California Regional Water Quality Control Board
North Coast Region

Administrative Civil Liability Order No. R1-2008-0008

for

Violations of Clean Water Act, Section 401, Water Quality Certification
and Municipal Storm Water Permit

In the Matter of
California Department of Transportation
Confusion Hill Bypass Project
WDID No. 1B05153WNME

Mendocino County

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

1. On July 15, 1999, the State Water Resources Control Board (SWRCB) adopted a National Pollutant Discharge Elimination System (NPDES) Permit for Storm Water Discharges from the State of California, Department of Transportation Properties, Facilities and Activities, Order No. 99-06-DWQ (Storm Water Permit).

2. The Storm Water Permit covers all municipal storm water and construction activities that require permit coverage conducted by the California Department of Transportation (Caltrans) in California and, therefore, provides construction storm water permit coverage for the Confusion Hill Bypass project.

3. On February 16, 2006, the Regional Water Board Executive Officer issued a Clean Water Act, Section 401, Water Quality Certification (Water Quality Certification) to Caltrans for the Confusion Hill Bypass project.

4. The project is located on Highway 101 in Mendocino County, approximately 18.5 miles south of Garberville and eight miles north of Leggett. Highway 101 currently crosses an active landslide in the area known as Confusion Hill. The purpose of the project is to provide a reliable transportation route around the landslide area by relocating the highway from the east side of the South Fork Eel River to the west side. Relocating the highway requires construction of two new bridges and a new section of highway between the new bridges.

5. The project includes drilling and excavation activities that result in turbid wastewater and sediment that is transported from one side of the South Fork Eel River to the other for disposal through a two-inch diameter water pipe (“transport pipe”).

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6. On May 4, 2007, Caltrans' contractor dismantled the transport pipe and pulled it from one side of the river to the other. The pipe was not capped before dismantling and turbid wastewater was discharged below the ordinary high water mark of the South Fork Eel River (hereafter referred to as "the pipeline discharge").

7. The Regional Water Board received verbal notification of the pipeline discharge from Walt Dragolowski of Caltrans on May 4, 2007. Mr. Dragolowski reported that the pipe had not been flushed with clean water nor capped before being dismantled and pulled to the other side of the river. Mr. Dragolowski directed the contractor to clean the discharged wastewater from the rocks on the gravel bar by hand without mechanized equipment. In comments to the Administrative Civil Liability Complaint submitted on October 25, 2007, Caltrans reported that the clean up activities did not take place except in the area above the flood plain, which is presumably above the ordinary high water mark.

8. On May 14, 2007, the Regional Water Board received a fax from the Office of Emergency Services (OES) reporting the pipeline discharge. OES had received notification from Karen Maurer, a California Department of Fish and Game warden. Ms. Maurer reported that 170 gallons of gray slurry with sediment was discharged to the South Fork Eel River when the pipe was dismantled and dragged through the river.

9. On June 11, 2007, Regional Water Board staff (Staff) received the written notice of the pipeline discharge. The notice of discharge was written by Justin Porteous of MCM Construction, Inc. and submitted to the Regional Water Board by Caltrans personnel. Mr. Porteous estimated that 15 to 25 gallons of turbid wastewater and drilling spoils were discharged to the South Fork Eel River.

10. Staff received conflicting and confusing reports on the pipeline discharge. It is Caltrans' responsibility to provide information clearly and accurately, with events described in detail and impacts to water quality plainly identified. One of the primary conflicts in the reports is the location of the discharge. In comments submitted on October 25, 2007, Caltrans stated that turbid wastewater was discharged to the gravel bar and an isolated pool, rather than to the flowing water of the South Fork Eel River, as the river was in a low flow period.

11. The gravel bar and the isolated pool are below the ordinary high water mark of the South Fork Eel River and are therefore within waters of the United States, which are also waters of the State. Discharges to the gravel bar would likely be washed into the river after the next rainfall. Not only will the large isolated pool eventually commingle with the river during higher flow periods, but the isolated pool itself has beneficial uses on its own that must be protected from discharges of waste. The California Department of Fish and Game identified the isolated pool as containing fish and amphibians, including a sighting of a California red-

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legged frog, an amphibian identified as threatened under the federal Endangered Species Act. The pipeline discharge, whether it occurred in the flowing water or on a gravel bar and isolated pool, was prohibited by the Water Quality Certification, as described in paragraph 12, below.

12. The following facts and applicable legal requirements are the basis for the alleged violations in this matter:

a. Caltrans' Water Quality Certification prohibits discharge of debris, soil, silt or other organic or earthen material to waters of the State, or discharge in which the wastes identified above may be washed by rainfall into waters of the State, unless specifically allowed by the Water Quality Certification. The conditions of the Water Quality Certification that were violated by the pipeline discharge include:

i. Additional Condition 7. Adequate best management practices for sediment and turbidity control shall be implemented and in place prior to, during, and after construction in order to ensure that no silt or sediment enters surface waters.

ii. Additional Condition 9. 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.

iii. Additional Condition 14. Project activities shall comply with provisions in the North Coast Region Water Quality Control Plan (Basin Plan).

b. The Water Quality Certification does not provide authorization for the May 4, 2007 pipeline discharge.

c. Conditions of the Storm Water Permit that were violated by the pipeline discharge include the following:

i. General Discharge Prohibition A.1. Any discharge from Caltrans rights-of-way or Caltrans properties, facilities, and activities within those rights-of-way that is not composed entirely of storm water to waters of the United States is prohibited unless authorized pursuant to Section B of the NPDES Permit.

ii. General Discharge Prohibition A.4. The dumping, deposition, or discharge of waste by Caltrans directly into waters of the State or adjacent to such waters in any manner that may allow its being

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transported in the waters is prohibited unless authorized by the RWQCB[1].

iii. General Discharge Prohibition A.6. The discharge of sand, silt, clay , or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity, or discoloration in waters of the State or which unreasonably affect or threaten to affect beneficial uses of such waters, is prohibited.

iv. Program Evaluation and Reporting Provision K. The Storm Water Management Plan (SWMP), prepared by Caltrans as required by the Storm Water Permit, and Provision K.3.a of the Storm Water Permit require that Caltrans notify the Regional Water Board verbally within five days and with written follow-up within thirty days after discovery of violations. The Storm Water Permit requires Caltrans to implement the reporting program specified in its SWMP.

In the SWMP section 9.4.1., Noncompliance Reporting Plan for Municipal and Construction Activities, Caltrans identifies violations that must be reported according to the schedule above, as those discharges that result in violations of narrative and numeric prohibitions and limitations of the Storm Water Permit, and discharges that violate requirements of Clean Water Act , 404 permits and 401 water quality certifications.

Caltrans notified Staff verbally of the discharge the same day as the discharge occurred, however, the required written notification was not submitted in a timely manner. As the discharge occurred on May 4, 2007, to comply with the Storm Water Permit, Caltrans needed to submit written notification of the violation by June 3, 2007. Caltrans submitted the written notification on June 11, 2007.

d. Provisions of the Basin Plan that are applicable to the project are as follows:

Discharge Prohibitions:

The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.

[1] RWQCB is an acronym used by the State Water Resources Control Board to refer to the Regional Water Quality Control Boards.

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The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.

13. California Water Code section 13385, subdivision (a)(1), (2), and (4) provides the basis for civil liability. Subdivision (a)(1) provides for civil liability against any person who violates California Water Code section 13376, which requires a person discharging pollutants or dredged or fill material into navigable waters of the United States to file a report of waste discharge. Subdivision (a)(2) provides for civil liability against any person who violates any NPDES permit or water quality certification. Subdivision (a)(4) provides for imposition of civil liabilities against any person who violates any Basin Plan prohibition issued pursuant to California Water Code section 13243 for a Basin Plan or order for administrative enforcement issued pursuant to Article 1 of Chapter 5 of Division 7 of the California Water Code. As detailed above, Caltrans violated the discharge prohibitions and requirements of the Water Quality Certification, Storm Water Permit, and Basin Plan.

14. California Water Code section 13385, subdivision (c) provides that the maximum amount of civil liability that may be imposed by the Regional Water Board is the sum of 1) $10,000 for each day in which the violation occurs, and 2) where there is discharge in excess of 1,000 gallons that is not susceptible to cleanup or is not cleaned up, an additional liability of $10 per gallon may be assessed. Although the Regional Water Board received conflicting reports of the volume of wastewater that was discharged on May 4, 2007, both wastewater volumes reported were well under 1,000 gallons, and, therefore, no additional liability beyond the maximum of $10,000 per day could be assessed.

15. The maximum civil liability that could be imposed against Caltrans in this matter is calculated as follows:

Violation	Number of Days (at $10,000/day)	Maximum Civil Liability
wastewater discharge	1 (May 4, 2007)	$10,000
failure to submit written report due June 3, 2007	4 (June 5 – June 8, 2007)	$40,000
Total Potential Civil Liability		$50,000

16. In determining the amount of any civil liability, pursuant to California Water Code section 13385, subdivision (e), the Regional Water Board is required to take into account the nature, circumstances, extent, and gravity of the violation; and, with respect to the violator, the ability to pay, any prior history of violations, the degree

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of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. The Regional Water Board is also required to consider the requirement in this section that states that, 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.

a. **Nature, circumstances, extent and gravity of the violation:** The wastewater discharge could have been easily avoided through more careful draining and cleaning of the pipeline and capping the pipeline before it was pulled across the South Fork Eel River.

   The United States Environmental Protection Agency established a total maximum daily load (TMDL) for the South Fork Eel River in 1999 for sediment and temperature. The TMDL confirmed the adverse effects to the beneficial uses of the South Fork Eel River from sediment and that discharges of sediment have a deleterious effect to the river.

   The South Fork Eel River is within the habitat range of coho salmon (*Oncorhynchus kisutch*), Chinook salmon (*Oncorhynchus tshawytscha*) and steelhead (*Oncorhynchus mykiss*), each listed under the federal Endangered Species Act or the California Endangered Species Act. Populations of salmonids in California have declined substantially in the last century. Elevated sediment loads are known to adversely affect salmonids. Sediment delivery to watercourses is known to have substantially increased in this watershed as a result of human activities. Beneficial uses related to aquatic life, including salmonids, are the most sensitive to sediment discharges.

   The Storm Water Permit and Caltrans' own SWMP require submittal of a written report of violations of permit conditions and of water quality certification conditions within thirty days of identification of the noncompliance. Caltrans discovered the pipeline discharge on May 4, 2007, but failed to submit the written report until June 11, 2007. Although a verbal report of the pipeline discharge was given by Caltrans on the day of its occurrence, information provided in the verbal notification was brief and incomplete. Staff needed the written report to evaluate the significance of water quality impacts from the pipeline discharge and to initiate enforcement, if needed. Staff contacted Caltrans personnel twice by email and several times by telephone requesting submittal of the written report. Staff requests for the written report began on May 4, 2007, and continued approximately at weekly intervals until the report was submitted over a month later. The reporting schedule in the Storm Water Permit is generous, but even with that and multiple requests from Regional Water Board staff, Caltrans failed to submit the report on time.

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As recognized by the SWRCB Water Quality Enforcement Policy (Enforcement Policy), accurate, honest reporting of violations is a cornerstone to the State's water quality program. The Enforcement Policy states that:

"The foundation of the State's regulatory program relies on dischargers to accurately and honestly report information required by the Boards. Knowingly falsifying or knowingly withholding such information that would indicate violations of requirements contained in board orders, plans and policies, erodes the State's regulatory program and places the health of the public and the environment at risk. The SWRCB views these violations as very important and strongly encourages the RWQCBs to respond to any instance of falsification or withholding of required information in accordance with this policy.

"The discharger is responsible for compliance with orders and reporting of required information, including violations, to the SWRCB or RWQCB. The discharger is also responsible for ensuring that any employees, agents, or contractors acting on its behalf report required information truthfully, accurately and on time.

"Enforcement of statutes pertaining to falsification or withholding of required information should be a high priority."

It is Caltrans' responsibility to provide information clearly and accurately, with events described in detail and impacts to water quality plainly identified. Not only was the report late, but it was difficult to determine the facts of the incident from the information provided by the report.

Caltrans has failed to report violations of Regional Water Board orders that occurred on other projects and these are discussed below. Staff has additionally discovered that Caltrans failed to report other violations that occurred at the Confusion Hill Bypass project previous to the violation addressed in this ACL Order and this is also discussed further in section d below. The Regional Water Board warned Caltrans in writing of the consequences of not complying with reporting requirements prior to the pipeline discharge, but has rarely taken more serious enforcement action on violations of reporting requirements.

b. **Susceptibility to Cleanup or Abatement and Voluntary Cleanup Efforts Undertaken:** Caltrans personnel verbally reported to Staff that the contractor had been directed to clean any rocks on the gravel bar of sediment that could be cleaned by hand without mechanized equipment. In Caltrans comments submitted on October 25, 2007, however, it was reported that the only cleanup efforts occurred at a location above the flood plain, which is presumably outside of waters of the State.

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c. **Violator's ability to pay:** Staff understands that the Confusion Hill Bypass project will cost between $70 million and $77 million. The maximum potential civil liability is small in comparison to the cost of the project. Staff has no information to indicate that Caltrans would be unable to pay the administrative civil liability.

d. **Prior history of violations:**

Confusion Hill Bypass Project Violations

On October 30, 2006, the Regional Water Board issued Caltrans the first notice of violation for the Confusion Hill Bypass project. The violations identified included turbid water discharges to the South Fork Eel River on August 29, and August 30, 2006, and a discharge of concrete wastewater to an unlined basin within waters of the State on September 29, 2006.

Additionally, the October 30, 2006, notice of violation described violations discovered by Staff on an inspection of the site on October 6, 2006, including a basin used routinely to settle turbid water within 100 feet of the active channel in violation of the Water Quality Certification. During the October 6, 2006 inspection, Staff was informed that the same unlined basin was routinely used to dispose of concrete wastewater, another violation of the Water Quality Certification. Also during the inspection, Staff witnessed welding and cutting activities occurring within waters of the State on the gravel bar and above waters of the State on the trestle bridge without the use of containment best management practices (BMPs). Steel cuttings, welding slag and other debris littered the gravel bar and were allowed to fall into the river from the trestle bridge. This violated Additional Condition nine of the Water Quality Certification. Finally, also in violation of the Water Quality Certification, Staff observed heavy equipment on the gravel bar leaking excessive fluid and without adequate BMPs to contain the unauthorized leakage.

On November 27, 2006, the Regional Water Board issued to Caltrans a combined notice of violation for violations of the Confusion Hill Bypass project Water Quality Certification and Storm Water Permit and California Water Code Section 13267 Order requiring submittal of a technical report. This second notice of violation included violations such as turbid discharges to the river, failure to report violations of the Water Quality Certification and Storm Water Permit, inadequate BMPs to control turbid discharges and the inappropriate uses of BMPs, for example using a silt fence within the flowing water of the river to control a turbid plume that appeared to be caused by heavy equipment pushing gravel and silt into the river.

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The violations identified in the November 27, 2006, notice of violation came to Staff's attention through reports and photographs provided by the California Department of Fish and Game (CDFG). The violations had not been reported to the Regional Water Board by Caltrans.

The California Water Code Section 13267 Order required Caltrans to submit a technical report to the Regional Water Board regarding these violations and others. Staff had learned from CDFG staff of the existence of biological monitoring reports created for the project by a Caltrans contractor during the previous summer. Staff required their submittal within the California Water Code 13267 Order. The biological monitoring reports and other Caltrans documents submitted in response to the California Water Code 13267 Order identified many violations of the Water Quality Certification and Storm Water Permit that Caltrans had failed to report to the Regional Water Board. The types of violations that were not reported include sediment discharges, oil and other machinery fluid discharges, discharges of concrete wastewater and discharges of welding slag and cuttings to waters of the State.

Staff is currently evaluating these additional violations that are not included in this Order, and is drafting supplementary enforcement actions to address them.

Other Relevant Violations

On November 1, 2005, the Regional Water Board issued a Cleanup and Abatement Order to Caltrans for the Dry Creek Bridge replacement project. Caltrans violated the Water Quality Certification issued for the project by allowing equipment staging, material stockpiles and refuse disposal within waters of the State without a permit. Staff discovered the violations of the Water Quality Certification from a citizen complaint. Caltrans had not reported the violations.

On December 28, 2005, the Regional Water Board issued an Administrative Civil Liability Complaint to Caltrans for violations of the Van Duzen River Bridge replacement project Water Quality Certification. The violations included turbid discharges to the Van Duzen River, inadequate BMPs to protect water quality, leaks and spills of petroleum products within waters of the State, the unauthorized discharge of fill materials to waters of the State, failure to comply with the authorized work schedule required to protect wildlife and endangered species, and failure to report these violations as required by the Water Quality Certification. Caltrans paid an administrative civil liability of $101,000.

On April 7, 2006, the Regional Water Board issued a California Water Code section 13267 Order to Caltrans to require the submittal of information related

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to the disposal of landslide material into the South Fork Eel River at Confusion Hill. Caltrans failed to apply for a permit for these activities or to notify the Regional Water Board of the discharges until Staff discovered the sidecasting activities. The Regional Water Board received a complaint from a downstream water supply system that water quality monitoring revealed anomalous turbidity readings in the South Fork Eel River that may have been related to the sidecasting activities.

e. **Degree of culpability:** Staff has worked closely with Caltrans on the Confusion Hill Bypass project, attempting to ensure compliance with the Water Quality Certification and the Storm Water Permit. Staff has spent considerable time providing assistance to Caltrans on the project by amending the Water Quality Certification at Caltrans' request, performing inspections, and providing guidance for compliance by email and telephone. Staff also issued two written notices of violation and a California Water Code Section 13267 Order to address previous violations associated with the project.

The violations included in this Order were easily avoidable through the use of adequate BMPs and timely reporting of the violation. Caltrans had been warned by the two previous notices of violation that many of the BMPs utilized at Confusion Hill were inadequate and had resulted in violations of the Water Quality Certification and Storm Water Permit.

Staff contacted Caltrans at least two times by email and three times by telephone to request submittal of the written notification of the May 4, 2007 pipeline discharge required by the Storm Water Permit. Even though the report was prepared by the contractor on May 7, 2007, it was not submitted until June 11, 2007.

f. **Economic benefit:** Staff assumes that Caltrans or its contractor received economic benefit by failing to implement adequate BMPs, but that the economic benefit gained was small. Staff estimates the economic benefit gained by the violations to be $300 for staff time and equipment to properly flush and cap the pipeline before dismantling.

g. **Other matters that justice may require:** Staff has expended and continues to expend considerable time attempting to bring the Confusion Hill Bypass project into compliance with the Water Quality Certification and Storm Water Permit and address violations. Staff costs for this enforcement action are estimated to be $7,437.

17. On July 17, 2007, the Regional Water Board Assistant Executive Officer issued an Administrative Civil Liability Complaint in response to the pipeline discharge.

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On October 25, 2007, Caltrans requested a hearing on this Order. The hearing has been properly noticed.

18. The adoption of this Order is an enforcement action to protect the environment and is, therefore, exempt from provisions of the California Environmental Quality Act (Public Resources Code sections 21000 et seq.) pursuant to title 14, California Code of Regulations, sections 15308 and 15321, subdivision (a)(2).

THEREFORE, IT IS HEREBY ORDERED, pursuant to California Water Code Section 13385, that:

1. Caltrans shall be assessed a total civil liability of $50,000 to be paid to the State Water Pollution Cleanup and Abatement Account within 30 days of the adoption of this Order.

2. Not withstanding the adoption of this Order, the Regional Water Board shall retain the authority to assess supplementary penalties for additional violations of Caltrans' Water Quality Certification, Storm Water Permit, and the Basin Plan.

Certification

I, Robert R. Klamt, Interim 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 6, 2008.

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Robert R. Klamt
Interim Executive Officer

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