ORDER NO. R5-2023-0500
ACCEPTANCE OF SETTLEMENT OFFER AND WAIVER OF RIGHT TO A HEARING
FOR
TOLL WEST COAST LLC
BASS LAKE NORTH
EL DORADO COUNTY

By signing below and returning this Acceptance of Settlement Offer and Waiver of Right to Hearing (Acceptance and Waiver) to the Central Valley Water Board, Toll West Coast LLC (Discharger) hereby accepts the Settlement Offer described in the letter dated 05 October 2022 and titled Offer to Settle Administrative Civil Liability, Toll West Coast LLC, Bass Lake North, El Dorado County, WDID 5S09C393555 and waives the right to a hearing before the Central Valley Water Board to dispute the alleged violations described in the Settlement Offer and its enclosures.

The Discharger agrees that the Settlement Offer shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the Central Valley Water Board to assert jurisdiction over the alleged violations. The Discharger agrees to perform the following:

- Pay an administrative civil liability in the sum of forty-five thousand six hundred seventy-five dollars ($45,675) by cashier's check or certified check made payable to the "State Water Resources Control Board Cleanup and Abatement Account". This payment shall be deemed payment in full of any civil liability pursuant to Water Code section 13385 that might otherwise be assessed for violations described in the Settlement Offer and its enclosures.

- Fully comply with the conditions of the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order 2009-0009 DWQ (General Permit) at the Bass Lake North construction project.

The Discharger understands that by signing this Acceptance and Waiver, the Discharger has waived its right to contest the allegations in the Settlement Offer and the civil liability amount for the alleged violation(s). The Discharger understands that this Acceptance and Waiver does not address or resolve any liability for any violation not specifically identified in the Settlement Offer and its enclosures.

Upon execution by the Discharger, the Acceptance and Waiver shall be returned to the following address:

Central Valley Regional Water Quality Control Board
Attention: Kari Holmes, Supervisor, Enforcement Section
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

The Discharger understands that federal regulations require the Prosecution Team to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action for violations of an NPDES permit. Accordingly, this

Acceptance and Waiver, prior to being formally endorsed by the Central Valley Water Board Executive Officer (acting as head of the Advisory Team), will be published as required by law for public comment

If no comments are received within the notice period that cause the Prosecution Team to reconsider the Settlement Offer, then the Prosecution Team will present this *Acceptance and Waiver* to the Central Valley Water Board's Executive Officer for formal endorsement on behalf of the Central Valley Water Board.

The Discharger understands that if significant comments are received in opposition to the settlement, then the offer may be withdrawn by the Prosecution Team. If the Settlement Offer is withdrawn, then the Discharger will be notified and the Discharger's waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violation(s) will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued, and the matter may be set for a hearing.

The Discharger understands that once this *Acceptance and Waiver* is formally endorsed and an Order Number is inserted, then the full payment is a condition of this *Acceptance and Waiver.* An invoice will be sent upon endorsement, and full payment will be due within 30 days of the date of the invoice.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Discharger in the making and giving of this *Acceptance and Waiver*.

TOLL WEST COAST LLC

By: *Original Signed by* Scott Esping

Title: Division President

Date: 02 November 2022

IT IS SO ORDERED, pursuant to California Water Code section 13385.

Date: 2023.01.20 16:47:39 -08'00'

Water Boards

By: PATRICK PULUPA, Executive Officer

PENALTY CALCULATION METHODOLOGY
FOR
TOLL WEST COAST LLC
BASS LAKE NORTH
EL DORADO COUNTY

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13385(e). Each factor of the ten-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

(https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf)

Background

On 20 October 2021, staff from the Central Valley Regional Water Quality Control Board (Board) conducted an inspection of the Toll West Coast LLC (Discharger) Bass Lake North construction project (Project). The inspection was conducted in anticipation of a major storm event that was forecasted to begin on 22 October 2021. The Project received coverage under the State Water Resources Control Board's *Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction and Land Disturbance Activities, Order 2009-009-DWQ*, as amended by Orders 2010-0014-DWQ and 2012-0006-DWQ(Construction General Permit) on 19 April 2021 and is categorized as a Risk Level 3 project. Risk Level 3 is the highest Risk Level assigned under the Construction General Permit for projects with a higher potential for erosion. Generally speaking, one of the main purposes of the Construction General Permit is to minimize the amount of pollutant discharge with storm water runoff from a construction project, especially during rain events. Although the Construction General Permit requires implementation of Best Management Practices (BMPs) at enrolled sites, such as the Project, to accomplish this goal, during the inspection, Board staff observed that the Project failed to meet those requirements. Some areas had insufficient BMPs installed, while other areas failed to include any BMPs at all. During the inspection, Board staff was presented a "Winterization Plan" for the project which described BMPs that the Discharger planned to install to meet the requirements of the Construction General Permit. During this inspection, Board staff observed that the Winterization Plan had not yet been implemented and that the BMPs installed at the Project did not meet the Construction General Permit's requirements for the upcoming storm event. Board staff expressed concerns about the amount of disturbed soil and communicated that the implementation schedule in the "Winterization Plan" was too late to reach compliance during the upcoming storm event.

On 22 October 2021, Board staff re-inspected the Project during the first day of a four-day storm event. Rain gauge data downloaded from rain gauge CA-SA-7 located in Folsom show that the Project received approximately 0.66 inches of precipitation on 22 October 2021 (the day of the re-inspection) and between 22 October 2021 and 26 October 2021, approximately eight inches of rain fell. During the 22 October 2021 inspection, storm water with a measured turbidity exceeding 1,000 Nephelometric Turbidity Units (NTU), which is the maximum

turbidity limit of the meter used, was observed discharging from the Project in two locations. The Numeric Action Level (NAL) contained in the Construction General Permit at section V.B.2 is 250 NTU. During the inspection, rilling and erosion on several unprotected slopes was observed. In addition, several pads above the slopes had none of the erosion control BMPs required by the Construction General Permit.

Board staff returned on 26 October 2021 following the rain event and documented widespread violations of the Construction General Permit caused by insufficient BMPs, manifesting in erosion and sediment discharge from the Project. In addition, Board staff documented that large portions of the upper areas of the Project had bare soil with none of the erosion control BMPs required by the Construction General Permit.

On 28 October 2021, the Project was issued a Notice of Violation (NOV) for the violations observed during the 22 and 26 October 2021 inspections. The Discharger responded to the NOV on 5 November 2021. The response included photos dated between 28 and 30 October 2021 documenting installation of BMPs that meet the Construction General Permit's requirements.

Board staff conducted a follow-up inspection on 23 November 2021. During this inspection, Board staff found that the Project was in substantial compliance with the erosion and sediment control BMP requirements and only minor housekeeping deficiencies were noted. The Discharger corrected those remaining deficiencies and responded to the inspection transmittal on 13 December 2021.

Violation 1 – Failure to minimize or prevent pollutants in storm water discharges in violation of the Construction General Permit

Pursuant to the Construction General Permit, the Discharger was required to minimize or prevent pollutants in storm water using controls, structures and management practices that achieve best available technology economically achievable (BAT) for toxic pollutants and non-conventional pollutants and best conventional pollutant control technology (BCT) for conventional pollutants, also referred as the BAT/BCT standard.

There were five days of precipitation between 1 and 28 October 2021 (on 28 October 2021 the Discharger implemented BMPs that met the Construction General Permit's requirements). Three of these days produced greater than 0.5 inches of rain, which caused a storm water discharge that did not meet the BAT/BCT standard contained in the Construction General Permit. Specifically, Attachment E, section A.1.b, Effluent Standards, in the Construction General Permit states: "Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants." The Discharger's actions as described herein failed to comply with that requirement of the Construction General Permit.

PENALTY FACTOR	VALUE	DISCUSSION
Step 1, Factor 1: The Degree of Toxicity of the Discharge (physical, chemical, biological, or thermal characteristics of the discharge)	2	High levels of turbidity in storm water discharges, such as those described herein, can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat. Here, a score of 2 is appropriate because the discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of threat to potential receptors).
Step 1, Factor 2: Actual Harm or Potential Harm to Beneficial Uses (harm or potential for harm to beneficial uses)	2	Discharges from the Project flow to Deer Creek which discharges into the Cosumnes River. The Cosumnes River is listed as a high-risk receiving water with both cold and warm water habitat, migration, and spawning beneficial uses listed in the Board's Basin Plan. Discharge samples collected by Board staff on 22 October 2021, the first day of a major four-day storm event, indicate that the turbidity in storm water discharge from the Project was greater than 1,000 NTU (the maximum the meter is able to register). Due to the dilution expected between the discharge locations and water bodies with beneficial uses, the discharge was expected to have a below moderate impact to beneficial uses, likely to cause harm in the short term but not appreciable harm in the long term. Therefore, a score of 2 is appropriate.
Step 1, Factor 3: Susceptibility to Cleanup or Abatement	1	The sediment from the turbid discharge was deposited over a long distance and cleanup or abatement of 50% or more of the material would not be possible. Therefore, a score of 1 is appropriate.
Step 1, Final Score: Potential for Harm	5	The Potential for Harm score is the sum of Factors 1 through 3 for Step 1, shown above. The total Potential for Harm score is 2+2+1 = 5.

PENALTY FACTOR	VALUE	DISCUSSION
Step 2: Per Gallon and per Day factor for Discharge Violations	0.15	The "Deviation from Requirement" is major because the Discharger did not implement required BMPs, rendering the permit's BAT/BCT effluent standard ineffective, resulting in a discharge from the Project with a turbidity over four times the NAL. The Potential for Harm from step one of 5 and the Major Deviation was used to determine both the per gallon and per day factors of 0.15 from Tables 1 and 2 of the Enforcement Policy.
Step 2: Volume Discharged	n/a	The Prosecution Team did not to calculate the discharge volume at this time. The Prosecution Team reserves the right to include the volume discharged in the penalty calculation should this matter proceed to hearing.
Step 2: Adjustment for High Volume Discharges	n/a	The Prosecution Team chose not to calculate the discharge volume at this time. The Prosecution Team reserves the right to assess penalties for the volume discharged should this matter proceed to hearing.
Step 2: Days of Discharge	3	According to available rainfall data from station "Folsom, 1.2SSE, CA-SA-07", there were a total of five days of rainfall, three of which had rainfall over ½" between 1 October 2021 and when compliant BMPs were installed on 28 October 2021. The Prosecution Team alleges that runoff was generated and discharge from the Project occurred on three days where over ½" of rain was recorded.
Step 2: Initial Liability for Violation #1	$4,500	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (0.15 x 3 days x $10,000/day = $4,500).
Step 3: Per Day Assessments for Non-Discharge Violations	n/a	This step does not apply to this violation as it is a discharge violation.
Step 4: Adjustments for Discharger Conduct: Culpability	1.2	The Discharger has retained the services of a Qualified SWPPP Developer and Practitioner who is responsible for advising the Discharger on what BMPs are required to be installed. Board staff has inspected the Project prior to the major October 2021 storm events and was presented a "Winterization Plan" indicating that the Discharger was aware that the Project needed to be protected with erosion control BMPs; however, the BMPs were not implemented prior to the next rain event. The Discharger was fully aware of the Construction General Permit's requirements and the consequence of not having BMPs installed that meet the BAT/BCT requirement during rain events. Therefore, an adjustment factor of 1.2 is appropriate.

PENALTY FACTOR	VALUE	DISCUSSION
Step 4: Adjustments for Discharger Conduct: History of Violations	1.0	The Central Valley Water Board has not previously issued any Administrative Civil Liability Orders against this Discharger; therefore, a neutral adjustment factor of 1.0 is appropriate.
Step 4: Adjustments for Discharger Conduct: Cleanup and Cooperation	1.0	Following the 28 October 2021 inspection, the Discharger exhibited the level of cleanup and installation of BMPs expected. Therefore, a neutral adjustment factor of 1.0 is appropriate.
Steps 1-4: Total Base Liability for Violation #1	**$5,400**	The base liability is calculated as the initial liability multiplied by each of the above three factors. ($4,500 x 1.2 x 1.0 x 1.0 = $5,400)

Violation 2 – Failure to implement erosion control BMPs on active areas in Violation of the Construction General Permit

During the Project inspections on 22 and 25 October 2021, Board staff observed that the Project had large areas of disturbed soil without the required erosion control BMPs during a storm event. Attachment E, section E.3, Sediment Control, in the Construction General Permit states: "Risk Level 3 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction." The Discharger violated this requirement on the five days of precipitation that occurred between 1 and 28 October 2021 (on 28 October 2021 the Discharger implemented BMPs that met the Construction General Permit's requirements).

PENALTY FACTOR	VALUE	DISCUSSION
Step 1: Actual Harm or Potential for Harm for Discharge Violations	n/a	This step is not applicable because the violation is not a discharge violation.
Step 2: Per Gallon and Per Day Assessments for Discharge Violations	n/a	This step is not applicable because the violation is not a discharge violation.
Step 3, Non-Discharge Violations: Potential for Harm	Moderate	The failure to install appropriate erosion controls led to the discharge of turbid, sediment laden water. Discharges of sediment can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat.

PENALTY FACTOR	VALUE	DISCUSSION
		Therefore, a "Moderate" potential for harm factor is appropriate.
Step 3, Non-Discharge Violations: Deviation from Requirement	Major	The "Deviation from Requirement" is major because the Discharger did not implement required erosion control BMPs prior to a major forecasted storm event on several disturbed soil areas of the Project rendering the permit requirement ineffective. Therefore, a Major deviation from requirement factor is appropriate.
Step 3, Non-Discharge Violations: Per day factor	0.55	The value of 0.55 was determined from Table 3 in the Enforcement Policy. The middle value was chosen at this time.
Step 3, Non-Discharge Violations: Days of Violation	5	The Discharger is required to implement erosion control BMPs on all disturbed soil areas prior to all rain events. The Prosecution Team alleges that the Discharger was in violation of the erosion control BMP requirement on all days of precipitation. During the period between 1 October 2021 and when the Discharger installed erosion control BMPs on 28 October 2021, there were five days of rainfall.
Step 3: Initial Liability for Violation #2	$27,500	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (0.55 x 5 days x $10,000/day = $27,500).
Step 4: Adjustments for Discharger Conduct Culpability	1.2	The Discharger retained the services of a Qualified SWPPP Developer and Practitioner who is responsible for advising the Discharger on what BMPs are required to be installed. Board staff inspected the Project prior to the major October 2021 storm events and was presented a "Winterization Plan" indicating that the Discharger was aware that the Project needed to be protected with erosion control BMPs; however, the BMPs were not implemented prior to the next rain event. The Discharger was fully aware of the Construction General Permit's requirements and the consequence of not having BMPs installed that meet the BAT/BCT requirement during rain events. Therefore, a culpability adjustment factor of 1.2 is appropriate.
Step 4: Adjustments for Discharger Conduct History of Violations	1.0	The Central Valley Water Board has not previously issued any Administrative Civil Liability Orders against this Discharger; therefore, a neutral History of Violations adjustment factor of 1.0 is appropriate.

PENALTY FACTOR	VALUE	DISCUSSION
Step 4: Adjustments for Discharger Conduct Cleanup and Cooperation	1.0	Following the 28 October 2021 inspection, the Discharger exhibited the level of cleanup and installation of BMPs expected. Therefore, a neutral cleanup and cooperation adjustment factor of 1.0 is appropriate.
Total Base Liability for Violation #2	$33,000	The base liability is calculated as the initial liability multiplied by each of the above three factors. ($27,500 x 1.2 x 1.0 x 1.0 = $33,000).

Other Factor Considerations

Total Base Liability for all violations is $38,400 ($5,400 for Violation #1 + $33,000 for Violation #2 = $38,400). The Enforcement Policy states that five other factors must be considered before obtaining the final liability amount.

OTHER FACTORS	VALUE	CONSIDERATIONS
Step 6: Ability to Pay and Continue in Business	No adjustment	Board staff does not have information suggesting that the Discharger cannot pay the proposed penalty and continue in business.
Step 7: Economic Benefit	$71	Board staff estimated the economic benefit for each violation. The cost of installing BMPs which would have avoided the violations were estimated at $39,204. Since these BMPs were installed following the violations, this cost was considered a delayed cost. The economic benefit of delaying these costs was estimated using the EPA's BEN model. Calculations showing the estimated Economic Benefit are included as Attachment A.
Step 8: Other Factors as Justice May Require	$7,275	The costs of investigation and enforcement are "other factors as justice may require" and are added to the liability amount. The Board has incurred approximately $7,275 in staff costs associated with the investigation and enforcement of the alleged violations. The estimated staff costs used in Step 8 are included as Attachment B.
Step 9: Maximum Liability	Over $80,000	Based on California Water Code section 13385, the maximum liability is $10,000 per day per violation and $10 per gallon. The maximum penalty of $80,000 is calculated using only days of violation (8 days x $10,000 per day) and does not include gallons discharged as the Prosecution Team has not estimated the discharge volume. The Prosecution Team reserves the right to include the volume discharged in the penalty calculation should this matter proceed to hearing. In addition, the Prosecution Team reserves the right to assess penalties

OTHER FACTORS	VALUE	CONSIDERATIONS
		for other violations observed during the 20, 22, 26 October 2021 and 23 November 2021 inspections that were not included herein.
Step 9: Minimum Liability	$78	Based on California Water Code section 13385, civil liability must be at least the economic benefit of non-compliance. Per the Enforcement Policy, the minimum liability is to be the economic benefit plus 10%.
Step 10: Final Liability	**$45,675**	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability but cannot exceed the maximum liability. The Final Liability is $45,675 ($38,400 + $7275 = $45,675)

Attachments: A. Economic Benefit Calculation

B. Staff Cost Estimate

Economic Benefit Analysis

Bass Lake North

Compliance Action	One-Time Non-Depreciable Expenditure				Non-Compliance Date	Compliance Date	Penalty Payment Date	Discount Rate	Benefit of Non-Compliance
	Amount	Basis	Date	Delayed?					
Hydromulch with tackifier	$ 37,636	CCI	10/6/2021	Y	10/18/2021	10/30/2021	12/25/2022	7.50%	70
Mobilization of BMP Installer	$ 500	CCI	10/6/2021	Y	10/18/2021	10/30/2021	12/25/2022	7.50%	1

Income Tax Schedule: Corporation **Total Benefit: $ 71**
USEPA BEN Model Version: Version 2022.0.0 (June 2022)
Analyst: Jennifer McGovern, Valaree St Mary
Date/Time of Analysis: 9/28/22 11:26

Assumptions:

- Cost estimates and compliance actions provided by Regional Board Staff
- Failure to implement construction BMPs which included hydromulch with tackifier and mobilization of BMP installer was delayed, not avoided
- Approximately 19.2 acres were disturbed according to Regional Board Staff
- BMP installation adjusted using the construction cost index (CCI)
- Non-compliance and compliance dates for each compliance action provided by Regional Board Staff
- The penalty payment date is assumed to be 3 months from the date of analysis
- The discharger is assumed to operate as a for-profit entity

Accesible Draft

Attachment B. Staff Cost Estimate - Bass Lake North

Table 1. Staff Cost Summary

	Quantity	Unit Cost	Total Cost
Inspections	4	$ 236.33	$ 945.31
Inspection Reports	4	$ 313.50	$ 1,253.99
Notice of Violations	1	$ 390.67	$ 390.67
ACL Prep	1	$ 4,685.79	$ 4,685.79
	Total Staff Costs		**$ 7,275.76**

Table 2. Staff Cost Calculation

Inspection	Hours [1]	Ave Cost/Hour [2]	Cost
Water Resource Control Engineer	2	$ 118.16	$ 236.33
Senior Environmental Scientist	0	$ 154.34	$ -
Supervising Water Resources Control Engineer	0	$ 179.32	$ -
Assistant Executive Officer	0	$ 185.26	$ -
Cost per Inspection			$ 236.33

Inspection Report	Hours	Ave Cost/Hour	Cost
Water Resource Control Engineer	2	$ 118.16	$ 236.33
Senior Environmental Scientist	0.5	$ 154.34	$ 77.17
Supervising Water Resources Control Engineer	0	$ 179.32	$ -
Assistant Executive Officer	0	$ 185.26	$ -
Cost per Inspection Report			$ 313.50

Notice of Violation	Hours	Ave Cost/Hour	Cost
Water Resource Control Engineer	2	$ 118.16	$ 236.33
Senior Environmental Scientist	1	$ 154.34	$ 154.34
Supervising Water Resources Control Engineer	0	$ 179.32	$ -
Assistant Executive Officer	0	$ 185.26	$ -
Cost per Notice of Violation			$ 390.67

ACL Preparation	Hours	Ave Cost/Hour	Cost
Water Resource Control Engineer	20	$ 118.16	$ 2,363.27
Senior Environmental Scientist	8	$ 154.34	$ 1,234.72
Supervising Water Resources Control Engineer	4	$ 179.32	$ 717.28
Assistant Executive Officer	2	$ 185.26	$ 370.52
Cost per Notice of Violation			$ 4,685.79

Notes:

1 Inspection Time includes in-office pre-inspection research and drive time.

2 Hourly costs from SWRCB Office of Enfocrement Fiscal Year 2020-2021 Billing Costs Summary, mid range salary used.