

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2009-0541
IN THE MATTER OF

MADERA COUNTY RESOURCE MANAGEMENT AGENCY,
MADERA COUNTY ROAD DEPARTMENT
MADERA COUNTY

This Administrative Civil Liability Complaint (Complaint) is issued to the Madera County Resource Management Agency, Madera County Road Department (hereafter Discharger), pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability (ACL), and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that the Discharger violated provisions of the federal Clean Water Act (CWA), the CWC, and the National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity Order 99-08-DWQ (NPDES No. CAS000002)(Construction General Permit).

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds, with respect to the Discharger's acts, or failure to act, the following:

1. The Discharger began construction of Phase I of the Road 200 Widening Project (hereafter Project) from Spring Valley School to Leprechaun Lane (the Site) on 7 July 2008, and continued activities through the summer and fall of 2008. The Site is in the Sierra foothills, approximately 30 miles from the City of Madera, and 2 miles northeast of the intersection of State Highway 41 and Road 200, along a 3.4 mile long section of Road 200. The Site is within Sections 16, 21, and 29 of Township 9 South, Range 21 East, and Section 14 of Township 9 South, Range 21 East, MDBM.

The Project is comprised of an 80-foot wide right-of-way with a 40-foot paved section, for a total of 34 acres, including approximately 16 acres of soil disturbed during construction activities. The Project crosses numerous tributaries to Willow Creek, which drains to Millerton Lake, an impoundment of the San Joaquin River. The San Joaquin River and its tributaries are waters of the United States.

2. On 19 August 1999, the State Water Resources Control Board issued the Construction General Permit, which implements Waste Discharge Requirements for storm water discharges associated with construction activity.
3. The Construction General Permit requires that those who discharge storm water associated with construction activity to surface waters (a) file a Notice of Intent to obtain coverage under the Construction General Permit and (b) use best available technology

economically achievable and best conventional control technology to reduce storm water pollution. The Construction General Permit authorizes non-storm water discharges only where they do not cause or contribute to a violation of any water quality standard and are controlled through implementation of appropriate Best Management Practices (BMPs) for elimination or reduction of pollutants.

4. CWC section 13376 states, in relevant part,

Any person discharging pollutants or proposing to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or any person discharging dredged or fill material or proposing to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with the procedures set forth in Section 13260...

Construction activities disturbing one or more acres of land, such as the Project, result in the discharge of pollutants. Under the terms of the federal CWA, CWC section 13376, and the Construction General Permit itself, the Discharger was required to obtain coverage under the Construction General Permit prior to commencing construction activities.

5. The Central Valley Water Board's Water Quality Certification program regulates dredge and fill activities that result in discharges to waters of the U.S. These projects require federal permits pursuant to CWA section 404. Section 401 of the CWA requires any applicant for a federal license or permit for activities that may result in discharge into waters of the U.S. to obtain a certification (Water Quality Certification) from the respective State that the project will meet water quality standards.

The Discharger's activities included moving fill materials within waters of the U.S., which required a permit pursuant to CWA section 404. In order to obtain this permit, the Discharger was required to obtain a Water Quality Certification from the Central Valley Water Board prior to initiating construction activities.

6. The Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin, Fourth Edition, Revised October 2007, (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation programs for achieving objectives, and incorporates by reference, plans and policies adopted by the State Water Resources Control Board. Drainages and waters of the U.S. within the Project site are tributaries to Millerton Lake, an impoundment of the San Joaquin River. The beneficial uses of the San Joaquin River above Millerton Lake as identified in Table II-1 of the Basin Plan are: municipal and domestic supply; agricultural supply; hydropower generation; water contact recreation; non-contact water recreation; warm freshwater habitat; cold freshwater habitat; and wildlife habitat.

7. The Construction General Permit states, in part, the following:

A. DISCHARGE PROHIBITIONS

3. Storm water discharges shall not cause or threaten to cause pollution, contamination or nuisance.

C. SPECIAL PROVISIONS FOR CONSTRUCTION ACTIVITY:

2. All dischargers shall develop and implement a SWPPP in accordance with Section A: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard.
3. Discharges of non-storm water are authorized only where they do not cause or contribute to a violation of any water quality standard and are controlled through implementation of appropriate BMPs for elimination or reduction of pollutants...

SECTION A: STORM WATER POLLUTION PREVENTION PLAN

6. At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season.

8. The attached Chronology (Attachment A) is a part of this Order and provides a more detailed historical account of project activities. The following summarizes pertinent portions of the Chronology:

- a. On 28 October 2002, Madera County approved a Mitigated Negative Declaration (MND) for the Project. Based on comments from the U.S. Army Corps of Engineers (Corps) and Board staff, the MND included mitigation measures that required the Discharger to, among other things:
 - i. Obtain a CWA Section 404 permit from the Corps;
 - ii. Obtain a CWA Section 401 Water Quality Certification from the Central Valley Regional Water Quality Control Board; and
 - iii. Obtain coverage under the General Permit.
- b. The Discharger began Project construction on 7 July 2008.
- c. On 1 August 2008, Board staff inspected the Project in response to a complaint. Board staff observed construction activity taking place, which included filling and excavation activities in various surface waters within the work area. Board staff observed that several hundred feet of tributary drainages had been excavated, filled, re-routed, or otherwise disturbed. Several acres of graded slopes adjacent to drainages were vulnerable to erosion. Board staff did not observe soil stabilization measures or other storm water Best Management Practices (BMPs) implemented on disturbed areas of the site. The Discharger had not obtained coverage under the General Permit, and had not obtained a CWA Section 401 Water Quality Certification for site dredge and fill activities. During the inspection and in a

subsequent 7 August 2008 telephone conversation, Board staff informed the Discharger that it was in violation of CWC section 13376 for failure to obtain coverage under the General Permit, and was likely in violation of Section 401 of the CWA for failing to obtain a Water Quality Certification for dredging and discharging fill to waters of the U.S.

- d. The Discharger subsequently obtained coverage under the General Permit, and was assigned WDID No. 5F20C353019 on 14 August 2008.
- e. Board staff transmitted the results of the inspection in a 26 August 2008 Notice of Violation. The NOV informed the Discharger that, at the time of the inspection, it was in violation of the CWA sections 401 and 404 and CWC section 13376 for discharging fill to waters of the U.S. and for failing to obtain coverage under the General Permit. The NOV directed the Discharger to install BMPs to stabilize disturbed areas and to submit a complete application for federal CWA Section 401 Water Quality Certification.
- f. On 4 November 2008, Board staff, accompanied by County staff, re-inspected the Project after a rain event and observed straw wattles buried in sediment, straw wattles placed longitudinally in drainages, six-foot to ten-foot sections of silt fence that appeared to be randomly placed on site, and many slopes without erosion protection. Slopes adjacent to waters showed erosion rills, sediment laden water was discharging off-site, and sediment was being deposited in waters downstream of ineffective BMPs. Board staff also observed areas where fill had been discharged into waters of the U.S. Board staff notified the Discharger during the inspection that many BMPs on site were ineffective, and directed it to stabilize disturbed areas.
- g. The Discharger then submitted an application for a CWA Section 401 Water Quality Certification that did not accurately describe impacts to waters of the U.S. During the 4 November 2008 inspection, Board staff described to the Discharger how to accurately report the impacted waters of the U.S. in a revised application.
- h. Board staff transmitted the 4 November 2008 inspection results in a 25 November 2008 Notice of Violation. The NOV instructed the Discharger to stabilize disturbed areas and to submit a restoration plan for waters of the U.S. impacted by construction activities.
- i. On 17 February 2009, Board staff re-inspected the "completed" Project site during a storm event and observed sediment-laden water discharging off the site and many erosion rills on unstabilized slopes. BMPs such as silt fencing and straw wattles were compromised and/or buried in several areas. Board staff measured up to six inches of sediment accumulated on the bed of tributary drainages, and measured erosion gullies that exceeded two feet in depth and width. Disturbed areas of the Project site, which comprised approximately 16 acres, remained unstabilized and threatened to continue discharges of sediment off site and to waters of the State and waters of the U.S.

- j. On 3 April 2009, Board staff re-inspected the Project site and observed that no further work had been done to stabilize disturbed areas.
 - k. On 29 April 2009, Board staff re-inspected the Project site and observed that no further work had been done to stabilize disturbed areas.
 - l. On 24 June 2009, Board staff re-inspected the Project site and observed that no further work had been done to stabilize disturbed areas.
 - m. On 8 September 2009, the Discharger submitted past-due information required for a complete Water Quality Certification application.
9. The soil, sediment, and earthen material transported by erosion and discharged to the tributaries of Willow Creek by the Discharger constitutes "waste" as defined in CWC section 13050. Based on Board staff observations, the Discharger's construction activities discharged waste, (e.g., soil, sediment, and earthen material), directly into surface waters. The Discharger, through this activity, has caused waste to be discharged where it has caused a condition of pollution or nuisance, and continues to threaten to cause a condition of pollution or nuisance, by increasing levels of sediment, settleable materials, suspended material, and turbidity in surface waters.
10. Findings Nos. 8 and 9 show the Discharger violated CWC section 13376; Section 401 of the CWA; and the Construction General Permit.
11. CWC section 13323 states, in relevant part:
- Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.
12. CWC section 13385 states, in relevant part:
- (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.
- *****
- (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

(e) In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, 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, 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.

13. **Potential Maximum Civil Liability.** Per CWC section 13385(c), liability may be assessed at \$10,000.00 per violation per day.

As illustrated by Findings Nos. 8.b and 8.d, and the attached Chronology, the Discharger operated for 38 days (7 July 2008 through 14 August 2008) without obtaining coverage under the Construction General Permit, as required by CWC section 13376. The Discharger's maximum liability in this regard is \$380,000.00.

On 8 September 2009, the Discharger submitted past-due information required for a complete Water Quality Certification application. The Discharger operated for 429 days (7 July 2008 through 8 September 2009) without obtaining Water Quality Certification for dredge and fill activities, which is required pursuant to CWC section 13376. The Discharger's potential liability in this regard is \$4,290,000.00.

As illustrated by Finding No. 8 and the attached Chronology, the Discharger operated in violation of the Construction General Permit, by failing to have an effective combination of BMPs, for 242 days during the rainy season (1 October 2008 through 30 May 2009). The Discharger's failure to maintain an effective combination of BMPs violates numerous terms in the Construction General Permit. Although the Board may count each discreet violation of the General Permit as a separate violation, and may therefore multiply the number of violations by the number of days, for the purposes of this Complaint the maximum penalty is calculated as one violation for each day. No runoff

calculation was performed that would lead to a per-gallon assessment under CWC section 13385(c)(2). The Discharger's potential liability in this regard is \$2,420,000.00.

The Discharger's total potential liability as calculated for this Complaint is \$7,090,000.00.

14. **Minimum Civil Liability.** Per CWC section 13385(e), the minimum liability shall be assessed at a level that recovers the economic benefit or savings, if any, derived from the acts that constitute the violations. The Discharger should have installed an effective combination of storm water BMPs, and should have stabilized disturbed areas to prevent the discharge of sediment to surface waters. The Discharger should have prepared and implemented a mitigation plan for the re-constructed areas of surface waters. The Discharger should have prepared a complete application for section 401 Water Quality Certification and obtained such Certification prior to beginning work to dredge or fill in waters of the U.S. Projected costs associated with these activities are presented as follows:

Board staff has reviewed the Discharger's SWPPP and a cost estimate prepared by Compliance One Solutions, Inc., the firm hired by the Discharger to install erosion controls in response to the Cleanup and Abatement Order, and estimates that it would cost at least \$254,648.95 to properly implement erosion and sediment control storm water BMPs throughout the project site.

Wetland delineation drawings prepared on 21 May 2009 indicate the project includes 763 linear feet of jurisdictional channels that should have been stabilized before, during, and after construction. It also includes 1,556 linear feet of streams that were filled. Provisions to mitigate for these permanent impacts should have been addressed by the Discharger during construction. The Discharger now proposes to reconstruct/recreate 665 linear feet of tributary streams and pay \$44,250.00 into a mitigation account to compensate for the 1,556 linear feet of permanent impacts.

For the 665 linear feet of created streams, the Discharger should have installed BMPs such as brush mattresses, live stakes, rock toe revetments, rock weirs, etc., to stabilize the reconstructed bed and bank and provide an environment for the natural re-vegetation and re-establishment of the riparian ecosystem. Board staff estimates it would have cost \$168.00 per linear foot to implement ecological restoration to the streams. Based on this, the Discharger should have spent \$111,720.00 to recreate/restore these streams.

For the 763 linear feet of temporarily impacted channels, it would have been appropriate to install BMPs such as straw matting along the bank, and rock toe revetment or fiber rolls with plant plugs at the toe of the bank. Board staff estimates it would have cost \$20.00 per linear foot to install these treatments. Based on this, the Discharger should have spent \$15,260.00 to restore the temporarily impacted channels.

The Discharger should have obtained a Water Quality Certification prior to the commencement of dredge and fill activities conducted in waters of the U.S. The Discharger should have paid the application fee of \$15,982.00 prior to beginning work on the project. Board staff estimates a consultant would have charged \$150.00 per hour for professional services to prepare an application package for a Water Quality Certification, and would have needed 100 hours to update the wetland delineation drawings and renew the expired jurisdictional determination, prepare the application package, and design an appropriate compensatory mitigation and restoration plan. Based on this, the Discharger should have spent \$15,000.00 prior to beginning work on the project.

The Discharger should have offset permanent losses to waters of the U.S. by paying into a mitigation fund for any losses not offset by on-site creation of waterways. The Discharger should have spent the \$44,250.00 proposed in the mitigation plan submitted on 8 September 2009, prior to beginning work on the project.

The total economic savings the Discharger realized by these violations is \$456,860.95.

15. On 10 March 2009, Teichert Construction staff sent an email to Board staff stating that \$230,044 was spent on "erosion control type activities." It is unclear where this money was spent, as many of the BMPs were installed incorrectly or not at all and most were largely ineffective. Because of this, Board staff estimates the Discharger saved at least \$456,860.95 for failing to properly implement the BMPs and for failing to submit a complete application for, and obtain, a Water Quality Certification.
16. Board staff costs have amounted to 358 hours at \$150.00 per hour for a total of \$53,700.00.
17. CWC section 13385 states, in relevant part:
 - (n) (1) Subject to paragraph (2), funds collected pursuant to this section shall be deposited in the State Water Pollution Cleanup and Abatement Account.
 - (2) (A) Notwithstanding any other provision of law, moneys collected for a violation of a water quality certification in accordance with paragraph (2) of subdivision (a) or for a violation of Section 401 of the Clean Water Act (33 U.S.C. Sec. 1341) in accordance with paragraph (5) of subdivision (a) shall be deposited in the Waste Discharge Permit Fund and separately accounted for in that fund.

It is appropriate to split the assessed amount of liability for CWA Section 401 and other CWC section 13385 violations between the Waste Discharge Permit Fund (WDPF) and State Water Pollution Cleanup and Abatement Account (SWPCAA) based on the percentage of the Discharger's maximum potential liability associated with federal CWA section 401 violations and other CWC section 13385 violations. This equates to 61% going to the WDPF and 39% going to the SWPCAA.

18. The factors in CWC section 13385(e), as cited in Attachment B, were considered and a \$510,600.00 Administrative Civil Liability is appropriate.
19. Issuance of this Complaint is exempt from the provisions of the California Environmental Quality Act (Public Resources Code § 21000, et seq.), in accordance with California Code of Regulations, title 14, section 15321.

MADERA COUNTY IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an administrative civil liability in the amount of \$510,600.00. The amount of the proposed liability is based upon a review of the factors cited in CWC section 13385(e), as well as the State Water Resources Control Board's Water Quality Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled on **9/10/11 December 2009**, unless either of the following occurs by **26 October 2009**:
 - a) The Discharger waives the hearing by completing the attached form (checking off the box next to Option #1) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of \$311,466.00 to the *Waste Discharge Permit Fund* and \$199,134.00 to the *State Water Pollution Cleanup and Abatement Account*; or
 - b) The Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking off the box next to Option #2 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed; or
 - c) The Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking off the box next to Option #3 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed.
3. If a hearing on this matter is conducted, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, which may

include raising the monetary value of the civil liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

PAMELA C. CREEDON, Executive Officer

25 September 2009

Date

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ATTACHMENT A

CHRONOLOGY MADERA COUNTY ROADS DEPARTMENT ROAD 200 PROJECT MADERA COUNTY

12 April 2002 to 12 May 2002	Madera County (County) circulates a Draft Mitigated Negative Declaration to comply with the California Environmental Quality Act (CEQA). The Mitigated Negative Declaration includes an estimate of 0.46 acres of waters of the U.S.
17 April 2002	Central Valley Water Board staff comments on the Draft Mitigated Negative Declaration, stating that a federal Clean Water Act Section 401 Water Quality Certification (Water Quality Certification) will be required for the project. The letter also states that coverage under the <i>National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity, Water Quality Order No. 99-08-DWQ</i> (Construction General Permit) will be required for the project.
8 July 2002	The U.S. Army Corps of Engineers sends a letter to the County and concurs with the estimate of waters of the U.S., and states that a federal Clean Water Act Section 404 permit (Section 404 permit) will be required for the project.
28 October 2002	<p>The County adopts the Mitigated Negative Declaration and files a Notice of Determination with the State Clearinghouse (No. 2002041055).</p> <p>The Final Mitigated Negative Declaration includes a response to the 17 April 2002 Central Valley Water Board letter, stating that the County will obtain coverage under the General Permit and obtain Water Quality Certification for the project. It also includes a response to the 8 July 2002 U.S. Army Corps of Engineers letter, stating that the County will obtain a Section 404 permit.</p> <p>The Final Mitigated Negative Declaration includes the following:</p> <p>Mitigation Measure M21; requires the County to obtain the required Section 404 permit and Water Quality Certification.</p> <p>Mitigation Measure M23; requires the County to obtain coverage under the Construction General Permit and implement storm water controls to prevent erosion and sedimentation.</p> <p>Mitigation Measure M20; requires the County to “Prepare a mitigation and monitoring plan, implementation of which will result in no net loss of wetland habitat, or wetland function.”</p>

<p>25 June 2008</p>	<p>California Department of Fish and Game (DFG) issues Stream Alteration Agreement No. 2008-0068-R4 for the Project.</p>
<p>1 August 2008 Inspection No. 1</p>	<p>Central Valley Water Board staff inspects the project in response to a complaint and observes that construction activity is taking place to fill and excavate various surface waters within the work area; there are few to no storm water Best Management Practices (BMPs) in place on the site; there are many areas of drainages and waterways vulnerable to erosion and sedimentation; and many areas of disturbed soil that are vulnerable to erosion. The project is not covered under the Construction General Permit, and is not covered under a Water Quality Certification.</p> <p>Central Valley Water Board staff informs County staff that the County is in violation of the federal Clean Water Act for failure to obtain coverage under the General Permit, and questions County staff about the obvious need for federal Clean Water Act Section 404 and 401 permitting, based on observations that surface waters within the Project site have been dredged and/or filled. County staff is unable to provide information regarding compliance with CEQA, any wetland delineations or surveys that have been done to identify waters of the U.S. within the project site, or consultations with the U.S. Army Corps of Engineers regarding the need for Section 404 permitting.</p> <p>Based on overwhelming evidence that suggests that waters of the U.S. have been dredged and/or filled, Central Valley Water Board staff directs County staff to submit an application for a Water Quality Certification.</p> <p>Central Valley Water Board staff also directs County staff to obtain coverage under the General Permit and implement storm water Best Management Practices (BMPs) throughout the Project site to prevent erosion and sedimentation.</p>
<p>12 August 2008</p>	<p>The County submits to the Central Valley Water Board a Storm Water Pollution Prevention Plan (SWPPP).</p>
<p>14 August 2008</p>	<p>The County obtains coverage under the Construction General Permit.</p>
<p>26 August 2008</p>	<p>Central Valley Water Board staff sends a Notice of Violation to the County that documents the County's failure to implement an effective combination of storm water erosion and sediment control BMPs on the site.</p>

	<p>The Notice of Violation directs the County to submit by 3 October 2008:</p> <ol style="list-style-type: none">1. A complete application for a Water Quality Certification, including: a completed application form for the Water Quality Certification; a copy of the Section 404 permit application to the U.S. Army Corps of Engineers; a copy of the 1601 Streambed Alteration Agreement application to the California Department of Fish and Game; and the appropriate application fee. The County is also required to provide evidence of compliance with the CEQA. Alternatively, the Notice of Violation directs the County to provide evidence in the form of written notification from the U.S. Army Corps of Engineers that Section 404 permits are not required for the project.2. A description of all actions that will be taken by Madera County to ensure that all required permits are obtained for public works projects undertaken in the future.3. Evidence that the County has installed Best Management Practices (BMPs) in all areas of the project to stabilize disturbed areas and ensure that sediment and construction debris and materials do not discharge into surface waters on the site.
11 September 2008	<p>The County submits an incomplete application for Water Quality Certification. Contrary to the Mitigated Negative Declaration and Central Valley Water Board staff observations, and without any supporting evidence, the application package states there are no temporary or permanent impacts to waters of the U.S.</p> <p>Central Valley Water Board staff speaks with County staff on the telephone and explains that the application package needs to include a description of the temporary and permanent impacts to waters of the U.S.</p> <p>The application package also does not include a wetland delineation map, or any kind of map that would illustrate project areas of dredge and/or fill. The application package also does not include evidence of compliance with CEQA, and it does not include the required fee.</p>
26 September 2008	<p>The County misses the deadline to provide evidence demonstrating that storm water BMPs are installed throughout the project site, as required by the 26 August 2008 Notice of Violation.</p>

3 October 2008	<p>Central Valley Water Board staff sends a letter to the County stating the application for Water Quality Certification is incomplete, because it does not include sufficient funds based on the acreage of both permanent and temporary impacts to waters of the U.S. and it does not describe the waters of the U.S. proposed to be permanently and temporarily impacted. The letter also states that the Central Valley Water Board cannot issue Water Quality Certification without evidence of compliance with CEQA.</p>
14 October 2008	<p>The County submits to the Central Valley Water Board the Project Mitigated Negative Declaration.</p> <p>Central Valley Water Board staff speaks with County staff by telephone and tells it the CEQA document includes wetland delineation maps that show 0.46 acres of waters of the U.S. in the work area. Central Valley Water Board staff tells County staff the CEQA document includes a copy of the 8 July 2002 verification letter from the U.S. Army Corps of Engineers that concurs with the estimate of waters of the U.S. and states the County must obtain Section 404 permitting for dredge and/or fill of waters of the U.S. Central Valley Water Board staff tells County staff the CEQA document includes a copy of the 17 April 2002 letter from the Central Valley Water Board stating that the County must obtain a Water Quality Certification for dredge and/or fill of waters of the U.S. and stating that the County must obtain coverage under the Construction General Permit. Central Valley Water Board staff describes to County staff the requirements included in the CEQA document, including Mitigation Measures M20, M21, and M23.</p> <p>Central Valley Water Board staff directs County staff to revise the application for Water Quality Certification to reflect the accurate acreage of impacted waters of the U.S.</p> <p>Central Valley Water Board staff coordinates a site visit to help County staff understand how Central Valley Water Board staff is going to verify acreages reported in the application for Water Quality Certification against actual disturbance at the site. The site visit is also intended to provide compliance assistance for the erosion control issues.</p>
4 November 2008 Inspection No. 2	<p>Central Valley Water Board staff re-inspects the site, meets with County staff, and explains how to revise the Water Quality Certification application to reflect actual impacts of waters of the U.S. on the project site.</p>

	<p>During the inspection, Central Valley Water Board staff observes many areas where the BMPs are inadequate, improperly installed, or inadequately maintained; areas of disturbed soil that do not have any stabilization measures to prevent erosion and sedimentation; several hundred feet of tributary waters of the U.S. that have been realigned or re-constructed with inadequate stabilization measures to ensure sediment does not discharge into flows in the channels; and sediment-laden water in the channels in tributary waters of the U.S.</p> <p>Central Valley Water Board staff directs County staff to repair and maintain storm water BMPs; stabilize disturbed soils that are vulnerable to erosion; and comply with the Construction General Permit by implementing an effective combination of erosion and sediment control BMPs to prevent erosion and sedimentation on the Project site.</p> <p>Central Valley Water Board staff spends 5.5 hours on the site, travels along the entire length of the roadway construction, and inspects all areas of disturbed soil. Four individuals from the County are present, and Central Valley Water Board staff directs, comments, and describes measures the County could use to further stabilize disturbed areas of the project.</p>
25 November 2008	<p>Central Valley Water Board staff sends a Notice of Violation to the County stating the County is in violation of Clean Water Act Section 401 for dredging and placing fill in waters of the U.S. without a Water Quality Certification and California Water Code section 13376 for failing to comply with Construction General Permit Section A.2 (which prohibits discharges of material other than storm water) and Section C.2 (which requires implementation of controls to reduce pollutants in storm water discharges from construction sites to the standards of Best Available Technology Economically Achievable for toxic and non-conventional pollutants and Best Conventional Pollutant Control Technology for conventional pollutants).</p> <p>The Notice of Violation requires the County to immediately stabilize all disturbed areas and to submit by 29 December 2008 the following:</p> <ol style="list-style-type: none">1. Evidence that all areas of disturbed soil have been stabilized against erosion and sedimentation;2. A restoration plan for all realigned and re-constructed tributary waters of the U.S., including mitigation measures to ensure no net loss of wetland functions and values.

<p>29 December 2008</p>	<p>County staff submits via email a revised application for Water Quality Certification, showing 0.19 acres (992 linear feet) permanent impacts, and 0.026 acres (2,459 linear feet) temporary impacts. County staff indicates it thinks the appropriate fee for the impacted waters would be \$1,234.00.</p>
<p>29 December 2008</p>	<p>The County misses the deadline to provide the required items in the 25 November 2008 Notice of Violation. By this date, the County has not submitted evidence demonstrating that storm water BMPs are installed throughout the project site, and has not submitted a restoration plan for dredged and/or filled waters of the U.S.</p>
<p>30 December 2008</p>	<p>Central Valley Water Board staff notifies County staff by email that the appropriate fee for the Section 401 Water Quality Certification should be \$23,226.00, based on the revised Water Quality Certification application submitted by the County on 29 December 2008.</p> <p>Central Valley Water Board staff also reiterates that the County has not submitted the two items required by the 25 November 2008 Notice of Violation, and that the County remains in violation of Clean Water Act Section 401 for dredging and placing fill in waters of the U.S. without a Water Quality Certification; and California Water Code Section 13376 for failing to comply with Construction General Permit Section A.2 (which prohibits discharges of material other than storm water) and Section C.2 (which requires implementation of controls to reduce pollutants in storm water discharges from construction sites to the standards of Best Available Technology Economically Achievable for toxic and non-conventional pollutants and Best Conventional Pollutant Control Technology for conventional pollutants).</p>
<p>15 January 2009</p>	<p>County staff sends an email to Central Valley Water Board staff stating the County “stabilized all areas of disturbed soil and implemented a restoration plan for the realigned segment of the tributary waters of the U.S.” The email contains no evidence or supporting documentation to support this claim.</p> <p>County staff indicates that the County retained Live Oak & Associates to submit an "all inclusive" Section 401 permit that would incorporate all phases of the Road 200 Project, and not just the completed phase.</p>
<p>16 January 2009</p>	<p>Central Valley Water Board staff emails County staff back reiterating the need for the two required items in the 25 November 2008 Notice of Violation and states, “To date, we have not received these items. The County is in violation of the federal Clean Water Act and the California</p>

	<p>Water Code. Please provide evidence to substantiate your claim that the County has stabilized all areas of disturbed soil and implemented a restoration plan. Please submit the plan to our office, and provide photographs of the site that document the stabilization activities.”</p>
<p>20 January 2009</p>	<p>Central Valley Water Board staff is contacted by staff at Live Oak Associates who asks if the County can combine the application for the Water Quality Certification with a future phase of the Road 200 project. Central Valley Water Board staff states they cannot because the CEQA documents are not ready for the second phase of the project.</p> <p>Live Oak Associates staff forwards an email from the County intended to respond to the two items in the 25 November 2008 Notice of Violation. The email includes photographs that do not demonstrate that disturbed areas are appropriately stabilized. The email includes a portion of a California Department of Transportation contract pertaining to water pollution control work that does not include a restoration plan for waterways in the project site.</p> <p>Central Valley Water Board staff speaks to Live Oak Associates staff on the phone and tells it the email does not satisfy the two items in the 25 November 2008 Notice of Violation, and follows up with an email detailing the comments on the photographs. Live Oak Associates staff states it will forward Central Valley Water Board staff comments and the email to the County.</p>
<p>17 February 2009 Inspection No. 3</p>	<p>Central Valley Water Board staff re-inspects the site during a storm event and observes sediment-laden water discharging off the site, severe and uncontrolled erosion and sedimentation, and failure of installed BMPs to control sediment discharge off the site.</p>
<p>23 February 2009</p>	<p>Central Valley Water Board staff sends an email to both Live Oak Associates staff and County staff, reiterating that the County’s 20 January 2009 email did not satisfy the requirements in the 25 November 2008 Notice of Violation.</p> <p>The email also states that the County remains in violation of Section 401 of the Clean Water Act for placing fill in waters of the U.S. without a Water Quality Certification; and California Water Code Section 13376 for failing to comply with Section A.2 and Section C.2 of the Construction General Permit.</p> <p>The email also states that Central Valley Water Board staff recently re-inspected the site and found problems with erosion and sediment control, and directs the County to immediately stabilize the site.</p>

	<p>Live Oak Associates staff calls to say it is working with the County to submit a revised application for the Water Quality Certification that will accurately reflect the actual acreage and linear footage of impacted waters of the U.S., and to create a restoration plan for the waterways. Live Oak Associates staff states it will be hired by the County only to assist with the application for Water Quality Certification, and are not involved in erosion control issues.</p>
<p>3 April 2009 Inspection No. 4</p>	<p>Central Valley Water Board staff, accompanied by U.S. Army Corps of Engineers staff, inspects the Project site, and observes that no more work appears to have been done on erosion control since the previous inspection of the site on 17 February 2009. Central Valley Water Board staff observes there are still areas of erosion on unstabilized slopes and areas where sediment has discharged to waterways.</p>
<p>29 April 2009 Inspection No. 5</p>	<p>Central Valley Water Board staff, accompanied by County staff and Live Oak Associates staff, inspects the Project site and observes that no more work appears to have been done on erosion control since the previous inspection of the site on 3 April 2009. Central Valley Water Board staff observes there are still areas of erosion on unstabilized slopes and areas where sediment has discharged to waterways.</p> <p>Central Valley Water Board staff explains to County staff that the site is still not stabilized; areas of erosion must be repaired and stabilized; and that sediment that had discharged to waterways must be cleaned up. Central Valley Water staff tells County staff that the County is in violation of the federal Clean Water Act for failing to obtain a Water Quality Certification, and in violation of the Construction General Permit for failing to employ an effective combination of erosion and sediment controls. County staff acknowledge that they understand what Central Valley Water Board staff is communicating to them.</p>
<p>24 June 2009 Inspection No. 6</p>	<p>Central Valley Water Board staff inspects the site and observes that no more work appears to have been done on erosion control since the previous inspection of the site on 29 April 2009. Central Valley Water Board staff observes there are still areas of erosion on unstabilized slopes and areas where sediment has discharged to waterways.</p>
<p>30 June 2009</p>	<p>Central Valley Water Board issues Cleanup and Abatement Order No. R5-2009-0703.</p>

2 July 2009	The County submits \$15,482.00 for the Water Quality Certification fee, based on revised figures for an estimate of waters of the U.S. prepared by Live Oak Associates. The submittal also includes a table and maps documenting impacts to waters of the U.S., based on the 29 April 2009 site visit with the U.S. Army Corps of Engineers.
8 September 2009	The County submits information to comprise a complete application for Water Quality Certification.

ATTACHMENT B

CONSIDERATION OF SECTION 13385(e) FACTORS MADERA COUNTY ROADS DEPARTMENT ROAD 200 PROJECT MADERA COUNTY

California Water Code (CWC) section 13385 (e) states: *“In determining the amount of civil liability, the regional board...shall take into consideration the nature, circumstance, extent and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as 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.”*

In preparing the Administrative Civil Liability Complaint, Central Valley Regional Water Quality Control Board (Board) staff considered the following:

1) The nature, circumstances, extent, and gravity of the violation or violations.

Nature: Madera County (County) operated for 38 days (7 July 2008 through 14 August 2008) without obtaining required coverage under the *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002 for Storm Water Discharges Associated With Construction Activity, Water Quality Order No. 99-08-DWQ* (Construction General Permit) even though it said it would do so in the Mitigated Negative Declaration prepared under the California Environmental Quality Act (CEQA). The County only obtained coverage after being notified of the requirements by Board staff investigating a complaint about the project.

After obtaining coverage, the County repeatedly violated the Construction General Permit by failing to implement an effective combination of sediment and erosion control Best Management Practices (BMPs).

The County completed the project without obtaining the required federal Clean Water Act (CWA) water quality certification for dredge and fill activities in known waters of the U.S. After being directed by Board staff to submit a federal CWA water quality certification application, the County submitted an incomplete application. (Contrary to the Mitigated Negative Declaration and Board staff observations, and without any supporting evidence, the application package states there are no temporary or permanent impacts to waters of the U.S.) After being directed by Board staff to correct the application, the County submitted a revised application that was incomplete because it did not provide a description of measures to stabilize and restore temporarily impacted waters of the U.S., and it did not include the appropriate fee. The County finally provided the required items to comprise a complete application on 8 September 2009, almost one year after its initial application.

Circumstances:

Board staff inspected the site before the rainy season and repeatedly during the rainy season. Board staff repeatedly encouraged the County to implement adequate storm water BMPs and obtain the required water quality certification. If the County had complied with the Construction General Permit, implemented appropriate storm water BMPs, and obtained and complied with the water quality certification, it could have prevented unauthorized discharges of sediment and fill to waters of the State and waters of the U.S.

Extent:

As documented in Board staff inspection reports, erosion of the 16 acres of disturbed soils on the site was extensive, as were the resulting violations. Two culverts passing under the road were almost completely filled with sediment, as were several waters of the State and waters of the U.S. Sediment discharged to waters of the State and waters of the U.S. exceeded six inches in depth in the stream channels.

The County specifically violated:

1. The federal CWA, section 401, for failing to obtain a water quality certification prior to dredge and fill activities in waters of the U.S.
2. California Water Code section 13376, for failing to obtain coverage under the Construction General Permit prior to construction. Once the County obtained coverage under the Construction General Permit, it violated the following sections thereof: Section A.2 (which prohibits discharges of material other than storm water) and Section C.2 (which requires implementation of controls to reduce pollutants in storm water discharges from construction sites to the standards of Best Available Technology Economically Achievable for toxic and non-conventional pollutants and Best Conventional Pollutant Control Technology for conventional pollutants).

Gravity:

The gravity of the violations is significant. At first, the County did not obtain the appropriate permits. Then, the site was operated in violation of Construction General Permit requirements and without appropriate erosion protection BMPs during the entire rainy season, resulting in discharges of turbid water and sediment to waters of the State and waters of the U.S. Waters of the U.S. were modified without water quality certification, resulting in unauthorized discharges of fill to waters of the U.S. As a result, significant site erosion resulted in the discharges of turbid water and large amounts of sediment and fill into waters of the State and waters of the U.S. These discharges likely caused exceedances of applicable water quality objectives for turbidity, sediment, settleable and suspended material, and toxicity. As a result, the discharges likely adversely impacted the beneficial uses of warm freshwater habitat (WARM) and wildlife habitat (WILD) of the receiving waters.

2) Whether the discharge is susceptible to cleanup or abatement.

Discharges to the County's easement are susceptible to cleanup, and the Executive Officer issued Cleanup and Abatement Order (CAO) No. R5-2009-0703 on 30 June 2009. The Order requires the County to clean up and abate the discharge to the extent practicable.

Discharges of turbid water and sediments off-site are not generally susceptible to cleanup.

3) The degree of toxicity of the discharge.

Toxic can be defined as "capable of causing injury or death..." (American Heritage College Dictionary). Discharges of excessively turbid or sediment laden water can cause injury or death to aquatic organisms by blocking light, clogging gills and respiratory structures, blocking feeding structures, smothering eggs and organisms, scouring organisms from anchorages, and filling spawning and hiding areas. Given the sediment and fill depths observed during Board staff inspections, discharges from the site certainly caused injury and/or death of aquatic species using the waters.

4) County's ability to pay and continue in business.

The County is not a business. Nevertheless, the Board does not have any evidence that the County cannot pay the proposed amount.

5) Any voluntary cleanup efforts undertaken.

The County did employ some BMPs on the site; however, the BMPs were installed incorrectly and were large ineffective. As a result and as mentioned above, the Executive Officer issued CAO No. R5-2009-0703 on 30 June 2009. The CAO requires the County to stabilize the site by 21 August 2009. The County waited until 19 August 2009, to hire a contractor to begin erosion control work and to date, continues to work on stabilizing the site. The County is otherwise generally complying with the CAO.

6) Any prior history of violations.

The County has no applicable prior history of violations on other County sites.

7) Degree of culpability.

The County is fully culpable for the violations. The Construction General Permit has been around in some form since 1992; municipalities are fully aware they are required to obtain coverage under the Construction General Permit prior to initiating construction projects of one acre or more. The County's own CEQA document acknowledges its obligation to obtain coverage under the Construction General Permit. Yet the County only obtained coverage under the Construction General Permit after Board staff inspected the site in response to a complaint, a month after it started construction, and notified the County that it was violating the

federal CWA for failing to obtain Construction General Permit coverage. Despite several subsequent inspections and contacts by Board staff, the County continued to violate the Construction General Permit once it obtained coverage by failing to install an effective combination of storm water BMPs and stabilizing disturbed areas, resulting in sediment discharges to surface waters.

Similarly, the requirement to obtain State water quality certification has been around for decades, and the County's own CEQA document acknowledges its obligation to secure federal CWA 401 water quality certification for its proposed work in waters of the U.S. However, the County only submitted an application for water quality certification after a site inspection by Board staff and notification that it was in violation of the federal CWA. Subsequently, the County submitted an application that said there were no waters of the U.S. to impact, again contradicting its CEQA document. The County completed the project without obtaining water quality certification.

8) Economic benefit or savings, if any, resulting from the violation.

The County should have installed an effective combination of storm water BMPs, and should have stabilized disturbed areas to prevent the discharge of sediment to surface waters. The County should have prepared and implemented a mitigation plan for the re-constructed areas of surface waters. The County should have prepared a complete application for section 401 water quality certification and obtained such certification prior to beginning work to dredge or fill in waters of the U.S. Projected costs associated with these activities are presented as follows:

- a) Board staff has reviewed the Discharger's SWPPP and a cost estimate prepared by Compliance One Solutions, Inc., the firm hired by the Discharger to install erosion control in response to the Cleanup and Abatement Order, and estimates that it would cost at least \$254,648.95 to properly implement erosion and sediment control storm water BMPs throughout the project site.
- b) Wetland delineation drawings prepared on 21 May 2009 indicate the project includes 763 linear feet of jurisdictional channels that should have been stabilized before, during, and after construction. It also includes 1,556 linear feet of streams that were filled. Provisions to mitigate for these permanent impacts should have been addressed by the Discharger during construction. The Discharger now proposes to reconstruct/recreate 665 linear feet of tributary streams and pay \$44,250.00 into a mitigation account to compensate for the 1,556 linear feet of permanent impacts.

For the 665 linear feet of created streams, the Discharger should have installed BMPs such as brush mattresses, live stakes, rock toe revetments, rock weirs, etc., to stabilize the reconstructed bed and bank and provide an environment for the natural re-vegetation and re-establishment of the riparian ecosystem. Board staff estimates it would have cost \$168.00 per linear foot to implement ecological

restoration to the streams. Based on this, the Discharger should have spent \$111,720.00 to recreate/restore these streams.

For the 763 linear feet of temporarily impacted channels, it would have been appropriate to install BMPs such as straw matting along the bank, and rock toe revetment or fiber rolls with plant plugs at the toe of the bank. Board staff estimates it would have cost \$20.00 per linear foot to install these treatments. Based on this, the Discharger should have spent \$15,260.00 to restore the temporarily impacted channels.

The Discharger should have obtained Water Quality Certification prior to the commencement of dredge and fill activities in waters of the U.S. The Discharger should have paid the application fee of \$15,982.00 prior to beginning work on the project. Board staff estimates a consultant would have charged \$150.00 per hour for professional services to prepare an application package for a Water Quality Certification, and would have needed 100 hours to update the wetland delineation drawings and renew the expired jurisdictional determination, prepare the application package, and design an appropriate compensatory mitigation and restoration plan. Based on this, the Discharger should have spent \$15,000.00 prior to beginning work on the project.

The Discharger should have offset permanent losses to waters of the U.S. by paying into a mitigation fund for any losses not offset by on-site creation of waterways. The Discharger should have spent the \$44,250.00 proposed in the mitigation plan, prior to beginning work on the project.

The total economic savings the Discharger realized by these violations is \$456,860.95.

- c) Board staff costs have amounted to 358 hours at \$150.00 per hour for a total of \$53,700.00.

9) Other matters that justice may require.

Madera County has a small population base of 152,331 (January 2009). The unemployment rate as of August 2009 was 12.1% compared to the State rate of 13.3%. The median household income, as of 2007, was 73.9% of the State median household income.

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent the Madera County Road Department (hereafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2009-0541 (hereafter the "Complaint"). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served. The person who has been issued a complaint may waive the right to a hearing."

(OPTION 1: Check here if the Discharger waives the hearing requirement and will pay in full.)

- a. I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board.
- b. I certify that the Discharger will remit payment for the proposed civil liability in the full amount of **five hundred ten thousand, six hundred dollars (\$510,600.00)** by two checks that reference "ACL Complaint No. R5-2009-0541." made payable to:
 - \$199,134.00 payable to the *State Water Resources Control Board, Cleanup and Abatement Account.*
 - \$311,466.00 payable to the *State Water Resources Control Board, Waste Discharge Permit Fund.*Payment must be received by the Central Valley Water Board by **26 October 2009**.
- c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after a 30-day public notice and comment period. Should the Central Valley Water Board receive significant new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.
- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

(Print Name and Title)

(Signature)

(Date)

Central Valley Regional Water Quality Control Board

HEARING PROCEDURES
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
R5-2009-0541

ISSUED TO
MADERA COUNTY ROAD DEPARTMENT
ROAD 200 WIDENING PROJECT
MADERA COUNTY

SCHEDULED FOR 9/10/11 DECEMBER 2009

PLEASE READ THESE HEARING PROCEDURES CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Background

The Executive Officer has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (CWC) section 13323 to the Madera County Road Department, alleging violations of the federal Clean Water Act (CWA), the CWC, and the *National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity*, Order 99-08-DWQ (NPDES No. CAS000002)(Construction General Permit).

The Complaint proposes that an administrative civil liability in the amount of \$510,600.00 be imposed. A hearing is currently scheduled to be conducted before the Central Valley Water Board during its 9/10/11 December 2009 meeting.

Purpose of Hearing

The purpose of the hearing is to consider relevant evidence and testimony regarding the ACL Complaint. At the hearing, the Central Valley Water Board will consider whether to issue an administrative civil liability order assessing the proposed liability, or a higher or lower amount, or reject the proposed liability. The public hearing on will commence at 8:30 a.m. or as soon thereafter as practical, or as announced in the Central Valley Water Board meeting agenda. The meeting will be held at:

11020 Sun Center Drive, Suite 200, Rancho Cordova, California.

An agenda for the meeting will be issued at least ten days before the meeting and posted on the Central Valley Water Board's web page at:

http://www.waterboards.ca.gov/centralvalley/board_info/meetings.

Hearing Procedures

The hearing will be conducted in accordance with these Hearing Procedures. These Hearing Procedures have been approved by the Central Valley Water Board Chair in model format, and are subject to further revision by the Central Valley Water Board's Advisory Team or the Chair. A copy of the general procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and is available at: <http://www.waterboards.ca.gov>, or upon request.

In accordance with Section 648, subdivision (d), any procedure not provided by these Hearing Procedures is deemed waived. Except as provided in Section 648, subdivision (b) and herein, Chapter 5 of the Administrative Procedures Act (commencing with Gov't Code § 11500) does not apply to this hearing.

ANY OBJECTIONS TO THE HEARING PROCEDURES MUST BE RECEIVED BY THE CENTRAL VALLEY WATER BOARD'S ADVISORY TEAM NO LATER THAN 8 OCTOBER 2009, OR THEY WILL BE WAIVED. FAILURE TO COMPLY WITH THE DEADLINES AND REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF DOCUMENTS AND/OR TESTIMONY.

The Discharger shall contact the Prosecution Team to try to resolve objections regarding due dates, the hearing date and hearing time limits BEFORE submitting objections to the Advisory Team.

Hearing Participants

Participants in this proceeding are designated as either "parties" or "interested persons." Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from the Central Valley Water Board, staff or others, at the discretion of the Central Valley Water Board.

The following participants are hereby designated as parties in this proceeding:

1. Central Valley Water Board Prosecution Team
2. Madera County Road Department

Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party must request party status by submitting a request in writing (with copies to the existing designated parties) so that it is received no later than 5 p.m. on **15 October 2009**, by the Advisory Team attorney (contact information listed below). The request shall include an explanation of the basis for

status as a designated party (i.e., how the issues to be addressed in the hearing and the potential actions by the Central Valley Water Board affect the person, and the need to present evidence or cross-examine witnesses), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be received by the Advisory Team, the person requesting party status, and all other parties by 5 p.m. on **26 October 2009**. The parties will be notified by 5 p.m. on **4 November 2009** whether the request has been granted or denied.

Primary Contacts

Advisory Team:

Mr. Kenneth Landau, Assistant Executive Officer
Central Valley Water Board
11020 Sun Center Drive, #200, Rancho Cordova CA 95670
klandau@waterboards.ca.gov

Ms. Lori Okun, Senior Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
Physical Address: 1001 I Street, Sacramento, CA 95814
Mailing Address: P.O. Box 100, Sacramento, CA 95812
Phone:(916) 341-5165; fax: (916) 341-5199
lokun@waterboards.ca.gov

Prosecution Team:

Pamela Creedon, Executive Officer
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Lonnie Wass, Supervising Engineer
W. Dale Harvey, Senior Water Resources Control Engineer
Bridget Supple, Environmental Scientist
1685 E Street
Fresno, CA 93706
Phone: (559) 445-5919
bsupple@waterboards.ca.gov

Patrick Pulupa, Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
1001 I Street
Sacramento, CA 95814
Phone: (916)341-5189; fax: (916) 341-5199
ppulupa@waterboards.ca.gov

Discharger:

Johannes J. Hoevertsz, Road Commissioner
Madera County Road Department
2037 W. Cleveland Avenue, MS "D"
Madera, CA 93637
jhoevertsz2@madera-county.com

Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Central Valley Water Board (Prosecution Team) have been separated from those who will provide advice to the Central Valley Water Board (Advisory Team). Members of the Advisory Team are: Kenneth Landau and Lori Okun. Members of the Prosecution Team are: Pamela Creedon, Lonnie Wass, W. Dale Harvey, Bridget Supple, and Patrick Pulupa. Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Pamela Creedon regularly advises the Central Valley Water Board in other, unrelated matters, but is not advising the Central Valley Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Central Valley Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Central Valley Water Board or the Advisory Team regarding this proceeding.

Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in ex parte communications regarding this matter with members of the Advisory Team or members of the Central Valley Water Board. An ex parte contact is any written or verbal communication pertaining to the investigation, preparation or prosecution of the ACL Complaint between a member of a designated party or interested person on the one hand, and a Central Valley Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all other designated parties (if written) or made in a manner open to all other designated parties (if verbal). Communications regarding non-controversial procedural matters are not ex parte contacts and are not restricted. Communications among one or more designated parties and interested persons themselves are not ex parte contacts.

The following communications to the Advisory Board must be copied to all designated parties: Objections to these Hearing Procedures; requests for modifications to these Hearing Procedures; requests for designated party status, or objections thereto; and all written evidence, legal argument or policy statements from designated parties. This is not an all-inclusive list of ex parte communications.

Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined **30** minutes to present evidence (including evidence presented by witnesses called by the designated party), cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have 3 minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received by 5:00 p.m. on **18 November 2009**. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Central Valley Water Board Chair (at the hearing) upon a showing that additional time is necessary. Such showing shall explain what testimony, comments or legal argument require extra time, and why the Discharger could not adequately provide the testimony, comments or legal argument in writing before the hearing.

If *new* rebuttal evidence or argument is accepted after the above date, designated parties shall submit any requests for additional time to respond to the rebuttal, **at 3 December 2009**. In most cases, additional time will not be necessary to respond to rebuttal.

A timer will be used, but will not run during Board questions or the responses to such questions, or during discussions of procedural issues.

Submission of Evidence and Policy Statements

Case in Chief: The Prosecution Team, the Discharger and each other designated party must submit the following information in writing in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the Central Valley Water Board to consider. Evidence and exhibits already in the public files of the Central Valley Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3. Board members will generally not receive copies of materials incorporated by reference, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony. (This information is not required for rebuttal witnesses or rebuttal testimony.)
4. The qualifications of each expert witness, if any. (This information is not required for rebuttal witnesses.)

The Prosecution Team's information must include the legal and factual basis for its claims against each Discharger; a list or attached copy of all evidence on which the Prosecution

Team relies, which must include, at a minimum, all documents cited in the complaint or Staff Report; and the witness information required under items 3-4 for all witnesses, including staff. The Prosecution Team shall provide an electronic copy to Kenneth Landau and Lori Okun of all documents cited in the complaint or Staff Report no later than the due date under Important Deadlines, below.

The Prosecution Team shall submit one hard copy and one electronic copy to Kenneth Landau and one electronic copy to Lori Okun. Each other designated party shall submit 3 hard copies and one electronic copy to Kenneth Landau and one electronic copy to Lori Okun. Kenneth Landau and Lori Okun must receive all submissions no later than 5:00 p.m. on the applicable due date under Important Deadlines, below.

Rebuttal: Any designated party that would like to submit evidence, legal analysis or policy statements to rebut the information previously submitted by other designated parties shall submit 3 hard copies of their rebuttal information to Kenneth Landau and one electronic copy of the information to Lori Okun so that they are received by 5 p.m. on the due date under Important Deadlines, below. "Rebuttal" means evidence, analysis or comments offered to disprove or contradict other designated parties' submissions. Rebuttal shall be limited to the scope of the materials previously submitted by the other designated parties. Rebuttal information that is not responsive to information previously submitted by other designated parties may be excluded.

Copies: Board members will receive copies of all materials submitted in hard copy or electronic format. The Board's copies will be printed in black and white from the designated parties' electronic copies. Designated parties who are concerned about print quality of all or any part of their written materials should submit a high-resolution pdf or provide an extra nine paper copies for the Board members. For items with voluminous submissions, Board members may receive copies electronically only. Electronic copies are also posted on the Board's website.

Parties without access to computer equipment are strongly encouraged to have their materials scanned at a copy and mailing center. However, the Board will not reject materials solely for failure to provide electronic copies.

By **24 November 2009** the Prosecution Team shall prepare a summary agenda sheet ("buff sheet") for this item to be included in the Board members' agenda package and posted on the internet. The buff sheet shall clearly state that it was prepared by the Prosecution Team. The Prosecution Team shall provide a copy of the buff sheet to all parties by mail or email.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible, but they must be received by **24 November 2009**. Interested persons do not need to submit written comments in order to speak at the hearing.

In accordance with California Code of Regulations, title 23, section 648.4, the Central Valley Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Central Valley Water Board may

exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will not be considered by the Central Valley Water Board and will not be included in the administrative record for this proceeding. Power Point and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. Designated parties must provide the Advisory Team with a printed copy of such materials at or before the hearing, for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Evidentiary Documents and File

The Complaint and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 11020 Sun Center Drive, Suite 200, Rancho Cordova, California. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Central Valley Water Board's Chair. Many of these documents are also posted on-line at: http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml Although the web page is updated regularly, to assure access to the latest information, you may contact Bridget Supple (contact information above).

Questions

Questions concerning this proceeding may be addressed to the Advisory Team attorney (contact information above).

IMPORTANT DEADLINES

(Note: the Central Valley Water Board is required to provide a hearing within 90 days of issuance of the Complaint (CWC § 13323). The Advisory Team will generally adhere to this schedule unless the discharger submits a waiver and it is accepted.)

All required submissions must be received by 5:00 p.m. on the due date.

- 25 Sept 2009 Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends Hearing Procedures to Discharger and Advisory Team, and publishes Public Notice
- 8 Oct 2009 Objections due on proposed Hearing Procedures
- 15 Oct 2009 Deadline for submission of request for designated party status.
- 26 Oct 2009 Deadline for opposition to request for designated party status.
- 26 Oct 2009 Discharger's deadline for submitting signed form to waive right to hearing within 90 days.
- 4 Nov 2009 Advisory Team issues decision on requests for designated party status, if any.
- 26 Oct 2009 Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above.
- 16 Nov 2009 Remaining Designated Parties' (including the Discharger's) deadline for submission of all information required under "Evidence and Policy Statements," above.
- 16 Nov 2009 Prosecution Team submits an electronic copy to Kenneth Landau and Lori Okun of all documents cited in the complaint or Staff Report, unless previously submitted.
- 25 Nov 2009 All Designated Parties shall submit any rebuttal evidence, written rebuttal to legal argument and/or written rebuttal to policy statements; and all evidentiary objections to other Designated Parties' submittals.
- 18 Nov 2009 Requests for additional hearing time (see Hearing Time Limits, above).
- 3 Dec 2009 If *new* rebuttal evidence or argument is submitted, deadline for designated parties to submit any requests for additional time at the hearing to respond to the rebuttal.
- 24 Nov 2009 Interested persons' comments are due.
- 24 Nov 2009 Prosecution Team's deadline to submit Buff Sheet.
- 9/10/11 Dec 2009 ... Hearing