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11 North Coast Region

12 In the Matter of: )  
13 California Department of Transportation, )  
14 Confusion Hill Bypass Project, WDID No. ) ACLC Order No. R1-2012-0034,  
15 1B05153WNME, ) Confusion Hill Bypass Project

16 PROSECUTION TEAM'S WRITTEN  
17 COMMENTS ON ACL ORDER

18 **Introduction:**

19 As directed, the Prosecution Team limits its comments regarding the  
20 Administrative Civil Liability Order No. R1-2012-0034 (the "Order") to the general  
21 acceptability of the Order and technical corrections. In general, the Prosecution Team  
22 appreciates the clarity and organization of the Order, especially given the amount of  
23 documentation submitted by the parties. The Advisory Team showed understanding of  
24 why the Prosecution Team considered this an important enforcement action, over and  
25 above the number of violations involved or the penalties sought.

26 **Propriety of Advisory Team to Revisit Violations, Prosecution Team Concessions or**

27 **Valuations:**

28 The Prosecution Team tried to remain consistent throughout the enforcement process,  
and submitted what it felt was a fair complaint that dealt with the Water Code 13385  
factors and the need for compliance and deterrence in a way that it felt appropriate. It

1 recognizes the propriety of the Advisory Team revisiting decisions and recommendations,  
2 and ultimately recommendations based on the record in front of it, including finding  
3 violations based on in-stream sediment (Order, pg. 3) and modifying recommended  
4 penalty amounts.

5 **Staff Costs:**

6 The Order limits the Prosecution Team's staff costs to \$70,182 (Order, pg. 6). This was  
7 the estimated amount as stated in the complaint, issued in August 2009. The hearing for  
8 this matter was held in June 2011. The 2002 Water Quality Enforcement Policy  
9 instructed that staff costs may be one of the "other factors that justice may require," and  
10 **should be estimated** when setting an ACL. (2002 Policy, pg. 40) The complaint  
11 language was as follows:

12 Staff has expended and **continues to expend** considerable time attempting to  
13 bring the Confusion Hill Bypass Project into compliance with the Water Quality  
14 Certification and Storm Water Permit and address violations. Staff costs for this  
15 enforcement action **are estimated** to be \$70,182. Staff respectfully requests that  
16 the Regional Water Board award it these costs of enforcement in addition to the  
17 proposed administrative civil liability. (emphasis added)

18 The complaint language tracked the enforcement policy by providing an estimate, but  
19 provided notice that costs were continuing. After the issuance of the complaint, Caltrans  
20 and MCM engaged in lengthy settlement discussions and then extensive discovery, all of  
21 which required significant staff participation. The \$235,500 sought did NOT include the  
22 following:

- 23 (1) Dean Prat and Mona Dougherty's time to draft Notices of Violation, or Dean Prat's  
24 time to attend his deposition or assist with hearing preparation;
- 25 (2) David Leland and Luis Rivera's time to review the ACLC prior to issuance, or assist  
26 with hearing preparation, David Leland's time to attend his deposition;
- 27 (3) Cris Carrigan's time in hearing preparation;
- 28 (4) Mona Dougherty, Kason Grady, Luis Rivera or David Leland's time spent in

1 settlement negotiations, either formal meetings between Caltrans and/or MCM, or  
2 informal discussions;

3 (5) The time of two interns who assisted Kason Grady with document review in  
4 preparing the complaint; and

5 (6) Indirect costs.

6 This information was submitted in the Prosecution Team's Case in Chief on February 11,  
7 2011, which allowed the other parties to rebut it in writing and question the witnesses  
8 during the hearing. All persons who were seeking staff costs submitted declarations  
9 regarding how their time was spent.

10 The Prosecution Team would be willing to forego the staff costs for the attorneys,  
11 but requests that the Advisory Team reconsider the post-complaint staff costs for Kason  
12 Grady and Mona Dougherty, as outlined on page 29 of the Prosecution Team's Case in  
13 Chief (submitted herewith for convenience). This would increase staff costs from \$70,182  
14 by **\$60,318** to a total of **\$130,500**.

15 **Multiple Parameters Can Be Penalized:**

16 While the Regional Board chose not to make a precedential order, it is within its discretion  
17 and consistent with both the 2002 and, more explicitly the 2010 Enforcement Policies to  
18 issue multiple violations for a single act. See 2010 Policy, pgs. 17-18. In bringing this  
19 case to hearing, prosecution staff often referred to the goals behind specific conditions  
20 contained within the 401 certification and Storm Water Permit in assessing violations. For  
21 example, this led to the "twos" and "threes" that the Advisory Team declined to find, but  
22 the goals of the 401 conditions of turbidity and turbidity monitoring are often different: the  
23 discharge prohibition has a goal of preventing sediment into an already impaired water  
24 body, and the monitoring requirement is aimed at providing information to the Regional  
25 Board regarding the discharge event and the discharger's response. Both can be  
26 properly penalized. Even without "independent" (Order, pg. 28) violations, the Board has  
27 the discretion to issue penalties pursuant to the Storm Water Permit for violations that  
28 also violated the 401 Certification. We recognize the Board elected not to exercise its

1 discretion in this fashion, but the Prosecution Team asserts that it could have, and the  
2 evidence would have supported such findings.

3  
4 **Correction Regarding Violation 122:**

5 The draft Order identifies violation 122 as insufficient turbidity measurements having  
6 occurred on October 20, 2006, but review of the Prosecution Team's chart A2 and of the  
7 final photographic appendix reveals that violation 122 refers to steel cutting on October  
8 24, 2006. The Prosecution Team believes that the violation referred to in the draft Order  
9 is intended to be 121, which occurred on the referred date of October 20, 2006, and  
10 represents an insufficient turbidity measurement violation of Condition 19. If the Advisory  
11 Team is referring to violation 121, then its assertion is incorrect that,

12 Turbidity measurements appear to correlate to simultaneous measurements for  
13 pH, conductivity, salinity, and dissolved oxygen. (Id.) No visual observation of a  
14 plume was reported during the flurry of monitoring activity on this date. Rather, the  
15 data suggest elevated pH in the River, consistent with cementitious discharges.

16 (Order, pg. 22, 4<sup>th</sup> full para.)

17 However, the Advisory Team's conclusion that "the record does not support a violation for  
18 insufficient turbidity measurements" (Order, pg. 22) appears to the Prosecution Team to  
19 be incorrect. The Prosecution Team points to the following evidence:

20 -Photo ID 061020-02 taken at 1600 hours depicts a turbidity plume

21 -Appendix A of the URS Report on Page 325 of the Final Evidence Document indicates  
22 that turbidity was observed as a 1 on the Biological Monitor's visual scale at 1656 hours  
23 on October 20, 2006, but there were no turbidity, pH, conductivity, salinity, or dissolved  
24 oxygen measurements taken around the time of the discharge depicted in the photo. It  
25 appears that the elevated pH data referred to by the Advisory Team in the draft Order is  
26 contained on the same page (325) of the Final Evidence file and refers to data collected  
27 5.5 hours prior to the discharge depicted in the photo (i.e. at ~10:30 AM).

28 **Burden Shifting Regarding Equipment Leaks:**

1 The Advisory Team recognizes written and photographic evidence from the Biological  
2 Monitor of leaky equipment on October 11 and 12, 2006, and specifically of a discharge  
3 of oil and diesel to the gravel bar on October 12, 2006, but the Advisory Team does not  
4 charge a violation because the "Prosecution Team offers no evidence that these  
5 particular discharges were not cleaned up." (Order, pgs. 13-14) It is not the Prosecution  
6 Team's responsibility to offer evidence that a discharge was not cleaned up. Based on  
7 the discharge prohibitions in the 401 certification, clean up is a mitigating factor; once  
8 discharged, a violation has occurred. It is the discharger's responsibility to provide  
9 evidence that the discharge was cleaned up. We are unaware of any such evidence, and  
10 that is why the Prosecution Team included the violation.

11 **Project Effect Mischaracterized:**

12 The Advisory Team mischaracterizes the Project effects as "reduc[ing] a significant  
13 source of sediment that was discharged into the South Fork Eel historically from the  
14 failing portion of the road it replaced." (Order, pg. 5). The landslide where the former road  
15 surface is located on the east side of the river channel continues to be a source of  
16 sediment discharges to the Eel River and was in no way repaired or stabilized by the  
17 Project work.

18 Thank you for your consideration of the foregoing.

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21 Date: February 29, 2012

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

1 complaint was issued in 2009. Settlement discussions at the request of the Dischargers  
 2 took place in 2008-2010. In August 2010, the Prosecution Team elected to discontinue  
 3 settlement negotiations and proceed to hearing. Staff time is routinely valued at \$150 an  
 4 hour. A conservative<sup>48</sup> 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 <sup>49</sup> ; 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

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

21 <sup>48</sup> These staff costs do not include: (1) Dean Prat and Mona Dougherty's time to draft  
 22 Notices of Violation, or Dean Prat's time to attend his deposition or assist with hearing  
 23 preparation; (2) David Leland and Luis Rivera's time to review the ACLC prior to issuance,  
 24 or assist with hearing preparation, David Leland's time to attend his deposition; (3) Cris  
 25 Carrigan's time in hearing preparation; (4) Mona Dougherty's, Kason Grady's, Luis  
 26 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.

27 <sup>49</sup> The Hearing Preparation totals will continue to accrue until the conclusion of the March  
 28 24, 2011 hearing. The totals for Kason Grady, Mona Dougherty, and Julie Macedo should

[Footnote continued on next page.]