CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

PRELIMINARY TECHNICAL ANALYSIS

Proposed Administrative Civil Liability Contained in Complaint No. R9-2007-0064 Ashby USA, LLC

Noncompliance with

Clean Water Act Section 401 Water Quality Certification No. 01C-091

July 31, 2007

by
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1. INTRODUCTION

This technical analysis provides a preliminary analysis of factual and analytical evidence supporting administrative assessment of civil liability in the amount of $546,250 against Ashby USA, LLC for violations of Water Quality Certification No. 01C-091 as alleged in Complaint No. R9-2007-0064. The intent is to complete this analysis after the discharger and interested parties submit additional evidence, exculpatory information, and arguments to fully consider the factors required by California Water Code Section 13385(e).

2. ALLEGATIONS

The following allegations against Ashby USA, LLC are the basis for assessing administrative civil liability and also appear in Complaint No. R9-2007-0064.

2.1. Disturbances to Long Valley Wash

Ashby USA, LLC disturbed Long Valley Wash from its natural condition for 202 days (between August 29, 2006 and February 20, 2007) in violation of Condition No. 10 of Water Quality Certification No. 01C-091.

2.2. Failure to Submit Mitigation Plan

Ashby USA, LLC failed to submit a mitigation plan by December 20, 2005 as required by Condition No. 3 of Minor Modification No. 2 to Water Quality Certification 01C-091 and has failed to submit the plan for 569 days as of July 12, 2007. This is an ongoing violation as the mitigation plan has not yet been submitted.

2.3. Failure to Implement Mitigation

Ashby USA, LLC failed to implement mitigation for impacts to Santa Gertrudis Creek and Long Valley Wash by October 20, 2006 as required by Condition No. 2 of Minor Modification No. 2 to Water Quality Certification No. 01C-091 and has failed to implement mitigation for 265 days as of July 12, 2007. This is an ongoing violation as construction of mitigation has not yet begun.

2.4. Inadequately Designed Detention Basin

Ashby USA, LLC failed to design a detention basin implementing post-construction best management practices for 94 days (between August 29, 2006 and November 30, 2006) as required by Condition No. 16 of Water Quality Certification No. 01C-091.

3. BACKGROUND

On December 11, 2002, Ashby USA, LLC received Clean Water Act Section 401 Water Quality Certification No. 01C-091 from the Regional Board in association with proposed impacts to 3.38 acres (later changed to 10.26 acres) of waters of the United States (Santa Gertrudis Creek and Long Valley Wash) in conjunction with a large scale residential construction project located in the City of Temecula. The original Water Quality Certification has had minor modifications issued on September 29 and October 20, 2005, and April 2, 2007. On March 20, 2003, Ashby USA, LLC also enrolled in State Board Order No. 99-08-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002, Waste Discharge Requirements (WDRS) for Discharges of Storm Water Runoff Associated with Construction Activity.*

Roripaugh Ranch is an 804-acre site where approximately seventy-five percent of the site, 600 acres, will be disturbed by construction activities. In May 2003, after numerous inspections at the site and the issuance of two Notices of Violation for inadequate implementation of best management practices that resulted in multiple discharges of sediment to waters of the Nation and downstream neighborhoods, the Regional Board issued Administrative Civil Liability Complaint No. R9-2003-0227 to Ashby USA, LLC in the amount of $84,500.

In November 2003, the Regional Board agreed to settle the allegations of violations documented in the Complaint without a public hearing. The settlement resulted in a payment to the Cleanup and Abatement Account in the amount of $51,000 and a commitment from Ashby USA, LLC to maintain compliance with the General Permit throughout the construction project.

Numerous complaints have been filed with the Regional Board by property owners down stream of the construction site. Many of the complaints have been for sediment discharges and erosion from the Roripaugh Ranch construction site. Many of these discharges were addressed by the Regional Board in the 2003 Complaint, however, complaints continued to be received after the settlement of Complaint No. R9-2004-0227 and Regional Board inspections on August 29 and November 15, 2006, and February 20, 2007 identified several violations of the Water Quality Certification. Sediment discharges from the construction site were not a significant issue during the 2006-07 rainy season possibly because of the unusually low amount of precipitation during the period.

Because the Regional Board previously reduced the proposed administrative civil liability against Ashby USA, LLC from the recommended amount, in part because of Ashby USA, LLC's pledge to be maintain compliance with water quality related requirements at the Roripaugh Ranch construction site, the proposed administrative civil liability for the violations addressed in Complaint No. R9-2007-0064 is significantly higher than the previous enforcement action.

4. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

4.1. Factors to be Considered When Determining Administrative Civil Liability

California Water Code §13385(e) requires the Regional Board to consider several factors when determining the amount of civil liability to impose. These factors include:..."the nature, circumstance, extent and gravity of the violation, whether the discharge is susceptible to cleanup and abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require."

4.1.1. Disturbances to Long Valley Wash

4.1.1.1. Nature, Circumstance, Extent and Gravity of Violation

Condition No. 8 of Water Quality Certification No. 01C-091 states, "Armorflex will be installed along both sides of Long Valley Wash, outside of jurisdictional waters of the U.S. The existing low flow wash will remain in its natural condition, except as detailed in the amended 401 Water Quality Certification application package, dated July 25, 2002." **(See Appendix A, Water Quality Certification No. 01C-091.)**

Condition No. 8 was amended in Minor Modification No. 3 issued on April 2, 2007, to read, "Armorflex will be installed along both sides of Long Valley Wash. The low flow wash will be maintained in its natural condition until installation of the Armorflex and will be returned to a natural condition, except as detailed in the modified 401 Water Quality Certification." **(See Appendix B, Minor Modification No. 3 to Water Quality Certification No. 01C-091.)**

On August 29, 2006, the Regional Board observed several instances where Long Valley Wash had been disturbed from its natural condition in violation of Condition No. 8 of Water Quality Certification No. 01C-091. A large amount of soil was excavated in the wash downstream of a temporary crossing. In addition, the pipe for the crossing appeared too small and had no energy dissipation measures in place. These activities occurred outside of the areas of impact identified in the Water Quality Certification Application and subsequent certification issued by the Regional Board. **(See Appendix C, Regional Board Inspection Report, August**

29, 2006.)

On November 2, 2006 the Regional Board issued Notice of Violation No. R9-2006-0135 to Ashby USA, LLC for the violations observed on August 29, 2006. In particularly the Notice of Violation identified that disturbing Long Valley Wash was a violation of their Water Quality Certification. **(See Appendix D, Notice of Violation No. R9-2006-0135.)**

On November 15, 2006, the Regional Board observed several large earthen berms constructed within Long Valley Wash. The installation of the berms in the channel demonstrated Ashby USA, LLC's intention to use the stream channel itself as a sediment catch basin in lieu of necessary best management practices (BMPs) approved for such uses (i.e. a constructed sediment basin).

Earthen berms such as these that are not specifically authorized in the Water Quality Certification and improperly constructed within a stream channel would clearly interfere with the natural stream flow patterns and could cause erosion and excessive sedimentation downstream **(See Appendix E, Regional Board Inspection Report, November 15, 2006.)**

By letter dated November 30, 2006, Ashby USA, LLC stated that "all such disturbances that were not specifically approved by the permit are in the process of being removed and returned to their natural condition and be completed by November 30, 2006." **(See Appendix F, Ashby USA, LLC letter, November 30, 2006.)** However, a subsequent Regional Board inspection on February 20, 2007 revealed that berms installed in the stream upstream of the Butterfield Stage Road bridge were still in place. **(See Appendix G, Regional Board Inspection Report, February 20, 2007.)**

On March 19, 2007, Mr. John Bergin of Ashby USA, LLC notified the Regional Board that the remaining berms had been removed from Long Valley Wash. **(See Appendix H, Ashby USA, LLC letter, March 19, 2007.)**

Beneficial uses of Long Valley Wash include:

a. Municipal Supply
b. Agricultural Supply

c. Industrial Service Supply
d. Industrial Process Supply
e. Ground Water Recharge (potential)
f. Water Contact Recreation
g. Non-contact Water Recreation
h. Warm Freshwater Habitat
i. Cold Freshwater Habitat
j. Wildlife Habitat

4.1.1.2. Susceptibility to Cleanup and Abatement

Discharges of sediment from the disturbance of Long Valley Wash in receiving waters would be difficult to remove without widespread disturbances of native flora and fauna. Water quality benefits of a cleanup would need to be weighted against potential impacts resulting from cleanup action.

4.1.1.3. Degree of Toxicity of the Discharge

While the discharge of sediment to Long Valley Wash is considered a pollutant, it is not considered toxic.

4.1.1.4. Ability to Pay and Continue in Business

At this time, the Regional Board has no information that Ashby USA, LLC is unable to pay the proposed administrative civil liability (ACL) or how payment of the proposed ACL would affect the ability of Ashby USA, LLC to remain in business. Any burden to prove a financial hardship is Ashby USA, LLC's to prove.

4.1.1.5. Voluntary Cleanup Efforts Undertaken

Ashby USA, LLC returned Long Valley Wash to its original state only after the Regional Board gave notification that they were in violation of the Water Quality Certification.

4.1.1.6. Prior History of Violation

The Regional Board cited Ashby USA, LLC for two documented storm water discharges and numerous SWPPP violations at this construction site in March, April and October, 2003. Liability for these violations was assessed by the Regional Board in November 2003 (**See Appendix I Administrative Civil Liability Order No. R9-2003-0302**).

Violations of Regional Board requirements have continued to be documented at the Roripaugh Ranch construction site. The continuation of Ashby USA, LLC to ignore the requirements prescribed by the Regional Board shows a woeful lack of concern by the discharger for the environmental impacts caused by the project.

4.1.1.7. Degree of Culpability

Ashby USA, LLC bears full responsibility to comply with the conditions of its Water Quality Certification. As a result of Ashby USA, LLC willfully altering Long Valley Wash in contradiction of Condition No. 8 of Water Quality Certification No. 01C-091, Ashby USA, LLC bears a high degree of culpability for this violation.

4.1.1.8. Economic Benefit Resulting from the Violation

At this time, the Regional Board has no information as to whether the disturbance of Long Valley Wash was an economic benefit to Ashby USA, LLC.

4.1.1.9. Other Matters as Justice May Require

The Regional Board has incurred specific expenses relating to the investigation of the violations alleged in this report as well as the preparation of enforcement documents associated with this enforcement action. To date, the Regional Board's total expenditures are $26,319.85.

4.1.2. Failure to Submit Mitigation Plan

4.1.2.1. Nature, Circumstance, Extent and Gravity of Violation

Minor Modification No. 2 to Water Quality Certification No. 01C-091 required Ashby USA, LLC to submit a Mitigation Plan to the Regional Board by December 20, 2005. On January 12, 2006 the Regional Board e-mailed Mark Carpenter requesting a status report on the delinquent report. On that date Mr. Carpenter reported that their anticipated delivery date of the Final Mitigation Plan was February 20, 2006. **(See Appendix J, Minor Modification No. 2 to Water Quality Certification No. 01C-091.)**

Meetings were held with Ashby USA, LLC, the Regional Board and other interested agencies regarding the Mitigation Plan on March 15, 2005 and July 6, 2006. Ashby USA, LLC submitted a Mitigation Plan to all responsible agencies on October 24, 2006. However, the Regional Board in conjunction with the other agencies determined the Mitigation Plan was not acceptable for many reasons including the location of the proposed off-site mitigation.

To date an acceptable revised Mitigation Plan has not been submitted. A meeting with the resource agencies and Ashby USA, LLC was held on February 27, 2007 to discuss a new mitigation proposal. On March 1, 2007, the Regional Board sent a response to Ashby USA, LLC on review of the proposal for a new Mitigation Plan. Conceptually the new plant appeared to be acceptable. To date, however, a new Mitigation Plan has not been submitted to the Regional Board.

4.1.2.2. Susceptibility to Cleanup and Abatement

This factor does not apply to this violation.

4.1.2.3. Degree of Toxicity of the Discharge

This factor does not apply to this violation.

4.1.2.4. Ability to Pay and Continue in Business

See section 4.1.1.4.

4.1.2.5. Voluntary Cleanup Efforts Undertaken

This factor does not apply to this violation.

4.1.2.6. Prior History of Violation

See section 4.1.1.6.

4.1.2.7. Degree of Culpability

Ashby USA, LLC bears full responsibility for compliance with all conditions of Water Quality Certification No. 01C-091. Ashby USA, LLC was notified on January 12, 2006 that the report was late. An additional ten months before submittal of

a draft of the required document. A final document has not been submitted. At no time did Ashby USA, LLC express concern that the document was past-due and proceeded as though noncompliance with the deadline was of no significance.

Ashby USA, LLC caused the impacts to occur even though a mitigation proposal had not been agreed upon by all resource agencies. In order for Ashby USA, LLC to maintain compliance with the Water Quality Certification, an approved Mitigation Plan should have been in place prior to any impacts to waters of the United States.

4.1.2.8. Economic Benefit Resulting from the Violation

It is presumed that Ashby USA, LLC realized some economic benefit by delaying the release of the Mitigation Plan for nearly two years. Documentation pertaining to expenditures relating to this violation was not requested prior to this enforcement action; however, it is anticipated that the proposed administrative civil liability for this violation would adequately recover most, if not all, the economic benefit.

4.1.2.9. Other Matters as Justice May Require

See section 4.1.1.9.

4.1.3. Failure to Implement Mitigation

4.1.3.1. Nature, Circumstance, Extent and Gravity of Violation

Minor Modification No. 2 of Water Quality Certification No. 01C-091 requires that mitigation for the impacts to Santa Gertrudis Creek and Long Valley Wash (a total of 10.26 acres) be constructed within one year of when impacts occur. Minor Modification No. 2 was issued on October 20, 2005. Impacts from the project had already occurred at this date. The mitigation, therefore, was required to be constructed and completed by October 20, 2006. The purpose of mitigation is to restore habitat that has been impacted as quickly as possible in order to restore habitat for displaced species.

On August 29, 2006, the Regional Board conducted an inspection of the designated mitigation sites and observed

that no mitigation had begun.

On November 2, 2006, the Regional Board issued Notice of Violation No. R9-2006-0135, notifying Ashby USA, LLC that they were in violation of Water Quality Certification No. 01C-091 for failure to construct the required mitigation.

In response, Ashby USA, LLC asserted that they were not in violation because they were not done impacting Santa Gertrudis Creek and Long Valley Wash. They incorrectly interpreted the requirement to be that mitigation of impacts did not begin until one year after all the impacts to habitat were completed. This interpretation is contrary to a literal interpretation of the requirement in the original 401 Water Quality Certification which clearly states "The construction of the proposed mitigation shall be completed within the same calendar year as impacts to the waters of the United States occur, or at least no later than 9 months following the close of the calendar year in which impacts first occur."

4.1.3.2. Susceptibility to Cleanup and Abatement

This factor does not apply to this violation.

4.1.3.3. Degree of Toxicity of the Discharge

This factor does not apply to this violation.

4.1.3.4. Ability to Pay and Continue in Business

See section 4.1.1.4.

4.1.3.5. Voluntary Cleanup Efforts Undertaken

This factor does not apply to this violation.

4.1.3.6. Prior History of Violation

See section 4.1.1.6.

4.1.3.7. Degree of Culpability

In response to Notice of Violation No. R9-2006-0135 Ashby USA, LLC states that they interpreted "within one year that impacts occur" means within one year after impacts have

ceased. This is clearly contrary to a reasonable reading of the condition in the Water Quality Certification. Ashby USA, LLC's recalcitrance towards not only compliance with the requirements but with regards to restoring the environment after impacts in an expeditious manner indicates a high degree of culpability.

4.1.3.8. Economic Benefit Resulting from the Violation

It is estimated that Ashby USA, LLC has received some economic benefit from failing to construct mitigation in a timely matter. Documentation pertaining to expenditures relating to this violation was not requested prior to this enforcement action; it is anticipated, however, that the proposed administrative civil liability for this violation would adequately recover any economic benefit.

4.1.3.9. Other Matters as Justice May Require

See section 4.1.1.9.

4.1.4. Inadequately Designed Detention Basin

4.1.4.1. Nature, Circumstance, Extent and Gravity of Violation

Condition No. 16 of Water Quality Certification No. 01C-091 requires Ashby USA, LLC to fully implement its *Final Water Quality Management Plan* dated September 26, 2002 which includes the use of the detention basin for water quality treatment.

During the August 29, 2006 Regional Board site inspection, it was discovered that the detention basin behind the construction offices on Pourroy Road was not designed to adequately treat and control urban and storm water runoff. The basin's outlet pipe was located at the elevation of the basin floor allowing water to flow straight through without allowing any detention time for sediment and associated pollutants to settle out of the flow. The basin was lacking a riser pipe to prevent no more than 50 percent of the water quality volume to drain from the detention basin in the first 24 hours as recommended by the California Stormwater Quality Association. Observations of fine grain sediment discharged from the outlet pipe confirm that inadequate

detention was occurring in the basin.

4.1.4.2. Susceptibility to Cleanup and Abatement

This factor does not apply to this violation.

4.1.4.3. Degree of Toxicity of the Discharge

This factor does not apply to this violation.

4.1.4.4. Ability to Pay and Continue in Business

See section 4.1.1.4.

4.1.4.5. Voluntary Cleanup Efforts Undertaken

This factor does not apply to this violation.

4.1.4.6. Prior History of Violation

See section 4.1.1.6.

4.1.4.7. Degree of Culpability

Ashby USA, LLC was aware that this basin was one of the sources of past sediment discharges to downstream properties. Evidence of the discharges on the rip rap below the outfall pipe is visible. Ashby USA, LLC's notification to the Regional Board that an engineer had been hired to design the riser indicates that the discharger knew that a riser was required. Therefore, Ashby USA, LLC has a high degree of culpability with regards to this violation.

4.1.4.8. Economic Benefit Resulting from the Violation

Ashby USA, LLC received some economic benefit from failing to adequately construct the basin. Documentation pertaining to expenditures relating to this violation was not requested prior to this enforcement action; however, it is anticipated that the proposed administrative civil liability for this violation would adequately recover any economic benefit

4.1.4.9. Other Matters as Justice May Require

See section 4.1.1.9.

4.2. Maximum Civil Liability

Pursuant to California Water Code §13385 the maximum civil liability that the Regional Board may assess is (a) ten thousand dollars ($10,000) per day of violation (per violation); and (b) ten dollars ($10) for every gallon discharged, over one thousand gallons discharged that was not cleaned up. California Water Code §13385(e) requires that, when pursuing civil liability under California Water Code §13385, "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."

4.2.1. Disturbances to Long Valley Wash

The Regional Board first observed disturbances to Long Valley Wash on August 29, 2006. By letter dated November 30, 2006, Ashby USA, LLC notified the Regional Board that all unauthorized disturbances to Long Valley Wash would be removed by November 30, 2006, however, a Regional Board inspection on February 20, 2007 confirmed that all disturbances had not been removed. By letter dated March 19, 2007, Ashby USA, LLC submitted photographic documentation confirming the removal of the final earthen berm in Long Valley Wash. Using March 19, 2007 as the date of compliance, the total number of days of violation is 202 days. Therefore, the maximum liability that can be assessed for this violation is two million twenty thousand dollars ($2,020,000).

4.2.2. Failure to Submit Mitigation Plan

Ashby USA, LLC's Mitigation Plan was due by December 20, 2005. A Mitigation Plan was submitted on October 24, 2006. With input from other resource agencies the Regional Board determined that the Mitigation Plan submitted by Ashby USA, LLC was incomplete. To date, an approved Final Mitigation Plan has not been submitted. As a result, the total number of days of violation is five hundred sixty nine days (569). Therefore, as of July 12, 2007, the maximum liability that can be assessed for this violation is five million, six hundred ninety thousand dollars ($5,690,000). The liability amount may continue to increase until the violation is corrected.

4.2.3. Failure to Implement Mitigation

Ashby USA, LLC, was required to mitigate the impacts to Santa Gertrudis Creek and Long Valley Wash by October 20, 2006. Ashby USA, LLC has failed to begin to implement the required mitigation. As

a result, the total number of days of violation is, at a minimum, two hundred sixty five days (265). Therefore, as of July 12, 2007, the maximum liability that can be assessed for this violation is two million six hundred fifty thousand dollars ($2,650,000). The liability amount may continue to increase compliance is achieved.

4.2.4. Inadequately Designed Detention Basin

Condition No. 16 of Water Quality Certification No. 01C-091 requires Ashby USA, LLC to fully implement its Final Water Quality Management Plan. Ashby USA, LLC failed to construct an adequate detention basin that would significantly reduce the discharge of sediment from the basin. The basin has been in place for a minimum of 94 days (August 29, 2006 through November 15, 2006). Therefore the maximum liability that can be assessed for this violation is nine hundred forty thousand dollars ($940,000).

4.3. Proposed Civil Liability Per Violation

The proposed amount of civil liability attributed to each violation was determined by taking into consideration the factors discussed in section 4.1, as well as the maximum civil liability that the Regional Board may assess as discussed in section 4.2.

4.3.1. Disturbances to Long Valley Wash

Ashley USA, LLC disturbed Long Valley Wash from its natural condition from August 29, 2006 through March 19, 2006. The disturbances included earth moving and destruction of native plants to the construction of earthen berms which give the appearance of using the wash as a BMP. The liability for the 202 days of violation is five hundred fifty dollars ($550) per day for a total of one hundred eleven thousand one hundred dollars ($111,100).

4.3.2. Failure to Submit Mitigation Plan

Ashby USA, LLC failed to submit its Final Mitigation Plan by the December 20, 2005 due date. As a result, Ashby USA, LLC was in violation of Minor Modification No. 2 of Water Quality Certification No. 01C-091 for at least 569 days. This is an ongoing violation and the number of days of violation are calculated through July 12, 2007. The liability for 569 days of violation is one hundred dollars ($100) per day for a total of fifty six thousand nine hundred dollars ($56,900).

4.3.3. Failure to Implement Mitigation

Ashby USA, LLC failed to construct mitigation for disturbances in Long Valley Wash and Santa Gertrudis Creek from the due date of October 20, 2006 through, at a minimum, June 30, 2007. As a result, Ashby USA, LLC was in violation of Minor Modification No. 2 to Water Quality Certification No. 01C-091 for a minimum of 265 days. This is an ongoing violation and the number of days of violation are calculated through July 12, 2007. The liability for 265 days of violation is one thousand two hundred fifty dollars ($1,250) per day for a total of three hundred thirty one thousand two hundred fifty dollars ($331,250).

4.3.4. Inadequately Designed Detention Basin

Ashby USA, LLC failed to construct a detention basin that would adequately treat and control urban and storm water runoff from August 29, 2006 through November 30, 2006 in violation of Condition No. 16 of Water Quality Certification No. 01C-091. As a result, Ashby USA, LLC was in violation for 94 days. The liability for 94 days of violation is five hundred dollars ($500) per day for a total of forty seven thousand dollars ($47,000).

4.4. Total Proposed Administrative Civil Liability

The total proposed civil liability in this matter is five hundred forty six thousand two hundred fifty dollars ($546,250).