

**STATE OF CALIFORNIA  
REGIONAL WATER QUALITY CONTROL BOARD  
LOS ANGELES REGION**

<b>In the matter of:</b>	)	<b>Complaint No. R4-2008-0041-R</b>
	)	<b>Administrative Civil Liability</b>
<b>City of Malibu's Solstice Creek and Corral Canyon Road Bridge Replacement Project</b>	)	<b>Pursuant to California Water Code §13350(a)(2) and §13385(c)(1)</b>
<b>26023.5 Pacific Coast Highway</b>	)	<b>For Violations of</b>
<b>Malibu, CA</b>	)	<b>Order No. 2003-0017-DWQ and California Water Code §13376</b>

**THE CITY OF MALIBU IS HEREBY GIVEN NOTICE THAT:**

1. The City of Malibu (Permittee) built the Solstice Canyon Creek Bridge Replacement Project (Project), located on Corral Canyon Road at 26023.5 Pacific Coast Highway in Malibu, California. Solstice Canyon Creek flows from north to south under Corral Canyon Road via a box culvert with a reinforced concrete bottom. The Project consisted of removing the existing box culvert under Corral Canyon Road, replacing it with a 28-foot long by 58-foot-wide clear span bridge over Solstice Canyon Creek, and grading about 300 feet of the stream channel. The culvert is located approximately 0.25 miles upstream of the Pacific Ocean.
2. Based on the Regional Water Quality Control Board (Regional Board) staff's inspection of the Permittee's Solstice Creek and Corral Canyon Road Bridge Replacement Project (Site) on January 25, 2008, erosion control and drainage practices employed during the construction activities at the Site were inadequate and resulted in illegal discharges to waters of the State and waters of the United States for which the Regional Board may impose administrative civil liability under section 13350 and 13385 of the California Water Code (CWC).
3. On August 25, 2008, the Regional Board Chief Deputy Executive Officer (Chief Deputy Executive Officer) issued Complaint No. R4-2008-0041 in the amount of \$52,375 for the above-described violations.
4. After further investigation and discussion with the Permittee, the Regional Board Assistant Executive Officer (Assistant Executive Officer) hereby issues Revised Complaint No. R4-2008-0041-R (Revised Complaint) in the amount of \$30,015. This Revised Complaint supersedes Complaint No. R4-2008-0041, which is hereby rescinded.

**BACKGROUND**

5. On June 14, 2005, in response to the Department of Fish and Game (DF&G) 401 Water Quality Certification Application (401 Application) the State Water Resources Control Board issued Order No. 2003-0017-DWQ, pursuant to CWC section 13260, for Conditional Water Quality Certification (401 Water Quality Certification) to DF&G for one hundred and eleven restoration

February 16, 2010

- projects funded by DF&G grants, including the Project at Solstice Canyon Creek. The purpose of the restoration projects is to improve watershed conditions for anadromous fish.
6. On September 6, 2006, the Permittee made applications to various local, state and federal agencies to construct the Corral Canyon Road Bridge Project. The Permittee proposed removing the existing box culvert under Corral Canyon Road and replacing it with a 28-foot long by 58-foot-wide clear span bridge over Solstice Creek.
  7. On December 14, 2006, DF&G issued Streambed Alteration Agreement Number 1600-2006-0361-R5 to Ms. Shelah Riggs, consultant for the City of Malibu, for the Solstice Creek Project.
  8. On May 25, 2007, the United States Army Corps of Engineers determined that the project as described was subject to its jurisdiction under Section 404 of the Clean Water Act due to the temporary impact of approximately 0.14 acres of waters of the United States, including wetlands, as a result of replacing the Corral Canyon Bridge over Solstice Creek in Malibu, California.
  9. The City of Malibu received permission from the United States Army Corps of Engineers (Corps) to install a diversion in the channel on May 15, 2007 across the entire width of the channel. The diversion was constructed along the entire 260 foot width of the channel, on both the north side and the south side of the proposed Solstice Canyon Creek Bridge Replacement Project in early Fall 2007. The Permittee pumped the stream around the diversion/construction project and discharged it downstream of the diversion structures. The Solstice Canyon Creek bridge replacement project was completed in the Fall of 2008.
  10. The "Other Actions/Best Management Practices" section of DF&G's 401 Application to the State Water Resources Control Board states that project work within the wetted stream "shall be limited to the period between July 1 and November 1, or the first significant fall rainfall." Enclosure 1, the Project Information Fact Sheet, of the State Board's 401 Water Quality Certification stipulates that the identified Best Management Practices must be followed.

#### **FACTUAL ASSERTIONS**

11. On January 25, 2008, after a rain event, Regional Board staff received complaints from the public regarding discharges of soil from spoils piles from the excavation of bridge footers to the creek. Regional Board staff conducted an inspection of the Site on January 25, 2008 and observed spoils piles located on the stream bank and in the creek bed. The rain event had led to erosion and discharge of significant portions of the spoils piles into waters of the State and United States.
12. During the January 25, 2008 inspection, Regional Board staff also noted that there was active erosion along the unprotected stream banks and slopes throughout the Solstice Creek Bridge Replacement Project site (Site).
13. Improper placement of spoils piles and fill material in Solstice Canyon Creek resulted in major discharge of sediment into Solstice Canyon Creek during the January 22, 2008 and January 25, 2008 storm events when the diversion failed.
14. Erosion control and drainage practices employed during the construction activities at this Site proved to be inadequate and resulted in discharges to waters of the State and United States. The Permittee failed to implement the requirements prescribed in their 401 Water Quality Certification.

15. On March 10, 2008, Regional Board staff contacted Mr. Granville Bowman, City of Malibu, to inform the City of the violations. Mr. Bowman stated that the City was aware of the spoils piles being stock piled in the creek and that some of the material had washed downstream.
16. On March 11, 2008, Mr. Richard Calvin, City of Malibu, contacted Regional Board staff to inform the Regional Board that the spoils piles had been removed from the creek.
17. The creation of conditions of pollution or nuisance in any waterbody and its subsequent discharge in violation of waste discharge requirements are violations of CWC sections 13350, 13376 and 13385. The discharges were not solely a result of natural phenomena of an exceptional, inevitable, and irresistible character and could have been prevented or avoided by the exercise of due care or foresight (i.e. compliance with stated Best Management Practices).

#### **SOURCES OF INFORMATION**

18. The facts set forth above were obtained from the following sources:
  - a. Regional Board staff inspection on January 25, 2008.
  - b. Regional Board staff inspection report and photographs taken January 25, 2008.
  - c. Regional Board staff inspection on March 6, 2008 and photographs taken that day.
  - d. Regional Board Record of Communication dated March 10, 2008.
  - e. Regional Board Record of Communication dated March 11, 2008.
  - f. Regional Board staff inspection on March 21, 2008.

#### **COUNT I**

19. The Regional Board realleges paragraphs 1 through 18.

#### **IMPACTS TO THE WATERS OF THE STATE**

20. As set forth in the factual assertions above, the Permittee and/or its contractors, agents, and employees improperly placed spoils piles and fill material in Solstice Canyon Creek, a water of the State, which resulted in major discharge of sediments into Solstice Canyon Creek during the January 22, 2008 and January 25, 2008 storm events.
21. The placement of the spoil piles and fill material in Solstice Canyon Creek was the first discharge to waters of the State because even when a stream is temporarily diverted, the streambed, itself, has not moved. The vegetation and soil structure of the streambed remain despite the diversion. The second discharge occurred when the storm event further discharged the sediments into Solstice Canyon Creek.
22. Further, erosion control and drainage practices employed by the Permittee's contractors during the construction activities at this Site were inadequate and resulted in discharges to Solstice Canyon Creek, a water of the State, and impacted water quality and beneficial uses.
23. The Permittee violated Order No. 2003-0017-DWQ and the 401 Water Quality Certification because the Permittee worked outside the mandated timeframe of July 1 to November 1 as established in Section 11 of the DF&G 401 Application and Certification. Therefore the Permittee did not use best management practices to avoid degrading the water quality.

**CONCLUSION**

24. Based on the Regional Board staff inspection of the Permittee's Solstice Creek and Corral Canyon Road Bridge Replacement Project (Site) on January 25, 2008, erosion control and drainage practices employed during the construction activities at this Site were inadequate and the construction itself took place outside the timeframe established in the 401 Application and Certification. The improper activities stated above all led to illegal discharges to the waters of the State for 45 days from January 25, 2008 to March 10, 2008, for which the Regional Board may impose administrative civil liability under section 13350 of the CWC.
25. The unauthorized placement of waste (the spoils piles) by the Permittee's contractor in the streambed where it was washed away during a rain event constituted a discharge to waters of the State. These discharges are in violation of water quality objectives established in the *Water Quality Control Plan for the Los Angeles Region* and applicable State and Federal Water Quality Standards. The Permittee's activities adversely impacted Solstice Creek.

**POTENTIAL CIVIL LIABILITY**

26. Section 13350(a)(2) of the CWC states that "(a) Any person who... (2) in violation of any waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e)."
27. Pursuant to CWC section 13350(e), civil liability may be administratively imposed by a Regional Board in accordance with CWC section 13323 et seq. in an amount which shall not exceed five thousand dollars (\$5,000) for each day in which the violation occurs or ten dollars (\$10) for each gallon of waste discharged, but not both.

The maximum civil liability authorized by the CWC for violation of the requirements contained in Order No. 2003-0017-DWQ, for Count I, is:

**COUNT I  
 MAXIMUM PENALTY**

Penalty Category	Calculation	Total
<i>Failure to comply with Order No. 2003-0017-DWQ</i>	CWC section 13350(a)(2): 45 days x \$5,000/day	\$225,000
<b>MAXIMUM ACL</b>		<b>\$225,000</b>

**COUNT II**

28. The Regional Board realleges paragraphs 1 through 18 and asserts the following as an alternative to Count I.

**IMPACT TO THE WATERS OF THE UNITED STATES**

29. As set forth in the factual assertions above, the Permittee's contractors improperly placed spoils piles and fill material in Solstice Canyon Creek, which resulted in major discharges of sediment into Solstice Canyon Creek during the January 22, 2008 and January 25, 2008 storm events. Even when a stream is temporarily diverted, the streambed itself has not moved, therefore, this placement of spoils piles and fill material into the streambed constitutes a discharge.
30. Further, erosion control and drainage practices employed by the Permittee's contractors during the construction activities at this Site proved to be inadequate and resulted in discharges to Solstice Canyon Creek, a water of the United States, and impacted water quality and beneficial uses.
31. The Permittee violated Order No. 2003-0017-DWQ and the 401 Water Quality Certification because the Permittee worked outside the mandated timeframe of July 1 to November 1 as established in Section 11 of the DF&G 401 Application and Certification. Therefore the Permittee did not use best management practices to avoid degrading the water quality.

**CONCLUSION**

32. The Permittee illegally discharged into waters of the United States when they placed spoils piles and fill material in Solstice Canyon Creek. The placement of the spoils piles in the creek violated best management practices as required by 401 Water Quality Certification and Order No. 2003-0017-DWQ.
33. The inadequate erosion control and drainage practices and the construction outside the mandated timeframe of July 1 to November 1 at the Site were in violation of the 401 Water Quality Certification and Order No. 2003-0017-DWQ, both issued by the State Water Resources Control Board. The State Water Resources Control Board issued this certification pursuant to CWC Section 13160 because, when issuing the certification and Order No. 2003-0017-DWQ, the State Board exercised powers delegated to the state by the Federal Water Pollution Control Act.

**POTENTIAL CIVIL LIABILITY**

34. Section 13376 of the CWC states that "The discharge of pollutants or dredged or fill material... by any person except as authorized by waste discharge requirements or dredged or fill material permits is prohibited..."
35. Section 13160 of the CWC states that "The state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act, heretofore or hereafter enacted, and is (a) authorized to give any certificate or statement required by any federal agency pursuant to any such federal act that there is reasonable assurance that an activity of any person subject to the jurisdiction of the state board will not reduce water quality below applicable standards, and (b) authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.) and acts amendatory thereto."

36. Section 13385 of the CWC states “(a) Any person who violates any of the following shall be liable civilly in accordance with this section: (1) Section 13375 or 13376... (2) Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.”
37. Pursuant to CWC section 13385(c)(1), civil liability may be administratively imposed by a Regional Board in accordance with CWC section 13323 et seq. in an amount which shall not exceed ten thousand dollars (\$10,000) for each day in which the violation occurs.

**COUNT II  
MAXIMUM PENALTY**

Penalty Category	Calculation	Total
<i>Failure to comply with 401 Water Quality Certification and Order No. 2003-0017-DWQ</i>	CWC section 13385(c)(1): 45 days x \$10,000/day	\$450,000
<i>Failure to comply with CWC section 13376</i>	CWC section 13385(c)(1): 45 days x \$10,000/day	\$450,000
<b>MAXIMUM ACL</b>		<b>\$900,000</b>

**RECOMMENDED CIVIL LIABILITY**

38. Pursuant to sections 13327 and 13385(e) of the CWC, the Regional Board is required to consider the following factors in determining the amount of civil liability to be imposed: the nature, circumstances, extent, and gravity of the violation(s); susceptibility of the cleanup or abatement of the discharge; the degree of toxicity of the discharge; with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability and economic benefit or savings, if any, resulting from the violation; and other matters as justice may require.

a. Nature, circumstances, extent, and gravity of the violations:

The Permittee’s improper management practices during the Solstice Canyon Creek Bridge construction project lead to the pollution and degradation of water quality in Solstice Canyon Creek and consequently the Pacific Ocean. The discharges were not solely a result of natural phenomenon of an exceptional, inevitable, and irresistible character and could have been prevented or avoided by the exercise of due care or foresight by not putting the spoils piles into the creek bed, or by not constructing during the period of July 1 through November 1, as mandated by the 401 Certification. However, while the improper placement of the spoils piles and fill material was the cause of the discharge, the considerable storm made the discharge worse and more difficult to prevent. Therefore, a reduction from the maximum civil liability is warranted.

b. Susceptibility of the cleanup or abatement of the discharge:

On March 11, 2008, Regional Board staff contacted the Permittee’s representatives and requested the removal of the spoils piles. In compliance with the request, the spoils piles

were removed. Following the removal of the spoils piles, the Permittee implemented the required BMPs at the site until the end of the project. Therefore, a reduction from the maximum civil liability is warranted.

c. Degree of toxicity of the discharge:

The discharge of material from the spoils piles resulted in a negative impact on water quality downstream by increasing turbidity and total suspended solids in waters of the State. However, because of the rain event, the discharge was part of a larger natural run-off of debris from an earlier fire event. Therefore, a reduction from the maximum civil liability is warranted.

d. The ability of the Permittee to pay:

The Permittee has not submitted sufficient information for the Regional Board to determine the Permittee's ability to pay the maximum civil liability. It is possible; however, that the maximum liability of \$1,125,000 is in excess of the financial resources available to the Permittee because the Permittee is undertaking other water quality improvement projects. Therefore, a reduction from the maximum civil liability is warranted.

e. The effect on the Permittee's ability to continue its business:

The Permittee has not submitted sufficient information for the Regional Board to determine the Permittee's ability to continue its business. It is possible; however, that the maximum liability of \$1,125,000 will have an effect on the Permittee's ability to continue its business because the Permittee is undertaking other water quality improvement projects. Therefore, a reduction from the maximum civil liability is warranted.

f. Any voluntary cleanup efforts undertaken:

In addition to the Permittee's full compliance with the Regional Board request, the Permittee implemented remediation and mitigation measures to rectify the effects the Project had on the stream channel. Therefore, a reduction from the maximum civil liability is warranted.

g. Prior history of violations:

The Permittee does not have a history of prior violations of this nature; therefore, a reduction of the maximum civil liability is warranted.

h. Degree of culpability:

The discharge alleged in this Complaint was avoidable and the Permittee failed to implement the requirements prescribed in its 401 Water Quality Certification. However, it is clear the Permittee made efforts to have its contractor implement best management practices and to oversee the contractor prior to the rain events. Therefore, a reduction from the maximum civil liability is warranted.

i. Economic benefit or savings:

Economic benefit or savings as a result of the illegal discharge is unknown.

j. Other matters as justice may require:

An additional matter to consider includes time spent by the staff of the Regional Board in evaluating the incidents of violation and preparing this complaint and related documents. The Regional Board charges at a rate of \$125 per hour for staff cost recovery. With total staff time at approximately 60 hours, staff costs incurred by the Regional Board are estimated at \$7,500.

- a. After consideration of the factors in sections 13327 and 13385(e) of the CWC, the Chief Deputy Executive Officer recommends that administrative civil liability be imposed on the Permittee by the Regional Board in the amount of \$30,000.

**RECOMMENDED CIVIL LIABILITY**

Penalty Category	Calculation	Total
<i>For failing to comply with Order No. 2003-0017-DWQ</i>	CWC section 13350(a)(2): 45 days x \$667/day	\$30,015
<b>TOTAL RECOMMENDED PENALTY</b>		<b>\$30,015</b>

- 39. If the Permittee elects to pay the recommended civil liability, the administrative civil liability is due and payable and must be received by the Regional Board by the close of business on **March 18, 2010**.
- 40. The Permittee may waive the right to a hearing. Should the Permittee choose to waive the right to a hearing, an authorized agent must sign the waiver form attached to this complaint and return the executed waiver form to the Regional Board at 320 West 4<sup>th</sup> Street, Suite 200, Los Angeles, CA 90013 to be received by the Regional Board by the close of business on **March 18, 2010**. If the hearing is waived, the following options are available to satisfy the civil liability:
  - a. A check in the amount of **\$30,015** (payable to the State Water Resources Control Board Waste Discharge Permit Fund) shall accompany the signed waiver.
- 41. Unless waived, a hearing before the Regional Board or Regional Board Hearing Panel (Hearing Panel) will be held within 90 days after service of this Complaint pursuant to CWC sections 13228.14 and 13323. Should the Permittee choose to waive its right to a hearing, an authorized agent must sign the waiver form attached to Complaint No. R4-2008-0041-R and return it to the Regional Board by **March 18, 2010**. If we do not receive the waiver and payment of the penalty by October 1, 2009, the matter will be heard before the Regional Board or Hearing Panel.
- 42. The Permittee and/or the Permittee's representative(s) will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of civil liability by the Regional Board. A notice containing the date, time, and location of the hearing will be mailed to the Permittee not less than ten (10) days prior to the hearing date. The Regional Board or a Regional Board Hearing Panel may assess a penalty higher than the recommended civil liability in this Revised Complaint.
- 43. The Regional Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for recovery of judicial liability in a greater amount.
- 44. There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations contained in the California Code of Civil Procedure that refers to "actions" and

City of Malibu

Administrative Civil Liability Complaint No. R4-2008-0041-R

“special proceedings” apply to judicial proceedings, not administrative proceedings. See *City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.)

45. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, title 14, section 15321.

  
Samuel Unger, P.E.  
Assistant Executive Officer

February 16, 2010