

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD  
**ORDER WQ 2014-0015**

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In the Matter of the Petitions of  
**CALIFORNIA DEPARTMENT OF TRANSPORTATION AND MCM CONSTRUCTION, INC.**

For Review of  
Administrative Civil Liability Order No. R1-2012-0034  
California Department of Transportation, Confusion Hill Bypass Project

Issued by the  
California Regional Water Quality Control Board,  
North Coast Region

***SWRCB/OCC FILE A-2208(a) and (b)***

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BY THE BOARD:

In this Order, the State Water Resources Control Board (State Water Board) reviews and upholds Administrative Civil Liability Order No. R1-2012-0034 (ACL Order) issued to the California Department of Transportation (Department) by the North Coast Regional Water Quality Control Board (North Coast Water Board), with the exception of three assessed violations which the parties agree should not have been included in the final ACL Order.<sup>1</sup>

**I. Background**

In February 2006, the North Coast Water Board approved the Department's request for water quality certification pursuant to Clean Water Act section 401 (401 Certification) for activities related to the construction of the Confusion Hill Highway Bypass Project (Project) near the South Fork of the Eel River (river) in Mendocino County.<sup>2</sup> The Project relocated Highway 101 from the east side of the river to the west side, in order to bypass a landslide.

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<sup>1</sup> North Coast Water Board Administrative Civil Liability Order No. R1-2012-0034, adopted March 15, 2012. The ACL Order is available at: <[http://www.waterboards.ca.gov/northcoast/board\\_decisions/adopted\\_orders/pdf/2012/120323\\_12\\_0034\\_ACLO\\_Caltans\\_ConfusionHill.pdf](http://www.waterboards.ca.gov/northcoast/board_decisions/adopted_orders/pdf/2012/120323_12_0034_ACLO_Caltans_ConfusionHill.pdf)>. (See North Coast Water Board's Response to Petitions of California Department of Transportation and MCM Construction, Inc., (Dec. 24, 2012) [Response to Petitions], pp. 1-2 [discussing "previously conceded violations" that should be "struck (*sic*) from the (Civil Liability) Order."])

<sup>2</sup> 401 Certification (Feb. 16, 2006) at p. 1. The 401 Certification was subsequently amended on April 18, 2006, and December 12, 2007.

Project construction involved erecting two bridges connected by a roadway. MCM Construction, Inc. (MCM) was the Department's construction contractor for the Project.<sup>3</sup> In addition to the 401 Certification, Project construction was subject to the provisions of the Department's statewide stormwater permit (stormwater permit) issued by us in 1999.<sup>4</sup>

After North Coast Water Board staff issued two notices of violation of the 401 Certification and stormwater permit to the Department in October and November of 2006, the Assistant Executive Officer of the North Coast Water Board issued an administrative liability complaint (complaint) against the Department in August 2009.<sup>5</sup> The complaint alleged that the Department committed 154 violations of the 401 Certification and 141 days' worth of violations of the stormwater permit.<sup>6</sup> The charges fell within nine categories of liability: construction dewatering, leaky equipment, slag discharges, turbid discharges, insufficient turbidity measurements, cementitious discharges, rubbish and debris discharges, individual events, and violations of the stormwater permit. The complaint recommended that the North Coast Water Board find the Department liable for penalties amounting to \$1,511,000, and an additional \$70,182 in enforcement-related staff costs, for a total recommended liability of \$1,581,182.<sup>7</sup>

Prior to issuing the complaint, the North Coast Water Board established distinct prosecution and advisory teams to comply with the separation of functions and ex parte communication requirements of California's Administrative Procedures Act's (APA) adjudicative

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<sup>3</sup> ACL Order at pp. 1-2. Since the Department is the certified party under the 401 Certification and the permittee under the stormwater permit, it is legally responsible for any violations thereunder, including violations by its agents (e.g., MCM). This Order, therefore, does not distinguish the acts of the Department from those of MCM. (See also, Hearing Transcript (Jul. 2, 2013) (transcript), at p. 16:3-6 [noting that a future proceeding will determine the degree of liability for which each of the Department and MCM is responsible].)

The transcript is available at:

<[http://www.waterboards.ca.gov/northcoast/board\\_info/board\\_meetings/03\\_2012/items/06/mcm\\_06-2011\\_Waterboard\\_Hearing\\_Transcript%20.pdf](http://www.waterboards.ca.gov/northcoast/board_info/board_meetings/03_2012/items/06/mcm_06-2011_Waterboard_Hearing_Transcript%20.pdf)>.

<sup>4</sup> State Water Board [Order 99-06-DWQ](#).

<sup>5</sup> North Coast Water Board Administrative Civil Liability Complaint No. R1-2009-0095 for Violations of Clean Water Act, Section 401, Water Quality Certification and State Water Resources Control Board Order No. 99-06-DWQ Storm Water Permit (Aug. 13, 2009).

<sup>6</sup> *Id.* at pp. 2-3, ¶ 7.

<sup>7</sup> *Id.* at pp. 26-27, Table 1 (\$1,511,000 recommended penalties), and at p. 21, ¶ 21.g. (\$70,182 in enforcement-related staff costs).

We note that between the filing of the complaint and the filing of the prosecution team's "Prosecution Brief," dated February 14, 2011, the prosecution team concluded that the complaint's overall total recommended liability had been \$1,511,000, including staff costs. (See Prosecution Brief at p. 29.) The North Coast Water Board's ACL Order cited that \$1,511,000 amount as well, as "includ[ing] staff costs." (ACL Order at p. 2.) The complaint, however, clearly states that the \$70,182 in staff costs were sought "in addition to the proposed administrative civil liability [of \$1,511,000]." (Compare ACL Order at p. 2 with complaint at p. 21, ¶ 21.g.) (Emphasis added.)

provisions, and the due process provisions of the United States and California constitutions.<sup>8</sup> Members of the prosecution team were subject to the prohibition against ex parte communications with the members of the North Coast Water Board and its advisory team, as were the Department and MCM.

During the course of discovery, the prosecution team reduced its recommended penalty by \$222,500, but requested continuing staff costs of \$235,500.<sup>9</sup> The ACL Order states that by the time the hearing on the complaint was held (in June 2011), the prosecution team's overall recommended liability was \$1,524,000, which we accept as the overall liability amount requested by the prosecution team for the purposes of this Order (because the accuracy of that amount is unchallenged by any party, and any error we see is to the benefit of the Department).<sup>10</sup>

In June 2011, a four-member panel of the nine-member North Coast Water Board held a day-long hearing on the merits of the complaint. The hearing notice indicated that the proceeding would be conducted pursuant our regulations implementing chapter 4.5 (commencing with section 11400) of the APA.<sup>11</sup> The prosecution team, Department and MCM each had opportunities to make opening and closing statements, present evidence and elicit testimony from party witnesses, and cross-examine those witnesses. The panel of North Coast Water Board members also directly questioned witnesses.<sup>12</sup> After the conclusion of the hearing, the panel members prepared an administrative civil liability order for consideration by the full North Coast Water Board. After releasing a draft administrative civil liability order in February 2012, the North Coast Water Board adopted, in our opinion, a thoroughly and carefully analyzed ACL Order in March 2012. The ACL Order assessed overall liability to the Department in the amount of \$475,182 (including \$70,182 in staff costs), but rejected the prosecution team's request for an additional \$235,500 for on-going staff costs that had not been properly noticed.<sup>13</sup>

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<sup>8</sup> See Gov. Code, §§ 11430.10-11430.80, 11425.30; *Howitt v. Superior Ct.* (1992) 3 Cal.App.4th 1575.

<sup>9</sup> ACL Order at p. 2.

<sup>10</sup> We accept that \$1,524,000 amount for purposes of this Order, despite fn. 7, *ante*, which discusses how the overall liability initially sought by the complaint may have been incorrectly calculated (to the Department's benefit) by the prosecution team in its Prosecution Brief and by the North Coast Water Board's ACL Order by the amount of the initial staff costs requested by the prosecution team (i.e., \$70,182).

<sup>11</sup> AR, Exh. E at p. 2-3

<sup>12</sup> A recording of that hearing is available at: <[http://www.waterboards.ca.gov/northcoast/board\\_info/board\\_meetings/06\\_2011/](http://www.waterboards.ca.gov/northcoast/board_info/board_meetings/06_2011/)>, item no. 9.

<sup>13</sup> ACL Order at pp. 5-6

The North Coast Water Board's assessment of liability amounted to a nearly 69 percent decrease in liability from the \$1,524,000 sought by the prosecution team.

The Department and MCM each filed timely petitions requesting State Water Board review of the ACL Order.<sup>14</sup> On November 7, 2012, we consolidated the two petitions for review since they are legally and factually related to the ACL Order.<sup>15</sup> On September 24, 2013, we adopted an order to review the ACL Order on our own motion.<sup>16</sup> Having reviewed the two petitions, the record in this matter, and responses to the petitions from the North Coast Water Board, we have reached the following conclusions regarding the merits of the petitions.

## II. Brief Summary of Issues and Findings

The Department's petition asks us to review the North Coast Water Board's inclusion of staff costs in its assessment of liability; raises evidentiary objections; and requests relief from the North Coast Water Board's imposition of liability for charges that had been withdrawn by the prosecution team prior to the hearing on the matter. MCM's petition challenges seven of the nine categories of permit violations for which the North Coast Water Board assessed liability (construction dewatering, leaky equipment, turbid discharges, insufficient turbidity measurements, cementitious discharges, individual events, and stormwater permit violations). It also challenges the application of statutory factors the North Coast Water Board made when determining the amount of liability.<sup>17</sup>

The Department's assertion that the North Coast Water Board was not authorized by statute or regulation to include staff costs in its assessment of liability is incorrect. Upon review of the hearing transcript and record, the evidence challenged by the Department for lacking authentication and amounting to hearsay was, in fact, properly authenticated, subject to statutory hearsay exceptions, and therefore admissible. The Department did exhaust its argument before the North Coast Water Board that "all" previously withdrawn charges be removed from the North Coast Water Board's draft order.<sup>18</sup> The North Coast Water Board

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<sup>14</sup> State of California Department of Transportation's Petition for Review re North Coast Regional Water Quality Control Board Administrative Civil Liability Order No. R1-2012-0034 (Confusion Hill Bypass Project) (Department's petition); [MCM] Petition for Review of Administrative Civil Liability Order No. R1-2012-0034 (Regional Water Quality Control Board, North Coast Region) (MCM's petition).

<sup>15</sup> Pursuant to Cal. Code Regs., tit. 23, § 2054.

<sup>16</sup> State Water Board [Order WQ 2013-0100](#); see Wat. Code § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

<sup>17</sup> See Wat. Code, § 13385, subd. (e) (hereinafter referred to as the "section 13385 factors").

<sup>18</sup> See Comment letter entitled "In re: Administrative Civil Liability draft Order No. R1-2012-0034, Confusion Hill Bypass Project," from the Department's attorney Ardine Zazzeron to Lisa Bernard and the Advisory Team (Feb. 29, *Continued*)

acknowledges that it overlooked three previously withdrawn charges when it adopted final ACL Order,<sup>19</sup> so we order those three charges stricken from the ACL Order, along with the amount of liability assessed for those three violations.

The seven categories of permit violations challenged by MCM are all supported by evidence in the record. The North Coast Water Board analyzed the ten section 13385 factors in one section of its ACL Order, and incorporated its conclusions by reference into all other sections of the ACL Order that addressed the facts and the North Coast Water Board's liability assessments. MCM's challenge to the Regional Board's analysis of section 13385 factors amounts to an organizational or stylistic preference on its part.

### **III. Merits Analysis**

#### **A. The Department's Petition**

##### **1. Imposition of Staff Costs**

In its ACL Order, the North Coast Water Board declined to assess enforcement-related staff costs incurred by the prosecution team after the filing of the complaint. It did, however, assess liability in the amount of \$70,182, for the staff costs incurred prior to the filing of the complaint.<sup>20</sup>

The Department argues that the North Coast Water Board is not authorized by statute or regulation to include staff costs when calculating civil liability amounts. In particular, it alleges that the 2002 Enforcement Policy,<sup>21</sup> which the North Coast Water Board cited in the ACL Order for the recovery of certain staff costs, is not a valid regulation, and does not authorize the recovery of staff costs calculated on an hourly basis.<sup>22</sup> The Department argues further that the ACL Order relies on an "isolated phrase in Water Code § 13385," which does not mention costs or fees, nor does the language of the statute suggest legislative intent to allow for cost recoveries.<sup>23</sup> We disagree with the Department.

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2012), p. 4, section B.3 (Department's Comment Letter). See also Cal. Code Regs., tit. 23, § 2050, subds. (a)(9) and (c) (exhaustion requirement).

<sup>19</sup> See Response to Petitions, pp. 1-2.

<sup>20</sup> ACL Order at pp. 5-6.

<sup>21</sup> State Water Board Resolution 2002-040.

<sup>22</sup> See the Department's petition at p. 2:22-24. The Department argues that the Enforcement Policy is not a valid regulation because it was not promulgated in accordance with the rulemaking provisions of the APA set forth in Government Code section 11340, et seq.

<sup>23</sup> See the Department's petition at p. 2:19-28 for a summary of its staff costs arguments.

We adopted our 2002 Enforcement Policy on February 19, 2002, in accordance with Water Code section 13140. Contrary to the Department's assertions, it was then submitted to and approved by the Office of Administrative Law (OAL);<sup>24</sup> transmitted to the Secretary of State for filing;<sup>25</sup> and summarized in the California Code of Regulations at title 23, section 2910 (effective July 30, 2002).<sup>26</sup> Its provisions that staff costs may be one of the "other factors that justice may require," and should be estimated when setting an ACL," are legal and fully consistent with Water Code section 13385, subdivision (e).<sup>27</sup> Administrative costs associated with investigating and prosecuting an enforcement action are properly imposed in accordance with this factor.

We and our predecessors have made a consistent, long-standing, quasi-legislative determination that the "justice may require" language of Water Code section 13385 authorizes a water board to include staff enforcement costs as an appropriate factor in an enforcement proceeding. Pursuant to this long-standing agency interpretation, a violator can be ordered to reimburse a board for the administrative costs of an enforcement action imposing penalties. This result is just, in part, because otherwise the remaining waste dischargers, who pay fees to support the waste discharge permit program, would subsidize the full costs of enforcement actions against individual violators. Authorizing a water board to recover staff costs as part of considering "other factors that justice may require" appropriately shifts the burden of an enforcement action, where a water board finds a violation has occurred, onto the violator. As a result, we uphold the North Coast Water Board's assessment of staff costs pursuant to the 2002 Enforcement Policy. We also find that calculating such costs on an hourly basis was a reasonable approach for the North Coast Water Board to have taken, because state employee time is recorded and reported to payroll offices in hourly increments (or subsets thereof).

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<sup>24</sup> See Gov. Code, § 11353, subd. (b)(2). (Incidentally, the same APA process was followed when we adopted the previous 1996 Enforcement Policy, which policy also allowed for the recovery of staff costs.)

<sup>25</sup> This submission was also performed in accordance with the APA, specifically Government Code section 11353, subdivision (b)(5)-(6).

<sup>26</sup> The 2002 Enforcement Policy was in effect until it was repealed and replaced with the current State Water Board 2010 Enforcement Policy. (State Water Board Resolution 2009-0083; Cal. Code Regs., tit. 23, § 2910.)

<sup>27</sup> Compare Wat. Code, § 13385, subd. (e), with the 2002 Enforcement Policy at p. 40. The section 13385 factors are to be considered by regional boards when imposing liability. Those factors include "other matters that justice may require." (Wat. Code, § 13385, subd. (e).)

## 2. Evidentiary Objections

Prior to the administrative hearing, in April and June 2011, the North Coast Water Board issued two evidentiary rulings, one regarding the Department's hearsay objections, the other regarding the admission of new evidence.<sup>28</sup> At issue here is the hearsay ruling.<sup>29</sup>

The hearsay ruling allowed the prosecution team to introduce biological monitoring reports into evidence at the hearing, over the Department's continuing objection.<sup>30</sup> The parties agree that the biological monitoring reports were prepared by a Department subcontractor to satisfy the Department's compliance obligations under a federal National Marine Fisheries Service permit for the Project.<sup>31</sup> The parties further agree that the biological monitors were retained to report on Project conditions that could have "adverse" or "unanticipated" effects on salmonids.<sup>32</sup>

According to the Department, the biological monitors visited the Project site and reported their findings back to the Department through the subcontracting reporting chain. The Department then submitted those reports to the federal permitting authority, as required by that permit. It submitted those reports without modification, because the biological monitors acted independently of the Department's supervision, in accordance with the terms of the federal permit. The Department had no ability to challenge the content of those reports.<sup>33</sup>

The Department objects to the introduction of the biological monitoring reports (and photographs within those reports) permitted by the North Coast Water Board at the hearing. Because the reports and photographs were offered as evidence of violations, but were not authenticated by the author or photographer (or someone else with first-hand knowledge of the reports and photographs), the Department argues that their admission into evidence was improper because the documents lacked authentication and amounted to hearsay.<sup>34</sup>

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<sup>28</sup> Evidentiary Rulings on Hearsay Objections to Biological Monitoring Reports, ACL Complaint No. R1-2009-0095, Confusion Hill Bypass Project (Apr. 27, 2011) (hearsay ruling); and Evidentiary Ruling on Objections to Caltrans and MCM Correspondence on Water Quality Compliance, ACL Complaint No. R1-2009-0095, Confusion Hill Bypass Project (Jun. 3, 2011).

<sup>29</sup> The Department's petition focuses solely on the North Coast Water Board's April 2011 hearsay ruling. The June 2011 admission of new evidence ruling is not before us.

<sup>30</sup> Hearsay Ruling at pp. 3-5.

<sup>31</sup> See the Department's petition at p. 12:7-24.

<sup>32</sup> Hearsay Ruling at p. 3. Compare ACL Order's description of the biological monitors' responsibilities as including "identifying and reconciling any condition that could adversely affect salmonids and their habitat," with the Department's petition that states that the biological monitors' role was to "document any unanticipated effects of work activities on salmonids and/or to document any necessary fish relocation." (Department's petition at p. 12:16-18.)

<sup>33</sup> *Id.* at p. 12:21-24.

<sup>34</sup> Department's petition at pp. 3 and 4:1-16.

We note that while the Department's petition cites to a matrix of objections to reports and photographs that it submitted prior to the hearing, it never specifies which objections continue to apply to the violations that the North Coast Water Board ultimately assessed against the Department.<sup>35</sup> "We are not required to search the record to ascertain whether it contains support for [petitioners'] contentions."<sup>36</sup> The North Coast Water Board reviewed the Department's matrix, and also considered the weight to give to the reports and photographs (and related testimony). In many instances, the North Coast Water Board either found insufficient evidence supporting the charges (when the biological monitoring reports or photos were relied upon), or declined to impose fines because the photographs or reports revealed only minor problems.<sup>37</sup> So, the Department's citation to its matrix of objections is unhelpful to us, as it is far broader than the liabilities that were ultimately assessed against the Department.

Upon review of the transcript and record, we find that the prosecution team (with assistance from the Department) sufficiently authenticated the reports (and the reports' photographs) to which the Department objects. We also find that the reports were properly admitted under statutory hearsay exceptions.

*a. Authentication*

Adjudicative proceedings conducted by the State and Regional Water Boards must be in accordance with the provisions and rules of evidence set forth in the APA.<sup>38</sup> Hearings held under the APA "need not be conducted according to technical rules relating to evidence and witnesses," and allow admission of "[a]ny relevant evidence...if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs...."<sup>39</sup> Thus, in an administrative hearing held under the APA, an agency such as the North Coast Water Board may consider evidence that would not necessarily be admissible in

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<sup>35</sup> See the Department's petition at p. 4:8; see also Transcript of ACL Order hearing at p. 173:2-5.

The Department cites to *one* photograph as an example of the "multiple" photographs to which it objects. (Department's petition at p. 3:15-17 and Exhibit B.) The Department admits that the photograph cited corresponds to alleged violations 8 and 9. (Department's petition at p. 3:15.) The North Coast Water Board, however, declined to assess liability for these two violations: "It seems inappropriate to assess a fine when the only evidence cited shows that the spill was cleaned up." (ACL Order at p. 13.) So, we find the Department's one example unhelpful to our review.

<sup>36</sup> *Salas v. Cal. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, 1074 (when upholding a summary judgment in favor of the Department in a personal injury suit, the court noted in its analysis of evidentiary objections that appellants carry the burden to demonstrate specific, not general, error in lower court rulings on evidentiary objections).

<sup>37</sup> See fns. 67 & 70, *post*.

<sup>38</sup> Gov. Code, § 11513, subds. (c)-(d); see also Cal. Code Regs., tit. 23, § 648.

<sup>39</sup> Gov. Code, § 11513, subd. (c).



court.<sup>40</sup> The cases cited by the Department in its petition center primarily on trial-court requirements that the author or other person most knowledgeable is required to authenticate documents.<sup>41</sup> That is not the standard here, but even if it were, the documents at issue were properly authenticated.

At trial, authentication of writings (including photographs)<sup>42</sup> is defined as “(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.”<sup>43</sup> Under California evidence law, contents of documents may be authenticated “in light of the circumstances.”<sup>44</sup>

Unlike the administrative hearing cases cited by the Department, the reports and photographs at issue here were not prepared by the public agency holding the adjudicative hearing.<sup>45</sup> Instead, they were prepared by monitors retained by the Department’s consultant in order to satisfy a federal permit requirement.<sup>46</sup> While the Department’s petition attempts to distance itself from the contents and conclusions within the reports (including the photographs), it admits that it was required to hire the monitors to prepare reports to satisfy federal permit requirements relating to the Project. It admits that it retained those monitors through a subcontracting process.<sup>47</sup> The Department further admits that it submitted the reports for which it contracted to the federal permitting authority.<sup>48</sup> The Department’s own petition does not deny that the documents at issue are biological reports.<sup>49</sup> In light of these circumstances, the reports satisfy even trial-court expectations surrounding authentication.<sup>50</sup> While the Department’s

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<sup>40</sup> See *ibid.*

<sup>41</sup> See the Department’s petition at pp. 14-15.

<sup>42</sup> California’s Evidence Code includes photographs within the definition of “writing.” (Evid. Code, § 250.)

<sup>43</sup> Evid. Code, § 1400.

<sup>44</sup> See *McAllister v. George* (1977) 73 Cal.App.3d 258, 263 (invoice reflected the fact that professional services had been rendered).

<sup>45</sup> See *Jacobson v. Gourley* (2000) 83 Cal.App.4th 1331 (Department of Motor Vehicles failed to authenticate its own report in license-suspension hearing); *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344 (school district failed to authenticate video tapes it took of employee it terminated).

<sup>46</sup> See the Department’s petition at p. 12:7-24; North Coast Water Board’s Evidentiary Ruling on Hearsay Objections to Biological Monitoring Reports (Apr. 27, 2011) at p. 3 (Evidentiary Ruling).

<sup>47</sup> Department’s petition at p. 12:7-24.

<sup>48</sup> *Id.* at p. 12:24.

<sup>49</sup> *Ibid.*

<sup>50</sup> See Evid. Code, § 1400; *McAllister v. George, supra*, 73 Cal.App.3d at p. 263.

petition would have us conflate authenticity with the weight or consideration to afford those reports, that is an issue distinct from the Department's own admission that the documents at issue are indeed biological reports from the Project site.<sup>51</sup>

With regard to the weight the North Coast Water Board afforded those reports, the Department again assisted the prosecution team's efforts. The prosecution team submitted the biological monitoring reports and photographs into evidence in concert with the testimony from North Coast Water Board staff, all of whom had visited the Project.<sup>52</sup> At the hearing, an attorney representing the Department assisted the prosecution team's efforts during its cross examination of Mr. Grady, when it asked him why he felt the biological monitoring reports were "reliable."<sup>53</sup> The Department elicited testimony from Mr. Grady that he generally spoke with the monitors/photographers about the type of camera used to take the photographs, information contained in the reports, and dates of the photographs. According to Mr. Grady's testimony on cross, those conversations helped Mr. Grady to "corroborate" some of the contents of the biological monitoring reports and to confirm the dates of the photographs with the corresponding written content of the report.<sup>54</sup>

Thus, contrary to the Department's assertions, the biological monitoring reports were authenticated sufficiently for an administrative hearing.<sup>55</sup>

*b. Hearsay*

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing, and that is offered to prove the truth of the matter stated.<sup>56</sup> While hearsay evidence is generally not admissible in court because of its inherent unreliability, there are numerous exceptions to the hearsay rule based on the rationale that even though a statement was made out of court or by another party, it is still reliable.<sup>57</sup> In

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<sup>51</sup> See the Department's petition at pp. 13-16.

<sup>52</sup> See Transcript at p. 122:17-21 (regarding Messrs. Grady and Pratt's respective site visits) and at p.164:21 (regarding Ms. Dougherty's site visit).

<sup>53</sup> *Id.* at pp. 180:13-25, 181:1-10.

<sup>54</sup> *Id.* at pp. 174-178.

<sup>55</sup> See e.g., *Desert Turf Club v. Bd. of Supervisors* (1956) 141 Cal.App.2d 446, 455 ("While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, **or** by *authenticated* documents....") (Emphasis added, italics in original.)

<sup>56</sup> Evid. Code, § 1200, subd. (a).

<sup>57</sup> See *Idaho v. Wright* (1990) 497 U.S. 805, 817.

administrative hearings, “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.”<sup>58</sup> Thus, in a matter such as this, where the Department raised timely hearsay objections, hearsay evidence cannot form the sole basis for a finding of violation unless an exception to the hearsay rule applies to that evidence.

### **1. Biological Monitoring Reports**

As discussed above, the biological monitoring reports were prepared by the Department’s subcontractors. But the parties nevertheless dispute whether the monitors were agents of the Department, independent actors, or somehow agents of the North Coast Water Board (because the federal permit requirements sought verification of Project conditions independently of the Department’s reporting).<sup>59</sup> For purposes of our determination of the appropriateness of admissibility, the employment status of the monitors does not matter, because a hearsay exception applies to each scenario posited by the parties. These reports are either admissible under the official records or business records exceptions (if the monitors are either the Department’s or the North Coast Water Board’s agents), or the business records exception (if the monitors are independent actors).<sup>60</sup>

Of note is the fact that the Department itself also used these biological monitoring reports during the hearing. Regardless of whether the official records or business records hearsay exception applies, the Department’s use of the materials supports their trustworthiness. The Department relied on the reports in an attempt to impeach Ms. Dougherty’s hearing testimony as inconsistent from her deposition testimony regarding habitat damage and degradation, and potentially related wildlife deaths. In this example, the Department’s attorney

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<sup>58</sup> Gov. Code, § 11513, subd. (d).

<sup>59</sup> See North Coast Water Board’s Evidentiary Ruling at p. 4; see also the Department’s petition at p. 18.

<sup>60</sup> The official records hearsay exception is defined as, “Evidence of a writing made as a record of an act, condition or event,” made “by and within the scope of duty of a public employee.” (Evid. Code, § 1280.) The writing must have been made “at or near the time of the act, condition, or event.” (*Id.*, § 1280, subd. (b).) The “sources of information and method and time of preparation” must have been such as “to indicate its trustworthiness.” (*Id.*, § 1280, subd. (c).) The business records hearsay exception is defined as, “Evidence of a writing made as a record of an act, condition or event,” made “in the regular course of a business.” (*Id.*, § 1271.) The writing must have been made “at or near the time of the act, condition, or event.” (*Id.*, § 1271, subd. (b).) A “qualified witness” must testify to the document’s “identity and the mode of its preparation.” (*Id.*, § 1271, subd. (c).) The “sources of information and method and time of preparation” must have been such as “to indicate its trustworthiness.” (*Id.*, § 1271, subd. (d).) (Note that the business records and official records exceptions can overlap.) (See 1 Witkin, Cal. Evidence (5th ed. 2012) § 247(b), p. 1135.)

asked Ms. Dougherty to refer to and read from portions of the very biological monitoring reports that it is challenging.<sup>61</sup>

## 2. Photographs within the Biological Monitoring Reports

While California's Evidence Code requires photographs to be authenticated, photographs are not included in the Evidence Code's definition of "statement."<sup>62</sup> As a result, photographs are not hearsay.<sup>63</sup> Instead, the trial-court admissibility standard for photographs is, "The testimony of the photographer is not necessary to establish admissibility of a photograph. All that is required is testimony that the photograph is a correct representation of the objects it portrays."<sup>64</sup> "Whether a photograph accurately represents an object or scene is primarily question for trial court, and its ruling will be sustained unless an abuse of discretion is apparent."<sup>65</sup>

Here, the Department's attorney elicited Mr. Kason's *general* qualifications to testify about the reports and their photographs:

Well, what I -- what I spoke to [the biological monitors] primarily about as I recall was some of the reports that I was reviewing in front of me that I received from Caltrans through our 13267 Order that we requested, because we had not previously received them from Caltrans. And they contained a lot of violations in these reports that were -- had previously not been identified to the Water Board staff, and so I needed to corroborate some of his reports, and also the dates of the photographs. So, when talking to him, I confirmed what kind of -- I forget what kind of camera, but he said a digital -- he used a digital camera, and that he set the date stamp on the -- or set the date on the camera, and he told me that I could confirm that by looking at the reports that he had written and confirming the date stamp on the photos with the reports.<sup>66</sup>

But, as we noted above, the Department's petition offers us no *specific* information as to which photographs it now objects.<sup>67</sup> We have no information from the Department indicating that the

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<sup>61</sup> Transcript at pp. 168-171. We note that the Department moved to strike Ms. Dougherty's testimony in summation (Transcript at p. 266: 2-6). The North Coast Water Board did not rule on this motion, and the Department did not raise its objection in its petition, so in our review of the record we have considered the entirety of Ms. Dougherty's testimony, including the Department's attempt to impeach her deposition and/or hearing testimony.

<sup>62</sup> Evid. Code, § 225.

<sup>63</sup> See Evid. Code, § 1200 ("Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.").

<sup>64</sup> *Adams v. San Jose* (1958) 164 Cal.App.2d 665, 667-668 (internal citations omitted).

<sup>65</sup> *Id.* at p. 667.

<sup>66</sup> Transcript at pp. 174:19-25 - 175:1-9.

<sup>67</sup> See *Salas v. Cal. Dept. of Transportation*, *supra*, 198 Cal.App.4th at p. 1074.

North Coast Water Board abused discretion with regard to specific photographs (or their alleged corresponding violations),<sup>68</sup> and we therefore uphold the admission of the biological monitoring reports' photographs into evidence.

With regard to both the reports and their photographs, the record also reflects that the North Coast Water Board carefully considered the weight to give those documents. In at least eleven instances when the biological monitoring reports or photographs were relied upon by the prosecution team to support an alleged violation, the North Coast Water Board found insufficient evidence supported the alleged violations, and did not assign liability to the Department.<sup>69</sup> In at least fifteen additional instances, it also declined to assign liability where the reports and photographs revealed only minor violations (e.g., minor leaks or prompt cleanup).<sup>70</sup>

In sum, we find that the North Coast Water Board properly admitted the biological monitoring reports and their photographs into evidence in accordance with authentication requirements, records-based hearsay exceptions, and photographic admissibility standards, and then weighed the evidence thoughtfully.

### **3. Imposition of Liability for Previously Withdrawn Charges**

Three violations assigned liability in the ACL Order had been withdrawn by the prosecution team prior to the hearing.<sup>71</sup> In a timely submitted letter that commented on the content of the North Coast Water Board's draft order, the Department requested that "all" previously withdrawn charges be removed from the draft order.<sup>72</sup> The North Coast Water Board

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<sup>68</sup> See *Adams v. San Jose, supra*, 164 Cal.App.2d at 667.

<sup>69</sup> Violations 96-98 regarding dewatering of the footings on a gravel bar ("documentation of this activity is not established in the evidence provided") (p. 11); violations 53, 54, 66, 67 (based on one photograph each, "while these photographs technically could document some type of discharge, we do not find sufficient evidence to support a violation" (p. 13); violations 70, 71, 86 and 87 (supported by photographs and biological monitoring report text, "there is not sufficient evidence supporting the liability proposed") (p.13). (All page references to the ACL Order.)

<sup>70</sup> Violation 1 (hydraulic spill reported in weekly biological monitoring report "was unauthorized; however, it was small and accidental...[,] reported properly and promptly cleaned up") (p. 25); violations 8-9 regarding stained gravel placed in buckets ("based on one photograph[,]...it seems inappropriate to assess a fine with the only evidence cited shows that the spill was cleaned up") (p. 13); violations 107-110 ("stem from a weekly biological monitoring report...showing minor leaks identified for clean-up do not support the imposition of the proposed penalties" (p. 13); violation 74 (stemming from biological monitoring report, "the Dischargers made reasonable efforts to collect turbidity samples and no liability will be assessed") (p. 20); violation 119 (documented by the biological monitor, "This event represents a technical violation..., but [dischargers] will not be assessed liabilities") (p. 21); violations 61, 63, 68, 69, 123 and 124 (from biological monitoring reports and photographs, "We do not find that these violations rise to the level of a \$10,000 fine. Nothing in the documents indicates that cleanup efforts were not performed in a timely manner") (pp. 24-25). (All page references to the ACL Order.)

<sup>71</sup> ACL Order violations 101 and 104 (pp. 20-21) and 112 (p. 21).

<sup>72</sup> Department's Comment Letter at p.4, § B.3.

responded by removing all but three of those charges in its final ACL Order.<sup>73</sup> The North Coast Water Board acknowledges in its response to the Department's petition that those three charges should also have been removed, but were inadvertently "overlooked."<sup>74</sup> The parties agree that there is no dispute over these three charges, so we hereby amend the ACL Order by striking the three charges and the accompanying \$30,000 in liability.

We also take this opportunity to correct the accounts to which any penalty payment must be paid. The ACL Order directed the entire payment to the State Water Pollution Cleanup and Abatement Account.<sup>75</sup> Many of the penalties collected pursuant to the Porter-Cologne Water Quality Control Act are to be deposited into the Cleanup and Abatement Account.<sup>76</sup> This includes the penalties associated with violations of the Department's stormwater permit discussed in section I.B.7, below. Some penalties, however, including violations of certifications issued to implement Clean Water Act section 401, shall be deposited into the Waste Discharge Permit Fund.<sup>77</sup> All the penalties arising from violations of the 401 Certification must be paid to the Waste Discharge Permit Fund, and the remaining balance associated with the Department's stormwater permit shall be paid to the Cleanup and Abatement Account.

## **B. MCM's Petition**

MCM's petition challenges seven categories of permit violations for which the North Coast Water Board assessed liability. We address each contention below.

### **1. Construction Dewatering Violations**

Permitted dewatering activities at the Project's construction site involved MCM pumping water from the riverbed in order to lower the water table prior to laying foundations and structural supports. After dewatering, the water (and other constituents such as sediment contained within that water) that had been pumped out of the river required a new discharge location. Both the dewatering and the discharge activities at the Project site were governed by

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<sup>73</sup> ACL Order at pp. 20-21.

<sup>74</sup> See Response to Petitions, pp. 1-2.

<sup>75</sup> See ACL Order at pp. 29-30.

<sup>76</sup> See, e.g., Wat. Code, § 13441, subd. (c).

<sup>77</sup> See, e.g., Wat. Code, § 13385, subd. (n)(2)(A). Penalties deposited into the Waste Discharge Permit Fund are separately accounted for and may only be expended upon appropriation by the Legislature. (See, e.g., Wat. Code, § 13385, subd. (n)(2)(B).)

the 401 Certification and the stormwater permit.<sup>78</sup> The North Coast Water Board found that MCM violated the 401 Certification by improperly discharging dewatered waste to (1) a gravel bar adjacent to the river, and (2) a sedimentation basin known as “Isolated Pool B”<sup>79</sup> that was located too close to a live stream channel of the river to be used as a dewatering discharge point under the 401 Certification.<sup>80</sup>

MCM argues that the Department’s 401 Certification allowed for the use of dewatering basins on the gravel bar, and the use of “Isolated Pool B” as a sediment basin. The Department’s 401 Certification Conditions 7 and 17 each address dewatering in terms of general discharge; but Conditions 9 and 12 are quite specific. MCM could not dewater if such activity would result in discharge to waters of the State:

Condition 9: No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or concrete washings, oil or petroleum products, or other organic or earthen material from any construction or associated activity of whatever nature, other than that authorized by this permit, shall be allowed to enter into or be placed where it may be washed by rainfall into waters of the State.

Condition 12: If construction dewatering is found to be necessary, the applicant will use a method of water disposal other than disposal to surface waters (such as land disposal) or the applicant shall apply for coverage under the General Construction Dewatering Permit and receive notification of coverage to discharge to surface waters.<sup>81</sup>

The Department’s North Region Branch Chief of Environmental Engineering, Mr. Melendrez, admitted on cross-examination that the Department understood that portions of the gravel bar were below the ordinary high water mark (i.e., that the location of the gravel bar constituted waters of the State), so use of the gravel bar, and discharge to it was prohibited under Condition 9.<sup>82</sup>

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<sup>78</sup> See ACL Order at pp. 6-9.

<sup>79</sup> A pool that is usually part of the river, except when it is separated from the river during dry season, low-flow periods. (Transcript at p. 21:23-25.)

<sup>80</sup> See ACL Order at p. 7.

<sup>81</sup> 401 Certification at p. 6.

<sup>82</sup> Transcript at pp. 53-54.

With regard to Isolated Pool B, the Department's application for its 401 Certification proposed that any sediment basins used would be at least 100 feet from the river.<sup>83</sup> But MCM's Project Manager, Mr. Evan Paine, admitted in direct testimony that due to the topography of the Project site, a sediment basin could only be as far away as 70 feet from the river, and that MCM selected the 70-foot-distant Isolated Pool B to use as a sediment basin.<sup>84</sup> MCM selected Isolated Pool B in spite of the fact that it was below the ordinary high water mark, so its use as a discharge point was also prohibited under the 401 Certification.<sup>85</sup> By MCM's own admission, it couldn't meet the 100-foot standard that the Department applied for, and it did not seek to amend that distance into the 401 Certification.<sup>86</sup> Instead, MCM unilaterally and impermissibly discharged into Isolated Pool B.

In addition to violations under the 401 Certification, the stormwater permit clearly prohibited discharge to the gravel bar and Isolated Pool B. The stormwater pollution prevention plan that the Department prepared for the Project (in accordance with the provisions of the stormwater permit) required all dewatered material to be first pumped into tanks to allow sediment to settle.<sup>87</sup> While the North Coast Water Board did not assess liability under the stormwater permit for these dewatering violations, MCM's discharges directly to the gravel bar and Isolated Pool B should never have occurred, in light of the provisions of the stormwater permit.

Based on the foregoing, we find the North Coast Water Board acted appropriately in determining these violations of the 401 Certification. Its assessment of liability under this category was proper.

## **2. Leaky Equipment Violations**

Condition 13 of the Department's 401 Certification specifically prohibits vehicle and equipment operation and maintenance activities (including fueling and lubricating) from resulting in discharge or threatening to discharge to waters of the United States. It also prohibits the Department from using vehicles or equipment that could impact water quality. The

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<sup>83</sup> AR, Exh. A-4 at pp. 2-3

<sup>84</sup> Transcript at pp. 215-216.

<sup>85</sup> Transcript at p. 53-54 (Testimony of Mr. Melendrez).

<sup>86</sup> Transcript at pp. 92-93.

<sup>87</sup> ACL Order at pp 8-9; see also the Department's Stormwater Pollution Prevention Plan for the Project (AR, Exh. B-3 at p. 33) prepared in accordance with the requirements of the stormwater permit; and see the Department's BMP NS-2, one of its suite of construction-related BMPs developed pursuant to its statewide stormwater permit. (Available at: <<http://www.dot.ca.gov/hq/construc/stormwater/NS02Update.pdf>>, [as of Aug. 19, 2013].)



North Coast Water Board found the Department liable for four violations of the 401 Certification for leaky equipment. In doing so, the North Coast Regional Board reduced the prosecution team's recommended liability amount for leaky equipment violations by 83 percent. Rather than hold the Department responsible for minor or promptly remedied leaky equipment violations, the North Coast Board assessed liability in the amount of \$25,000 for "several chronic problems that the contractor either ignored or was too slow to correct."<sup>88</sup>

MCM argues that the ACL Order's leaky equipment violations are tied to requirements that are not in the plain language of the 401 Certification. It further argues that 75 percent of the violations in this category were immediately caught or captured by Best Management Practices (BMPs) before any discharge occurred. It also argues that the North Coast Water Board's reliance on the biological monitoring reports (discussed above) violated its due process rights, because it had no opportunity to examine the authors of the reports.<sup>89</sup>

Dealing with the last assertion first, the Department admitted in its petition that the biological monitors were hired through its own subcontracting process.<sup>90</sup> Nothing stopped either the Department or MCM from interviewing, deposing or subpoenaing the biological monitors (either as party or rebuttal witnesses) if they had questions about the preparation or content of those reports.<sup>91</sup> The North Coast Water Board did not violate MCM's due process rights. MCM simply chose not to include the Department's subcontractors on its witness list. Even if the North Coast Water Board had committed error in this regard, the error would be harmless because, as discussed in each instance below, multiple lines of evidence supported the ultimate finding. In other words, there was no instance when the North Coast Water Board relied solely upon the biological monitors' report to find a violation.

Contrary to MCM's assertion, not only does the 401 Certification contain plain language governing leaky equipment, this plain language does not require actual discharge – only the threat of discharge.<sup>92</sup> In our opinion, the North Coast Water Board exercised considerable restraint in assessing liabilities for actual discharges that were not immediately cleaned up, rather than assessing liability for all discharges and threats of discharges, as authorized by the 401 Certification.

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<sup>88</sup> ACL Order at p. 12.

<sup>89</sup> MCM petition at pp. 11-15.

<sup>90</sup> Department's petition at p. 12:11-24.

<sup>91</sup> See Gov. Code, §§ 11450.10 and 11450.20; see also Cal. Code Regs., tit. 23, § 649.6.

<sup>92</sup> 401 Certification at p. 6.

Specifically, the North Coast Water Board reduced the proposed penalties from \$150,000 to \$25,000, because many of the small discharges were cleaned up quickly. It cited the Department for four violations that were supported by direct field reports from North Coast Water Board, the Department and MCM staff, in addition to the biological monitoring reports.

The August 22, 2006 violation was originally proposed as three separate violations – 6, 7 and 294. The North Coast Water Board consolidated these into one violation,<sup>93</sup> and received evidence and heard testimony at the hearing from both Department and MCM employees that they witnessed the leak and failed to report it.<sup>94</sup>

The October 6, 2006 violations (violations 88 and 89) were not only identified in the biological monitoring reports, but were also witnessed by North Coast Water Board staff.<sup>95</sup>

The October 27, 2006 violations (violations 129 and 130), while identified in the biological monitoring report, were also supported by the Department's e-mail correspondence to MCM that was introduced at the hearing. The e-mail from the Department's engineer, Mr. Sebastian Cohen, to MCM's Mr. Evan Paine accused MCM of not cleaning up after leaky equipment two years after the first Notice of Violation for this project was issued. Mr. Cohen admitted that MCM's leaky equipment was a chronic problem at the jobsite.<sup>96</sup>

The November 3, 2006 violations (violations 142 and 143) were observed and reported by Department staff.<sup>97</sup>

We therefore uphold the North Coast Water Board's determinations regarding each of the violations assessed under this category.

### **3. Turbid Discharges to River**

Under this category of charges, the North Coast Water Board found that MCM violated Conditions 7, 9 and 17 of the 401 Certification for unpermitted turbid discharges to surface water, and using inadequate BMPs to mitigate against the resulting increase in surface water turbidity.<sup>98</sup> In turn, MCM argues that the violations assessed under this category do not represent a reasonable interpretation of the 401 Certification. MCM alleges that the North

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<sup>93</sup> ACL Order at p. 12.

<sup>94</sup> Transcript pp. 91-92 (Testimony from MCM's Mr. Paine regarding a Department email about oil discharge to the gravel bar).

<sup>95</sup> ACL Order at p. 13; see also Notice of Violation (Oct. 30, 2006) (AR, Exh. A-4, p. 3).

<sup>96</sup> Transcript at pp. 77-81, particularly 80-81 (Testimony of Department engineer Cohen).

<sup>97</sup> AR, Exhs. M-53 at 255-256, and M-71 at 441; ACL Order at p. 14.

<sup>98</sup> ACL Order at p. 16.

Coast Water Board interprets the 401 Certification as having a “zero turbidity” standard, which is an impossible standard to meet. We disagree with MCM’s assertions.

Condition 7 in the 401 Certification is not a “zero turbidity” standard. It requires adequate BMPs for sediment and turbidity control to keep sediment from entering surface waters.<sup>99</sup> As with the other violations discussed above, we note that the North Coast Water Board reduced the proposed penalties from \$150,000 to \$40,000, targeting violations where BMPs were not implemented or were inadequately implemented. Furthermore, the North Coast Water Board only imposed penalties for one-day’s-worth of violations, rather than some instances of multi-day violations. With regard to the specific violations, we note the following evidentiary support for the North Coast Water Board’s Condition 7 violations.

The September 9, 2006 violation (violation 51) of rock discharge into the river was verified by a biological monitoring report<sup>100</sup> and by Department staff.<sup>101</sup> At the hearing, MCM did not deny the charge; instead, it elicited direct testimony from Mr. Evan Paine that offered an explanation for the discharge, but did not address the adequacy of MCM’s BMPs.<sup>102</sup>

The other September 22, 2006 violation (violation 64) involved construction vehicles driven across the river that generated a 400-foot plume for at least 30 minutes.<sup>103</sup> A Department engineer, Mr. Sebastian Cohen (who was not the site engineer when this violation occurred), testified in response to Board Member Noren’s questioning that the BMP for crossings is to clean equipment first, then travel slowly across the channel.<sup>104</sup> The biological monitor reported that the equipment was not cleaned prior to crossing the river,<sup>105</sup> while MCM’s Mr. Evan Paine stated that MCM did apply BMPs.<sup>106</sup> The pictures in the record here are telling: caked mud appears in the heavy equipment’s tracks. That caked mud corresponds to the report’s conclusion that it “appeared that the 4 pieces of heavy equipment were never...washed prior” to crossing. Here, too, MCM complains that it didn’t have the opportunity to examine the

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<sup>99</sup> 401 Certification at p. 6.

<sup>100</sup> AR, Exh. M-19.

<sup>101</sup> AR, Exh. M-15.

<sup>102</sup> Transcript at p. 252:14-24.

<sup>103</sup> ACL Order at pp. 16-17; AR, Exh. M-25 at pp. 163 and 165.

<sup>104</sup> Transcript at pp. 332-333.

<sup>105</sup> AR, Exh. M-25, at pp. 163, 165.

<sup>106</sup> Transcript at pp. 253-254.

biological monitors. As above, we find that nothing stopped the Department or MCM from calling biological monitors as witnesses.

The September 29, 2006 violations (violations 73 and 75) involve turbidity generated during concrete pours, which resulted in two separate plumes in the river. The Department itself identified these violations,<sup>107</sup> and they were supported by MCM's direct hearing testimony. Mr. Evan Paine admitted that these were accidental leaks, as does the Department's written explanation in the record (i.e., the BMPs were insufficient to prevent or contain accidental leaks).<sup>108</sup>

Based on the foregoing, we uphold the North Coast Water Board's determinations regarding each of the violations assessed under this category, and the corresponding reduction of the proposed penalty from \$150,000 to \$40,000.

#### **4. Insufficient Turbidity Measurements Violations**

Under this category, the North Coast Water Board found that MCM violated Condition 19 of the 401 Certification by repeatedly and chronically failing to adequately monitor the effects of its construction activities on the turbidity of the river.<sup>109</sup>

MCM again alleges that these violations are tied to requirements that are not in the plain language of Condition 19 of the 401 Certification. MCM would have Condition 19 allow for visual inspection for field turbidity measurements, despite its provisions that require numeric measurements when background concentrations of turbidity are exceeded. Condition 19 also discusses the North Coast Water Board's expectations regarding the frequency of measurements and reporting requirements.<sup>110</sup> Specifically, Condition 19 states that "All recorded visual observation and all field turbidity measurements...shall be submitted in a report to [the North Coast Water Board]...."<sup>111</sup> There is no ambiguity here that the North Coast Water Board expected numeric measurements, and the Department's own testimony acknowledged that fact.<sup>112</sup>

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<sup>107</sup> AR, Exh. M-26.

<sup>108</sup> Transcript at pp. 255-256 (Mr. Evan Paine's testimony); AR, Exh. M-26 at p. 169 (Department's written explanation for the discharge).

<sup>109</sup> ACL Order at pp. 17-21.

<sup>110</sup> 401 Certification at pp. 7-8.

<sup>111</sup> *Id.* at p. 8 (emphasis added).

<sup>112</sup> See Transcript at pp. 57-60 (prosecution's cross-examination of the Department's Engineering Chief, Mr. Dave Melendrez, where he states that in his professional opinion, visual monitoring would not sufficiently address compliance with 401 Certification Condition 19). We specifically note his testimony that, "Field turbidity (*Continued*)

We therefore uphold the North Coast Water Board's determinations regarding each of the 13 violations assessed for the Department's (MCM's) failure to monitor under this category.

## **5. Cementitious Discharges Violations**

The North Coast Water Board found that MCM violated Conditions 9, 10, and 17 of the 401 Certification when it improperly disposed of cement waste at the Project site.<sup>113</sup> MCM argues that cement-discharge violations 58-59<sup>114</sup> (cement discharge to the edge of Isolated Pool B (i.e., to the gravel bar)) were not supported by substantial evidence in the record. The biological monitor's report labeled the discharge as "cement waste."<sup>115</sup> At the hearing, MCM's expert, Mr. David Bieber, testified that the discharged material was natural sediment, not cement.<sup>116</sup>

Although there is conflicting evidence about the nature of the waste, the penalty assessment is appropriate whether the waste is cementitious or sediment. We agree with the North Coast Water Board<sup>117</sup> that even if the discharge were sediment rather than cement, sediment was not allowed to be discharged to the gravel bar either.<sup>118</sup> As a result, we find the North Coast Water Board's assessment of liability for these two violations to be appropriate.

## **6. Individual Events Violations**

The North Coast Water Board created this "individual events" category as a catch-all category for orphaned violations that were not covered by the topics of the other categories of ACL Order violations.<sup>119</sup> MCM asserts that two of the five violations covered by this category are not supported by substantial evidence. As discussed below, we disagree with this assertion.

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measurements...need to be taken using a device, which measures that turbidity in terms of NTUs.") (*Id.* at p. 57:7-10.)

<sup>113</sup> ACL Order at pp. 22-24.

<sup>114</sup> This was another example of the North Coast Water Board's restraint regarding assessments. A singular \$10,000 penalty was spread across both violations. (See ACL Order at p. 23.)

<sup>115</sup> AR, Exh. M-70 at 371.

<sup>116</sup> Transcript at pp. 267-270.

<sup>117</sup> See Response to Petitions, p. 7.

<sup>118</sup> See 401 Certification Conditions 7, 9, and 17; see *ante* discussion of Construction dewatering violations at pp.14-16.

<sup>119</sup> ACL Order at pp. 25-26.

The November 3, 2006 violation (violation 144) involved construction activities generating loose soil that ultimately discharged into waters of the State. The Department itself reported this violation in a report noting the absence of BMPs to control loose soil.<sup>120</sup> Condition 9 of the 401 Certification is quite clear. It states that “no...soil” is “to be placed where it may be washed by rainfall into waters of the State.”<sup>121</sup> It requires none of the ancillary information that MCM’s petition suggests is necessary to support a violation assessment (e.g., amount of soil, reasons for the cascade<sup>122</sup>).

So, too, with respect to the November 23, 2007 sandblasting violations (violations 152-153), where sand and rebar discharged directly to the gravel bar in violation of Condition 9.<sup>123</sup> The Department appropriately reported these violations of Condition 9 (including MCM’s disregard of the Department’s specific directions),<sup>124</sup> and the North Coast Water Board appropriately assessed liability.

We therefore uphold the North Coast Water Board’s determinations regarding the violations assessed under this “individual events” category.

## **7. The Department’s Stormwater Permit Violations**

Here the North Coast Water Board reduced by 93 percent the amount of liability requested by the prosecution team. It assessed \$30,000 in liability against the Department for stormwater permit violations related to the discharges from the trestle deck used during Project construction.<sup>125</sup>

MCM’s allegation under this last of the violation categories is that the North Coast Water Board’s reading of the Department’s statewide stormwater permit effectively mandated that MCM maintain a watertight trestle deck.<sup>126</sup> That is not what the ACL Order stated.

The North Coast Water Board did not assess violations for MCM’s failure to maintain a completely water-tight trestle deck. It assessed violations (154-283) for failing to

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<sup>120</sup> AR, Exhibit M-53 at p. 286, ¶¶ 13 and 19.

<sup>121</sup> 401 Certification at p. 6.

<sup>122</sup> Contrary to MCM’s assertion, the Department’s report did include the construction-related reasons for the cascade. (AR, Exhibit M-53 at p. 286, ¶¶ 13 and 19.)

<sup>123</sup> With one \$10,000 fine assessed for both violations, not the \$20,000 asserted by MCM on p. 23:22 of its petition. (ACL Order at p. 26.)

<sup>124</sup> AR, Exh. M-77.

<sup>125</sup> ACL Order at pp. 26-28.

<sup>126</sup> MCM’s Petition at p. 24:6-12.

implement corrective measures to contain discharged materials on the trestle deck, as required by the Department's statewide stormwater permit.<sup>127</sup> It also assessed violations for failing to remove leaky equipment from the trestle deck, in accordance with permit terms. The record reflects that MCM violated those requirements.<sup>128</sup>

The Department's field reports from the Project site note that after the Department's repeated requests to repair or replace the leaky Manitowoc crane on the trestle deck, MCM continued its use, and the containment BMP used beneath the crane (plastic sheeting) also leaked.<sup>129</sup> At the hearing, MCM's Mr. Evan Paine admitted in his testimony relating to the trestle deck that he removed a backhoe from the Project site. But he mentioned nothing about removing the Manitowoc crane that the Department repeatedly ordered removed.<sup>130</sup>

Though it could have assessed the maximum \$10,000 for each of the 130 days of violations, the North Coast Water Board assessed a penalty in the amount of \$30,000 (i.e., the equivalent of three days assessed at maximum penalty). The North Coast Water Board reduced its penalty assessment because it took into account the efforts that were ultimately made by MCM to improve deck containment, including the "trial and error" efforts the North Coast Water Board acknowledged are often needed to hone in on the appropriate combination of BMPs.<sup>131</sup>

We find that the North Coast Water Board properly found the discharges to be violations of the Department's stormwater permit. Moreover, the North Coast Water Board acted in a restrained and reasonable manner in assessing penalties for violations of the Department's stormwater permit.

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<sup>127</sup> ACL Order at pp. 27-28.

<sup>128</sup> See the Department's BMP NS-13, another of its suite of construction-related BMPs developed pursuant to its statewide stormwater permit. (Available at: <<http://www.dot.ca.gov/hq/construc/stormwater/NS13.pdf>>, [as of [Aug. 19, 2013].) The Department's Stormwater Pollution Prevention Plan for the Project, approved by the North Coast Water Board on June 14, 2004, requires all equipment used over the water (i.e., on trestle decks) to conform with BMP NS-13. (AR, Exh B-3 at p. 34). BMP NS-13 requires, among other things, that trestle decks have "watertight curbs or toe boards to contain spills and prevent materials, tools, and debris from leaving" the trestle deck. It also requires that leaking equipment be removed from the trestle deck (i.e., from over the water), if it cannot be repaired.

<sup>129</sup> AR, Exh. M-53, AR; Exh. M-52 at p. 286; Exh. M-71 at p. 442; and Exh. M-61.

<sup>130</sup> Transcript at p. 235:6-12.

<sup>131</sup> Compare ACL Order at p. 28 ("it is reasonable to allow for some amount of trial and error") with the testimony of MCM's Mr. Evan Paine that outlined the various BMPs implemented on the trestle deck (Transcript at p. 230-232).

## 8. North Coast Water Board's Application of Section 13385 Factors

As discussed above, regional boards must consider the ten section 13385 factors when determining the amount of liability to impose in an administrative civil liability order.<sup>132</sup>

MCM argues that the ACL Order failed to meaningfully discuss the section 13385 factors when determining the amount of liability to assess, and did not take the factors into account for each and every alleged discharge. We disagree.

In section 2.3 of the ACL Order,<sup>133</sup> the North Coast Water Board analyzed and provided its rationales for each of the factors. It then stated that those rationales “were incorporated into all aspects of the [ACL Order]” – including its numerous decisions to reduce liability amounts, not assess liability when the record reflected timely clean up, or not find violations at all.<sup>134</sup> The North Coast Water Board simply organized the structure of its ACL Order by analyzing the section 13385 factors and the conclusions it reached regarding those factors in section 2.3, and then applied the facts in the remainder of the ACL Order. Nothing in section 13385 prohibits such an analytical or structural approach to ACL Order drafting.

MCM also cites an excerpt of the ACL Order for the assertion that the North Coast Water Board has taken the position that section 13385 factors do not need to be analyzed in cases of intentional discharges.<sup>135</sup> That is not what the ACL Order says.

Context that MCM should have provided when making this assertion reveals that the North Coast Water Board's finding did not “depend” on the duration and volume factors to be considered in a section 13385 finding. Instead, the violation at issue (Condition 9 of the 401 Certification) was established by the evidence that a non-permitted discharge occurred, and the North Coast Water Board had adequate evidence that this was a short term, presumably small-volume discharge: “[The biological monitoring report's] [f]ailure to cite the duration and volume of the waste discharge does not apply in this instance as this violation does not depend upon

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<sup>132</sup> The section 13385 factors are:

...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.

(Wat. Code, § 13385, subd. (e).)

<sup>133</sup> ACL Order at pp. 4-5, § 2.3.

<sup>134</sup> *Id.* at p. 5, § 2.3

<sup>135</sup> MCM's petition at pp. 25:28, and 26:1-11 (citing p. 10 of the ACL Order).



those factors, but rather the intentional discharge of dewatering waste to waters of the state without a permit.”<sup>136</sup> MCM is mistaken in its assertion that the North Coast Water Board contended it did not need to consider the section 13385 factors in cases of intentional discharge.

Accordingly, MCM's petition is denied in its entirety.

#### IV. ORDER

IT IS HEREBY ORDERED that the ACL Order is amended as described above in this Order. Specifically, the ACL Order is amended to:

- (1) strike violations 101, 104, and 112 (the previously withdrawn charges);
- (2) reduce the total amount of the liability assessed by \$30,000 to \$445,182;
- (3) require that \$415,182 of the liability shall be paid to the Waste Discharge Permit Fund and \$30,000 shall be paid to the State Water Pollution Cleanup and Abatement Account.

The North Coast Water Board is directed to prepare a complete version of the amended ACL Order, post it on its website, and distribute it as appropriate.

#### CERTIFICATION


The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 4, 2014.

AYE: Chair Felicia Marcus  
Vice Chair Frances Spivy-Weber  
Board Member Tam M. Doduc  
Board Member Steven Moore  
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None

  
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Jeanine Townsend  
Clerk to the Board

<sup>136</sup> ACL Order at p. 10. (Emphasis added.) See also complaint at p. 11.