

California Regional Water Quality Control Board
North Coast Region

COMPLAINT NO R1-2005-0125

FOR

ADMINISTRATIVE CIVIL LIABILITY

IN THE MATTER OF

CALIFORNIA DEPARTMENT OF TRANSPORTATION

FOR

FAILURE TO COMPLY WITH CLEAN WATER ACT SECTION 401
WATER QUALITY CERTIFICATION

FOR

SOUTHBOUND HIGHWAY 101
VAN DUZEN RIVER BRIDGE REPLACEMENT PROJECT
(WDID No. 1B04029WNHU)

Humboldt County

This civil liability complaint (Complaint) is issued to the California Department of Transportation, to assess administrative civil liability pursuant to California Water Code (CWC) Section 13385(a)(2) for violations of a Clean Water Act Section 401 Water Quality Certification, which was issued to the California Department of Transportation on May 5, 2004.

The Executive Officer of the California Regional Water Quality Control Board, North Coast Region (Regional Water Board), hereby finds that:

1. The California Department of Transportation is replacing the southbound bridge on Highway 101 over the Van Duzen River near Fortuna, California. The California Department of Transportation submitted an application and requested Clean Water Act Section 401 Water Quality Certification (Certification) for the bridge replacement project on March 17, 2004. The Regional Water Board issued Certification on May 5, 2004, contingent upon: a) the discharge being limited and all proposed mitigation being completed in strict compliance with the applicant's project description, and b) compliance with all applicable requirements of the Regional Water Board's Water Quality Control Plan for the North Coast Region (Basin Plan). For the purpose of this Complaint, the California Department of Transportation is hereinafter referred to as the "Discharger."
2. The Certification specifies that, pursuant to Title 23, California Code of Regulations, Section 3859(a), the Discharger shall comply with the conditions listed in the Certification. The Certification includes the following conditions:

- a. No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or concrete washings, oil or petroleum products, or other organic or earthen material from any construction or associated activity of whatever nature, other than that authorized by this permit, shall be allowed to enter into or be placed where it may be washed by rainfall into waters of the State. When operations are completed, any excess material or debris shall be removed from the work area. No rubbish shall be deposited within 150 feet of the high water mark of any stream.
 - b. Best Management Practices for sediment and turbidity control shall be implemented and in place prior to, during, and after construction in order to ensure that no silt or sediment enters surface waters.
 - c. If, at any time, an unauthorized discharge to surface waters occurs, or any water quality problem arises, the project shall cease immediately and the Regional Water Board shall be notified promptly.
3. On August 26, 2005, U.S. Army Corps of Engineers (USACOE) staff notified Regional Water Board staff that construction activities were causing elevated turbidity levels in the Van Duzen River downstream of the project. USACOE staff reported that steel sheet pile for a cofferdam was being installed near the edge of the river and the activity was creating turbidity in the river downstream of the project. Elevated turbidity was reported to be visible from the project area all the way down to the Eel River, approximately one-half mile downstream of the project.
4. On September 7, 2005, Regional Water Board staff inspected the project. Staff observed that a water-bladder barrier wall had been installed between the river and the construction activity to prevent additional silt and sediment from reaching the river. Staff were informed by the Discharger that its contractor continued to install the sheet pile cofferdam after the Discharger discovered that its construction activity was causing excessive turbidity in the river. The Discharger did not notify Regional Water Board staff that the project had caused a water quality problem. The Discharger told Regional Water Board staff that the sediment discharge continued until the water-bladder was installed and installation was completed on the same day the sediment discharge began.
5. The Certification includes conditions requiring the Discharger to implement Best Management Practices (BMPs) prior to, during, and after construction, in order to ensure that no silt or sediment enters surface waters. The water-bladder barrier wall was an effective BMP after it was installed; however, the Discharger did not install any BMPs prior to initiating the construction activity that caused the turbidity problem. Failure to install BMPs prior to construction is a violation of the Certification.
6. Regional Water Board staff observed additional violations of the Certification during the September 7, 2005 inspection. Staff observed several areas of stains on the gravel bar from spills or leaks of petroleum products, active leaks of petroleum products from hoses and

fittings connected to an air compressor generator, and a 50-gallon drum of biodegradable hydraulic oil was sitting on the gravel bar without any spill containment. The Discharger allowed oil or petroleum products to leak and be placed where they may be washed by rainfall into waters of the State in violation of the Certification. Staff also observed that earthen material originating from a pier footing excavation had been spread over the gravel bar and the earthen material contained a high percentage of fine-grained material. It appeared that the Discharger spread the excavated material over the gravel bar to create a work area for cranes and other heavy equipment. Spreading these fine-grained materials over the gravel bar is not consistent with implementation of BMPs for sediment and turbidity control. The excavated material was supposed to be hauled offsite or stockpiled for removal from the gravel bar. Instead, the Discharge placed this fine-grained earthen material in an area where it may be washed by rainfall into waters of the State, violating the Certification. In addition, no BMPs had been installed to ensure that no silt or sediment would enter surface waters, another violation of the Certification.

7. On September 28, 2005, Regional Water Board staff sent the Discharger a Notice of Violation (NOV) letter. The NOV describes the violations that Regional Water Board staff observed and required that the Discharger make sure that adequate BMPs were installed at the site immediately. The NOV requested that the Discharger submit a report by October 15, 2005 documenting any actions taken by the Discharger to address the issues of non-compliance described in the NOV. The NOV states that the report shall specify the dates any corrective actions were taken. On October 13, 2005, the Discharger submitted a report (dated October 12, 2005) describing several actions taken by the Discharger to address the issues of non-compliance; however, the report did not specify the date that each action was taken.
8. The Discharger's report indicates that the stains and petroleum leaks were cleaned up, the contaminated materials were appropriately disposed of offsite, and secondary containment measures had been installed/implemented for all generator and drum storage areas as well as areas where fueling activities were occurring. The report does not specify the dates when the Discharger cleaned up the stains and leaks, disposed of contaminated materials, or installed secondary containment.
9. The Discharger has violated the conditions of a Certification issued by the Executive Officer pursuant to Section 401 of the Clean Water Act, for which the Regional Water Board may impose civil liability under California Water Code (CWC) Section 13385(a)(2).
10. The Executive Officer, therefore, seeks to assess civil liabilities as provided in this Complaint. Unless waived, a hearing on this matter will be held before the Regional Water Board within 90 days following the issuance of this Complaint. Unless you decide to waive this right to a hearing, you or your representative will have an opportunity to address and contest the allegations in this Complaint and the imposition of civil liability before the Regional Water Board, in Santa Rosa, California. An agenda showing the time set for the hearing will be mailed to you not less than 10 days before the hearing.

At the hearing, unless waived, the Regional Water Board will consider whether to affirm, reject, or modify the proposed civil liability, whether to refer the matter to the Attorney General for recovery of judicial liability, or take other enforcement actions.

11. The following facts are the basis for the alleged violations in this matter:

- a. Construction of the sheet pile cofferdam resulted in a discharge of soil, silt and earthen material to waters of the State. The Discharger violated an applicable Certification condition (listed above in finding 2a) for one (1) day.
- b. BMPs were not implemented prior to construction of the sheet pile cofferdam and the construction activity resulted in a discharge of soil, silt and earthen material to waters of the State. The Discharger violated an applicable Certification condition (listed above in finding 2b) for one (1) day.
- c. On August 26, 2005, the Discharger discovered that construction of a steel sheet pile cofferdam was causing silt and sediment to surface waters and the Discharger did not stop the activity that was causing the water quality problem. The Discharger did not notify Regional Water Board staff that a water quality problem had occurred. Regional Water Board staff were notified of the water quality problem by USACOE staff. The Discharger violated an applicable Certification condition (listed above in finding 2c) for one (1) day.
- d. The Discharger allowed oil or petroleum products to enter into or be placed where they may be washed by rainfall into waters of the State. The Discharger was observed to be in violation of the Certification on September 7, 2005. The Discharger's report states that areas of leaks have been cleaned up and appropriately disposed of offsite. The report also states that all fueling and storage of generators and drums is now occurring with the use of secondary containment. Although the NOV states that the Discharger's report shall specify the date any actions were taken and shall include photos of the affected area, the Discharger's report does not contain any photos documenting installation of secondary containment or soil cleanup actions. The report also does not specify when secondary containment was installed and areas of leaks were cleaned up. Based on the nature of this violation and the Discharger's lack of attention to this issue while Regional Water Board staff were onsite inspecting the project, the Discharger was likely to be in violation of the Certification prior to Regional Water Board staff's inspection. If this violation was not addressed until the Discharger received the NOV the Discharger violated an applicable Certification condition (listed in finding 2a above) for at least twenty-two (22) days from September 7, 2005 to September 28, 2005.
- e. The Discharger excavated fine-grained earthen material from within a steel sheet pile cofferdam and spread the material over the gravel bar. The Discharger allowed debris,

soil, silt, or earthen material from construction activity to be placed where it may be washed by rainfall into waters of the State. The Discharger's report states that as of October 7, 2005 over seventy (70) percent of the excavated material that was spread over the gravel bar had been removed offsite or stockpiled and winterized onsite for later use and ninety-five (95) percent of the material would be removed and disposed of by October 15, 2005. Regional Water Board staff inspected the site on October 19, 2005 and confirmed that the Discharger had removed most of the earthen material from the gravel bar. The Discharger violated an applicable Certification condition (listed in finding 2a above) for at least thirty-nine (39) days from sometime prior to September 7, 2005 to October 15, 2005.

- f. The Discharger excavated fine-grained earthen material from within a steel sheet pile cofferdam and spread the earthen material over the gravel bar surface. The Discharger did not install any BMPs for sediment and turbidity control prior to or during this construction activity to ensure that no silt or sediment would enter surface waters. The Discharger's report states that as of October 6, 2005, silt fencing had been placed around the entire work area and between access roads and the river. The Discharger violated an applicable Certification condition (listed in finding 2b above) for at least thirty (30) days from prior to September 7, 2005 to October 6, 2005.
 - g. The Certification requires all in-stream work activities to be conducted between June 1 and October 15 to minimize impacts to juvenile salmonids and to avoid impacts to adult salmonids. This work period is also described in the Biological Opinion issued by the National Oceanic and Atmospheric Administration (NOAA Fisheries). Regional Water Board staff inspected the site on October 19, 2005 and observed the Discharger conducting in-stream work activities including removal of the temporary stream crossing. The Discharger violated the Certification for four (4) days from October 16, 2005 to October 19, 2005.
 - h. The Discharger did not remove two sheet pile cofferdams that were installed in the gravel bar. The Discharger requested permission and permit modifications from the various regulatory agencies to allow the Discharger to continue working past October 15th and also to allow the two cofferdams to remain in the gravel bar until the following construction season. The Discharger did not provide Regional Water Board staff with enough time to evaluate their proposed construction activities and revise the Certification. The Discharger covered the cofferdams with riprap and left them installed through the winter. The Discharger violated the work period authorized in the Certification beginning on October 15, 2005 and continues to violate the Certification daily while the cofferdams remain in the gravel bar. As of November 21, 2005, the Discharger has been in violation of the Certification for thirty-six (36) days.
12. CWC Section 13385(c) specifies that civil liability may be imposed administratively by the Regional Water Board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of ten thousand dollars (\$10,000) for each

day in which a violation occurs and where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

13. As of October 19, 2005, the date of Regional Water Board staff's last inspection, the total civil liability that could be imposed against the Discharger in this Complaint is calculated as follows:

From Finding 11a:	1 day x \$10,000/day	= \$10,000
From Finding 11b:	1 day x \$10,000/day	= \$10,000
From Finding 11c:	1 day x \$10,000/day	= \$10,000
From Finding 11d:	22 days x \$10,000/day	= \$220,000
From Finding 11e:	39 days x \$10,000/day	= \$390,000
From Finding 11f:	30 days x \$10,000/day	= \$300,000
From Finding 11g:	4 days x \$10,000/day	= \$40,000
<u>From Finding 11h:</u>	<u>36 days x \$10,000/day</u>	<u>= \$360,000</u>
Total	134 days x \$10,000/day	= \$1,340,000

In summary, the Discharger is subject to maximum potential civil liabilities in the amount of \$1,340,000.

14. In determining the amount of civil liability actually assessed, pursuant to California Water Code Section 13327, the Regional Water Board considered the following factors:

a) The Nature, Circumstances, Extent, and Gravity of the Violations:

i. Cofferdam (Alleged violations listed in Findings 11a, 11b and 11c)

The Discharger failed to install BMPs prior to construction of a cofferdam and allowed soil, silt and earthen material from the construction activity to enter waters of the State. The Discharger failed to cease the activity causing the discharge and failed to notify the Regional Water Board upon their discovery that the activity caused a water quality problem. This violation was not caused by an accidental action or equipment failure and the Discharger could have easily prevented the discharge by installing the water bladder barrier wall or other BMPs prior to initiating construction of the cofferdam. The Discharger also could have stopped the activity rather than continuing to violate the Certification and could have reported the water quality problem to Regional Water Board staff immediately. Therefore, Regional Water Board staff believe that the maximum amount of civil liability is appropriate for these violations, and have calculated a liability of \$30,000, based on three separate violations for one day each.

ii. Petroleum Product Storage and Handling (Alleged violations listed in Finding 11d)

The Discharger allowed oil or petroleum products to enter into or to be placed where they may enter groundwater or be washed by runoff into waters of the State. The stains on the gravel bar and the leaking hoses were very obvious and not hidden to inspectors or to the Discharger. The Discharger did not adequately control heavy equipment and vehicle access onto the gravel bar and allowed oil and petroleum products to be spilled and leaked directly onto the gravel bar. The Discharger evidently did not inspect the gravel bar or the heavy equipment in order to identify and clean up any accidental spills or leaks. The Discharger could have used secondary containment methods/measures and prevented some of these oil and petroleum discharges. The Discharger should have cleaned up any incidental leaks as they occurred and could have fixed the equipment that was obviously leaking on the gravel bar. The Discharger's report did not include the date when this violation was addressed. After the report was submitted, the Discharger reported verbally that cleanup of the spills began on September 7, 2005 and that cleanup efforts were ongoing from that date forward.

Regional Water Board staff calculated civil liability in this matter using the maximum daily amount but did not use the maximum number of days of violation; instead, staff based the number of days of violation on an assumption that this violation likely existed at least one day prior to Regional Water Board staff's inspection and that complete cleanup of all the stains and leaks, and installation of secondary containment was not likely to be accomplished in one afternoon. Therefore, the proposed civil liability for the petroleum product-related violations is \$30,000, based on \$10,000 a day for three days of violation including the day before and the day after Regional Water Board staff's inspection.

iii. Placement of Fine-Grained Material on Gravel Bar (Alleged violations listed in Findings 11e and 11f)

The Discharger excavated fine-grained earthen material from within a steel sheet pile cofferdam, then spread the earthen material over the gravel bar surface without implementing any BMPs for sediment and turbidity control. The Discharger allowed soil, silt, or earthen material from a construction activity to be placed where it may be washed by rainfall into waters of the State in violation of the Certification. The Discharger was able and capable of hauling the material offsite or stockpiling the material out of the stream channel for future use. This construction activity violated two Certification conditions.

When calculating the civil liability for the violations associated with the matter, Regional Water Board staff noted that the violations did not result in a direct discharge and adverse impact to surface waters and the Discharger was able to eliminate or significantly reduce threatened sediment discharges by installing BMPs

(silt fencing) and by removing and hauling most of the fine-grained material out of the stream channel prior to any significant storm events. Therefore, rather than recommending the maximum penalty amount of \$690,000 for sixty-nine days of violation, staff propose a penalty of \$30,000. Staff based this calculation on \$1,000 a day for thirty days of violation from September 7th, the day of Regional Water Board staff's inspection, through October 6th, the date reported by the Discharger as the date when silt fencing had been installed and over 70-percent of the soil had been removed from the stream channel.

iv. In-Stream Work Activities During Winter Period (Alleged violations listed in Findings 11g and 11h)

The Discharger continued conducting in-stream work activities after October 15th in violation of the Certification, apparently assuming that an extension would be granted even though Regional Water Board staff had issued an NOV for the project and had told the Discharger that an extension would not be considered until all violations were appropriately addressed. The Discharger eventually began winterizing the project and removed temporary structures such as the stream crossing and sediment basin that was used for disposal of water generated by dewatering activities.

The Discharger also allowed two cofferdams to remain in the gravel bar. The adequacy of the Discharger's cofferdam winterization efforts and the potential impact of leaving those cofferdams in the gravel bar through the winter remain to be seen, and the Regional Water Board retains the option of assessing additional penalties for this violation if the cofferdams cause any adverse water quality impacts. Thus, at this time, proposed penalties for in-stream work conducted after October 15 does not include penalties for cofferdams in place beyond October 15. Further, staff note that the Discharger continued in-stream activities after October 15 with knowledge of a favorable weather forecast, and these extended operations did not result in any known additional adverse impacts to water quality. Thus, rather than recommending the maximum possible penalty of \$400,000, for at least forty days of violation at \$10,000 per day of violation, staff propose a penalty of \$4,000, based on four days of violation at \$1,000 per day.

b) Degree of Culpability:

Regional Water Board staff notified the Discharger of this Board's water quality concerns verbally while onsite and in a NOV. The Discharger was notified of the Certification requirements and was given an opportunity to come into compliance. The Discharger, a State agency, is likely more aware than many dischargers of State laws and regulations, particularly in light of its ongoing interaction with the State and Regional Water Boards statewide in water quality-related matters associated with its

road construction and maintenance efforts. The Discharger's actions prior to the NOV demonstrated a willful disregard of the law and a high level of culpability.

c) Prior History of Violations:

The Discharger has a history of CWA and CWC violations and has been subject to other Regional Water Board enforcement actions. The Discharger has a prior history of continuing work on construction projects to near the end of the authorized work period and appears to operate under the assumption that extensions of the authorized work period will always be granted.

d) Susceptibility to Cleanup and Voluntary Cleanup Efforts Undertaken:

Regional Water Board staff have no knowledge of any voluntary cleanup efforts undertaken by the Discharger. Under pressure from Regional Water Board staff and other regulatory agency personnel, and in response to the NOV, the Discharger cleaned up the petroleum product spills and leaks on the gravel bar. The Discharger also installed silt fencing and removed the fine-grained earthen material that was excavated then spread over the gravel bar prior to a storm event that could have washed that material into the river.

e) Economic Savings:

The Discharger avoided costs associated with implementation of adequate BMPs. The Discharger attempted to avoid costs for BMPs to control turbidity from cofferdam installation but eventually installed the water-bladder after regulatory agencies were aware that the project was causing a sediment discharge and excessive turbidity in the Van Duzen River. The Discharger implemented additional BMPs and corrected other violations after Regional Water Board staff issued the NOV. Economic savings for omitting necessary BMPs and delaying implementation of BMPs would have primarily been any money that was saved by delaying the financing of the BMPs.

The Discharger installed steel sheet pile cofferdams in the gravel bar on each side of the river for bridge pier installation. The Discharger did not have adequate time to complete either pier during the 2005 construction season and decided to winterize the cofferdams, protect the cofferdams with a riprap cover, and allowed the cofferdams to remain in the gravel bar through the winter. Leaving the cofferdams in the stream channel through the winter season was not proposed in the Discharger's application and the Certification does not authorize the Discharger to leave temporary structures in the stream channel through the winter.

Regional Water Board staff were told the cost to remove one of the cofferdams at the end of this construction season and to reinstall the cofferdam at the beginning of next season was approximately one million dollars. The Discharger saved significant costs

by installing two sheet pile cofferdams, although the Discharger did not have enough time to complete either pier. By leaving these cofferdams in the gravel bar over the winter the Discharger has avoided spending approximately one million dollars, the reported cost to remove and reinstall the cofferdams.

f) Ability to Pay and Ability to Continue in Business:

The Regional Water Board has no reason to believe the Discharger does not have the ability to pay. The Discharger is a state agency that is not at risk of going out of business. Regional Water Board staff were told the total cost for the bridge project is approximately seventeen million dollars and that the contract for the project included significant funding for environmental compliance and BMPs.

g) Other matters as justice may require: The cost for staffs' time to investigate the matter and prepare this Complaint is estimated to be \$7,000.

h) Total Civil Liability

Based on the factors discussed above, staff propose a civil liability of \$30,000 for violations associated with the cofferdams, \$30,000 for violations associated with petroleum product storage and handling, \$30,000 for violations associated with placement of fine-grained material on the gravel bar, \$4,000 for violations associated with in-stream work after October 15, and \$7,000 for Regional Water Board staff costs associated with this matter. Thus, the total proposed civil liability is \$101,000.

15. The issuance of a Complaint for Administrative Civil Liability is an enforcement action and is not subject to the California Environmental Quality Act, pursuant to Title 14, California Code of Regulations, Section 15321(a)(2).
16. Payment of the Civil Liability does not satisfy the Discharger's obligation to comply with the Certification. That Order remains in full force and effect.
17. Notwithstanding the issuance of this Complaint, the Regional Water Board shall retain the authority to assess additional penalties for violations of the requirements of the Certification, not otherwise addressed by this Complaint.
18. Regulations of the U.S. Environmental Protection Agency require public notification of any proposed settlement of the civil liability occasioned by violation of the Clean Water Act. Accordingly, interested persons will be given 30 days to comment on any proposed settlement of this Complaint.

Proposed Civil Liability

Based on the above factors, I hereby propose that the Discharger pay an Administrative Civil Liability in the amount of \$101,000.

You may waive the right to a hearing. If you wish to waive the right to a hearing, please sign the enclosed waiver and return it together with a cashier's check or money order, made payable to the "State Water Resources Control Board" for \$101,000 within 30 days of receipt of this Complaint to the California Regional Water Quality Control Board, North Coast Region, 5550 Skylane Boulevard, Suite A, Santa Rosa, CA 95403. Payment of the proposed civil liability will be treated as a settlement, and as with any other settlement, will not become effective until after a 30-day public comment period.

Ordered by _____
Catherine E. Kuhlman
Executive Officer

December 28, 2005