



ASHBY USA, LLC

Mailing Address: 39252 Winchester Rd. #107-393, Murrieta CA 92563

Site Address: 39600 Pourroy Rd., Temecula CA 92591

Phone: (951) 699-0207 Fax: (951) 699-0209

November 8, 2007

Mr. John R. Robertus
Executive Director
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4353

Attn: Rebecca Stewart

Re: Administrative Civil Liability Complaint No. R9-2007-0064
File No. CA: 18-2001091.02:Rstewart

Dear Mr. Robertus:

Ashby USA, LLC. (Ashby) is in receipt of the above referenced Administrative Civil Liability Complaint (ACL) dated July 31, 2007. The Allegations in the Complaint are as follows:

1. Between August 29, 2006 and March 19, 2007, for a total of 202 days, Ashby disturbed Long Valley Channel from its natural condition in violation of Condition No.10 of the Water Quality Certification.
2. Ashby failed to submit a mitigation plan by December 20, 2005 as required by Condition No. 3 of minor modification No. 2 to Water Quality Certification 01C-091. This is an ongoing violation that has occurred for 569 days as of July 12, 2007.
3. Ashby failed to implement mitigation for the impacts to Santa Gertrudis Creek and Long Valley Channel by October 20, 2006 as required by Condition No. 2 of minor modification No. 2 to Water Quality Certification 01C-091. This is an ongoing violation that has occurred for 265 days as of July 12, 2007.
4. Ashby failed to design a detention basin implementing post-construction best management practices from August 29, 2006 to November 30, 2006 for a total of 94 days, as required by Condition No. 16 of Water Quality Certification 01C-091.

Please find below our responses to the individual allegations in the Administrative Civil Liability:

1. In response to the Preliminary Technical Analysis section 4.1.1. **Disturbances to the Long Valley Wash:**

The Complaint against Ashby is that Ashby disturbed the Long Valley Channel in violation of condition No .8 to the Water Quality Certification.

There were two construction zone check dams that were that were upstream of the bridge structures to protect the construction. These check dams were not intended to be Storm Water check dams. They were allowed by Minor Modification No.2 (Appendix A) to the Water Quality Certification which states "Construction of the bridge structures and associated concrete work is needed as soon as possible to protect downstream property" Special Condition 8 of Minor Modification No. 3 was modified and acknowledges that the low flow wash will be affected by the construction and that the channel will be returned to a natural condition, except as detailed in the modified 401 Water Quality Certification which allowed for the bridge structures. In the Regional Board inspection report dated February 20, 2007 (Appendix B), you can clearly see the construction is still in progress. The necessity to protect construction activities was confirmed by the Regional Board staff in the September 6, 2007 (Appendix C) meeting, in which the Regional Board staff concurred that the implementation of these construction zone dams are allowed with the condition that any storm related flows be pumped or bypass the construction zone. Ashby continued to maintain pumps on site for the purpose water conveyance around the construction zone. As explained in our response letter dated November 30, 2006 to the Notice of Violation (Appendix D), and the letter dated March 19, 2007 (Appendix E) noting the removal of the dams, it was reaffirmed that these temporary dams were only installed to protect the installation of the bridge structures.

The three mid-stream check dams were installed by Ashby per the direction of and inspected by the City of Temecula to prevent storm flows that pass through the site from creating further incision and sediment transfer downstream. The check dams were proposed to the Regional Board staff in a meeting on September 20, 2005 (Appendix F) to prevent further channel incision and no objection or concern was raised until the August 29, 2006 Regional Board inspection report (Appendix G). The channel, by design, receives no errant water from the site as the City of Temecula specifically required that Ashby install interim detention and settlement basins on site to prevent the on-site water from entering the channel until the approved Water Quality Management Plan (WQMP) can be implemented and accepted by the City of Temecula. On November 2, 2006 a Notice of Violation was issued to Ashby regarding the mid-stream check dams. As a result of the Notice of Violation, the mid-stream check dams were removed as noted in the Required Technical Report dated November 30, 2006 in response to the Notice of Violation (Appendix H).

As evidenced by the afore mentioned documentation, the construction zone check dams were allowed by the nature of the bridge construction and this issue was conceded to by Regional Board staff in the meeting on September 6, 2007. While the mid-stream check dams were proposed to the Regional Board, there is a period of time where Ashby will acquiesce to the Regional Board's position on the three mid-stream check dams as these were never ratified in the Water Quality Certification. The impacts to the Long Valley Channel throughout the duration have been minimal to the project, as evidenced by the photographs included in Appendix I.

The current ACL assesses the fine at \$110,000.00 for 202 days of violation, which equates to \$109.00 per day for five check dams. We propose that the fine be assessed for only the three mid-stream check dams from August 29, 2006 to November 30, 2006 for a total of 93 days. The remaining 109 days noted in the ACL were only in reference to the approved construction zone checks dams and no penalty should be assessed for these. Ashby respectfully requests that the fine be reduced to \$30,411.00.

2. In response to the Preliminary Technical Analysis section 4.1.2. Failure to Submit Mitigation Plan:

The complaint against Ashby includes a penalty for failure to comply with the requirement in Minor Modification No. 2 of Water Quality Certification No. 01C-091 to submit a Mitigation Plan to the Regional Water Quality Control Board (RWQCB) by December 20, 2005. In fact, Ashby submitted a Mitigation Plan to the RWQCB on November 8, 2005 (Appendix J) at a multi-agency meeting held at the U.S. Fish and Wildlife (USFWS) office in Carlsbad, California. That Mitigation Plan included adequate mitigation activities to satisfy the requirements of RWQCB Certification, and RWQCB staff attending the meeting stated that the plan met its requirements. However, the plan

did not achieve consensus from all of the Regulatory Agencies. The USFWS opposed the Mitigation Plan on the grounds that implementation would impact additional upland resources; therefore the footprint of the mitigation site necessarily had to be adjusted to avoid those resources. RWQCB staff in attendance concurred that the Mitigation Plan should be revised to overcome the objections of U.S. Fish and Wildlife Service. Ashby responded by submitting a revised Mitigation Plan to the RWQCB and other Regulatory Agencies for approval on March 15, 2006. Although this revised Mitigation Plan continued to be acceptable to RWQCB staff, it again failed to achieve approval from U.S. Fish and Wildlife Service. Ashby submitted a third iteration of the Mitigation Plan to RWQCB and other Regulatory Agencies on October 24, 2006. Again, this Mitigation Plan was acceptable to RWQCB but failed to be approved by the USFWS (see the mitigation timeline, Appendix K).

The greatest stumbling block for achieving consensus has been the U.S. Fish and Wildlife Service's insistence on minimizing wetland creation within the existing open space to the detriment of sensitive upland habitats, regardless of the net improvements to be made to the creek and wetland resources. The U.S. Fish and Wildlife Service's concerns grew from the increasing footprint of the mitigation which was caused by temporal impacts, penalties, and the addition of the off site component of the project which, when permitted, would increase the mitigation requirements. In order to meet Regulatory Agencies' requirements for maintaining a soft bottom channel in the Santa Gerturdis Creek, Ashby is now being required to demolish and replace the down stream Liefer Road Bridge which is offsite of the project. The bridge replacement was not a part of the original Development Agreement and is only being replaced to satisfy Water Quality requirements. The cost for the bridge replacement is \$1,500,000.00 as well as the additional mitigation impacts for replacing the bridge detailed in the response to the third allegation below. The additional financial burdens related to the bridge replacement and mitigation were not a part of the developer obligations and the expense is in addition to the established budget for the project. All of the parties involved were in agreement that the offsite mitigation component should be implemented concurrently with the onsite mitigation as there is a shortfall of mitigation opportunities within Santa Margarita Watershed. The offsite mitigation component was added to the November 8, 2005 mitigation plan, but would have impacted sensitive upland habitat that was objected to by the USFWS. Therefore each subsequent version of the Mitigation Plan increased the footprint to avoid the sensitive upland habitat areas from the wetland construction. RWQCB Staff deferred to the USFWS's requirements to avoid sensitive upland habitat which was interpreted as justification for the delay in the submission of a revised mitigation plan.

In the meeting on February 27, 2007 (Appendix L) held to review the Mitigation Plan submitted on October 24, 2006 and determine actions necessary to achieve consensus, a proposal was made by the USFWS that would reduce the overall footprint of the wetlands creation area while avoiding important upland resources. This proposal is achievable on the grounds that the agencies requiring wetlands mitigation allow Ashby to satisfy its 1:1 "no net loss" requirement within the existing open space while satisfying "temporal" losses at a ratio not less than 2:1 through conservation of adjacent property that contains high value wetland and upland buffer habitat. All Regulatory Agencies, including RWQCB, have agreed in concept to the plan proposed in this meeting (Appendix M), but this proposal is contingent upon the successful acquisition of the parcels which are owned by the University of California at Riverside (UCR). The acquisition is being negotiated with the Regents of the University of California and Ashby has reached agreement on the purchase of the property containing wetland buffer habitats (Appendix N). Ashby is currently negotiating the purchase of the riparian habitat from UCR since conservation of riparian habitat will better serve the "temporal" loss replacement requirements of the RWQCB and other Regulatory Agencies by providing "in kind" conservation rather than wetland buffer habitat. Upon completion of the negotiation and acquisition of the parcels, a final revised Mitigation Plan can be drafted.

Ashby was notified on January 12, 2006 that an approved Mitigation Plan is past-due and requested an immediate response. Megan Quigley stated "I know there were a lot of issues to address, so I don't plan to pursue the fact that it's late at this point, but please give me an update on the status immediately." Mark Carpenter, the Landscape Architect for Ashby responded on January 12, 2007 to the satisfaction of the Regional Board Staff. Subsequently, Ashby submitted a revised plan on March 15, 2006 and again on October 24, 2006. All versions of the Mitigation

Plan satisfied RWQCB but failed to meet the expectations of U.S. Fish and Wildlife Service. The RWQCB did not provide Ashby with a new deadline for submitting a Mitigation Plan that RWQCB (and other Regulatory Agencies) can approve. Difficulty in reaching a consensus from all of the Regulatory Agencies has been compounded by the fact that Ashby has been required to meet larger mitigation acreage as described above. This is evidenced by the various permutations of the mitigation plans (Appendix O). Ashby's response dated November 30, 2006 to the Notice of Violation dated November 2, 2006 is consistent with the above response.

The costs associated with the final revision to the mitigation plan includes design (\$120,000.00), acquisition (\$820,000.00-\$1,500,000.00), construction (\$1,300,000.00), maintenance & monitoring (\$250,000.00), and a stewardship endowment (\$150,000.00). These costs include the additional mitigation costs for the offsite component of work but do not capture the cost of the Bridge replacement as mentioned previously. The additional financial burdens related to the Bridge replacement and mitigation were not a part of the developer obligations and the expense is in addition to the established budget for the project. Ashby has agreed to move forward and incur these additional costs, which are reflected in the figures above. Upon securing the UCR land the timing to submit the final mitigation plan would be 12-16 weeks. Upon approval of the final mitigation plan the construction is expected to be completed within one year. The maintenance would continue until the success criteria are reached.

Due to current issues with the Community Facilities District being managed by the City of Temecula Public Finance Authority, the Project finances are on hold and no construction activities are taking place on the Roripaugh Ranch project. Until this issue is resolved, Ashby will be unable to acquire the UCR land and obtain the permits needed from the City of Temecula to start the construction of any improvements needed for the Mitigation area. However, Ashby is seeking additional project funding to resolve the project's current cash flow constraints. In letters dated June 7, 2007 and August 28, 2007 the financial status of the project was explained (Appendix P) to show the inability of Ashby to move forward at this time with the construction. However we are working diligently to resolve the issues with the project cash flow and should have resolution in the near future. As an assurance of the intent of Ashby to complete the mitigation, a surety bond (Appendix Q) was issued in the amount of \$550,000.00 on March 6, 2003. The bond is being held by the USACOE.

At no time has Ashby intentionally neglected to meet the requirement to develop a Mitigation Plan for the Roripaugh Ranch Project, and until receipt of the above-reference Proposed Administrative Civil Liability, Ashby understood itself to be in compliance with that requirement since RWQCB staff had found each version of the Mitigation Plan to be acceptable. The Complaint to which we are here responding itself states that the tentative Mitigation Plan discussed on February 27, 2007 appears to be acceptable (see last paragraph of section 4.1.2.1.), and Ashby continues to move toward acquiring the UCR property in order to complete that plan. The attached Mitigation Time Line (Appendix C) demonstrates Ashby's good faith effort to reach a mitigation solution that is amenable to all of the Regulatory Agencies. Based on the evidence provided herein the reason no final approved mitigation plan has been drafted is beyond Ashby's control. This is a result of the Regulatory Agencies being unable to reach a consensus on mitigation requirements, therefore Ashby USA, LLC respectfully requests that this allegation be rescinded.

3. In response to the Preliminary Technical Analysis section 4.1.3. Failure to Implement Mitigation:

The complaint against Ashby includes a penalty for failure to comply with a requirement of Minor Modification No. 2 to Water Quality Certification No. 01C-091 to implement a Mitigation Plan for impacts to Long Valley Wash and Santa Gertrudis Creek by October 20, 2006 (one calendar year from the date of impact).

If Ashby were to implement the wetland construction aspects of the submitted Mitigation Plan using the requirements that would be acceptable per the RWQCB staff, it would cause Ashby to be in violation of requirements of other Regulatory Agencies. Due to this conflict, Ashby has been unable to implement the Mitigation

Plan. RWQCB staff has been fully aware of the objections by USFWS and concurred that the Mitigation Plan should be revised to satisfy the objections raised. The proposal discussed in the February 27, 2007 meeting has been agreed to in concept by all agencies, including the RWQCB staff, and negotiations to acquire the UCR land are ongoing toward the implementation of that plan. As soon as the UCR land is secured, a final revised Mitigation Plan will be drafted and submitted to all Regulatory Agencies for approval. Upon consensus agreement by all agencies, the Mitigation Plan will be fully implemented. The RWQCB staff concurred that modification of the Mitigation Plan to satisfy the objections of USFWS is reasonable. Ashby interpreted this concurrence to be an authorization to delay the implementation due to the fact that there is an un-permitted component to this project that will add to the mitigation requirement for the wetland creation/enhancement aspects of the Mitigation Plan which would allow for all impacts to be mitigated onsite.

Although ground has not been broken on the wetland creation/enhancement mitigation area, Ashby has been working toward acquisition of the UCR property adjacent to the Roripaugh Ranch Project to satisfy the temporal impacts. By pursuit of conservation of habitat to mitigate for temporal impacts, Ashby has begun implementing the acquisition aspect of the Mitigation Plan. Ashby is unable at this time to initiate the implementation of the wetland creation aspect of this plan due to the inability of the agencies to agree on a mitigation outcome. Ashby is clearly demonstrating good faith by implementing the mitigation plan as far as we can; we respectfully request that this allegation be dismissed.

4. In response to the Preliminary Technical Analysis section 4.1.4. Inadequately Designed Detention Basin:

The complaint against Ashby is that we failed to install a post construction best management practice in a detention basin.

As a result of the Regional Board inspection report dated August 29, 2006 (Appendix G), a year round construction BMP was installed and inspected by the City of Temecula. This BMP will be maintained year round until a post construction BMP can be installed (Appendix R). The Regional Board facility inspection report dated February 20, 2007 (Appendix B) shows in photos 4 & 5 that the water did pond as a result of the construction BMP. An engineering firm (VA Consulting) has been contracted to study and design a standpipe system as a post construction BMP based on the recommendations of the Regional Board staff. The standpipe system will need to be approved and permitted by the City of Temecula.

Due to the project current financial constraints, the construction BMP will be maintained year round until the Post Construction BMP design can be finalized, approved, and installed.

Ashby understands that the Regional Board staff is ensuring that the most current BMP's are in place. The basin was designed in 2002 and was initially built to the standards of the time. Being that the Regional Board confirmed in the meeting on September 6, 2007 that they view this as a construction basin and not complete, Ashby proposes that the fine be assessed as follows:

The current ACL assesses the fine at \$500.00 per day for 94 days, which totals \$47,000.00. Ashby requests that since the BMP's were in place by September 30, 2006 that the fine be calculated from August 29, 2006 to September 30, 2006. Based on the same time assumptions as the ACL, Ashby respectfully requests that the fine be specific to 32 days of violation at \$500.00 per day, totaling \$16,000.00.

In summary:

Ashby is continuing to move forward with the mitigation plan as discussed on February 27, 2007. This plan includes the creation 6.16 acres of wetland for the impacts associated with construction and 2.1 acres to offset the

maintenance of the channels. In addition we will convey a minimum of 12.5 acres of land to the Johnson Ranch Reserve for temporal impact and penalties. As a component to the mitigation, Ashby will contribute a reasonable endowment for the long term management of the acreage being added to the Johnson Ranch Reserve.

As evidenced by the information provided herein, Ashby's efforts have been above and beyond reasonable economic expectations.

It is Ashby's intention to complete the project and the required mitigation in as timely a manner as possible. Ashby and its engineers will continue to work diligently and in good faith with all of the agencies for the final solution. Ashby will continue to work judiciously as possible to secure its cash flow needs, procure the \$41 million proceeds from the Community Facility District (CFD) reimbursement fund, and ultimately complete the required mitigation associated with the various agencies certifications.

Should you have questions regarding this request, please feel free to contact at your earliest convenience.

Sincerely,

Ashby USA, LLC



Peter M. Olah
Project Manager

cc:

Aldo Licitra, City of Temecula, P.O. Box 9033, Temecula CA 92589-9033

Laurie Monnares, U.S. Army Corps of Engineers, Regulatory Branch, 16885 West Bernardo Drive, Suite 300A, San Diego, CA 92127

Jeff Brandt, California Department of Fish and Game, 3602 Inland Empire Blvd., Suite C-220, Ontario CA 91764

Bill Orme, State Water Resources Control Board, Division of Water Quality, P.O. Box 100, Sacramento CA 95812

David W. Smith, Wetlands Regulatory Office, U.S. EPA, Region 9, 75 Hawthorne Street, Mail Code WTR-8, San Francisco, CA 94105

Elizabeth Goldman, U.S. EPA, Region 9, 75 Hawthorne Street, Mail Code WTR-4, San Francisco, CA 94105