

DEPARTMENT OF TRANSPORTATION

LEGAL DIVISION

595 MARKET STREET, SUITE 1700
SAN FRANCISCO, CA 94105
PHONE (415) 904-5700
FAX (415) 904-2333
TTY 711

Public Workshop (1/21/14)
Confusion Hill Bypass- A-2208(a) and (b)
Deadline: 1/7/14 by 12:00 noon



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January 7, 2014

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor 95814
PO Box 100
Sacramento, Ca 95812-0100
commentletters@waterboards.ca.gov



Re: Comments to A-2208(a) and (b) – January 21 Board Workshop
State Board review of ACL Complaint No. R1-2009-0095 by
California Regional Water Quality Control Board, North Coast Region
Confusion Hill Bypass Project, Mendocino County

Dear Ms. Townsend:

The California Department of Transportation hereby respectfully submits its attached comments and objections to the December 19, 2013, draft order prepared by the State Water Resources Control Board following its review of the North Coast Regional Water Quality Control Board's Administrative Civil Liability Order No. R1-2012-0034.

Sincerely,

ARDINE ZAZZERON
Attorney IV
California Department of Transportation – Legal Division

1 RONALD W. BEALS, Chief Counsel
DAVID GOSSAGE, Deputy Chief Counsel
2 LUCILLE BACA, Assistant Chief Counsel
ARDINE ZAZZERON, (SBN 130109)
3 DOUGLAS C. JENSEN, (SBN 230166)
595 Market Street, Suite 1700, San Francisco, CA 94105
4 Telephone: (415) 904-5700, Facsimile: (415) 904-2333

5 Attorneys for Plaintiff THE PEOPLE OF THE STATE OF
CALIFORNIA, acting by and through the DEPARTMENT
6 OF TRANSPORTATION

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8 **STATE OF CALIFORNIA**
STATE WATER RESOURCES CONTROL BOARD
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11 **IN THE MATTER OF THE PETITIONS**
OF THE CALIFORNIA DEPARTMENT
OF TRANSPORTATION AND MCM
CONSTRUCTION, INC., for review of

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14 **ADMINISTRATIVE CIVIL LIABILITY**
ORDER NO. R1-2012-0034 (CONFUSION
HILL BYPASS PROJECT), issued by the
15 North Coast Regional Water Quality Control
16 Board

DEPARTMENT OF
TRANSPORTATION'S SUBMISSION RE
STATE BOARD'S REVISED DRAFT
ORDER

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

Workshop Date: January 21, 2014

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18 On April 16, 2012, the State Water Resources Control Board (Board) received petitions for
19 review by the California Department of Transportation (Department) and MCM Construction Inc.
20 (MCM). The petitions arise from Administrative Civil Liability Order No. R1-2012-0034 (ACL
21 Order) issued in March 2012 by the North Coast Regional Water Quality Control Board (Regional
22 Board). The State Board issued its draft order on December 19, 2013¹. Without waiving or
23 modifying any objections, argument, or other matter asserted and submitted in its defense of this
24 administrative proceeding, the Department sets forth the following comments and objections to the
25 draft order.
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27 ¹ The State Board initially released a draft Order on December 4, 2013. However, material errors contained in that
28 document led to the Board's recognition that it had been reviewing a superseded (i.e., inoperative) draft order. The
December 19 revised Board draft order reflects corrections of the December 4 version. It is noted here for the record
that the correct ACL Order was both attached to and referenced in the Department's petition.

1 **General Comment:** Other than the Board’s proposed elimination of \$30,000 from the
2 violation penalty amount (see, page 13 of the draft order, “Imposition of Liability for Previously
3 Withdrawn Charges”), the Department disputes the liability findings and penalty amounts set forth
4 in the draft order. Because the record already contains the Department's testimony, briefs, and
5 arguments on liability, penalties, and objections, they will not be repeated here. To the extent the
6 draft order contains new matter, the Department comments/objects as follows:

7 **A. Staff Costs/Fees:** The draft order provides no legal authority for the proposition that an
8 award of costs or fees can be based merely on past Board practice and a “quasi-legislative”
9 interpretation of a statute that neither expressly nor impliedly addresses cost/fee awards in board
10 enforcement cases. The Board asserts that it views the imposition of fees as “just”, but that opinion
11 does not have authority to instill Water Code 13385 with a cost/fee mandate; only the Legislature
12 can create the legal obligation that the board seeks to impose on the Department.

13 In this case, the \$70,182 fee/cost assessment represents 100% of that amount sought by the
14 Regional Board in its complaint², notwithstanding that only \$375,000 out of the \$1,524,000 in
15 liability claims sought by the prosecution team (i.e. less than 25%) were upheld in the proceeding.
16 Without waiving any of the Department’s other objections or arguments on this issue, the
17 Department asserts that it is not just to shift 100% of prosecution costs in a case onto accused
18 dischargers who have successfully defended the majority of charges brought against them. Such
19 parties have already been forced to bear the costs of defending themselves against the unproven
20 charges in the enforcement proceeding. Fairness, justice, and equity are not served by also
21 compelling them to fund the prosecution of charges that were denied due to insufficient evidence.

22 **B. Evidentiary Objections:** The Department disagrees with the draft order’s analyses and
23 findings. Because the Department’s points and authorities on these issues are already in the record,
24 they will not be repeated here. As for matters raised in the draft order, the Department sets forth
25 comments/objections as follows:

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27 ² The \$70,182 in proposed fees/costs represents 100% of the amount sought in the complaint for the enforcement costs
28 for all 150± charges initially pursued against the Department. The Regional Board denied the prosecution team’s post-
complaint demand for an additional \$235,000 in fees/costs solely because the prosecution did not provide sufficient
notice of continuing cost accrual, *not* because the liability findings fell short of warranting a full recovery.

1 1. The draft order indicates that it is unclear which violations in the ACL Order the
2 Department is challenging with respect improper reliance upon photographs and/or reports. It notes
3 that while the Department provided a matrix of objections, it is “unhelpful to us, as it is far broader
4 than the liabilities that were ultimately assessed...” The draft order further notes that the State
5 Board is not required to “search the record” to ascertain whether it contains support for the
6 Department’s contentions.

7 The Department’s petition clearly states that it is challenging all violations that were solely,
8 or in substantial part, based on photographs and/or biological monitoring reports. A reading of the
9 ACL Order discloses which charges were upheld based on photographs and/or reports. A
10 burdensome search of the case records should not be required and was not intended by the
11 Department. Furthermore, the Department’s defense and objection matrices specifically identify by
12 date, violation type, and appendix designation the violations and evidence targeted by the
13 evidentiary objections. Although the appendix designations were altered by the prosecution team
14 prior to the hearing, and the ACL Order utilizes the altered designations, the Department’s
15 individual objections are still readily discernable by the matrices. The Department is not
16 challenging violations proposed by the prosecution team but ultimately declined by the Regional
17 Board; while those objections remain in the Department’s objection matrix, identification of the
18 outstanding objections can be reasonably accomplished, as described above.

19 However, to avoid any confusion and without waiving any other objections, the Department
20 continues to object to photographic and biological monitoring evidence which supports the charges
21 described by the ACL Order as: 16, 27, 31/33, 34, 40, 49/50, 52, 58/59, 64, 82, 86, 88/89, 115,
22 129/130, 134/135, 139/140. The ACL Order, for the most part, discloses specific references to the
23 evidence supporting each finding of liability. Each of the above-referenced charges were, as
24 revealed on the face of the ACL Order, supported by either biological monitoring reports,
25 photographs, or both.

26 While the Regional Board did not assess monetary liability for Violations 8, 9³, 53, 54, 66,
27 and 67, which are violations based solely on photographs, the Department maintains its objections

28 ³ See footnote 35 of the draft Order for the draft order’s treatment of the Department’s citation to Violations 8 and 9.

1 to the underlying photos because the Regional Board admitted them and found them relevant and
2 influential in its review of the case: “While these photographs technically could document some
3 type of discharge, we do not find sufficient evidence to support a violation warranting the liability
4 proposed. *These photos, however, are relevant to show a continuing pattern that becomes more*
5 *problematic as the project went on.*” (ACL Order, page 13.) [Italics added.]

6 **2. Draft Order re Authentication:** The draft order appears to interchangeably address the
7 Department’s objections to the photographs and to the written reports. The petition, however,
8 clearly segregated the two forms of evidence and asserted distinct objections to each. The
9 Department’s authenticity objections were directed solely at the admitted photographs. To the
10 extent that the draft order makes points about the authenticity of the *reports* or how the Department
11 “assisted” the prosecution team in authenticating the reports, the record is clear that the Department
12 did not dispute the authenticity of the written reports. The Department did, and does, dispute that
13 the Regional Board properly authenticated any of the biological monitor *photographs* in that it
14 failed to produce testimony that the photos contained true and accurate representations of what the
15 Regional Board claimed were depicted. The draft order cites cases imposing Evidence Code section
16 1400 authentication requirements in administrative cases, and the Department has cited to authority
17 regarding authentication in particular of photographs and other visual depictions, but the draft order
18 does not apply the established case law and other applicable authority to the facts of this case.

19 While Kason Grady testified about his general discussions with one of the two biological
20 monitors about the camera used by that biologist⁴, foundation for the individual photos supporting
21 each charge was required by law, as thoroughly addressed by the Department in its Petition and
22 preceding briefs and arguments. Kason Grady could not and did not testify that the photographs
23 accurately represented what the prosecution claimed were depicted. Mr. Grady did not take the
24 photos, and did not verify the prosecution’s assumptions and conclusions about the photographs
25 with the photographers. Moreover, Mr. Grady could not testify as to the accuracy of the purported
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28 ⁴ There is no evidence that Kason Grady spoke to the second biologist about his camera, a fact not acknowledged in the draft order.

1 dates of the photos or hence that each photograph was taken on and corresponded with the alleged
2 date of each purported violation.

3 **3. Draft Order re Hearsay:** In several instances the draft order claims that the Department
4 “relied” on biological monitoring reports during the cross-examination of Mona Dougherty, and that
5 the purported usage of the reports “supports their trustworthiness” (page 11, draft order). The
6 Department proffers several comments and objections in this regard. Initially however, it is noted
7 that while the draft order cites to page numbers of the hearing transcript, the administrative record
8 does not appear to contain a written transcript; hence, the following comments/objection are based
9 solely the audio recording of the cross-examination from the Regional Board’s web page.

10 a. The Department was not the proponent of the report at the hearing; the witness herself
11 produced and read from it on her own volition in order to bolster her hearing testimony that, to the
12 Department’s and MCM’s surprise, was different from her deposition testimony. The Department’s
13 attorney did not affirmatively attempt to use the report for any purpose, and asked no substantive
14 questions about its content. It is thus not an accurate representation to characterize the Department
15 as having “relied” upon the report, “using” it, “reading” from it, and asking about it at the hearing,
16 and the Department objects to the draft order’s characterizations in this regard as inaccurate.

17 b. The subject report did not form the basis of any charge either brought or upheld; it is thus
18 unclear why it warrants references in the order. The Department objects to all references to the
19 report and Mona Dougherty’s testimony about the report as irrelevant, prejudicial, misleading, and
20 inflammatory. Said references should be stricken from the order. If the Board maintains the
21 references, text should be added to clarify that the prosecution brought no charges based upon the
22 referenced report, and no charges involving wildlife injury. The Department reserves its right to

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1 challenge any suggestion in a Board order that the Department or MCM was charged with, or
2 should have been charged with, wildlife harm due to Confusion Hill Bypass project work.

3 Respectfully submitted,

4 DATED: _____

RONALD W. BEALS
DAVID GOSSAGE
LUCILLE Y. BACA
ARDINE ZAZZERON
DOUGLAS C. JENSEN

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By: _____
Attorneys for CALIFORNIA DEPARTMENT
OF TRANSPORTATION

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