

REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE ("Agreement") is made and entered into by the Assistant Executive Officer of the Regional Water Quality Control Board, North Coast Region and his Prosecution Team, ("Prosecution Team") and the California Department of Transportation ("Caltrans") (collectively the "Parties") with reference to the following facts:

RECITALS

1. This Agreement is entered into by the Prosecution Team and Caltrans to resolve by consent the alleged failure to report discharge violations occurring at the Confusion Hill Bypass Construction Project ("Project") between August 2006 and March 2007, as set forth and detailed in Exhibit A attached hereto and incorporated herein by this reference. This Agreement resolves any and all liability for each reporting violation claim that is or could have been set forth in Exhibit A, which violations constitute solely failures to report alleged discharges ("Reporting Violations"). This Agreement settles only the Reporting Violations detailed in Exhibit A, and it is contemplated by the Parties that an administrative civil liability complaint will be issued for the alleged predicate discharge violations. The Parties acknowledge that this Agreement must be approved pursuant to an Order adopted by the California Regional Water Quality Control Board, North Coast Region (the "Regional Water Board") after due notice and opportunity for public comment. A true and correct copy of the [Proposed] Administrative Civil Liability Order on Stipulation and Settlement Agreement approved as to form by the Parties (the "Order"), is attached hereto as Exhibit B.
2. Caltrans contracted to construct the Project, located on Highway 101 in Mendocino County, approximately 18.5 miles south of Garberville and 8 miles north of Leggett. Confusion Hill is an active landslide area. The purpose of the Project was to provide a reliable transportation route around the landslide area by permanently relocating the highway from the east side of the South Fork of the Eel River to the west side.
3. The Prosecution Team, in general, contends that Caltrans is responsible for at least 160 separate discharge violations, and that it failed to report those violations for a cumulative total of 516 days. The alleged discharges upon which the Reporting Violations are predicated, and which are the focus of a proposed bifurcated Administrative Civil Liability Complaint include, but are not limited to, discharges of petroleum products into the Eel River; discharges of petroleum products onto a gravel bar located in or near the Eel River; discharges of construction dewatering material to the gravel bar; turbidity discharges and discharges involving cementitious materials (the "Discharge Violations"). Caltrans denies some or all of the alleged illicit Discharge Violations.

4. The Prosecution Team further contends that Caltrans' alleged failures to report the alleged discharges constitute violations of State Water Resources Control Board Order No. 99-06-DWQ; National Pollutant Discharge Elimination System (NPDES) Permit No. CAS000003 for Storm Water Discharges and Waste Discharge Requirements for The State of California, Department of Transportation Properties, Facilities, and Activities (the "General Permit"); and the Clean Water Act, Section 401 Water Quality Certification ("Certification") issued to Caltrans for the Confusion Hill Bypass Project, dated February 16, 2006. The alleged Reporting Violations warrant a maximum civil liability of Fifty-One Million Six Hundred Thousand Dollars (\$51,600,000).
5. In settling this matter, Caltrans does not admit to liability as to any of the Reporting Violations alleged in Exhibit A, or to any of the Discharge Violations.
6. The Parties believe that settlement of this matter by Caltrans' payment of Four Hundred Thousand Dollars (\$400,000) to the State Water Resources Control Board Cleanup and Abatement Account and as otherwise provided below is in the best interest of the people of the State.

AGREEMENT

NOW THEREFORE, in exchange for their mutual promises and for other good and valuable consideration specified herein, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The Parties agree to support, advocate for, and promote the proposed Order before the Regional Water Board.
2. Caltrans hereby agrees to pay Four Hundred Thousand Dollars (\$400,000) to the Cleanup and Abatement Account no later than 30 days following the Regional Water Board's adoption of the Order approving this Agreement.
3. Contingent only upon the Regional Water Board's adoption of the Order, this Agreement is effective and binding on the Parties upon its execution by both.
4. In consideration of Caltrans' compliance with this Agreement, the Prosecution Team hereby agrees not to initiate any administrative or judicial enforcement actions against Caltrans for the Reporting Violations alleged and detailed in Exhibit A attached hereto.
5. Subject to the Regional Water Board's adoption of the Order, the Assistant Executive Officer has the authority to execute this Agreement in accordance with California Water Code Section 13323, Government Code Section 11415.60 and all applicable law. Caltrans warrants that the person signing below has the legal authority to bind it to the terms of this Agreement.

6. Caltrans has been informed of the rights provided by California Water Code Section 13323, subdivision (b), and hereby waives its right to a hearing before the Regional Water Board as to the Reporting Violations.
7. Caltrans hereby waives its right to petition the Regional Water Board's adoption of the Order or its approval of this Agreement for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
8. Caltrans understands that this Agreement and the proposed Order approving this Agreement must be noticed for a 30-day public review period, the timing of which shall be consistent with the provisions set forth below in Paragraph 16 of this Agreement. In the event objections are raised during the public comment period the Regional Water Board or the Executive Officer may, under certain circumstances, require a public hearing regarding the proposed Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the Agreement as necessary or advisable under the circumstances. Caltrans agrees that it will not rescind or otherwise oppose the effectiveness of this Agreement unless substantial changes to the proposed Order are made by the Regional Water Board and the Parties' meet and confer efforts fail. In the event the Regional Water Board does not approve the Agreement and adopt the proposed Order, Caltrans further agrees to waive any and all claims of bias with respect to the Regional Water Board Members and/or its advisory team should the matter proceed to a contested hearing on the Reporting Violations. Caltrans' waiver of bias shall be null and unenforceable should, at any time prior to the full and final resolution of the proposed Reporting Violations and Discharge Violations, any member of the Prosecution Team be appointed to or act as a Regional Board Member, and/or join or become affiliated with the Board's Advisory Team. The Prosecution Team represents that it will act diligently and in good faith to notify Caltrans if any member of the Prosecution Team is appointed to or acts as a Regional Board Member, and/or joins or becomes affiliated with the Board's Advisory Team.
9. Caltrans understands that payment in accordance with this Agreement is not a substitute for compliance with applicable laws, and that future violations of the type alleged and detailed in Exhibit A may subject it to further enforcement, including additional administrative civil liability.
10. The Parties agree that neither this Agreement, the accompanying Stipulated Order, nor any payment pursuant to the Order, shall constitute evidence of, or be construed as a finding, adjudication, or acknowledgment of any fact, law or liability against Caltrans, nor shall either be construed as an admission of violation of any law, rule, permit, or regulations by Caltrans. However, this Order and/or any actions or payment pursuant to the Order may constitute evidence in actions seeking compliance with this Order.

11. If any portion of this Agreement is determined not to be enforceable, the entire Agreement shall become null and void.
12. This Agreement may be executed in counterparts and by facsimile signature.
13. The Parties to the Agreement are represented by counsel, and agree that this Agreement shall not be construed against the Party preparing it, but shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.
14. This Agreement shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications to the Agreement must be in writing and signed by all Parties.
15. Each Party to this Agreement shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
16. Publication of this Agreement, the proposed Order approving this Agreement, and all Exhibits shall not occur until the earlier of the day after the Regional Water Board hearing regarding the bifurcated Administrative Civil Liability Complaint involving the Discharge Violations, or, in the event there is no such hearing, the day upon which a settlement agreement and/or proposed order regarding the Discharge Violations is made public. Prior to publication, this Agreement, the proposed Order approving this Agreement, and all Exhibits shall be considered "records pertaining to pending litigation" under the California Public Records Act, and thus exempt from disclosure under Government Code section 6254(b). It is contemplated by the Prosecution Team that the Administrative Civil Liability Complaint involving the Discharge Violations will be issued in or about August, 2009, and will be tentatively set for hearing before the North Coast Regional Water Board in or about October, 2009.
17. The Parties agree that the procedure contemplated for the adoption of the proposed Order by the Regional Water Board and review of this Agreement by the public is lawful and adequate. In the event procedural objections are raised prior to the proposed Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
18. Caltrans agrees and covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective officers on the dates set forth, and this Agreement is effective as of the most recent date signed.

California Regional Water Quality Control Board
North Coast Region

By: Original document signed

Its: Assistant Executive Officer 11/4/09

Date: _____

Approved as to form: original document signed

Its: Counsel for the California Regional Water Quality Control Board
North Coast Region

Date: 11/2/09

State of California, Department of Transportation

By: Original documents signed

Its: District Director, District One

Date: September 22, 2009

By: Original documents signed

Its: North Region Construction Manager West

Date: 9/22/09

Approved as to form: Original document signed

Its: Attorney, Department of Transportation Legal Division

Date: 10.12.09

EXHIBIT A

Date	Description	Date Notified	Notification Type	# Days Between Event and Notification	# Days Late	Maximum Potential Penalty
8/16/2006	Hydraulic Fluid Spill on Gravel bar	11/20/2006	BMR CD	96	66	\$660,000
8/21/2006	Constr Dewater to gravel bar	5/14/2007	Appendix BMR CDs	266	236	\$2,360,000
8/22/2006	Discharge of Oil to gravel bar	12/14/2006	Walt's inspection	114	84	\$840,000
8/29/2006	Oil Leak on Gravel Bar	5/14/2007	Appendix BMR CDs	258	228	\$2,280,000
8/29/2006	Cement Discharge to Iso B	12/14/2006	Binder	107	77	\$770,000
8/29/2006	Cementitious discharge to gravel bar (footing)	12/14/2006	Cover Letter (Binder)	107	77	\$770,000
8/29/2006	prolonged Dewatering Discharge to Iso B	11/20/2006	BMR CD	83	53	\$530,000
8/29/2006	Prolonged Dewatering Discharge to River	10/6/2006	Fax: Karen Spliethof	38	8	\$80,000
8/30/2006	Concrete Washout	5/14/2007	Appendix BMR CDs	257	227	\$2,270,000
8/30/2006	Constr Dewater to gravel bar (Iso B)	11/20/2006	BMR CD	82	52	\$520,000
8/30/2006	Prolonged Dewatering Discharge to River	10/6/2006	Fax: Karen Spliethof	37	7	\$70,000
8/31/2006	Discharge to Isolated Pool B	12/14/2006	Final BMR	105	75	\$750,000
8/31/2006	Constr Dewater to gravel bar	12/14/2006	Final BMR	105	75	\$750,000
9/1/2006	Cementitious discharge to river	10/6/2006	Fax: Karen Spliethof	35	5	\$50,000
9/5/2006	Cementitious discharge to gravel bar	5/8/2007	Engr Diaries	245	215	\$2,150,000
9/7/2006	Discharge to Isolated Pool B	5/8/2007	Engr Diaries	243	213	\$2,130,000
9/7/2006	Discharge from Iso Pool B to River	5/8/2007	Engr Diaries	243	213	\$2,130,000
9/7/2006	Cement Discharge through CSP to River	5/8/2007	Engr Diaries	243	213	\$2,130,000
9/9/2006	Discharge to River: Compressed air in footing	11/20/2006	BMR CD	72	42	\$420,000
9/11/2006	Discharge to River	5/8/2007	Engr Diaries	239	209	\$2,090,000
9/13/2006	Cementitious discharge to gravel bar	12/14/2006	Final BMR	92	62	\$620,000
9/15/2006	Welding Slag	5/8/2007	Engr Diaries	235	205	\$2,050,000
9/21/2006	Welding Slag	12/14/2006	Walt's inspection	84	54	\$540,000
9/22/2006	Attachment K submitted late (River Crossing)	12/14/2006	BMR	83	53	\$530,000
9/27/2006	Oil Leak on trestle (6:26 AM)	12/14/2006	Final BMR	78	48	\$480,000
9/28/2006	Attachment K submitted late	12/14/2006	BMR	77	47	\$470,000
9/28/2006	CSP Dewatering: Discharge to Iso B	5/14/2007	BMR	228	198	\$1,980,000
9/29/2006	Discharge to River: #3FTG	12/14/2006	Binder BMR	76	46	\$460,000

9/29/2006	Discharge to River #4FTG	12/14/2006	Binder BMR	76	46	\$460,000
9/29/2006	Cementitious discharge to gravel bar	12/14/2006	Binder: Engr Diaries	76	46	\$460,000
10/3/2006	Discharge to gravel bar	5/8/2007	Engr Diaries	217	187	\$1,870,000
10/5/2006	Oil Leak on Gravel Bar	5/8/2007	Engr Diaries	215	185	\$1,850,000
10/7/2006	Constr Dewater to gravel bar	11/20/2006	BMR CD	44	14	\$140,000
10/7/2006	Discharge to River 2nd event	11/20/2006	BMR CD	44	14	\$140,000
10/7/2006	Discharge to River 3rd event	12/14/2006	Binder: Engr Diaries	68	38	\$380,000
10/17/2006	Steel Cutting	11/20/2006	BMR	34	4	\$40,000
10/18/2006	Steel Cutting	5/14/2007	Appendix BMR CDs	208	178	\$1,780,000
10/18/2006	Insufficient Turbidity Measurements (401)	11/20/2006	BMR CD	33	3	\$30,000
10/20/2006	Discharge to River: Concrete Seal Pour	11/20/2006	BMR CD	31	1	\$10,000
10/20/2006	Cementitious discharge to land	11/20/2006	BMR CD	31	1	\$10,000
10/24/2006	Steel Cutting	5/8/2007	Engr Diaries	196	166	\$1,660,000
10/25/2006	Steel Cutting	5/8/2007	Engr Diaries	195	165	\$1,650,000
10/26/2006	Steel Cutting	5/8/2007	Engr Diaries	194	164	\$1,640,000
10/28/2006	Oil Leak on Gravel Bar	5/14/2007	Appendix BMR CDs	198	168	\$1,680,000
10/30/2006	Oil Leaks on Trestle and Roads	5/14/2007	Appendix BMR CDs	196	166	\$1,660,000
11/1/2006	Welding Slag	5/14/2007	Appendix BMR CDs	194	164	\$1,640,000
11/2/2006	Attch K: Stormwater Sediment Discharge	12/14/2006	Binder:	42	12	\$120,000
11/3/2006	Oil Leak on Trestle	5/8/2007	Engr Diaries	186	156	\$1,560,000
11/3/2006	Sediment Discharge to River	5/8/2007	Engr Diaries	186	156	\$1,560,000
11/13/2006	Constr Dewater to gravel bar	5/8/2007	Engr Diaries	176	146	\$1,460,000
1/5/2007	Turbid Discharge to River	2/21/2007	Email Notification	47	17	\$170,000
3/7/2007	Constr Dewater to gravel bar	5/8/2007	Engr Diaries	62	32	\$320,000
Total						\$53,170,000

EXHIBIT B

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION**

5550 Skylane Boulevard, Suite A
Santa Rosa, CA 95403-1072

In the matter of:)

The State of California,)
Department of Transportation,)
Confusion Hill Bypass Project)

) Order No. R1-2012-0054
) **[Proposed] Administrative Civil Liability**
) **Order**
) **On Stipulation and Settlement Agreement**

This Stipulated Administrative Civil Liability Order (hereafter “Stipulated Order”) is issued in reference to alleged reporting violations committed by the California Department of Transportation with respect to its Confusion Hill Bypass Construction Project. The parties to this proceeding are the Assistant Executive Officer of the Regional Water Quality Control Board, North Coast Region, and his Prosecution Team (“Prosecution Team”) and the California Department of Transportation (“Caltrans”) (Collectively “Parties”). This Stipulated Order is presented to the California Regional Water Quality Control Board, North Coast Region (“Regional Water Board”) for adoption as an Order by settlement under Government Code section 11415.60 and all applicable law.

The Regional Water Board is hereby presented with a proposed settlement of the Prosecution Team’s claims, which are summarized below. The proposed Settlement Agreement, a true and correct copy of which is attached hereto as Exhibit A, has been developed during negotiations between the Parties’ representatives, and represents a mutually agreed-upon resolution of the Prosecution Team’s claims by the payment of an administrative civil liability in the amount of Four Hundred Thousand Dollars (\$400,000) to the State Water Resources Control Board Cleanup and Abatement Account within thirty (30) days of issuance of this Order by the Regional Water Board.

The Parties have determined that the terms of this Order are appropriate, and recommend that the Regional Water Board issue this Order to effectuate the proposed Settlement Agreement. Having provided public notice of the proposed Settlement Agreement and an opportunity for public comment, the Regional Water Board finds the following:

1. The California Department of Transportation contracted to construct the Confusion Hill Bypass Project (“Project”), located on Highway 101 in Mendocino County. In the area of the Project, Highway 101 crosses an active landslide area known as Confusion Hill. The purpose of the Project was to provide a reliable transportation route around the landslide area by permanently relocating the highway from the east side of the South Fork of the Eel River to the west side. Relocating the highway required the construction of two new bridges and a new section of highway connecting the bridges. The Eel River is a water of the United States and of the State of California.

2. Clean Water Act Section 301 prohibits discharging pollutants without a National Pollutant Discharge Elimination System (NPDES) Permit. Clean Water Act Section 401(a)(1) requires every applicant for an NPDES Permit for any activity that may result in a discharge of pollutants to a water of the United States to obtain a State Water Quality Certification that the proposed activity will comply with State water quality standards, or to obtain a waiver from such Certification.
3. The State Water Resources Control Board issued Order No. 99-06-DWQ, and NPDES Permit No. CAS000003 for Storm Water Discharges and Waste Discharge Requirements for the State of California, Department of Transportation Properties, Facilities, and Activities (the "General Permit"). The General Permit regulates storm water discharges associated with Caltrans' construction activities, including those at the Confusion Hill Bypass Project. In relevant part, the General Permit specifically requires that Caltrans notify the Regional Water Board of noncompliance within 5 working days of a discharge, and in writing within 30 days.
4. On February 16, 2006 (as amended on April 18, 2006), the Regional Water Board issued a Clean Water Act, Section 401 Water Quality Certification (the "Certification") for the Project. The Certification prohibits discharges into and/or that threaten the Eel River. The Certification further requires that the Eel River be monitored for turbidity, and that the Regional Water Board be notified within 1 hour if turbidity levels in the Eel River are greater than 20% above background 100 feet downstream of the source of the turbidity.
5. The Prosecution Team contends that between August 2006 and March 2007, Caltrans experienced at least 160 separate unpermitted discharge violations that were not reported as required by the General Permit and/or the Certification ("Reporting Violations"). The Prosecution Team further contends that the Reporting Violations resulted in a total of 516 cumulative days of violation, and a concomitant maximum administrative civil liability under California Water Code sections 13385(a)(4) and 13385(a)(5) of Fifty-One Million, Six Hundred Thousand Dollars (\$51,600,000). A detailed description of the alleged Reporting Violations is attached hereto as Exhibit B and is incorporated herein by this reference. Caltrans denies some or all of the alleged Reporting Violations and/or denies that the General Permit and/or Certification require reporting of some or all of the alleged discharge violations.
6. Under California Water Code Section 13385, the minimum liability the Regional Water Board may impose is recovery of the economic benefit (if any) derived from the Reporting Violations. The economic benefit, if any, derived by Caltrans solely from the Reporting Violations does not exceed the recommended Four Hundred Thousand Dollar (\$400,000) administrative civil liability.

7. Neither this Stipulated Order, nor any payment pursuant to the Order, shall constitute evidence of, or be construed as a finding, adjudication, or acknowledgment of any fact, law or liability against Caltrans, nor shall either be construed as an admission of violation of any law, rule, permit, or regulations by Caltrans. However, this Order and/or any actions or payment pursuant to the Order may constitute evidence in actions seeking compliance with this Order.
8. In accepting the proposed Settlement Agreement, the Regional Water Board has considered, where applicable, each of the factors prescribed by Water Code section 13385(e). The Regional Water Board's consideration of these factors is based upon information obtained by the Prosecution Team in investigating the Reporting Violations, information otherwise provided to the Regional Water Board, and information located in the Regional Water Board files.
9. Notice of the proposed Settlement Agreement and proposed Four Hundred Thousand Dollar (\$400,000) administrative civil liability was published on the North Coast Regional Board website on or before March 26, 2012 notifying the public of the review period and soliciting public comments on the terms of the proposed settlement.
10. Based on the nature, circumstances, extent and gravity of the violations, and Caltrans' history of violations, culpability and economic benefit, as well as the uncertainties of civil prosecution and appeals, and the costs and delays attendant to administrative adjudication, the proposed Settlement Agreement is a fair settlement of the Reporting Violations, as set forth in Exhibit B, and supports the assessment of administrative civil liability as set forth in this Order. This settlement and assessment of administrative civil liability serves the public interest and provides for the full and final resolution of each and all of the Reporting Violations for the Project that could have been alleged by the Prosecution Team in an Administrative Civil Liability Complaint.
11. Issuance of this Stipulated Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.) in accordance with Sections 15061(b)(3) and 15321(a)(2) of Title 14 of the California Code of Regulations.
12. Subject to the terms of the Settlement Agreement, any person affected by this action of the Regional Water Board (other than the Parties hereto) may petition the State Water Resources Control Board to review the action in accordance with Section 13320 of the Water Code and title 23, California Code of Regulations, section 2050. Any such petition must be received by the State Water Resources Control Board within thirty (30) days of the date of this Order. Copies of the laws and regulations applicable to filing such a petition will be provided upon request.

THEREFORE, IT IS HEREBY ORDERED, pursuant to Water Code section 13385(c), Government Code section 11415.60 and all applicable law, that:

1. The Settlement Agreement is **approved**;
2. Caltrans shall pay an administrative civil liability of **Four Hundred Thousand Dollars (\$400,000)**, as agreed to under the Settlement Agreement in accordance with its terms;
3. The Executive Officer of the Regional Water Board is hereby authorized to refer this matter directly to the Attorney General for judicial enforcement if Caltrans fails to perform any of its obligations under the Settlement Agreement;
4. Fulfillment of Caltrans' obligations under the Settlement Agreement constitutes full and final satisfaction to the Regional Water Board for any and all liability for each Reporting Violation claim that is or could have been set forth concerning the Confusion Hill Bypass Project; and
5. Caltrans is ordered to submit payment in the form of a check, payable to the *State Water Resources Control Board Pollution Cleanup and Abatement Account*, and shall indicate on the check the number of this Stipulated Order. Caltrans shall send the original signed check to State Water Resources Control Board, Department of Administrative Services, PO Box 1888, Sacramento, CA 95812-1888, with copies sent to: Luis Rivera, Assistant Executive Officer, North Coast Regional Water Quality Control Board, 5550 Skylane Boulevard, Suite A, Santa Rosa, California 95403-1702, and Julie Macedo, State Water Resources Control Board, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812.

I, Catherine Kuhlman, 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 April 26, 2012.

Catherine Kuhlman
Executive Officer