

California Regional Water Quality Control Board
North Coast Region

Administrative Civil Liability Complaint R1-2012-0112 (AMENDED)

for
Violations of Clean Water Act, Section 401, Water Quality Certification
WDID No. 1B08081WNSO
and
State Water Resources Control Board Order No. 99-06-DWQ (NPDES No. CAS000003)

In the Matter of the

California Department of Transportation
Highway 101 High Occupancy Vehicle Central Project:
North of Pepper Road in Petaluma to Rohnert Park Expressway in Rohnert Park

Sonoma County

The Assistant Executive Officer of the California Regional Water Quality Board, North Coast Region (hereinafter the Regional Water Board), under his or her lawfully delegated authority hereby gives notice that:

1. This administrative civil liability complaint (Complaint) is issued under the authority of California Water Code section 13323 to the California Department of Transportation (Caltrans or Discharger) to assess administrative civil liability pursuant to Water Code sections 13323 and 13385 (a)(4) and (a)(5).
2. Unless waived, the Regional Water Board will hold a hearing on this Complaint at the **November 19, 2015** Board meeting to be held at 5550 Skylane Boulevard, Santa Rosa, California. The Discharger or its representatives will have an opportunity to be heard and contest the allegations in this Complaint and the imposition of the civil liability. Not less than 10 days before the hearing date, an agenda for the meeting will be available on the Regional Water Board's website:
http://www.waterboards.ca.gov/northcoast/board_info/boardmeetings/.
3. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed civil liability (including an increase in the amount of the civil liability up to the statutory maximum), or refer the matter to the Attorney General to have a Superior Court consider enforcement. The Discharger can waive its right to a hearing to contest the allegations contained in this Complaint by submitting a signed waiver and paying the civil liability in full or by taking other actions as described in the attached waiver form.
4. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent

to the issuance of this administrative civil liability complaint through hearing. The enforcement costs can be considered as an additional factor as justice may require.

5. Regulations of the United States Environmental Protection Agency (U.S. EPA) require public notification of any proposed settlement of the civil liability occasioned by violation of the Clean Water Act. Accordingly, interested persons will be given thirty days to comment on any proposed settlement of this Complaint.

THE ASSISTANT EXECUTIVE OFFICER OF THE NORTH COAST REGIONAL WATER BOARD ALLEGES:

STATEMENT OF REGULATORY AUTHORITY

6. Caltrans is responsible for the design, construction, management, and maintenance of the State's highway system, including freeways, bridges, maintenance facilities, and related properties. Caltrans contracted with North Bay Construction to construct the Highway 101 Widening Central Project (Project).
7. The Project consists of 83 acres from Rohnert Park Expressway to North of Pepper Road in Petaluma, extending from post mile (PM) 14.4 to PM 22.4, where additional lanes and shoulders are being added for the High Occupancy Vehicle (HOV) Project. The Project includes widening Highway 101 from four to six lanes, creating standard 10-foot outside and inside shoulders, construction of auxiliary lanes between the Highway 116 and Rohnert Park Expressway interchanges, widening bridges at the Laguna de Santa Rosa and Copeland Creek, and making on- and off-ramp improvements for the Highway 116 interchange. Work on the Project began in January 2010, with Project completion projected for summer 2012. The stated purpose of the Project is to reduce traffic congestion, and to address existing roadway and operational deficiencies. Caltrans deemed the Project as having achieved substantial completion on July 9, 2012, and submitted its final monitoring report for the month of December 2012 on March 6, 2013.
8. The Water Quality Control Plan for the North Coast Region (Basin Plan) designates beneficial uses, establishes water quality objectives, and contains implementation plans and policies for all waters of the Basin. Existing and potential beneficial uses applicable to the Laguna Hydrologic Subarea of the Russian River Hydrologic Unit, including Copeland Creek and the Laguna de Santa Rosa, are municipal and domestic supply; agricultural supply; industrial service supply; industrial process supply; groundwater recharge; freshwater replenishment; navigation; hydropower generation; water contact recreation; non-contact water recreation; commercial and sportfishing; warm freshwater habitat; cold freshwater habitat; wildlife habitat; rare, threatened, or endangered species; migration of aquatic organisms; spawning, reproduction, and/or early development; shellfish harvesting; and aquaculture.

9. On October 11, 2011, U.S. EPA provided final approval of the 2008-2010 303(d) list of impaired water bodies prepared by the State of California. The list identifies the entire Russian River watershed, including its tributaries, and specifically including the Laguna de Santa Rosa, as impaired by excess sediment and siltation. The Project was constructed in the Russian River watershed.
10. Pursuant to North Coast Regional Water Board Resolution R1-2004-0087, *Total Maximum Daily Load Implementation Policy Statement for Sediment-Impaired Receiving Waters within the North Coast Region*, the Executive Officer is directed to “*rely on the use of all available authorities, including existing regulatory standards, and permitting and enforcement tools to more effectively and efficaciously pursue compliance with sediment-related standards by all dischargers of sediment waste.*”

WATER QUALITY CERTIFICATION

11. The Clean Water Act, section 401, requires Caltrans to apply for and obtain a Water Quality Certification for the Project (Certification).
12. On April 5 and September 6, 2007, Caltrans, the Sonoma County Transit Authority, and Regional Water Board staff met to discuss the Water Quality Certification requirements for the Project. Board staff emphasized that storm water treatment is required for all the new impervious surfaces and that due to site restrictions, the Project was not anticipated to meet this treatment goal.
13. On May 6, 2008, Caltrans, in conjunction with the Sonoma County Transit Authority, filed an application for Certification. The application specifically noted, in the Draft Storm Water Data Report, proposed wetland impacts to the culvert crossing at Laguna de Santa Rosa Creek. As stated in the application, Caltrans anticipated the need for a dewatering permit for discharging accumulated stormwater or surface water from excavations or temporary containment facilities due to temporary channel obstruction on the Laguna de Santa Rosa and culvert extension on Copeland Creek. The Regional Water Board issued the Certification on January 20, 2009.
14. The Certification contains Project-specific requirements designed to reduce temporary and permanent impacts caused by the Project’s activities, including requirements for monitoring and reporting, implementation of best management practices, implementation of the Project as described in the application for Certification, cessation of Project activities in the event of an unauthorized discharge or water quality problem, as well as a prohibition against unauthorized discharges and working in flowing or standing surface water.

CHRONOLOGY

15. At a semiannual interagency meeting for the Project on August 31, 2010, staff of the Regional Water Board, Caltrans, the U.S. Army Corps of Engineers and several resource agencies including the California Department of Fish and Wildlife (previously the California Department of Fish and Game) (DFW), the United States Fish and Wildlife Service, and the National Marine Fisheries Service met to discuss items including the status of the Project, environmental compliance and monitoring requirements, the stormwater pollution prevention plan (SWPPP) inspection and environmental issues related to the diversions in Laguna and Copeland Creek. Regional Water Board Staff reminded the Discharger of Certification Condition 18's requirement to submit monthly monitoring reports.
16. At a semiannual interagency meeting for the Project on March 21, 2011, staff of the Regional Water Board, Caltrans, and several resource agencies including the DFW, the United States Fish and Wildlife Service, and the National Marine Fisheries Service met to discuss the status of the Project and the possible methods of diversion. The Discharger's representatives included the Resident Engineer and stormwater and biology staff, as well as the water pollution control manager employed by the Ghilotti Construction Company and various consultants. Regional Water Board staff reminded Caltrans of the need to conduct in-stream water quality monitoring for any diversions. During this meeting, Regional Water Board staff reiterated the August 2010 reminder to the Discharger that Condition 18 of the Certification required submittal of monthly monitoring reports.

JUNE 28-29, 2011 COPELAND CREEK AND LAGUNA DE SANTA ROSA INSPECTIONS

17. Regional Water Board staff inspected portions of the Project on June 28 and 29, 2011. It started to rain the morning of June 28, leading Board staff to drive by the Copeland Creek site on the way into work. Caltrans contractors were observed filling bags and applying erosion and sediment control measures, including wattles and silt fencing, to unprotected locations. Potential problems at the site were noted, including an excavator in Copeland Creek, prompting an inspection later that same day.
18. Regional Water Board staff conducted an inspection of the Copeland Creek bridge portion of the Project at mid-day on June 28, 2011. Upon returning to the location where the excavator had been observed, Board staff noted that three pumps had been placed upstream of the work area and that water was being pumped to divert it around the isolated Project work area, apparently in response to a failure of the water diversion for Copeland Creek. The water elevation upstream of the diversion was observed to be nearly equal to that of the work area, indicating that the diversion attempt was failing. Board staff also observed Caltrans contractor staff neck-deep, swimming or wading in Copeland Creek to attach lines for the diversion, as well as Caltrans contractor staff inside the box culvert, downstream of the temporary dam. At this point in the inspection, Regional Water Board staff expressed immediate concerns regarding worker safety within the work area to Caltrans contractor staff and to the Resident Engineer. Regional Water Board staff

observed that the discharge from the pumps had resulted in a noticeable increase in foam and turbidity in Copeland Creek, and that excess foam from the pumping extended approximately 700 feet downstream of the work area. The turbidity appeared to be increased for well over 1,000 feet downstream.

19. During the inspection, Regional Water Board staff spoke with the Discharger's Resident Engineer, construction manager, area construction engineer, and biological inspectors, site superintendent, and water pollution control manager (WPCM). During this discussion, Regional Water Board staff again reminded the Discharger's staff of the monthly reporting requirements contained in Condition 18 of the Certification and reiterated the request that the delinquent reports, along with the Rain Event Action Plan (REAP) for the current storm, as described in Attachment D to the Construction General Permit, at Rain Event Action Plan H.1, be promptly submitted to the Regional Water Board.
20. On June 29, 2011, Regional Water Board staff conducted a follow-up inspection of the Copeland Creek and Laguna de Santa Rosa work areas in conjunction with DFW Office of Spill Prevention and Response (OSPR) staff. Regional Water Board staff observed that the earthen dams were still in place at both sites, and that many of the surrounding best management practices on the adjacent banks appeared to be damaged and ineffective.
21. On June 30, 2011, Regional Water Board staff e-mailed Caltrans staff with a summary of the Certification's monitoring and reporting requirements, emphasizing the differences between the Construction General Permit water quality requirements and triggers incorporated into the Caltrans Storm Water Permit and those in the Certification. In the e-mail, Regional Water Board staff specifically reminded Caltrans of the Certification's requirement that monitoring data for each month be reported to the Regional Water Board by the fifteenth of the following month. The e-mail noted that despite repeated verbal requests, the Regional Water Board had still not received any of the Certification Condition 18 monthly monitoring reports; the Certification Condition 28 rainy day report; the Certification Conditions 22, 23, and 24 in-stream activity monitoring data; or the previously-requested water quality tail-gate meeting notes and sign-in sheets required to be maintained by Certification Condition 25.
22. Regional Water Board staff entered violations of Conditions 4.a. and 14 of the Certification into the California Integrated Water Quality System (CIWQS) on November 10, 2011.
23. On May 10, 2012, Regional Water Board staff requested that Caltrans submit SWPPP amendments, all inspection records, all sampling and analysis results, all rain event action plans, and all other records required under the Construction General Permit, Attachment D by May 17, 2012. On May 17, 2012, Caltrans submitted records and documents partially responsive to the May 10, 2012 request, including the June, July, and August 2011 monthly monitoring reports required by Condition 18 of the Certification.

24. On October 12, 2012, following notification to Caltrans of the impending issuance of the Administrative Civil Liability Complaint (ACLC) No. R1-2012-0112, Regional Board staff received the September 2012 monitoring report.
25. On November 5, 2012, the North Coast Regional Water Board issued ACLC No. R1-2012-0112 for reporting and non-reporting violations.
26. After the issuance of the ACLC, Caltrans submitted monitoring reports due for the Project to stop liability from continuing to accrue. At the time of the late submissions, the Project was essentially complete, and the submitted reports were inadequate and did not serve to protect water quality or allow the Regional Water Board staff to provide guidance as to how to bring the Project back into compliance (this inadequacy is reflected in the selection of Enforcement Policy factors, discussed in Attachment A). The failure to provide monthly monitoring reports undermines the Regional Water Board's ability to implement the water quality programs and prevents Regional Water Board staff from determining compliance with conditions of the Certification and timely responding to water quality impacts.
27. The failure to timely submit the required report after the first rainfall, or even at some time prior to Project completion, severely impeded the Regional Water Board's ability to evaluate the effectiveness of best management practices and provide feedback to the Discharger in time for the Discharger to make any necessary adjustments to prevent or minimize adverse impacts to water quality as the Project proceeded. The Regional Water Board relies on dischargers to self-report to ensure compliance with conditions of its permits and certifications.
28. Caltrans, Ghilotti Construction Company and subcontractor Gordon N. Ball, Inc. entered into a Settlement Agreement and Stipulated Order (R1-2015-0044) with the North Coast Regional Water Board for the non-reporting violations. As a condition of settlement, the reporting violations are being re-asserted against Caltrans.

PERMIT AND CERTIFICATION REQUIREMENTS

29. The Caltrans Storm Water Permit contains, in pertinent part, the following requirements:

RWQCB Authority D.4: "RWQCBs may require additional monitoring and reporting program requirements and may provide guidance on monitoring plan implementation."

RWQCB Authority D.5: "RWQCBs may require Caltrans to conduct additional site inspections, submit reports and certifications, to perform water quality sampling and analysis of discharges from construction sites, roadways and maintenance facilities."

Construction Program Management H.2: "The Construction Management Program shall be in compliance with requirements of the NPDES General Permit for Construction Activities (Construction General Permit) not including NOI filing. The

current Construction General Permit is SWRCB Board Order 92-08—DWQ [currently, 2009-0009-DWQ].”

30. The Water Quality Certification contains, in pertinent part, the following conditions:

Condition 18: “Monthly monitoring reports shall be submitted to the appropriate Regional Water Board staff person. The monthly monitoring reports shall include at a minimum a summary of discharges, a summary of corrective actions taken (if necessary), pictures, all field sampling measurements and/or results, project status (i.e. upcoming construction schedule and disturbed soil area updates), biological monitoring reports, changes to the SWPPP. Monthly monitoring reports are due to the Regional Water Board by the 15th of each month once work on the project has been initiated.”

Condition 24: “Turbidity and pH monitoring results shall be reported to appropriate Regional Water Board staff person by telephone within one hour of taking any turbidity measurement higher than 20 percent above background or pH measurements outside of 6.5 – 8.5 at a point 100 feet or more downstream of the source(s). Pictures of Copeland Creek and/or the Laguna de Santa Rosa upstream, downstream and within the working and/or disturbed area shall be taken and submitted to the appropriate Regional Water Board staff via e-mail or fax within 24 hours of the incident.”

Condition 28: “Caltrans shall take photos of all areas disturbed by project activities, including all excess materials disposal areas, after the first rainfall event that generates visible runoff from these areas in order to demonstrate that erosion control measures have been successful. A report containing these photos shall be submitted within 60 days of the first rainfall event that generates runoff from the disturbed areas.”

VIOLATIONS AND DETERMINATION OF LIABILITY

31. Water Code section 13385, subdivision (a)(5) provides the basis for civil liability. Subdivision (a)(5) provides for civil liability against any person who violates any requirements of Section 401 of the Clean Water Act, as amended. As detailed in this Complaint, the Discharger violated the requirements of the Certification. Water Code section 13385, subdivision (c) provides that the maximum amount of civil liability that may be imposed by the Regional Water Board is \$10,000 for each day of violation.
32. Pursuant to Water Code section 13385, in determining the amount of any civil liability, the Regional Water Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, 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 violations, and other matters that justice may require.

Water Code section 13385, subdivision (e) also requires that at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation(s).

33. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385. The entire Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf
34. The required factors have been considered for the violations described in Findings 36-38 using the methodology in the Enforcement Policy, as explained in detail in Attachment A, which is attached hereto and incorporated herein by reference.
35. Determinations of maximum and proposed liabilities are described in Findings 36-38 and the results are summarized in the following table:

Permit	Requirement Violated	Maximum Liability	Proposed Liability
Certification	Condition 18: Submittal of monthly monitoring reports (total of 18,954 days late)	\$189,540,000	\$5,834,556
Certification	Condition 24: 1 hour/24 hour reporting of turbidity measurements (1 day, 1 site)	\$10,000	\$9,464
Certification	Condition 28: First rainfall event report (1,070 days late; received May 17, 2013)	\$10,700,000	\$388,024
Violations Total		\$200,250,000	\$6,232,044
Staff Costs (as of December 1, 2014; continue through settlement and hearing)		--	\$25,000
TOTAL LIABILITY		--	\$6,257,044

VIOLATIONS OF THE 401 CERTIFICATION

36. The Certification requires, at Condition 18, the submittal of monthly monitoring reports containing a summary of discharges, corrective actions taken, pictures, all field sampling results, project status, biological monitoring reports, and changes to the SWPPP to the appropriate Regional Water Board staff by the fifteenth of each month once work on the project has been initiated.

Work on the Project commenced in late January 2010. ACLC R1-2012-0112 was issued November 5, 2012. As of the date of issuance of ACLC R1-2012-0112, no monthly monitoring reports had been received for the Project, excepting the June, July, and August

2011 monitoring reports, which were received May 17, 2012, and the September 2012 monitoring report, which was received October 12, 2012, following notification to the Discharger of the impending issuance of ACLC R1-2012-0112. The first month for which a monitoring report was due was the month in which the Project began, in January 2010. The Discharger submitted its final monitoring report for the month of December 2012. As of April 9, 2013, all monthly monitoring reports had been submitted and were a total of 18,954 days late. An itemization of the late reports is provided in Attachment A.

The maximum potential administrative civil liability for violation of Condition 18 of the 401 Certification is $\$10,000/\text{day} \times 18,954 \text{ days} = \$189,540,000$.

37. The Certification requires, at Condition 24, that within one hour of taking any turbidity measurement higher than 20 percent above background at a point 100 feet or more downstream of the source(s), the results shall be reported by telephone to the appropriate Regional Water Board staff person. Condition 24 further requires that pictures of Copeland Creek and/or the Laguna de Santa Rosa upstream, downstream, and within the working and/or disturbed area shall be taken and submitted to the appropriate Regional Water Board staff via e-mail or fax within 24 hours of the incident.

During the June 28, 2011 inspection of the Project by Regional Water Board staff, the Discharger's WPCM informed Regional Water Board staff that he had sampled Copeland Creek and found the upstream turbidity to be 20 NTU and the downstream turbidity to be 175 NTU—an increase of 775 percent above background. No photographs have been received by Regional Water Board staff as of the date of this Complaint. If there are additional reports required under this condition that have not been received by the Regional Water Board, additional violations of Conditions 23 and 24 may have also occurred.

The maximum potential administrative civil liability for violation of Condition 24 of the 401 Certification is $\$10,000/\text{day} \times 1 \text{ site} \times 1 \text{ day} = \$10,000$.

38. The Certification requires, at Condition 28, that the Discharger take photographs of all areas disturbed by project activities, including all excess materials disposal areas, after the first rainfall event that generates visible runoff from these areas and to submit a report containing these photographs within 60 days of that event.

Based on data collected for Santa Rosa station KCASANTA15, from February 2010 through April 2012, there have been 305 days on which measureable precipitation occurred. Of these, there were 87 days on which 0.25 inch or more of rain fell, with 50 of those days receiving 0.50 inch or greater.

It is expected that some of these rainfall events generated visible runoff from the areas disturbed by Project activities. Conservatively assuming that the date of the first rainfall event generating visible runoff was February 24, 2010, with its two-day precipitation total

of 3.49 inches, the report was due April 25, 2010. This report was received May 17, 2013—a total of 1,070 days late.

The maximum potential administrative civil liability for violation of Condition 28 of the 401 Certification is \$10,000/day x 1,070 days = \$1,070,000.

39. The total maximum potential administrative civil liability for reporting violations of the 401 Certification is \$200,250,000.

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

40. Based on consideration of the above facts, the applicable law, and after applying the penalty methodology, the Assistant Executive Officer of the Regional Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of six million two hundred fifty-seven thousand and forty-four dollars (\$6,257,044).
41. Notwithstanding the issuance of this Complaint, the Regional Water Board retains the authority to assess additional penalties for violations of the requirements of the Caltrans' NPDES permit and water quality certification for which penalties have not yet been assessed or for violations that may subsequently occur.
42. Issuance of this Complaint is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Public Resource Code section 21000, *et seq.*) pursuant to title 14, California Code of Regulations, sections 15308 and 15321(a)(2).

Shin-Roei Lee, Assistant Executive Officer
Regional Water Board Prosecution Team

DATE