

January 7, 2014

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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PO Box 100
Sacramento, Ca 95812-0100
commentletters@waterboards.ca.gov



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

Dear Ms. Townsend:

On behalf of MCM Construction, Inc., we submit the comments below concerning the proposed order prepared by the State Water Resources Control Board (“Draft Order”), following its review of the North Coast Region Water Quality Control Board’s Administrative Civil Liability Order No. R1-2012-0034 (“ACL Order”).

As follows, the State Board’s Draft Order does not remedy the defects underlying the ACL Order. The penalties against the California Department of Transportation (“Caltrans”) are not supported by the terms of the Section 401 Certification or the evidence in the administrative record. The Draft Order does not resolve these concerns, and falls short of the critical analysis due for a matter of importance to California’s building industry.

Builders are entitled to consistency and predictability in the regulatory environment. That is not possible if a regional board fails to observe the language of their permits, or allows its staff to substitute its opinions for Caltrans’ expertise on construction decisions. The Certification relied upon Caltrans and its contractors to use their professional skill to decide on the appropriate “best management practices” for this project, and years later, second guessed those decisions and levied penalties without credible evidence that Caltrans’ professional decisions were wrong or that its BMPs were inadequate.

More problematically, the Regional Board imposed penalties for impacts which were fully expected and that are part-and-parcel to building a bridge in a flowing river. The Regional Board granted approval based on application materials that plainly described temporary turbidity and other unavoidable consequences of building in and adjacent to flowing waters. The record is

undisputed that, although these impacts occurred, they were far less than projected, to the credit of Caltrans and its contractors. Where a 401 Certification allows such impacts, yet the Regional Board pursues the same impacts as violations, it renders the Certification illusory.

Below, we offer brief comments to supplement the arguments in the Petition. MCM's comments are organized to track the categories of violations found by the Regional Board, in the order discussed by the Draft Order. We hope by these comments to highlight the main flaws in the Draft Order, and areas that merit reconsideration by the State Board.¹

Construction Dewatering Violations

These violations are based upon Caltrans' and MCM's adaptation of a portion of a dry gravel bar for use as a sedimentation basin. The error in the ACL Order stems from the fact that Caltrans plainly stated in its written application to the Regional Board that it would use "portions of the gravel bar for construction dewatering." Regional Board staff then issued the Certification without restrictions on this activity or any mention that the dewatering plans were not acceptable. The only conclusion the record supports is that Regional Board staff meant to authorize Caltrans' plans to use the dry gravel bar for a sedimentation basin.

Years later, and through different sets of eyes, the Regional Board has reversed course and believes the gravel bar should not have been used for a sedimentation basin. Yet none of the justifications advanced by the Regional Board, or State Board, are supported by the language of the Certification.

First, the Draft Order argues that dewatering to the gravel bar was prohibited under Condition 9, which bars discharges into "waters of the State" on the premise that "waters of the State" means lands below the ordinary high water mark, such as the gravel bar. The Certification does not, however, define waters of the State as the ordinary high water mark, nor does state law. To the contrary, Water Code section 13050(e) defines "waters of the State" as "surface water or groundwater..." Because a dry gravel bar is not "surface water," the record does not support the finding that the basin lay within "waters of the State." MCM complied with the Certification by dewatering via "land disposal," as expressly allowed in Condition 12.

Second, the Draft Order relies too heavily on a statement in Caltrans' application that sedimentation basins would be 100 feet from the river. The 100-foot distance was irrelevant to the issuance of the Certification. It was a Caltrans' standard specifications, which was included on the assumption that the canyon was wide enough to allow that setback. Workers complied by putting the basin as far away from the river as the canyon physically permitted (70 feet laterally from the river; 137 feet up-gradient from the river). Staff testified that it would have issued the Certification *even with the basin in this location*. MCM's hydrologist also testified that the basin was sufficiently far from the river to function as an effective BMP (Transcript, p. 216-217). The

¹ Our office was unable to obtain a full copy of the administrative record until January 6, 2014. We reserve the right to update our comments after we have the opportunity to give the record a complete review.

Regional Board offered no contrary or rebuttal evidence. Thus, the record altogether shows that Caltrans substantially complied with this project specification.²

MCM appreciates that the State Board and Regional Board may, in other settings, consider “waters of the State” to include dry gravel bars. These considerations were not made a part of the Certification, however. The after-the-fact interpretation of the phrase “waters of the State,” as used in this Certification, cannot overcome staff’s approval to use portions of the gravel bar for dewatering.

Leaking Equipment Violations

These violations rely on opinion evidence that certain pieces of heavy construction equipment were excessively leaky by persons presumptively unqualified to render such opinions. The Regional Board had no basis to find that the persons acting as biological monitors had skills or experience to provide credible opinions on the condition of heavy equipment. Without it, the Regional Board had no credible evidence to find violations on the dates alleged.

The Draft Order suggests that these violations were nonetheless well founded because Caltrans’ employees raised concerns over equipment leaks. The ACL Order cannot be supported based on generalized concerns, however. What is required is evidence of a specific violation on a specific date. Here, that evidence was supplied based on the biological monitors’ uncorroborated statements. As such, the violations are not supported by “multiple lines” of evidence, as the Draft Order contends.

Further, MCM introduced evidence that the equipment was well maintained – that, in fact, MCM took an unusual step of devoting a full-time mechanic to the project to be certain that equipment was in good condition. (Transcript, 233:19-235:12.) Expert testimony also explained that heavy equipment invariably leaks, and thus, the standard of care is to use BMPs so that leaks are controlled. (Transcript, 235:15-236:10.) The record shows that MCM used plastic sheets and other BMPs which successfully captured leaks. Regional Board staff testified that these actions prevented a violation. This rebuts the any evidence supporting the violations.

Turbid Discharge Violations

It cannot be overemphasized that turbidity was fully expected to result from bridge construction. Indeed, Caltrans paid \$450,000 to mitigate for temporary turbidity impacts. Yet because of changes by Caltrans and MCM, turbidity was much less than forecast. MCM found ways to build the project with only a fraction of the total number of in-stream piles called for by the original design, dramatically reducing the degree of in-stream work that produces turbidity. MCM also found ways to avoid constructing a large earthen ramp down to the river that would

² Under the doctrine of substantial compliance, “technical deviations are not to be given the nature of noncompliance.” (*Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 668.) The “test must be whether [the party’s] substantial compliance with the [...] requirements satisfies the policy of the statute.” (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 284, citing *Latipac, Inc. v. Superior Court of Marin County* (1966) 64 Cal.2d 278, 281.) Likewise, doctrine of substantial performance allows a contractor acting in good faith to deviate from specifications where the usefulness of the feature is not affected. (*See Murray’s Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1290.)

have demolished habitat and created a sediment source. As a result of such changes, the extent of short-term turbidity was far less severe than anticipated, and far less severe than actually permitted by the Certification.

It also bears repeating that the existence of turbidity alone is not a violation. Rather, under Condition 7 Caltrans' obligation was to use "adequate" BMPs to reduce or avoid turbidity. The Regional Board's fundamental error is failing to demonstrate that the BMPs used to prevent turbidity were not adequate. The record is clear that BMPs were actually in place for each of the events in this category. The Regional Board failed, however, to advance evidence showing how those BMPs were inadequate. It made no attempt to show, for instance, that turbidity could have been eliminated by selecting other BMPs. The Regional Board also offered no expert analysis of the BMPs used on the project. The Regional Board simply relied on the existence of turbidity to establish violations. That was not enough to carry its burden.

Rather than confronting these shortcomings, the Draft Order attempts to flip the burden of proof upon its head, suggesting that it was the dischargers' burden to show that BMPs were, in fact, adequate. This was not this dischargers' burden. To impose penalties, the Regional Board needed to demonstrate how the BMPs could have been carried out more effectively. As no such evidence exists in the record, these violations cannot be supported.

Insufficient Turbidity Measurements Violations

This category of violations is not supported by the terms of the Certification. This category surrounds the requirement in Condition 19 that "field turbidity measurements" be taken to monitor turbidity and demonstrate compliance with the receiving water limitations. Condition 19 does not say how "field turbidity measurements" may be taken. For minor turbidity, Caltrans and its contractors used visual means. MCM offered expert testimony that turbidity monitoring using visual means is a common practice. (Transcript, 260:1-263:13.)

The Draft Order, however, upholds the Regional Board's position that "field turbidity measurements" instead required the use of a specific instrument – an NTU meter. Condition 19 does not expressly require this, however, and does not preclude monitoring by other means than an NTU meter. If the Regional Board intended that an NTU meter or similar instrumentation be used at all times, it could easily have written that requirement. Having not done so, the violations simply are not supported by the Certification's plain language.

Further, the Draft Order ignores that visual monitoring did, in fact, result in numeric measurement and recordation of the extent of turbidity. For example, on August 29, a 15-foot plume; on August 30, a 15-foot plume; on September 1, a 20-foot plume; and on October 16, an 8-foot plume. The fact that some turbidity was relatively small lent to the appropriateness of the visual method. For these, visual monitoring not only met the terms of the Certification, but also was logical and reasonable method of complying with the Certification.

Cementitious Discharge Violations

MCM presented evidence at the hearing that the single image supporting this alleged violation did not depict cement waste, but instead showed natural river sediments. Rather than resolve this claim, however, the Draft Order manufactures a new and different ground for ACL liability. The State Board's authority to modify orders of the Regional Board cannot, consistent with due process, support violations under new theories of liability based on factual assumptions not advanced by the Regional Board. Moreover, if the record is inadequate to determine whether the material is concrete or sediment, which the Draft Order seems to plainly admit, then the record is not adequate to support liability for this alleged violation.

Individual Events Violations

The Draft Order fares no better than the ACL Order in explaining the basis for these violations. The violation for "loose soil" remains almost entirely unexplained. The record does not indicate where this event occurred, how it occurred, or any other details needed to establish a violation. Likewise, with respect to sandblasting, the Draft Order makes no effort to explain how a violation occurred when the evidence shows that BMPs specifically designed for this activity were followed at all times.

Storm Water Permit Violations

The Draft Order appears to misstate the ACL Order's findings. The ACL Order based penalties in this category on inadequate containment of the trestle deck. The ACL Order stated: "[a]lleged violations 154-283 are based on alleged inadequate containment of the trestle deck for the entire construction season of 2006..." The Draft Order, however, suggests that the penalties were not for lack of containment, but instead for equipment-related discharges to the trestle deck. This rationale is difficult to reconcile with the ACL Order. In its present state, the Draft Order does not appear to respond to the issues raised in MCM's Petition.

Application of Section 13385 Factors

The Draft Order is inconsistent with Water Code section 13385. As explained in the Petition, the language of section 13385, subdivision (e), required the Regional Board to apply the ten adjustment factors to each specific violation.³ The statute does not permit a regional board to "incorporate" its thinking into its overall order, and such an approach does not create an adequate record for review by the State Board or the courts. MCM continues to reserve its rights to challenge the Regional Board's methodology as inadequate.

Finally, Caltrans also is submitting comments to the State Board with today's date. MCM agrees with those comments and incorporates them by reference. Specifically, current law does not support an award of costs and fees; the authority to exact such costs does not exist in the Water Code. MCM also incorporates Caltrans' evidentiary objections, as set forth in Caltrans' comment letter.

³ Notably, the latest version of the State Board's Enforcement Policy requires this, bringing this version into line with state law.

We appreciate the State Board's consideration.

Very truly yours,

HARRISON, TEMBLADOR, HUNGERFORD
& JOHNSON LLP

A handwritten signature in black ink, appearing to read "SEAN K. HUNGERFORD", with a long horizontal flourish extending to the right.

SEAN K. HUNGERFORD

cc: Edmundo Puchi, Esq., MCM Construction