that
14 measures to minimize impacts prior to causing the said impact is what is
15 expected from the language of the permits. The idea of allowing welding slag
16 and sandblasting waste to deposit freely without containment measures, and
17 then be cleaned from the river bar after construction is complete, is not what
18 Caltrans and the permitting agencies consider to be an acceptable practice.
19 Minimization prior to the causation of the deposition of waste and maximization
20 of containment are the key components in a majority of BMPs, regardless of
21 the waste product; the construction operation; or the specific BMP. I believe
22 that you will find this to be true and respected as an industry standard practice
23 for most projects in environmentally sensitive areas, of which our project site
24 most definitely is. (emphasis in original)³⁰

19 Caltrans conducts construction projects throughout the state, and has a 200+ page BMP
20 manual. While the Regional Board does not take a position between the ultimate
21 allocation of the penalties between Caltrans and MCM, MCM's position as it had been
22 communicated to Caltrans prior to this correspondence and as it has been communicated
23 to the Regional Board throughout this hearing process is unacceptable.

25
26
27 develop its bid.

28 ³⁰ See Macedo Decl, Exhibit R.

1 **B. MCM's Argument Regarding what is a Sufficient BMP**

2 The Regional Board does not prescribe the manner or method of BMPs, but they
3 are required to be effective. A management practice that is ineffective, poorly
4 maintained, or simply not the best selection given the pollutant at issue, the water body
5 affected, or the effectiveness of the practice fails to meet this standard. The amount of
6 money spent on BMPs may not be a good indicator of their adequacy. For example, if
7 BMPs that are not appropriate for the site or activity are selected, or not appropriate for
8 the pollutant that they are intended to control (filter fabric for sediment control is not
9 effective for containing hydrocarbons), or BMPs are improperly installed or maintained,
10 they will be ineffective while still being expensive.

11
12 Communications exchanged between Caltrans and MCM, between MCM and its
13 subcontractors, and even between subcontractors themselves, are full of disagreements
14 about who is responsible for installing a BMP or who must pay for it, but there is very little
15 discussion regarding the cost effectiveness of the BMP. Furthermore, there is absolutely
16 no communication with the Regional Board to discuss more cost effective alternatives, or
17 to compare the cost of foregoing BMPs with the cost of the violations for failing to comply
18 with the permits.³¹

19
20 **C. MCM's Disregard of Caltrans' Directives to Comply with Permits**

21 MCM sometimes *intentionally* disregarded MCM directives regarding installing
22 BMPs.

23
24 The disturbing aspect of yesterday's events are that MCM staff was directly
25 informed that the sandblasting operations, as being planned during the end of
26 the day on Tuesday, 5/22/07, were going to require appropriate BMPs to
minimize the impacts of the sandblasting operation. No specific BMPs were
discussed at the time and no direction was given in writing, but clear indication

27
28 ³¹ See Macedo Decl, Exhibits M, S, T, U, and V.

1 that some measures were needed was given, and was apparently received, as
2 MCM staff apparently stated that the issue would be put off until the next day.
3 Upon arrival at the north bridge early Wednesday, 5/23/07, Caltrans staff found
4 that the sandblasting operation had taken place with no BMPs of any kind in
5 place. No action or even a good-faith effort was attempted to contain the
6 material. The fact that the operation took place with no measures to minimize
7 deposition of material, and the fact that it took place prior to the presence of
8 Caltrans staff appears to have been a deliberate attempt to violate the permit.
9 MCM had clear direction that the operations, as initially planned, were not to
10 take place.

11 Additionally, if further disregard and/or intentional violation of any of the permits
12 on this project occur, immediate personnel changes will be required and project
13 suspension will be contemplated until such a time that adequate measures are
14 taken to ensure that no future violations will occur. If MCM has the position
15 that inappropriate interpretation of the permits is taking place, or that BMPs
16 that are being required by the contract are excessive or are not an industry
17 standard practice, the Notice of Potential Claim process is the appropriate
18 avenue to pursue such disagreements. Disregard for direction given from
19 Caltrans staff, regarding any contractual or compliance issue, will not be
20 tolerated.

21 I understand that MCM is concerned with setting a precedent for future projects
22 or for future work on this project; specifically, how future sandblasting work on
23 the superstructure will occur and what the necessary BMPs will be. My
24 immediate response to such issues or concerns is that the proposed measures
25 for the work should be contemplated and appropriate BMPs proposed and
26 reviewed with Caltrans staff, regarding their effectiveness. At a minimum, a
27 good faith effort is required. (emphasis added)³²

28 This is at least in line with what the Regional Board would have preferred – the Regional
Board may not have approved of a good faith effort that was ineffective, but even that was
not made in many cases. The cost of BMPs are an issue to work out between Caltrans
and MCM – the correct answer is not to forego installing or developing the BMPs
altogether.³³ When changed conditions are found, Regional Board staff is available to
work with permittees regarding a possible amendment or to develop a more effective

³² See Macedo Decl, Exhibit K.

³³ As Caltrans points out in the document cited, the proper procedure is to (1) comply with the permits and (2) make a claim to Caltrans for payment.

1 BMP. Regional Board Staff testified that enforcement for technical violations would be
2 unlikely if the discharger in question is making appropriate efforts and communicating with
3 the Regional Board to improve or develop an effective BMP.

4 VI. OVERALL POOR ENVIRONMENTAL COMPLIANCE DURING PROJECT

5 A. Lack of BMP Installation and Upkeep

6 Despite what the Dischargers are likely to argue, the Project had significant
7 compliance issues. One issue that continued throughout the Project was the failure of the
8 contractor to install and maintain BMPs.³⁴ This failure was noted repeatedly by Caltrans,
9 both at the beginning of the Project, and also in 2008, after both the Caltrans' Resident
10 Engineer and the Project SWPPP Coordinator had been replaced and after two rainy
11 seasons, when the Regional Board would expect better understanding of permit and
12 project conditions. Correspondence demonstrates deliberate and intentional violations:
13

14 The State exhibited frustration with MCM's cooperation with "housekeeping"
15 BMPs. Several state personnel (biologists, structures, inspectors, etc.) voiced
16 concerns that MCM personnel have refused to employ appropriate BMPs when
17 they point out what they believe are BMP deficiencies. Specifically, the State
18 has photographs of minor equipment leaks and spills and produced
19 photographs of spent welding rods on the gravel bar and areas surrounding the
20 current trestle construction. **In fact, they believe many used welding rods
21 were discharged deliberately to contradict the wishes of the various State
22 employees.**³⁵

23 Caltrans' frustration was expressed in writing:

24 ³⁴ The Caltrans Storm Water Permit includes section H.2 under Construction Program
25 Management that requires all Caltrans construction sites to comply with the State Board
26 Construction General Permit. The Construction General Permit includes section C.2
27 under Special Provisions for Construction Activity that requires dischargers to develop and
28 implement a storm water pollution prevention plan (SWPPP) and implement controls to
reduce pollutants in storm water discharges from their constructions sites. Failure to
implement BMPs in fueling operations and failure to provide containment on the trestle
above the river violated the Caltrans Storm Water Permit by failing to have these controls
in place. See Dougherty Declaration, ¶11.

1 We have had way too many of the same reoccurring SWPPP issues and my
2 staff and I are completely fed up with asking and trying to enforce compliance –
3 just as you are tired of hearing about it. ... When I visit the site in the evenings
4 and find piles of sandblasting sand, oil stains, slag piles, excessive piles of
5 garbage etc., that were all asked to be cleaned up several weeks ago and in
6 some cases months ago, I become quite frustrated. Drill Tech was recently
7 shut down due to re-occurring leaking equipment; several other mini-memos for
8 various items of work were required to be submitted threatening work-
9 shutdown to bring about permit compliance; Portious [sic] has been
10 significantly absent; the SWPPP document itself is not up-to-date with
11 amendments; we have had several concrete containment issues (which have
12 been discussed repetitively); and the general attitude towards SWPPP
13 compliance has generally deteriorated in the last few months. **As usual, a
14 majority of the issue[s] are easily achievable with only a little effort and
15 forethought on the part of the Contractor[s], yet the same issues continue
16 to occur.** In short – Ham's attitude and guidance to all staff on the project is in
17 need of alteration and a renewed willingness to comply.³⁶

18 In anticipation of a water board visit, Caltrans was trying to prod the contractors into
19 getting all of the appropriate BMPs in place.

20 We have several areas that have not been addressed at all, and other that
21 have been partially winterized. Unfortunately, almost all of the things we
22 looked at yesterday are things that were provided in our list several weeks ago
23 (which is clearly listed in the SWPPP Manager's duties), indicating what
24 needed to be done by the 20th of September. The Specials are quite clear that
25 all of that was to be 100% complete by 9/20. As of yesterday we still have
26 several things remaining, and this is after we had several inches of rain on Oct.
27 2-4. ... **I am very close to simply writing a letter shutting down all
28 operations on the project until everything is complete. I am obviously too
much of a softy, and have yet to get so pissed off that I have to do this,
but I'm pretty close.**³⁷

Note that these communications are admissions that BMPs often go for weeks without
being installed as directed. As one can expect, the lack of BMPs can lead to discharges.

Equipment is being fueled on the riverbar at the north bridge. Our permit with
the Regional Water Quality Control Board explicitly states that fueling must only
occur outside of waters of the United States. At the PDT James Hamm

³⁵ See Macedo Decl, Exhibit W.

³⁶ See Macedo Decl, Exhibit C.

³⁷ See Macedo Decl, Exhibit E.

1 acknowledged that they were fueling a compressor, generator, man-lift and
2 backhoe. A discharge of oil occurred from the backhoe directly onto the
3 riverbar. Equipment that has even minor leaks must not be allowed to operate
4 in sensitive areas such as the riverbar. This discharge should have been
reported to the RE and cleaned up immediately. There were no BMPs in place
to prevent the discharged oil from reaching the riverbar. (emphasis added)³⁸

5 These documents prove that Caltrans considered these activities discharges, and
6 therefore permit violations.

7 **B. Disregard of Prohibited Activities Leading to Cementitious Discharges**

8 The most toxic water quality violations alleged in the complaint are the cementitious
9 discharges. Even with the direct impact this wastewater can have on the environment,
10 MCM's representatives did not make the effort to take environmental precautions.

11 During a phone conversation on Thursday, August 24, 2006, Mr. Hamm
12 indicated that pumped groundwater that had come into contact with wet cement
13 would be treated and then sprayed on the riverbar as a dust palliative. This is
14 unacceptable and would be a violation of the RWQCB permit since the water
would most likely still contain cementitious material.³⁹

15 The practice of using cement wastewater as a dust control measure is a fundamental
16 misunderstanding of the permit requirements.

17 **C. Project Specific Issues, Including Personnel Issues and Work Stoppages**

18 The personnel issues reflect the problems between Caltrans and MCM. Ron Den
19 Heyer was initial Caltrans Resident Engineer and ultimately replaced in part for failing to
20 enforce compliance with environmental permits. The SWPPP Coordinator was removed
21 by Caltrans for ineffectiveness. Work stoppages were often threatened and sometimes
22 ordered. In addition to the correspondence excerpted in this brief reflecting the consistent
23 prodding of MCM by Caltrans to step up its environmental compliance efforts, MCM and
24
25

26
27 ³⁸ See Macedo Decl, Exhibit L.

28 ³⁹ See Macedo Decl, Exhibit L.

1 Caltrans attended at least two "project partnering" meetings where the parties were able to
2 air out their differences. However, these meetings did not seem to result in improved
3 compliance.

4 **D. The Control of Information Led to Reporting Violations**

5 Caltrans is responsible for submitting information related to a discharge to the
6 Regional Board, at a maximum, within 5 days after a discharge. There are numerous
7 examples of actual discharges that went unreported. A separate and distinct issue arose
8 when it was evidence through documentation only produced through discovery that Walt
9 Dragoloski was prevented from sharing information regarding discharges with Alex
10 Arevalo, who is the Caltrans NPDES Storm Water Coordinator for District 1.⁴⁰ Mr. Arevalo
11 is in part responsible for preparing an annual report that includes all discharges.
12

13 Therefore, not only is the discharge not being reported to the Regional Board, but it
14 appears that the discharge is also not being included in Caltrans' annual report, which is
15 ultimately submitted to the State Water Resources Control Board as a requirement of
16 Caltrans' storm water permit. Ron Den Heyer spoke with Mr. Dragoloski and made sure
17 the information was kept in the direct chain of command. This email communication
18 raises issues beyond this Project of reporting violations and internal Caltrans' procedures.
19

20 **VII. THE DISCOVERY PROCESS HAS REVEALED MANY MORE VIOLATIONS**

21 At the time the ACLC was issued, an investigatory §13267 order and multiple
22 Notices of Violation had been issued. A small ACLC for \$20,000 was issued in March
23 2008 for a discharge of turbid wastewater and drilling spoils to the South Fork Eel River
24 and failure to submit a report on time. Staff intended for these enforcement actions to
25 serve as a deterrent for further violations, but in preparing for this hearing, Caltrans and
26
27
28

1 MCM have produced documents that indicate the prior enforcement did not provide any
2 deterrent effect, and the violations on the Project continued.⁴¹

3 **A. Additional Discharge Violations**

4 As mentioned above, the cementitious discharges were the most toxic to the
5 affected waterways. These continued in 2008.

6
7 Due to current methods being utilized; current weather conditions; and
8 subsequent concerns regarding the quality of the product being provided, the
9 immediate termination of grouting operations on this Bridge has been
10 implemented. The existing field conditions indicate that the grout tubes contain
11 a substantial amount of water from ongoing precipitation events. During the
12 current grouting operations being utilized the vent tubes are spilling and
depositing cementitious (sic) material onto the bridge deck and subsequently
into "Water of the State", a definite permit violation. The lack of containment of
cementitious (sic) material during grouting operations at the vent locations is
unacceptable.⁴²

13 And:

14 On the morning of June 13, 2008, the Contractor performed tendon grouting
15 operations on the bridge deck of the Segmental Bridge (Southbridge). A small
16 hole in the plastic inlet grout tube allowed a stream of grout approximately 1/16
17 to 1/4 inch in diameter lasting approximately 10 to 15 seconds to discharge to
18 the bar of the South Fork Eel River...a total discharge of approximately 3 to 5
gallons of grout material fell to the river bar below. Although the majority of the
material fell to river bar that was immediately below the location of where the
material left the bridge deck, because of high winds some of the material drifted
in the wind and landed within the waters of the South Fork of the Eel River
(SFER).⁴³

23 ⁴⁰ See Macedo Decl., Exhibit L. Mr. Arevalo is a cc of Mr. Dragolowski's email.

24 ⁴¹ The ACLC does not preclude the Regional Board from alleging additional violations that
25 occurred during the complaint period, August 2006 through June 2007. However,
26 violations that occurred from June 2007 through the end of the Project in mid-2009 are
considerably more numerous.

27 ⁴² See Macedo Decl., Exhibits X and Y.

28 ⁴³ See Macedo Decl., Exhibit Z.

1 And:

2 The (3) Concrete Cement washout basins are 40% full of rainwater and
3 concrete cement washout material accumulation. MCM has been removing
4 water from the basins for disposal at Schendell. MCM has spilled some of this
5 cementitious (sic) water in the adjacent ditch and have been requested to
6 remove the solid before the next rains and treat the soil as wash out material,
7 i.e., dispose of at Snake Pit.⁴⁴

8 These three documents indicate continued discharges that had a direct impact on
9 Waters of the State. Other documents indicate that sediment discharges, leaky
10 equipment violations, and debris changes also continued.⁴⁵ If the Regional Board issued
11 another §13267 order to cover the remainder of the Project since November 2006, it
12 would specifically request information about how long cement and grouting operations
13 continued. The earliest date of a cementitious discharge in the current ACLC is August
14 29, 2006; these two documents indicate grouting and cement operations continued at
15 least until January 2009, and the Regional Board alleged only single-day violations based
16 on documentation that existed at the time the ACLC was issued. If further discovery
17 revealed that the grout operations and improper use of the concrete wastewater basins

18 ⁴⁴ See Macedo Decl., Exhibit AA.

19 ⁴⁵ The Project activities that comprise the other categories of violations in the ACLC also
20 continued. For example, see the February 22, 2009 sediment discharge ("A significant
21 amount of soil fines were left on the south end of the bridge deck over the weekend,
22 resulting in some of the material being washed over the edge by heavy rainfall (Photo
23 003). In addition, a pile of refuse, some of which is susceptible to wind-carry, remained on
24 the bridge near recent guardrail construction activities (Photo 004)." The second page of
25 this exhibit shows how long unresolved issues were left; even high priorities items sat for
26 days. See Macedo Decl, Exhibit BB. The use of leaky equipment continued: "...Lastly,
27 the grout pump used by your subcontractor has an oil leak that leaks continuously while
28 the pump is running. This equipment must be repaired or removed and replaced prior to
further grouting." See Macedo Decl., Exhibit X; dated January 8, 2008. Finally, a
petroleum spill on January 12, 2009: "North End of South Bridge - 3. Several small spills
of what appears to be hydraulic fluid were observed on the bridge deck near the north end
of the SB (Photos 005 and 006). The spills should be mitigated by application of
absorbent granules, then swept up and placed in a proper disposal container." See
Macedo Decl., Exhibit CC.

1 continued with no effort at containment, failure to comply with Caltrans' directives, or
2 evidence of overflow due to rainwater, it is conceivable that every working day that
3 grouting operations took place or the washout basins were used resulted in a discharge,
4 and is subject to a \$10,000 fine.

5 **B. Reporting Violations**

6 The Regional Board is largely dependent on the regulated community self-
7 monitoring. Obviously, reporting violations represent a direct threat to water quality, since
8 unreported discharges often go undetected and untreated, and a threat to the regulatory
9 scheme itself. Neither the January 8, 2008, nor the January 9, 2009, cementitious
10 discharges were reported to the Regional Board. The discharges were toxic and both
11 occurred during the rainy season. Reporting violations are subject to a *\$10,000 day*
12 *penalty for each day the discharge goes unreported*. The sediment discharges, petroleum
13 spills, and debris left on the gravel bar described in Footnote 47 were also not reported.
14 Notwithstanding the customary calculation of the violation continuing until the discharge is
15 reported, cutting off the time at the completion of the Project still results in penalties in
16 excess of hundreds of thousands of dollars for the few violations identified in this Brief
17 alone.

18 **C. A Future Enforcement Action Would Utilize the New Enforcement Policy and** 19 **Its Penalty Calculator**

20 The State Water Recourses Control Board adopted a new penalty calculation
21 methodology that was not used in the ACLC before the Board. However, if the Regional
22 Board seeks penalties for the violations for violations for the latter two years of the Project,
23 the consideration of Water Code §13385 factors changes slightly. The Dischargers'
24 culpability, cleanup and cooperation, and history of violations can all be used as
25 multipliers for the total penalty. While the Board has the ultimate say as to the penalty
26 amount, it must justify its figure within the confines of the methodology. Considering the
27
28

1 size and scope of the Project, the toxicity of the cementitious discharges and the chronic
2 nature of other discharges, the continued failure to report such discharges to the Regional
3 Board, and the attitudes of the Dischargers, particularly MCM, regarding permit
4 compliance, the Regional Board staff believes it is appropriate to pursue these violations
5 in an effort to deter such disregard for environmental quality on future construction sites in
6 the region and throughout the state.

8 **VIII. OTHER COST ISSUES: ULTIMATE PENALTY SOUGHT FROM BOARD**

9 Kason Grady, who was the key staff member responsible for drafting the ACLC and
10 evaluating the evidence in support of it, testified for three days as the "Person Most
11 Knowledgeable" on behalf of the Regional Board. Mr. Grady, both during his deposition
12 and since that time, considered the strength of the evidence supporting each violation.
13 For almost all of the violations, counsel for MCM questioned whether the photographs and
14 statements submitted by the Biological Monitor or other Caltrans employees could be
15 duplicative or misdated. While this was unlikely to be the case for every violation, the
16 Prosecution Team has consistently stated that it would not seek penalties for errors in its
17 calculations or description of the evidence, and went back and reviewed the evidence with
18 duplicates in mind. In addition, an issue arose about in-stream sediment, and while Mr.
19 Grady is not part of Regional Board management, the Prosecution Team does not wish to
20 modify his testimony, and has decided to forego the penalties related to in-stream
21 sediment. Finally, staff costs are consistently added to the penalty as recoverable costs.
22 These adjustments and the ultimate penalty amount sought in a Board order are
23 described below.
24
25
26
27
28

1 **A. Potential Duplicates, Reduced Penalties**

2 During Mr. Grady's deposition, counsel for MCM questioned whether undated
3 photographs could be duplicative of dated, known violations. Mr. Grady's review of the
4 photographs and other evidence after his deposition, viewed in the light most favorable to
5 the Dischargers, revealed that the September 7, 2006, and November 14, 2006, violations
6 might be duplicates of other dates.⁴⁶ These turbid discharges to the river and construction
7 dewatering violations had a maximum penalty of \$100,000 and a recommended penalty of
8 \$87,500.
9

10 Upon additional review, Mr. Grady considered two days of discharges to have
11 evidence that warranted further investigation, but which a review of the available
12 documents did not clarify the extent to which, if any, containment was achieved.⁴⁷ These
13 violations were for a cementitious discharge on September 29, 2006, and for construction
14 dewatering on October 16, 2006. The maximum penalty that could be assessed is
15 \$50,000, and after consideration of the §13385 factors, staff recommended a penalty of
16 \$45,000. The Prosecution Team will not be seeking these penalties in the final Order.
17

18 **B. In-Stream Sediment Issue**

19 The allegations in the ACLC regarding in stream sediment are found in Appendix D,
20 Turbid Discharges to River and comprise \$120,000 in maximum penalties and \$90,000 in
21 recommended penalties. An issue arose about these violations in the deposition of Kason
22 Grady. The North Coast Basin Plan states that turbidity shall not be increased more than
23
24

25 ⁴⁶ It is conceivable that the violations for September 7, 2006 are based on conversations
26 that could be referring to dates prior to September 7. The November 14, 2006 event date
27 could be referring to the November 13 event. With additional discovery or an investigatory
28 order, we could confirm the precise date of the violations.

⁴⁷ See Grady Declaration, ¶12.

1 20 percent above naturally occurring background levels, with a provision for allowable
2 zones of dilution for specific discharges upon the issuance of permits or waivers. The
3 Basin Plan does not differentiate between a turbidity increase due to disturbing sediment
4 in the stream or turbidity from other new sources. Monitoring requirements and sampling
5 points are set to ensure protection of beneficial uses, because it is very feasible for
6 turbidity from disturbed in-stream sediment to adversely impact beneficial uses. Thus, if
7 an activity causes a turbidity increase above Basin Plan objectives to occur (whether it
8 was from a discharge or an action that causes mobilization of sediment already in the
9 stream), it constitutes a violation, and the permittee is responsible and subject to potential
10 penalties. While the Water Board has the right to pursue these violations, based on the
11 testimony given by the PMK, we will not pursue those in the Order sought from the Board.

12 In summary, there are \$270,000 in maximum penalties and \$222,500 in
13 recommended penalties that the Prosecution Team is willing to forego.

14 **C. Staff Costs**

15 According to the State Water Board Enforcement Policy, staff costs are "other
16 factors as justice may require" and should be added to the total amount of liability. The
17 2002 Enforcement Policy in effect at the time of the Confusion Hill ACLC allowed staff
18 costs to be added to the penalty amount, and the more recent Enforcement Policy has
19 clarified what is included in staff costs.

20 These costs may include the cost of investigating the violation, preparing the
21 enforcement action, participating in settlement negotiations, and putting on a
22 hearing, including any expert witness expenses. Such costs are the total costs
23 incurred by the Water Boards enforcement or prosecution staff, including legal
24 costs that are reasonably attributable to the enforcement action. Costs include
25 the total financial impact on the staff of the Water Board, not just wages, and
26 should include benefits and other indirect overhead costs. Policy, pg. 20.

27 This was a significant enforcement action for the Regional Board, and considerable staff
28 time was involved. Document review for the violations began in mid-2007, and the

complaint was issued in 2009. Settlement discussions at the request of the Dischargers took place in 2008-2010. In August 2010, the Prosecution Team elected to discontinue settlement negotiations and proceed to hearing. Staff time is routinely valued at \$150 an hour. A conservative⁴⁸ estimate of staff costs are reflected below:

Prosecution Team Member:	Activity/Dates:	Total Hours/Total Amount (\$150/hour):
Kason Grady:	Pre-ACLC; 2007-2009	390/\$58,500
	Hearing Preparation ⁴⁹ ; August 2010 - February 2011	300/\$45,000
Mona Dougherty:	Hearing Preparation; August 2010 - February 2011	180/\$27,000
Cris Carrigan:	Pre-ACLC; 2007-2009	100 hours/\$15,000
	Settlement Negotiation; 2009-2010	100 hours/\$15,000
Julie Macedo	Hearing Preparation; August 2010-February 2011	500 hours/\$75,000
	Total:	1,570/\$235,500

- (i) Initial ACLC penalty amount: \$1,511,000
- (ii) Evidentiary Reductions: \$222,500
- (iii) Additional Staff Costs: \$235,500
- (iv) **Total Penalty Amount Sought Against Caltrans and MCM: \$1,524,000**

⁴⁸ These staff costs do not include: (1) Dean Prat and Mona Dougherty's time to draft Notices of Violation, or Dean Prat's time to attend his deposition or assist with hearing preparation; (2) David Leland and Luis Rivera's time to review the ACLC prior to issuance, or assist with hearing preparation, David Leland's time to attend his deposition; (3) Cris Carrigan's time in hearing preparation; (4) Mona Dougherty's, Kason Grady's, Luis Rivera's or David Leland's time spent in settlement negotiations, either formal meetings between Caltrans and/or MCM, or informal discussions; (5) the time of two interns who assisted Kason Grady with document review in preparing the complaint; and (6) indirect costs. The Prosecution Team feels the total amount of staff time listed above is conservative but fair.

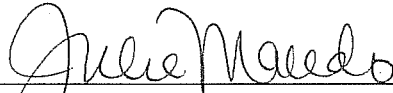
⁴⁹ The Hearing Preparation totals will continue to accrue until the conclusion of the March 24, 2011 hearing. The totals for Kason Grady, Mona Dougherty, and Julie Macedo should

[Footnote continued on next page.]

1 **IX. CONCLUSION**

2 The Regional Board feels the requested civil liabilities are fair and necessary to
3 send a message regarding what is expected in terms of respect for environmental
4 compliance. It is not the Board's responsibility to allocate the liability between MCM and
5 Caltrans; that is to be decided between them at a later date. As Permittee, Caltrans is
6 responsible for the permit violations. As the prime contractor directing construction, MCM
7 is responsible for its actions that led to permit violations. This Project was an example of
8 construction at the expense of the environment and the regulatory system. The manner in
9 which the Confusion Hill Project was conducted resulted in numerous avoidable permit
10 violations and real harm to water quality. That type of behavior, and general attitude
11 toward environmental compliance, should not be allowed to continue.
12

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14 Date: February 11, 2011

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16 Julie Macedo, Counsel for North Coast
17 Regional Water Quality Control Board
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27 therefore be increased at the time of the Board's Order.
28

Witness Statement

**Prosecution Team Case-in-Chief
Confusion Hill Bypass Project**

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10 Attorney for Regional Water Quality Control Board,
11 North Coast Region

12 BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD
13 NORTH COAST REGION

14 In the Matter of:)
15 California Department of Transportation,) ACLC Order No. R1-2007-0095
16 Confusion Hill Bypass Project,)
17 WDID No. 1B05153WNME) Prosecution Team Case in Chief; Witness
18 Statement

19 Consistent with the requirement in the Hearing Procedures issued December 23, 2010
20 (pg. 6), the Prosecution Team may wish to call the following witnesses at the Confusion
21 Hill administrative hearing on March 24, 2011:

22 **Name of Each Fact Witness:**

- 23 1. Kason Grady;
- 24 2. Mona Dougherty;
- 25 3. Dean Prat; and
- 26 4. David Leland.

27 **A Brief Summary of Their Testimony:**

28 Mr. Grady and Ms. Dougherty provided declarations submitted with the Prosecution
Team's Case in Chief submission, and will both be available for cross-examination on

1 such subjects. They may also be questioned on topics presented in Rebuttal, or on
2 subjects raised in their depositions. Mr. Grady may testify further about the evidence
3 supporting the Confusion Hill ACLC and additional violations, and Ms. Dougherty's
4 testimony will also cover her knowledge of the Caltrans and general construction storm
5 water permits.

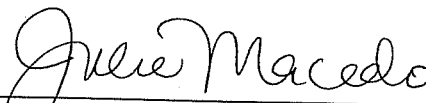
6 Mr. Prat may be called to testify regarding the 401 certification process for the Confusion
7 Hill Project. He offered deposition testimony previously in this matter.

8 Mr. Leland may offer testimony regarding the North Coast's policies and procedures. He
9 also offered deposition testimony previously in this matter. Mr. Prat and Mr. Leland may
10 have testimony on rebuttal topics.
11

12 **Anticipated Time Required for Each Witness to Present Direct Testimony:**

13 Counsel for the Prosecution Team, MCM and Caltrans stipulated to extend the hearing to
14 2 hours of Presentation for the Prosecution Team, and 4 hours for the Dischargers (MCM,
15 Caltrans, Ladd) collectively, to be divided among them as they see fit. If this modification
16 is accepted, the Prosecution Team anticipates no more than 1 hour of the Prosecution
17 Team's time will be used for direct presentation, most likely with Mr. Grady and Ms.
18 Dougherty. If the Advisory Team orders some other hearing time limits, the 1 hour
19 estimate will be modified accordingly.
20
21

22 February 11, 2011

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24 Julie Macedo, Counsel for North Coast
25 Regional Water Quality Control Board
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