CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION

Administrative Civil Liability Order No. R1-2012-0034

Amended February 12, 2014

In the Matter of
California Department of Transportation
Confusion Hill Bypass Project
Complaint No. R1-2009-0095
WDID No. 1B05153WNME

Mendocino County

1. Executive Summary

This matter comes before the North Coast Regional Water Quality Control Board (Regional Water Board) from an Administrative Civil Liability Complaint R1-2009-0095 dated August 13, 2009 (Complaint) issued to the California Department of Transportation (Caltrans), who contracted with MCM Construction, Inc. (MCM) (hereafter collectively Dischargers). (See Administrative Record ("AR") exhibit C, Index attached to this Order as Attachment A.) The Complaint alleged violations of water quality permits for the Confusion Hill Bypass Project and proposed an administrative civil liability (ACL) in the amount of One Million Five Hundred Eleven Thousand Dollars ($1,511,000) pursuant to Water Code section 13385. A hearing took place on June 23, 2011, in accordance with the Hearing Notice and Procedure (AR, exhibit E) and California Code of Regulations, title 23, sections 648-648.8. The Regional Water Board heard relevant evidence and testimony to decide whether to issue an ACL order assessing the proposed liability, a higher or lower amount, or to reject the proposed liability.

To help ensure the fairness and impartiality of the proceeding, the functions of those who acted in a prosecutorial role by presenting evidence for consideration by the Regional Water Board (Prosecution Team) were separated from those who advise to the Regional Water Board (Advisory Team). Members of the Prosecution Team were subject to the prohibition on ex parte communications with the members of the Regional Water Board or the Advisory Team, just like other Parties.

The Project, located in Mendocino County on Highway 101 approximately 18.5 miles south of Garberville and eight miles north of Leggett, involved relocating the highway from the east side of the South Fork Eel River (River) to the west side. (AR, exhibit H, tab 102.) This required construction of two new bridges and a new section of highway between the new bridges. The completed Project provides a reliable transportation route by permanently relocating the highway from an area subject to chronic landslides and closures.

The Project was subject to water quality certification pursuant to Clean Water Act, section 401 (401 Certification), which was issued February 16, 2006 and amended on April 18,

2006. (AR, exhibit A.) In addition, the Project was subject to the Caltrans statewide stormwater permit (Storm Water Permit), issued by the State Water Resources Control Board (State Water Board), which regulates all storm water discharges from Caltrans' owned municipal separate storm sewer systems, maintenance facilities and construction activities. (AR, exhibit B.)

The Complaint as issued sought $1,511,000 civil liability, which included staff costs of $70,182. (AR, exhibit C.) During review of the evidence, Prosecution Team reduced the proposed penalty by $222,500, but requested additional continuing staff costs of $235,500 for administrative civil liability totaling $1,524,000. (AR, exhibit F1 at 29.)

This Order summarizes Regional Water Board's decision and imposes penalties for violations based upon the evidence, relevant factors and conclusions presented herein. The Regional Water Board orders the following:

- Caltrans shall pay a penalty of $405,000 and staff costs of $70,182, for a total liability of $475,182. A detailed explanation of the penalty costs is provided later in this Order.
- Of the total liability, $70,182 (staff costs) must be remitted as payment to the State Cleanup and Abatement Account in accordance with Water Code section13399.35.
- The remaining liability may either be remitted to the Cleanup and Abatement Account, or used for an environmental project which meets criteria contained in the 2002 Enforcement Policy.

The organization of this Order is as follows: Section 2 discusses several issues including the evidentiary rulings, multiple permit terms, relevant factors analysis and staff costs. Section 3 presents a detailed discussion of penalties (grouped into nine categories).

2. Issues

2.1 Evidentiary Rulings

In preparation for the hearing, Parties exchanged evidence, submitted legal argument, rebuttal, evidentiary objections and responses. The evidence provided by the Prosecution Team to support alleged violations included email and memorandum from the Caltrans Storm Water Coordinator, daily engineering reports, biological monitoring reports (including photo documentation), notices of discharge, and Regional Water Board staff inspection observations. (AR, exhibits C & M.) Dischargers requested that much of this evidence be excluded as inadmissible hearsay and for lack of foundation. (AR, exhibits G & H.) In two evidentiary rulings prior to the hearing, these objections were overruled. The biological monitoring reports were found sufficiently reliable as they were prepared by qualified professionals hired specifically to document environmental compliance and were prepared concurrently with the activities documented therein. Evidence in the record supported the application of both official records and business records exceptions to the hearsay rule. (Evidentiary Ruling on Hearsay Objections to Biological Monitoring Reports,

April 27, 2011.) Dischargers also objected to exhibits containing correspondence between Caltrans and MCM on the subject of water quality compliance as inadmissible hearsay. The Hearing Officer found that statements by Caltrans employees fell within the party admission exemption of the hearsay rule and declarations by MCM fell within the declarant liability exception to the hearsay rule. (Evidentiary Ruling on Objections to Caltrans and MCM Correspondence on Water Quality Compliance, June 3, 2011.) These two rulings are incorporated by reference into this Order and attached as Attachment B and C. (See also AR, exhibit P.)

As explained in these rulings, certain basic requirements must be met to constitute substantial evidence upon which the Regional Water Board can rely. Documents and other exhibits must have some foundational support to be properly admitted; however, trial-like foundation is not required. The Prosecution Team originally submitted photographs that were not labeled or otherwise identified. Absent additional, corroborating evidence, random photographs could lack foundation sufficient for the Regional Water Board to rest a finding on. Examination of the entire record shows these photos in context with the biological monitoring reports that most often included captions and explanatory text. The Regional Water Board finds that generally the photographs with accompanying documents submitted by the Prosecution Team have sufficient foundation for the same reason that they were found sufficiently reliable in the hearsay rulings. The biological monitoring reports were generated by professionals hired to perform environmental compliance monitoring pursuant to a specific contract and work order. Reports and communications from Caltrans and MCM also have sufficient foundation. These documents were produced by the Parties themselves, often during or near the time when events occurred. Any remaining objections to evidence for lack of foundation are overruled. All evidence was closely examined to determine whether such evidence supported the finding of a violation. In cases where it was questionable whether the elements of an alleged violation were met because the evidence was vague and/or ambiguous, a penalty was not assessed.

2.2 Violation of Multiple Permit Terms and Conditions

The Complaint alleged violations of both the 401 Certification as well as the Storm Water Permit. Prosecution Team provided evidence showing that the Dischargers violated multiple terms and conditions required for the Project. Many of the alleged violations stem from one event charged under two or more permit conditions. It may be appropriate in some cases to charge separate violations under different permit terms for a single event; however, in this Order liability is assessed for each violation event per day rather than each term or condition violated.

2.3 Relevant Factors

In determining the amount of any civil liability, pursuant to California Water Code section 13385, subdivision (e), the Regional Water Board shall take into account the nature, circumstances, extent, and gravity of the violation(s); whether the discharge is susceptible to cleanup, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. Relevant factors were considered in the assessment of liability for each alleged violation in the subcategories below, and are summarized more generally here.

The Project was constructed in the South Fork of the Eel River, which is listed as impaired for sediment pursuant to section 303(d) of the Clean Water Act. The River is an important salmon and steelhead spawning and rearing area. Excessive sediment is among the factors known to contribute to the documented decline of these species. In addition to salmonids, the River provides habitat for an abundance of species, including juvenile fish and frogs. Both juvenile fish and frogs were found in Isolated Pool B, the location where several unauthorized discharges occurred. Dischargers failed to comply with the requirements of both the 401 Certification and Storm Water Permit on a number of occasions for various activities. As a result, unpermitted discharges occurred within biologically sensitive areas of the River. On many occasions the discharges were not adequately monitored and therefore impacts to beneficial uses are difficult to assess. Violations for discharges to the live channel of the River, and for failure to monitor and report are assigned maximum liability per event for these reasons. Because cementitious discharges can be seriously harmful, those violation events are assigned maximum liability. In contrast, other discharges (i.e. slag) were not determined to be particularly harmful so liability is significantly reduced.

Caltrans is a public entity which represents the best interests of the people of California. Those interests include compliance with regulatory requirements and permits, including those which preserve and protect the beneficial uses of state waters. Caltrans has implemented many projects statewide and in the North Coast Region. Between March 2004 and January 2006 alone, Caltrans applied for and received 31 water quality certifications in the North Coast Region (Regional Board database). Caltrans has been regulated under its own statewide Storm Water Permit since 1999 and is fully aware of best management practices (BMPs), monitoring, and management techniques necessary to assure permit compliance and beneficial use protection. (AR, exhibit B.)

The record for this case contains evidence that is both encouraging and troubling. The Regional Water Board appreciates Caltrans taking its permitting obligations seriously as evidenced by numerous complaints and reminders to its contractors of what the rules are. Documents also show a mix of compliance and non-compliance by the contractors for which Caltrans is responsible. Many discharges associated with rubbish, debris, and leaks from equipment were cleaned up. These cleanup activities have been taken into account

and discussed in association with the applicable category below. Discharges associated with dewatering, cementitious wastes, and turbidity discharges were either not cleaned up or not susceptible to cleanup and therefore, reduction in civil liabilities for these discharge categories is not applicable.

While the Regional Water Board does not have precise information to calculate economic savings resulting from avoiding permit requirements, timely implementation of adequate BMPs and monitoring both come with considerable cost. The Confusion Hill Bypass Project cost over $70 million. (AR, exhibit C at 19.) The civil liability assessed in this Order is small in comparison to the cost of the Project. Caltrans has not indicated an inability to pay or continue in business related to this administrative civil liability.

Caltrans has a history of water quality violations reflected in this Project and others. For the Confusion Hill Project, the Regional Water Board issued its first Notice of Violation on October 30, 2006 (AR, exhibit A-4), and a second on November 27, 2006 (AR, exhibit A-5). Many violations came to the Regional Water Board staff's attention through third party reports and photographs rather than reported directly to the Regional Water Board by Caltrans. This is problematic because water quality programs and permits rely heavily on self-monitoring and reporting requirements.

The Confusion Hill Bypass Project was successfully completed in 2009. The Regional Water Board recognizes that the Project was completed using less concrete, fewer River crossings and less access roads than originally projected; (AR, exhibit H-1 at 2-4) theoretically, this resulted in less overall impacts to water quality associated with the Project. Upon completion, the Project was awarded project of the year in 2009 from the California Transportation Association. (Id.) The magnitude of the Project and the difficulties associated with its construction were taken into account when reducing liabilities for leaky equipment and garbage violations. The Regional Water Board recognizes that a certain amount of leaks and trash can be expected for a project of this size.

These considerations are incorporated into all aspects of this Order, including the decision to not find violations for multiple permit terms, and to not assess liability when the record shows that clean up timely occurred.

2.4 Staff Costs

Staff costs may be one of the "other relevant factors that justice may require" under Water Code section 13385, subdivision (e). (See 2002 Enforcement Policy at 40; see also Cal. Code Regs., tit. 23, § 2910 [repealed and replaced by 2010 Enforcement Policy].) The Prosecution Team estimated its initial staff costs for this enforcement action at $70,182. During review of the evidence, Prosecution Team reduced the total penalty sought by $222,500, but requested continuing staff costs of $235,500 for administrative civil liability totaling $1,524,000. The Complaint did not include notice to Dischargers that staff costs would continue to accrue. Accordingly, the Regional Water Board will only require payment for noticed staff costs of $70,182.

3. Discussion of Penalties

The following sub-sections provide a more detailed explanation of the penalties determined by the Regional Water Board.

3.1 Organization

The Complaint included 296 alleged violations of the 401 Certification and Storm Water Permit. The Prosecution Team grouped violations into the following nine categories:

A. Construction Dewatering
B. Leaky Equipment
C. Slag Discharges
D. Turbid Discharges to the River
E. Insufficient Turbidity Measurements
F. Cementitious Discharges
G. Rubbish and Debris Discharges
H. Individual Events
I. Storm Water Permit

Violations were listed in each category chronologically by date. Caltrans submitted a "Defense Matrix" that followed the same sequencing. (AR, exhibit G-2.) Due to the large number of alleged violations, the Advisory Team requested that Prosecution Team specify a unique identifier for each alleged violation to provide a point of reference for the Parties and the Regional Water Board. (AR, exhibit I.) In response, the Prosecution Team assigned numbers in sequence to each alleged violation in accordance with the date of occurrence (violations 1 through 296), but not chronologically within each category. (AR, exhibit N.) As a result, the numbers do not track consecutively within each section. Also, because the Prosecution Team often alleged violations for multiple permit terms, violation numbers may be grouped in twos or threes for a given event. To provide context and to maintain consistency with the Complaint and the organizational structure that followed, this Order will address each alleged violation by category, using the identification number as provided in the violation matrix.

3.2 Discharge Violations by Category

Category A Construction Dewatering

Prosecution Team recommended a penalty of $340,000 for 34 alleged violations for construction dewatering activities. Dewatering is a common activity on construction sites involving removal or draining groundwater or surface water, in this case from a riverbed, by pumping. Dewatering is conducted before or during excavation to lower the water table for placement of foundations and structural supports. Dewatering activities invariably require a point of disposal for the water being removed. These discharges are not just pure water, but usually contain other constituents such as sediment.

MCM disposed of dewatering wastes to at least two locations on the gravel bar of the River: (1) on the bar itself, and (2) in a temporary sedimentation basin that had been constructed and used within less than 100 feet of the live stream channel referred to as Isolated Pool B (AR, exhibit C, finding 8). These discharges occurred without proper permitting for several months, and after Caltrans staff identified this practice as a compliance deficiency on August 22, 2006 (AR, exhibit M-Tab 8). Although Caltrans' Construction Storm Water Coordinator Walt Dragaloski inspected the site in mid-August, 2006 to evaluate permit compliance, evidence in the record shows that intentional discharges to Isolated Pool B and the gravel bar persisted unpermitted into October. (AR, exhibit M-Tab 48.)

Condition 12 of the 401 Certification specified that any disposal of dewatering wastes to waters of the state would require additional permitting.[1] In addition, Condition 9 prohibited any discharge of waste to waters of the state not authorized by the permit. Condition 17 required that all activities be conducted as described in the permit and the application for the permit. Condition 7 required adequate sediment and turbidity BMPs. (AR, exhibit A.) Absent an additional permit authorizing discharges of this nature, construction dewatering events violated Conditions 7, 9, 12, and 17 of the 401 Certification. The violations alleged by Prosecution Team occur in “twos” and “threes” based on Prosecution Team proposing violations of all applicable 401 Certification conditions for one discharge event. However, the Regional Water Board has assessed civil liability in each instance for the event, rather than overlapping conditions. In light of the disregard for permit conditions, and evidence of harm to beneficial uses associated with Isolated Pool B, the maximum penalty for each event shall be imposed. Construction dewatering discharges into Isolated Pool B and onto the gravel bar warrant the maximum penalty of $10,000 because the evidence describes and depicts intentional unpermitted discharges of waste directly to waters of the state.

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[1] Condition 12 provided: “If construction dewatering is found to be necessary, the applicant will use a method of water disposal other than disposal to surface waters (such as land disposal) or the applicant shall apply for coverage under the General Construction Dewatering Permit and receive notification of coverage to discharge to surface waters.” A permit obtained in accordance with Condition 12 would have required among other criteria, an application to discharge, a list of alternatives available other than discharging to surface water, and compliance with Basin Plan receiving water limits, such as no increase of turbidity beyond 20% above background (Order No. 93-61).

As described in more detail below for each violation event, evidence in the record shows that construction dewatering wastes were discharged to Isolated Pool B and the gravel bar of the Eel River. The biological monitoring report dated September 9, 2006 describes Isolated Pool B as one of two "natural gravel bar/bedrock-formed pools at the BZ [blast zone] on the gravel bar" (AR, exhibit M-Tab 13). Photographic evidence further depicts Isolated Pool B as an unlined depression located within the gravels of the River in close proximity to the flowing channel (AR, exhibit J-4 at 6, 60, 11 & 55).

"The Isolated Pool B on the gravel bar of the Blast Zone was filled in by rock debris and gravels from the falsework footing preparation and extraction of bar gravels from the cofferdams holes in the bar itself and two juvenile yellow-legged frogs were either killed or displaced in this process. There were at least 2 frogs that resided there during transects prior this season and as recently as 27 Sept. of this last week. The pool was completely filled in by the evening of 28 Sept. 2006 (personal observation). Prior to its use as an unlined settling basin it contained an isolated school of juvenile Sacramento pikeminnow (ca. 25) and up to 6 metamorphosing yellow–legged frog juveniles. More recently, as it has been degraded over last 3-5 weeks, it usually contained a remaining 2-3 frogs on a daily basis. I believe I reported finding a dead juvenile pikeminnow there in a previous report when it was used as a settlement basin" (AR, exhibit M-Tab 28).

Caltrans argued that use of Isolated Pool B represents a discharge to a "sediment basin" on the gravel bar, and not to waters of the state in violation of condition 12 (AR, exhibit G-2). Pursuant to the 401 Certification application, a sedimentation basin at least 100 feet from the River could have been authorized for construction detwatering discharges. (AR, exhibit H-2, tab 101 at 9.) A Regional Water Board staff person testified that it probably would not matter if the sediment basin was 70 feet away from the stream rather than 100 feet away as proposed in the application. (AR, exhibit H-2, tab 108 at 54.) MCM suggests that because discharges would have been authorized 100 feet away, the unauthorized discharge 70 feet or closer should be excused.

The discharge within less than 100 feet of the live stream channel cannot be excused. First, regardless of whether a Regional Water Board employee testified that a discharge closer to the River might have been allowed, Dischargers should have sought permission to discharge waste and failed to do so. While Condition 17 does provide that activities be conducted as described in the permit and application, Condition 12 explicitly requires additional permitting before any disposal of dewatering wastes. In this case, Condition 12 is the more specific and stringent and shall control. It is possible that the proposed site would not have been appropriate or additional BMPs would have been necessary after an evaluation of the circumstances. Also, the record shows that the unauthorized discharges occurred sometimes as close as 15 feet from the active channel. Second, it appears that at least one location where unauthorized discharges occurred supported beneficial uses and would not have been approved for any waste disposal. Third, the Storm Water Permit required the application of BMP NS-2, which provides, "[a] dewatering plan is attached to this SWPPP. Dewatering will be performed during the pile construction portion of this project. Detwatered material will be pumped into tanks in order to allow sediment to

settle. The material will be filtered and returned to the river or hauled to a disposal site. All dewatering activities will conform to BMP NS-2" (AR, exhibit B-3).

Condition 9 provided: "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." (AR, exhibit A.) Under the Water Code, "waters of the state" means "any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code, §13050, subd. (e).) Isolated Pool B was located below mean high water of the river and therefore a water of the state, not a sedimentation basin (AR, exhibit M-Tab 48 at 250). Also, the characteristics of Isolated Pool B are different from the 'gravel bar' because the pool contained water prior to disposal of wastes and supported aquatic life (AR, exhibit M-Tab 13 at 95). In addition, the gravel bar also constitutes waters of the state because these areas are part of the active channel during varying times of the year dependent upon seasonal fluctuations, and therefore any unpermitted construction dewatering discharges to the gravel bar violated the 401 Certification.

On August 21, 2006, MCM discharged turbid water through a pipe into Isolated Pool B (violation 2, 3, 4) as shown through photo documentation presented in the biological monitoring reports (AR, exhibit J-4 at 2). Mr. Dragaloski documented the presence of Isolated Pool B as a temporary sedimentation basin that had been constructed and used within less than 100 feet of the live stream channel (AR, exhibit M-Tab 8). Caltrans and MCM did not dispute these violations but objected to fines under multiple permit terms (AR, exhibits T-2; H-2 tab100). A $10,000 liability is warranted for this event.

From August 29 through August 31, 2006, violations 17-19, 22-24, and 28-30 resulted from dewatering over a three day period into Isolated Pool B during construction of the footings for the temporary trestle (AR, exhibit M-Tab 59). Prolonged dewatering at high rates and resulting discharge into Isolated Pool B overfilled Isolated Pool B and the resultant hydrostatic pressure through the gravel bar caused turbidity in the active channel on August 29th and 30th (AR, exhibit M-Tabs 11 and 64). The filling of Isolated Pool B is depicted in photo documentation presented in the biological monitoring reports (AR, exhibit J4 at 6). Waste discharges occurring between August 29th and August 31st associated with dewatering activities resulted in the temporary filling of the Isolated Pool B with loose rocks, gravel and water (AR, exhibit M-Tab 64). Any removal that may have been conducted to restore natural conditions in Isolated Pool B is not documented in the record. Caltrans and MCM did not dispute these violations but objected to certain fines under multiple permit terms. (AR, exhibits T-2; H-2 tab 100.) A $10,000 liability is warranted for each day that this discharge activity took place.
Dewatering activities conducted for construction of the footings for the temporary trestle continued on August 31st after Isolated Pool B was filled with debris waste discharges. Dewatering waste was pumped directly onto the gravel bar adjacent to the cofferdams resulting in violation 31-33 (AR, exhibit M-Tab 63). The section of the gravel bar used was approximately 15 feet from the active channel, maybe closer. (Id.) Caltrans objected to violation 31-33, stating that the evidence does not specify a date of violation, amount of

water pumped, or length of time water was pumped (AR, exhibit G-2). The biological monitor's report (AR, exhibit M-Tab 63) states however, that the discharge of waste from dewatering activities continued on the gravel bar immediately following the description of dewatering events on August 29th through August 31st, giving a specific description of the proximity to the active channel. Therefore, it is reasonable to assess this violation on or about August 31, 2006. Failure to cite the duration and volume of the waste discharge does not apply in this instance as this violation does not depend upon those factors, but rather the intentional discharge of dewatering waste to waters of the state without a permit. A $10,000 liability is warranted for this event.

Violation 37-39 stems from a Caltrans daily engineering report dated September 5, 2006, documenting dewatering activities associated with the B5 cofferdam (AR, exhibit M-Tab 11 at 82). The record shows that MCM discharged dewatering wastes during placement of seal coarse concrete for the footing at B5 on the rock immediately outside the cofferdam. Again, no permit was obtained as required under Condition 12 of the 401 Certification. A $10,000 liability is warranted for this event.

Violation 55-57 stems from documentation in a September 11, 2006, Caltrans assistant resident engineer's daily report (AR, exhibit M-Tab 15). Prosecution Team alleged violations for construction dewatering to Isolated Pool B inconsistent with the 401 Certification application and without proper permits. Based upon prior and continuing dewatering activities by the Dischargers, these wastes were likely discharged to waters of the state. However, the record does not indicate the location to which waste from pumping out of the corrugated metal pipe was directed. Prosecution Team failed to establish this fact in the record. Accordingly, the Regional Water Board does not impose liability for construction dewatering on this day.

On October 3, 2006, waste was discharged from dewatering associated with dredge activities on the gravel bar within 50 feet of the active channel just outside the steel plate cofferdam (AR, exhibit M-Tab 29), resulting in violation 84-86. This waste discharge violation was identified by Caltrans staff, Rich Thompson, who required the MCM to cease and modify this activity. Mr. Thompson documented the violation on the day of occurrence on the assistant structure representative's daily report. (Id.) More than six weeks into the Project activities, Caltrans continued to correct MCM and noted an apparent disregard for proper construction dewatering BMPs. (Id.) A $10,000 liability is warranted for this event.

Three days later during an October 6, 2006, Regional Water Board compliance inspection, staff observed dewatering wastes being discharged into Isolated Pool B, resulting in violation 93-95. Staff documented the unauthorized discharge in a photo (AR, exhibits M-Tab 48 and J-4 at 60). Staff followed the inspection with a written Notice of Violation on October 30, 2006 (AR, exhibit M-Tab 48). Caltrans and MCM did not dispute this violation but objected to fines under multiple permit terms (AR, exhibits T-2; H-2 tab 100). A $10,000 liability is warranted for this event.
Violation 96-98 relies upon observations of the biological monitor documented for October 7, 2006, in a weekly biological monitoring report which states, "[d]ewatering of the footings on the gravel bar caused some concern…silty water was not being deposited in the

approved area 70-feet away from the river [Isolated Pool B]" (AR, exhibit M-Tab 32). While Prosecution Team staff may have correctly assumed that dewatering wastes were deposited to an area within waters of the state, documentation of this activity is not established in the evidence provided. Therefore, civil liabilities will not be imposed for this event.

During a routine inspection on November 14, 2006, the assistant resident engineer observed dewatering wastes being discharged from the drilling operation draining onto the rock within the 100 year flood plain (AR, exhibit M-Tab 57), resulting in violation 147. Caltrans staff told MCM staff that this activity was in violation of the permits. (Id.) Additional notes from a second assistant resident engineer from November 14 indicate that as of mid-November, no specific plan was in place to control water [removed] from excavations (AR, exhibit M-Tab 58). Caltrans' photo contains a handwritten note stating; "Pumping H2O directly into gravel bar documents the activity" (AR, exhibit C- Appendix C). In addition to violating Condition 9, 12 and 17, this violation event occurred after the October 31st deadline for performing work in waters of the United States as specified in 401 Certification Condition 16. This shows disregard for permit requirements and proper BMPs associated with construction dewatering.

Caltrans argued that the evidence does not meet the burden of proof because the reference to permits in the daily engineering report is ambiguous and the evidence appears to reference an activity occurring on November 13th (AR, exhibit G-2). The evidence appears to document the discharge of dewatering wastes onto the gravel bar on both November 13 and 14, 2006. The Prosecution Team had already conceded a violation for November 13th and only charges for dewatering violations on the second day. This is a reasonable approach. A $10,000 liability is warranted for this event.

On the March 7, 2007, daily inspection, Caltrans assistant resident engineer observed dewatering wastes being discharged under an Oregon Oak Tree (AR, exhibit M-Tab 75), resulting in violation 152. The brownish water flowed overland to the Eel River side-channel discoloring the waters. (Id.) Caltrans argued that the cited evidence indicates a small discharge of native waters should be permissible according to discussion with Regional Water Board staff (AR, exhibit G-2). However, alleged discussions with Regional Water Board staff and the context were not provided. No evidence in the record indicates or suggests that Regional Water Board staff authorized discharges of turbid water to the River in any amount. A $10,000 liability is warranted for this event.

Prosecution Team proposed liability for 34 violations associated with 12 construction detwatering events totaling a liability of $340,000. However, upon review of the evidence, alleged violations for events occurring on September 11, and October 7, 2006 (violations 55 and 96) are charged based upon evidence in the record that is either unclear or does not adequately support the violations. **Accordingly, the Regional Water Board finds 10 violation events established in the record for a total penalty of $100,000.**

Category B Leaky Equipment

Prosecution Team proposed liability for 28 leaky equipment violations at $150,000. As explained below, the evidence shows that there were numerous minor leaks and spills but most of these were cleaned up quickly. Monitors were vigilant in identifying problems and implementing controls, which is what is needed and required for effective permit implementation. Some of the events charged as violations do not warrant imposing fines as small discharges can be expected and were cleaned up. There were several chronic problems that the contractor either ignored or was too slow to correct. It is appropriate to assess liability when the evidence shows deliberate and/or chronic noncompliance with the rules designed to prevent and minimize these types of discharges.

Many of the alleged violations appear in multiples stemming from one event charged under two or more permit conditions, often Certification Conditions 9 and 13. Condition 9 of the water quality certification provided: "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." Condition 13 provided: "Fueling, lubrication, maintenance, storage and staging of vehicles and equipment shall be outside of waters of the United States and shall not result in a discharge or a threatened discharge to waters of the United States. At no time shall applicant use any vehicle or equipment, which leaks any substance that may impact water quality." (AR, exhibit A.) Leaky equipment is also addressed under the Storm Water Permit. BMP NS-10 provides that leaks be repaired immediately or remove the problem vehicle from the project. (AR, exhibit B-3; F-3 tab B.) It may be appropriate to charge separate violations under different permit terms for a single event in some cases; however, here we agree with Caltrans that "double-dipping" with multiple catch-all permit conditions is not appropriate.

Violations 6 and 7 address a leaking backhoe on the river bar on August 22, 2006. This same event is tagged for storm water fine violation 294. A Caltrans email dated August 25 noted that a discharge of oil went directly on the river bar, which is an environmentally sensitive area, and there were no BMPs in place to prevent the discharged oil from reaching the river bar. Under the SWPPP, the discharge should have been reported to the RE and cleaned up immediately. (AR, exhibit M-Tab 8.) Caltrans and MCM did not dispute this violation but objected to fines under multiple permit terms. (AR, exhibits G-2; T-2; H-2 tab 100.)

Violations 8 and 9 are based on one photograph taken August 29, 2006 showing stained gravel placed in buckets. It seems inappropriate to assess a fine when the only evidence cited shows that the spill was cleaned up. Violations 53 and 54 are based on one photograph taken September 9, 2006 captioned "Photo of oil from leaky equipment."(AR, exhibit J-4 at 15.) Violations 66 and 67 are solely supported by a photo taken on September 26, 2006, captioned "dirt road with many oil stains." (AR, exhibit J-4 at 35.) While these photographs technically could document some type of discharge, we do not find sufficient evidence to support a violation warranting the liability proposed. These photos, however,

are relevant to show a continuing pattern that becomes more problematic as the project went on.

The URS December 2006 Final Report noted that "[s]ome equipment seemed to suffer from chronic leaks. Those were photo-documented and presented to Caltrans inspectors (Figure 42 [showing oil leaks on trestle from crane].) Most leaks were cleaned up promptly when pointed out by the monitors." (AR, exhibit M-Tab 71 at 6-24.) Violations 70 and 71 address oil leaks on the uncontained trestle deck on September 27, supported by photos dated September 27, 2006. (AR, exhibit J-4 at 45.) Violations 86 and 87 stem from the weekly biological monitoring report for October 2-7, 2006, which noted that "oil and diesel stains on the gravel bar were identified for cleanup." (AR, exhibit M-Tab 32 at 191.) Again, there is not sufficient evidence supporting the liability proposed for these types of events.

Violations 88 and 89 stem from an inspection report by Regional Water Board staff after visiting the site on October 6, 2006. That inspection resulted in a Notice of Violation (NOV) dated October 30, 2006. (AR, exhibit A-4.) On October 6, 2006, staff observed a backhoe on the gravel bar with excessive fluid leaks. Even though absorbent rags were stuffed into crevices to control the leakage, the equipment was not in adequate condition to be used at that location. Several photographs from that day show equipment on plastic tarps. The NOV requested that Caltrans implement adequate BMPs immediately and submit a report by November 15 describing actions taken to address all areas of non-compliance. (Id. at 3.) The record shows that Caltrans did take several actions in an effort to remedy the violations (AR, exhibit M-Tab 59) although it is not entirely clear whether the final result was acceptable.

Violations 107-110 stem from a weekly biological monitoring report for October 9-14, 2006. (AR, exhibit M-Tab 34.) On October 11, the monitor found an IR compressor leaking excessively and diapers and plastic sheets were employed. The monitor also noted a leak from the Manitowoc crane. Plastic sheeting catching oil and hydraulic leaks had split on several occasions. On October 12, the monitor noted that oil and diesel stains on the gravel bar were identified for cleanup. These actions are supported by photographs taken October 12, 2006. (AR, exhibit J-4 at 67-69.) Again, evidence showing minor leaks identified for clean-up do not support the imposition of the proposed penalties.
In contrast, violations 129 and 130 stem from a disturbing weekly biological monitoring report for October 23-28, 2006. On October 27, the monitor noted: "Oil leaks continue to occur without adequate cleanup or prevention with kiddy pools and diapers. Most of the heavy equipment used on this project is old and leak constantly. Overnight oil spots are often not prevented, and often just covered up with soil by apathetic workers the next morning, if at all. The Manatowoc [sic] crane on the false bridge, the LINK man lift on the gravel bar, the CAT 350 are the worst offenders. This has been brought to the attention of MCM on many occasions, with no satisfactory resolution." (AR, exhibit M-Tab 46 at 240-241.) Leaks were also documented by photos taken on October 27. (AR, exhibit J-4 at 104-106.)

Violations 134 and 135 stem from additional photos of leaky equipment taken on October 30, 2006. (AR, exhibit J-4 at 109-113.) Violations 139 and 140 are based on a photograph

taken October 31, 2006, showing equipment leaking oil onto the ground. (AR, exhibit J-4 at 124.)

Violations 142 and 143 stem from a report of a site visit conducted by a Caltrans employee reviewing storm water BMPs on November 3. (AR, exhibit M-Tab 53.) He noted that "[t]he crane is being used on the trestle has leaking fluids. This has been noted many times earlier. The contractor has attached a piece of plastic under the crane, but the plastic catches both oil leaks and storm water. There is evidence on the trestle deck that oil that [sic] has leaked off the plastic. I observed commingled oil with water on the plastic during my site visit. I recommend that the crane be repaired immediately or discontinue its use." (Id. at 286.) As summarized in the December biological monitoring report, the Manitowoc crane, the man lift on the gravel bar, and the CAT 350 were "main offenders" for oil and hydraulic leaks, and were difficult to correct. Recommendations such as placing sheets of plastic under the vehicles did not work properly. Oil leaks improved over time but remained problematic throughout the monitoring period. The contractor was told to remove the Manitowoc crane from the trestle deck at night to avoid leaks into the river at the beginning of November. (AR, exhibit M-Tab 71 at 441.) The record is not clear whether the problem with the crane was remedied.

Even when assessing liability per violation event rather than per permit condition, it can still be problematic to levy a $10,000 fine for each drop of oil that incidentally spills. It is unrealistic to expect a project of this magnitude to not have minor leaks and discharges, and use of administrative enforcement for these types of violations may not be appropriate, especially when the photographic evidence shows clean ups in progress.

However, there were several chronic problems that the contractor either ignored or was too slow to correct. An effective storm water program requires on-the-ground responsiveness and implementation. It is appropriate to assess liability when the evidence shows deliberate and/or chronic noncompliance with the rules designed to prevent and minimize these types of discharges. The record shows an unauthorized discharge occurring on the river bar without any BMPs on August 22, 2006. In addition, sufficient evidence supports finding violations for leaky equipment on October 6, October 27, and November 3, 2006. Violation of Condition 13 is not dependent upon the showing of an actual discharge. The record shows a chronic problem with certain equipment and a somewhat recalcitrant contractor. The record shows unwillingness by the contractor to address the problems with the crane on the uncontained trestle deck, discussed under further the Storm Water Permit as well. **Accordingly, the Regional Water Board finds four violations for a total of $25,000 liability for leaky equipment.**

<u>Category C Slag Discharges</u>

Prosecution Team recommended a penalty of $50,000 for 15 slag discharge violations from welding and steel cutting. Again the Prosecution team alleged violations in pairs for one event violating Certification conditions 9 and 12. For violations 90 and 91, Prosecution Team cited the weekly biological monitoring report for October 2-7, in which the monitor identified molten slag discharges. "Molten slag was observed dripping into the river at 2:20pm, using no bucket to catch the excess. This activity was terminated, but not before

noticeable amounts of slag, small sheets of rusty metal, welding rods, and other debris had accumulated in the river channel." (AR, exhibit M-Tab 32 at 191.) That same day, Regional Board staff inspected the site and issued a Notice of Violation identifying slag discharges not having proper BMPs, and strong language to fix immediately. (AR, exhibit M-Tab 48 at 251 ["Welding slag was observed to be falling directly into the water and the adjacent gravel bar"].) The problem continued on October 26, and monitors "have to tell them day after day" to not do that. (AR, exhibit M-Tab 45.) Welding continued to fall without mitigation by October 28. (AR, exhibit M-Tab 46 at 242.) Caltrans and MCM did not dispute most of the slag discharge violations but objected to fines under multiple permit terms and the amount of proposed liability. (AR, exhibits T-2; H-2 tab 100.) Slag discharges present a low impact to water quality; however, the record shows disregard by the contractor after being repeatedly reminded to implement BMPs for this activity. For this reason, **the Regional Water Board finds that a $5,000 penalty is appropriate for the violation that occurred on October 6, 2006, and evidence of the continuing violations cited above.**

Category D Turbid Discharges to the River

The Prosecution Team alleged 20 violations for turbid discharges to the River, resulting in a proposed penalty of $150,000. Violation 150 is discussed in Category H Individual Events below due to the unique circumstances involved with that event. Turbidity is a measure of water clarity and how much the material suspended in water decreases the passage of light through the water. Suspended materials can include soil particles (clay, silt, and sand), algae, plankton, microbes, and other substances. Higher turbidity can increase water temperatures because suspended particles absorb heat. This, in turn, reduces the concentration of dissolved oxygen (DO) because warm water holds less DO than cold water. Suspended materials can cause adverse biological effects, such as clogging fish gills, reducing resistance to disease in fish, lowering growth rates, and affecting egg and larval development. As suspended particles settle, they can blanket the stream bottom, especially in slower waters, and smother fish eggs and benthic macroinvertebrates (http://water.epa.gov/type/rsl/monitoring/vms55.cfm).
Condition 7 of the 401 Certification provided: "Adequate BMPs 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*." (AR, exhibit A [emphasis added].) In order for a BMP to be adequate, no silt or sediment must enter surface water. Condition 9 prohibited the discharge of unauthorized waste to waters of the state. Condition 17 required that activities, BMPs and associated mitigation be conducted as described in the Permit and application. (AR, exhibit A.) The Regional Water Board will not double or triple the penalty pursuant to multiple permit conditions. Category D violations apply to unpermitted turbid discharges to surface water increasing surface water turbidity for which BMPs were inadequate and therefore the maximum liability of $10,000 is applied to each discharge event.

On September 9, 2006, violation 51 was identified by the biological monitor, Carl Page (AR, exhibit M-Tab 19). Mr. Page estimated that 2.5 gallons of fine rock debris discharged directly into the flowing channel of the river. Further, Mr. Page indicated that this same activity occurred later that same day and again two days later. (Id.) Caltrans staff identified

this activity as a concern based upon the photos of drilling debris in the river around a footing (AR, exhibit M-Tab 15). Caltrans argued that the cited evidence does not correspond with the photos presented (AR, exhibit G-2). However, the record shows that the engineering diary was generated in response to activities which were plainly documented in the biological monitor report for September 9 through 15 (AR, exhibit M-Tabs 15 and 19). Nevertheless, a single violation for this series of three events was charged. Based upon the discussion in the engineering diary (AR, exhibit M-Tab 15), discharges from this activity were apparently preventable as the contractor used a baffle to keep drilling debris contained and Caltrans' follow-up investigation on September 11, 2006 of the incident revealed no further discharges. A $10,000 liability is warranted for this event.

On September 22, 2006, violation 64 was identified by the biological monitor, Bradford Norman (AR, exhibit M-Tab 25). Crossing of the wetted channel without implementing appropriate BMPs resulted in discharge of sediment causing a plume approximately 400 feet long which lasted about 50 minutes (AR, exhibit M-Tb 25 and Tab 62). The equipment crossing was planned several days in advance. Despite ample notice and time to prepare for implementation of appropriate BMPs (AR, exhibit M-Tab 23), four large pieces of equipment crossed the channel within a span of two minutes without adequate cleaning (AR, exhibit M-Tab 25). It is unclear whether the failure to clean the equipment, the speed of the crossings, or some combination of these factors resulted in the discharge. None-the-less, BMPs used for this activity were not adequate to comply with Condition 7. Caltrans correctly asserted that heavy equipment crossings were a permitted activity. The 401 Certification contemplates and permits river crossings provided that BMPs for sediment and turbidity control are implemented as non-compensatory mitigation (AR, exhibit G-2). However, the record shows a clear disregard for proper procedures identified for the protection of water quality and that these actions resulted in the discharge of sediment to the stream in violation of permitted activities (AR, exhibit M-Tab 24). A $10,000 liability is warranted for this event.

On September 29, 2006, violations 73 and 75 were identified by the Caltrans assistant resident engineer (AR, exhibit M-Tab 26). During the placement of concrete for bridge footings below the flowing channel, the contractor did not provide adequate seal for concrete containment. As a result, concrete escaped the corrugated metal pipe, causing a 150 foot long plume in the river. (Id.) A second discharge of turbidity occurred while the contractor stood on the sand bags outside the corrugated metal pipe trying to reattach a concrete tremie, which had apparently come apart during the pour. It is unclear whether the second plume was the result of concrete discharges or the disturbance of river bottom deposits. Caltrans argued that the plumes may have been composed of materials other than concrete (AR, exhibit G-2). While this may be true, no monitoring data was collected to offer conclusive evidence of that fact. Regardless, the violations cited are for a turbid discharge and therefore, do not rely upon the presence or absence of concrete in the documented plumes. BMPs were inadequate to prevent these discharges. A $10,000 liability is warranted for each of these events. After careful review of the evidence, **the Regional Water Board finds support in the record for four events involving the unauthorized turbid discharge to the river, for a total penalty of $40,000.**

Category E Insufficient Turbidity Measurements

The Prosecution Team alleged 17 turbidity measurement violations for a proposed liability of $170,000. Condition 19 of the 401 Certification required that "…[f]ield turbidity measurements shall be collected whenever project activity causes turbidity in the South Fork Eel River to be increased above background concentrations in order to demonstrate compliance with receiving water limitations." Condition 19 further required that "[t]he frequency of turbidity monitoring shall be a minimum of every hour during periods of increased turbidity and shall continue until turbidity measurements demonstrate compliance with receiving water limitations…." (AR, exhibit A.)

Self-monitoring and reporting is a key component used by the Regional Water Board to protect human health and the environment. The purpose of self-monitoring is to ensure that the regulated entity, in this case Caltrans, implements permit provisions and abides by permit limitations protecting water quality in accordance with applicable statutes and regulations. An appropriate self-monitoring program allows the permittee to evaluate the effectiveness of environmental management practices already in place, detect and correct potential violations in a timely manner. Self-monitoring required by the 401 Certification places the responsibility to perform systematic, documented, and objective self-review of facility operations and practices related to meeting environmental compliance on Caltrans and its contractor, MCM. As in this situation, all self-monitoring programs rely upon the integrity and capability of the permittee to implement an adequate program.

Caltrans developed a visual scale used in conjunction with digital photographs to document turbidity (AR, exhibit M-Tab 60). "This scale consisted of four possible values, 0, 1, 2, or 3 indicating the degree of sediment pluming in the South Fork mainstem." (Id.) While necessary and applicable, visual monitoring is only the first step required under Condition 19 of the 401 Certification. Once a turbidity plume has been observed, Condition 19 requires the collection of turbidity measurements to demonstrate compliance with receiving water limitations, which are presented in the Basin Plan as numeric criteria. It is not possible to comply with a numeric standard using qualitative data such as a visual scale.

As explained below, the evidence shows that Dischargers did not take the responsibility of self-monitoring seriously. Monitoring equipment was frequently not available, in a state of disrepair or not used at all. Failure to have available and maintain proper monitoring equipment is chronic throughout the period of record. This failure to allocate time and resources ensuring quality receiving water monitoring indicates an apathetic attitude towards the very core of regulatory compliance and evaluation. The maximum civil liability of $10,000 each is applied for 10 insufficient monitoring violations. Civil liability of $5,000 is applied to three insufficient monitoring violations (violations 16, 27, and 34) because the turbidity plumes were visually recorded, of short duration, and less than 20 feet in length. A total civil liability of $115,000 is applied for 13 insufficient monitoring violations.

On August 29 and August 30, 2006, a turbid plume 15 ft. long and four feet wide lasting for two hours was created from unpermitted dewatering activities (AR, exhibit M-Tab 14). Although the Caltrans submission to the Regional Water Board indicated that monitoring

100 feet downstream of the plumes indicated no increase over background turbidity, no documentation of sample collection or results from said monitoring was contained in the biological monitoring report for that period. (Id.) Turbidity monitoring is required to assess compliance with receiving water limitations at the point of discharge (ie. within the heart of the plume), not 100 feet downstream. Even if samples had been collected, the results of which were not reported, sampling downstream of the plume rather than within the impacted area violated Condition 19 self-monitoring requirements resulting in violations 16 and 27 (AR, exhibit M-Tabs 22, 23, and 62). Liability is assessed for these two events.

On September 1, 2006, Caltrans submitted a notice of discharge, attachment K (notice) for the discharge of sediment disturbed on the channel floor during the placement of gravel filled bags around the outside of a steel pipe (AR, exhibit M-Tab 10). The notice indicated that the plume was 20-feet in length lasting approximately two minutes and that the biologist confirmed background turbidity levels were not increased as measured from a point 100-feet downstream. (Id.) This statement is inconsistent with the biological monitor's summary report, which shows only an observation of 1 on the visual scale (AR, exhibit M-Tab 62). In either instance, visual monitoring alone and or monitoring outside of the plume to asses receiving water compliance both result in a violation (violation 34) of self-monitoring requirements. Evidentiary review of violation 36 appears to refer to the same incident cited under violation 34. Therefore, liability is assessed for only one of these violations.

On September 6, 2006, violation 40 occurred when Caltrans and MCM failed to monitor a plume resulting from three vehicles crossing the south side of the River (AR, exhibit M-Tab 13, and Tab 62). The weekly biological monitoring report for September 5-8, 2006 and Caltrans' turbidity memo both report a plume on a qualitative scale of 3 lasting for at least 12 minutes and extending through a habitat zone previously noted to contain fish, frogs and snakes; (Id.) yet no quantitative turbidity measurements were taken to assess return to compliance with receiving water limitations. (Id.) Liability is assessed for this event.

On September 9, 2006, a turbidity plume was observed resulting from drilling debris around trestle foundation 4 Lt, but turbidity monitoring was not conducted, resulting in violation 52 (AR, exhibit M-Tab 15, Tab 19, and Tab 62; see also Category D-Turbidity Discharge violation 51). The evidence indicates that material was discharged to the River causing a visual turbidity plume as photo documented by the biological monitor (AR, exhibits C-Appendix A; J-4 at 13-14). Violation 52 is assessed liability because a plume was observed, given a visual rating of 2, and not followed-up with quantitative turbidity measurements (AR, exhibit M-Tab 62).

On September 22, 2006, turbid discharges resulted from planned crossings of the wetted channel. (See Category D-Turbidity Discharge violation 64.) Appendix A to the URS report shows 14 field turbidity measurement data: eleven measurements were made using a HORIBA turbidimeter (results reported in NTU's) and three measurements were made using a LaMotte Sechhi CUP (results reported in JTU's). These measurements were taken on September 22nd between 08:56 and 9:04 AM in the South Fork Mainstem (AR, exhibit M-

Tab 62). The HORIBA turbidity measurement data are all flagged with an asterisk " * ", which indicates inaccurate readings. A visual rating of 3 was assigned to the plume which lasted for 50 minutes, yet only one of the 14 attempted measurements was collected during the crossing and none were collected after to document a return to background conditions in the receiving water. (Id.) This shows disregard for the importance of self-monitoring as a key component to implement protection of beneficial uses. Caltrans admitted to violation 65 occurring in its initial Caltrans Defense Matrix submitted with its Case in Chief (AR, exhibit G-2). Liability is assessed for this event.

On September 28, 2006, violation 72 occurred, for inadequate monitoring of a 100 foot long plume lasting approximately four hours resulting in NTU readings between 3-5 (Tab 60 and Tab 62). Chronologically, this is a better attempt by the Dischargers to monitor impacts to water quality from turbid discharges. However, Condition 19 of the 401 Certification required that monitoring continue, "until turbidity measurements demonstrate compliance with receiving water limitations." (AR, exhibit A.) Monitoring of the plume is documented between 15:10 and 15:15, showing that this four-hour long plume was monitored for a span of only five minutes. Further, a comparison of the final measurement of 3 NTU to a background condition of 0 NTU does not show a return to compliance with receiving water limitations (IAR, exhibit M-Tab 62). Therefore, liability is assessed for this event.

On September 29, 2006, alleged violations 74 and 76 occurred when two distinct turbidity plumes were observed in the river. No turbidity measurements were taken to assess the second plume; however, turbidity measurements were taken to assess the turbidity resulting from the cementitious discharge associated with the first plume (AR, exhibit M-Tab 62). The first plume resulted when concrete escaped from the corrugated metal pipe leaving a 150 foot long plume lasting for over an hour in the river. The second plume occurred while trying to reattach the tremie and the contractor worked around the corrugated metal pipe by standing on the sandbags (AR, exhibit M-Tabs 26, 37 and 59; see also Category D-Turbidity Discharges violation 73 and Category F-Cementitious Discharges violation 78). Appendix A of the URS report contains the data collected by a biological monitor in the plume and above the plume, however perhaps due to the nature and source of the turbidity, the Horiba turbidimeter produced unreliable data which is reported as" 999* " and " 5* " (AR, exhibit M-Tab 62). The biological monitor collected secondary samples using the LaMotte Sechhi CUP. Sechhi CUP turbidity measurements were collected and reported above, within and post plume. (Id.) Caltrans admitted to these facts in its initial Defense Matrix (AR, exhibit G-2). The Regional Water Board finds that in this instance, the Dischargers made reasonable efforts to collect turbidity samples and no liability will be assessed for violation 74. Because no measurements were taken for the second plume, liabilities are assessed for this event.

On October 2, 2006, an equipment crossing caused a 100-foot long plume lasting for a period of three minutes. URS Report Appendix A shows two data at 3:24 and 3:25 PM, the turbidity measurements of 0 NTU before the crossing increased to 2 NTU during the equipment crossing (AR, exhibit M-Tab 62). These two data are insufficient to comply with self- monitoring requirements of Condition 19, which required a minimum of hourly field

turbidity measurements until the measurements demonstrate compliance with receiving water limitations. Violation 82 is assessed liability for failure to monitor the plume until measurements show a return to background conditions.

On October 16, 2006, two weeks prior to the end of the allowable in-stream construction season, a new pattern of monitoring resulted in a total of sixty eight Horiba turbidimeter and sixty seven Sechhi CUP sample results. These measurements were all collected within a 45 minute period (AR, exhibit M-Tab 62). A single eight foot long plume lasting 15 minutes with visual rating of 1 is reported for the same period of record. (Id.) Likewise, 13 Horiba turbidimeter, three Secchi disk and three Sechhi CUP turbidity sample results are reported for October 20, 2006 during a 62 minute timeframe. (Id.) Despite the many turbidity samples collected, violation 115 is assessed because the Dischargers failed to monitor post plume conditions to document a return to background conditions.

On October 18, 2006, the biological monitor documented a 20 foot long, 6 foot wide plume lasting for 20 minutes as a result of cofferdam construction (Tab 42, pg. 218). A turbidity plume was observed, but no upstream background turbidity measurements were taken. Nonetheless, Sechhi CUP samples were collected within the plume as well as 51 minutes later. These samples showed JTU of 1 within the plume and 0 JTU almost one hour later (AR, exhibit M-Tab 62). This event represents a technical violation (violation 119) of turbidity monitoring requirements, but will not be assessed liabilities because the Dischargers monitored in-plume and post plume conditions showing a return to compliance with receiving water limitations. (Id.)

October 20, 2006, Prosecution Team alleged that violation 122 occurred for insufficient turbidity measurements. Turbidity measurements appear to correlate to simultaneous measurements for pH, conductivity, salinity, and dissolved oxygen. (Id.) No visual observation of a plume was reported during the flurry of monitoring activity on this date. (Id.) Rather, the data suggest elevated pH in the River, consistent with cementitious discharges. Nonetheless, the record does not support a violation for insufficient turbidity measurements.

Prosecution Team proposed liability for 14 insufficient turbidity monitoring violations totaling a liability of $140,000. However, upon review of the evidence, four of the violations, for events occurring on September 1, October 14, 18, and 20, 2006 (violations 36, 74, 119, and 122) were charged based upon evidence in the record that is either unclear or does not adequately support the violations. **The Regional Water Board finds support in the record for 10 violations of insufficient turbidity measurements, for a total penalty of $112,000.**

<u>Category F Cementitious Discharges</u>

The Prosecution Team alleged 11 violations for improper disposal of cement waste, resulting in a proposed liability of $110,000. Concrete and cementitious wastewaters are caustic to both human health and aquatic environments, and are considered to be corrosive with a pH typically around 12. The Basin Plan criteria for pH in the Eel River is a range from 6.5 to 8.5 pH units. Contact with wet (unhardened) concrete, or other cementitious

materials can cause skin irritation and severe chemical burns or serious eye damage. The effects of high pH on aquatic organisms may include: death, damage to gills, eyes, and skin; and an inability to dispose of metabolic wastes.

For these reasons, the Regional Water Board generally does not permit any concrete waste discharges to land unless it is fully contained, such as in a lined Basin. (See e.g. AR, exhibit M-Tab 4.) Condition 9 of the 401 Certification prohibits the unauthorized discharge of cement or concrete washings. Condition 10 requires that "[a]ll materials used for cleaning concrete from tools and equipment, and any wastes generated by this activity, shall be adequately contained to prevent contact with soil and surface water and shall be disposed of properly." Condition 17 requires that all activities be conducted in accordance with the Permit and application. (AR, exhibit A.)

In an e-mail communication dated January 6, 2006, Regional Water Board staff clarified the requirements related to concrete management and disposal (AR, exhibit M-Tab 4):

> We are not permitting any waste [concrete] discharges to land (only lined basins), ground water or surface water for this project. All the 401s… issued to CDOT contain a condition that incorporates the following language.
>
> > *No cement or concrete washings, 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.*
>
> The 401 for Confusion Hill will contain the same version of the above requirement that is in all the 401s I've issued to CDOT in the past. Other than complete containment of all concrete waste and wash water in lined basins of the types shown on the submitted plans, CDOT has not proposed any other acceptable method for disposal, reuse, etc., of the wastewater. Therefore, the only authorized discharge of concrete is the concrete that will become the bridges." (Id.)

Caltrans responded, "Thanks for the clarification. We understand the condition and…[a]ll concrete waste and wash water will be contained." (Id.)

Notwithstanding, the record shows at least six separate events of improper disposal of cement waste, as discussed in more detail below. Because the intent of the Regional Water Board to prohibit concrete waste disposal at the site was clear, each event associated with unpermitted concrete disposal at the site is assigned the full liability of $10,000 allowable under the statue.

Activities associated with violation 10-11 and 49-50 occurred on August 29 and September 8, 2006 respectively. The Caltrans letter of December 13, 2006, states that on August 29, "during placing a [sic] concrete in a corrugated steel pipe within the river, the water level rose and to prevent it from overflowing into the river, the water was pumped to the dewatering basin" (AR, exhibit M-Tab 73 at 469-479). Similarly, the acting structure representative's daily report dated September 7, 2006 states that, "the next day the water was tested for pH, treated with muriatic acid then pumped into the settlement basin. I estimate about 25 gal was pumped from the Lt CSP and perhaps 50 gal pumped from the Rt

CSP based on the conc[rete] placed" (AR, exhibit M-Tab 12). There is no evidence to indicate that a properly contained dewatering basin was constructed proximate to the trestle footings for concrete management at the site. Rather the evidence indicates that the 'dewatering basin' used on August 29th and September 8th was in fact Isolated Pool B, waters of the United States, or another unlined dewatering location. Photo documentation shows the pipe from the concrete within the corrugated metal pipe discharging to the unlined basin, collaborating the forgoing evidence (AR, exhibit C-Appendix C; J-4 at 11-12). Therefore, the Regional Water Board finds sufficient basis to assess liabilities for these two events (AR, exhibit M-Tab 8).

Also on August 29, 2006, violation 12-14 occurred from improper disposal of waste and materials used for cleaning concrete tools and equipment. This event is documented by statements contained in the December 13 correspondence: "After placing the concrete seal course, the contractor cleaned the hopper, tremie and shovels in a footing excavation in the river bar." (AR, exhibit M-Tab 73 at 474.) A $10,000 liability is warranted for this event.

Violations 58-59 are based upon photographic evidence (AR, exhibit C-Appendix C; J-4 at 16) in the final URS report labeled "cement waste pour to edge of Isolated Pool B." (AR, exhibit M-Tab 70 at 371.) MCM suggested that the photo shows natural sediments of the type prevalent in the river; however, the photo caption documented by the biological monitor clearly states that the waste was cement, thereby corroborating the photograph. The photo shows a discharge of cementitious waste directly on the gravel bar of the River within waters of the United States. (Id.) A $10,000 liability is warranted for this event.

Violations 77 and 78 are based on a written description of an unauthorized discharge of cement on September 29, 2006. (AR, exhibit M-Tab 29.) Caltrans engineering diary report No. 46.395 describes the discharge of cement to the River from concrete footing seal pour indicating that "Sandbags were then placed on the outside perimeter only, no sandbags were placed on the inside of the CMP. CONTR began placing seal coarse concrete @ 1701 hrs…. CONTR began by placing the seal coarse in the #3 FTG. During the placement, it was apparent that the contractor did not have a good seal around the CMP. Concrete escaped from the CMP leaving a plume in the river approx. 150'-0 in length." (Id.) The written description of this violation is further supported by photo documentation of the event (AR, exhibit C-Appendix C; J-4 at 49-51). Caltrans and MCM did not dispute this violation event but objected to fines under multiple permit terms (AR, exhibit T-2; H-2 tab 100). This alleged violation event overlaps with violations 73 and 75 discussed and assessed liability in Category D, therefore, no liability is assessed in this category.

The Regional Water Board will not increase the liability pursuant to multiple permit terms for a single event. **Evidence in the record shows at least five separate events of improper disposal of cement waste, for a total penalty of $50,000.**

<u>Category G Rubbish and Debris Discharges</u>

Prosecution Team recommended a penalty of $10,000 for nine days of rubbish and debris discharges. Since the submittal of its Case in Chief, Prosecution Team is no longer alleging violations on three of those days.

The Regional Water Board has similar concerns with the proposed liability for the rubbish and debris issues as it does for leaky equipment. Prosecution Team brought charges under condition 9 of the 401 Certification. While technically trash in the river could count as a discharge, it must be viewed in context. It is not reasonable to expect that each piece of trash could trigger a penalty, particularly when evidence shows that the trash was picked up. Condition 11 of the permit shows a reasonable approach for addressing trash and project materials. It provided: "When operations are complete, any excess material or debris shall be removed from the work area and disposed of properly. No rubbish shall be deposited within 150 feet of the high water mark of any stream." (AR, exhibit A.)

Violation 61 and 63 stem from a weekly biological monitor report (September 18-22) noting the discharge of trash blowing off the trestle deck, and no closed waste receptacles to contain the trash (AR, exhibit M-Tab 24 and 25). Materials cited included sawdust, cigarette butts, plastic and paper packaging and empty water bottles, welding wire, loose nails, rust scab from recycled I-beams, welding rods, oily rags and gloves, cut wood pieces, and welding slag. Violation 61 is supported by two photos dated September 18, 2006 showing a block of wood and other trash in the water. (AR, exhibit J-4 at 17-18.) Violation 63 is supported by several photos dated September 22, 2006 showing pieces of trash in the river. (Id. at 22-24.)

Violation 68 and 69 stem from the next weekly biological monitor report (September 26-30) noting some improvement with the trash issues identified the week before, however sawdust, nails, wood and large rust flakes remained on the trestle deck (AR, exhibit M-Tab 28). Photos dated September 26 and 27 show rust flakes in the water and some floating wood. (AR, exhibit J-4 at 36-40.)

Violation 123 and 124 stem from a weekly biological monitoring report (Oct. 23-28) that noted large rust flakes accumulated on the gravel bar on October 24, but also noting that these were cleaned up (AR, exhibit M-Tab 50). On the next day the biological monitor noted that wood scraps, saw dust, rust flakes and plastics were cleaned up, and large rust flakes from the I-beams that could easily fall into the river were cleaned up. Additional trash was targeted to be cleaned up by the end of the month.

We do not find that these violations rise to the level of a $10,000 fine. Nothing in the documents indicates that cleanup efforts were not performed in a timely manner, in fact, the documents demonstrate that trash issues were identified and addressed. **Accordingly, the Regional Water Board finds that liability is not warranted in this violation category.** Containment on the trestle deck is addressed under the Leaky Equipment and Storm Water Permit subcategories.

<u>Category H Individual Events</u>
The Prosecution Team alleged five individual event violations that do not fit into any specific category, for a total of proposed liability of $41,000. The Regional Water Board finds support for four of these violations. In addition, violation 150 is discussed and assigned liability in this section instead of in Category D because of the unique

circumstances of that event. Liabilities totaling $40,000 are warranted for these five violation events.

Violation 1 stems from a small hydraulic fluid spill on August 16, 2006. A line accidentally severed on the gravel bar and was cleaned up promptly. (AR, exhibit M-Tab 5.) Prosecution Team proposed a total of $1,000 liability for the violation. This discharge was unauthorized; however, it was small and accidental. Moreover, the record shows that it was reported properly and promptly cleaned up, which demonstrates correct implementation of the permits. The Regional Water Board declines to impose the liability proposed by the Prosecution Team for this event.

Violation 5 stems from contractor fueling equipment on the gravel bar. A SWPPP compliance inspection was conducted on August 22, 2006 where fueling on the gravel bar was observed. The inspection report stated that James Hamm acknowledged that they were fueling a compressor, generator, man-lift and backhoe (AR, exhibit M-Tab 8). Condition 13 of the 401 Certification provided that fueling of equipment and vehicles shall be outside the waters of the US. (AR, exhibit A-1.) A liability of $10,000 is warranted for the violation of this condition.

Violation 144 stems from reports of sediment discharges on November 3, 2006. Walt Dragaloski visited the project site during a rain event to review construction storm water BMPs and observed the following: "During construction of the work platform for the south bridge Pier 2, loose soil was pushed over the edge of the bank. The soil cascaded all the way to the toe of the slope, which is below the Ordinary High Water elevation." (AR, exhibit M-Tab 53.) Mr. Dragaloski recommended that the loose soil be removed. (Id.) It is unclear whether efforts were made to clean up the problem. Condition 9 of the water quality certification prohibited unauthorized discharges of construction waste to enter into or be placed where it may be washed by rainfall into waters of the State. (AR, exhibit A-1.) The permit did not authorize pushing loose soil over a bank the stream or areas around the stream. A liability of $10,000 is warranted for this violation.

Violation 150 was identified in early 2007 by Caltrans assistant resident engineer (AR, exhibit M-Tab 26). Caltrans staff reported the discharge of turbid water to Regional Water Board staff on February 21, 2007, five days after evidence of the discharge was discovered. The notification indicated that evidence of fine gray silt was observed in a backflow channel and on the bank below the 100-year flood plain on the west side of the river at the south bridge location during a February 16, 2007, Department of Fish and Game (DFG) site inspection. After interviewing Caltrans staff and a representative of the contractor, Caltrans staff estimated that the discharge occurred six weeks prior to discovery on, or around January 5, 2007. The discharge was thought to have been caused by a rupture of an aerial line suspended over the River. As much as 170 gallons of turbid water discharged to the river. The discharge was not reported to Caltrans staff by the contractor (AR, exhibit M-Tab 74). This violation is particularly disturbing because it was neither discovered nor reported in a timely manner. Only as a result of a DFG inspection was this discharge of sediment identified, despite that fact that it was significant enough to display identifiable residue six weeks post event. (Id.) This violation relies upon the direct observations and reporting of

Caltrans staff onsite and is therefore considered reliable. Further, Caltrans and MCM did not dispute this violation event. (AR, exhibit T-2; H-2 tab 100.) A liability of $10,000 is warranted for this violation.

Violations 152-153 stem from sandblasting of rebar which occurred on two separate occasions on May 23, 2007. Walt Dragaloski notified the Regional Water Board of the unauthorized discharge, as required by the Storm Water Permit. (AR, exhibit M-Tab 77.) "The contractor used sand to sandblast rebar which was extruding from concrete on the North Bridge at Pier 3 without the use of appropriate BMPs, without Caltrans oversight, and in disregard of the direction provided by the Resident Engineer prior to the activity." (Id.) The sand and rebar was not contained and was deposited directly onto the gravel bar in violation of 401 Certification Condition 9. A liability of $10,000 is warranted for these two violations. The Regional Water Board will not impose any additional liability under Condition 7 of the water quality certification for this event. **The Regional Water Board finds support in the record establishing five individual violation events for a total penalty of $40,000.**

<u>Category I Storm Water Permit Violations</u>

The Prosecution Team alleged 141 violations under the Storm Water Permit for a proposed penalty of $450,000. The Regional Water Board finds the proposed penalties excessive in light of the evidence presented and in considering the liabilities already assessed for specific 401 Certification condition violations. Activities regulated by the 401 Certification largely overlap activities subject to Storm Water Permit conditions so that many violations found under the Certification could also be construed as Storm Water Permit violations. For example, unauthorized discharges under 401 Certification Condition 9 were unauthorized because proper BMPs as required under the Storm Water Permit were not in place. Many of the 401 Certification violations were documented as a result of Storm Water Permit implementation. Just as the Regional Water Board declines to impose additional penalties for multiple permit term violations, the Regional Water Board intends to avoid imposing additional penalties under multiple permits for identical or related discharge events. However, Storm Water Permit implementation is vital for adequate water quality protection, and the record contains troubling evidence about the Dischargers' ability and willingness to comply with the Program. For this reason, and based on the evidence presented, the Regional Water Board finds $30,000 liability appropriate for Storm Water Permit violations related to the trestle deck that are independent from 401 Certification violation events.

Federal regulations require discharges of storm water associated with construction activity that disturbs five acres or more to obtain a National Pollutant Discharge Elimination System (NPDES) permit and to implement BMPs that achieve performance standards of Best Available Technology Economically Achievable (BAT) for toxic pollutants and Best Conventional Technology (BCT) for conventional pollutants. (AR, exhibit B-1 at 3.) The Caltrans Storm Water Permit requires Caltrans to implement an *effective* Storm Water Management Plan (SWMP) (Id. at 9 [emphasis added]) that covers construction by Caltrans and construction under contract for Caltrans. (Id. at 17.) Required program elements include: 1) review of the construction site plan; 2) implementation of structural and

nonstructural BMPs; 3) site inspection and enforcement; and 4) education of construction site operators. (Id. at 17-18.)

A site-specific SWPPP is developed for each construction project and Caltrans is responsible for having an *effective* SWPPP. (Id. at 19 [emphasis added].) The SWMP is an integral and enforceable component of the storm water program. The SWMP refers to BMP manuals and Standard Specifications that contain details of BMP implementation. (AR, exhibit B-2.) The permit relies on BMP implementation rather than establishing "end of pipe" effluent limitations to reduce of prevent unauthorized pollutants in discharges. Therefore, a discharger's ability to implement, monitor, and adjust BMPs is crucial for this permitting program to be effective.

The procedures for the proper use, storage, and disposal of materials and equipment on temporary construction pads include providing watertight curbs or toe boards to contain spills and prevent materials, tools, and debris from leaving the platform. (AR, exhibit B-3 at 500-11, 12, 13, M-Tab 81, Construction Site BMP Manual, NS-13.) If a leaking line cannot be repaired, the equipment must be removed from over the water. (Id.) Also, NS-10 requires immediate repair of leaking equipment and removal from the project if leaks cannot be repaired. (Id.; AR, exhibit F-3 tab 8.)

Alleged violations 154-283 are based on alleged inadequate containment of the trestle deck for the entire construction season of 2006, a total of 130 days. The evidence cited by the Prosecution Team shows the containment problem beginning August 23-29, 2006. (AR, exhibit M-Tab 47.) At that time, Dischargers tried caulking the trestle deck but heavy equipment had split the seams. Meanwhile, leaky equipment, as well as construction materials and garbage, discharged or threatened to discharge directly to the river. Dischargers attempted to patch with pieces of plywood. By October 31, 2006, "new wood decking used to complete the false bridge fitted together tightly and sealed the decking adequately. However, the old deck mats employed directly above the river are not as flat or well sealed, and have the potential to allow debris to enter the river." (AR, exhibit M-Tab 51.) Ultimately a fabric barrier was rolled over the deck. (AR, exhibit M-Tab 76.)

Assigning a maximum penalty each day for the entire construction season seems inappropriate in this case, as the evidence shows that efforts were made to improve containment on the trestle deck. While it is true that the permit requires BMPs to be effective, it is reasonable to allow for some amount of trial and error, particularly when documents show that discharged materials were subsequently removed and cleaned up. On the other hand, such an excessive amount effort should not be required by Caltrans and others before the contractor implemented corrective measures. A site visit was conducted by a Caltrans employee reviewing storm water BMPs on November 6. (See AR, exhibit M-Tab 53.) He notes that "[t]he crane is being used on the trestle has leaking fluids. This has been noted many times earlier. The contractor has attached a piece of plastic under the crane, but the plastic catches both oil leaks and storm water. There is evidence on the trestle deck that oil that [sic] has leaked off the plastic. I observed commingled oil with water on the plastic during my site visit. I recommend that the crane be repaired immediately or discontinue its use." (Id. at 286.) MCM was directed to remove the

Manitowoc crane off the deck at night in early November. (AR, exhibit M-Tab 71 at 442.) On December 1st MCM did not want the crane to continuously be moved. ARED notes "Much time has been expended with MCM on SWPP issues. It is apparent that they have ignored many of the issues for containment on the trestle." (AR, exhibit M-Tab 61.)

The SWPPP requires containment of the trestle deck and control of excessive leaking equipment. If excessively leaking equipment cannot be repaired, it must be removed. (AR, exhibit M-Tab 81.) While efforts were made to contain the trestle deck, the record shows that the contractor did not adequately respond to specific direction regarding the Manitowoc crane for over a month. This violates section H(8)(b) of the Storm Water Permit for failure to implement BMPs NS-10 and NS-13 for an extended period of time. (AR, exhibits B-1; B-3.) **Accordingly, the Regional Water Board assesses a total penalty of $30,000 for the non-containment of the trestle deck over an extended period of time**.

The remaining alleged storm water violations 288-294 are not supported by any specifically- referenced evidence. Tab 83 of Prosecution Team's documentary evidence (AR, exhibit M) contains 88 pages of random documents with no direction about where and why they are relevant to the charges. Prosecution Team has the burden of establishing the evidence in the record to support its case and has not done so adequately for the storm water refueling violations.

4. Conclusion

The following table summarizes the total penalties for violations:

Category		Liability
A.	Construction Dewatering	$100,000
B.	Leaky Equipment	$25,000
C.	Slag Discharges	$5,000
D.	Turbid Discharges to the River	$40,000
E.	Insufficient Turbidity Measurements	$112,000
F.	Cementitious Discharges	$50,000
G.	Rubbish and Debris Discharges	$0
H.	Individual Events	$40,000
I.	Storm Water Permit	$30,000
Total Penalty for Violations		**$375,000**

Section IX of the State Water Board's 2002 "Water Quality Enforcement Policy" provides that the Regional Water Board may allow a discharger to satisfy some or all of the penalties in an ACL Order by funding a Supplemental Environmental Project (SEP). Some or all of the penalties assessed in this Order shall be eligible for a SEP if approved by the Executive Officer of the Regional Water Board.

The issuance of this Order is an enforcement action to protect the environment, and is therefore exempt from the provisions of the California Environmental Quality Act (Pub.

Resources Code, §§ 21000-21177) pursuant to title 14, California Code of Regulations, sections 15308 and 15321, subdivision (a)(2).

Any person affected by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with section 13320 of the Water Code and title 23, California Code of Regulations, section 2050. The petition must be received by the State Water Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

IT IS HEREBY ORDERED, pursuant to Water Code section 13385, that: Caltrans is assessed penalties of $375,000 for violations and additional liability of $70,182 for staff costs. Caltrans shall pay a total liability of $445,182 in the following manners:

(a). Pay $30,000 of the assessed liability to the State Water Pollution Cleanup and Abatement Account (CAA) and $445,182 of the assessed liability to the State Waste Discharge Permit Fund within 30 days of the date of this Order; or

(b). Within 30 days of the date of this Order: 1) Pay the minimum $70,182 staff costs and any remaining liability not proposed for a SEP to the CAA and or State Waste Discharge Permit Fund as appropriate; and 2) submit a SEP proposal to the Executive Officer to suspend all or a portion of remaining liability.

Any SEP proposal shall comply with provisions of section IX of the State Water Board's 2002 "Water Quality Enforcement Policy." If the initially proposed SEP is not acceptable, the Executive Officer may allow Caltrans an additional 30 days to submit a new or revised proposal. If the Executive Officer does not approve any proposed SEP, Caltrans shall pay the suspended penalty in full within 30 days. All payments, including money not used for the SEP, must be payable to either the CAA or State Waste Discharge Permit Fund in accordance with allocations identified under section (a). above.

Certification

I, Matthias St. John, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, North Coast Region on March 15, 2012 as amended February 12, 2014.

Original Signed By

_____

Matthias St. John
Executive Officer

Administrative Record Index - ACL Order No. R1-2012-0034
Amended February 12, 2014
Confusion Hill Bypass Project

A. <u>401 Cert and Related Documents</u>

A-1 401 Certification
A-2 Amendment Request
A-3 401 Cert Amendment
A-4 October 30 Notice of Violation
A-5 November 27 Notice of violation

B. <u>Storm Water Permit and Related Documents</u>

B-1Storm Water Permit
B-2SWMP
B-3SWPPP

C. <u>Complaint</u>

D. <u>Post Complaint Correspondence</u>

E. <u>Hearing Notice and Procedures</u>

F. <u>Prosecution Team Submittals</u>

F-1 Case in Chief and Attachments
F-2 Mona Dougherty Declaration
F-3 Kason Grady Declaration
F-4 Julie Macedo Declaration
F-5 Rebuttal and Attachments
F-6 Response and Declarations
F-7 PT Response to Caltrans Evidentiary Objections March 3
F-8 PT Response to Caltrans Evidentiary Objections March 18

G. <u>Caltrans Submittals</u>

G-1Case in Chief and Attachments
G-2Defense Matrix
G-3Rebuttal and Attachments
G-4Caltrans Response to PT Rebuttal
G-5Caltrans Responses to Pre-Hearing Instructions
G-6Cover Letter
G-7Contract with MCM
G-8Standard Specifications 1999

H. MCM Submittals

H-1 Opening Brief
H-2 Opening Brief Attachments
H-3 Rebuttal and Attachments

I. Advisory Team Pre-Hearing Instructions and Correspondence March 9

J. PT Response to AT March 9 Request

J-1 Cover Letter Explaining Submission
J-2 A-2 Chart
J-3 A-3 Chart
J-4 Photo Documents

K. Caltrans and MCM Response to Pre-Hearing Instructions

L. Caltrans Response to PT's Response

M. Prosecution Team Documentary Evidence Binder

N. Prosecution Team Violation Matrix

O. Conceded Violations Summaries

P. Evidentiary Rulings and Correspondence

Q. Caltrans - MCM Contract

R. Post Hearing Notice Correspondence

S. PT Hearing Exhibits

T. Caltrans Hearing Exhibits

T-1 Caltrans Power Point Presentation
T-2 Caltrans Summary of Accepted Violations - Revised June 23, 2011

U. MCM Hearing Exhibits

V. **MCM Petition**

W. **Caltrans Petition**

X. **State Water Board Order WQ 2013-0100**

Y. **State Water Board Order WQ 2014-0015**