

SETTLEMENT AGREEMENT  
Attachment B – Specific Factors Considered  
**SETTLEMENT MODIFICATIONS REFLECTED HEREIN**

California Department of Transportation,  
Ghilotti Construction Company,  
and Gordon N. Ball, Inc.  
Highway 101 High Occupancy Vehicle Central Project  
North of Pepper Road in Petaluma to Rohnert Park Expressway in Rohnert Park

California Water Code section 13385(e) factors, along with corresponding Enforcement Policy scores, are presented for each alleged violation below. The penalty methodology addresses Non-reporting Violations of the Caltrans Storm Water Permit. The Respondents deny the allegations in ACLC R1-2012-0112, but have agreed to settle the Non-reporting Violations for the amount described herein.

I. Caltrans Storm Water Permit Violations – Discharge Violations

- A. General Discharge Prohibitions A.2, A.3, A.4, and A.6 – Discharge of approximately 75 cubic yards of soil to Copeland Creek and discharge of approximately 75 cubic yards of soil to the Laguna de Santa Rosa to construct temporary earthen dams and use of diversion bags containing silt and sand, thereby causing or threatening to cause a condition of pollution or nuisance, allowing for transport into waters of the State, in quantities that caused excess turbidity and threatened to cause deleterious bottom deposits or discoloration.

Step 1. Potential for Harm: 5 (final score)

- a. Harm or Potential Harm to Beneficial Uses: 3 (moderate)

The excavation of the streambed walls and the placement of approximately 75 cubic yards of soil (equivalent to 15,000 gallons) in the middle of the water body at each work site resulted in elevated turbidity levels, the disturbance of which could have reasonably been expected to temporarily impact beneficial uses such as warm and cold freshwater habitat; migration of aquatic organisms; wildlife habitat; spawning, reproduction, and/or early development; and non-contact water recreation.

The Project was constructed in the Russian River watershed, which is listed in its entirety as impaired for sediment pursuant to section 303(d) of the Clean Water Act. The Russian River is an important salmon and steelhead spawning and rearing area. Excessive sediment is among the factors known to contribute to the documented decline of these species. In addition to salmonids, the River provides habitat for an abundance of species, including juvenile fish and frogs.

- b. Physical, Chemical, Biological, or Thermal Characteristics of the Discharge: 2 (moderate)

The discharge consisted of soil and sediments of unknown particle size distribution and cleanliness. The excavation of the streambed walls and the placement of approximately 75 cubic yards of soil (equivalent to 15,000 gallons) in the middle of the water body at each work site resulted in elevated turbidity

levels, which could have reasonably been expected to pose a moderate threat to potential receptors including freshwater habitat; aquatic wildlife; spawning, reproduction, and/or early development; and non-contact water recreational activities.

- c. Susceptibility to Cleanup or Abatement: 0  
The Enforcement Policy assigns a score of zero (0) for this factor if 50% or more of the discharge is susceptible to cleanup and abatement, and a factor of one (1) if less than 50% is susceptible to cleanup and abatement. Following placement of soil in Copeland Creek and the Laguna de Santa Rosa as earthen dams, the Dischargers could and did remove the remainder of the dams. While the exact percentage of discharged soil recovered from the water bodies is unknown, it is estimated that the majority of the soil composing the dams was removed. Therefore, because 50% or more of the soil was susceptible to cleanup, a score of zero (0) was assigned.

Step 2. Assessments for Discharge Violations

- a. Deviation from Requirement: *major*.  
The placement of soil was strictly prohibited under General Discharge Prohibitions A.2, A.3, A.4, and A.6. Therefore, because the requirements were rendered ineffective, the Dischargers' extent of deviation from requirements was determined to be major.

Step 3. *Not Applicable to Discharge Violations*

Step 4. Adjustment Factors

- a. Culpability – 1.2 (*see general discussion below*)  
b. Cleanup and Cooperation: 1 (*see general discussion below*)  
c. History of Violations – 1.3 (*see general discussion below*)

Step 5. Total Base Liability:  $\$4,680$  each for A.2/A.3, A.4, and A.6 =  $\$14,040$ .  $\{[0.15$  (Per Day Factor)  $\times 2$  sites  $\times 1$  day  $\times \$10,000$  per day (statutory max)]  $\} \times 1.2$  (culpability)  $\times 1$  (cleanup and cooperation)  $\times 1.3$  (history of violations) =  $\$4,680$ .

II. Caltrans Storm Water Permit Violations – Non-Discharge Violations

A. Sediment Controls E.3 – Failure to implement appropriate erosion control BMPs.

Step 1. Potential for Harm for Discharge Violations – not applicable.

Step 2. Assessment for Discharge Violations – not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations: 0.55

- a. Potential for Harm: *moderate*.  
Best Management Practices (BMPs) are required to reduce contamination of stormwater by construction-related materials and to minimize erosion and subsequent deposition of soils and sediments in waters of the State. Failure to

appropriately implement BMPs for exposed soil surfaces can result in the discharge of excessive quantities and concentrations of suspended and settleable materials, contribute to elevated turbidity levels in streams, and cause or contribute to adverse impacts to such beneficial uses as freshwater habitat; aquatic wildlife; spawning, reproduction, and/or early development; and non-contact water recreational activities.

- b. Deviation from Requirement: *major*.  
The BMPs were not in place at the commencement of Project activities that could result in the discharge of sediment to surface water. BMPs are ineffective until such time as they are properly installed and maintained.

Step 4. Adjustment Factors

- a. Culpability – 1.2 (see general discussion below)
- b. Cleanup and Cooperation: 1 (see general discussion below)
- c. History of Violations – 1.3 (see general discussion below)

Step 5. Total Base Liability: \$17,160.

$0.55$  (Per Day Factor) X 2 sites X 1 day X \$10,000 per day (statutory max) X 1.2 (culpability) X 1 (cleanup and cooperation) X 1.3 (history of violations) = \$17,160.

III. 401 Certification Violations – Non-Discharge Violations

- A. Condition 4.a – Failure to complete proposed mitigation in strict accordance with Project description, by use of excavator in Copeland Creek and placement of pumps in Copeland Creek.

Step 1. Potential for Harm – not applicable.

Step 2. Assessment for Discharge Violations – not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations:  $0.55$

- a. Potential for Harm: *moderate*  
The violation at issue involves performing mitigation activities in-stream during a period when flows were higher than minimal in Laguna De Santa Rosa and Copeland Creek. As water had been increasing in the diversion area and the upstream end of the diversion was being overrun by the creek, the Dischargers attempted to conduct activities in-stream during the rainfall event to save the diversion. The Dischargers attempted to perform methods of mitigation such as placing pumps into each of the creeks, installing an excavator to excavate the bank of the creek and placing an earth dam downstream of the work area. Excavating the bank and installing the excavator in-stream had the potential to significantly impair and threaten beneficial uses such as the feeding and breeding habitat for aquatic life, including for communities of rare, threatened or endangered species.
- b. Deviation from Requirement: *major*.  
The extent of deviation from the applicable requirements is major. A 401 Certification certifies that the Dischargers' activities comply with applicable

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state water quality standards, limits and restrictions. Such requirements were rendered ineffective when the Dischargers conducted mitigation activities in a manner contrary to what was proposed in the 401 Certification application.

Step 4. Adjustment Factors

- a. Culpability – 1.2 (see general discussion below)
- b. Cleanup and Cooperation: 1 (see general discussion below)
- c. History of Violations – 1.3 (see general discussion below)

Step 5. Total Base Liability: \$34,320.

$0.55$  (Per Day Factor)  $\times$  2 sites  $\times$  2 days  $\times$  \$10,000 per day (statutory max)  $\times$  1.2 (culpability)  $\times$  1 (cleanup and cooperation)  $\times$  1.3 (history of violations) = \$34,320.

B. Condition 4.b – Failure to comply with Basin Plan turbidity requirements by causing an increase in turbidity in excess of 20 percent.

Step 1. Potential for Harm for Discharge Violations – not applicable.

Step 2. Assessment for Discharge Violations – not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations: 0.55

- a. Potential for Harm: *moderate*.

The amount of foam and raised turbidity levels substantially threatened non-contact recreational activities including the aesthetic enjoyment of the water bodies in conjunction with hiking, boating, etc., while also having the potential to pose substantial harm to aquatic life from suspended sediment and settleable materials that may clog gills and cause deposition of sediments in spawning areas.

- b. Deviation from Requirement: *major*.

The extent of deviation from the applicable requirements is major. Such mitigation activities created several hundred yards of foam downstream and turbidity levels well exceeding 20% over background levels. These methods of mitigation were not provided for in the Certification and posed a substantial potential for harm to beneficial uses. The Dischargers engaged in construction related activities that caused exceedances of the objectives for turbidity and floating material, thereby rendering the requirements ineffective.

Step 4. Adjustment Factors

- a. Culpability – 1.2 (see general discussion below)
- b. Cleanup and Cooperation: 1 (see general discussion below)
- c. History of Violations – 1.3 (see general discussion below)

Step 5. Total Base Liability: \$8,580.

$0.55$  (Per Day Factor)  $\times$  1 site  $\times$  1 day  $\times$  \$10,000 per day (statutory max)  $\times$  1.2 (culpability)  $\times$  1 (cleanup and cooperation)  $\times$  1.3 (history of violations) = \$8,580.

C. Condition 12 – Working in flowing or standing waters.

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- Step 1. Potential for Harm for Discharge Violations – not applicable.
  - Step 2. Assessment for Discharge Violations – not applicable.
  - Step 3. Per Day Assessment for Non-Discharge Violations: *0.55*
    - a. Potential for Harm: *moderate*.  
Working in standing waters caused turbidity which had the potential to pose substantial harm to aquatic life from suspended sediment and settleable materials that may clog gills and cause deposition of sediments in spawning areas.
    - b. Deviation from Requirement: *major*.  
The Certification prohibits working in flowing or standing waters and therefore the Dischargers' activities rendered the requirement ineffective.
  - Step 4. Adjustment Factors
    - a. Culpability – 1.2 (*see general discussion below*)
    - b. Cleanup and Cooperation: 1 (*see general discussion below*)
    - c. History of Violations – 1.3 (*see general discussion below*)
  - Step 5. Total Base Liability: *\$25,740*.  
*0.55 (Per Day Factor) X 3 site-days X \$10,000 per day (statutory max) X 1.2 (culpability) X 1 (cleanup and cooperation) X 1.3 (history of violations) = \$25,740.*
- D. Condition 14 - Failure to appropriately implement BMPs for erosion and turbidity control.
- Step 1. Potential for Harm for Discharge Violations – not applicable.
  - Step 2. Assessment for Discharge Violations – not applicable.
  - Step 3. Per Day Assessment for Non-Discharge Violations: *0.55*
    - a. Potential for Harm: *moderate*.  
BMPs are required to reduce contamination of storm water by construction-related materials and to minimize erosion and subsequent deposition of soils and sediments in waters of the State. Failure to appropriately implement BMPs for exposed soil surfaces can result in the discharge of excessive quantities and concentrations of suspended and settleable materials, contribute to elevated turbidity levels in streams, and cause or contribute to adverse impacts to such beneficial uses as warm and cold freshwater habitat; migration of aquatic organisms; wildlife habitat; spawning, reproduction, and/or early development; and non-contact water recreation.
- The Project was constructed in the Russian River watershed, which is listed in its entirety as impaired for sediment pursuant to section 303(d) of the Clean Water Act. The Russian River is an important salmon and steelhead spawning and rearing area. Excessive sediment is among the factors known to contribute to the documented decline of these species. In addition to salmonids, the River provides habitat for an abundance of species, including juvenile fish and frogs.

- b. Deviation from Requirement: *major*.  
The BMPs were not in place at the commencement of project activities to control the erosion or discharge of sediment to surface water. BMPs are ineffective until such time as they are properly installed and undamaged.

Step 4. Adjustment Factors

- a. Culpability – 1.2 (see general discussion below)
- b. Cleanup and Cooperation: 1 (see general discussion below)
- c. History of Violations – 1.3 (see general discussion below)

Step 5. Total Base Liability: \$17,160.

$0.55$  (Per Day Factor)  $\times$  2 sites  $\times$  1 day  $\times$  \$10,000 per day (statutory max)  $\times$  1.2 (culpability)  $\times$  1 (cleanup and cooperation)  $\times$  1.3 (history of violations) = \$17,160.

Adjustment Factors (unless otherwise specified above)

**Culpability:** The Dischargers have a high degree of culpability. Regional Water Board staff worked with the Dischargers on the Highway 101 Widening Project, attempting to ensure compliance with the Water Quality Certification and Storm Water Permit by clarifying requirements in the Application and Certification including the requirements to submit monthly monitoring reports, erosion control reports, and in-stream activity monitoring. Regional Water Board staff spent time providing guidance for compliance in meetings and via e-mail and have explained and reminded the Dischargers' water pollution control manager and Resident Engineer on at least two separate occasions of the requirements for conducting turbidity monitoring under the 401 Certification.

The Dischargers could have avoided the violations alleged herein had they used adequate BMPs and complied with the 401 Certification requirements. A reasonably prudent discharger would have acted in accordance with its permit conditions. The Dischargers should have refrained from engaging in activities that were unauthorized by the 401 Certification.

Therefore, Regional Water Board staff selected 1.2, which is a high culpability multiplier in the given range.

**Cleanup and Cooperation:** This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation.

The Dischargers only partially voluntarily cooperated in returning the site to compliance with the Caltrans Storm Water Permit and 401 Certification. For instance, after Regional Water Board staff warned the Dischargers, BMPs such as plastic sheeting were added to reduce the turbidity and foam. However, the earth dams were still in place at both locations and many of the surrounding BMPs were damaged and ineffective. Regional Water Board staff selected a neutral multiplier value of 1.

**History of Violations:** Other relevant North Coast Region violations are noted below.

On November 1, 2005, the Regional Water Board issued a Cleanup and Abatement Order to Caltrans for the Dry Creek Bridge replacement project. Caltrans violated the Water Quality Certification issued

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for the Dry Creek project by allowing equipment staging, material stockpiles and refuse disposal within waters of the State without a permit. Staff discovered the violations of the Water Quality Certification from a citizen complaint. Caltrans had not reported the violations.

On December 28, 2005, the Regional Water Board issued an Administrative Civil Liability Complaint to Caltrans for violations of the Van Duzen River Bridge replacement project Water Quality Certification. The violations included turbid discharges to the Van Duzen River, inadequate BMPs to protect water quality, leaks and spills of petroleum products within waters of the State, the unauthorized discharge of fill materials to waters of the State, failure to comply with the authorized work schedule required to protect wildlife and endangered species, and failure to report these violations as required by the Water Quality Certification. Caltrans paid an administrative civil liability of \$101,000.

On April 7, 2006, the Regional Water Board issued a California Water Code section 13267 Order to Caltrans to require the submittal of information related to the disposal of landslide material into the South Fork Eel River at Confusion Hill. Caltrans failed to apply for a permit for these activities or notify the Regional Water Board of the discharges until staff discovered the sidestepping activities. The Regional Water Board received a complaint from a downstream water supply system that water quality monitoring revealed anomalous turbidity readings in the South Fork Eel River that may have been related to the sidestepping activities.

On March 6, 2008, the Regional Water Board adopted Administrative Civil Liability Order No. R1-2008-0008 in the matter of Caltrans Confusion Hill project. The order assessed a total civil liability of \$20,000 for one day of discharge of 170 gallons of a sediment slurry to the River and four days of failure to submit a written report of the discharge.

On December 10, 2009, the Regional Water Board adopted Administrative Civil Liability Order No. R1-2009-0115, in the matter of Caltrans Hardscrabble Creek Bridge Replacement Project. The order assessed a total civil liability of \$26,000 for two 1,000 gallon discharges, the failure to follow the project description and the failure to have adequate BMPs.

On March 15, 2012, the Regional Water Board adopted Administrative Civil Liability Order No. R1-2012-0034, in the matter of Caltrans Confusion Hill Bypass Project. The order assessed a total civil liability of \$475,182 for ten discharge violations related to construction dewatering, four discharges related to leaky equipment, slag discharge violations, four discharges related to the unauthorized turbid discharge to the River, thirteen violations of insufficient turbidity measurements, five events of improper disposal of cement waste, five individual discharge events, and non-containment of the trestle deck.

On April 26, 2012, the Regional Water Board adopted Administrative Civil Liability Order No. R1-2012-0054, with respect to the Caltrans Confusion Hill Bypass Project for reporting violations settled between Regional Water Board staff and Caltrans that allegedly occurred on the Confusion Hill Bypass Project. The order reflected the settlement agreement of a total civil liability of \$400,000.

Based on the timing of the previous violations relative to the enforcement action and the similarity of the violations to the violations alleged in the complaint, the Regional Water Board Prosecution Team selected a multiplier of 1.3.

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Step 6 – Ability to Pay

According to the Caltrans web site (<http://www.dot.ca.gov/dist4/101centralproject/>, accessed August 16, 2012), the Highway 101 High Occupancy Vehicle Project cost \$55 million to construct. Regional Water Board staff have no information to indicate that the proposed administrative liability would jeopardize the Dischargers' ability to remain in business, or that it would be unable to pay the proposed administrative civil liability.

Step 7 – Other Factors as Justice May Require

The Enforcement Policy provides that if the Regional Water Board believes that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express findings are made. Additionally, the staff costs for investigating the violation and preparing the Complaint should be added to the liability amount.

Consistent with the Prosecution Team's Settlement Offer of January 30, 2014, the agreed-upon amount of \$127,725 will be honored. However, at some point in the exchange of settlement correspondence the violations and staff costs apparently resulted in a math error. We have reduced the staff costs to honor the final settlement amount. Please note that the reduction in the hourly staff cost rate (from \$150.00 to \$125.00 an hour) will carry over to any amendment of R1-2012-0112 for Reporting Violations, and \$25,000 in staff costs as of January 30, 2014 will remain allocated to reporting violations, consistent with our January 30, 2014 correspondence, fn. 3. While those costs may continue to accrue, such as in amending, prosecuting, and/or discussing the resolution of amended R1-2012-0112 for Reporting Violations, we will not allocate any of the Non-Reporting staff costs to the amended complaint R1-2012-0112.

Staff costs of \$5,265 will be added to the Total Base Liability.

Step 8 – Economic Benefit

Regional Water Board staff calculated the Dischargers' economic benefit of failing to implement adequate BMPs, including but not limited to installing a larger culvert and conducting a proper site assessment. The agreed-upon settlement amount captures at least the benefit of noncompliance plus 10%, consistent with the Enforcement Policy.

Step 9 – Maximum and Minimum Liability Amounts

Statutory Maximum

The Enforcement Policy directs the Regional Water Board to consider maximum and minimum liability amounts set forth in the applicable statutes.

The maximum potential liability for the alleged violations is \$190,000.

Statutory Minimum

The Enforcement Policy requires the Regional Water Board to recover, at a minimum, ten percent more than the economic benefit. In this case, the administrative civil liability is expected to capture the economic benefit amount plus ten percent.

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Step 10- Final Liability Amount

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided the amounts are within the statutory minimum and maximum amounts. The final liability amount was calculated as follows:

$$(\text{Combined Total Base Liability Amount}) + (\text{Staff Costs}) + (\text{Adjustment for Other Factors as Justice May Require}) = (\text{Final Liability Amount})$$

**Final Liability Amount = \$127,725**

**The table below summarizes the penalty amounts for each type of violation:**

Permit	Requirement Violated	Maximum Liability	Proposed Liability
Storm Water	Prohibition A.2/A3: No discharge of waste to waters of the State (1 day; 2 sites)	\$20,000	\$4,680
Storm Water	Prohibition A4: No dumping, depositing or discharging directly into waters of the State	\$20,000	\$4,680
Storm Water	Prohibition A.6: No sand, silt or earthen materials in waters of the State (1 day; 2 sites)	\$20,000	\$4,680
Storm Water	CGP Attachment D, Sediment Controls E.3: Erosion control BMPs (1 day, 2 sites)	\$20,000	\$17,160
Certification	Condition 4.a: Mitigation in strict compliance with 401 project description (2 days, 2 sites)	\$40,000	\$34,320
Certification	Condition 4.b: Actions compliant with Basin Plan (1 day, 1 site)	\$10,000	\$8,580
Certification	Condition 12: No working in flowing or standing waters unless proposed in application and approved by Regional Water Board (2 days at Copeland Creek, 1 day at Laguna de Santa Rosa)	\$30,000	\$25,740
Certification	Condition 14: BMPs implemented (1 day, 2 sites)	\$20,000	\$17,160
Certification	Condition 24: 1 hour/24 hour reporting of turbidity measurements (1 day, 1 site)	\$10,000	\$5,460
<b>Violations Total</b>		\$190,000	\$122,460
<b>Staff Costs</b>		--	\$5,265
<b>FINAL LIABILITY</b>		--	\$127,725