

# **EXHIBIT**

# **G**

**Declaration of Kason Grady**

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

1 California Regional Water Control Board  
2 North Coast Region  
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4 In the Matter of:  
5 ADMINISTRATIVE CIVIL LIABILITY  
6 COMPLAINT NO. R1-2009-0095.

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11 Deposition of:

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13 KASON VERNE GRADY

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15 Thursday, October 21st, 2010

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19 Reported by: Stephanie Anne Fox, CSR #4640

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24 COASTAL REPORTING SERVICES  
25 131-A STONY CIRCLE, SUITE 500  
SANTA ROSA, CALIFORNIA 95401  
(707) 573-9766

1           The deposition of KASON VERNE GRADY was taken  
2 pursuant to agreement at the NORTH COAST REGIONAL WATER  
3 QUALITY CONTROL BOARD, 5550 Skylane Boulevard, Suite A,  
4 in the City of Santa Rosa, County of Sonoma, State of  
5 California, on Thursday, the 21st of October, 2010,  
6 commencing at the hour of 9:17 a.m. thereof, before  
7 Stephanie Anne Fox, CSR No. 4640, a California Certified  
8 Shorthand Reporter.

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10                                   APPEARANCES

11

12 For the California Regional Water Quality Control Board,  
13 North Coast Region:

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15                                   State Water Resources Control Board  
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20                                   By: Julie E. Macedo  
21                                   Attorney at Law

22 For MCM Construction, Inc.:

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Transportation:

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9 Department of Transportation  
Legal Division  
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11 By: Ardine Zazzeron  
12 Deputy Attorney  
and  
13 Douglas C. Jensen  
Attorney at Law  
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13 hypothetical, equipment would have been used which  
14 leaked a substance that could impact water quality.  
15 That portion would be violated.

16 Further, if it was being operated, then  
17 operation of the equipment would have resulted in both a  
18 discharge, depending on the location of the leak, either  
19 a discharge directly to waters of the United States or a  
20 threatened discharge to waters of the United States.

21 Q. I'll represent to you that to my knowledge,  
22 it's impossible to make construction equipment one  
23 hundred percent leak free, and that as just purely an  
24 operational matter, as good as you can maintain  
25 equipment, it still will leak. Do you have any reason

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1 to disbelieve that statement?

2 A. I have no reason to disbelieve that statement.  
3 I could, I could speak as -- I would want to ask a  
4 question as to why MCM and Caltrans did not petition  
5 this permit if they believed that they couldn't achieve  
6 the requirements of the permit.

7 Q. And I'm not going to answer that simply because  
8 I'm not the person being deposed here.

9 A. Sure.

10 Q. It's probably a reasonable question that can be  
11 answered a number of different ways, but I think the  
12 situation is this, that it's impossible to keep  
13 equipment a hundred percent leak free, and in this case,

# **EXHIBIT**

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Confusion Hill Bypass Project**



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
Southwest Region  
501 West Ocean Boulevard, Suite 4200  
Long Beach, California 90802-4213

APR 10 2006

In response refer to:  
151422SWR2006SR00125:DJL

Gene K. Fong  
Division Administrator  
United States Department of Transportation  
Federal Highway Administration  
980 Ninth Street, Suite 400  
Sacramento, California 95814-2724

Lena Ashley, North Region Chief  
California Department of Transportation  
Environmental Management Division  
P.O. Box 3700  
Eureka, CA 95502

Dear Mr. Fong and Ms. Ashley:

This letter is in response to the water drafting activities proposed by the California Department of Transportation (CalTrans) for the Highway 101 relocation at the Confusion Hill site in Mendocino County. On November 4, 2005, NOAA's National Marine Fisheries Service (NMFS) issued a biological opinion and incidental take statement for the Confusion Hill project (NMFS File No. 151422SWR04SR9151). In a March 15, 2006, letter to CalTrans, NMFS determined that the proposed addition of water drafting to the Confusion Hill project had no adverse effects to Southern Oregon/Northern California Coast coho salmon (*Oncorhynchus kisutch*), California Coastal Chinook salmon (*O. tshawytscha*), Northern California steelhead (*O. mykiss*), or designated critical habitat for those species.

In contrast, the incidental take statement included with the November 4, 2005, biological opinion prohibited water drafting in term and condition 3(e). As described above, our letter to you dated March 15, 2006, concluded that water drafting could be incorporated into the Confusion Hill project without additional adverse effects to listed species. We reached that determination based on the following:

- The maximum amount of water drafting proposed by CalTrans (14,000 gal/d) is about 0.15 percent of the daily flow at 14 ft<sup>3</sup>/s (the threshold proposed by CalTrans to use an alternative water source.) The more important metric to consider, though, is the instantaneous rate of pumping. The maximum rate of pumping proposed by CalTrans is 250 gal/min, which is 0.56 ft<sup>3</sup>/s, or about 4 percent of 14 ft<sup>3</sup>/s. At a rate of 250 gal/min, a 4000 gal tanker truck will take 16 minutes to fill – a short duration for withdrawal. The



effect of the project is greatest during the summer months, a period when the South Fork Eel River (SFER) surface flow is the lowest.

- SONCC coho salmon, CC Chinook salmon, and NC steelhead use the project area primarily as a migration corridor en route to the Pacific Ocean to mature to adulthood or to travel, from the ocean, upstream to spawn (only Chinook salmon are likely to spawn in the project area). The proposed water drafting will have no effect on adult salmonid migration, as stream flow during the migration period (October through May, depending upon the species) is high and the amount of water removed by the water drafting is expected to be insignificant, with no effect on migration. Also, the pumping apparatus is small and will not create a physical barrier to migration. The pumping activities will have no effect on Chinook salmon eggs, as CalTrans will not be taking sufficiently large amounts of water to dewater redds
- Juvenile coho salmon do not rear at the Confusion Hill site in the SFER. Juvenile Chinook salmon from the SFER emigrate to the Eel River estuary and Pacific Ocean shortly after emergence from redds. In some years, juvenile NC steelhead rear at the Confusion Hill site. Relatively poor habitat conditions (high water temperature) in the general location limit juvenile NC steelhead densities. The small impacts on habitat space from pumping are not expected to affect NC steelhead, as habitat space is not in short supply given the small numbers of fish present. The pumping apparatus will be constructed, maintained, and operated to meet or exceed NMFS and CDFG screening criteria and water drafting operational guidelines. Therefore, no juvenile salmonids are expected to become impinged on the screen apparatus.
- Smolting salmonids of all three species pass by the Confusion Hill site. Smolting salmonids are sufficiently large and developed enough to easily avoid the pumping apparatus, and the amount of water removed by the water drafting will allow sufficient water depth for migration of smolts.
- NMFS does not expect additional adverse effects to occur when the impacts of the project change are added to those analyzed previously (turbidity, increased sound levels, toxic chemicals, fish relocation, stream dewatering and diversion, and wet channel crossings). For example, the small fluctuations in flow from water drafting are unlikely to change the number of steelhead exposed to crushing (or the ability of steelhead to avoid crushing) in the wet crossing areas, should these events occur concurrently. As above, water drafting is unlikely to affect habitat space to the extent that juvenile steelhead distribution would change.

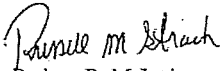
To remedy the inconsistency between the original incidental take statement and the conclusion of the March 15, 2005 letter, NMFS amends the November 4, 2005, incidental take statement by removing term and condition 3(e) "Water for dust abatement, if necessary, must be acquired from an off-site source. Water drafting from the action area is not permitted"; all other elements of the incidental take statement remain unchanged. The amended incidental take statement is included as an enclosure to this letter. This amended incidental take statement replaces the incidental take statement provided in the November 4, 2005, biological opinion.



As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action (including the project change) has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the action (including the project change) that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action (including the project change) is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action (including the project change). In instances where the amount or extent of incidental take is exceeded, formal consultation shall be reinitiated immediately.

If you have any questions about this ESA consultation, or if you require additional information, please contact Mr. Daniel Logan at (707) 575-6053.

Sincerely,

  
for Rodney R. McInnis  
Regional Administrator

Enclosure

cc: Russell Strach, NMFS  
Susan Leroy, CalTrans  
Corinne Gray, California Department of Fish and Game

Enclosure

**ACTION AGENCY:** Federal Highway Administration, California Division, and the California Department of Transportation

**ACTION:** Relocation of Highway 101 at Confusion Hill in Mendocino County, California.

**CONSULTATION  
CONDUCTED BY:** National Marine Fisheries Service, Southwest Region

**FILE NUMBER:** 151422SWR2006SR00125

**DATE AMENDED:** April 10, 2006

**IX. INCIDENTAL TAKE STATEMENT**

Section 9 of the ESA and Federal regulation pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by NMFS as an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the ESA provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are nondiscretionary, and must be undertaken by the FHWA, CalTrans, and their designees for the exemption in section 7(o)(2) to apply. The FHWA and CalTrans have a continuing duty to regulate the activity covered by this incidental take statement. If the FHWA and CalTrans: (1) fail to assume and implement the terms and conditions, or (2) fail to require any designee to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to any permit, grant document, or contract, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, the FHWA and CalTrans must report the progress of the action and its impact on the species to NMFS as specified in the incidental take statement (50 CFR §402.14(i)(3)).

#### **A. Amount or Extent of Take**

The realignment of Highway 101 at Confusion Hill is expected to result in minimal incidental take of threatened SONCC coho salmon, CC Chinook salmon, and NC steelhead. Fish in the vicinity of the project could be adversely affected by the project construction activities. Juvenile salmonids that are relocated or that have fled the area to avoid disturbances may suffer an increase risk of competition.

The number of ESA-listed salmonids that may be incidentally taken during project activities cannot be accurately quantified due to: (1) the precise number of fish that may be present is unknown; (2) the precise number of fish that may be stranded is unknown; and (3) the level of harm that might occur when juvenile fish are relocate or displaced to other habitat areas of the stream. In instances where NMFS cannot quantify the amount of incidental take, the extent of habitat affected or modified by the proposed action is used.

Therefore, take is quantified as: All fish present in the areas to be dewatered between May 15 and October 31 during the years that the project occurs may be captured by relocation activities. Based on the low mortality rates for relocation efforts and the small number of salmonids present in the action area, NMFS anticipates no more than one percent of juvenile salmonids handled will be harmed or killed during relocation efforts. NMFS expects that the number of juvenile salmonids that will be killed as a result of stranding during dewatering activities will be less than those killed during relocation. This is due to the small area affected, the relocation efforts, and the low numbers of juvenile salmonids expected to be present within the action area. NMFS anticipates that no salmonids will be harmed by sound levels generated by pile placement or blasting. NMFS anticipates that all of the juvenile steelhead at the area of the wet crossings and pile placement will be exposed to crushing and may perish. However, the amount of area exposed to instream construction activities is small, the instream activities are infrequent and of short duration, the activities are done slowly giving juvenile steelhead an opportunity to escape, and the habitat is not heavily used by juvenile steelhead during the anticipated instream activities. Therefore, NMFS anticipates that no more than 50 juvenile, non-smolting steelhead will be killed during instream construction activities.

#### **B. Effect of the Take**

In the accompanying opinion, NMFS determined that this level of anticipated take is not likely to result in jeopardy to the species.

#### **C. Reasonable and Prudent Measures**

NMFS believes the following reasonable and prudent measures are necessary and appropriate to minimize take of SONCC coho salmon, CC Chinook salmon, and NC steelhead:

1. Undertake measures to ensure that harm and mortality to listed salmonids resulting from fish relocation and dewatering activities is low.
2. Undertake measures to minimize harm to listed salmonids resulting from construction activities.

3. Undertake measures to assure that adverse effects to water quality are minimized.
4. Prepare and submit an annual report to document effects of construction and relocation activities and performance.

#### D. Terms and Conditions

In order to be exempt from the prohibitions of section 9 of the ESA, the FHWA, CalTrans, and their designees must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline required reporting/monitoring requirements. These terms and conditions are nondiscretionary.

1. The following terms and conditions implement Reasonable and Prudent Measure 1 to ensure that harm and mortality to listed salmonids resulting from fish relocation and dewatering activities is low:
  - a. The FHWA and CalTrans shall retain a qualified biologist with expertise in the areas of anadromous salmonid biology, including handling, collecting, and relocating salmonids; salmonid/habitat relationships; and biological monitoring of salmonids. The FHWA and CalTrans shall ensure that all biologists working on this project be qualified to conduct fish collections in a manner which minimizes all potential risks to ESA-listed salmonids. Electrofishing, if used, shall be performed by a qualified biologist and conducted according to the *NOAA Fisheries Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act*, June 2000.
  - b. The biologist shall monitor the construction site during placement and removal of cofferdams to ensure that any adverse effects to salmonids are minimized. The biologist shall be on site during all dewatering events to ensure that all ESA-listed salmonids are captured, handled, and relocated safely. The biologist shall notify NMFS biologist Daniel Logan at (707) 575-6053 or dan.logan@noaa.gov one week prior to capture activities in order to provide an opportunity for NMFS staff to observe the activities.
  - c. ESA-listed fish shall be handled with extreme care and kept in water to the maximum extent possible during rescue activities. All captured fish shall be kept in cool, shaded, aerated water protected from excessive noise, jostling, or overcrowding any time they are not in the stream and fish shall not be removed from this water except when released. To avoid predation the biologist shall have at least two containers and segregate young-of-year fish from larger age-classes and other potential aquatic predators. Captured salmonids will be relocated, as soon as possible, to a suitable instream location in which suitable habitat condition are present to allow for adequate survival of transported fish and fish already present.
  - d. If any salmonids are found dead or injured, the biologist shall contact NMFS biologist Daniel Logan by phone immediately at (707) 575-6053 or the NMFS Santa Rosa Area Office at (707) 575-6050. The purpose of the contact is to

review the activities resulting in take and to determine if additional protective measures are required. All salmonid mortalities shall be retained, placed in an appropriately-sized sealable plastic bag, labeled with the date and location of collection, fork length, and be frozen as soon as possible. Frozen samples shall be retained by the biologist until specific instructions are provided by NMFS. The biologist may not transfer biological samples to anyone other than NMFS Santa Rosa Area Office without obtaining prior written approval from the Santa Rosa Area Office, Supervisor of the Protected Resources Division. Any such transfer will be subject to such conditions as NMFS deems appropriate.

2. The following terms and conditions implement Reasonable and Prudent Measure 2 to minimize harm to listed salmonids resulting from bridge and roadway construction:
- a. The FHWA or CalTrans shall notify the NMFS Santa Rosa Area Office, by letter stating the project commencement date, at least fourteen days prior to implementation. The letter shall be sent to the NMFS Santa Rosa Area Office, Attention: Supervisor of Protected Resources Division 777 Sonoma Avenue, Room 325, Santa Rosa, California, 95404-6528.
  - b. The FHWA or CalTrans shall allow any NMFS employee(s) or any other person(s) designated by NMFS, to accompany field personnel to visit the construction sites during activities provided for in this opinion.
  - c. The FHWA or CalTrans shall conduct a worker education program prior to construction activities on the importance of protecting salmonids and their habitat and the project measures to do so.
  - d. A biologist shall monitor inchannel activities and performance of sediment control or detention devices for the purpose of identifying and reconciling any condition that could adversely affect salmonids or their habitat. The FHWA or CalTrans and their contractors, upon notification from the biologist, shall halt the work activity causing the condition affecting salmonids and recommend measures for avoiding the condition. Work can resume when NMFS agrees that the proposed measures are appropriate for avoiding the condition.
  - e. Prior to commencement of work on the Red Mountain Creek fish passage improvement component, FHWA or CalTrans shall submit the final engineering design for the structures related to fish passage to NMFS for evaluation and approval prior to implementation. The designs should be sent to the NMFS Santa Rosa Area Office, Attention: Supervisor of Protected Resources Division, 777 Sonoma Avenue, Room 325, Santa Rosa, California, 95404-6528.
  - f. The standard for success for revegetation activities shall be 80 percent survival of plantings or 80 percent ground cover for broadcast planting of seed after a period of three years. If either success criteria is not met, FHWA and CalTrans shall collaborate with NMFS to develop and undertake a satisfactory plan for revegetation.

- g. Prior to any work within the 100-year flood plain of the South Fork Eel River or any blasting related to the Confusion Hill project, FHWA or CalTrans shall ensure that a hydroacoustic monitoring program is implemented at the project site. FHWA and CalTrans shall work collaboratively with NMFS and CDFG to create a satisfactory hydroacoustic monitoring program. The hydroacoustic monitoring plan shall include, at a minimum, measurements of underwater sound levels, both peak decibels and root mean square decibels, at several locations in the wetted channel. The hydroacoustic monitoring plan shall include an emergency response protocol and include annual reporting requirements.
  - h. Prior to any work within the 100-year flood plain of the South Fork Eel River, FHWA or CalTrans shall ensure and provide funding for implementation of minimization and mitigation measures and for monitoring compliance and effectiveness of those measures in a form and amount acceptable to and approved in writing by NMFS and CDFG.
  - i. Prior to any work within the 100-year flood plain of the South Fork Eel River, FHWA or CalTrans shall develop a biological monitoring plan which shall be approved in writing by NMFS and CDFG. The biological monitoring plan shall include annual reporting requirements.
  - j. Once construction is finished for each construction season, all project introduced material (pipe, gravel, false work, filter fabric, demolition debris, etc.) must be removed, leaving the creek as it was before construction. Excess materials will be disposed of at an approved disposal site.
3. The following terms and conditions implement Reasonable and Prudent Measure 3 to assure that adverse effects to water quality are minimized.
- a. Contractors must have a supply of erosion control materials onsite to facilitate a quick response to unanticipated storm events or emergencies.
  - b. Bentonite shall be prevented from entering the stream channel. Any bentonite that does enter the stream during construction shall be immediately removed in a manner that has minimal impact to the streambed and water quality.
  - c. Water that comes in contact with wet concrete and has a pH greater than 9.0 must not be allowed to enter the ground or stream but shall be either: (1) pumped to a separate, lined basin, and then pumped to a truck or upland for disposal or treatment (not within the bank to bank of any waterway); or (2) pumped directly to a truck for disposal at a site that is not within the top of bank to top of bank of any waterway.
  - d. Construction equipment used within the creek channel will be checked each day prior to work within the creek channel (top of bank to top of bank) and if necessary action will be taken to prevent fluid leaks. If leaks occur during work in the channel (top of bank to top of bank), FHWA, CalTrans, or their contractor will contain the spill and remove the affected soils.

4. The following term and condition implements Reasonable and Prudent Measure 4 to document status of construction and relocation activities and performance.
- a. FHWA and CalTrans shall provide a written report to NMFS by January 15 following completion of each construction season. The report shall be submitted to the NMFS Santa Rosa Area Office Attention: Supervisor of Protected Resources Division, 777 Sonoma Avenue, Room 325, Santa Rosa, California, 95404-6528. The report shall contain, at a minimum, the following information:

**Construction related activities** -- The report shall include the dates construction began and was completed; a discussion of any unanticipated effects or unanticipated levels of effects on salmonids, a description of any and all measures taken to minimize those unanticipated effects and a statement as to whether or not the unanticipated effects had any affect on ESA-listed fish; the number of salmonids killed or injured during the project action; and photographs taken before, during, and after the activity from photo reference points.

**Revegetation** -- The report shall include a description of the locations planted or seeded, the area (m<sup>2</sup>) revegetated, a plant palette, planting or seeding methods, the efforts taken to ensure success of new plantings, performance or success criteria, and pre- and post-planting color photographs of the revegetated area.

**Fish Relocation** -- The report shall include a description of the location from which fish were removed and the release site including photographs; the date and time of the relocation effort; a description of the equipment and methods used to collect, hold, and transport salmonids; if an electroshocker was used for fish collection, a copy of the logbook must be included; the number of fish relocated by species; the number of fish injured or killed by species and a brief narrative of the circumstances surrounding ESA-listed fish injuries or mortalities; and a description of any problems which may have arisen during the relocation activities and a statement as to whether or not the activities had any unforeseen effects.

**Sound** -- The report shall include elements related to the hydroacoustic monitoring discussed in section IX, D, 2, g of this opinion.