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Items W 18 & W 19

Staff: Aaron McLendon-SF
& Elijah Davidian-SF
Staff Report: Nov. 1, 2006
Hearing Date: Nov. 15, 2006

STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDERS CCC-06-CD-10 & 11

**CEASE AND DESIST ORDER TO
CALIFORNIA DEPARTMENT OF
TRANSPORTATION:**

CCC-06-CD-10

**CEASE AND DESIST ORDER TO
MCM CONSTRUCTION, INC.:**

CCC-06-CD-11

RELATED VIOLATION FILE:

V-1-06-003

PROPERTY LOCATION:

Highway 101 bridge over the Van Duzen River, 5 miles south of Fortuna, Humboldt Co.

VIOLATION DESCRIPTION:

Unpermitted development and development inconsistent with the Coastal Act and/or the terms of numerous Special Conditions of Coastal Development Permit No. 1-04-014, including: 1) dropping of the demolished bridge into the Van Duzen River and onto the gravel bar; 2) dredging of material from the active wet channel and on the gravel bar; 3) placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; 4) crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; 5) conducting work in the active wet channel other than for the construction of the temporary bridge crossing; 6) failure to divert the active channel away from construction areas; 7)

sedimentation of the Van Duzen and Eel Rivers; 8) the parking and idling in the riverbed of vehicles not directly involved in construction work; 9) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from vehicles without cleanup or containment; and 10) failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline.

PERSONS SUBJECT TO THESE ORDERS:

1. California Department of Transportation
2. MCM Construction, Inc.

SUBSTANTIVE FILE DOCUMENTS:

1. Coastal Development Permit and Staff Report No. 1-04-014; Notification of Intent to Commence Cease and Desist Order Proceedings, September 8, 2006; Statement of Defense, submitted by California Department of Transportation, September 28, 2006; U.S. Department of Commerce NOAA, National Marine Fisheries Service (NMFS) Offense Investigation Report, March 13, 2006; California Regional Water Quality Control Board (RWQCB), Notice of Violation, September 28, 2005

A. Exhibits A through L, attached.

CEQA STATUS:

Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308 and 15321).

I. SUMMARY OF FINDINGS FOR CEASE AND DESIST CCC-06-CD-10 & 11

Staff recommends that the Commission approve two separate Cease and Desist Orders, which would require the California Department of Transportation, (hereinafter, "CalTrans") and MCM Construction, Inc. (hereinafter, "MCM") to cease and desist from conducting any further unpermitted development at the Highway 101 bridge crossing of the Van Duzen River, located approximately 5 miles south of Fortuna in Humboldt County (hereinafter, "Subject Property"), and would require both parties to comply with the California Coastal Act and all terms and conditions of Coastal Development Permit No. 1-04-014 (hereinafter, "CDP"), as amended.¹

A. Actions Unpermitted and Inconsistent with the Coastal Development Permit

The unpermitted development that is the subject of these Cease and Desist Orders (hereinafter "Orders") consists of numerous violations of the Coastal Act and CDP No. 1-04-014, resulting from construction activities in and around the Van Duzen River ("River"), including the dropping of the demolished bridge into the Van Duzen River corridor. These actions caused, among other things, elevated turbidity in the channel, which disrupts the primary productivity upon which the aquatic food chain is built, including the macro-invertebrates upon which Pacific salmonids, which are federally- and State-listed as threatened species, forage.² Elevated turbidity also abrades fish gills, suffocates fish and incubating eggs, induces behavioral modification, disrupts predator and prey detection, limits the number of viable sites for egg nests and increases mortality.³

The full list of violations addressed by this action includes: 1) dropping of the demolished bridge into the Van Duzen River and onto the gravel bar; 2) dredging of material from the active wet channel and on the gravel bar; 3) placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; 4) crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; 5) conducting work in the active wet channel other than for the construction of the temporary bridge crossing; 6) failure to divert the active channel away from construction areas; 7) sedimentation of the Van Duzen and Eel Rivers; 8) the parking and idling in the riverbed of vehicles not directly involved in construction work; 9) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from

¹ These proceedings are being separated into two Orders, one to CalTrans and the other to MCM, both of whom performed or conducted the development that is the subject of these proceedings, as more fully discussed herein.

² The "listing" of a species is a legal designation, pursuant to the Endangered Species Act (federal) and the California Endangered Species Act (State), providing special protection to plant and animal species. A listing of "endangered" means that the species is in danger of becoming extinct. A listing of "threatened" means that the species is likely to become endangered in the near future.

³ Excerpted from the National Marine Fisheries Service's Biological Opinion, dated March 11, 2002 (**Exhibit A**).

vehicles without cleanup or containment; and 10) failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline. Both MCM and CalTrans (hereinafter, "Respondents") undertook and performed the unpermitted development. MCM, CalTrans' contractor, performed much of the unpermitted development on behalf of, under the supervision of, and at the direction of CalTrans the permittee.

B. Site Description

The stretch of the Van Duzen River that is the subject of these Orders is located within the Commission's retained permit jurisdiction, approximately ¼ mile upstream from the confluence of the Van Duzen and Eel Rivers, and is composed of broad, flat, aggraded alluvial deposits. Extensive riparian woodlands exist along the north bank of the River, extending several hundred feet back from the shoreline, while a narrower band of riparian woodlands, approximately 50 feet in width, exists along the River's south bank. The Van Duzen and Eel Rivers, both designated by the National Parks Service as "Wild and Scenic Rivers", provide critical habitat for chinook salmon, coho salmon, and steelhead trout, which are federally (and for coho, also State-) listed as threatened anadromous salmonid species.⁴ In addition, the U.S. Fish and Wildlife Service (hereinafter, "FWS") reports that western snowy plovers, which are federally listed as threatened species, have been detected on gravel bars at the confluence of the Eel and Van Duzen Rivers, and has stated that plovers may be present in the vicinity of the project site.

C. Permit Conditions and Violations

As discussed more fully below, on October 14, 2004, the Commission conditionally approved CDP No. 1-04-014 for the replacement of the southbound Highway 101 Bridge over the Van Duzen River. The existing Van Duzen Bridge consists of two separate bridges located side by side, one carrying northbound traffic and the other carrying southbound traffic. From bank to bank, the bridges are both approximately 800 feet long. Where the bridge is located, the width of the Van Duzen River is approximately 400 feet at ordinary high water and less than 50 feet during low flow conditions in the summer.

The southbound bridge replacement project included the removal of the existing bridge piers and abutments, and construction of new piers, abutments and bridge superstructure, as well as other associated work, including construction of sedimentation basins, cofferdams, temporary structures, and replacement of slope protection at the abutments. Numerous conditions were imposed by the CDP to minimize adverse impacts to the Van Duzen River and its associated environmentally sensitive habitat areas (hereinafter, "ESHA"), anadromous salmonid species, western

⁴ In passing the Wild and Scenic Rivers Act, Congress sought to protect for present and future generations, "...certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values..."

snowy plovers, water quality and the biological productivity of this area. On December 20, 2004, the Executive Director issued CDP 1-04-014 to CalTrans. On December 21, 2004, CalTrans returned a signed copy of the CDP, acknowledging and accepting all terms and conditions of the CDP.

Prior to the Commission's action in October of 2004, several state and federal agencies, including the Regional Water Quality Control Board (hereinafter, "RWQCB"), the California Department of Fish and Game (hereinafter, "DFG"), the National Marine Fisheries Service (hereinafter "NMFS"), and FWS, had reviewed and approved CalTrans' proposed project and imposed conditions of approval on their permits, many of which the Commission incorporated and required in CDP No. 1-04-014. By applying for the CDP and participating in the permit application, hearing and issuance process, soliciting bids for work, retaining a contractor, and undertaking work, CalTrans demonstrated knowledge and accepted the terms and conditions of the CDP and other agencies' requirements.

Prior to the commencement of the bidding process for the Van Duzen River Bridge replacement project, CalTrans issued a "Notice to Contractors and Special Provisions for Construction of State Highway" (hereinafter, "Special Provisions", and discussed more fully herein), which provided a detailed project description, as well an explanation of the sensitive resources in the project area and the development restrictions applicable to the project, including those required by the CDP and its specific conditions, and the requirements of other agencies, many of which were incorporated in the CDP, designed to protect those resources. The document was available to all contractors wishing to bid on the project. In addition, the Special Provisions Section 5-1.19 ("Project Information"), makes specific reference to an "Information Handout", which contained complete copies of all permits, agreements, and requirements issued, executed, or imposed by all state and federal agencies that reviewed and approved the Van Duzen Bridge project. The Information Handout was made available to any contractors wishing to bid on the project.

The standard bidding form provided to bidders by CalTrans entitled, "Proposal and Contract for Construction on State Highway in Humboldt County Near Alton From 1.0 km South of Van Duzen River Bridge to 0.1 km North of Duzen River Bridge" (hereinafter "Proposal"), notified potential bidders of the Special Provisions and required that all bids incorporate the costs associated with construction in conformance with those provisions, including the CDP and its conditions. The contract signed by CalTrans and MCM, entitled: "Execution of Contract for Construction on State Highway in Humboldt County Near Alton from 1.0 km South of Van Duzen River Bridge to 0.1 km North of Duzen River Overflow Bridge (Contract No. 01-314404 ("Contract")), also makes reference to the Special Provisions.

MCM, whom CalTrans hired to carry out most of the work, therefore, had the opportunity to review the terms and provisions of the contract, including the Special Conditions of the CDP and other agency requirements, prior to bidding on the project. MCM also agreed to comply with all of the requirements and restrictions made

applicable to the project by the CDP and the letters and approvals issued by other resources agencies, many of which were also required by the CDP.⁵ Moreover, by signing the contract with CalTrans, MCM agreed to construct the bridge replacement project in accordance with the plans reviewed and approved by all federal and state agencies having jurisdiction over the project, including the Commission, and the restrictions and requirements imposed by all such agencies in connection with their approvals.

The development at issue herein has occurred on the Subject Property in direct violation of the terms and conditions of CDP No. 1-04-014. The permit was conditioned to limit the time, place, manner, nature, and intensity of development in the Van Duzen River corridor. Special provisions were written or incorporated into the CDP to protect the threatened species dependent on the Van Duzen and Eel River ecosystems, including: protection of the physical, biological, and chemical integrity of the rivers; measures to contain and minimize the impacts of accidents, such as falling debris and fuel spills; and the setting of a seasonal deadline for ceasing construction, so as to ensure that construction activities in the wetted channel did not interfere with the migration and spawning of Pacific salmonids. The actions described above undermined the intent of these conditions, resulting in far-reaching immediate and potentially long-term detrimental impacts to the Van Duzen and Eel Rivers, and the habitat and species therein.

In fact, development undertaken that is inconsistent with a CDP means that it was not authorized by a CDP, and therefore, is considered unpermitted development. And unpermitted development is also violation of the Coastal Act. "Development" is broadly defined by Section 30106 of the Coastal Act and includes: the placement of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, or solid waste; grading, removing, dredging, or extraction of any materials; change in the density or intensity of use of land, change in the intensity of use of water, or of access thereto; and construction, reconstruction, demolition, or alteration of the size of any structure. Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP. Because the unpermitted activity clearly constitutes "development" within the meaning of Section 30106 of the Coastal Act and was not authorized by CDP No. 1-04-014, it requires a CDP. No such permit was issued by the Commission.

The actions at issue herein are also inconsistent with the underlying coastal development permit and the Coastal Act, including Sections 30230 (protection of marine resources), 30231 (protection of water quality), 30232 (protection from hazardous substance spills), 30233 (protection from diking, filling, and dredging), 30236 (protection from stream alteration), and 30240 (protection of environmentally sensitive habitat), of the Coastal Act (as fully discussed below). The unpermitted development is also

⁵ As discussed in Section IV (D), below.

causing continuing resource damage, as defined by Section 13190 of the Commission's regulations.

The impacts caused by the unpermitted development and the development inconsistent with the CDP (hereinafter "actions") meet the definition of damage provided in Section 13190(b) of the Commission's administrative regulations (Title 14, Division 5.5, California Code of Regulations (CCR)): "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development." The actions at issue herein will lead to continuing degradation of the Van Duzen and Eel Rivers; the habitats within and adjacent to these rivers; the state and federally listed species and species otherwise dependent on those habitats; and the physical, biological and chemical integrity of these rivers.

D. Conclusions

Commission staff had hoped to resolve this matter through a consent agreement, offered both parties this opportunity, and even postponed this matter from the October 2006 hearing in an attempt to accomplish this. Unfortunately, these efforts did not result in successful movement towards a consent agreement. Consequently, staff had to resort to these cease and desist order proceedings.

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where they find the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP.

Again, staff recommends approval of the Cease and Desist Orders to require CalTrans and MCM to cease and desist from conducting any further unpermitted development at the Highway 101 bridge crossing of the Van Duzen River and to require both parties to comply with the Coastal Act and all terms and conditions of Coastal Development Permit No. 1-04-014, as amended.

II. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order are outlined in Title 14, Division 5.5, Section 13185 of the California Code of Regulations (CCR).

For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with

particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which time Staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in Title 14, California Code of Regulations (CCR) Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Orders, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Orders.

III. STAFF RECOMMENDATION

Staff recommends that the Commission adopt the following two motions:

California Department of Transportation

1. Motion

I move that the Commission issue Cease and Desist Order No. CCC-06-CD-10 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order

The Commission hereby issues Cease and Desist Order No. CCC-06-CD-10, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit and that development has occurred in violation of the terms and conditions of CDP No. 1-04-014.

MCM Development, Inc.

2. Motion

I move that the Commission issue Cease and Desist Order No. CCC-06-CD-11 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order

The Commission hereby issues Cease and Desist Order No. CCC-06-CD-11, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit and that development has occurred in violation of the terms and conditions of CDP No. 1-04-014.

IV. FINDINGS FOR CEASE AND DESIST ORDERS No. CCC-06-CD-10 AND No. CCC-06-CD-11⁶

Staff recommends the Commission adopt the following findings in support of its action.

A. Description of Unpermitted Development and CDP Violations for Year 1

The unpermitted development that is the subject of this CDO consists of numerous violations of the Coastal Act and CDP No. 1-04-014 including: 1) dropping of the demolished bridge into the Van Duzen River and onto the gravel bar; 2) dredging of material from the active wet channel and on the gravel bar; 3) placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; 4) crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; 5) conducting work in the active wet channel other than for the construction of the temporary bridge crossing; 6) failure to divert the active channel away from construction areas; 7) sedimentation of the Van Duzen and Eel Rivers; 8) the parking and idling in the riverbed of vehicles not directly involved in construction work; 9) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from vehicles without cleanup or containment; and 10) failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline. Respondents undertook the unpermitted development. MCM, CalTrans' contractor,

⁶ The findings include by reference the Summary of Findings in Section I above.

performed much of the unpermitted development on behalf of, and at the direction of CalTrans the permittee.

The lower reach of the Van Duzen River ("River") has been designated by NMFS as critical habitat for coho salmon (*Oncorhynchus kisutch*), steelhead trout (*O. mykiss*), and chinook salmon (*O. tshawytscha*), each of which is federally (and for coho salmon, also State-) listed as threatened. In addition, the FWS reports that western snowy plovers, which are also federally listed as threatened, may be in the vicinity of the project area. As discussed more fully herein, the unpermitted actions that are the subject of these Cease and Desist Order proceedings resulted in adverse impacts to the Van Duzen River, thereby disrupting the habitat that the CDP was specifically conditioned to protect, and on which these and other sensitive species rely.

B. Description of Unpermitted Development and CDP Violations for Year 2

During the writing of this staff report, Commission staff became aware of additional actions, associated with year 2 of the replacement project for the southbound Highway 101 bridge crossing over the Van Duzen River, which constitute unpermitted development and are inconsistent with the terms and conditions of CDP 01-04-014.

Special Condition 17.F. of the Amended CDP requires the biological monitor to submit to Commission staff within fifteen days, of the end of the dry construction season (October 15th), detailed daily field notes of all observations from that season's construction activities, including any instance of potential non-compliance. In reviewing these logs provided in October 2006, Commission staff became aware of numerous violations and unpermitted development of a nature similar to those occurring during year 1 of the permit. The violations and unpermitted development occurred throughout the second construction season, after CalTrans and MCM had received a Notice of Violation from RWQCB, dated September 28, 2005. The actions even continued after Commission staff sent a Notice of Violation, dated March 10, 2006, for the matters identified in year 1, including several weeks during which CalTrans and MCM assured Commission staff that they were committed to resolving amicably the issues that are the subject of these CDO proceedings.

Commission staff notes that the unpermitted development and CDP violations that occurred in both years 1 and 2, may be subject to penalties under Chapter 9 of the Coastal Act.

C. Salmonids and Plovers and Their Relationship to the Subject Property

1. Anadromous Salmonids⁷

Coastal streams and rivers serve a critical function in the life cycle of anadromous salmonids. Shallow pools, cobble substrates, and large woody debris, within cool, clear, and flowing streams, provide habitat for incubation, hatching, and rearing of juvenile salmonids, the earliest and most vulnerable stages of the salmonid lifecycle. As anadromous salmonids near maturity, they migrate towards the ocean, where they will spend a significant portion of their lives. However, after they reach maturity and are ready to spawn, anadromous salmonids return to the very stream from which they emerged. As a result, the integrity of these habitats is critical not only to the success of the individual salmonid, but also to the genetic diversity of the species. Unfortunately, habitat integrity has been compromised along much of the west coast, leading to the federal listing of several west coast anadromous salmonids as threatened or endangered under the Endangered Species Act.

Habitat factors that may have contributed to the declines in California salmonid populations include changes in channel morphology, substrate changes, loss of instream roughness and complexity, loss of estuarine habitat, loss of wetlands, loss and/or degradation of riparian areas, declines in water quality, altered stream flows, impediments to fish passage, and elimination of habitat. The major activities identified as responsible for the decline of salmonids include logging, road building, grazing, mining, urbanization, stream channelization, dams, wetland loss, beaver trapping, water withdrawals, and unscreened diversions for irrigation. Water diversions for agriculture, flood control, domestic supply, and hydropower purposes have greatly reduced or eliminated historically accessible habitat. Forestry, agriculture, mining, and urbanization have degraded, simplified, and fragmented habitat. Sedimentation from extensive and intensive land use activities such as timber harvesting, road building, livestock grazing, and urbanization degrades the essential features and functions of salmonid habitat.

Historic land and water management practices, including timber harvesting, mining, and grazing, have contributed to the loss of habitat diversity within the Van Duzen River. Functioning aquatic habitat is also limited in the Van Duzen watershed due to low abundance of pools, low abundance of large woody debris, low instream cover levels, and high levels of fine sediment. While spawning habitat is present, existing conditions indicate that the Van Duzen River has limited rearing habitat due to elevated water temperatures. Cool water seeps, thermal stratification, and habitat complexity all play critical roles in sustaining micro-habitat for juvenile and adult salmonids.

The presence of salmonids in the Van Duzen River has dramatically declined over the years. A 1959 reconnaissance survey, cited by the NMFS Biological Opinion, indicated

⁷ This section was largely excerpted from the NMFS Biological Opinion, dated March 11, 2002, several provisions of which were also required by Special Condition 6.A. of CDP 01-04-014, issued by the Commission. The NMFS Biological Opinion is included in Exhibit A.

that the Van Duzen River watershed had the capability to support a run of 7,000 chinook salmon and reported 1,500 spawning nests. Chinook spawning was documented within the lower stretch of the Van Duzen River in 1995, after DFG opened the mouth of the river and fish were able to migrate past the shallow riffles. Adult anadromous salmonid migration into the Van Duzen River appears to be controlled by rainfall and begins after the first rains in the fall. The NMFS Biological Opinion notes that in 1997 a few juvenile steelhead were observed in the lower Van Duzen River, accompanied by thousands of pikeminnow, which are known predators of salmonids. The Biological Opinion references a 2000 report which documented the presence of steelhead age 2+ and 3+ and two summer steelhead adults in the lower stretch of the Van Duzen River. The report goes on to note that in 1965 annual runs of chinook and coho salmon numbered 2,500 and 500, respectively, while in 1992 the steelhead runs numbered less than 100. CalTrans' biological monitors' observations indicate that natural populations of anadromous salmonids persist at low levels within the Van Duzen watershed.

As is clear from the discussion above, historic land and water management practices in the Van Duzen River have contributed to the degradation of salmonid habitat, resulting in declining populations of chinook and coho salmon, and steelhead trout. These impacts are reflected by the federal listing of these species and designation of the Van Duzen River as critical habitat. While healthier systems might be able to rebound more easily from periodic stresses, the resilience of the Van Duzen River ecosystem is clearly stretched. As a result, additional impacts, such as the actions at issue in these CDO proceedings, are likely to have compounding, and longer lasting, effects.

2. Western Snowy Plovers⁸

The California Department of Fish and Game has identified the western snowy plover as a "species of special concern" throughout California since 1978. The Pacific coast population of the western snowy plover was federally listed as threatened on March 5, 1993, and critical habitat was designated on December 7, 1999.

Nesting and breeding habitats for western snowy plovers include coastal beaches, sand spits, dune-backed beaches, sparsely-vegetated dunes, beaches at creek and river mouths, and salt pans at lagoons and estuaries. The FWS Biological Opinion notes that the FWS has identified the Eel River from the mouth to the Van Duzen River as a breeding area that is important for the recovery of the snowy plover. The report goes on to state that snowy plovers may be present in the vicinity of the project area for the following reasons: 1) potentially suitable habitat exists at the project site; 2) the May 2000 detection of two snowy plovers at the confluence of the Eel and Van Duzen Rivers; 3) known nesting sites approximately .25 to .5 miles downstream from the confluence of the Eel and the Van Duzen Rivers; and 4) as many as 39 breeding plovers have been documented along the Eel River.

⁸ This section was largely excerpted from the FWS Biological Opinion dated March 12, 2003, and submitted with CDP 1-04-014, issued by the Commission. The FWS Biological Opinion is included in Exhibit A.

The FWS Biological Opinion identifies several primary threats that necessitated the listing of snowy plovers, including activities that cause or increase human-associated disturbance within habitat areas, such as off-road vehicle use, walking, jogging, dredge disposal, and activities that produce contamination events. The FWS Biological Opinion also notes that habitat modification within the construction site (including construction of facilities on the gravel bar), such as temporary roads, sedimentation basin, dikes, and berms, would physically modify suitable nesting habitat. However, the report's Analysis of Project Effects found that habitat modification within the project area would have minimal impact on the species based on the following assumptions: 1) the project would be constructed as proposed; 2) all terms and conditions of the FWS Biological Opinion would be followed; 3) all construction materials and debris would be removed at completion of the project; 4) habitat alteration would be confined to the project site (2 acres). FWS anticipated the "take" resulting from the project as proposed would include four adult western snowy plovers, six chicks, and three eggs. The incidental take was expected to include one plover nest containing three eggs, resulting from construction within the CalTrans right of way.

While it may be too early to determine whether the unpermitted activities that are the subject of these Cease and Desist Orders resulted in increased mortality of snowy plovers beyond the anticipated level, it is clear that the actions as performed stray from the assumptions upon which biologists relied in determining that the project would have minimal impacts on snowy plovers and their habitat. The actions at issue not only deviated from the project as proposed, but also impacted an area well beyond the project site, threatening the integrity of the Eel and Van Duzen River corridors, their habitats, and species dependent thereon.

D. History of Commission Actions on Subject Properties

In 1993, the Commission approved CDP No. 1-93-05 for the replacement of the northbound Highway 101 bridge over the Van Duzen River, and construction was completed in 1995. On October 14, 2004, the Commission conditionally approved CDP No. 1-04-014 (**Exhibit A**) for the replacement of the southbound Highway 101 bridge over the Van Duzen River.

The southbound bridge replacement project included the removal of the existing bridge piers and abutments, and construction of new piers, abutments and bridge superstructure, as well as other associated work, including construction of sedimentation basins, cofferdams, temporary structures, and replacement of slope protection at the abutments. On December 20, 2004, the Executive Director issued CDP 1-04-014 to CalTrans. On December 21, 2004, CalTrans returned a signed copy of the CDP, acknowledging and accepting all terms and conditions of the CDP.

Prior to submitting a CDP application to the Commission for the construction of the southbound Highway 101 Bridge over the Van Duzen River, CalTrans obtained other regulatory approvals, which also included conditions on the work to be performed. These included a Stream Alteration Agreement from DFG, a Clean Water Act Section

401 Certification from RWQCB, and Biological Opinions from NMFS and FWS. The approvals from DFG, RWQCB, NMFS, and FWS were issued to CalTrans with numerous conditions regarding the protection of the sensitive resources associated with the Van Duzen River. As discussed more fully herein, Special Conditions No. 6, 7, 8, and 9 of CDP No. 1-04-014 incorporated numerous provisions of the other agency approvals, and required CalTrans to comply with all requirements and conditions of the Stream Alteration Agreement, the Clean Water Act Section 401 Certification, and the Biological Opinions, as specific conditions of the CDP. These, along with several other conditions of CDP No. 1-04-014 are the very conditions that were violated by the Respondents.

Prior to the commencement of the bidding process for the Van Duzen River Bridge replacement project, CalTrans issued a "Notice to Contractors and Special Provisions for Construction of State Highway" (hereinafter, "Special Provisions", and discussed more fully herein), which provided a detailed project description, as well an explanation of the sensitive resources in the project area and the development restrictions applicable to the project, including those required by the CDP and the requirements of other agencies, many of which were also required by the CDP, designed to protect those resources. The document was available to all contractors wishing to bid on the project. In addition, the Special Provisions Section 5-1.19 ("Project Information"), makes specific reference to an "Information Handout", which contained complete copies of all permits, agreements, and requirements issued, executed, or imposed by all state and federal agencies that reviewed and approved the Van Duzen Bridge project. The Information Handout was made available to contractors wishing to bid.

The standard bidding form provided to bidders by CalTrans entitled, "Proposal and Contract for Construction on State Highway in Humboldt County Near Alton From 1.0 km South of Van Duzen River Bridge to 0.1 km North of Duzen River Bridge" (hereinafter "Proposal"), notified potential bidders of the Special Provisions and required that all bids incorporate the costs associated with construction in conformance with those provisions. The first line of the Proposal, used by MCM to bid on the bridge replacement project, states:

"The work for which this proposal is submitted is for construction in conformance with the special provisions... ¶ The special provisions for the work to be done are dated May 9, 2005 and are entitled: ¶ State of California; Department of Transportation; Notice to Contractors and Special Provisions for Construction on State Highway in Humboldt County Near Alton from 1.0 km South of Van Duzen River Bridge to 0.1 km North of Duzen River Overflow Bridge."

The contract signed by CalTrans and MCM, entitled: "Execution of Contract for Construction on State Highway in Humboldt County Near Alton from 1.0 km South of Van Duzen River Bridge to 0.1 km North of Duzen River Overflow Bridge (Contract No. 01-314404 ("Contract"))", also makes reference to the Special Provisions. The Special Provisions and Information Handout were provided to MCM with the Contract. The first sentence in Article I of the Contract, states:

“[MCM] agrees with [CalTrans], at [its] own proper cost and expense, to do all the work... necessary to construct and complete... in a good, workmanlike and substantial manner and to the satisfaction of [CalTrans], the work described in the special provisions and the project plans... ¶The special provisions for the work to be done are dated May 9, 2005 and are entitled: ¶State of California; Department of Transportation; Notice to Contractors and Special Provisions for Construction on State Highway in Humboldt County Near Alton from 1.0 km South of Van Duzen River Bridge to 0.1 km North of Duzen [sic] River Overflow Bridge.”

MCM, whom CalTrans hired to carry out most of the work, therefore, had the opportunity to review the terms and provisions of the contract, including the Special Conditions of the CDP and other agency requirements, prior to bidding on the project. MCM also agreed to comply with all of the requirements and restrictions made applicable to the project by the CDP and the letters and approvals issued by other resources agencies, many of which were also incorporated into the CDP. Moreover, by signing the contract with CalTrans, MCM agreed to construct the bridge replacement project in accordance with the plans reviewed and approved by all federal and state agencies having jurisdiction over the project, including the Commission, and the restrictions and requirements imposed by all such agencies in connection with their approvals.

History of Violation Investigation

On August 3, 2005, a CalTrans biologist monitoring the project notified North Coast Commission staff that MCM had dropped the old bridge directly into the Van Duzen River corridor with no protective measures whatsoever, in direct violation of CDP No. 1-04-014. The action caused extensive release of airborne particulates and sediment, as well as the actual bridge debris, to fall onto and coat the gravel bar below the mean high water mark of the Van Duzen River, and caused pH-altering concrete dust and sediment to blow or fall into the wet channel of the Van Duzen River. Additional violations were documented and reported to Commission staff or directly observed by Commission staff on several separate occasions in September and October of 2005, including but not limited to: 1) the parking and idling of vehicles not directly involved in construction work in the riverbed; 2) the crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, which created sediment plumes that disturbed and impacted salmonid habitat; 3) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from vehicles without any cleanup or containment; 4) the placement and compaction of fill material directly in the river and on the gravel bar in order to create a work platform; and 5) jeopardizing spawning salmonids by continuing construction work past permitted time periods, all of which are in direct violation of the CDP conditions specifically designed to protect the natural resources of the area.

Other regulatory agencies with jurisdiction over this area also took actions to try to address some of the numerous violations at this site. On September 28, 2005, RWQCB, North Coast Region, sent a "Notice of Violation" letter to CalTrans regarding violations of the Clean Water Act Section 401 Certification that RWQCB issued for the Van Duzen Bridge project (**Exhibit J**). The violations described in the letter include actions causing extensive turbidity of the river, dark stains on the gravel bar that appeared to be from petroleum spills or leaks, storage of a generator on the gravel bar and leaking hose connections coming from the generator, storage of a drum of hydraulic fluid on the gravel bar, and the lack of any secondary containment around the generator or drum and the lack of any containment or clean up of the leaks. Additional violations discovered by RWQCB and described in the letter included stockpiling excavated material on the gravel bar and spreading and leveling fine sediment across the gravel bar. Furthermore, best management practices (hereinafter, "BMPs"), which were required in the CDP and the 401 Water Quality Certification, such as silt fences and secondary containment of generators, drums, and fueling areas, had not been implemented around these areas to protect against the further degradation of water quality. All of these violations are also violations of the CDP and the Coastal Act, as well. The RWQCB letter concludes by stating that the violations threaten to impact water quality and beneficial uses of the river.⁹

Sedimentation of the Van Duzen and Eel Rivers, caused by violations of the CDP between late August 2005 and early September 2005, is also documented in a March 13, 2006 Offense Investigation Report, conducted by NMFS (**Exhibit I**). The Report documents several actions of the Respondents that are inconsistent with the CDP, the Stream Alteration Agreement, the Clean Water Act Section 401 Certification, and the Biological Opinions. The Report also identifies several days where MCM, under the direct monitoring by and supervision of CalTrans, was working and excavating in the active river channel of the Van Duzen, creating large sediment plumes that flowed downstream, through the Van Duzen River and into the Eel River, in violation of the CDP. The investigation report also indicated that there were no sediment control devices installed, as required by the CDP, which exacerbated the sedimentation of the Van Duzen and Eel Rivers caused by the first violation noted.

On March 10, 2006, Commission enforcement staff sent a letter to MCM and CalTrans notifying them of the Commission's confirmation of violations of the Coastal Act and the CDP (**Exhibit D**). The letter advised MCM and CalTrans that Commission staff was going to take further enforcement action to address the confirmed violations of the CDP, including initiating Cease and Desist Order proceedings, a legal action for declaratory and equitable relief, and/or collecting penalties pursuant to Chapter 9 of the Coastal Act. On March 15, 2006, CalTrans responded to Commission staff's letter and requested to meet with enforcement staff regarding the violations and stated that the cited activities (such as the discharge of concrete debris, rubble and dust into the riverbed due to the unprotected dropping of the old bridge; fueling and storage of equipment, open storage

⁹ On January 30, 2006, the North Coast Regional Water Quality Control Board collected from CalTrans a \$101,000 payment of an Administrative Civil Liability Complaint for violating the requirements of the Section 401 Certification for the Van Duzen River Bridge project (**Exhibit K**).

of fuel and leaking of the stored fuel, and compaction of earthen material on the gravelbar; unauthorized crossing of the low-flow channel and failure to cease all construction and remove all temporary construction devices by October 15th of a given calendar year) all happened during the first construction year and that measures had been implemented to ensure compliance with regulatory approvals (**Exhibit E**). However, as noted above, Commission staff recently became aware of numerous additional violations, occurring during the 2006 construction season (year 2) that are the same and/or similar in nature to those occurring during the 2005 construction season (year 1) and cited in the March 10, 2006 violation notice.

Commission staff also received a response letter dated April 7, 2006 from MCM, alleging that the CDP requirements and requirements from other state and federal agencies were not a part of their contract with CalTrans, and therefore claiming that MCM was not liable for the violations of these requirements (**Exhibit F**).¹⁰ MCM indicated that they would not take responsibility for the matter, and they alleged that the permit and regulatory commitments were not part of the contract. Although not at all relevant to these proceedings, they also alleged that compliance with the permit conditions may make it impossible to construct the project as per their contract with CalTrans.

On May 2, 2006, Commission enforcement, permit, and legal staff met with representatives of MCM and CalTrans to discuss the violations, the responsibility of both MCM and CalTrans under the Coastal Act, and the Commission's authority to resolve violations through Cease and Desist Order proceedings. Commission staff had hoped to resolve this matter through a consent agreement, offered both parties this opportunity, and even postponed this matter from the October 2006 hearing in attempt to accomplish this. However, neither the May 2, 2006 meeting, nor subsequent conversations with both parties, resulted in successful movement towards a Consent Agreement. As a result, on September 8, 2006, pursuant to Section 13181, Title 14, division 5.5 of the California Code of Regulations, the Executive Director sent, via certified and regular mail to each CalTrans and MCM, a Notice of Intent to Issue a Cease and Desist Order (hereinafter, "NOI") (**Exhibit G**). The NOI included a thorough explanation of why the subject activity constitutes development and violated the CDP and how such activity meets the criteria of Section 30810 of the Coastal Act to commence proceedings for issuance of a Cease and Desist Order.

¹⁰ As previously stated, it was evident from the contract between MCM and CalTrans that all requirements of the CDP as well as all requirements of the Stream Alteration Agreement by DFG, the 401 Certification by RWQCB, and the Biological Opinions from NMFS and FWS, were incorporated into the Contract; and it is clear from the contract that MCM was, in fact, responsible for complying with these requirements, as was CalTrans. Moreover, apart from MCM's contractual obligations, as the entity directly implementing the work authorized by CDP 1-04-014, MCM was also responsible for compliance with the terms of that permit. Even if MCM was in some way exempt from complying with the CDP that it was carrying out under the contract with CalTrans, which it was not, MCM is still subject to the requirements of the Coastal Act for undertaking development in the Coastal Zone.

In accordance with Section 13181(a) of the Commission's Regulations, CalTrans and MCM were provided the opportunity to respond to the Commission staff's allegations as set forth in the NOI by completing a Statement of Defense form (hereinafter "SOD"). CalTrans and MCM were required to submit the SOD form by no later than September 28, 2006.

On September 28, 2006, Commission staff received a SOD from CalTrans in response to the NOI (**Exhibit H**). These defenses and Commission staff's response to those defenses are addressed in Section I of this Staff Report.

By September 28, 2006, Commission staff had not received any response from MCM, which therefore waived its rights to present defenses to this matter. In fact, as of the date of this Staff Report, Commission staff has still received no response from MCM.

E. Basis for Issuance of Cease and Desist Order

The statutory authority for issuance of these Cease and Desist Orders is provided in Section 30810 of the Coastal Act, which states, in relevant part:

- a) If the Commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the Commission may issue an order directing that person or governmental agency to cease and desist.*
- b) The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with [the Coastal Act], including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to [the Coastal Act].*

The following paragraphs set forth the basis for the issuance of these Cease and Desist Orders by identifying the primary evidence on which the Commission relied in determining that the development undertaken by Respondents satisfies all of the required criteria listed in Section 30810 for the Commission to issue a Cease and Desist Order.

1. Development Has Occurred that is Inconsistent with CDP 1-04-014

As noted above, the permit was conditioned to minimize the impacts of the project on the Van Duzen and Eel Rivers, and on the habitat and species therein. Based on the conditions of the CDP, Commission found that "wetland habitat values will be maintained or enhanced, and that coastal water quality will be protected against degradation as the result of the proposed project." But for these conditions, the CDP

would not have been found consistent with the Coastal Act. The actions that are inconsistent with the terms and conditions of the CDP and form the basis for the issuance of these Cease and Desist Orders, pursuant to Section 30810 of the Coastal Act, are itemized below and include references to the relevant terms and conditions of the CDP.

- a. Dropping of the demolished bridge into the Van Duzen River.

Special Conditions No. 8. and 9. of the CDP require that the permittee must comply with the terms and conditions of the Stream Alteration Agreement and the Section 401 Certification, respectively. The terms and conditions of both of those approvals (Condition 9. of the Stream Alteration Agreement and Condition 2. of the Section 401 Certification) state:

“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 shall be allowed to enter into or be placed where it may be washed by rainfall or runoff into waters of the State.”

Special Condition 11.A. of the CDP required the submittal and approval of a plan for the demolition and capture of the old bridge that was to include, among other things, measures to prevent waste and debris from falling into the riverbed. In addition, Special Condition 11.B.(7) of the CDP states:

“Particular care shall be exercised to prevent foreign materials...**from entering the Van Duzen River corridor**, or areas that drain into the river...For any work on or beneath fixed bridge decks, heavy-duty mesh containment netting shall be maintained below all work areas where construction discards or other material could fall into the water” (emphasis added).

Despite these prohibitions, Respondents did not undertake development in compliance with the CDP, and instead, they dropped the demolished bridge directly onto the gravel bar in the Van Duzen River corridor. CalTrans’ monitors and engineers onsite did not stop the work and allowed the unpermitted activity to continue without the required measures to protect the Van Duzen River and Van Duzen River habitat.

The Commission imposed these conditions based on its express finding that the project would need to comply with these restrictions in order to be consistent with the Coastal Act policies in PRC sections 30230 (protection of marine resources), 30231 (protection of water quality), and 30240 (protection of environmentally sensitive habitat). Accordingly, Respondents’ failure to comply with, or to ensure compliance with, these requirements meant the work was both inconsistent with the permit conditions and with the Coastal Act policies designed to protect coastal resources. As performed inconsistent with the CDP, the development caused significant degradation to coastal resources in the form of, but not limited to, water quality impairment, elevated turbidity,

reduced biological productivity, degradation of salmonid and western snowy plover habitat, and a potential increase in salmonid and plover mortality in the Van Duzen and Eel Rivers (for a fuller discussion of these issues, please see Section 3, *infra*).

- b. Sedimentation of the Van Duzen and Eel Rivers; failure to divert the active channel away from construction areas; and the dredging of material from the active wet channel and on the gravel bar

On the morning of August 26th, a CalTrans engineer observed an excavator go into the wetted channel and dig into the active river channel 8-10 feet down, causing significant sedimentation of the Van Duzen River. Additional work was observed being performed later in the afternoon, consisting of the dumping of the excavated material into the river so that the excavator could move farther out into the river to excavate an area further out into the wetted channel. According to the daily log kept by CalTrans' biological monitor, in-water excavation began in the morning of August 25, 2005. During the previous day, August 24, 2005, the biological monitor documented in his daily log, approximately 15 trout actively feeding near and downstream from the point of excavation. The in-water excavation resulted in sediment plumes that reached all the way to the confluence of the Van Duzen and Eel Rivers, approximately ¼ mile downstream from the project site, including areas of demonstrate salmonid habitat.

The permit was specifically conditioned to prevent such sedimentation and associated resource impacts. The CDP required a dry work area for any dredging associated with construction within the channel. Condition 7. of the Streambed Alteration Agreement, compliance with which was required by Special Condition 8. of the CDP, states that "[d]uring construction in flowing water which can transport sediment downstream, the flow shall be diverted around the work area by pipe, pumping or temporary diversion channel." Special Condition 11.B.(5) of the CDP states, "Silt curtains appropriate for use in riverine waters shall be installed around any areas to be excavated." Condition 3. of the Section 401 Certification, compliance with which is required by Special Condition 9.A. of the CDP, states that best management practices will be implemented and in place prior to, during, and after construction to prevent adverse impacts to water quality. Condition 2.(g) of the NMFS Biological Opinion, compliance with which is required by Special Condition 6.A. of the CDP, also requires that best management practices be implemented. No such practices had been installed or utilized at the time of the August 2005 inspections.

The CDP required a dry work area in order to construct the footings' new columns without having to work in the active channel, so as to avoid causing elevated turbidity of the Van Duzen and Eel River. This dry work area was to be created by the use of river diversion and cofferdams and other dewatering techniques in the project areas that encountered the low-flow channel. These CDP requirements were not followed. Instead, Respondents installed a cofferdam within the active channel without first diverting the river around the work area and also constructed the cofferdams without sediment controls in place. Respondents also excavated directly within the river channel, placed fill directly in the river, and did so without any sediment controls, in

violation of the CDP requirements, and causing extensive sediment plumes in the river. On August 29, 2005, a NMFS Special Agent visited the site and noted some of the impacts of these violations (**Exhibit I**):

“I observed much sediment along the banks of the river. It was like a blanket of fine mud, and it coated everything in the water channel and banks...¶ I walked about 50 yards upstream from the bridge construction site and observed a clean river bed and bank with no sediment. From the bridge construction site [downstream] to the Eel River several hundred yards away there was a fine layer of mud on everything.”

In addition, the CDP, and the project description reviewed by NMFS, required the creation of a temporary flat-car bridge for crossing the low-flow channel, which would completely span the low flow channel, so that equipment would not be in direct contact with water (see discussion below regarding river crossing). Despite this, MCM, under the supervision of CalTrans, did not construct the temporary bridge as required to avoid sedimentation of the Van Duzen River, in direct violation of the CDP. In addition, CalTrans monitors and engineers did not stop the unpermitted activity and allowed unpermitted activity to occur throughout the 2005 construction period.

The Commission imposed these conditions based on its express finding that the project would need to comply with these restrictions in order to be consistent with the Coastal Act policies in PRC sections 30230 (protection of marine resources), 30231 (protection of water quality), 30233 (diking, filling, and dredging), and 30240 (protection of environmentally sensitive habitat). Accordingly, Respondents' failure to comply with, or to ensure compliance with, these requirements meant the work was both inconsistent with the permit conditions and with the Coastal Act policies designed to protect coastal resources. As performed inconsistent with the CDP, the development caused significant degradation to coastal resources in the form of, but not limited to, water quality impairment, elevated turbidity, reduced biological productivity, degradation of salmonid habitat, and a potential increase in salmonid mortality in the Van Duzen and Eel Rivers.

- c. The storage of vehicles and equipment on gravel bars within the riverbed; the leakage of fuel onto gravel bars within the riverbed without cleanup or containment; and the placement and compaction of earthen material onto the gravel bar both within and outside of the active wet channel of the Van Duzen River.

As noted above, Special Conditions No. 6. and 8. of the CDP require compliance with all Terms and Conditions of the NMFS Biological Opinion and the DFG Stream Alteration Agreement, respectively. The NMFS Biological Opinion states, under the Specific Project Components section, that no equipment staging or refueling shall take place within the river channel. The Biological Opinion and the CDP go on to include specific provisions to avoid contamination and to minimize turbidity associated with construction in and around the wetted channel. Condition 2.a. of the Biological Opinion requires that storage of fuel must be at least 150 feet from the two-year flood elevation or within an adequate fueling containment area. In addition, Condition 2.c. of the

Biological Opinion, requires that excavation spoils that contain soils not be stored in or near the stream channel, and that excavation spoils not be stored or stockpiled on site. In addition, Condition 10. of DFG's Stream Alteration Agreement, compliance with which is also required by the CDP, states:

"No servicing of equipment shall take place within the stream bed and all equipment shall be stored when not in use out of the streambed. No petroleum products shall be allowed to enter the stream channel. If a spill occurs, the Dept. shall be notified immediately and cleanup and containment shall commence."

In addition, Special Condition 11.B.(3) of the CDP states that machinery or construction materials not essential for project construction are not allowed within the Van Duzen River corridor. Special Condition 11.B.(7) of the CDP requires that a designated staging area shall be used for refueling of equipment and storing of materials. Furthermore, Special Condition 12.A. of the CDP requires that a hazardous materials management plan must be submitted, and that the plan must provide that oil absorbent booms and/or pads are on site at all times, that all equipment is free of oil and fuel leaks, and that provisions for cleanup, temporary storage and containment and disposal of hazardous materials are provided. Finally, the Section 401 Certification, compliance with which is required in Special Condition 9.A., requires that no equipment staging or refueling shall take place within the river channel.

On September 7, 2005, RWQCB staff conducted a site visit and observed violations of CalTrans' Section 401 Certification (**Exhibit A**). The violations discovered consisted of the fueling of equipment, storage of equipment and fuel, and compaction of earthen material in order to create a work platform, all occurring on the gravel bar of the Van Duzen River, within the river corridor, river channel, and/or stream channel, and within 150 feet of the two-year flood elevation. In addition, the fuel and equipment stored on the gravel bar was observed to be leaking, and there was no secondary containment for the stored fuel or equipment, or any attempt to contain or clean up the leak. These are all directly inconsistent with the permit conditions.

During a site visit on October 13, 2005, Commission staff also observed that a number of CalTrans and MCM vehicles that were not directly involved in actual construction activities were parked or idling in the riverbed area. Special Condition 11.B.3 states, "No machinery or construction materials not essential for project construction shall be allowed at anytime within the Van Duzen River corridor." This provision was included to prevent unnecessary disruption of the corridor, including the increased probability of crushing a plover nest, egg, or chicks, which as the FWS Biological Opinion notes, are often difficult to detect.

As noted in the RWQCB's violation letter (**Exhibit A**), CalTrans' monitors and engineers onsite did not take action to stop apparent violations, allowing the unpermitted activity to continue without the required measures to protect the Van Duzen River and Van Duzen River habitat. The Commission imposed these conditions based on its express finding that the project would need to comply with these restrictions in order to be consistent

with the Coastal Act policies in PRC Sections 30230 (protection of marine resources), 30231 (protection of water quality), 30232 (oil and hazardous substance spills), 30233 (diking, filling, and dredging), and 30240 (protection of environmentally sensitive habitat). Accordingly, Respondents' failure to comply with, or to ensure compliance with, these requirements meant the work was both inconsistent with the permit conditions and with the Coastal Act policies designed to protect coastal resources. As performed inconsistent with the CDP, the development caused significant degradation to coastal resources in the form of, but not limited to water quality impairment, elevated turbidity, reduced biological productivity, degradation of salmonid habitat, and a potential increase in salmonid mortality in the Van Duzen and Eel Rivers.

- d. Conducting work in the active channel other than for the permitted construction of a temporary bridge crossing, even one was installed and fully available for use and; the unpermitted crossing of the low-flow channel of the Van Duzen River by tracked vehicles.

The CDP requires that equipment will cross the low-flow channel only on a temporary bridge-crossing above the water, and that construction of the temporary bridge-crossing would only require two crossings of the low-flow channel in water, once to install the temporary crossing and once to remove it. NMFS also required this mitigation measure in its Biological Opinion, compliance with which is required by Special Condition 6. of the CDP, and also states specifically that all equipment should cross the low-flow channel on the temporary bridge crossing, and that vehicular crossing of the low-flow channel in water should only occur twice: during installation, and during dismantling of the temporary crossing. Conditioning the exception, the NMFS Biological Opinion states, "A person shall wade the stream ahead of heavy equipment crossing the wetted low flow channel to scare any rearing juvenile salmonids out of the crossing area."

During an October 13, 2005 site visit, Commission staff observed that the temporary bridge that Respondents were required to construct did not fully span the low flow channel as required by the CDP. Instead, fill material and k-rail were dumped into the river to narrow the river channel apparently so that MCM could utilize steel beams that they already owned as a cost saving measure. On October 19, 2005, CalTrans fisheries monitors reported to Commission staff that Respondents conducted numerous crossings in the river by tracked vehicles, driven during construction work, in direct violation of the CDP. In addition, the biological monitor's logs reveal numerous instances in which heavy equipment crossed the channel without an escort. These actions likely caused significant turbulence and turbidity, and disruption of salmon nesting and rearing habitats including the scaring of juveniles and/or crushing of salmon egg nests, in areas where rearing juvenile salmonids were observed.

The Commission imposed these conditions based on its express finding that the project would need to comply with these restrictions in order to be consistent with the Coastal Act policies in PRC sections 30230 (protection of marine resources), 30231 (protection of water quality), 30233 (protection from diking, filling, and dredging), and 30240 (protection of environmentally sensitive habitat). Accordingly, Respondents' failure to

comply with, or to ensure compliance with, these requirements meant the work was both inconsistent with the permit conditions and with the Coastal Act policies designed to protect coastal resources. As performed inconsistent with the CDP, the development caused significant degradation to coastal resources in the form of, but not limited to, water quality impairment, elevated turbidity, reduced biological productivity, degradation of salmonid habitat, and a potential increase in salmonid mortality, in the Van Duzen and Eel Rivers.

- e. Failure to cease construction and remove all temporary construction devices by October 15, 2005.

Respondents failed to cease work and remove all temporary construction devices by October 15, 2005. Special Condition 16. of the CDP specifically provided that project activities in the river channel outside the low-flow channel are prohibited between October 15th and June 1st of a given year, and that project activities in the low-flow channel are prohibited between October 15th and June 15th. In addition, Condition 1.a. of the NMFS Biological Opinion, compliance with which is required by Special Condition No. 6. of the CDP, states that project activities are prohibited after October 15th in order to minimize incidental take of salmonids. Finally, Condition 2. of the Streambed Alteration Agreement, compliance with which is required by Special Condition 8 of the CDP, states that all work in or near the stream shall be confined to the period June 15th through October 15th, and the project description given in the Section 401 Certification states that in-stream work activities will be conducted between June 15th and October 15th. These deadlines were imposed in order to avoid construction activities in the channel during the time that adult salmonids return to the river to spawn.

Because CalTrans and MCM did not prepare to stop work and remove all construction materials from the Van Duzen River corridor by the October 15th deadline as required by the permit, CalTrans, on October 13, 2005, requested an emergency CDP for two specific items: 1) to retain two cofferdams installed within the river channel during the 2005 dry season over the winter rainy season and migratory/spawning season for coho and chinook salmon and steelhead trout, and 2) to place temporary riprap around the outside of the coffer dams. Leaving the cofferdams in the river channel after October 15, 2005 and placing riprap protection around the cofferdams were both clear violations of the CDP (**Exhibit B**).

Special Condition No. 16 of the CDP was required to ensure that no work would occur after October 15th, and to prevent this very outcome. Since Respondents violated Special Condition No. 16 by failing to remove the cofferdams and not preparing to cease work prior to October 15th, the Executive Director was left to determine whether the environmental damage to the Van Duzen River, associated habitat, and salmonids that use this habitat would be greater if work to remove the cofferdams continued beyond October 15th, or if the cofferdams were left in place within the active channel through the winter season. It was determined that while the outcome of each option would have significant resource damage to the Van Duzen River ecosystem, leaving the cofferdams in place would have less potential disruption to the Van Duzen River than

continuing work to remove the cofferdams beyond October 15th. Because it was determined by the Executive Director that removing the cofferdams after October 15, 2005 would cause more environmental damage than leaving them in place, the Executive Director orally approved the request for emergency authorization on October 14, 2005.

As required by the Emergency Permit, on March 2, 2006, CalTrans submitted a CDP amendment request, requesting after-the-fact permission to work past the October 15, 2005 deadline to keep cofferdams in the river and place riprap revetments around the cofferdams. At that time, CalTrans also proposed several additions and changes to the original project as approved under CDP No. 1-04-014; these include requests for approval of unpermitted development that is the subject of these enforcement proceedings. On June 16, 2006, the Commission conditionally approved the amendment request, in part, but denied the request for after-the-fact approval of the unpermitted development that is the subject of this enforcement action (**Exhibit C**).¹¹

The Commission imposed these conditions based on its express finding that the project would need to comply with these restrictions in order to be consistent with the Coastal Act policies in PRC sections 30230 (protection of marine resources) and 30240 (protection of environmentally sensitive habitat). Accordingly, Respondents' failure to comply with, or to ensure compliance with, these requirements meant the actions were both inconsistent with the permit conditions and with the Coastal Act policies designed to protect coastal resources. As performed inconsistent with the CDP, the development caused significant degradation to coastal resources in the form of, but not limited to, degradation of salmonid habitat by disrupting the flow of channel during the spawning run, and a potentially increasing salmonid mortality in the Van Duzen and Eel Rivers.

2. Development Has Occurred Without a Coastal Development Permit ("CDP")

As discussed in the previous sections, Respondents undertook development that was inconsistent with the CDP. The fact that development was inconsistent with a CDP means that it was not authorized by a CDP, and therefore, is considered unpermitted development. And unpermitted development is also a violation of the Coastal Act. The unpermitted actions undertaken and performed by Respondents that constitute "development" as defined in Section 30106 of the Coastal Act and form a basis for the issuance of these Cease and Desist Orders, pursuant to Section 30810 of the Coastal Act, as discussed more fully herein, include but are not limited to:

- a. Dropping of the demolished bridge into the Van Duzen River;

¹¹ In the follow-up permit to the Emergency Permit, Commission conditionally approved the retaining of two 40 ft. x 40 ft. wide, 40 ft. deep coffer dams, fully sealed against fish entrapment, including placement of an approximately 12-ft.-wide band of rip-rap around the perimeter of each coffer dam, after the otherwise-applicable October 15, 2005 deadline (**Exhibit C**).

- b. Placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River;
- c. Dredging of material from the active wet channel of the Van Duzen River;
- d. Crossing the low-flow channel of the Van Duzen River by tracked vehicles, multiple times without using the temporary bridge crossing, even after one was installed and fully available for use;
- e. Sedimentation of the Van Duzen and Eel Rivers;
- f. Parking and idling in the riverbed of vehicles not directly involved in permitted construction work;
- g. Storage of equipment on gravel bars within the riverbed;
- h. Leakage of fuel onto gravel bars within the riverbed without cleanup or containment;
- i. Conducting work in the active channel other than for the permitted construction of a temporary bridge crossing;
- j. Failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline.

“Development” is defined by Section 30106 of the Coastal Act as follows:

*"Development" means, on land, in or under water, the **placement** or erection of any **solid material** or structure; **discharge** or disposal of any **dredged material** or of any gaseous, **liquid**, **solid**, or thermal waste; grading, removing, **dredging**, mining, or extraction **of any materials**; change in the density or **intensity of use of land**...change in the **intensity of use of water**, or of access thereto; **construction**, reconstruction, **demolition**, or alteration of the size of any structure, including...any public, or municipal utility... (Emphasis added).*

All of the items listed above (a. – j.) constitute development under Section 30106 of the Coastal Act.

3. Inconsistency with the Resource Policies of the Coastal Act

The actions forming the basis for these CDO proceedings, including unpermitted development and development that is inconsistent with the CDP (hereinafter, “actions”) performed by Respondents, are inconsistent with Sections 30230, 30231, 30232, 30233, 30236 and 30240 of the Coastal Act. A discussion of how these actions are inconsistent with said Coastal Act policies is included after the text of each of the relevant Coastal Act Sections.

a. Protection of Marine Resources and Environmentally Sensitive Habitat Area and

Section 30230 of the Coastal Act states the following:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30240 of the Coastal Act states the following:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

The lower reach of the Van Duzen River has been designated by the NMFS as a critical habitat area for coho salmon, steelhead trout, and chinook salmon, each of which is federally (and for coho salmon, also State-) listed as threatened.¹² The FWS has also reported that federally listed western snowy plovers use the Van Duzen and Eel River corridors for nesting and over-wintering. In addition, the DFG has identified the western snowy plover as a “species of special concern” throughout all of California since 1978. The state and federal status of these species is but one indication that their natural habitats are degraded or diminishing in size, and that their populations are declining as a result.

Numerous conditions of the CDP, including Special Conditions No. 6, 8, 9, 11, 13, and 16, were added to ensure that construction in and around the river minimized potential impacts to the Van Duzen River and the species and habitat dependent thereon (**Exhibit A**). The unpermitted actions of CalTrans and MCM, including but not limited to: 1) dropping of the demolished bridge into the Van Duzen River and onto the gravel bar; 2) dredging of material from the active wet channel and on the gravel bar; 3) placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; 4) crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; 5) conducting work in the active wet channel other than for the construction of the

¹² The “listing” of a species is a legal designation, pursuant to the Endangered Species Act (federal) and the California Endangered Species Act (State), providing special protection to plant and animal species. A listing of “endangered” means that the species is in danger of becoming extinct. A listing of “threatened” means that the species is likely to become endangered in the near future.

temporary bridge crossing; 6) failure to divert the active channel away from construction areas; 7) sedimentation of the Van Duzen and Eel Rivers; 8) the parking and idling in the riverbed of vehicles not directly involved in construction work; 9) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from vehicles without cleanup or containment; and 10) failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline; individually and cumulatively contributed to the degradation of the Van Duzen River and the habitats on which these threatened species rely.

As discussed more fully in the following sections, the actions of CalTrans and MCM that are the subject of these CDO proceedings, not only impacted the species identified above, but also caused immediate and potentially long-term adverse impacts to the entire Van Duzen River ecosystem, thereby impacting not only the species living within the Van Duzen and Eel Rivers, but also those species from adjacent areas that rely on the Van Duzen and Eel Rivers for sustenance. As such, the actions cited herein are inconsistent with Sections 30230 and 30240 of the Coastal Act.

b. Diking, filling, or dredging; continued movement of sediment and nutrients

Coastal Act Section 30233 (b) states the following:

Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable longshore current systems.

The intent of Section 30233 is to protect aquatic habitats from the impacts of dredging associated with development in and around coastal waters. The unpermitted actions of CalTrans and MCM, including but not limited to dredging in the active wet channel and placement of dredge spoils onto the gravel bar and into the wet channel of the Van Duzen River, resulted in a spike in the turbidity of the Van Duzen and Eel Rivers, as indicated in the NOAA Offense Investigation and RWQCB's Notice of Violation to CalTrans (**Exhibits I and J**). Construction activities in the stream channel disrupts the layering of sediments in the stream, making more fine sediments available for transport, which leads to elevated turbidity. The NMFS Biological Opinion states:

"Elevated turbidity can affect the entire foodweb in streams in numerous ways. Stream photosynthesis and primary production can be reduced if sunlight does not reach the substrate. The resulting hindrance of benthic macro-invertebrate production is a reduction in species on which listed Pacific salmonids forage.... Suspended sediments cloud otherwise clear waters making salmonids' prey and predator detection difficult, reducing feeding opportunities, and possibly inducing behavioral modifications. Suspended sediments may cause clogging and abrasion of gills and other respiratory surfaces, providing conditions conducive to entry and persistence of disease related organisms, which, in turn, may provoke behavioral modifications. [Spawning areas of salmonids] may be harmed when

suspended sediment deposits on them, affecting inter-gravel permeability and dissolved oxygen levels, adhering to the chorion of eggs, suffocating incubating salmonid eggs, and/or entombing different life stages. Physical habitat may be degraded by pools filling with sediment and losing volume and by the settling of fine sediment into the interstitial spaces of the substrate in riffles.”

The turbidity-elevating actions of CalTrans and MCM, that are the subject of these CDO proceedings, are numerous and occurred over at least several consecutive days for the bridge dropping violations alone. Other violations at the site, including: placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; dredging of material from the active wet channel; crossing of the low-flow channel of the river by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; conducting work in the active channel other than for the construction of the temporary bridge crossing; failure to divert the active channel away from construction areas; sedimentation of the Van Duzen and Eel Rivers; the parking and idling in the riverbed of vehicles not directly involved in construction work; and the continuance of construction work past October 15, 2005; clearly increased the turbidity of the protected area, and occurred over several weeks.

While the impacts of these actions may not have been immediately apparent (i.e. dead fish at the construction site), the above passage suggests that the impacts of these actions are far reaching and potentially long-term. Because these actions clearly disrupted fish and wildlife habitat, they are inconsistent with Section 30233 of the Coastal Act.

c. Oil and hazardous substance spills

Coastal Act Section 30232 states the following:

Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.

The intent of Section 30232 is to protect against the accidental or intentional introduction of hazardous substances related to development into coastal waters. The actions of CalTrans and MCM, including the storage of equipment and fuel and the fueling of equipment on the gravel bar in the Van Duzen River without any containment or spill prevention, resulted in leaks of vegetable based hydraulic fluid and what appeared to be petroleum fuel onto the gravel bar in the Van Duzen River corridor, as indicated in the RWQCB Notice of Violation to CalTrans (**Exhibit J**). Fuel spills introduce toxins into the water and create sheens on the surface that poison, coat, suffocate, or otherwise disrupt the natural behavior of aquatic species, and species dependent thereon. While the CDP explicitly prohibited such activity, it also required that containment devices, including oil-absorbent booms, be on-site at all times to

minimize the impacts of any accidental spills. At the time the violation was observed by RWQCB staff, the required containment devices also were not in place. These actions, and their results, are not only in direct violation of the CDP, they are also inconsistent with Section 30232 of the Coastal Act.

d. Biological Productivity; water quality

Coastal Act Section 30231 states the following:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

The intent of Section 30231 is to protect the productivity and quality of coastal waters, including streams and wetlands. The unpermitted actions taken by CalTrans and MCM, including but not limited to dropping of the bridge; dredging and sedimentation of the active wet channel; the release of hydraulic fluids without containment; placement of fill into the active wet channel; and the unnecessary vehicular crossing of the low-flow channel of the Van Duzen River, resulted in unnecessary adverse impacts to the water quality and habitat, thus threatening the biological productivity of the Van Duzen River. As noted above, elevated turbidity can disrupt primary productivity in the aquatic ecosystem, and fuel spills clearly degrade water quality and disrupt habitat for the species that depend on clean water for survival. In addition, the dust from bridge demolition had the clear potential to affect the river's pH, and therefore the water quality and biological productivity of the channel. DFG Game Warden Ed Ramos notified Commission staff on October 19, 2005, that he had determined in the course of his investigation that the concrete dust from the bridge demolition had pH altering potential. Most aquatic species are sensitive to changes in the pH of their environment. The warden noted that when washed into the channel, the concrete dust could be detrimental to fisheries. Both the warden and CalTrans' biological monitor informed Commission staff that the wind was strong enough on subsequent days to blow concrete dust into the wetted channel.

Condition 2.f. of the NMFS Biological Opinion, compliance with which is required by Special Condition 6.A. of the CDP, requires special handling of concrete around the water so as to avoid changes in the water's pH. The Biological Opinion was explicitly conditioned to avoid the introduction of concrete into the channel for that very reason. It is clear from this discussion, and those above, that CalTrans and MCM did not take the steps necessary to protect the biological productivity or water quality of the Van Duzen River. As a result, these actions are inconsistent with Section 30231 of the Coastal Act.

e. Water supply and flood control

Section 30236 of the Coastal Act states the following:

Channelizations, dams, or other substantial alterations of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for the public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.

One of the purposes of Section 30236 is to ensure that essential public works projects incorporate the best mitigation measures feasible to minimize incidental adverse impacts to rivers and streams. The actions of CalTrans and MCM, including but not limited to failing to divert the stream channel around coffer-dam installation area, dredging in the active wet channel, and placement of dredge spoils on the gravel bar and into the active wet channel of the Van Duzen River, constitute failures to implement best management practices as set forth in, and as requirements of, the Stream Alteration Agreement and the CDP. The resource impacts associated with these actions, including sedimentation of the Eel and Van Duzen Rivers and the impacts associated with elevated turbidity could have been feasibly mitigated by following the terms and conditions of the CDP. As a result, the unpermitted actions are inconsistent with Section 30236 of the Coastal Act.

F. Cease and Desist Order is Consistent with Chapter 3 of the Coastal Act

The Cease and Desist Orders attached to this staff report are consistent with the resource protection policies found in Chapter 3 of the Coastal Act. These Cease and Desist Orders would require CalTrans and MCM to 1) cease and desist from performing or maintaining unpermitted development, 2) cease and desist from performing or maintaining development that is inconsistent with the terms and conditions of CDP 1-04-014 (as amended), and 3) cease and desist from performing or maintaining development that is inconsistent with the Coastal Act. The requirements of these Cease and Desist Orders would minimize adverse impacts to the Van Duzen River ecosystem, and the federally listed species dependent thereon, incidental to the bridge replacement project authorized by the CDP. Therefore, these Cease and Desist Orders are consistent with the Chapter 3 policies of the Coastal Act.

G. California Environmental Quality Act (CEQA)

The Commission finds that issuance of this Cease and Desist Order is exempt from any applicable requirements of the California Environmental Quality Act (CEQA) of 1970 and will not have significant adverse effects on the environment, within the meaning of CEQA. These Cease and Desist Orders are exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3),

15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines (Title 14 of the California Code of Regulations).

H. Summary of Key Findings

1. The two Highway 101 bridges, managed by CalTrans, carry northbound and southbound traffic across the Van Duzen River and are publicly owned. The bridges are located approximately 5 miles south of Fortuna, Humboldt Co., and approximately 1/4 mile southeast (upstream) of the confluence of the Van Duzen and Eel Rivers.
2. On March 8, 2004, CalTrans applied for a coastal development permit for replacement of the southbound Highway 101 bridge over the Van Duzen River. On October 14, 2004, the Commission conditionally approved CDP No. 1-04-014 for the replacement of the southbound Highway 101 bridge over the Van Duzen River.
3. On December 20, 2004, the Commission issued CDP No. 1-04-014 to CalTrans.
4. On July 11, 2005, CalTrans and MCM signed a contract requiring MCM to complete the bridge replacement project on behalf of CalTrans, in accordance with the plans reviewed and approved by all federal and state agencies having jurisdiction over the project, including the Coastal Commission, and subject to all of the restrictions and requirements imposed by all such agencies in connection with their approvals.
5. Subsequent to July 11, 2005, CalTrans and MCM have undertaken and performed development on the subject property, including but not limited to: 1) dropping of the demolished bridge into the Van Duzen River and onto the gravel bar; 2) dredging of material from the active wet channel and on the gravel bar; 3) placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; 4) crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; 5) conducting work in the active wet channel other than for the construction of the temporary bridge crossing; 6) failure to divert the active channel away from construction areas; 7) sedimentation of the Van Duzen and Eel Rivers; 8) the parking and idling in the riverbed of vehicles not directly involved in construction work; 9) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from vehicles without cleanup or containment; and 10) failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline.
6. Each of the actions enumerated in finding No. 5, above, constitute separate violations of the Coastal Act or CDP No. 1-04-014.
7. CalTrans performed and undertook development as that term is defined in Section 30106 of the Coastal Act. CalTrans directly conducted some of the actions which

were violations of the permit and Coastal Act. CalTrans also arranged for, paid for, authorized, hired, and supervised a contractor as a means of undertaking much of the development being performed pursuant to in CDP No. 1-04-014, but in a manner inconsistent with its terms, as well as other development not authorized by any CDP, and is therefore subject to Section 30810 of the Coastal Act. CalTrans observed and provided oversight for many of the specific actions performed at the site and cited herein.

8. MCM performed and undertook development, as the term is defined in Section 30106, which was both unpermitted and inconsistent with permits previously issued by the Commission, and is therefore subject to Section 30810 of the Coastal act.
9. The development described herein and its impacts were inconsistent with Chapter 3 resource protection policies of the Coastal Act, including Sections 30230, 30231, 30232, 30233, 30236, and 30240.
10. The development undertaken on the site, which is addressed by this action, constitutes numerous violations of the Coastal Act, was not authorized by a CDP, and therefore is unpermitted development.
11. No exemption from the permit requirements of CDP 01-04-014 applies to the development on the subject property.
12. The actions of CalTrans and MCM were not permitted under, and/or are inconsistent with, the terms and conditions of CDP 01-04-014, and the requirements of other agencies, many of which were also included as requirements in the CDP and its conditions.
13. The development constitutes numerous violations of CDP 01-04-014.
14. Additional unpermitted development, and development inconsistent with CDP 01-04-014 (as amended), of a nature similar to that which is the subject of these Cease and Desist Order proceedings, continued throughout the 2006 construction season. These violations are in direct conflict with the terms and conditions of the CDP and associated requirements, all of which were known to both CalTrans and MCM. These violations continued after the initial RWQCB violation notice, dated September 28, 2005. These violations then continued to occur after CalTrans and MCM had each received the Commission's Notice of Violation, dated March 10, 2006, for the actions cited in this Order. These violations even continued to occur after Commission staff met with MCM and Caltrans on May 2, 2006, to discuss resolving these violations through a Consent Order. Therefore, MCM and CalTrans undertook the actions at issue herein intentionally and knowingly in violation of CDP 01-04-014 and the Coastal Act.
15. The development caused resource damage at the site and off-site (particularly downstream), including habitat degradation, water quality degradation, disruption of

channel morphology, and elevated turbidity, in the Van Duzen River. The impacts of these actions disrupted the Van Duzen River ecosystem, imposing immediate and potentially long-term stresses on federally and state listed threatened species, and species otherwise dependent on the habitats within Van Duzen and Eel River corridors.

16. On January 30, 2006, the North Coast Regional Water Quality Control Board collected from CalTrans a \$101,000 payment of an Administrative Liability Complaint from CalTrans for failing to comply with the requirements of the Section 401 Water Quality Certification for the Van Duzen River Bridge Project.

I. Violators' Defenses and Commission's Responses

Absence of any Statement of Defense for MCM

As noted previously, MCM was provided the opportunity to identify its defenses to issuance of the Order in a written Statement of Defense, as provided in the Commission's Regulations, but has failed to do so. Section 13181(a) of the Commissions Regulations states, in part:

"The notice of intent shall be accompanied by a 'statement of defense form' that conforms to the format attached to these regulations as Appendix A. The person(s) to whom such notice is given shall complete and return the statement of defense form to the Commission by the date specified therein, which date shall be no earlier than 20 days from transmittal of the notice of intent."

As of the date of the Staff Report, MCM had not presented any defenses, or any other response, to staff's allegations as set forth in the September 8, 2005 NOI. The final date for submittal of the statement of defense form ("SOD") was September 28, 2005. MCM did not submit the SOD by the September 28, 2005 deadline, and did not request additional time to do so. Since the completion of Section 13181's statement of defense form is mandatory, MCM has failed to raise and preserve any defenses that it may have had. The SOD is necessary to enable the Executive Director to prepare a recommendation to the Commission that includes rebuttal evidence to matters raised in the SOD and summarizes any unresolved issues, as required by Section 13183 of the Commission's Regulations. Since MCM did not submit an SOD, MCM has waived its right to present defenses for the Commission's consideration in this matter.

Statement of Defense for CalTrans

Charles C. Fielder, on behalf of CalTrans, submitted a Statement of Defense, which was received by the Commission staff on September 28, 2006, and is included as Exhibit H of this Staff Report. The SOD submitted by CalTrans contains general denials and objections as well as some brief defenses. Many of the issues raised by CalTrans are not relevant to whether the evidence before the Commission demonstrates a violation of the Coastal Act, and thus, to whether the Commission is authorized to issue this Cease and Desist Order. The Commission responds to these issues nonetheless,

for the information of all parties. We note that the only relevant issue to whether an Order may be issued under Section 30810 is whether there was either unpermitted development or violations of the CDP requirements – that is, a violation of the Coastal Act, establishing grounds to issue an Order under Section 30810. The following paragraphs describe the defenses contained in the SOD and set forth the Commission's response to each defense.

1. The Respondents' Defense:

Bridge demolition did not result in debris entering the wetted channel of the Van Duzen River, and therefore is not inconsistent with the CDP Special Condition 11.B.(7) or Condition 2. of the RWQCB Section 401 Certification, which is incorporated in Special Condition 9.A. of the CDP.

Commission's Response:

On August 3, 2005, CalTrans' biological monitor notified Commission staff that Respondents were dropping the old bridge deck directly into the Van Duzen corridor, onto the gravel bar, with no protective measures or methods to catch the debris in place. The biological monitor also noted that a substantial amount of concrete dust and small rubble was also discharged into riverbed gravels. On October 19, 2005, DFG Game Warden Ed Ramos informed Commission staff that the bridge debris is not inert and that when flushed by rainfall into the river waters, it has pH altering potential that may be detrimental to fisheries.

Special Condition 11.B.(7) states, "Particular care shall be exercised to prevent foreign materials...from entering the Van Duzen River corridor, or areas that drain into the river." Condition 2. of the RWQCB Section 401 Certification, compliance with which is required by CDP Special Condition 9.A., states, "No debris...from any construction 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." In addition, Special Condition 11.A.(4) of the CDP requires the development and implementation of "a plan for the demolition and capture of the old bridge and related components," including "measures to prevent debris and waste from falling into the riverbed or adjacent areas." Special Condition 11.B.(1) states, "No construction debris or waste shall be placed or stored where it may enter coastal waters."

At the time the old bridge was dropped into the Van Duzen River corridor, no protective measures were in place. As a result, dust and debris from the demolition fell onto gravel bars within the Van Duzen River corridor. DFG Game Warden Ed Ramos and CalTrans' Environmental Construction Liaison Melinda Molnar both informed Commission staff that the dust was blowing significantly enough to enter the water. Moreover, as is clear from the language of the conditions cited above, debris need not fall into the wetted channel in order to constitute a violation of the CDP, rather debris must only have been placed where it could be washed by rainfall or drain into the wetted channel. Some of the debris likely did fall or blow into the wetted channel, but even if it did not, rain falling

on gravel bars within a river corridor will, with the exception of the portion that evaporates, ultimately drain into the wetted channel, and therefore, any solid materials dropped on the gravel bar will eventually reach the wetted channel. As a result, the dropping of the bridge into the Van Duzen River corridor is inconsistent with the conditions of the CDP and the RWQCB Section 401 Certification, compliance with which is required by the CDP.

2. The Respondents' Defense:

- a) Debris that fell onto the gravel bar, resulting from demolition of the bridge deck on August 3, 2005, was removed between August 4, 2005 and August 15, 2005.
- b) The NOI mailed to CalTrans on September 8, 2006 alleged that the dropping of the bridge deck into the Van Duzen River corridor, "clearly impact[ed] the species that the conditions were designed to protect. " CalTrans' response states,

"Caltrans denies this allegation on the following basis: Caltrans personnel involved in inspecting and overseeing the removal of the demolished bridge from the gravel bar, including the Biological Monitor did not observe any direct impacts to aquatic species."

- c) "Moreover, the alleged violation is inconsistent with the ongoing, large gravel mining operation in the river and adjacent to the project, as well as those mining operations upstream and downstream of the project."

Commission's Response:

Even if the large pieces of debris that fell onto the gravel bar were removed by August 15, 2005 (the only evidence of which is CalTrans' assertion), this would still mean that the violation remained in place, by CalTrans' own admission, until August 15, 2005. More important, even after that date, the concrete dust and fine rubble that coated the gravel bar remained. As noted in the NMFS Biological Opinion, elevated turbidity resulting from increases in fine sediments, such as the concrete from bridge demolition, "impacts the entire foodweb." More specifically, the Biological Opinion states,

"When the areas disturbed by the construction activities become inundated by the first flows of the season, they will prove an additional source of easily transported fine sediments... The new sediment, in combination with existing sediment in transport, will contribute to any physical or behavioral impacts that the turbidity is causing listed Pacific salmonids..."

While CalTrans personnel may not have observed any direct impacts to aquatic species at the time the bridge was dropped, the NMFS Biological Opinion had already found that any increased turbidity would detrimentally impact Pacific salmonids. Therefore, based on the analysis and conclusion of the NMFS biologist, fine sediment associated with dropping the bridge deck on to the gravel bar will necessarily have had direct impacts

on the species that the Biological Opinion and the CDP were conditioned to protect. Moreover, many of the impacts to the biological productivity, habitat value, and water quality of the river and surrounding areas would not have necessarily have been easily observed or immediately obvious. In fact, many of the conditions were designed to protect against long-term adverse effects to the habitat.

The assertion that “the alleged violation is inconsistent with” the actions of other operators in the river is not relevant to this proceeding and does not provide any evidence to support a claim that the findings for a cease and desist order have not been met, or address the issue of whether the development was consistent with the terms and conditions of the permit, which are the issues relevant to issuance of a cease and desist order under Section 30810 of the Coastal Act. Each action taken in the Coastal Zone must be evaluated on its merits. The conditions that were placed on permits issued for development in this area were intended to avoid harm to coastal resources.

The regulatory approvals for the bridge replacement project, including the CDP, as well as the Biological Opinions assessing the construction-related impacts, are legal requirements, separate and apart from the requirements placed on other persons performing development in nearby areas. All other operators within the Coastal Commission’s jurisdiction, including gravel mining operations, proposing new, non-exempt development after 1973, are required to obtain a coastal development permit and to similarly comply with all applicable permit conditions.

3. The Respondents’ Defense:

- a) CalTrans encountered an unanticipated obstruction during the installation of the cofferdam, which required excavation to remove the obstruction. In the course of excavating, the gravel berm between the excavation and the low flow channel failed, hydraulically connecting the excavation site to the wetted channel. At the suggestion of the biological monitor, a water bladder was installed to hydraulically separate the excavation required to repair and complete construction of the cofferdam.
- b) “The activities of specific site personnel are under review, however, the project records indicate that work continued after the berm failure on August 25, 2005, with concurrence of the Biological Monitor. And during the sediment releases noted on August 26, 2005, work was temporarily suspended, based on a recommendation of the Biological Monitor.”

Commission’s Response:

The Respondent’s statement does not provide any evidence to support a claim that the findings for a cease and desist order have not been met, or address the issue of whether the development was consistent with the terms and conditions of the permit, which are the issues relevant to issuance of a Cease and Desist Order under Section 30810 of the Coastal Act.

In fact, the permit specifically addressed what was supposed to be done in the case of such a situation, in order to minimize adverse effects. Special Condition 6.B. required permittee to contact the nearest field office of NMFS, should stream diversion or dewatering methods proposed for the subject project fail to ensure a dry environment for pile driving and other construction activities. Condition 7. of the DFG Stream Alteration Agreement, compliance with which is required by Special Condition 8. of the CDP, required diversion of flowing water around work areas that might otherwise occur in flowing water and have the potential to transport sediment downstream. Similarly, Condition 3. of the RWQCB's Section 401 Water Quality Certification, compliance with which is also required by Special Condition 9.A. of the CDP, required that best management practices for sediment and turbidity control were to be implemented and in place prior to, during, and after construction in order to minimize disruption of sediment in, and introduction of sediment into, coastal waters. Finally, Special Condition 11.B.5. requires that silt curtains appropriate for use in riverine waters shall be installed around the areas to be excavated.

Despite the requirements identified above, CalTrans and MCM failed comply with these provisions of the permit as well. They failed to cease work and contact the nearest NMFS field office once the excavation site became connected to the wetted channel. Instead, excavation and placement of dredge spoils in the wetted channel continued, absent silt curtains or other best management practices, throughout the days of August 25, 2005 and August 26, 2005. Excavation was temporarily suspended on August 26, 2005 between 10:30 and 1:00pm. Four days later, on August 29, 2005, contractors began installation of a water bladder dam to isolate the excavation pit. These actions were not in compliance with the permit and did not minimize and avoid adverse effects, as was intended by the permit conditions.

4. The Respondents' Defense:

- a) The NOI mailed to CalTrans on September 8, 2006 alleged that the temporary bridge crossing was "never constructed at all." CalTrans' response states,

"This statement is incorrect. A temporary crossing was built during the first week of August 2005. Clean washed gravel was used to build the abutments on the edge of both banks in order to span the river using 80 foot steel girders. "

- b) "The Amended CDP, though conditioned, accommodates the same general design of the temporary bridge from 2005, as CalTrans and [MCM] demonstrated that a complete span of the low flow channel is not feasible."

Commission's Response:

Commission staff observed that the temporary bridge was not constructed to fully span the low flow channel, as was required by the NMFS Biological Opinion, compliance with which is also required by Special Condition 6.A. of the CDP. The Biological Opinion requires, "The footings and approaches will not contact the water." Instead, MCM pushed fill material and k-rail into the low flow channel to narrow it. A CalTrans

supervisor informed commission staff that this was done so that the contractor could utilize materials (steel beams) that they already owned as a cost saving measure. Thus, CalTrans and MCM never constructed the temporary crossing as approved.

Special Condition 5.A. of the CDP states, "The proposed project shall be constructed strictly in accordance with the approved plans. Any future modification of the approved development...shall require a Commission amendment to this coastal development permit." Commission staff was not notified by CalTrans or MCM, prior to installation of the noncompliant temporary bridge, of their assertion that the design as approved was not feasible. If this actually was the case, and had the Commission been aware of the issue prior to installation, Commission staff could have worked with CalTrans and MCM to develop an alternative that would have minimized impacts to the Van Duzen River. Instead, CalTrans and MCM pursued their own alternative without regulatory approval and without consulting the California Coastal Commission, in violation of the CDP, and sought after-the-fact approval for the associated violations. In addition, staff notes that the CDP amendment granted to CalTrans on June 16, 2006 specifically denied after-the-fact approval for violations associated with the 2005 installation of the noncompliant temporary bridge and does not provide any excuse or defense to these violations.

5. The Respondents' Defense:

- a) "Since CCC staff first notified CalTrans in March 2006, of the violations now identified in the NOI for CDO, the CDP has been amended... The amended CDP clearly defines the role of the Biological Monitor in new SC 17A-H. Both the environmental construction liaison and the biological monitor, "have the authority to order the immediate cessation of any activity."
- b) "...The amended CDP allows that those materials originally excavated from the Pier 3 cofferdam, which were intended for backfill of the necessary excavation, may remain on the gravel bar adjacent to the excavation as long as adequate BMPs are in place to ensure containment."

Commission's Response:

The fact that a CDP amendment, which partially addresses some of the situations that were created by the numerous violations, was later sought and partially granted does not provide a defense to this action. It does not provide any evidence that the elements in Section 30810 of the Coastal Act, have not been met, or address the issue of whether the development was consistent with the terms and conditions of the legally approvable permit, which are the issues relevant to issuance of a Cease and Desist Order under Section 30810 of the Coastal Act. In fact, as noted by CalTrans, the amendment includes a requirement to utilize best management practices to achieve containment, which was one of the goals of the original permit conditions, which were not followed.

Moreover, CalTrans does not explain how the new definition for the role of the biological monitor is relevant to any of the violations listed herein, and the Commission can see no relationship. While a more clearly defined role for the environmental construction liaison

and biological monitor may assist with future compliance with the CDP, the violations and unpermitted development that are the subject of these Cease and Desist Orders proceedings, including the unauthorized placement and compaction of dredge material in the active wet channel without adequate BMPs, were not resolved through the CDP amendment.

6. The Respondents' Defense:

The Commission-approved Storm Water Pollution Prevention Plan ("SWPPP") indicated that fueling could occur anywhere within the project limits, excluding the low flow channel, provided that proper best management practices were employed. Therefore, fueling and the storage of fuel on the gravel bar are not violations.

Commission's Response:

The SWPPP, developed by MCM and submitted for Executive Director approval as required by Special Condition 9.B., is but one of a suite of documents and conditions that, when taken together, were designed to minimize impacts to the Van Duzen River. The SWPPP does not state that fueling is permitted "anywhere within the project site." Rather, it specifically articulates where fueling is prohibited. The SWPPP states, "No vehicle or equipment maintenance, fueling, or cleaning shall take place within the active channel limits" (**Exhibit L**). The absence of language within the SWPPP specifically prohibiting fuelling everywhere on the project site should not be read as allowing fueling anywhere else within the project area. The SWPPP must be read in conjunction with all of the other requirements and conditions of the permit.

The RWQCB's Section 401 Certification and the NMFS Biological Opinion also place similar restrictions on the storage and fueling of equipment within the project area. In addition, DFG's Stream Alteration Agreement restricts the location of "servicing" of equipment and requires storage when not in active use.

The Section 401 Certification, compliance with which is mandated by Special Condition 9.A. of the CDP, states, "Best Management Practices will be implemented to prevent adverse impacts to water quality. No equipment staging or refueling will take place within the river channel." Similarly, Condition 2. of the RWQCB certification states, "No...oil or petroleum products...shall be allowed to enter or be placed where it may be washed by rainfall into waters of the State."

Condition 2.a. of the NMFS Biological Opinion, compliance with which is required by Special Condition 6.A. of the CDP, also places restrictions on where fueling may take place. The Biological Opinion states:

"...the FHWA/Caltrans shall ensure that applicable BMPs are implemented to minimize adverse effects to aquatic habitat, and listed Pacific salmonids...Vehicle maintenance, re-fueling and storage of fuel shall be done at least 150 feet from the 2-year flood elevation or within an adequate fueling containment area."

Moreover, the Work Conditions in the DFG Stream Alteration Agreement, compliance with which is required by Special Condition 8. of the CDP, incorporates Condition 2. of the RWQCB Certification and states in Condition 10., “No servicing of equipment shall take place within the streambed and all equipment shall be staged and stored when not in use out of the streambed.”

It is clear that the potential for spills from refueling was a major concern. Each of these agencies was concerned with where and how fueling was to take place, and many regulatory efforts were made to avoid these problems. The Commission incorporated the restrictions and requirements imposed by these agencies into its own permit specifically to be able independently to ensure that those concerns were addressed and that those requirements were satisfied.

Despite this, on September 7, 2005, RWQCB staff observed at the construction site,

“...leaks from hoses and fittings connected to a generator that was located on the gravel bar. There was a drum of biodegradable hydraulic oil next to the generator. The drum and generator did not have any type of secondary containment, and obvious leaks were not being contained or cleaned up”
(Exhibit J).

Even if the SWPPP were to have been the only document restricting where and how fueling was to occur, which it was not, the actions cited herein would have still violated the terms of that document. The SWPPP states, “Accidental discharges will be handled immediately, automatically, and routinely. Appropriate methods will be used to handle minor, semi-significant, and significant/hazardous spills” **(Exhibit L)**. Yet, the RWQCB staff observed stained gravel and “obvious leaks [that] were not being contained or cleaned up.”

Moreover, in terms of the location of fuel storage and active fueling, the SWPPP was but one of several documents restricting the fueling and storage of equipment at the project site. The provisions of these documents, incorporated in the CDP, serve as requirements of the Coastal Development Permit as much as any other provisions of the CDP. As indicated above, these documents clearly required fuel to be stored farther from the river or in an adequate containment area (Special Condition No. 6. and the NMFS Biological Opinion) and prohibited re-fueling equipment anywhere in the more broadly defined river channel (Special Condition No. 9. and RWQCB 401 certification), as well as generally requiring the implementation of BMPs to protect the adjacent water quality and aquatic habitat. Thus, it is not true that “fueling could occur anywhere within the project limits, excluding the low flow channel, provided that proper best management practices were employed” or that fueling and the storage of fuel on the gravel bar was allowable. And best management practices clearly were not being employed. Therefore, the argument raised by the Respondent does not provide any excuse or defense to these violations.

7. The Respondents' Defense:

"During the 2005 construction season, there was an incidental discharge of vegetable based hydraulic oil, which was cited by the RWQCB. The violation was resolved by payment of fine to the RWQCB."

Commission's Response:

The fact that some violation fees were paid to the RWQCB, for a violation of RWQCB's requirements, does not provide any relevant defense to this action. It does not provide any evidence to support a claim that the findings for a cease and desist order have not been met, or address the issue of whether the development was consistent with the terms and conditions of the permit, which are the issues relevant to issuance of a cease and desist order under Section 30810 of the Coastal Act. In fact, they support the fact that a violation exists here. We also note that even "vegetable based hydraulic oil" can have serious adverse impacts on water quality, fish and wildlife, and habitat function.

The Regional Water Quality Control Board and the California Coastal Commission are separate regulatory entities with have separate regulatory authorities and different enabling acts with different fine/penalty provisions. Compliance with the conditions specified in the RWQCB's Section 401 Water Quality Certification was mandated by the CDP. However, RWQCB does not have authority to settle violations of the Coastal Act or a CDP on behalf of the Commission, just as the Commission does not have authority to settle violations on behalf of the RWQCB. The CDP provision requiring compliance with the RWQCB's Section 401 Water Quality Certification made the requirements of that document applicable and enforceable through both the Water Code and the Public Resources Code. Therefore, payment to the RWQCB for violations of the Section 401 Certification does not resolve violations of the Coastal Act or the CDP. In fact, since the same requirement found by the RWQCB to be violated was incorporated by reference into the CDP, as a separate requirement of the CDP, it clearly supports a conclusion that the CDP was violated as well.

8. The Respondents' Defense:

- a) Regarding the failure to cease construction by the October 15 deadline, CalTrans' response states:

"All agencies, except the CCC, have informal mechanisms for work window extensions based on favorable weather conditions. It was noted [on October 13, 2005] by CCC staff that extensions were not allowed informally. The schedule was modified to immediately remove the temporary bridge and sedimentation basin, and to prepare the cofferdams for over-wintering in order to close up the site as quickly as possible. CalTrans and the contractor were completely out of the river channel on October 20, 2005."

- b) "CalTrans requested an emergency CDP to address over-wintering the cofferdams in the river channel and placement of associated RSP, which was granted."

Commission's Response:

All state and federal agencies involved with the permitting of this project were concerned that work not continue past October 15th. Construction activities in the river after this date can have especially detrimental impacts on spawning salmonids and their egg nests. The October 15th deadline was required by the NMFS Biological Opinion, the DFG Stream Alteration Agreement, and explicitly stated in Special Condition 16. of the CDP. Moreover, the CalTrans project description submitted as part of the CDP application, and included in the CDP, states in pertinent part, "At the end of the first construction season, the diversion, coffer dams, and settling basin are removed and the river bar is recontoured to resemble natural contours." Therefore, the CDP identified not only when seasonal construction was to cease, but also made specific reference to the items that were to be removed in preparation for that deadline. The deadlines were specifically set forth in the CDP and were well known to both CalTrans and MCM far in advance of the deadline. The permit required them to plan ahead and take appropriate steps to enable them to be out of the riverbed by that date.

The deadline was imposed specifically to protect spawning salmonids. Any construction beyond that deadline would have placed these species in jeopardy during a critical phase of their lifecycle. Any "informal mechanisms for work window extensions" would have been directly inconsistent with the goal of the condition, and would not have protected the spawning salmonids. Beyond that, even if Commission staff had found good reason to allow work to continue in the Van Duzen River beyond the October 15th deadline, Commission's regulations do not allow for informal work window extensions, especially for those which are indirectly inconsistent with the permit as issued by the commission. The fact that other regulatory agencies' procedures may allow for such extensions is immaterial.

In light of their failure to remove the temporary structures from the Van Duzen River by the October 15th deadline, CalTrans requested an emergency CDP to: 1) allow two cofferdams to remain in the river through the winter, and 2) place temporary riprap protection around the outside of the cofferdams. Both were clearly in violation of the CDP. Given the failure of CalTrans and MCM to comply with the permit, as evidenced in their response above, the Executive Director was left to determine which course of action would have greater resource impact, continuing removal of the structures beyond the deadline or leaving the structures in the active channel through the winter. Because it was determined that continuing work beyond the October 15th deadline would have greater impact, the emergency CDP was approved.

As required by the Emergency Permit, on March 2, 2006, CalTrans submitted a CDP amendment request for, among other things, after-the-fact permission to work past the October 15th deadline to prepare the site for the rainy season and to keep cofferdams in the river and place riprap revetments around the cofferdams. On June 16, 2006, the Commission conditionally approved the amendment request for various changes to the project as approved under CDP 1-04-014, but denied the request for after-the-fact approval of the unpermitted development, based on the finding that a preferable and

less environmentally damaging alternative existed: to comply with the seasonal restrictions on activities within the Van Duzen River wet channel and gravel bars.

9. The Respondents' Defense:

- a) "...The original CDP did not permit channel diversion. The sediment plumes of August 25th and 26th... could have been avoided had the original CDP been reconciled with the DFG Permit, and not forced the contractor to work needlessly close to the low flow channel thereby increasing the risk of failure."
- b) Conditions of CDP, the DFG Stream Alteration Agreement, and RWQCB 401 Certification, regarding channel diversion, are ambiguous and inconsistent.

Commission's Response:

In fact, the original CDP did not prohibit stream diversion. In contrast, it allowed gravel grading to alter the course of the channel. The Findings and Declarations section of the Staff Report for the CDP, approved as recommended, (Page 16) states:

"Diversion of the Van Duzen River at the construction site is required to remove the existing piers, construct the new piers, and to place the false work. A temporary dike constructed of clean, washed, salmonid spawning-sized gravel is proposed to divert the flow and maintain dry conditions around Pier 4..."

The NMFS Biological Opinion states:

"Diversion of the Van Duzen River at the construction site is required to remove existing piers, construct the new piers and to place the false work. A temporary dike constructed of clean, washed, spawning-sided gravel is proposed to be used to divert flow and maintain dry conditions around pier 4."

This is reflected Special Condition 6.B. of the CDP. The CDP states:

"Should stream diversion or dewatering methods proposed for the subject project fail to ensure a dry environment for pile-driving, and other construction activities in the manner anticipated, the permittee shall immediately contact the nearest field office of the National Marine Fisheries Service..."

The DFG Stream Alteration Agreement Condition 7., compliance with which is also required by Special Condition 8. of the CDP, states:

"During construction in flowing water which can transport sediment downstream, the flow shall be diverted around the work area by pipe, pumping, or temporary **diversion channel**" (emphasis added).

The RWQCB's Section 401 Water Quality Certification, states in relevant part:

"The proposed project requires temporary diversion of the Van Duzen River. A temporary dike will be constructed of river-run gravel to divert the river around the work area."

It is clear from the excerpts above that the Commission knew of the proposed channel diversion, and approved the diversion as proposed, in conjunction with other regulatory approvals, in the CDP. Furthermore, as noted above, Special Condition 6.B. provided additional guidance for how to proceed in the event that the proposed channel diversion failed to provide a dry work area. Yet, CalTrans asserts that the conditions of approval included in the various regulatory permits were ambiguous and inconsistent. Standard Condition 2. of the CDP states, "Any questions of intent or interpretation of any condition will be resolved by the Executive Director." This was included specifically to resolve questions regarding the interpretation of conditions and to avoid violations of the CDP. However, CalTrans never approached Commission staff requesting clarification of conditions regarding stream diversion.

Moreover, the permit conditions were validly issued by the California Coastal Commission, and accepted by CalTrans. The time allowed to challenge any permit conditions has long passed and such an objection, even if it would have been valid if made at that time, which it would not, is now legally barred. It clearly does not provide a defense to an enforcement action pertaining to failures to comply with the valid permit conditions.

CEASE AND DESIST ORDER NO. CCC-06-CD-10
California Department of Transportation

- 1.0 Pursuant to its authority under Public Resources Code Sections 30810, the California Coastal Commission (hereinafter "Commission") hereby orders and authorizes the California Department of Transportation, all its employees, agents, contractors, and any persons acting in concert with any of the foregoing (hereinafter, "CalTrans"), to take all actions required by this Order, including:
 - A) Cease and desist from performing any unpermitted development on, under, or around the Highway 101 bridge over the Van Duzen River, 5 miles south of Fortuna, Humboldt Co. (hereinafter "Subject Property").
 - B) Refrain from conducting any future development on the Subject Property that is inconsistent with CDP 1-04-014, as amended or this Cease and Desist Order (hereinafter "Order").
 - C) Cease and desist from any future development that is inconsistent with the Coastal Act of 1976 (as amended), and any permits issued thereunder.
- 2.0 PERSONS SUBJECT TO THESE ORDERS
 - 2.1 The persons subject to this Cease and Desist Order are the California Department of Transportation, its officers, directors, divisions, employees, agents, contractors, and anyone acting in concert with the foregoing.
- 3.0 IDENTIFICATION OF SUBJECT PROPERTIES
 - 3.1 The property that is the subject of this Order is located at the southbound Highway 101 bridge crossing of the Van Duzen River, 5 miles south of Fortuna, Humboldt, Co.
- 4.0 DESCRIPTION OF COASTAL ACT VIOLATION
 - 4.1 CalTrans' Coastal Act violations consist of performing development that is not authorized in a coastal development permit, are directly inconsistent with coastal development permits previously issued, and therefore are also violations of the Coastal Act. The unpermitted development includes: 1) dropping of the demolished bridge into the Van Duzen River and onto the gravel bar; 2) dredging of material from the active wet channel and on the gravel bar; 3) placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; 4) crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; 5) conducting work in the active wet channel other than for the construction of the temporary bridge crossing; 6) failure to divert the active

channel away from construction areas; 7) sedimentation of the Van Duzen and Eel Rivers; 8) the parking and idling in the riverbed of vehicles not directly involved in construction work; 9) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from vehicles without cleanup or containment; and 10) failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline.

5.0 COMMISSION AUTHORITY TO ACT

5.1 The Commission is issuing this Order pursuant its authority under Section 30810 of the Public Resources Code.

6.0 FINDINGS

6.1 This Order is being issued on the basis of the findings adopted by the Commission on November 15, 2006, as set forth in the foregoing document entitled: STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER.

7.0 EFFECTIVE DATE

7.1 This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

8.1 Strict compliance with the terms and conditions of this Order is required. If CalTrans fails to comply with any requirements of this Order, including any deadline contained herein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which compliance failure persists under Section 30822, and additional penalties authorized in Chapter 9 of the Coastal Act, including exemplary damages. Penalties may also accrue (under the terms of Section 30820) in the amount of up to \$30,000 for each violation, and up to \$15,000 per day in which each violation persists.

9.0 EXTENSIONS OF DEADLINES

9.1 Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the subject deadline. If the Executive Director determines that CalTrans has made a showing of good cause, he/she may at his/her discretion grant extensions of the deadlines contained herein.

10.0 APPEALS AND STAY RESOLUTION

10.1 Pursuant to Public Resources Code Section 30803(b), CalTrans, against whom this Order is issued, may file a petition with the Superior Court for a stay of this Order.

11.0 SITE ACCESS

11.1 CalTrans shall provide Commission staff and staff of any agency having jurisdiction over the work being performed under this Order with access to the subject property at all reasonable times. Nothing in this Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission and other relevant agency staff may enter and move freely about the following areas: (1) the portions of the subject property on which the violations are located, (2) any areas where work is to be performed pursuant to this Order or pursuant to any plans adopted pursuant to this Order, (3) adjacent areas of the property, and (4) any other area where evidence of compliance with this order may lie, as necessary or convenient to view the areas where work is being performed pursuant to the requirements of this Order or evidence of such work is held, for purposes including but not limited to inspecting records, operating logs, and contracts relating to the site and overseeing, inspecting, documenting, and reviewing the progress of CalTrans in carrying out the terms of this Order.

12.0 COMMISSION LIABILITY

12.1 The California Coastal Commission, including its officers, employees, and agents, shall not be liable for injuries or damages to persons or property resulting from acts or omissions by CalTrans in carrying out activities authorized under this Order, nor shall the Coastal Commission, including its officers, employees, and agents, be held as a party to any contract entered into by CalTrans or their contractors or agents in carrying out activities pursuant to this Order.

13.0 GOVERNING LAW

13.1 This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

14.0 NO LIMITATION OF AUTHORITY

14.1 Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 15th day of November, 2006 in Huntington Beach, California

Peter M. Douglas, Executive Director
California Coastal Commission

Date

CEASE AND DESIST ORDER NO. CCC-06-CD-10
MCM Construction, Inc.

- 1.0 Pursuant to its authority under Public Resources Code Sections 30810, the California Coastal Commission (hereinafter "Commission") hereby orders and authorizes the MCM construction, Inc. , all its employees, agents, contractors, and any persons acting in concert with any of the foregoing (hereinafter, "MCM"), to take all actions required by this Order, including:
 - A) Cease and desist from performing any unpermitted development on, under, or around the Highway 101 bridge over the Van Duzen River, 5 miles south of Fortuna, Humboldt Co. (hereinafter "Subject Property").
 - B) Refrain from conducting any future development on the Subject Property that is inconsistent with CDP 1-04-014, as amended or this Cease and Desist Order (hereinafter "Order").
 - C) Cease and desist from any future development that is inconsistent with the Coastal Act of 1976 (as amended), and any permits issued thereunder.
- 2.0 PERSONS SUBJECT TO THESE ORDERS
 - 2.1 The persons subject to this Cease and Desist Order are the MCM Construction, Inc., its officers, directors, divisions, employees, agents, contractors, and anyone acting in concert with the foregoing.
- 3.0 IDENTIFICATION OF SUBJECT PROPERTIES
 - 3.1 The property that is the subject of this Order is located at the southbound Highway 101 bridge crossing of the Van Duzen River, 5 miles south of Fortuna, Humboldt, Co.
- 4.0 DESCRIPTION OF COASTAL ACT VIOLATION
 - 4.1 MCM's Coastal Act violations consist of performing development that is not authorized in a coastal development permit, are directly inconsistent with coastal development permits previously issued, and therefore are also violations of the Coastal Act. The unpermitted development includes: 1) dropping of the demolished bridge into the Van Duzen River and onto the gravel bar; 2) dredging of material from the active wet channel and on the gravel bar; 3) placement and compaction of earthen material on the gravel bar both within and outside of the active wet channel of the Van Duzen River; 4) crossing of the low-flow channel of the Van Duzen River by tracked vehicles in the water multiple times without using the required temporary bridge crossing, even after one was installed and fully available for use; 5) conducting work in the active wet channel other than for the construction of the temporary bridge crossing; 6) failure to divert the active

channel away from construction areas; 7) sedimentation of the Van Duzen and Eel Rivers; 8) the parking and idling in the riverbed of vehicles not directly involved in construction work; 9) the fueling of equipment and the storage of fuel on the gravel bar and the leakage of fuel from vehicles without cleanup or containment; and 10) failure to cease work and remove all temporary construction materials from the river by the October 15, 2005 deadline.

5.0 COMMISSION AUTHORITY TO ACT

5.1 The Commission is issuing this Order pursuant its authority under Section 30810 of the Public Resources Code.

6.0 FINDINGS

6.1 This Order is being issued on the basis of the findings adopted by the Commission on November 15, 2006, as set forth in the foregoing document entitled: STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER.

7.0 EFFECTIVE DATE

7.1 This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

8.1 Strict compliance with the terms and conditions of this Order is required. If MCM fails to comply with any requirements of this Order, including any deadline contained herein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which compliance failure persists under Section 30822, and additional penalties authorized in Chapter 9 of the Coastal Act, including exemplary damages. Penalties may also accrue (under the terms of Section 30820) in the amount of up to \$30,000 for each violation, and up to \$15,000 per day in which each violation persists.

9.0 EXTENSIONS OF DEADLINES

9.1 Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the subject deadline. If the Executive Director determines that MCM has made a showing of good cause, he/she may at his/her discretion grant extensions of the deadlines contained herein.

10.0 APPEALS AND STAY RESOLUTION

- 10.1 Pursuant to Public Resources Code Section 30803(b), MCM, against whom this Order is issued, may file a petition with the Superior Court for a stay of this Order.

11.0 SITE ACCESS

- 11.1 MCM shall provide Commission staff and staff of any agency having jurisdiction over the work being performed under this Order with access to the subject property at all reasonable times. Nothing in this Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission and other relevant agency staff may enter and move freely about the following areas: (1) the portions of the subject property on which the violations are located, (2) any areas where work is to be performed pursuant to this Order or pursuant to any plans adopted pursuant to this Order, (3) adjacent areas of the property, and (4) any other area where evidence of compliance with this order may lie, as necessary or convenient to view the areas where work is being performed pursuant to the requirements of this Order or evidence of such work is held, for purposes including but not limited to inspecting records, operating logs, and contracts relating to the site and overseeing, inspecting, documenting, and reviewing the progress of MCM in carrying out the terms of this Order.

12.0 COMMISSION LIABILITY

- 12.1 The California Coastal Commission, including its officers, employees, and agents, shall not be liable for injuries or damages to persons or property resulting from acts or omissions by MCM in carrying out activities authorized under this Order, nor shall the Coastal Commission, including its officers, employees, and agents, be held as a party to any contract entered into by MCM or their agents or subcontractors in carrying out activities pursuant to this Order.

13.0 GOVERNING LAW

- 13.1 This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

14.0 NO LIMITATION OF AUTHORITY

- 14.1 Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 15th day of November, 2006 in Huntington Beach, California

Peter M. Douglas, Executive Director
California Coastal Commission

Date

Exhibit List

Click on the link at left to view the exhibits.

Exhibit Number	Description
A.	Coastal Development Permit and Staff Report No. 1-04-014
B.	Emergency CDP No. 1-05-052-G
C.	Adopted Findings for Coastal Development Permit Amendment 1-04- 014-A1
D.	California Coastal Commission, Notice of Violation to CalTrans and MCM, March 10, 2006
E.	Response to Commission's Notice of Violation letter, submitted by CalTrans, March 15, 2006
F.	Response to Commission's Notice of Violation, submitted by MCM, Inc., April 7, 2006
G.	Notification of Intent to Commence Cease and Desist Order Proceedings, September 8, 2006
H.	Statement of Defense to NOI, submitted by California Department of Transportation, September 28, 2006
I.	U.S. Department of Commerce NOAA, National Marine Fisheries Service (NMFS) Offense Investigation Report, March 13, 2006
J.	California Regional Water Quality Control Board (RWQCB), Notice of Violation, September 28, 2005
K.	California Regional Water Quality Control Board (RWQCB), Compliant for Administrative Civil Liability, December 28, 2005.
L.	Storm Water Pollution Prevention Plan (SWPPP), Section 500, prepared by MCM Construction, Inc., June 28, 2005.