

February 29, 2012

Advisory Team, c/o Lisa Bernard
Sanitary Engineering Associate
Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95043

Re: Administrative Civil Liability Draft Order No. R1-2012-0034, Confusion Hill Bypass
Project

Dear Ms. Bernard:

The following comments are submitted on behalf of MCM Construction, Inc. ("MCM") concerning the North Coast Regional Water Quality Control Board's proposed Administrative Civil Liability Order ("Proposed Order") for the Confusion Hill bridge project.

MCM recognizes and appreciates the extraordinary amount of time and attention given to this matter by the Regional Board's members and staff. We understand and concur with many aspects of the Proposed Order. In some respects, however, we believe it does not capture or reflect fundamental flaws in the Administrative Civil Liability ("ACL") Complaint, or the evidence presented in connection with the June 23, 2011 hearing. We respectfully request that the Regional Board consider these comments and revise the final Order as appropriate.

Our comments below follow the same organization and sequence of discussion presented in the Proposed Order.

Previously Conceded Violations

As a preliminary matter, it is inappropriate to reintroduce violations after the hearing that had previously been conceded by the Prosecution. Our objection concerns the four turbidity violations (Nos. 15, 26, 99 and 102) were conceded by the Prosecution, the additional conceded violations noted in the Proposed Order.

Due process prevents these violations from being revived. Due process fundamentally requires that parties in an adjudicatory proceeding have notice of the claims against them and an opportunity to present a defense. (See *Smith v. Organization of Foster Families for Equality & Reform* (1977) 431 U.S. 816, 848; *People v. Ramirez* (1979) 25 Cal.3d 260, 269 [citing *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886].) Once the violations were conceded, the violations were formally waived and ceased to form part of the ACL Complaint brought before the Regional Board members. Some further notice was required by due process to inform Caltrans and

MCM that the allegations would be revived, and allow an opportunity for a defense. Without such notice, the parties understandably did not present evidence, argument or testimony on these claims.

The violations also are barred under the Administrative Procedures Act (“APA”). California Code of Regulations, Title 23, section 648, incorporates the APA’s forth administrative rules for adjudicative proceedings involving the Regional Board. Under the APA, “[t]he agency shall give the person to which the agency action is directed notice and an opportunity to be heard, *including the opportunity to present and rebut evidence.*” (Gov. Code, § 11425.10. subd. (a)(1) [italics added].) Further, Government Code section 11513 preserves the right of each party to: “call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination...” These rights are violated where a party has no notice of the claims brought against it.

Finally, the conceded violations are barred under the principles of estoppel, which may be applied to government agencies. (See, e.g., *Emma Corp. v. Inglewood Unified School Dist.* (2004) 114 Cal.App.4th 1018, 1030; *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 306; *Fullerton Union High School Dist. v. Riles* (1983) 139 Cal.App.3d 369, 378.)

In summary, we believe there is no legitimate legal basis to reintroduce claims previously waived and conceded by the Prosecution. We respectfully ask that the Regional Board exclude these violations from its final order.

Category A - Construction Dewatering

MCM submits the findings with respect to “construction dewatering” violations should be revised on two grounds. First, we do not believe the Proposed Order’s interpretation of the Certification legally supports the findings. Second, we do not believe that the level of analysis given to each violation is adequate to meet the statutory requirements of Water Code section 13385, subdivision (e).

1. The law does not support the findings

The finding that the Certification prohibited construction dewatering to the gravel bar is not supported by the plain terms of the Certification. Caltrans’ Section 401 Application (“Application”) expressly “proposed to utilize portions of the gravel bar for construction de-watering during the dry season.” The resulting Section 401 Certification (“Certification”) incorporated the specifications in the Application through Condition 17: “All activities, BMPs, and associated mitigation shall be conducted as described in this Permit *and the application submitted by the applicant for this project.*” There was no condition in the Certification that explicitly negated the Application and the ability to use the gravel bar for a dewatering BMP.

It is well established that when governmental requirements contain specific and general provisions, the specific provisions take precedence over the general provisions. (See *Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 399.) The Certification, by incorporating the Application, specifically allowed use of the gravel bar for dewatering. Condition 9, in contrast, was a general prohibition against unauthorized discharges. Accordingly, the plainest legal reading of the Certification is to allow the gravel bar to be used for dewatering, and even if the gravel bar constituted “waters of the

state,” the Certification nonetheless allowed its use. We observe, in this connection, that the Proposed Order relies heavily on the 100-foot distance requirement that was in the Application but not expressly listed in the Certification. It is inconsistent for the Regional Board not to give equal effect to that part of the Application that allowed dewatering on the gravel bar.

It also is clear that the Regional Board staff reviewed the Application prior to issuing the Certification, knew of Caltrans’ plans to use the gravel bar for dewatering, and could have prohibited it, or at least clarified the issue prior to construction. To the contrary, staff testified that it would have issued the Certification even for a dewatering basin 70 feet away from the active river. (MCM Appendix 108, Transcript for Deposition of Dean Prat, at 54:1-19.) This strongly suggests that staff did not see anything objectionable over using the gravel bar for dewatering when the Certification was issued.

The remaining question is whether the specific location of Pool B, placed less than 100 feet from the river’s edge (in one direction) justifies administrative liability. The evidence compels the conclusion that it does not. Isolated Pool B was an effective BMP that substantially conformed to the Application, as shown by the following undisputed evidence at the hearing:

- Caltrans selected the 100-foot specification, not the Regional Board.
- This was a standard specification – there was no site-specific analysis that 100 feet was necessary to protect water quality, and that a shorter distance could not provide the same protection. The intent of the Certification to protect water quality was met.
- Isolated Pool B was more than 100 feet (approximately 137 feet) from the active river measured downgradient, and 70 feet when measured laterally.
- Isolated Pool B was placed as far away as possible from the active river given the topography and controlling bedrock.
- Staff testified that at the permitting stage, it would have accepted Isolated Pool B in its as-built location on the gravel bar.
- David Bieber, an expert hydrologist, testified that Isolated Pool B was sufficiently far from the river to perform effectively as a BMP. (Attachment 1, p. 216-217.)

MCM appreciates the Regional Board’s need for dischargers to fully comply with its requirements. But here, the 100-foot distance was not prepared by Board staff and was not an explicit requirement of the Certification. It was written by Caltrans and had certain qualities of a construction specification. Under the doctrine of substantial compliance, “technical deviations are not to be given the nature of noncompliance.” (*Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 668.) Likewise, doctrine of substantial performance allows a contractor acting in good faith to deviate from specifications where the usefulness of the feature is not affected. (*See Murray’s Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1290.) Generally, these principles exist to allow the flexibility to complete projects or perform work when site conditions are not as expected. This fits well with what occurred: the project followed the Application as closely as possible

within the site constraints, and ultimately afforded the level of protection intended by the Application. As a result, Isolated Pool B substantially complied with the Application, and thus complied with the Certification.

2. The evidence does not support the maximum \$10,000 per day penalty

The evidence also is not sufficiently developed to support the maximum civil liability for construction dewatering violations, as required under Water Code section 13385, subdivision (e). That section states that a water board shall take into account ten distinct factors to determine the appropriate amount of civil liability:

In determining the amount of any liability imposed under this section, the regional board... shall take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

(Wat. Code, § 13385, subd. (e).)

Rather than applying each of the ten factors, as required, the Proposed Order (after a general introduction on page 4) cites only two considerations supporting maximum civil liability for this category: (1) alleged “disregard for permit conditions,” and (2) “evidence of harm to beneficial uses associated with Isolated Pool B.” (Proposed Order, p. 7.) The Proposed Order does not explain how these considerations relate to the ten factors in Section 13385, and they do not withstand careful analysis.

First, the facts do not establish that Caltrans or MCM disregarded the Certification. The Application allowed Caltrans and MCM to use the gravel bar for dewatering, as explained above, and as a result they had a clear basis in the Certification for dewatering to the gravel bar. The facts reveal, at worst, uncertainty over what was required by the Certification, which was complicated by vague and inconsistent direction from Regional Board staff. Caltrans’ Sebastian Cohen testified to this at the hearing, as he described his communication with staff:

Q. Did you get clear answers when you would ask the questions about permit conditions and things like BAT and BCT?

A. No. Well, we’d discuss it, and it was clear that there was lots of different definitions. It comes down to interpretation, and there is a lot of gray in just about everything, but especially in a lot of this language. And that’s what -- that’s kind of the heart of the matter, if

you ask my opinion. But there is -- it's not black and white. Nothing is black and white. And it was quite clear, and when I had talked to the Board about, hey, what's the definition of this, because it will trigger whether or not this is a violation. And what's the definition of discharge? What's the definition of BCT, BAT? Does it apply here? Where does it -- And it was quite clear from talking to the Board, and I remember discussions with Dean, that there is even -- the Water Board staff amongst themselves has those discussions, and it's not quite clear. And it was quite clear from talking -- even another conversation with Kason about, yeah, the Water Board has been changing lately in how they enforce these conditions, which have been around quite a while, specifically Condition 9 has been on other jobs and was never enforced or interpreted this way before, interpreted, and, therefore, enforced. So, it was a lot of discussions on that. And, I mean, my whole goal, as directed by my management, was, look, get in there, get compliance, try to get the Water Board happy, try to get the job built, move on. And it was, you know, it was challenging. It was --

Q. Okay. Did you ever get the impression that maybe you were contacting the Board a little too much?

A. There was one time when, yeah, I e-mailed -- I have a tendency to be quite verbose, I'd say, and lengthy, and I think -- I was also working, you know, 14, 16 hour days. So, I e-mailed Dean a quite lengthy e-mail, and I think it was about one of the additional conditions in 18 or 19, I don't know which one, and he wrote back, I've already answered this question. I'm not even going to read the rest of your e-mail. Which, you know, we may have already discussed it before. That was about when I started to tone back some of my communication with the Water Board. I definitely had my own -- I mean, it's a massive project. I had lots of issues going on, not just dealing with the Water Board. I've got Fish and Game and U.S. Fish and Water. We were doing permit amendments all over the place, and --

Q. Okay.

A. And it was -- Yeah. Another thing I'd add is that, you know, members of the Water Board did agree that they didn't have much experience in this type of construction, and that right there should be some leeway to let us tell them, you know, hey, we're -- you know, we're trying here, and it was just kind of, hey, you're failing, that's it.

Q. Okay.

A. You failed. You're going to be penalized.

(Attachment 1, p. 126-128.)

Second, the minor harm to beneficial uses documented in the record does not support the maximum penalty. The Order relies on evidence that Isolated Pool B supported fish (pikeminnows) and amphibians (yellow-legged frogs) which were lost or displaced, thus demonstrating impacts to beneficial uses. Notably, this evidence was mainly absent prior to the hearing. Staff testified in deposition that they knew of no impacts to fish or wildlife. Staff reversed its earlier statements at the hearing, and unearthed monitoring reports that described the possible displacement of two frogs and loss of one pikeminnow (neither listed species)¹. (Attachment 1, p. 168, Cross-Examination of Mona Dougherty.) But even with this turn of events, it is clear that impacts to aquatic life were not a major factor in the calculus to pursue civil penalties. The possibility that two frogs and one pikeminnow were incidentally lost, on a project of this size, is an altogether weak basis for maximum penalties.

Third, the rationale for maximum penalties does not clearly apply to the five violations not based upon Isolated Pool B. The violations for August 31, September 5, October 3, November 14 and March 7 involve different facts, and do not lend themselves to the uniform approach to liability. For example, the March 7, 2007 violation (Nos. 150-151) was gleaned by staff from a handwritten note, without more, that vaguely referenced an event involving a pier pit on the south bridge, which did not involve Isolated Pool B. When deposed, staff was not aware of the facts and circumstances involved with this event:

- Q. The quote indicates that a small electric pump was used to dewater a pier pit, correct?
- A. **Correct.**
- Q. Do you know how much water was pumped?
- A. **No.**
- Q. Do you know where it was pumped to?
- A. **The quote says that it was being released under the Oregon oak tree.**
- Q. Do you have any idea how far away that is from the active river channel?
- A. **No, I don't.**
- Q. Do you know if it's within the hundred year floodplain?
- A. **No.**
- Q. The fact that it's an oak tree suggests at least that it's an uplands rather than on the gravel bar; correct?
- A. **Yes.**

(Deposition of Kason Grady, p. 72-73.)

Indeed, the Proposed Order intentionally avoided any type of particularized analysis to the level of detail that MCM believes is necessary to apply section 13385. This is illustrated by the treatment of the August 31, 2006 violation:

¹ Notably, the reports also state that the frogs were lost from rock debris entering Isolated Pool B, not from the act of dewatering.

Failure to cite the duration and volume of the waste discharge does not apply in this instance as this violation does not depend upon those factors, but rather the intentional discharge of dewatering waste to waters of the state without a permit. A \$10,000 liability is warranted for this event.

(Proposed Order, p. 10.)

Without a firm understanding of the facts involving each event, the Regional Board cannot satisfy section 13385 and its requirement of a fact-specific analysis of “the nature, circumstances, extent, and gravity of the violation or violations...” Nor is any analysis made regarding the degree of toxicity of any discharge (nonexistent) or the economic benefits derived. Section 13385 is written in mandatory terms, however; the regional boards “shall” take into account those factors, and the facts are legally essential to setting civil liability. Without undertaking this analysis, the record is inadequate to support civil liability for these violations.

Category B – Leaky Equipment

The Proposed Order correctly observed that a degree of leaks are unavoidable for a major construction project. The standard of care is to maintain equipment and to use BMPs to protect against leaks and spills. MCM testified at the hearing that its efforts to prevent leaks and spills, such as having a full time mechanic onsite to maintain equipment, went beyond anything that it had employed on prior projects. That only a single equipment leak was reported on the gravel bar for a project of this size indicates that these efforts were successful.

Still, the Proposed Order imposes penalties for three violations that did not involve any discharge. For the October 6, 2006 event, the biological monitor’s notes indicate that no discharge occurred, and that BMPs (absorbent materials, plastic tarps, etc.) prevented it. For the October 27, 2006 event, the biological monitors’ notes contain general criticism of equipment maintenance but do not reveal evidence of any discharge on that date that was not captured or controlled by BMPs. Likewise, Caltrans’ notes for November 3, 2006² observed the use of BMPs but did not record any uncontained discharges.

Staff acknowledged in deposition that liability was not warranted where BMPs prevented discharges:

- Q. So if the leak is captured so to speak through the use of BMPs, is that a condition that would violate the certification?
- A. **If it is indeed a BMP, then – you know, it’s difficult to answer a hypothetical not looking at a specific situation, but in general, the purpose of BMPs is to protect the water quality objectives, and if it is functioning properly, then the water quality objectives have been protected, and it would have prevented this, a discharge.**

² The date in the Proposed Order is incorrect. The November 3 event was listed as November 6.

Q. So if I can correctly describe your answer, is it your testimony, then, that if equipment leaks but that leak is completely captured through BMPs, then there is no violation of the certification?

A. **Correct.**

(MCM Appendix 104, Transcript of Deposition of Kason Grady, 78:12-79:6.)

This is because the ACL Complaint is predicated on the existence of discharges, rather than the perceived quality of the contractors' construction practices. Without showing that an actual discharge took place, the Prosecution has not established that the events legally support liability. As a result, the leaky equipment violations listed for October 6, 2006, October 27, 2006 and November 3, 2006 should be excluded from the Proposed Order.

Finally, we trust that the Board will not rely on opinion statements within the biological monitoring reports as a reason for liability. MCM understands that the record reveals a striking contrast between the monitors' opinions regarding equipment maintenance, and on the other hand, evidence that equipment leaks were well controlled. Because the biological monitors were not present during this proceeding, the reasons for their statements are not explored on the record. Their statements may be, as we suspect, a result of their lack of experience with heavy equipment, exacerbated by a poor relationship with site workers. We agree with the Hearing Officer's April 27, 2011 statement that "[k]nowledge of the function of heavy equipment is not necessary to monitor and report fluid leaks," but in this case the biological monitors' statements went beyond reporting and expressed clear opinions regarding equipment maintenance, which so far as the record discloses they were not qualified to offer. The reference in the Proposed Order to "recalcitrant" workers that were "unwilling" to make changes indicates that the Proposed Order relied on the biological monitors' opinions to contextualize their recorded observations and impose liability. We submit that it is inappropriate for the Regional Board to predicate liability in any way on these statements.

Category D – Turbid Discharges to River

This category of violations describes turbidity events that were fully anticipated. The Final Environmental Impact Statement for the project stated that "temporary adverse impacts to water quality including temporary water crossings, pile driving and other construction activities in the floodplain/river" would occur. (MCM Appendix 102, p. 68.) The Application similarly noted that the project would result in temporary increases in turbidity. (AR, p. 8.) Thus, liability cannot depend on whether turbidity existing, but under Condition 7 of the Certification, whether BMPs were used.

The Proposed Order nonetheless finds eight violations in this category, and with virtually no analysis, imposes the maximum possible penalties of \$80,000. The common theme is that BMPs are documented in nearly every case, as Condition 7 required, but there is no evidence establishing that the BMPs used were not adequate, or did not meet the Best Conventional Technology (BCT) standard required for sediment controls. The Proposed Order appears to rely on the existence of turbidity alone as the reason for the violations, but the presence of turbidity without more cannot support these violations.

The Proposed Order also falls short with respect to the calculation of penalties. Water Code section 13385, subdivision (e), requires an evaluation of ten distinct factors to calculate civil penalties. No such evaluation exists in the Proposed Order, and there is a strong need for it here. The maximum penalties are very difficult to understand in light of the substantial use of BMPs revealed in the record and other circumstances indicating that civil liability, if any, should be low.

August 29 and 30, 2006:

The Proposed Order revives two sets of allegations involving August 29 and 30 that had been previously conceded by the Prosecution. It is clear why reviving these allegations is a violation of due process: neither Caltrans nor MCM had notice that these claims were asserted, and consequently, did not present any evidence or expert testimony in defense. These violations should be excluded from the Proposed Order.

September 9, 2006:

The facts are insufficiently developed to support a violation. The photographs show turbidity emanating from a corrugated metal pipe footing in the river, and a worker and a large drill at the top of the pipe. MCM gave uncontradicted testimony that the turbidity shown in the photographs was probably from drill vibration through the CMP. The ACL Complaint also quoted engineering diaries which noted a conversation about the need to keep drilling debris controlled, but the record does not link that conversation to the photographs, or establish a cause for the turbidity in the photographs other than drilling vibration. In summary, the Proposed Order makes an assumption that turbidity was caused by drilling debris that is not supported in the record.

Even taking the findings as true, they do not establish a violation. The findings that the contractor was using BMPs (baffles) to control debris, and corrected the problem, indicates that the Certification was followed. In this regard, it was clear from the Application that turbidity was expected when the CMPs were installed: "Pile installation may cause temporary increases in turbidity. These increases would be minor and of short duration." The Certification did not outright prohibit any turbidity, which would not have been possible for this project, but instead required "[a]dequate BMPs for sediment and turbidity control." (Certification, Condition 7.) BMPs are not, however, intended to bulletproof construction against discharges. BMPs are a reasonable set of protective measures to prevent discharges, and if discharges nonetheless occur, the BMPs must be modified or replaced iteratively until the problem is solved. This is precisely the practice used here, according to the findings. The Proposed Order states that BMPs (baffles) were used to control debris, and when problems were noted, their use was modified and the problem did not reoccur. Accordingly, Condition 7 was followed, and no violation has been established.

The Proposed Order also does not contain the evaluation required by Water Code section 13385 to support the maximum liability of \$10,000. None of the ten factors have been analyzed. The need for such an evaluation is in this case clear, because the facts overwhelmingly suggest that the maximum \$10,000 penalty is not warranted. To summarize: turbidity was minor, short term, and fully expected because the activity was the construction of an underwater bridge footing; BMPs were used during the activity, and modified afterwards and the problem did not reoccur. These facts justify a very low penalty if any.

September 22, 2006:

The evidence does not establish that equipment was not pre-cleaned during this equipment crossing. It was well documented that the workers followed a practice of pre-cleaning equipment before equipment crossings on other dates. For the September 22 crossing, the URS report attributes turbidity to uncleaned or incompletely cleaned equipment, but a careful review of the report indicates that the monitor was not present to make this determination:

Biological monitors were able to inspect the equipment and walk the vehicle across the river for two of the crosses (September 6 and October 2). However, we were unable to do either for the second crossing... Although the biological monitor was notified that the wet-channel crossing was to occur that morning, he was not given any notice immediately before the event occurred. The vehicle did not stop at the edge of the river and continued directly into the river. The monitor attempted to hail the equipment operator but was not successful.

There was apparently some confusion or miscommunication involving the biological monitors prior to the September 22 crossing. The record does not reveal exactly what this was, and the monitors were not present at the hearing to explain or be cross-examined. From the documents alone, however, there is a legitimate question over whether the monitors actually witnessed a lack of pre-cleaning, or whether their statements in the URS report reflected nothing more than supposition on their part. Without more concrete evidence on this event, no violation can be established.

As with other violations, the Regional Board has not completely evaluated the factors under Section 13385, subdivision (e), and fails to provide any cogent rationale for such a high penalty. The evidence that an equipment pre-cleaning program was established and followed for river crossings, at least those that were adequately documented by the monitors, suggests that any civil liability should be low.

September 29, 2006:

The Proposed Order lists two violations for September 29, 2006.

The first involves an apparent leak from a CMP during a concrete pour that occurred despite the use of BMPs to prevent it. MCM devoted time in its presentation at the hearing to explain exactly how CMPs are installed in an active river under, conditions where pile driving was not allowed. This was to make it clear that the installation of footings is not a perfect science and that workers must adapt to changing conditions and here, do their best to establish a seal against the irregular bedrock on the river bottom. Here, an unexpected leak occurred despite using filter fabric, sandbags gravel to establish a seal around the bottom of the CMP. These were BMPs designed specifically to prevent a leak. MCM explained the event in a November 9, 2006 report, and was successful in preventing similar leaks. The relevant section of the certification is Condition 7, which requires the use of BMP for turbidity control. The undisputed evidence is that such BMPs were in place, and accordingly, there was no violation of this condition.

The other violation for September 22 also occurred during as a CMP was installed in the river bottom. In this case there is a near-complete lack of evidence establishing that turbidity was caused by a breach of the Certification. The record reveals only that a worker was standing on sandbags surrounding a CMP as concrete was poured. The sandbags, as noted, were themselves BMPs to prevent an escape of material, and the worker's presence was needed to maintain the seal. The circumstances suggest various possible causes of this turbidity, but none were ultimately established. These included: disturbance of silts on the river bottom; material escaping from the CMP; pressure from the worker's feet on the sandbags; or algae (a possibility noted by a Caltrans observer). A violation of Condition 7 is requires not just the existence of turbidity, but also reasonable evidence that BMPs were not in place to prevent it. The uncertainties prevent this showing from being made.

The penalty is not warranted because a complete evaluation of liability has not occurred under Section 13385, subdivision (e). Such an evaluation, if made, would not appear to support the maximum penalty under these facts. The record demonstrates that BMPs were used to prevent discharges during the installation of CMPs in the river. Turbidity was virtually unavoidable during this process, which involved construction in the active river. Low, if any, civil liability is warranted.

October 7, 2006:

The Proposed Order revives two sets of allegations involving October 7, 2006 that had been previously conceded by the Prosecution. Both stem from the same activity, the excavation of footings in the river using an excavator arm. Because neither Caltrans nor MCM had notice that these claims were asserted, they did not present any evidence or expert testimony in defense. These violations must be excluded.

Additionally, the evidence does not support either violation because the Prosecution did not demonstrate that the BMPs, which were clearly used here, were inadequate.

The BMPs were described in the engineer's daily report. The report indicates that BMPs were detailed and carefully planned. They involved the construction of an "isolation channel" in the river to contain turbidity. Workers began by installing a series of temporary fence posts from the shoreline, out into the river to surround the work area, and back to the shore. Workers draped fabric silt fencing from the top of the posts to the river bottom to isolate the work area. Sandbags held the silt fencing in place against the river bottom.

The report altogether establishes that Caltrans and the contractors exercised an appropriate degree of care to control turbidity, which was unavoidable for this type of activity. Nothing in the report suggests that the author, Caltrans' engineer, had any criticism of the BMP in its design or execution. The BMPs appeared to function to minimize turbidity, but did not fully control the plume in the isolated area. When turbidity began escaping the silt fence, the workers responded appropriately by stopping work, strengthening the barrier with additional sandbags, letting the plume dissipate.

In contrast, the record contains no evidence that the BMPs were not appropriate, or did not represent best conventional technology. The record also contains no evidence or expert testimony that

other BMPs were available and could produce better results at reasonable cost. This type of evidence is necessary to show that the BMPs were inadequate, and the record does not contain this.

The maximum \$10,000 penalty cannot be maintained on this record for this event. In light of the obvious care taken to design and construct an isolation channel, the facts would seem to merit little or no civil penalty. Exactly how or why the maximum penalties are imposed is perplexing. This is exactly why an evaluation under Section 13385, subdivision (e), is required.

Finally, it is unclear from the Proposed Order whether the reported statements of Mr. Ham (quoted in the Proposed Order) played a role in issuing the maximum penalty. That would not have been appropriate because there is no evidence that Mr. Ham carried through with his suggestion or that the event ever occurred. Also, in the conduct of serious affairs we trust the Board will not impose liability based on a second-hand quote of a worker recorded in an apparent moment of frustration.

Category E – Insufficient Turbidity Measurements

The Proposed Order concludes that visual turbidity measurements cannot satisfy Condition 19, and that field measurements were possible only using specific instrumentation such as a turbidity meter. We continue to object to this interpretation for two reasons. First, Condition 19 does not define “field turbidity measurements” or instruct as to how they must be taken. Second, it is not standard practice in construction monitoring to require the use of specific instrumentation, such as a meter, when turbidity is minor and it is clear from visual inspection that no exceedance has occurred (established by Mr. Bieber’s expert testimony). It does not seem unreasonable, in light of these factors, for workers to have relied on visual observations for minor turbidity where it was clear there was no increase of 20 percent over background at 100 feet downstream. We maintain our objections, but also note that after reading the comments made about self-monitoring in the Proposed Order, we have a greater appreciation for the importance of this issue to the Regional Board.

We focus the remainder of our comments in this section on the amount of liability. The Proposed Order sets the maximum penalty of \$10,000 for each event. Although the Order does contain a specific discussion of its reasons for the maximum penalty, we presume it was based on an impression that self-monitoring was not approached seriously enough on the project. On this, we ask the Regional Board to consider the following points:

First, we believe it is appropriate for the Regional Board to recognize that the gravity of the violation is less for minor turbidity, where visual monitoring would seem to workers a logical and reasonable method of recordation. Four events were logged at 20 feet or less using visual measurements: August 29 (15 foot plume), August 30 (15 feet), September 1 (20 feet) and October 16 (8 feet). Turbidity was inspected and recorded each time, showing that the need for self-monitoring was recognized. The use of visual means alone can be understood, even if not excused, based on the small magnitude of the events. Also, in this situation, entering the river to collect readings risks creating as much turbidity as the event that is being measured. In these situations, much lower liability would be appropriate.

Second, we ask the Regional Board to limit the number of violations imposed for the construction activity on October 7, 2006. One activity, the excavation of footings in the river using an

excavator arm, created two plumes. Condition 19 required turbidity measurements whenever a “project activity” caused turbidity to increase. It appears there was only a single activity ongoing at that time involving the excavation of footings, notwithstanding that this activity included a number of “passes” with the excavator. We submit that under the language of Condition 19, it would be appropriate to limit this event to one violation.

Third and finally, we are concerned that the administrative record may not have a complete history of turbidity monitoring during the construction process. We note the Proposed Order’s description for September 28, 2006: “Chronologically, this is the first and best attempt by the Dischargers to monitor impacts to water quality from turbid dischargers.” (Proposed Order, p. 20.) It is not clear, however, that the record contains all monitoring records for prior dates. Naturally, the Prosecution documented only the events it was critical of, and our defense was centered on those instances. The Proposed Order appears to adopt a “pattern and practice” method to setting penalties, but without a complete set of monitoring documents for context, the record would not factually support such an approach.

Category F – Cementitious Discharges

MCM appreciates the Regional Board’s concern over the management of cementitious waste. We have only limited comments on this aspect of the Proposed Order.

We submit, as with the other conceded violations, that the August 29, 2006 event also be excluded from the Proposed Order. The Prosecution previously waived this allegation, and as a result the dischargers made no further investigation of this claim or offered any defense. The need for additional information regarding this event seems clear because the violation is based on photographs alone, and the location appears to be some distance from the work area. Photographs alone do not provide evidence of the “nature, circumstances, extent, and gravity” of the event, whether it was cleaned up, or the other factors listed in Section 13385, subdivision (e), relating to civil liability. It is improper to reassert this violation when the parties were not given the opportunity to develop the record on these points.

The September 18, 2006 allegation (Nos. 58-59) involving the disposal of cement waste on the gravel bar is not supported by the record. This allegation is based upon a photograph showing what was assumed to be cement waste on the riverbar, without any corroborating evidence. MCM gave testimony at the hearing that the material in the photograph was natural sediments of the type prevalent in the river. MCM included a powerpoint slide showing another photograph by the biological monitors that showed these sediments collected in the river. The photograph used to support the allegation shows the concentration of these sediments near the outflow of the dewatering pipe, which would be expected.

Finally, the Proposed Order appears to misidentify violations 77 and 78. The Order describes this event as an August 29, 2006 cement leak from a CMP. That event actually occurred on September 29, 2006, and refers to Nos. 73 and 74. Also, the ACL Complaint did not seek liability for the September 29, 2006 event under Category F, perhaps because the circumstances involved an unexpected leak from a CMP where it was clear that BMPs were in place to prevent this from occurring (additional facts regarding this event are discussed above under Category D). We believe it is appropriate to remove this violation from the Proposed Order.

Category H – Individual Events

We request that the Regional Board to reconsider the November 3, 2006 violation (No. 144), involving loose soil that traveled downslope, based on the evidence submitted during the hearing. The evidence of this event is a short description of site observations in a punchlist-style email report circulated within Caltrans:

During construction of the work platform for the south Bridge Pier 2, loose soil was pushed over the edge of the bank. The soil cascaded all the way to the toe of the slope, which is below the Ordinary High Water elevation. The loose soil along the entire chute should be stabilized or removed. The loose soil below OHW should be removed.

The description suggests that the event was purely inadvertent. It does not provide evidence of the amount of soil, reasons for the cascade, or other circumstances that would seem necessary to set civil liability to the maximum. The record also documents that BMPs were in place to prevent soil movement and rockfall into the river channel (MCM offered photographic examples in its powerpoint presentation at the hearing). It is appropriate to exclude this violation based on the evidence of BMPs, or reduce the amount significantly.

We also ask the Regional Board to reconsider the full \$10,000 liability for the event involving the accidental break in the aerial line (No. 149), because the penalty appears based on facts that are not well supported by the record. The maximum penalty is assessed apparently on the assumption that the event could have been discovered earlier. Caltrans' report states, however, that the discharge was not witnessed by anyone and was in a location that was not readily visible. Other circumstances support this: the biological monitors documented the site conditions exhaustively, and it is unlikely that this event could have occurred in or near the work area and not be noticed and recorded by them for such a length of time. The only inference possible is that the evidence of the discharge was in an unexpected location, and not in a location where it would be normally discovered. In light of these unique circumstances and the accidental nature of the event, we submit that the record does not support the maximum penalty and that a reduction in the penalty is appropriate.

Finally, we believe that the maximum penalty for the sandblasting event (No. 152-153) is not appropriate because full containment was not industry practice, and also was not required under BMP NS-14. MCM testified that this was the first occasion in its bridge-building experience in which containment was requested. MCM responded reasonably by developing a new BMP to contain the material, which was implemented. We ask for the maximum penalty to be reduced, in light of the evidence that containment was novel for this type of construction, and diligent response when concerns were raised.

Category I – Storm Water Permit Violations

MCM appreciates the decision in the Proposed Order to limit the number of days for which liability was assessed for non-containment of the trestle deck. We reserve our objection that this is not a violation of any condition of the Certification. MCM testified that it has built hundreds of bridges

utilizing trestle decks such as the one here, including in the North Coast region, and it was novel in their experience to face a requirement that the deck be watertight. Against this backdrop, Caltrans' BMP NS-13 did not by its terms require a watertight deck, nor is there any evidence in this case that any discharge occurred through the deck. Additionally, Caltrans' expert testified at the hearing the trestle deck met the BMP requirements of the Certification:

Q. All right. In your opinion, was there any violation of the Caltrans Storm Water Permit in association with the trestle?

A. No.

Q. Okay. What's the basis of that opinion?

A. **The basis of that opinion is that from the record it is clear that Caltrans and the contractor made attempts to put BMPs on the trestle deck. They came out with the plywood patching, put it in the larger holes. They tried the expanding foam within the joints there. They eventually put up the toe boards. They installed the filter fabric. And if you read NS13, the expanding foam, filter fabric, those BMPs are not described in the construction site BMP Manual. So, when I look at that information, it appears to me that we went above and beyond what is described in NS13. And the -- you know, at the end of the day, there were no discharges from the trestle...**

(Attachment 1, p. 157.)

Because of the widespread use of trestle decks for this type of construction, and ubiquity of BMP NS-13, we also ask the Regional Board to consider the precedential value of its decision on this issue. We assure the Regional Board that after this project, there is now heightened sensitivity to this issue.

Staff Costs

We agree with the reduction of recoverable staff time. The record lacked documentation that these costs were, pursuant to the State Water Board's enforcement policy, actual costs which were reasonably attributable to enforcement. We particularly objected to the calculation of staff time at \$150 per hour, which strongly resembled an expert consultant rate. Although the reduced amount of \$70,182 appears more reasonable, the record still should contain backup documentation for how this amount was calculated. Paragraph 21(g) of the ACL Complaint states only that "Staff costs for this enforcement action are estimated to be \$70,182." Unless documentation of these costs can be produced, an award for this amount would not be appropriate.

CONCLUSION

MCM thanks the Regional Board and its advisory team for the time and effort spent on reviewing this complicated matter. We look forward to the March 15, 2012 hearing and to answering any questions the Board may have to clarify our comments above.

Very truly yours,

Harrison, Temblador, Hungerford
& Johnson LLP



By

Sean K. Hungerford

SKH/III