

# Lehigh Hanson

HEIDELBERGCEMENT Group

Gregory Knapp  
Director Environmental Affairs, Region West  
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May 31, 2013

**Via Federal Express**

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U.S. Army Corps of Engineers  
Regulatory Branch  
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Executive Officer  
Ms. Dyan Whyte  
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California Regional Water Quality Control  
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Mr. Nash Gonzalez  
Planning Director  
Santa Clara County  
70 W. Hedding St  
San Jose, CA

Re: Notification of Proposed Permanente Creek Restoration Activities and  
Request for Agency Meetings

Lehigh Southwest Cement Company and Hanson Permanente Cement, Inc. ("Lehigh") recently entered into a Consent Decree with the Sierra Club to informally resolve a federal lawsuit involving Lehigh's Permanente quarry and cement plant located in Santa Clara County, California ("Permanente facility"). That proposed Consent Decree was lodged with the U.S. District Court, Northern District of California, on April 24, 2013. Absent objection by the reviewing agencies, and presuming the Consent Decree is approved by the District Court in June/July 2013, Lehigh will soon begin undertaking action to comply with the Consent Decree's terms.

The proposed Consent Decree prescribes a variety of restoration activities for Permanente Creek, which flows through and adjacent to the Permanente facility. A copy of the proposed Consent Decree is enclosed, with restoration activities described in paragraphs 33 through 53. These activities will require review, consent, or other action by federal and state regulatory agencies prior to implementation. In an effort to expedite the review and/or approval processes, and consistent with paragraph 45 of the proposed Consent Decree, Lehigh is notifying the recipients of this letter of the proposed Permanente Creek restoration activities and the expected timing and content of upcoming submittals. Lehigh is also requesting that meetings (individual and/or inter-agency) to discuss the proposed restoration activities be timely scheduled between November 2013 and January 2014 so that the negotiated schedule in the Consent Decree can be attained.

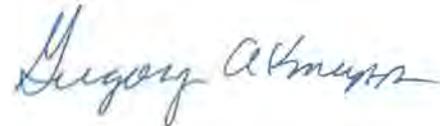
The upcoming activities and negotiated timeframes associated with Permanente Creek restoration activities are as follows:

#### Upcoming Permanente Creek Restoration Activities

Date	Activity
October 7, 2013	Submit Conceptual Restoration Plan (30% design level) to all pertinent agencies
November 2013 – January 2014	Participate in agency meetings regarding Conceptual Restoration Plan and permitting
July 30, 2014	Complete Draft Restoration Plan (70% design level)
August 30, 2014	Submit all necessary permit and approval applications to all pertinent agencies

Lehigh looks forward to working cooperatively with you to achieve timely implementation of the restoration activities. If you have any questions, or would like to discuss further, please do not hesitate to contact me. Please provide me with the name and contact information for the appropriate staff member who I can contact for further involvement in the review of our plans as we move forward.

Very truly yours,

A handwritten signature in blue ink that reads "Gregory Knapp". The signature is written in a cursive style.

Gregory Knapp  
Director Environmental Affairs  
Lehigh Hanson Region West

Enclosure

Cc: Michael N. Josselyn, WRA Environmental Consultants  
Nicole E. Granquist, Downey Brand LLP  
Mark D. Harrison, Harrison, Temblador, Hungerford & Johnson



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DATED: April 24, 2013

s/ Reed Zars  
For Plaintiff Sierra Club  
Reed Zars

s/ Nicole Granquist  
For Defendants Lehigh/Hanson  
Nicole Granquist

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SIERRA CLUB,  
Plaintiff,  
v.

LEHIGH SOUTHWEST CEMENT COMPANY,  
and HANSON PERMANENTE CEMENT, INC.  
Defendants.

Case No.: 5:11-cv-06392-HRL  
Judge: Hon. Howard R. Lloyd

**CONSENT DECREE**

**Date Lodged: April 24, 2013**

**Date Entered \_\_\_\_\_**

**I. RECITALS**

1. On December 19, 2011, Plaintiff Sierra Club (“Plaintiff” or “Sierra Club”) filed a Complaint for Declaratory and Injunctive Relief and for Civil Penalties in this federal Clean Water Act case against Defendants Lehigh Southwest Cement Company and Hanson Permanente Cement, Inc. (“Defendants”) pertaining to Defendants’ quarry, cement plant and associated facilities, located in Santa Clara County, California. Sierra Club and Defendants are collectively referred to herein as “Parties,” and individually referred to as “Party.”

2. The Complaint alleges that Defendants have, and continue to, discharge pollutants from the quarry pit into Permanente Creek without an authorizing national pollutant discharge elimination system (“NPDES”) permit and in violation of their storm water discharge permit.

3. The Complaint also alleges that Defendants have caused fill, including but not limited to mining wastes, overburden and sediment, to enter the bed and banks of Permanente Creek, and that such fill degrades, and continues to degrade, the water quality, habitat and natural function of the Creek.

4. Defendants deny all of Plaintiff’s allegations and claims in the Complaint.

5. The Parties, through their authorized representatives and without either adjudication of Plaintiff’s claims or admission by Defendants of any alleged wrongdoing have

United States District Court  
For the Northern District of California

1 chosen to resolve in full Plaintiff's Complaint through settlement and avoid the cost and  
2 uncertainties of further litigation.

3 6. The Parties agree that this Consent Decree has been negotiated in good faith and  
4 will avoid further litigation among the Parties, and that this Decree is fair, reasonable and in the  
5 public interest.

6 NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED,  
7 ORDERED AND DECREED as follows:

8 **II. JURISDICTION AND VENUE**

9 7. This Court has subject matter jurisdiction in this matter pursuant to 33 U.S.C. §  
10 1365(a)(1)(A) (citizen suit provision of the Clean Water Act) and 28 U.S.C. § 1331 (federal  
11 question statute). The relief required is authorized pursuant to 28 U.S.C. §§ 2201 and 2202  
12 (declaratory judgment), and 33 U.S.C. §§ 1319 and 1365 (Clean Water Act).

13 8. Venue in the Northern District of California is proper pursuant to 33 U.S.C. §  
14 1365(c)(1) (Clean Water Act citizen suit provision) because Defendants' discharges are located  
15 in this District. Venue also lies in the Northern District of California, pursuant to 28 U.S.C.  
16 § 1391(b) and (e), because the property that is the subject of this action is in Santa Clara County,  
17 California, and because Defendants' Facility is located in Santa Clara County, California.

18 9. Plaintiff and Defendants consent to this Court's jurisdiction to enter and enforce  
19 this Consent Decree, and consent to venue in this judicial district.

20 **III. APPLICABILITY**

21 10. The provisions of this Consent Decree apply to and are binding on Plaintiff and  
22 Defendants, any of their respective successors and/or assigns, officers, agents, servants, and  
23 employees, and any other entities who are in active concert or participation with Plaintiff or  
24 Defendants.

25 11. No transfer of ownership or operation of the Facility shall relieve Defendants of  
26 their obligation to comply with the terms of this Consent Decree. Moreover, prior to any transfer  
27 of ownership or operation, the transferee shall provide written confirmation to the Court and  
28

1 Plaintiff acknowledging the terms of the Consent Decree and consenting to be bound by its  
2 terms.

3 12. Defendants shall provide a copy of this Consent Decree to all officers,  
4 employees, agents, performance guarantors, consultants and contractors whose duties include the  
5 implementation of any provision of this Consent Decree.

6 **IV. DEFINITIONS**

7 13. Terms used in this Consent Decree that are defined in the federal Clean Water  
8 Act, 33 U.S.C. §§ 1251, *et seq.*, (“CWA”), or in regulations issued pursuant thereto, shall have  
9 the meanings assigned to them therein, unless otherwise provided in this Decree. Whenever the  
10 terms set forth below are used in this Consent Decree, the following definitions shall apply:

11 (a) “Applicable chronic water quality standard for Selenium” means 5 micrograms per  
12 liter (µg/l) of total Selenium.

13 (b) “Complaint” shall mean the Complaint filed by Sierra Club in this action on  
14 December 19, 2011.

15 (c) “Consent Decree” or “Decree” shall mean this Consent Decree and the  
16 exhibits attached hereto.

17 (d) “Creek” shall mean Permanente Creek.

18 (e) “Day” shall mean a calendar day unless expressly stated to be a business  
19 day. In computing any period of time under this Consent Decree, where the last day would fall  
20 on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the  
21 next business day.

22 (f) “Effective Date” shall mean the date this Decree is entered by the Court.

23 (g) “Facility” shall mean Defendants’ Permanente quarry, cement plant and associated  
24 works and property, located in Santa Clara County, California.

25 (h) “Final treatment system” shall mean a water pollution abatement system and  
26 associated flow modulation facilities designed, constructed and operated to achieve continuous  
27 compliance with all NPDES permit limits, and all water quality standards applicable to  
28 Permanente Creek, for all discharges to Permanente Creek from the Facility, including quarry pit

1 water and process waters currently associated with Pond 4A (quarry pit and primary crusher  
2 washdown), Ponds 9 & 11 (cement plant process waters in Pond 11 that flow through Pond 9),  
3 and Pond 20 (cement plant truck wash), and only excluding authorized storm water discharges  
4 from Pond 9 (after Pond 11 no longer flows to Pond 9), Pond 13, Pond 20 (after truck wash  
5 water no longer flows to Pond 20), and Pond 30. To the extent Defendants' future NPDES  
6 permit contains an effluent limit for nickel that differs from the water quality standard for nickel,  
7 such NPDES nickel effluent limit shall control.

8 (i) "Interim treatment system" shall mean a water pollution abatement system and  
9 associated flow modulation facilities designed, constructed and operated to treat up to 24,000  
10 gallons per hour of the quarry pit water currently associated with Pond 4A (quarry pit and  
11 primary crusher washdown) for the primary purpose of substantially reducing Selenium in the  
12 quarry pit water prior to discharge. Operation of this interim treatment system is also intended to  
13 inform the final design and successful operation of the final treatment system.

14 (j) "Meet and confer" shall mean to communicate at the same time in person, by phone,  
15 or through any video or other virtual electronic method.

16 (k) "NPDES" shall mean National Pollutant Discharge Elimination System.

17 (l) "Parties" shall mean Plaintiff and Defendants.

18 (m) "Quarry pit water" shall mean that surface and ground water that is pumped by  
19 Defendants to facilitate quarry mining.

20 (n) "Reach" shall mean that length of Permanente Creek that has been assigned a  
21 numerical value from 1 to 22 as shown in the URS profile and site layout map set forth as  
22 Exhibit A.

23 (o) "Regional Water Board" shall mean the San Francisco Bay Regional Water Quality  
24 Control Board.

25 (p) "Section" shall mean a portion of this Consent Decree identified by a Roman  
26 numeral.

27 (q) "Station" shall mean the numerical value (from 0 to 192) assigned to a location on  
28 Permanente Creek as shown on the URS profile set forth in Exhibit A.

1 (r) "EPA" shall mean the United States Environmental Protection Agency  
2 and any of its successor departments or agencies.

3 (s) "Work", as that term is used in Section X, shall mean all activities necessary to  
4 satisfy the Permanente Creek restoration obligations described in Section VI of this Decree,  
5 including but not limited to design, contracting, permitting, construction and monitoring  
6 activities.

7 **V. DISCHARGE TREATMENT**

8 14. Within 45 days of the date of lodging of this Decree, Defendants shall supplement  
9 their November 30, 2011 application for an individual NPDES permit for the Facility by  
10 submitting an amended Report of Waste Discharge, or procedurally similar document, to the  
11 Regional Water Board that includes requirements no less stringent than those set forth in  
12 Paragraphs 15 through 32 below.

13 A. Interim Quarry Pit Water Discharge Compliance

14 15. No later than August 1, 2013, Defendants shall execute one or more contracts for  
15 the engineering, procurement, and construction of the interim treatment system. No later than  
16 January 17, 2014, Defendants shall commence construction of the interim treatment system.

17 16. No later than October 1, 2014, Defendants shall have installed and commenced  
18 operation of the interim treatment system.

19 17. Beginning no later than October 1, 2014, and continuing no later than September  
20 30, 2017, Defendants shall direct all quarry pit water to the interim treatment system.  
21 Defendants shall treat no less than 24,000 gallons per hour of quarry pit water with the interim  
22 treatment system, except at those times when only flows less than 24,000 gallons per hour are  
23 available from the flow modulation facilities, in which case Defendants shall treat all lesser  
24 flows. Beginning no later than December 1, 2014, Defendants shall either remove, on a  
25 continuous basis, at least 50 percent of the total Selenium from the totality of such quarry pit  
26 water flow to be treated, or achieve a concentration of no greater than 10 µg/l of total Selenium  
27 in such quarry pit water flow to be treated when the concentration of total Selenium in the quarry  
28 pit water entering the interim treatment system is 20 µg/l or less, prior to its discharge into

1 Permanente Creek. Notwithstanding the above, Defendants shall operate the treatment system at  
2 all times to maximize the reduction of Selenium in the quarry pit discharge.

3 18. To determine the flow rates described above, Defendants shall use automatic,  
4 continuous flow measuring equipment with continuous data logging to monitor the total gallons  
5 per hour of quarry pit water entering the interim treatment system. Defendants shall also monitor  
6 the total gallons per hour of all quarry pit water treated by the interim treatment system and  
7 discharged to Permanente Creek, and the total gallons per hour of any quarry pit water that is not  
8 treated by the interim treatment system and discharged to Permanente Creek.

9 19. Beginning on October 1, 2014, and continuing through September 30, 2017,  
10 Defendants shall monitor, on no less than a weekly basis, the total Selenium in the untreated  
11 quarry pit water at the inlet to the interim treatment system, and at the outlet from the interim  
12 treatment system. The inlet and outlet samples shall be taken at the same time, and shall consist  
13 of a composite of twelve equal aliquots collected evenly over a 24-hour period. Data generated  
14 from this monitoring shall be used to assess compliance with Paragraph 17 on a weekly basis.

15 20. No later than March 31, 2015, Defendants shall provide Plaintiff with a report  
16 summarizing the performance of the interim treatment system since October 1, 2014, including  
17 but not limited to the measured concentration of total Selenium in the water discharged from the  
18 interim treatment system to Permanente Creek.

19 21. No later than June 30, 2015, Defendants shall provide Plaintiff with a report  
20 summarizing what additional treatment facilities or operational changes, if any, are necessary to  
21 ensure that quarry pit water treated by the interim treatment system will comply with the  
22 applicable chronic water quality standard for Selenium. If the water discharged from the interim  
23 treatment system is in compliance with the applicable chronic water quality standard for  
24 Selenium at that time, no additional treatment facilities or operational changes must be identified  
25 by Defendants, and in that case, after June 30, 2015 Defendants shall comply with such standard,  
26 in lieu of the 50 percent removal requirement set forth in Paragraph 17.

27 22. No later than December 31, 2015, Defendants shall have installed and shall  
28 commence operation of additional treatment facilities, if any, necessary to ensure that quarry pit

1 water treated by the interim treatment system will comply with the applicable chronic water  
2 quality standard for Selenium.

3 23. No later than March 31, 2016, the water discharged from the interim treatment  
4 system shall comply with the applicable chronic water quality standard for Selenium, in lieu of  
5 the 50 percent removal requirement set forth in Paragraph 17, unless compliance with the  
6 applicable chronic water quality standard for Selenium was achieved by June 30, 2015 pursuant  
7 to Paragraph 21.

8 24. No later than September 30, 2013, and continuing no later than September 30,  
9 2017, Defendants shall have installed and commenced operation of treatment facilities at Pond 9,  
10 for the discharge of water from Pond 11, and compliance with the Regional Water Board's  
11 discharge limits for pH, turbidity, and total suspended solids shall be attained and maintained.

12 25. Defendants shall provide to Plaintiff on a quarterly basis, in .pdf electronic  
13 format, all monitoring results from the interim treatment facility and Pond 9 discharges from the  
14 previous calendar quarter, within 30 days of the last day of each calendar quarter, including but  
15 not limited to the results of all flow and Selenium monitoring.

16 B. Final Facility Discharge Compliance

17 26. No later than August 1, 2016, Defendants shall execute contract(s) for  
18 engineering, procurement, and construction of the final treatment system. No later than February  
19 1, 2017, Defendants shall commence construction of the final treatment system.

20 27. Beginning no later than September 30, 2017, Defendants shall have installed and  
21 commenced operation of the final treatment system.

22 28. Beginning no later than September 30, 2017, Defendants shall not discharge any  
23 quarry pit water, or any process water, or stormwater mixed with process water, from the Facility  
24 into Permanente Creek unless such discharge is treated by the final treatment system and is in  
25 compliance with all applicable NPDES permit effluent limits, and all applicable receiving water  
26 quality standards, including but not limited to the applicable chronic Selenium and chronic  
27 toxicity standards.

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- Require work recommended by URS in the March 11, 2011 Permanente Creek Long-Term Restoration Plan (“URS Plan”), as proposed or as modified as described below; and
- Require restoration that is no less stringent than any restoration that is approved or required by any agency, including but not limited to the Santa Clara County Planning Department and the Regional Water Board, and that is to be performed in a period of time no greater than any restoration that is approved or required by any agency, including but not limited to the Santa Clara County Planning Department and the Regional Water Board.

34. Reaches 19-20-21. Defendants shall provide for sustainable fish passage throughout reaches 19, 20 and 21, and improve holding and rearing habitat during summer low-flow periods as follows. Using hand tools and small engine implements as necessary, Defendants shall create at least two self-sustaining, self-scouring rock-step pools in each reach, with each pool designed and constructed to maintain a depth of at least 12 inches and a surface area of at least 60 square feet (approximately 6 feet wide, 10 feet long), at locations where water has the greatest potential to remain in the pools year-round. Immediately above each pool, Defendants shall design and construct a rock reinforced drop that maximizes the scouring of the downstream pool. The downstream ends of the pools may be narrowed with logs on the banks to force the flow to the center to promote additional scouring. Defendants shall design the rock step pools and drops to withstand a 100-year storm event assuming the use of hand tools and small engine implements. If Defendants believe implementation of such design is infeasible using hand tools and small engine implements, and if Defendants notify Plaintiff prior to July 30, 2014, the parties will meet and confer to determine appropriate alternative design criteria. If the parties cannot agree regarding the appropriate design criteria, Defendants may invoke the dispute resolution provisions in this Decree.

35. Reaches 17-18. Defendants shall provide for sustainable fish passage between stations 138 and 119 in reaches 17-18 by excavating and permanently exporting overburden and mining-related sediment from the creek bed, banks, and from upland slopes (to the extent upland slope materials pose a risk of entering the creek), sufficient to restore creek alignment and slopes and to eliminate subsurface flow through the overburden and mining-related sediment.

1 In particular, Defendants shall layback and re-grade the north overburden slope to  
 2 provide a stable slope no steeper than 2:1 (50% grade) and shall remove sufficient material to  
 3 move the north toe of the slope at least 25 feet northward from its current location and elevation.  
 4 Defendants shall establish a creek channel and flood plain proportionally following the  
 5 conceptual modified trapezoidal cross-section as shown in Exhibit B, while preserving the flood  
 6 capacity geometry set forth therein. Fish passage design approaches for all reconstructed Creek  
 7 portions shall follow the California Department of Fish & Wildlife's California Salmonid Stream  
 8 Habitat Restoration Manual, 4<sup>th</sup> Edition (Vols. I-II, 2010) ("DFW Restoration Manual"), attached  
 9 as Exhibit C, or its revision if approved by Plaintiff, and shall incorporate channel lengthening  
 10 meanders and stepped pool and grade control complexes. The course of the Creek shall follow  
 11 exposed bedrock, and large native boulders with sands and gravels. Defendants shall either  
 12 create a berm along both reaches at the toe of the north slope, parallel to the creek (but set-back  
 13 above the 100-year flood high water line) or install other structures (*e.g.*, benches along the north  
 14 slope) to prevent overburden and sediment from entering the Creek.

15 Defendants shall remove the relic concrete structure at approximately Station 128, and  
 16 evaluate the feasibility of removing the old crusher foundation at approximately Station 116. No  
 17 later than June 30, 2013, Defendants shall provide to Plaintiff an evaluation of the environmental  
 18 advantages and disadvantages of removing the old crusher foundation. No later than July 15,  
 19 2013, Defendants shall meet and confer with Plaintiff regarding such evaluation. Defendants  
 20 shall seek agency approval to remove the old crusher foundation consistent with this Decree  
 21 unless (a) the Parties otherwise agree, or (b) Defendants do not believe the old crusher  
 22 foundation should be removed in which case Defendants may invoke the dispute resolution  
 23 provisions of this Decree.

24 36. Reaches 14-15-16. Defendants shall provide for sustainable fish passage  
 25 throughout reaches 14, 15 and 16 and improve holding and rearing habitat during summer low-  
 26 flow periods as follows. Using hand tools and small engine implements as necessary,  
 27 Defendants shall create at least two self-sustaining, self-scouring rock-step pools in each reach,  
 28 with each pool designed and constructed to maintain a depth of at least 12 inches and a surface

1 area of at least 60 square feet (approximately 6 feet wide, 10 feet long), at locations where water  
2 has the greatest potential to remain in the pools year-round. Immediately above each pool,  
3 Defendants shall design and construct a rock reinforced drop that maximizes the scouring of the  
4 downstream pool. The downstream ends of the pools may be narrowed with logs on the banks to  
5 force the flow to the center to promote additional scouring. Defendants shall design the rock  
6 step pools and drops to withstand a 100-year storm event assuming the use of hand tools and  
7 small engine implements. If Defendants believe implementation of such design is infeasible  
8 using hand tools and small engine implements, and if Defendants notify Plaintiff prior to July 30,  
9 2014, the parties will meet and confer to determine appropriate alternative design criteria. If the  
10 parties cannot agree regarding the appropriate design criteria, the Defendants may invoke the  
11 dispute resolution provisions in this Decree.

12       37. Reach 13. Defendants shall provide for sustainable fish passage through this  
13 reach by removing the dam infrastructure at Pond 13 and the half-culvert immediately  
14 downstream, including the removal of all concrete and metal structures and deposited sediment.  
15 The new channel and flood plain shall proportionally follow the conceptual modified trapezoidal  
16 cross-section as shown in Exhibit B, while preserving the flood capacity geometry set forth  
17 therein. Fish passage design approaches for all reconstructed creek portions shall follow the  
18 DFW Restoration Manual, and shall incorporate channel lengthening meanders and stepped pool  
19 and grade control complexes. The course of the Creek shall follow exposed bedrock, and large  
20 native boulders with sands and gravels.

21       38. Reaches 10-11-12. Defendants shall provide for sustainable fish passage  
22 throughout reaches 10, 11 and 12 by removing all culverts, riprap, and the road on top of the  
23 creek (concrete ramp), and by sufficiently setting back the road and aggregate rock pile to  
24 provide more room for a natural streambed and banks. Defendants shall narrow the road and  
25 accompanying vehicle barrier to a reduced total width no greater than 28.5 feet at any point,  
26 measured from the toe of the inside slope to the top of the creek-side vehicle barrier. The vehicle  
27 barrier height shall not exceed 5 feet, and the slopes of the vehicle barrier shall be no less than  
28 1.5 to 1 (67% slope). Defendants shall establish an enlarged creek channel that contains the

1 features set forth in the conceptual modified trapezoidal cross-section as shown in Exhibit B  
2 except the south side slope shall meet existing slope conditions and the north side slope shall be  
3 modified up to a 1.5 to 1 slope. Fish passage design approaches for all reconstructed creek  
4 portions shall follow the DFW Restoration Manual, and shall incorporate channel lengthening  
5 meanders and stepped pool and grade control complexes. The course of the creek shall follow  
6 exposed bedrock, and large native boulders with sands and gravels.

7 39. Reaches 8-9. Defendants shall provide for sustainable fish passage throughout  
8 reaches 8 and 9 by sufficiently setting back the road and associated slopes to provide more room  
9 for a natural streambed and banks. Defendants shall narrow the road and accompanying vehicle  
10 barrier to a reduced total width no greater than 28.5 feet at any point, measured from the toe of  
11 the inside slope to the top of the creek-side vehicle barrier. The vehicle barrier height shall not  
12 exceed 5 feet, and the slopes of the vehicle barrier shall be no less than 1.5 to 1 (67% slope).  
13 Defendants shall establish an enlarged creek channel that contains the features set forth in the  
14 conceptual modified trapezoidal cross-section as shown in Exhibit B except the south side slope  
15 shall meet existing slope conditions and the north side slope shall be modified up to a 1.5 to 1  
16 (67% slope).<sup>1</sup> Fish passage design approaches for all reconstructed creek portions shall follow  
17 the DFW Restoration Manual, and shall incorporate channel lengthening meanders and stepped  
18 pool and grade control complexes.

19 Defendants shall remove the culvert in the vicinity of Station 59 and, if replaced, replace  
20 it with a concrete box culvert with a sustainable, natural gravel bottom. Fish passage design  
21 approaches for all rehabilitated or replaced culverts shall follow the DFW Restoration Manual.  
22 Lehigh shall remove, and not replace, any culvert in the vicinity of Station 48. Defendants may  
23 leave the culvert in the vicinity of Station 42 as is, unless such culvert has greater than a 2%  
24 grade and/or does not have a gravel bottom in which case it shall be removed, and if replaced, it  
25 shall be replaced with a concrete box culvert with a sustainable, natural gravel bottom designed  
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27 <sup>1</sup> Box culverts referred to in this Paragraph do not need to contain the features set forth in  
28 Exhibit B.

1 in accordance with the DFW Restoration Manual.

2 Defendants shall remove the alluvial fan of gravel deposited on the floodplain located  
3 upstream of the culvert crossing in the vicinity of Stations 61-62. Defendants shall remove the  
4 gravel from the channel and banks located in the ephemeral drainage from a storage area in the  
5 vicinity of Stations 61-62 and take all other necessary measures to prevent further mining-related  
6 sediment and material from reaching Permanente Creek in the future from this drainage.  
7 Defendants shall revegetate the floodplain and ephemeral channel with native vegetation.

8 40. Reaches 6-7. Defendants shall provide for sustainable fish passage throughout  
9 reaches 6 and 7 by making sufficient modifications to the existing concrete-lined channel to be  
10 consistent with the fish passage design approaches set forth in "Fish Passage Design for Road  
11 Crossings: an Engineering Document Providing Fish Passage Design Guidance for Caltrans  
12 Projects," Caltrans 2007, attached as Exhibit D, or its revision if approved by Plaintiff. The  
13 design shall ensure the passage of adult and juvenile fish during high and low flows, and provide  
14 for resting areas.

15 Defendants shall also create at least two (2) sustainable, shaded pools for migrating fish,  
16 located at approximately Stations 25-27 and 17. Each pool shall be at least fifteen (15) feet long,  
17 at least seven (7) feet wide, and have a depth of at least three (3) feet. The bottom of each pool  
18 shall be at, or lower than, the bottom elevation of the existing concrete channel. Defendants  
19 shall partially backfill the pools with a gradation of rock to simulate a natural pool. Larger rocks  
20 shall be used at the upstream end of the pool to provide resting places for fish within the scour  
21 pool. A gradation of larger to smaller rocks shall be used downstream (beginning no closer than  
22 five (5) feet to the upstream end) towards the weir and the next drop to transition from the three  
23 (3) feet deep area to a shallower depth at the downstream weir.

24 Defendants shall also remove the culverts in the vicinity of Stations 28-29 and  
25 Stations 34-37 and, if replaced, replace them with concrete box culverts with sustainable, natural  
26 gravel bottoms. Any box culvert installed at Stations 34-37 shall provide for permanent passive  
27 lighting at approximately every fifty (50) feet sufficient to illuminate the floor of the culvert  
28 during the day to the same level of illumination that exists twenty (20) feet from either end of the

1 culvert. Defendants may leave the culverts in the vicinity of Stations 38-39 and 31-32 as they  
2 are, unless any culvert has greater than a 2% grade and/or does not have a gravel bottom in  
3 which case it shall be removed, and if replaced, it shall be replaced with a concrete box culvert  
4 with a sustainable, natural gravel bottom designed in accordance with the DFW Restoration  
5 Manual. Fish passage design approaches for all rehabilitated or replaced culverts shall follow  
6 the DFW Restoration Manual.

7 41. Reaches 2-3-4-5. Defendants shall provide for sustainable fish passage  
8 throughout reaches 2, 3, 4 and 5 as follows. Defendants shall remove the Pond 22 steel diversion  
9 structure, culverts, and ancillary concrete structure at the pond outlet, leaving the concrete dam  
10 structure in place. Immediately downgradient of the concrete dam structure, Defendants shall  
11 create an appropriate step pool transition channel profile to ensure sustainable fish passage up  
12 and over the concrete dam structure. Defendants shall leave Pond 14 in place for California red-  
13 legged frog use. Defendants shall make modifications to the Pond 14 bypass channel, if any, to  
14 ensure it is the main creek channel suitable for fish passage in accordance with the DFW  
15 Restoration Manual. Where the Pond 14 outfall channel meets the bypass channel, Defendants  
16 shall install a permanent drop structure barrier to discourage the passage of fish up to Pond 14.  
17 Defendants shall place rock to armor the channel, stabilizing it under clear-water discharge  
18 conditions.

19 42. After completing the required restoration work in each reach, Defendants shall  
20 revegetate the Creek banks and disturbed areas with native vegetation including willows, alders,  
21 elderberries, blackberries, rushes, and sedges. Defendants shall incorporate willow fascines  
22 along the edges of banks and spillways where high bank shear stress is expected.

23 43. By no later than July 1, 2013, Defendants shall correctly and permanently stake  
24 all reach boundaries and stations identified in this Decree at locations adjacent to the Creek that  
25 will not be disturbed by the restoration activities required by this Decree. The stakes shall be  
26 permanently labeled by applicable number and their location recorded using a professional "sub-  
27 foot" GPS. By no later than September 1, 2013, Defendants shall provide to Plaintiff a plan view  
28 topographic map (in hard copy and electronic format) showing the professional "sub-foot" GPS

1 locations of all stakes, the current thalweg and bank slope toes of the Creek, and all other current  
2 features such as road dimensions and pond and culvert locations referred to in this Decree.

3 B. Permanente Creek Restoration Permitting and Performance Deadlines.

4 44. The Parties anticipate that approvals will be required prior to the implementation  
5 of the Creek restoration work required above, including but not limited to approvals from:

- 6 • U.S. Army Corps of Engineers (Section 404 permit)
- 7 • Regional Water Board (NPDES permits and Section 401 certification)
- 8 • California Department of Fish & Wildlife (Section 1602 Streambed Alteration Agreement)
- 9 • U.S. Fish & Wildlife Service and National Marine Fisheries Service (Section 7 Endangered Species Act consultation)
- 10 • Santa Clara County (Reclamation Plan amendment)

11  
12 Defendants intend to secure authorization and access from Union Pacific Railroad, if necessary,  
13 for restoration activities at Pond 22 and Reaches 2-7. Applicable environmental review  
14 processes (*e.g.*, CEQA and/or NEPA) must also be satisfied prior to proceeding with any creek  
15 restoration activities.

16 45. To ensure a timely permit application and approval process with respect to the  
17 creek restoration work required above, Defendants shall complete the tasks below by the  
18 following deadlines:

19 (a) June 1, 2013: Notify all pertinent agencies of Consent Decree restoration  
20 requirements, design and permitting milestones, and anticipated transmittal of Conceptual  
21 Restoration Plan (30% design level) by October 7, 2013. Request agency meeting and/or  
22 meetings to be calendared in November 2013 through January 2014.

23 (b) September 10, 2013: Complete Conceptual Restoration Plan, submit to Plaintiff for  
24 review and comment.

25 (c) October 7, 2013: Submit Conceptual Restoration Plan to all pertinent agencies.

26 (d) November 2013 through January 2014: Participate in agency meetings regarding  
27 Conceptual Restoration Plan and permitting. To the extent one or more agency meetings do not  
28

1 take place by January 2014, the parties shall meet and confer to determine whether subsequent  
2 deadlines can and should be modified. If the parties cannot agree, then Defendants may invoke  
3 the dispute resolution provisions of this Decree.

4 (e) July 30, 2014: Complete Draft Restoration Plan (70% design level) and permit  
5 applications, submit to Plaintiff for review and comment.

6 (f) August 30, 2014: Submit all necessary permit and approval applications to appropriate  
7 agencies. This submission shall include all conditions reasonably calculated to be necessary to  
8 secure approval.

9 46. Defendants shall complete all restoration work required in Reaches 19-21, 14-16  
10 and 2-5 within one year of receipt of all necessary permits and approvals. Defendants shall  
11 provide Plaintiffs with a schedule showing commencement and expected completion dates for all  
12 restoration activities in these reaches within thirty (30) days of receipt of such permits and  
13 approvals.

14 47. Defendants shall complete all restoration work required in reaches 6-13 and 17-  
15 18, within two years of receipt of all necessary permits and approvals. Defendants shall provide  
16 Plaintiffs with a schedule showing commencement and expected completion dates for all  
17 restoration activities in these reaches within thirty (30) days of receipt of such permits and  
18 approvals.

19 48. This Consent Decree shall not relieve Defendants of their obligation to comply  
20 with all applicable federal, state and local laws, regulations and permits. To the extent there is  
21 any conflict between any provision in this decree and any other applicable requirement, the most  
22 stringent requirement shall apply.

23 C. Alternative Permanente Creek Restoration.

24 49. Should any regulatory agency not provide one or more legally necessary  
25 approvals to conduct the actions specified in Section VI.A., or place one or more unexpected  
26 conditions on the approval of any given action, Paragraphs 50-53 shall apply.

27 50. For purposes of this Section, "unexpected conditions" shall mean: (i) one or more  
28 conditions placed by a regulatory agency on the approval to undertake a creek restoration activity

United States District Court  
For the Northern District of California

1 in addition to the conditions specified in Paragraph 45(f), (ii) such conditions exceed the costs  
2 specified in subparagraph (b) below, and (iii) Defendants are unwilling to expend the additional  
3 costs of such conditions.

4 (a) For purposes of this Section, the initial total estimated cost to Defendants of the  
5 Permanente Creek restoration project is ten (10) million dollars. This estimated cost shall be  
6 adjusted annually consistent with the Engineering News-Record construction cost index for the  
7 Bay Area or, if unavailable, an equivalent cost index. The parties agree that the estimated total  
8 cost of the project is projected to be allocated within the Reaches of Permanente Creek as  
9 follows:

10 **Reaches 2 – 7:** Forty percent (40%) of total project cost

11 **Reaches 8 – 13:** Forty percent (40%) of total project cost

12 **Reaches 14 - 21:** Twenty percent (20%) of total project cost

13 (b) Unexpected conditions occur if the cost of the conditions of approval exceed the  
14 following amounts:<sup>2</sup>

15 **Reaches 2 – 7:** Conditions cause the cost of creek restoration actions in these reaches to  
16 exceed twenty percent (20%) of the total project cost, as adjusted.

17 **Reaches 8 – 13:** Conditions cause the cost of creek restoration actions to exceed the  
18 total project cost by twenty percent (20%) of the total estimated cost, as adjusted.

19 **Reaches 14 - 21:** Conditions cause the value of creek restoration actions to exceed  
20 the total project cost by ten percent (10%) of the total estimated cost, as adjusted.

21 51. For purposes of this Section, if Defendants believe any unexpected conditions  
22 will be or have been placed upon the approval or authorization to undertake one or more Creek  
23 restoration activities, Defendants shall notify Plaintiff within thirty (30) days of becoming aware  
24 of such unexpected conditions. The Parties shall meet and confer regarding any unexpected  
25 conditions.

26 <sup>2</sup> These percentages were derived by multiplying the allocated percentage by reach group times  
27 fifty percent. Thus, for Reaches 2-7, 40% allocation x 50% cost buffer = 20% of the total  
28 estimated cost of the restoration project.

1           52.     In the event any unexpected conditions become final, within thirty (30) days of  
 2 such event, Defendants shall notify Plaintiff and provide Plaintiff with a written demonstration  
 3 explaining why the conditions are unexpected. The Parties shall meet and confer within fourteen  
 4 (14) days of such notice. If Plaintiff does not agree that unexpected conditions have been  
 5 imposed, Defendants may invoke the dispute resolution provisions of this Decree. If Plaintiff  
 6 agrees unexpected conditions have been imposed, the Parties may stipulate to an alternative  
 7 method of achieving the purposes of this Decree and present it to the Court for approval.  
 8 Otherwise, without a stipulated agreement, and in lieu of implementing the relevant Creek  
 9 restoration actions required by this Decree, for the affected reaches, Defendants shall pay the  
 10 value of the project cost specified in Paragraph 50(a) above, plus the additional value specified in  
 11 Paragraph 50(b) above, as follows: Defendants shall pay the funds to the Rose Foundation for  
 12 Communities and the Environment ("Rose Foundation"), 1970 Broadway, Suite 600, Oakland,  
 13 California 94612, to be held in a separate Permanente Creek restoration account. Such funds  
 14 shall be subject to the condition that they only be distributed by the Rose Foundation after a  
 15 competitive application process, and that such funds, after satisfying any Rose Foundation  
 16 administrative costs,<sup>3</sup> shall only be used for the purpose of Permanente Creek restoration,  
 17 including steelhead re-introduction, unless such restoration activity is unavailable, in which case,  
 18 the funds shall be used for other local watershed restoration projects including those on Stevens  
 19 Creek.

20           53.     In the event any regulatory agency does not provide a legally necessary approval  
 21 to conduct an action specified in Section VI.A, either by actual notice or constructively through  
 22 inaction, the Parties shall meet and confer within fourteen (14) days of such event. If Plaintiff  
 23 disagrees that a necessary approval has not been provided, Defendants may invoke the dispute

24  
 25 <sup>3</sup> Rose Foundation administrative costs shall not exceed the following amounts: for funds paid of  
 26 \$500,000 or less, administrative costs shall not exceed ten percent of the total funds paid; for  
 27 funds greater than \$500,000 but no more than \$1,500,000, administrative costs shall not exceed  
 28 eight percent of the total funds paid; for funds greater than \$1,500,000 but no more than  
 \$3,000,000, administrative costs shall not exceed seven percent of the total funds paid; and for  
 funds greater than \$3,000,000, administrative costs shall not exceed six percent of the total funds  
 paid.

1 resolution provisions of this Decree. If Plaintiff agrees that a necessary approval has not been  
2 provided, the Parties may stipulate to an alternative method of achieving the purposes of this  
3 Decree and present it to the Court for approval. Otherwise, without a stipulated agreement, and  
4 in lieu of implementing the relevant creek restoration actions required by this Decree, for the  
5 affected reaches, Defendants shall pay the value of the project cost specified in Paragraph 50(a)  
6 above, plus the additional value specified in Paragraph 50(b) above, to the Rose Foundation in  
7 the same manner and for the same purposes as specified in Paragraph 52 above.

#### 8 **VII. REPORTING REQUIREMENTS**

9 54. All reports shall be submitted to the persons designated in Paragraph 96 of this  
10 Consent Decree.

11 55. The reporting requirements of this Consent Decree do not relieve Defendants of  
12 any reporting obligation required by the CWA or its implementing regulations, or by any other  
13 federal, state or local law, regulation, permit or other requirement.

14 56. Any information provided pursuant to this Consent Decree may be used by  
15 Plaintiff in any proceeding to enforce the provisions of this Consent Decree and as otherwise  
16 permitted by law.

#### 17 **VIII. SITE INSPECTIONS**

18 57. Defendants shall provide access to Plaintiff to inspect the interim and final  
19 treatment systems and related facilities, and to Permanente Creek and adjacent lands, at such  
20 intervals and times sufficient for Plaintiff to assess compliance with the terms of this Decree. At  
21 a minimum, access shall be provided to Plaintiff to inspect the interim and final treatment  
22 systems during construction and within six (6) months of the completion of construction of such  
23 systems. At a minimum, access shall also be provided to Plaintiff to inspect any Creek  
24 restoration work within five (5) days of the commencement of work in any Reach, at thirty (30)  
25 day intervals during restoration work in any Reach, and within six (6) months of the completion  
26 of any work in any Reach.

27 58. Plaintiff shall provide Defendants written notice of the date of any requested  
28 inspection at least five (5) days in advance of any inspection, and the requested inspection shall

1 take place on that date unless Defendants propose a different date in which case the Parties shall  
2 meet and confer to determine the best date for an inspection within a period no greater than  
3 fourteen (14) days after Plaintiff's notice.

4 **IX. STIPULATED PENALTIES**

5 59. In any calendar month in which Defendants violate any provision of this Decree,  
6 Defendants shall pay all accrued stipulated penalties to the Rose Foundation as specified in  
7 Paragraph 62 below within ten (10) days after the end of such month, without written demand  
8 from Plaintiff, except for penalties due under Paragraph 60(d). Stipulated penalties due under  
9 Paragraph 60(d) shall be due and payable to the Rose Foundation within 25 months of the  
10 violation if mandatory minimum penalties have not been paid to the State of California for the  
11 same violation. To the extent Defendants believe their non-compliance is due to a force majeure  
12 event, the funds shall be paid into an escrow account until such issue is resolved.

13 60. Defendants shall pay stipulated penalties for each failure to comply with the  
14 interim and final treatment system terms of this Decree as follows:

15 (a) For each failure to meet the obligation to install and operate the interim treatment  
16 system after October 1, 2014, as specified in Section V, Paragraph 16, per violation per day:

- 17 (1) 1st through 30th day after deadline - \$1,000/day  
18 (2) 31st through 60th day after deadline - \$2,000/day  
19 (3) Beyond 60th day - \$5,000/day

20 (b) For each failure to meet the obligations to install and operate the final treatment  
21 system after September 30, 2017, as specified in Section V, Paragraph 27, per violation per day:

- 22 (1) 1st through 30th day after deadline - \$1,000/day  
23 (2) 31st through 60th day after deadline - \$2,000/day  
24 (3) Beyond 60th day - \$5,000/day

25 (c) For each failure to comply with any interim discharge limit in Paragraph 17, \$3,000  
26 per violation per week up to fifteen weeks, and \$10,000 per week after the fifteenth week, and  
27 for each failure to comply with any interim discharge limit in Paragraph 23 of this Decree,  
28 \$3,000 per violation per day;

United States District Court  
For the Northern District of California

1 (d) For each failure to comply with any discharge (effluent) limit set forth in the NPDES  
2 Permit applicable to the final treatment system, \$3,000 per violation per day unless mandatory  
3 minimum penalties of the same or greater amounts for the same discharge limit are paid by  
4 Defendants to the State of California within 24 months of the violation.

5 61. Defendants shall pay stipulated penalties for each failure to comply with the  
6 stream restoration terms of this Decree as follows:

7 (a) For each day after August 30, 2014, or any later date that the parties agree to pursuant  
8 to Paragraph 45(d), that Defendants fail to submit all necessary permit and approval applications  
9 to all appropriate agencies pursuant to Paragraph 45(f).

10 (1) 1st through 30th day after deadline - \$1,000/day

11 (2) 31st through 60th day after deadline - \$2,000/day

12 (3) Beyond 60th day - \$5,000/day

13 (b) For each day that Defendants fail to complete all restoration work required in Reaches  
14 19-21, 14-16 and 2-5 within one year of receipt of all necessary permits and approvals or any  
15 later date that the parties agree to pursuant to Section XI:

16 (1) 1st through 30th day after deadline - \$1,000/day

17 (2) 31st through 60th day after deadline - \$2,000/day

18 (3) Beyond 60th day - \$5,000/day

19 (c) For each day that Defendants fail to complete all restoration work required in Reaches  
20 6-13, and 17-18 within two years of receipt of all necessary permits and approvals or any later  
21 date that the parties agree to pursuant to XI.

22 (1) 1st through 30th day after deadline - \$1,000/day

23 (2) 31st through 60th day after deadline - \$2,000/day

24 (3) Beyond 60th day - \$5,000/day

25 62. Defendants shall pay the stipulated penalty funds to the Rose Foundation in the  
26 same manner and for the same purposes as specified in Paragraph 52 above.

27 63. During any period of dispute resolution where a stipulated penalty may run,  
28 Defendants may request that the Court reduce or eliminate any such penalty that accrued during

1 the dispute resolution period if the Court deems that, although Defendants did not prevail in the  
2 dispute, the Defendants pursued the dispute in good faith and not for purposes of delay.

3 64. Stipulated penalties are not the Plaintiff's exclusive remedy for violations of this  
4 Decree. Plaintiff reserves its right to pursue any other remedies to which it is entitled, which  
5 may include, but are not limited to, additional injunctive relief or statutory penalties for  
6 Defendants' violations of the Decree or the Clean Water Act. The obligation to pay stipulated  
7 penalties under this Decree shall not relieve Defendants from any obligation to pay penalties for  
8 violations of any term or condition of any permit issued under the Act, including any NPDES  
9 permit. Any amounts paid by Defendants as stipulated penalties may be asserted by Defendants  
10 in response to any action requesting the imposition of additional civil penalties.

11 **X. PERFORMANCE GUARANTEE**

12 65. In order to ensure the full and final completion of the Work required in Section  
13 VI, Defendants shall establish and maintain an irrevocable performance guarantee, initially in the  
14 amount of \$12 million, to ensure the completion of such Work after issuance of a Work  
15 Takeover Notice and determination of Work Takeover as provided for below. The performance  
16 guarantee shall state it is for the exclusive benefit of the U.S. District Court, Northern District, to  
17 fund the actions required by Section VI of this Decree, immediately upon issuance of Plaintiff's  
18 Work Takeover determination.

19 66. The parties agree that the irrevocable surety bond set forth in Exhibit E, is an  
20 acceptable form of performance guarantee for the Work to be performed as required in Sections  
21 VI.

22 67. Within ten (10) days of entry of this Decree, Defendants shall execute or  
23 otherwise finalize all instruments and other documents required in order to make the selected  
24 performance guarantee(s) legally binding in a form substantially identical to the documents  
25 attached hereto as Exhibit E, and such performance guarantee(s) shall thereupon be fully  
26 effective.

27 68. In the event that Plaintiff determines at any time that a performance guarantee  
28 provided by Defendants pursuant to this Section is no longer sufficient, whether due to an

1 increase in the estimated cost of completing the work required in Section VI or for any other  
 2 reason, or in the event that Defendants become aware of information indicating that the  
 3 performance guarantee is insufficient, whether due to an increase in the estimated cost of  
 4 completing the work required or for any other reason, Defendants, within thirty (30) days after  
 5 receipt of notice of Plaintiff's determination or, as the case may be, within thirty (30) days after  
 6 any Defendant becoming aware of such information, shall obtain and present to Plaintiff for  
 7 approval a proposal for a revised performance guarantee. Within thirty (30) days after receiving  
 8 Defendants' revised performance guarantee proposal, or within sixty (60) days after Plaintiff's  
 9 insufficiency determination notice, Plaintiff shall provide to Defendants its determination of the  
 10 additional amount of performance guarantee that is necessary to ensure completion of the work  
 11 required by Section VI. Defendants may dispute this determination pursuant to the dispute  
 12 resolution provisions of this Decree, but only after they have provided the additional amount of  
 13 performance guarantee consistent with Plaintiff's insufficiency determination.

14         69. In the event Plaintiff determines that Defendants have (1) ceased implementation  
 15 of any portion of the Work, or (2) are seriously or repeatedly deficient or late in their  
 16 performance of the Work, Plaintiff may issue a written notice ("Work Takeover Notice") to  
 17 Defendants. Any Work Takeover Notice issued by Plaintiff will specify the grounds upon which  
 18 such notice was issued and will provide Defendants a period of ten (10) days within which to  
 19 cure the circumstances giving rise to Plaintiff's issuance of such notice. Within five (5) days of  
 20 receipt of a Work Takeover Notice, Defendants shall establish the Permanente Creek Restoration  
 21 escrow account to which performance guarantee funds shall be deposited if a Work Takeover is  
 22 determined as described in Paragraph 70. Funds deposited into the Permanente Creek  
 23 Restoration escrow account shall be accessible by the Court-appointed trustee described in  
 24 Paragraph 70.

25         70. If, after expiration of the ten-day cure period specified above, Defendants have  
 26 not remedied to Plaintiff's satisfaction the circumstances giving rise to Plaintiff's issuance of the  
 27 relevant Work Takeover Notice, Plaintiff may at any time thereafter notify the Court,  
 28 Defendants, and Defendants' Guarantor in writing (which writing may be electronic) that all or

1 any portion(s) of the Work will be completed with performance guarantee funds (“Work  
2 Takeover”). Within fourteen (14) days of such notice to the Court, Defendants, and Defendants’  
3 Guarantor, Defendants’ Guarantor shall convey all funds held as a performance guarantee to the  
4 Permanente Creek Restoration escrow account. Plaintiff shall provide to the Court the names of  
5 three (3) potential trustees from which the Court may select one trustee to take all necessary  
6 measures to complete the unfinished work required by Section VI of this Decree using the  
7 performance guarantee funds deposited in the Permanente Creek Restoration escrow account.

8 71. If Plaintiff triggers a Work Takeover, and actions are undertaken to complete the  
9 Work required in Section VI, the Defendants fully release Plaintiff, any Court-appointed trustee,  
10 any independent contractor, and any of their respective officers, employees, agents, successors,  
11 or assigns from any and all claims and demands, either at law or in equity, as to the sufficiency  
12 of actions taken to complete the work required in Section VI.

13 72. When Defendants believe they have completed all Work required by this Decree,  
14 they may notify Plaintiff of their determination, which determination shall include sufficient  
15 evidence of such completion. If Defendants receive written notice from Plaintiff that the Work  
16 has been fully and finally completed in accordance with the terms of this Consent Decree,  
17 Defendants may thereafter release, cancel, or discontinue the performance guarantee. Only after  
18 Plaintiff provides such notice may Defendants release, cancel, or discontinue any performance  
19 guarantee. In the event of a dispute, Defendants may release, cancel, or discontinue the  
20 performance guarantee(s) required hereunder only in accordance with a final judicial decision  
21 resolving such dispute pursuant to the dispute resolution provisions of this Decree.

## 22 XI. FORCE MAJEURE

23 73. For the purposes of this Decree, a “force majeure event” is defined as any event  
24 arising from causes beyond the reasonable control of Defendants or any entity controlled by  
25 Defendants (including, without limitation, Defendants’ contractors and subcontractors, and any  
26 entity in active participation or concert with Defendants with respect to the obligations to be  
27 undertaken by the Defendants pursuant to this Decree), that delays or prevents or can reasonably  
28

1 be anticipated to delay or prevent compliance with the obligations of this Decree, despite  
2 Defendants' best efforts to meet such deadlines. The requirement that Defendants exercise  
3 "best efforts" to meet the deadlines includes using best efforts to avoid any force majeure event  
4 before it occurs, and to use best efforts to mitigate the effects of any force majeure event as it is  
5 occurring, and after it has occurred, such that any delay is minimized to the greatest extent  
6 possible.

7 74. Without limitation, unanticipated or increased costs or changed financial  
8 circumstances shall not constitute a force majeure event. The absence of any regulatory approval  
9 shall not constitute a force majeure event, unless Defendants demonstrate that, as appropriate to  
10 the approval: (a) they made timely and complete applications for such approval(s) to meet the  
11 deadlines set forth in Sections V and VI of this Decree; (b) they reasonably complied with all  
12 requirements to obtain such approval(s); (c) they diligently sought such approval, (d) they  
13 diligently and timely responded to all requests for additional information, and (e) without such  
14 approval, Defendants will be required to act in violation of law to meet one or more of the  
15 obligations set forth in this Decree.

16 75. If any event occurs which causes or may cause a delay by Defendants in meeting  
17 any deadline in this Decree, whether or not attributable to a force majeure event, Defendants  
18 shall notify Plaintiff in writing within ten (10) days of the time Defendants first knew, or within  
19 thirty (30) days of when Defendants reasonably should have known that the event is likely to  
20 cause a delay. Defendants shall be deemed to have notice of any circumstance of which its  
21 contractors or subcontractors had or reasonably should have had notice, provided that  
22 those contractors or subcontractors were retained by Defendants to implement, in whole or in  
23 part, the requirements of this Decree. Within fifteen (15) days thereafter, Defendants shall  
24 provide in writing to Plaintiff a report containing: (a) an explanation and description of the  
25 reasons for the delay; (b) the anticipated length of the delay; (c) a description of the activity(ies)  
26 that will be delayed; (d) all actions taken and to be taken to prevent or minimize the delay; (e) a  
27 timetable by which those measures will be implemented; and (f) a schedule that fully describes  
28 when Defendants propose to meet any deadlines in this Decree which have been or will be

1 affected by the claimed force majeure event. Defendants shall include with any notice their  
2 rationale and all available documentation supporting its claim that the delay was or will be  
3 attributable to a force majeure event.

4 76. If Plaintiff agrees that the delay has been or will be caused by a force majeure  
5 event, the Parties may stipulate to an extension of the deadline for the affected activity(ies) as is  
6 necessary to complete the activity(ies). Plaintiff shall take into consideration, in establishing any  
7 new deadline(s), evidence presented by Defendants relating to weather, outage schedules and  
8 remobilization requirements. In the event the Parties cannot agree to the length of the extension,  
9 Defendants may invoke the dispute resolution procedures set forth in this Decree.  
10 Notwithstanding the foregoing, if Plaintiff finds that a force majeure event may delay  
11 Defendants' compliance with the terms of this Decree for more than six (6) months, Plaintiff may  
12 seek further relief from the Court to fulfill the purposes of this Decree.

13 77. If Plaintiff does not agree that the delay or anticipated delay has been or will be  
14 caused by a force majeure event, it will notify Defendants in writing of this decision within  
15 twenty (20) days after receiving Defendants' report alleging a force majeure event, and will not  
16 extend the deadline for any activity identified in this Decree. If Defendants seek review of this  
17 decision, the matter shall be resolved through the dispute resolution procedures set forth in this  
18 Decree.

19 78. At all times, Defendants shall have the burden of proving that any delay was  
20 caused by a force majeure event (including proving that Defendants had given proper notice and  
21 had made "best efforts" to avoid and/or mitigate such event), and of proving the duration and  
22 extent of any delay(s) attributable to such event.

23 79. Failure by Defendants to fulfill in any way the notification and reporting  
24 requirements of this Section shall constitute a waiver of any claim of a force majeure event as to  
25 which proper notice and reporting was not provided.

26 80. Any extension of one deadline based on a particular incident does not necessarily  
27 constitute an extension of any subsequent deadline(s) unless agreed to by the Parties or directed  
28 by this Court.

1 81. If Defendants fail to perform an activity by a deadline in this Decree due to a  
2 force majeure event, Defendants may only be excused from performing that activity or activities,  
3 and paying stipulated penalties for such failure, for that period of time excused by the force  
4 majeure event.

5 **XII. DISPUTE RESOLUTION**

6 82. Plaintiff and Defendants may invoke the dispute resolution procedures of this  
7 Section to the extent provided for in this Decree. The dispute resolution procedures of this  
8 Section shall be the exclusive mechanism to resolve such disputes with respect to such  
9 provisions of this Decree.

10 83. To invoke dispute resolution, a Party must provide written notice to the other  
11 party within thirty (30) days of the occurrence of the disputable event. The notice shall include  
12 all reasons the Party has for raising the disputed issue. Within thirty (30) days of receiving  
13 written notification, the other Party shall provide a written response and the Parties shall  
14 thereafter meet and confer within ten (10) days of such response. Failure of any party to fulfill  
15 this notification or response requirement shall constitute a waiver of the Party's right to dispute  
16 the issue(s).

17 84. If the Parties cannot resolve a dispute within fifteen (15) days of the Parties' meet  
18 and confer process above, the disputed issue shall be deemed to have been withdrawn unless the  
19 Party that raised the dispute files a petition or application with the Court to have the Court  
20 resolve the issue. Such petition or application shall include a description of the matter in dispute  
21 (but shall only rely on matters previously disclosed in writing in the dispute resolution process,  
22 unless information that was unavailable at the time of the filing of the initial dispute has come to  
23 light), the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any,  
24 within which the dispute must be resolved to ensure orderly implementation of this Decree. The  
25 other Party shall have thirty (30) days from receipt of any petition or application to file a  
26 response.

27 85. In judicial proceedings on any dispute under this Section, the disputing Party shall  
28 carry the burdens of proof and persuasion.



United States District Court  
For the Northern District of California

1 occurrence relating to the Facility that is not addressed in this Decree. Defendants expressly  
2 reserve all rights and defenses that they may have to any claim, demand, or cause of action  
3 relating to the Facility that is not addressed in this Decree. The Parties expressly reserve all  
4 rights, defenses, claims, demands, and causes of action which each Party may have against any  
5 person not a Party to this Decree with respect to any matter, transaction, or occurrence relating to  
6 the Facility. Nothing in this Decree shall be construed as a waiver of any privilege by a Party.

7 91. For the duration of this Decree, Plaintiff covenants not to sue Defendants, their  
8 officers, employees, agents, successors, or assigns for matters alleged in the Complaint. Nothing  
9 herein shall prevent Plaintiff from seeking any legal or equitable remedy to enforce the  
10 requirements of this Decree. This covenant not to sue does not pertain to any matters not alleged  
11 in the Complaint.

12 92. This Decree shall not be used to establish the liability of Defendants in any action,  
13 except to enforce the provisions of this Decree.

14 **XV. MISCELLANEOUS PROVISIONS**

15 93. **Severability.** In the event that any one of the provisions of this Consent Decree is  
16 held by a Court to be unenforceable, the validity of the enforceable provisions shall not be  
17 adversely affected.

18 94. **Construction.** The language in all parts of this Consent Decree, unless otherwise  
19 stated, shall be construed according to its plain and ordinary meaning.

20 95. **Choice of Law.** This Consent Decree shall be governed by the laws of the United  
21 States.

22 96. **Third Party Beneficiary.** This Consent Decree and its attachments are made for  
23 the sole benefit of the Parties, and no other person or entity shall have any rights or remedies  
24 under or by reason of this Consent Decree unless otherwise expressly provided for therein.

25 97. **Notices.** Any notices or documents required or provided for by this Consent  
26 Decree shall be sent by U.S. Mail, postage prepaid, and addressed as follows or, in the  
27 alternative, shall be sent by electronic mail transmission to the email addresses listed below:  
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United States District Court  
For the Northern District of California

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**For Plaintiff Sierra Club:**

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Each Party shall promptly notify the other of any change in the above-listed contact information.

98. **Termination of Decree.** This Decree shall remain an enforceable order of the Court until Plaintiff agrees, or the Court determines in response to a petition by Defendants, that (a) Defendants have satisfied in full all requirements of this Decree, (b) Defendants have

1 installed all treatment systems and have demonstrated compliance with all applicable NPDES  
2 permit limits for at least twelve (12) consecutive months, (c) Defendants have completed all  
3 required creek restoration work, and (d) Defendants have paid any stipulated penalties due under  
4 this Decree.

5       **99. Negotiated Agreement.** This Consent Decree shall be deemed to have been  
6 drafted equally by the Parties, and shall not be interpreted for or against any Party on the ground  
7 that any such party drafted it.

8       **100. Full Settlement.** This Consent Decree constitutes a full and final settlement of  
9 this matter. The Parties expressly understand and agree that each Party has freely and voluntarily  
10 entered into this Consent Decree with and upon advice of counsel.

11       **101. Integration Clause.** This Consent Decree and the attachments contain all of the  
12 final terms and conditions agreed upon by the Parties relating to the matters covered by the  
13 Consent Decree, and supersede any and all prior and contemporaneous agreements, negotiations,  
14 correspondence, understandings, and communications of the Parties, whether oral or written,  
15 respecting the matters covered by this Consent Decree.

16       **102. Modification.** This Consent Decree may be amended or modified only by a  
17 writing signed by the Parties or their authorized representatives, and then by order of the Court.

18       **103. Counterparts.** The Consent Decree may be executed in one or more counterparts  
19 which, taken together, shall be deemed to constitute one and the same document. An executed  
20 copy of this Consent Decree shall be valid as an original.

21       **104. Authority.** The undersigned representatives of Plaintiff and Defendants are  
22 authorized to execute this Consent Decree on behalf of the Party or Parties whom he/she  
23 represents.

24       **105. Electronic or Facsimile Signatures.** Telecopy, pdf, and/or facsimile copies of  
25 original signatures shall be deemed to be originally executed.

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United States District Court  
For the Northern District of California

**XVI. NOTICE OF DECREE**

106. Pursuant to 33 U.S.C. § 1365(c)(3) and 40 C.F.R. § 135.5, this Decree shall be lodged with the Court and simultaneously presented to the United States for review and comment for a period not to exceed forty-five (45) days.

107. After the review period, the Decree may be entered by the Court. If the Decree is not entered by the Court, the Parties shall retain all rights they had in this litigation before the lodging of the Decree.

108. The Parties agree to cooperate in good faith to obtain prompt review of this Decree by the United States and the Court. If the United States or the Court comment on the Decree, and as a consequence the Decree is not entered, the Parties agree to discuss such comments and attempt to make such revisions as necessary to obtain entry of the Decree.

**XVII. FINAL JUDGMENT**

109. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the Plaintiff and Defendants.

**SO ORDERED, THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2013.**

**UNITED STATES DISTRICT COURT JUDGE**

**United States District Court**  
For the Northern District of California

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1 **FOR PLAINTIFF:**

2   
3 Mike Ferreira  
4 Sierra Club Loma Prieta Chapter  
5 3921 E Bayshore Road  
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April 4, 2013  
Dated

6 Approved as to form:

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April 5, 2013  
Dated

United States District Court  
For the Northern District of California

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1 **FOR DEFENDANTS:**

2

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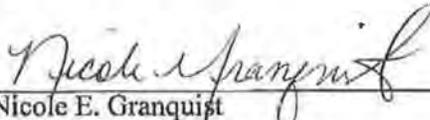
April 22, 2013  
Dated

7

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9

  
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Dated

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**EXHIBITS TO CONSENT DECREE**

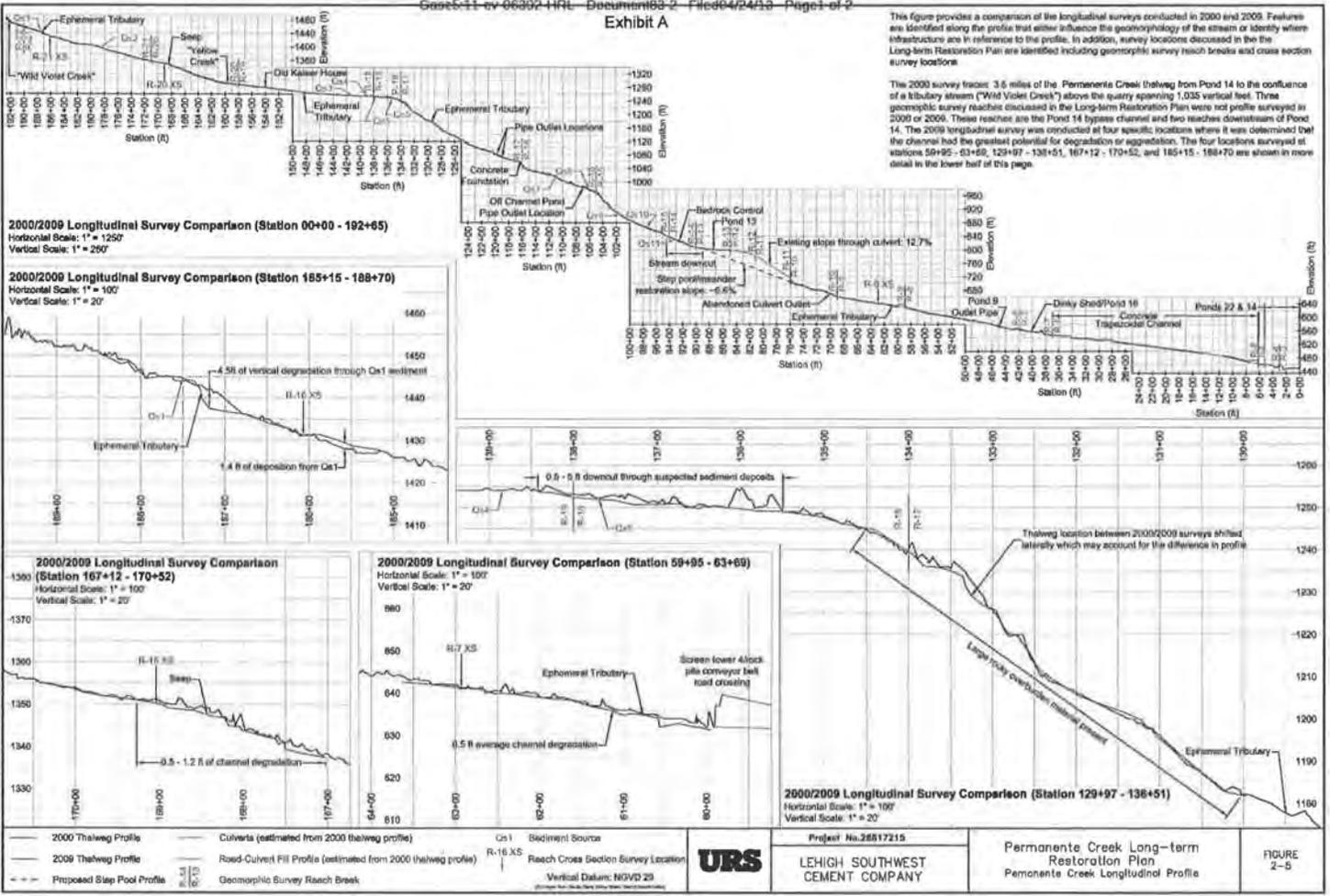
*Sierra Club v. Lehigh Southwest Cement*, 5:11-cv-06392-HRL

- Exhibit A: URS Permanente Creek profile and site layout map.
- Exhibit B: Conceptual modified trapezoidal channel cross-section.
- Exhibit C: California Department of Fish & Wildlife’s California Salmonid Stream Habitat Restoration Manual, 4<sup>th</sup> Edition (Vols. I-II, 2010) (cover page and table of contents only attached here, due to size constraints; complete document available on date of lodging at <http://www.dfg.ca.gov/fish/resources/habitatmanual.asp>).
- Exhibit D: Fish Passage Design for Road Crossings: an Engineering Document Providing Fish Passage Design Guidance for Caltrans Projects,” Caltrans 2007 (cover page and table of contents only attached here, due to size constraints; complete document available on date of lodging at <http://www.dot.ca.gov/hq/oppd/fishPassage/index.htm>).
- Exhibit E: Irrevocable surety bond.

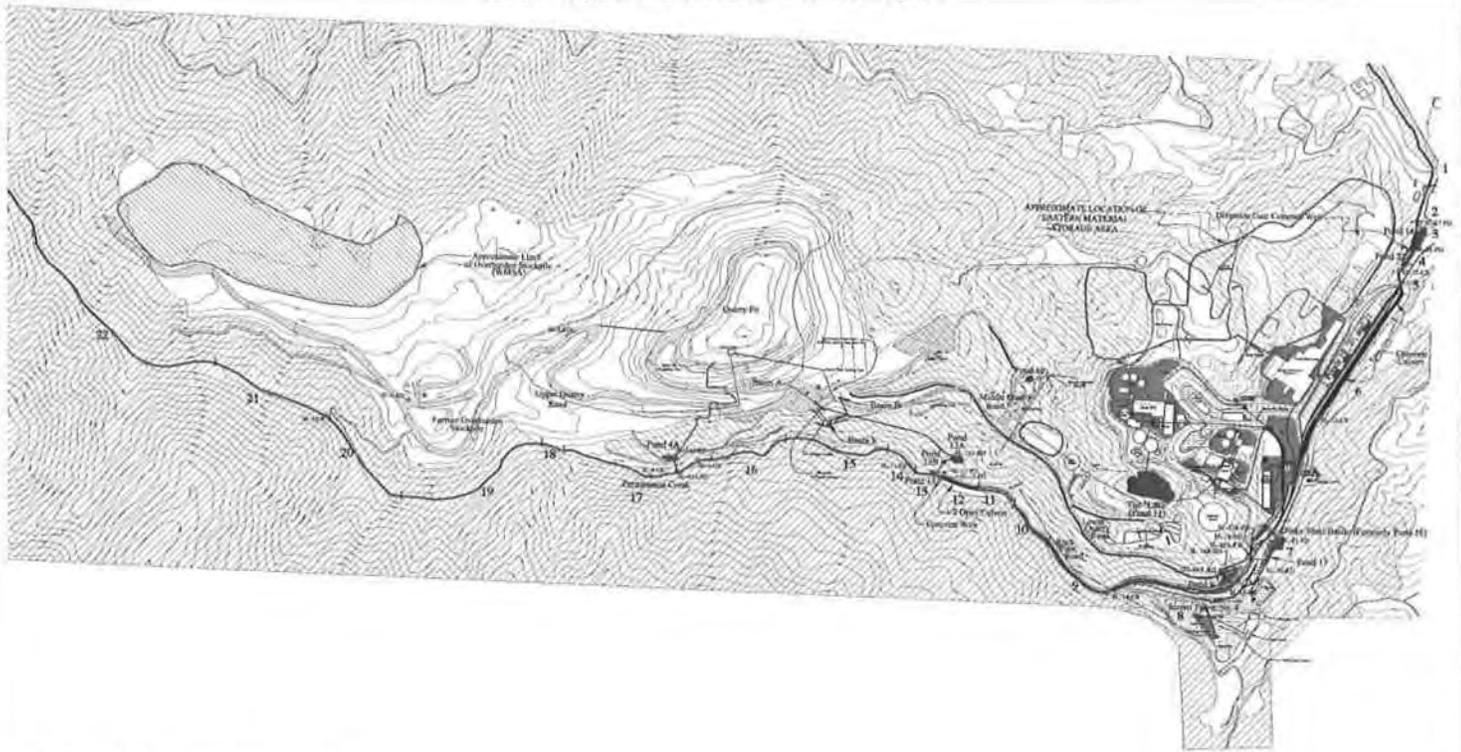
**United States District Court**  
For the Northern District of California

This figure provides a comparison of the longitudinal surveys conducted in 2000 and 2009. Features are identified along the profile that either influence the geomorphology of the stream or identify where infrastructure are in reference to the profile. In addition, survey locations discussed in the Long-term Restoration Plan are identified including geomorphic survey reach breaks and cross section survey locations.

The 2009 survey traces 3.5 miles of the Permanente Creek (thweg from Pond 14 to the confluence of a tributary stream ("Wild Violet Creek") above the quarry spanning 1,035 vertical feet. Three geomorphic survey reaches discussed in the Long-term Restoration Plan were not profile surveyed in 2000 or 2009. These reaches are the Pond 14 bypass channel and two reaches downstream of Pond 14. The 2009 longitudinal survey was conducted at four specific locations where it was determined that the channel had the greatest potential for degradation or aggradation. The four locations surveyed at stations 59+95 - 63+69, 129+97 - 138+51, 167+12 - 170+52, and 185+15 - 188+70 are shown in more detail in the lower half of this page.



Project No. 28517215  
**URS**  
 LEHIGH SOUTHWEST CEMENT COMPANY  
 Permanente Creek Long-term Restoration Plan  
 Permanente Creek Longitudinal Profile  
 FIGURE 2-5



Reaches (1) through (22) are noted along Permanente Creek.

Note: Features and Locations are Approximate.

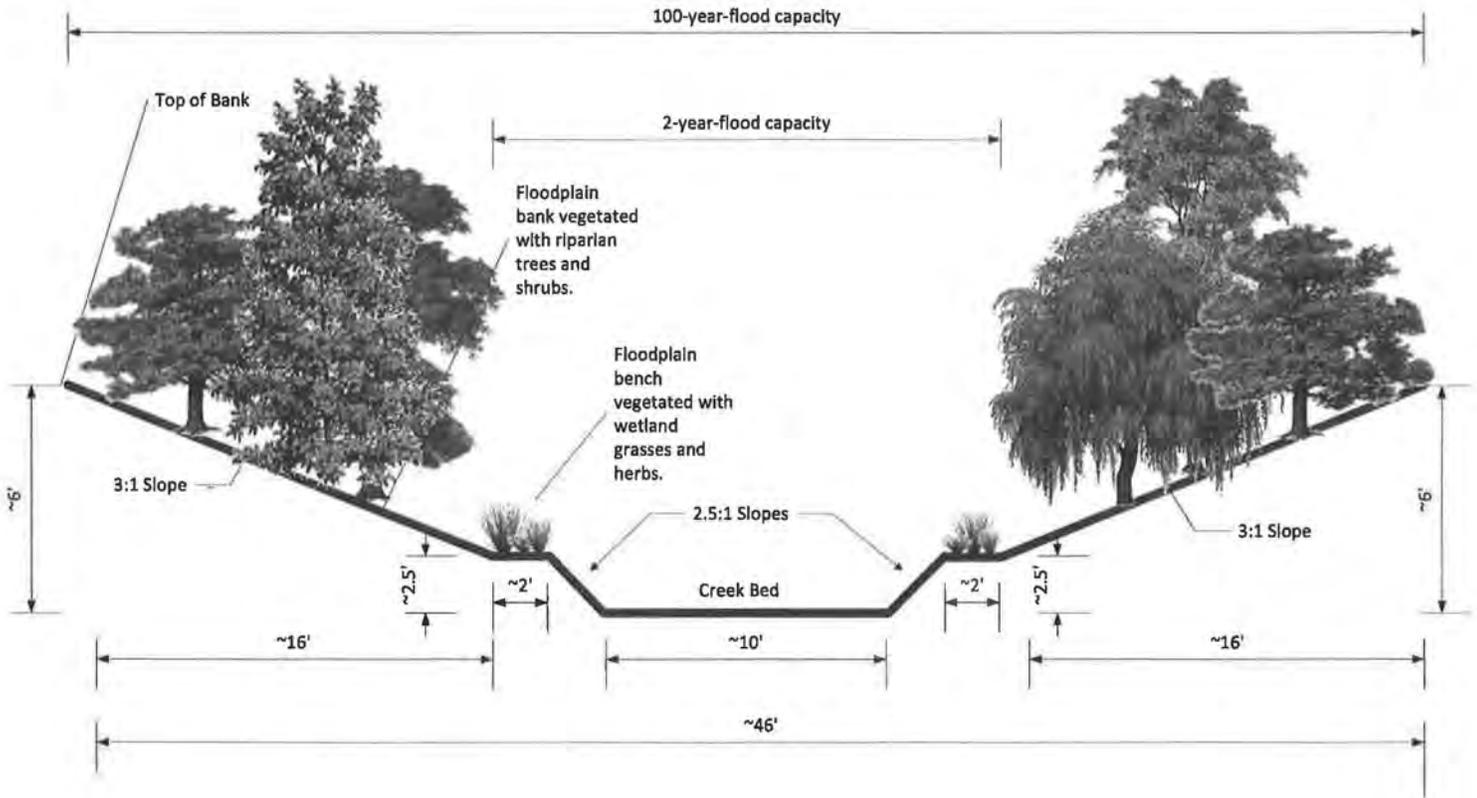
Paved Area	Topographic Contour	Sand/Gravel Berm	Current Recreational Seeding Location
Rock / Aggregate Storage Pile	Permanente Creek	Concrete K-Rail	Woodland Vegetation
Approved Roads and Access	Creek in Culvert	Sheet Pile Wall	Vegetated Land (Disturbed)
Paved Roads and Area Used as Traffic Ways	Sectional Ponds	Ditch Pipe (Proposed)	
		Ditch Pipe (Existing)	

APPROXIMATE SCALE

<b>URS Corporation</b>	
Lahigh Southwest Cement Company	
Site Layout Map	
26817600	Figure 2
FEBRUARY 2010	

Figure 1. Generalized cross section view of proposed restoration for Permanente Creek channel and floodplain.

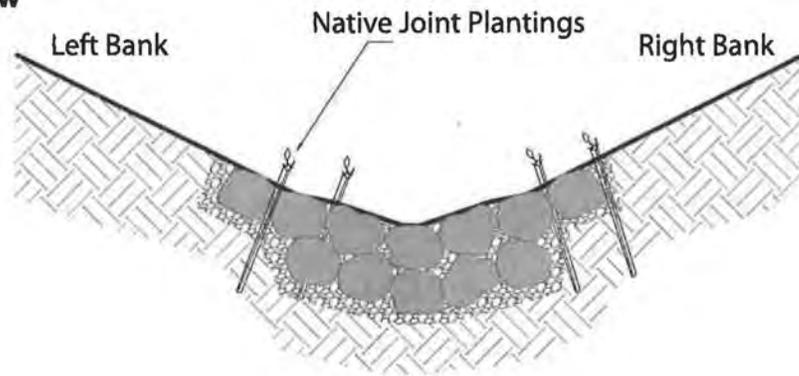
Exhibit B



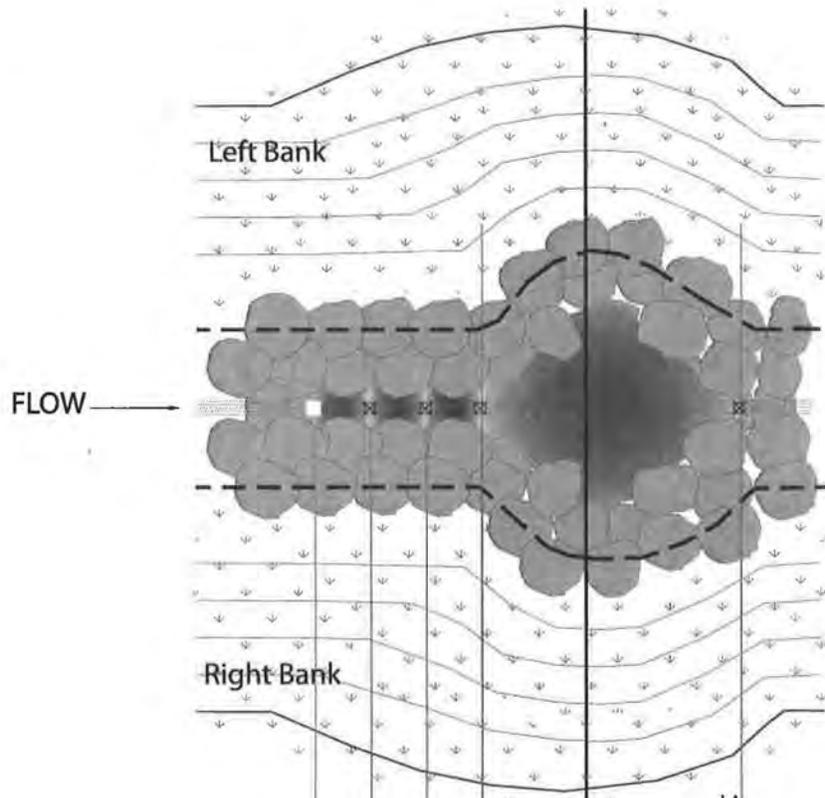
\* All dimensions are approximate based on conceptual analyses.

Exhibit B

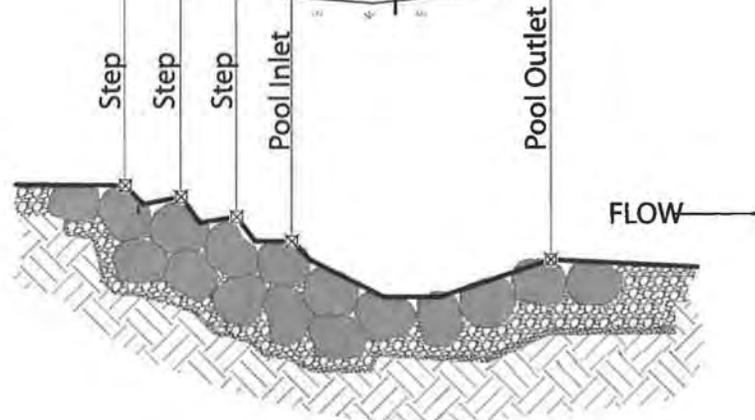
Cross Sectional View



Plan View



Longitudinal View



---

**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

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*FOURTH EDITION*

**Prepared by:**

**GARY FLOSI, SCOTT DOWNIE, JAMES HOPELAIN,  
MICHAEL BIRD, ROBERT COEY, and BARRY COLLINS**

**State of California  
The Resources Agency  
California Department of Fish and Game  
Wildlife and Fisheries Division**

---

**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

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DEDICATION

*to*

**Tim Curtis**  
*1944 - 1996*



The authors of the third edition of the *California Salmonid Stream Habitat Restoration Manual* wish to dedicate their work to **Tim Curtis**. Tim served with distinction with the California Department of Fish and Game as a fishery biologist, program supervisor, and patient mentor from 1971 to 1996. He was a pioneer in the Department's modern salmonid habitat restoration program and a contributing author to the second edition of this manual. Tim died much too young at age fifty-one, October 19, 1996, after a courageous battle with brain cancer.

Tim was a friend and motivational guide to all he came near. Although his life was brief he left his creative, inspirational mark on many. The third edition of this manual is part of his living legacy passed on through the present authors, and as such will continue to help improve the health of a resource he loved: the salmon and steelhead of California.

---

## CALIFORNIA SALMONID STREAM HABITAT RESTORATION MANUAL

---

### PREFACE

The first edition of this manual, written by Gary Flosi and Forrest Reynolds, and published in 1991, formally synthesized and described the Department of Fish and Game's approach and technical methods for anadromous salmonid habitat restoration. From 1991 through 1994 the first edition was broadly distributed and used as a "standard methods" text by many habitat restoration and resource inventory workers. As a result, many suggestions for improvement of the manual were received by the authors.

The second edition, by Flosi and Reynolds was supported by a team that included the authors of this third edition, and was published in October of 1994. The second edition included a number of revisions: 1) a reorganization of sections for project planning and project implementation; 2) the just then recently revised stream channel classification system developed by David Rosgen; 3) a new monitoring and evaluation section; 4) a listing of all databases used for resource inventory and analysis as presented in the manual; 5) a protocol for a large woody debris inventory; 6) a description of required environmental review processes and permits; 7) an expanded and updated listing of sensitive species; and 8) numerous editorial changes to text and data forms.

The third edition, like the second, incorporates changes recently developed in the practice of stream habitat inventory and restoration. The authorship list has changed with this edition to more accurately reflect the contributions of the writing team members. The manual is presented in binder form in this edition to more easily and economically incorporate future additions and developments as they evolve.

This fourth edition incorporates all changes, corrections, and revisions of this manual up to July 2010. The manual continues in binder form in this edition to easily and economically incorporate future additions and developments as they evolve.

The authors anticipate the continued widespread distribution and use of this manual will promote the implementation of the restoration techniques discussed. Additionally, in an effort to develop common methods for data collection and data storage of information, the authors encourage all anadromous salmonid resource assessment professionals to utilize protocols and database structures presented in this manual.

Readers should also be aware that computer data entry and data summary programs are available upon request for all data collection protocols presented in this manual. Updates to this manual are available on line at <http://www.dfg.ca.gov/fish/Resources/HabitatManual.asp>.

**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

**TABLE OF CONTENTS**

**VOLUME I**

<b>PREFACE</b> .....	ii
<b>ACKNOWLEDGEMENTS</b> .....	xvii
<b>FOREWORD</b> .....	xviii
 <b>PART I. SALMON AND STEELHEAD HABITAT RESTORATION IN CALIFORNIA</b>	
DEVELOPMENT OF CALIFORNIA'S FISH HABITAT RESTORATION PROGRAM..... I-1	
ORGANIZATION AND FUNDING OF CALIFORNIA'S FISH HABITAT RESTORATION PROGRAM.....	I-3
FISHERY RESTORATION PLANNING OBJECTIVES.....	I-4
 <b>PART II. PRELIMINARY WATERSHED ASSESSMENT</b>	
PRELIMINARY WATERSHED ASSESSMENT .....	II-1
WATERSHED OVERVIEW.....	II-1
Tools and Supplies.....	II-2
Instruction for Completing the Watershed Overview Work Sheet.....	II-2
WATERSHED OVERVIEW WORK SHEET.....	II-7
MAPS AND THEIR USE.....	II-8
AERIAL PHOTO INTERPRETATION: HISTORICAL SEQUENCE.....	II-9
HISTORICAL STREAM SURVEY REVIEW.....	II-10
WATER.....	II-10
RIPARIAN ZONE.....	II-11
SEDIMENT SOURCES.....	II-12
Mass Wasting.....	II-13
Surface Erosion.....	II-13
Stream and Channel Erosion.....	II-14
HYDROGRAPHS.....	II-14
REFERENCES.....	II-17
 <b>PART III. HABITAT INVENTORY METHODS</b>	
HABITAT INVENTORY METHODS.....	III-1
HABITAT INVENTORY FIELD PREPARATION.....	III-1
Tools and Supplies Needed for Two Person Crew.....	III-2
STREAM CLASSIFICATION SYSTEM.....	III-2
Stream Channel Type Definitions.....	III-3
Stream Type Delineation Criteria.....	III-3
STREAM CHANNEL TYPE DESCRIPTIONS AND STRUCTURE	
SUITABILITY.....	III-8
Stream Channel Types.....	III-8

**CALIFORNIA SALMONID STREAM  
 HABITAT RESTORATION MANUAL**

STREAM CHANNEL TYPE WORK SHEET..... III-22  
     Instructions for Completing the Stream Channel Type Work Sheet..... III-23  
 STREAM CHANNEL TYPE WORK SHEET (Form)..... III-26  
 HABITAT TYPING..... III-27  
     Definition of Habitat Types..... III-29  
         Level I Habitat Types: ..... III-29  
         Level II Habitat Types: ..... III-29  
         Level III and Level IV Habitat Types: ..... III-29  
         Level IV Habitat Type Descriptions: ..... III-30  
     Instream Shelter..... III-43  
         Instream Shelter Complexity..... III-43  
     Instructions for Completing the Habitat Inventory Data Form..... III-44  
 HABITAT INVENTORY DATA FORM..... III-48a  
 LARGE WOODY DEBRIS (LWD) ..... III-49  
 STREAM AND RIPARIAN INVENTORY ..... III-49  
     Background..... III-49  
 LWD INVENTORY METHODOLOGY..... III-50  
     Equipment list: ..... III-50  
     Stream selection..... III-50  
     Training..... III-51  
     Inventory Procedure..... III-51  
 LWD INVENTORY FORM KEY..... III-53  
 LWD INVENTORY FORM..... III-55  
 ESTIMATE CALIBRATION FORM..... III-56  
 REFERENCES..... III-57

**PART IV. FISH SAMPLING METHODS**

FISH SAMPLING METHODS..... IV-1  
 STREAM BANK OBSERVATION..... IV-2  
 UNDERWATER OBSERVATION..... IV-3  
     Tools and Supplies Needed..... IV-3  
     Instructions for Completing the Stream Bank or Underwater  
     Observation Field Form..... IV-4  
 STREAM BANK OR UNDERWATER OBSERVATION FIELD FORM..... IV-6  
 SALMON SPAWNER SURVEYS..... IV-7  
     Tools and Supplies Needed..... IV-7  
     Instructions for Completing the Daily Salmon Spawning Stock  
     Survey Field Form..... IV-8  
 DAILY SALMON SPAWNING STOCK SURVEY FIELD FORM..... IV-11  
 ELECTROFISHING..... IV-12  
     Instructions for Completing the Electrofishing Field Form..... IV-12  
 ELECTROFISHING FIELD FORM..... IV-16  
 ELECTROFISHING FIELD FORM SUPPLEMENTAL PAGE..... IV-17  
 REFERENCES..... IV-18

**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

**PART V. WORKING WITH THE DATA**

WORKING WITH THE DATA.....	V-1
DATA ENTRY.....	V-1
DATA SUMMARY AND ANALYSIS.....	V-2
Data Summary.....	V-2
Data Analysis.....	V-15
GIS FORMAT.....	V-15
Software.....	V-16
Data.....	V-16
Analytical Tools.....	V-16
STREAM REPORTS.....	V-16
DATA MANAGEMENT.....	V-17
Data Storage.....	V-17
Data Distribution.....	V-17
RECOMMENDATIONS.....	V-17
Interpreting Physical Habitat and Biological Inventories and Relating this Information to Critical Habitat Needs.....	V-17
Salmonid Habitat Requirements and Suggestions for Instream Structures to Enhance Critical Habitat.....	V-20
Chinook Salmon.....	V-20
Coho Salmon.....	V-21
Steelhead.....	V-22
Coast Cutthroat Trout.....	V-23
Resident Trout.....	V-23

**PART VI. PROJECT PLANNING AND ORGANIZATION**

PROJECT PLANNING AND ORGANIZATION.....	VI-1
Permits That May Be Required.....	VI-2
FISH HABITAT RESTORATION CATEGORIES.....	VI-3
Upslope Watershed Treatments.....	VI-3
Riparian Zone Treatments.....	VI-3
Instream Habitat Improvements.....	VI-4
Artificial Propagation.....	VI-4
Watershed Stewardship Training.....	VI-5
INSTREAM STRUCTURE SUITABILITY BY STREAM TYPE.....	VI-5
PROJECT RECOMMENDATION DEVELOPMENT FROM HABITAT INVENTORY DATA.....	VI-6
PROJECT SITE LAYOUT.....	VI-11
Using Basic Hydraulic Analysis For In Channel Design.....	VI-11
Surveying the Longitudinal and Cross Sectional Profiles.....	VI-12
Analysis of Longitudinal Profile.....	VI-14
Analysis of Cross Sectional Profiles.....	VI-15
REFERENCES.....	VI-17

**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

**PART VII. PROJECT IMPLEMENTATION**

PROJECT IMPLEMENTATION.....	VII-1
SELECTION OF STABLE SITES.....	VII-1
Gradient.....	VII-1
Stream Width.....	VII-2
Substrate.....	VII-2
Stream Order.....	VII-2
Reach Length.....	VII-2
Channel Sinuosity.....	VII-2
Bank Stability.....	VII-3
Bank Morphology.....	VII-3
HYDRAULIC IMPACTS.....	VII-3
SELECTION OF MATERIALS.....	VII-6
Basic Structural Materials.....	VII-7
Gabions.....	VII-7
Logs.....	VII-7
Root Wads.....	VII-7
Boulders.....	VII-8
Miscellaneous Structural Materials.....	VII-9
Geotextile Fabric.....	VII-9
Wire Fencing.....	VII-9
Concrete.....	VII-10
Wire Rope.....	VII-10
ANCHORING TECHNIQUES.....	VII-10
Cabling to Boulders or Bedrock Using Polyester Resin Adhesive.....	VII-10
Cabling to Logs and Root Wads.....	VII-11
Cabling Logs and/or Root Wads to Boulders or Bedrock.....	VII-12
Log Pinning With Rebar.....	VII-16
Stream Bank Anchors Using Rebar.....	VII-17
Bedrock and Boulder Anchors Using Threaded Rebar.....	VII-18
Threaded Rebar and Cable Anchor to Boulder or Bedrock.....	VII-19
Expansion Bolts.....	VII-20
Trenching.....	VII-21
Deadman.....	VII-22
Unanchored Large Woody Debris.....	VII-23
INSTREAM HABITAT IMPROVEMENTS.....	VII-24
Cover Structures.....	VII-24
Divide Logs.....	VII-25
Digger logs.....	VII-26
Spider Logs.....	VII-27
Log, Root Wad, and Boulder Combinations.....	VII-28
Bolder Structures.....	VII-29
Boulder, weirs.....	VII-29
Vortex Bolder Weir.....	VII-32
Boulder Clusters.....	VII-34
Single and Opposing Boulder Wing-Deflectors.....	VII-35

**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

Log Structures.....	VII-36
Log Weirs.....	VII-36
Upsurge Weirs.....	VII-42
Single and Opposing Log Wing-Deflectors.....	VII-43
Hewitt Ramps.....	VII-44
Placement of Imported Spawning Gravel.....	VII-46
Fish Screens.....	VII-46
<b>FISH PASSAGE.....</b>	<b>VII-47</b>
Obstructions.....	VII-48
Log Jams.....	VII-49
Beaver Dams.....	VII-49
Waterfalls and Chutes.....	VII-50
Landslides.....	VII-50
Human-Induced Obstructions.....	VII-51
Fishways.....	VII-51
Step-and-Pool Fishway.....	VII-52
Denil Fishway.....	VII-54
Alaskan Steep-pass.....	VII-55
Culverts.....	VII-56
Back-Flooding Weirs.....	VII-56
Culvert Baffles.....	VII-57
Washington Baffles.....	VII-57
Corrugated Metal Pipe (CMP) Steel Ramp Baffles.....	VII-60
<b>WATERSHED AND STREAM BANK STABILITY.....</b>	<b>VII-62</b>
Slide Stabilization.....	VII-62
Stream Bank Stabilization.....	VII-63
Boulder Stream Bank Stabilization Structures.....	VII-63
Boulder Riprap.....	VII-63
Boulder Wing-Deflectors.....	VII-66
Log Stream Bank Stabilization Structures.....	VII-67
Cribbing.....	VII-67
Live Vegetated Crib Wall.....	VII-68
Bank Armor.....	VII-69
Log Wing-Deflectors.....	VII-71
Tree Revetment.....	VII-73
Native Material Revetment.....	VII-74
Mulching.....	VII-75
Revegetation.....	VII-76
Transplanting.....	VII-76
Revegetation with Willow Sprigs.....	VII-76
Willow Wall Revetment.....	VII-78
Brush mattress.....	VII-79
Willow Siltation Baffles.....	VII-81
Planting Seedlings.....	VII-83
Checkdams.....	VII-86
Redwood Board Checkdams.....	VII-89

**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

Brush Checkdams.....	VII-90
Brush and Rock Checkdam.....	VII-90
Post Brush Checkdam.....	VII-91
Tree Checkdam.....	VII-93
Brush and Rock Mattress Headcut Repair.....	VII-94
Waterbars.....	VII-96
Exclusionary Fencing.....	VII-97
REFERENCES.....	VII-98

**PART VIII. PROJECT EVALUATION AND MONITORING**

PROJECT EVALUATION AND MONITORING.....	VIII-1
Pre-Project Assessment and Data Collection.....	VIII-2
Historic Information.....	VIII-2
Pre-Project Information.....	VIII-2
Documentation Immediately Following Project Completion.....	VIII-3
Instructions for Completing the Project Site Completion Form.....	VIII-4
PROJECT SITE COMPLETION FORM.....	VIII-7
Post-Project Evaluation.....	VIII-8
Habitat Project Evaluation Forms.....	VIII-8
Equipment.....	VIII-9
Instructions for Completing the General Project Information Form.....	VIII-9
STREAM HABITAT ENHANCEMENT PROJECT EVALUATION	
GENERAL INFORMATION FORM.....	VIII-12
Instructions for Completing the Individual Structure or Site Form.....	VIII-13
STREAM HABITAT ENHANCEMENT PROJECT EVALUATION	
INDIVIDUAL STRUCTURE OR SITE FORM.....	VIII-17
Structure objective codes.....	VIII-18
Structure type codes.....	VIII-18
Construction method codes.....	VIII-20
SUMMARY.....	VIII-21

<b>APPENDIX A.</b>	<b>POLICY AND REGULATIONS FOR SALMON AND STEELHEAD RESTORATION IN CALIFORNIA.....</b>	<b>A-1</b>
<b>APPENDIX B.</b>	<b>COOPERATIVE FISH PRODUCTION IN CALIFORNIA.....</b>	<b>B-1</b>
<b>APPENDIX C.</b>	<b>HYDROLOGIC BASIN PLANNING MAPS.....</b>	<b>C-1</b>
<b>APPENDIX D.</b>	<b>AERIAL PHOTO SOURCES.....</b>	<b>D-1</b>
<b>APPENDIX E.</b>	<b>LIST OF CALIFORNIA FISH SPECIES.....</b>	<b>E-1</b>
<b>APPENDIX F.</b>	<b>STATE AND FEDERAL ENDANGERED AND THREATENED SPECIES ASSOCIATED WITH SALMONID HABITAT.....</b>	<b>F-1</b>

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**CALIFORNIA SALMONID STREAM  
HABITAT RESTORATION MANUAL**

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<b>APPENDIX G.</b>	<b>CONVERSIONS, MEASUREMENTS, AND ABBREVIATIONS..</b>	<b>G-1</b>
<b>APPENDIX H.</b>	<b>THE MANNING ROUGHNESS COEFFICIENT.....</b>	<b>H-1</b>
<b>APPENDIX I.</b>	<b>COMPUTER PROGRAMS AND DATABASE STRUCTURES.....</b>	<b>I-1</b>
<b>APPENDIX J.</b>	<b>STREAM INVENTORY REPORT.....</b>	<b>J-1</b>
<b>APPENDIX K.</b>	<b>TOOLS.....</b>	<b>K-1</b>
<b>APPENDIX L.</b>	<b>TWO-PIN METHOD.....</b>	<b>L-1</b>
<b>APPENDIX M.</b>	<b>SPECIALTY INSTRUMENTS.....</b>	<b>M-1</b>
<b>APPENDIX N.</b>	<b>PERMITS, AGREEMENTS, AND ENVIRONMENTAL DOCUMENTS.....</b>	<b>N-1</b>
<b>APPENDIX O.</b>	<b>TEN PERCENT SAMPLING PROTOCOL FOR HABITAT TYPING INVENTORY SURVEYS.....</b>	<b>O-1</b>
<b>APPENDIX P.</b>	<b>CALIFORNIA SALMONID FISHES.....</b>	<b>P-1</b>
<b>APPENDIX Q.</b>	<b>GLOSSARY.....</b>	<b>Q-1</b>
<b>APPENDIX R.</b>	<b>FORMS.....</b>	<b>R-1</b>
<b>APPENDIX S.</b>	<b>FISH SCREEN CRITERIA.....</b>	<b>S-1</b>

***VOLUME II***

- PART IX. FISH PASSAGE EVALUATION AT STREAM CROSSINGS**
- PART X. UPSLOPE ASSESSMENT AND RESTORATION PRACTICES**
- PART XI. RIPARIAN HABITAT RESTORATION**
- PART XII. FISH PASSAGE DESIGN & IMPLEMENTATION**

Exhibit D

# **FISH PASSAGE DESIGN FOR ROAD CROSSINGS**

**An Engineering Document  
Providing Fish Passage Design Guidance for  
Caltrans Projects**

**May 2007**



## TABLE OF CONTENTS

1	Introduction
2	Fish Passage Considerations for Road Crossing Design
3	Fish Passage Design Elements
4	Active Channel Design Option
5	Stream Simulation Design Option
6	Hydraulic Design Option for New Culverts
7	Culvert Retrofit Design
8	Grade Control Design
9	Fishways
10	References
	Appendix A Glossary
	Appendix B CDFG Culvert Criteria for Fish Passage
	Appendix C NOAA Guidelines for Salmonid Passage at Stream Crossings
	Appendix D Caltrans Fish Passage Design Forms
	Appendix E Fish Passage Flows
	Appendix F Hydraulics of Baffles
	Appendix G Baffle Sample Calculations and Structural Details
	Appendix H Design Example – Active Channel Design Option
	Appendix I Design Example – Hydraulic Design Option (Culvert Replacement)
	Appendix J Design Example – Hydraulic Design Option (Rehabilitate Culvert with Baffles)
	Appendix K Design Example – Hydraulic Design Option (Rock Weirs)
	Appendix L Design Example – Stream Simulation Design Option
	Appendix M Construction Considerations
	Appendix N Rock Weir Design
	Appendix O Rock Weir and Associated Materials, Non-Standard Special Provisions

**EXHIBIT E**

**PERFORMANCE GUARANTEE**

**Bond No.** \_\_\_\_\_

KNOW ALL MEN BY THESE PRESENTS, that we, **Lehigh Southwest Cement Company and Hanson Permanente Cement, Inc.**, as Principal, and \_\_\_\_\_, licensed to do business in the State of \_\_\_\_\_, as Surety, are held and firmly bound unto **The United States District Court for the Northern District of California** (Obligee), in the penal sum of **Twelve million and no/100 Dollars (\$12,000,000.00)** lawful money of the United States of America (Surety Bond), for the payment of which sum, well and truly to be made, the Principal and Surety do bind themselves, their heirs, executors, administrators, and successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the above bounden Principal has entered into a certain written Consent Decree with the **Sierra Club**, lodged with the Court on the \_\_\_\_\_ day of **April, 2013**, which Consent Decree is made a part hereof and incorporated herein by reference, except that nothing said therein shall alter, enlarge, expand, or otherwise modify the term of the bond as set out below.

IN PARTICULAR, the Principal and Surety agree to convey all Surety Bond funds to the Permanent Creek Restoration escrow account within fourteen (14) days of Sierra Club providing notice of a Work Takeover pursuant to Paragraph 70 of the Consent Decree.

NOW, THEREFORE, if Principal, its executors, administrators, successors and assigns shall promptly and faithfully perform the Consent Decree, according to the terms, stipulations or conditions thereof, then this obligation shall become null and void, otherwise to remain in full force and effect. This bond is executed by the Surety and accepted by the Obligee subject to the following express condition:

Notwithstanding the provisions of the Consent Decree, the term of this bond shall apply from **April \_\_, 2013** until **April \_\_, 2014**, and will automatically renew for subsequent terms of one (1) year, subject to revision pursuant to Paragraph 68 of the Consent Decree. Such annual renewal shall include an adjustment to the value of the original penal sum above by the percentage increase or decrease in construction costs as set forth in the applicable Engineering News-Record construction cost index for the Bay Area or, if unavailable, a comparable cost index. In the event the Surety elects not to renew the bond, the Surety must provide Principal and Obligee written notice their intent to non-renew the bond no less than sixty (60) days prior to the expiration date of the bond. Principal shall provide a replacement performance guarantee acceptable to Sierra Club, as set forth in the Consent Decree, prior to the expiration date of the bond.

The liability of the Surety under this bond and all Continuation Certificates issued in connection therewith shall not be cumulative and shall in no event exceed the amount as set forth in this bond or in any additions, riders, or endorsements properly issued by the Surety as supplements thereto.

Sealed with our seals and dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**Principal Name**

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Principal

**Surety Name**

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Attorney-in-Fact

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Surety address, contact name and position, phone number, email address