

# Item 8

## Doc. 11

May 21, 2008

ACL Complaint No. R9-2008-0021  
CA:10-3022900:fmelbourn

Dear San Diego Regional Water Board,

I am writing this letter in regards to ACL R9-2008-0021 with a proposed fine of \$685,000 against NCTD for storm water violations along the Sprinter project beginning in the fall of 2007 and continuing into 2008. The proposed fine is based upon both sediment laden storm water flows into inlets as well as BMP violations along a 22 mile project. In my opinion the fine is far too small.

I believe that the seriousness of the violations clearly warrant maximum fines for two reasons: 1) the numerous and pervasive BMP violations along a 22 mile long project being counted for only a single violation, and 2) on the one occasion (November 30, 2007) where the Water Board was lucky enough to be performing an inspection during a significant rain event, 14 violations were observed with sediment flowing into either creeks or inlets at 10 of the 14 sites inspected.

NCTD has a 22 mile construction site where they have been told numerous times to comply with the law. NCTD has repeatedly shown little interest in complying with the law and has continued to pollute the waters of the United States in four different watersheds stretching from Oceanside to Escondido.

In Inspection Report after Inspection Report, it is clear that BMP violations are common throughout much of the length of the 22 miles of the Sprinter project. Inspection Reports from January 2008 read much like Inspection Reports of November 2007 which read much like Inspection Reports of February 2007. It seems quite obvious that NCTD has complete and total contempt for the laws that protect the waters of the USA as well as the compliance promises made when NCTD obtained a permit for the construction of the Sprinter.

Prior to January 2008, despite the ongoing violations, despite repeated notices from the Water Board to NCTD, and despite the clear wording of the law and the Storm Water Permit, NCTD willfully and deliberately chose to ignore the notices from the Water Board. There is no other way to explain it!

My understanding is that the Water Board is limited to a single daily fine of \$10,000 for BMP violations for a project site, regardless of how big or small. As proposed in the ACL, NCTD is being fined only \$5,000 per day for BMP violations. I cannot see any reason for NCTD to be given a discount or a break.

Prior to January 2008, at no point in time did NCTD demonstrate that it was sincerely interested in complying with the law. All NCTD had done was to make feeble efforts that clearly fell far short of anything remotely meeting the requirements of the law. Even after NCTD seemed to begin making real efforts at complying with the law, they somehow did not find it possible to Certify Compliance as ordered in the Cleanup and Abatement Order issued on December 31, 2007. Indeed, NCTD's stated goal of compliance by May 1, 2008 was truly pathetic as April 30<sup>th</sup> is the last day of the rainy season and thus marks the end of a great many BMP requirements.

For the Water Board to fine NCTD anything less than the maximum allowable fine sends a message out to the construction community that they can get away with the same contempt for the law. In the future, other polluters will argue to the Water Board that their action equaled or exceeded NCTD's and therefore warrant, at a minimum, the same consideration in the calculation of fines. There is absolutely no good reason for the Water Board to cut NCTD a break and many reasons for the Water Board to charge the maximum fine permitted by law.

The BMP violations are bad enough but then there are the discharges. On November 30, 2007, the Water Board staff observed 14 discharges spread among 10 of the 14 inspection sites visited that day (9 discharges were previously documented on Feb. 20, 2007 in ACL R9-2007-0093). On that same day, I visited a number of sites along the Sprinter line and documented my own observations with photographs and video clips. Bear in mind, that I was limited in what I was able to observe from the perimeter of the Sprinter project.

On November 30, 2007, I sent Water Board staff engineer, Ben Neil, eleven emails including: 1 video clip of sediment flowing into Buena Creek, 5 video clips showing sediment flowing into storm drain inlets, 1 photo of sediment laden water flowing into Alta Loma Creek, 1 video clip of sediment flowing into a gutter leading to a storm drain inlet, and 3 video clips showing flows going offsite into a gutter leading to a storm drainage channel.

Apparently, of all of the locations that I documented, only one of them overlapped with the sites visited by the Water Board on November 30, 2007. This would mean that on this one date, there were a combined 19 discharge violations documented. These 19 sites constitute only a small portion of the 22 mile long Sprinter construction project.

During the past rainy season there were many rainy days other than November 30, 2007. At the NOAA web site, I was able to find recorded rainfall greater than  $\frac{1}{4}$  inch on 15 dates after November 30<sup>th</sup> with rainfall exceeding 1 inch on 3 of those dates. If there were only 19 discharge violations on each of the 15 rainy days, that would total another 285 sediment laden discharges. Given all of the Inspection Reports that documented many of the very same ongoing BMP violations is there any reason to think that on each of these rainy dates, that a great many discharges were not occurring?

I think that it would be more than reasonable for the Water Board to assume that during the 15 dates with significant rainfall after November 30<sup>th</sup> that discharges were occurring with pretty much the same frequency as that recorded on November 30<sup>th</sup>. Perhaps the Water Board cannot inflict fines for all of the violations that went undocumented during the rainfall events, but the Water Board can extrapolate the situation such that the maximum fine of \$10,000 per day for BMP violations is levied in full. It is the BMP violations that make discharges likely and probable. In the case of NCTD, the lack of proper BMPs are documented to have actually resulted in illegal sediment flows into the waters of the USA.

In the prior ACL where NCTD paid a fine of \$160,000, I recall that they argued that this is the final construction project by them as SANDAG will be in charge of future construction. There would seem to be no reason to allow a company getting out of a business practice to get away with violating the law. Additionally, I think that NCTD may still be in the business of constructing replacement railroad trestles along with other types of projects that are capable of polluting the waters of the USA.

Thanks for your consideration,

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