# Natural Heritage institute 

April 15, 2005

## VIA ELECTRONIC AND FIRST CLASS MAIL

Deborah Edgerly

City Administrator
One City Hall Plaza, 3rd Floor
Oakland, CA 94612
dedgerly@oaklandnet.com

## Re: Leona Quarry Project (April 19, 2005, Agenda Item 18)

## Dear Administrator Edgerly:

The Millsmont Homeowners Association (MHA) writes to request that the City Council defer the decision to approve the Leona Quarry Project until the City assures that the Project complies with the Conditions of Approval (COA).

At the outset, we acknowledge the good intentions and hard work of City staff to implement these COA. We appreciate City staff's responses to our several letters. However, we respectfully disagree with City staff on one fundamental issue: are the COA, as implemented, adequate to assure that the Leona Quarry Project's discharge of stormwater will not cause adverse cumulative impact on Chimes Creek as it flows through our downstream neighborhood?

As we have stated in past letters, the channel of Chimes Creek had been relatively stable since the initial development of the neighborhood early in the 1920s. See Attachment 1. In the early 1980s, it was still possible to wade from the top of the creek banks across the creek, and several fences crossed the creek just above water level. See Attachment 2. However, the creek bed has incised more than 15 feet since 1985 along the 3800 block of Delmont Avenue, from Hillmont Drive to Nairobi Place. See id.; Attachment 3. Why this dramatic change? This incision appears to have resulted largely from the City's permitting of the Ridgemont development. To protect that development, the City constructed and operates a drainage system that collects runoff (much of which would naturally have percolated into the soil) and then discharges the stormwater into Chimes Creek in amounts and for durations that exceed the creek's capacity. This lowering of the creek bed has substantially impaired our use and enjoyment of our properties: the banks are steep and prone to slumping, and we no longer

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have easy access to the water itself. The Leona Quarry Project, even while still in construction, appears to have worsened the baseline condition. This winter, we have observed flow amounts and turbidity which appear to exceed the-levels in prior wet years. We respectfully ask that the Council not take final action on the final maps until assured that the Leona Quarry Project's cumulative impact is being effectively mitigated. This is not a challenge to the intent or validity of the COA: Rather, we believe that their implementation still does not meet their stated intent, which is to avoid such cumulative impact.

We understand that City considers approval of final maps to be a ministerial action. We understand that the approval does not reopen the COA themselves. However, determination whether the Project is in substantial compliance with the COA necessarily involves discretion and judgment. For example, Condition 37 provides:
"For the duration of the project, the City Development Director shall have the authority to determine whether the Project Applicant and the Project substantially comply with terms and conditions of this approval.... Upon a determination of non-compliance, the Director shall have the authority to suspend further Project approvals, including without limitation final subdivision maps, grading permits, building permits or certificates of occupancy for the duration of such noncompliance."

In the following table, MHA lists the primary outstanding issues related to the Project's compliance with the COA.

| Condition of Approval |  | Compliance Issue |
| :--- | :--- | :--- |
| 15 | "All Mitigation Measures <br> in the EIR as deemed to be <br> required in the <br> Environmental Findings <br> shall be considered <br> conditions of approval for <br> the project ... <br> Implementation of <br> Mitigation Measures shall <br> be adhered to in <br> accordance with the <br> MMRP." | Mitigation Measure F.2b requires the project applicant to <br> comply with all City of Oakland rules and regulations. <br> City staff recently determined that a City Creek Permit is <br> required for work done in the northern central portion of <br> the Project site. To date DeSilva has not obtained such <br> permit. |


| 17. | "The Project Applicant <br> shall implement all of the <br> mitigation measures <br> described in 'Section B. <br> Biology' of the MMRP..." | The City approved the Special Status Species Mitigation <br> and Monitoring Plan (SSSMMP) before receiving the <br> peer review prepared by Essex Environmental. It <br> appears the deficiencies identified by Essex have not <br> been addressed, and the following actions have not been <br> implemented: <br> Create a barrier to any Alameda Whipsnake <br> (AWS) movement into the Development Area and <br> Revegetation Area prior to the onset of construction. <br> Maintain barriers around the construction <br> footprint to prevent the movement of AWS into <br> construction areas. <br> Construction monitors shall record their work and <br> important information such as wildlife observed in a <br> "construction monitoring log." To date the City has not <br> provided copies of the logs despite repeated requests. <br> "The SSSMMP uses "qualified wildlife biologist," <br> "wildlife biologist," and "biological monitor" <br> interchangeably for preconstruction activities that are <br> required in B.1a of the MMRP to be performed by the <br> "qualified wildlife biologist." <br> The MMRP requires that all vegetation clearing <br> in AWS habitat be done by hand, but the SSSMMP <br> allows for some clearing to be performed by heavy <br> equipment, including a front loader. This represents a <br> material change from the MMRP. |
| :---: | :--- | :--- |

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| 23.b | "The Project Applicant shall meet the revised Clean Water Act [CWA] requirements as established by the Regional water Quality Control Board ('RWQCB')..." | - Runoff from the Project has exceeded the turbidity standard on several occasions. The most recent Notice of Discharge was March 23, 2005. See Attachment 4. To date DeSilva has not submitted a water quality monitoring report to the RWQCB which discusses implementation of additional measures necessary to assure consistent compliance with the turbidity standard. See, e.g., Attachment 5 ("...your inspectors and [RWQCB] inspectors have observed that these hay bales are inadequate to control turbidity in discharge from the small pond: Also, this overflow indicates an inadequate BMP design."). <br> DeSilva has not requested a CWA section 404 dredge and fill permit from the Army Corps of Engineers, nor has it requested the Corps' concurrence with its determination that such permit is not necessary. <br> DeSilva has not requested a CWA section 401 water quality certification from the RWQCB, nor has it requested the RWQCB's concurrence with its determination that such permit is not necessary. |
| :---: | :---: | :---: |
| $23 . f$ | "A hydrologic review and confirmation of seasonal wet weather conditions for conveyance of the storm water." | City staff have not confirmed that the final plans include this review. |
| 23.g | "A review and recommendations pertaining to the creation of a perennial creek through the site that drains into the lower detention basin, consistent with condition of Approval No. 19." | The City has provided MHA a summary of the technical report regarding the creation of a creek on the Project site, but not a copy of the actual report as requested. The summary does not discuss the consultants' specific findings of fact on which its conclusion is based. Given the significant potential benefits of the creation of a creek on the site, we expect the City considered more than a two-page summary prepared by DeSilva's consultants before dismissing this measure from consideration. |

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\(\left.\left.$$
\begin{array}{|c|l|l|}\hline \text { 23.j. } & \begin{array}{l}\text { "Provisions for an } \\
\text { inspection, monitoring, } \\
\text { certification and } \\
\text { maintenance process } \\
\text { throughout the course of } \\
\text { grading, construction, and } \\
\text { post construction to assure } \\
\text { that the approved draizage } \\
\text { plan and other measures } \\
\text { are functioning properly.". }\end{array} & \begin{array}{l}\text { This is a critical requirement. The monitoring program } \\
\text { must also include performance standards, and remedies if } \\
\text { performance standards are not being achieved. It does } \\
\text { not appear that the City has finalized or implemented } \\
\text { such a program. Further, it does not appear that the City } \\
\text { has undertaken a comprehensive review of onsite } \\
\text { hydrology and drainage measures to determine whether } \\
\text { their performance is consistent with the assumptions in } \\
\text { the EIR. }\end{array} \\
\text { This review is very important given the indications that } \\
\text { the system may not be adequate to maintain stormwater } \\
\text { runoff and comply with water quality standards. In } \\
\text { comments to the City dated February 8, 2005, the } \\
\text { RWQCB stated: }\end{array}
$$\right\} \begin{array}{l}"Also, we would note that given our further analysis of <br>
the detention pond for construction, it is unclear to us <br>
how this pond can be expected to function adequately to to <br>
treat post-construction runoff from the project site. A <br>
typical design would require the pond to treat the runoff <br>
resulting from about 1 inch of rain; however, it appears <br>
that the pond's post construction water quality volume <br>
falls well below the necessary volume. Similarly, even <br>
for small storms, runoff ponds in the basin to depths of at <br>
least several feet, rendering flow-through treatment of <br>
the kind described in the project's CEQA documents <br>
ineffective. Is it possible that the city has not yet <br>
completed an engineering review of the basin's water <br>
quality design features to ensure it would meet some <br>
basic minimum standards? This is of particular concern, <br>
since the City appears to have determined that no other <br>
stormwater treatment BMPs will be constructed in the <br>

project (aside from the basin)."\end{array}\right\}\)| See Attachment 5, p. 10. |
| :--- |

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## CONCLUSION

MHA is ready and willing to meet with City Staff, Project sponsors, and regulatory agencies to resolve all of these issues expeditiously. We renew our standing request that the City and Leona Project bring their hydrologists to this meeting so that we may address the fundamental factual issue whether the actual stormwater discharge from Leona Project may cause an adverse impact to the baseline condition of our creek. In sum, we support the Project, provided the COA are effectively administered to prevent an adverse cumulative impact. Thank you for this further opportunity to provide comments.

## Sincerely,



Attorneys for MILLSMONT HOMEOWNERS ASSOCIATION

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marie.cooper@binghiam.com

## Julie Gantenbein

From: Floofcal@aol.com<br>Sent: Thursday, April 14,2005 3:18 PM<br>To: Julie Gantenbein<br>Subject: Chimes Creek in Millsmont

Nancy Sidebothom has asked to me contact you and let you know what I know about Millsmont and how I was raised, as a child, in Millsmont.
My parents moved to 3940 Archmont Place, in 1925, when there were very few houses in the tract. My father built the house that is still there. As a child, and with many childhood friends that lived there, we went to the creek behind Hillmont Drive, and played with frogs and salamanders. We could walk across the creek at that time as there were no raised embankments. I lived there until 1934, at the age of 17, when I got married in December of that year.
I moved back to Millsmont in 1988, at 6301 Hillmont Drive, and there were still frogs and salamanders there. They were there for at least two years, and my neighbors and I would stand on our back porches and listen to the frogs as they sang. We of course, loved it. Many times, the salamanders would appear in my basement and in my back yard and on a few occasions, a small green frog would pop around my yard, also.
I moved from there in 2001, and at that time, the Department of Public Works were still promising me that they were going to repair the sewer that they had tied to a tree in the rear yard of my neighbor. They had been promising me that they were going to do that for at least 5 years and of course, they never did repair it. 1 am very emotional, of course, about a neighborhood which was the ideal of a place for children to grow up in, and it still is a wonderful place to live, if only it is not damaged by unthinking development.
I am a Realtor, so I am not unaware of the necessity to build houses that are needed, but it must be done with the right motives, and not because the quarry is "just there" and has to be accomodated without the consideration of the people that already live in the Millmont neighborhood.
Please let me know if I can do anything to help.
Respectfully,
Florence Negherbon
5 Clipper Way
Daly City, Ca 94014
P.S. You may be wondering how old I am.
$t$ am 87, and still working, as mentioned, Realtor
and a Tax Preparer

## Attachment 2

My name is Famous Limbrick III, and I reside at 3801 Delmont Ave. I am 29 years of age and I have lived here my entire life. My house is on the corner of Nairobi Place and Delmont Ave. Chimes Creek flows at the rear of our property.

In the early 1980's when I was growing up, my friends and I would play in the creek all the time. At that time, the creek bed was not as deep as it is now. It was easy enough for us kids to walk across and get to the other side of the creek. We would catch tadpoles and frogs. One of my friends even made a tadpole farm in his backyard from our catches. I have many memories of walking through and playing in the creek with my friends.

There used to be a footbridge that crossed Nairobi Place to connect to Hillmont Dr. That bridge was taken down sometime ago, in the eighties. Now, the easement is all overgrown with bramble and there is no access across the creek. At the end of Nairobi Place, if you look into the creek, you can see the sewer pipes about 10 feet down. There are some manholes there that flow over at times, and smells like the sewer.

Now, the creek behind my house is covered with weeds and bramble, and it has dropped about 15 feet since we used to play in it. At some time, maybe in the late 80 's, the sewer line up a couple of houses on the Hillmont side got exposed because the creck banks fell in from a fallen tree. To this day, the City repair crews keep returning to this spot to make repairs because these pipes, on both sides of the creek, keep breaking and spilling sewage in the creek.

Famous Limbrick


## Attachment 3

Acres
CIMON:

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$$

J. Dorsey 3825 Delmont Avenue Oakland, CA 94605<br>(415) 632-4059

July 10, 1986

Mr. Roger Campbell<br>Alameda County Flood Control<br>951 Turner Court<br>Hayward, CA 94545

Dear Mr. Campbell:
My home is located at 3825 Delmont Avenue, Oakland 94605 which has a creek running through the backyard. When we purchased this home in 1983 the creek was a brook As of today, we have lost over 25 feet of yard and the depth of the creel has increased by at least five feet. Numerous trees, bushes, plants, etc. have been taken down the creek at a rapid pace. A 8 -foot high $\times 50$-foot length retaining wall collasped in January 1985 due to the increased water flow and land movement. The Alameda County Flood Control broke up the concrete retaining wall to insure the free flow of the creek. The large blocks of concrete that were left in the bed of the creek were taken down the creek by the first rains in early October 1985 . We have had both the City of Oakland and Alameda County office personnel out to survey the site. Unfortunately, we have received the same response from both parties ("the City/County is responsible for this creek). We were told that the City had to do something soon so that the Alameda County Flood Control could keep the creek in good flowing condition. Neither party will assume responsibility (including our Homeowner's Insurance). We are in danger of losing our home! The value of our property has decreased due solely to the land loss and earth movement. We are not able to resell our home with the yard and creek in it's current condition.

After several calls to the City of Oakland and Alameda County, we could not get an answer on how this problem is going to be resolved. In total frustration, we talked with an attorney, Rod Kerr of Kaus \& Kerr in San Francisco. He came out to see our backyard and told us that he is handling a case for few homes on Hillmont Ave. (the other side of the creek), which is now pending against the City, County, and the Ridgemont Developers. He claimed the soil experts and engineers that studied the creek and surrounding areas found the cause of this new rapid land loss due to the increase in water flow thru the creek since Ridgemont's new drainage now passes through. We have been advised that we can start our own lawsuit against the same or wait to see if the creek problem will be resolved with the Hillmont lawsuit.

Hence, my inquiry to your office. We have a sewage tank (enclosed in brick) that is completely exposed. When we moved in the home in 1983, the sewage tank was at least 20 fee away from the creek. Our sidewalks are cracking due to the land movement. Our yard space has been cut in half, and now our home is developing cracks in the interior and exterior walls. It is obvious to everyone that passes on Delmont Ave. that the earth movement is falling toward the creek.

When the City of Oakland was declared a "Disaster Area" earlier this year, we filed for loan assistance to help us fix the creek to prevent future loss. However, we have been informed by Construction Engineers that putting up another retaining wall and trying to fix just our property would prove to be fruitless. The creek has to be corrected all the way up and down the street. All of our work and expense to correct the creek from taking the rest of our backyard would be lost in one to two winters.

As a property owner and taxpayer of this City and County, I demand to know what your office is doing to correct this disaster. Something has to be done this summer to prevent our house from sliding into the creek. I have heard from City personnel that they do not have the funds to improve this area. I'm wondering how funds can be allocated to correct this problem. Would it have been helpful if this were a more "expensive" Oakland neighborhood? I'm hoping that the City/County gives equal concern to all neighborhoods.

Please write to me as soon as possible and let me know how 1 can proceed. Our SBA Diaster Loan will expire in 30 days and we need to inform them how this matter will be resolved.

Thank you for your prompt attention in this serious matter.
Sincerely,


Judy A. Dorsey
3825 Delmont Ave.
Oakland, CA 94605
cc: SBA Loan Dept.

## ENGEO <br> incorporated

$$
\begin{aligned}
& 2010 \text { Crow Canyon Place - Suite } 250 \text { - San Ramon, CA } 94583 \\
& 631 \text { Commerce Drive - Suite } 100 \text { - Rosevile, CA } 95678 \\
& 60 \text { California Street - Suite } 1500 \text { - San Francisco, CA } 94111 \\
& 6288 \text { San Ignacio Avenue - Suite A - San Jose, CA } 95119
\end{aligned}
$$

APR -7 2005
(925) 866-9000 • Fax (925) 866-0199
(916) 786-8883 • Fax (916) 786-7891
(415) 439-5333 - Fax (41) $439-4299$
$J(408) 574-4900 \cdot \operatorname{Fax}(4 C) 574-4902$
(209) 835-0610 : Fax (209) 835-0675
(707) 455-7833 • Fax (707) 455-7844
(707) 562-0030 • Fax (7. ) 562-0032

## LETTER OF TRANSMITTAL

TO: | Mr. Bruce Wolfe |
| :--- |
| SF Regional Water Quality Control Board |
|  |
|  |
|  |
| Oakland, Califormia 94612 |

DATE: April 5,2005

FROM: Debra Carey
SUBJECT: Notice of Discharge for March 23, 2005
CC: $\quad$ City of Oakland-Marcel Uzegbu (1) Faustino Jun Osalbo (1)
DeSilva Group-David Chapman (1) Jim Summers (1)
DeSilva Gates-Peter Helseth (1) Kent Peyton (1)
Farella Braun + Martel-Christopher Locke (1) Lowney Associates- Scott Huntsman (1)

## REMARKS:



Enclosed please find the requested Notice of Discharge for Leona Quarry for March 23, 2005, prepared by DeSilva Gates Construction. Copies will also be kept on site with the SWPPP and distributed to the listed cc's. Please call if you have any questions.
Sincerely,
Debra Carey

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## ATTACHMENT K

## NOTICE OF DISCHARGE MARCH 23,2005

## INSTRUCTIONS

This form reports an instance of detention basin discharge that exceeded the average normal filtration system turbidity cencentrations. The completed form is submitted to the RWQCB within 14 days of the assessment of discharge, in accordance with the NPDES General Permit for Storm Water Discharges Associated with Construction Activity (General Permit).

## To: RWQCB

Date: April 4, 2005
Subject: Notice of Discharge

## Project Name:

Project Number/Location:

## Leona Quarry

WDID 201C $326257 /$ Oakland, California

In accordance with the General Permit and the Storm Water Pollution Prevention Plan (SWPPP) for the Leona Project, the following instance of discharge is hereby reported:

## Date, time, and location of discharge:

On March 23, 2005, from the hours of approximately 7:00 to 8:00 am, a discharge of storm water from the detention basin on site entered the 39 -inch-diameter storm drain under I-580 at the Project boundary. Stormwater processed by the mechanical filtration system constituted the majority of discharge from the site during this time period:

## Nature of the conditions that caused the discharge:

Although storm water from die site detention basin is currently processed by a mechanical filtration system prior to release, this system has a maximum short-term capacity of approximately 450 gpm and an average capacity of approximately 330 gpm . The rate of stormwater entering the basin was larger than could be processed by the filtration system during the subject time period. As a result, stormwater overtopped the temporary outfall plate and discharged into the 39 -inch-diameter storm drain until the intensity of rainfall decreased and the mechanical filtration system could process the stormwater volumes. The detention/water quality basin is designed to reduce the peak discharge in the 39-inch-diameter storm drain for storms ranging from the 2 -year to the 100 -year events and to target water quality treatment of 80 percent of annual storm ranoff volume.

## Initial assessment of any impact cause by the discharge:

We estimate that the discharge of cloudy water from the detention basin approached approximately 1 cfs during the peak of the storm event, based on the size of the contributing drainage area and the intensity of the rainfall. The turbidity measurement within the basin at the time of discharge was approximately 273 NTU. During this time, the mechanical filtration system was also discharging treated water from the site at approximately 0.7 cfs . We observed no sediment deposited downstream or within the City storm drain system as a result of the . discharge. We are unaware of any nuisance created or beneficial uses adversely affected as a result of the discharge.

## Existing BMP(s) in place prior to discharge event:

Hydroseed/mulch/tackifier, straw rolls, straw bales, inlet protection, construction entrance, temporary sediment basin, straw, erosion control blanket, and filtration system were performing at capacity.

## Date of deployment and type of BMPs deployed after the discharge:

The discharge was not occurring early on March 23 during storm event site monitoring; however, it was noted that the water elevation was rising within the basin. Crews were on site managing and maintaining existing BMPs, and initiating new measures for erosion control and storm water management, during the storm event. Immediate response after the water elevation rise was noted included the installation of another temporary 1 x 6 at the inlet from the basin. By approximately 7:00 am, the water elevation reached the temporary outfall plate and began discharging. The filtration system was operating at an average of 330 gpm during this time period and discharging 45 NTU stormwater into the storm drain system. Discharge of filtered water from the filtration system constituted the majority of discharge from the site.

## Steps taken or planned to reduce, eliminate and/or prevent recurrence of the discharge:

- Routine monitoring and maintenance of all site BMPs will continue, including monitoring and maintenance of the temporary outfall plate.
- Since the capacity of the mechanical filtration system is increased following backflushing, this procedure will be manually performed during extended storm events, in addition to the automatic backflushing that periodically occurs during filtration system operation.
- During storm events, monitoring of the filtration system will be performed on a full-time basis during daylight hours. During non-rainy periods, the filtration system will be checked hourly during daylight hours.


## Implementation and maintenance schedule for any affected BMPs:

The performance of all BMPs on the site were, and will continue to be, monitored before, during and after storm events and every 24 hours during extended storm events. Monitoring records are kept at the on-site trailer with the Project SWPPP. Evaluation will be on-going to determine the effectiveness of existing BMPs and whether additional control practices or corrective maintenance activities are needed.

If further information or a modification to the above schedule is required, please notify the contact person below.


## From: Keith Lichten

To: : Faustino Jun Osalbo
Date:
2/8/05 6:15PM
Subject:
Re: FW: Response to Natl Heritage Inst.
Jun,
Thanks for the chance to comment. Please see our redline-strikeout comments in the attached document. I tried to make them as straightforward as possible-hopefully, they are not too direct.

Overall, it is unclear to us why you don't simply say that the reported data are exceedances. This is the Discharger's own reported data, and it's straightforward to compare the data with the applicable Basin Plan standard. It is not clear that the site's BMPs are adequately designed; given the large contributing catchments, although they're certainly much better than what was out there October 1. Then, indicate the reasons why the City believes it is appropriate to fine (or riot).

Regards,
-Keith H. Lichten, P.E.
Acting Section Leader
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
(510) 622-2380 direct
(510) 622-2460 fax
klichten@waterboards.ca.gov
>>>"Osalbo, Faustino Jun" [losalbo@oakiandnet.com](mailto:losalbo@oakiandnet.com).02/08/05 03:41PM >>>
Keith,
Please comment on the attached draft. Do not send to NHI.
Thanks,
Jun Osalbo
----Original Message----
From: Ward, Ron (PWA)
Sent: Tuesday, February 08, 2005 3:30 PM
To: Osalbo, Faustino Jun
Subject: Response to Nat'l Heritage Inst.

Jun:
Please forward the attached dxaft response to the National Heritage Institute to Keith Lichten of the CRWQCB. for his comments:

Ron Ward
Supervising Civil Engineer
238-6606

CC:

Draft Response to the National Heritage Institute Feb. 1, 2005 letter:
Item 1

The City has not addressed DeSilva's failure to comply with applicable water quality standards. According to the RWQCB, it appears construction activities have resulted in violation of the water quality standards for turbidity: "the results appear to suggest that there were discharges from the lower detention pond .:: and turbidity exceedances, on December 7, 8, 27, 30, 31, and January 3, 2005," and "there remain discharges of turbid water from the site." E-mail from Keith Lichten, RWQCB, to National Heritage Institute (Jan. 24, 2005).

The Storm Water Pollution Prevention Plan (SWPPP) in effect for the Leona Quarry project requires the contractor to propose best management practices (BPs) to prevent erosion and discharge of sediment laden waters from the site. (The contractor is also required to keep turbidity of discharge waters below a target level of 50 NTU or no more than $10 \%$ above background turbidity when turbidity is above 50 NTU as part of the region-wide discharge requirements set by the California Regional Water Quality Control Board (CRWQCB)): However, in accordance with the CRWQCB practices, the contractor may not always be fined when the discharge water exceeds the turbidity standards. Included as part of the CRWQCB requirements is the condition that if the contractor implements the BPs to the "maximum extent practicable" (MEP), and the turbid discharge is unavoidable, a fine may not be imposed. CRWQCB's interpretation of MEAs is the highest level of effort and technology typically utilized to control erosion in projects of this size in areas of similar rainfall amounts. [As a reviewer, it is unclear to me what the Connection is between the City's enforcement process, which you

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do not discuss, and the Board's general approach, which is
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outlined here. This response does not make a connection between
the two, nor does it describe the City's approach, the
requirements of the NPDES municipal stormwater permit under which
the City operates (which are directly applicable to the case at
hand), or related information.

So if the turbidity standards are exceeded in the discharge water, the contractor is first required to identify the cause of the high turbidity. The contractor may not be finedurethe circumstances leading to the etischarge are beyond his eontrot: such as a-sexies of heayy storms. [This is true only up to a point. For example, if a project's controls were underdesigned for known site conditions, and that resulted in turbid discharges, then it would be inappropriate to simply use heavy storms as an excuse ${ }^{2}$ since the underdesigned controls-a factor within the discharger's control--would have clearly contributed to the discharge. As we note below, the site's BMPs-even the current BMPs-appear underdesigned.

Indeed, one of Désilva's initial arguments when we began enforcement in October was essentially that under the NPDES Construction Stormwater Permit, they were allowed to implement ineffective controls and then bring them up to a better condition as they failed over time. Our response was that the Permit requires a level of best professional judgment, such that one cannot aim very low as they did, and then come back later when
things go bad, using that Permit approach as a shield.]If further BMPs are identified as an effective way to reduce the turbidity, the contractor is then responsible for implementing those BMPs without a fine being assessed. If the cause of the turbidity is found to be negligence of the contractor, a fine may be imposed. Since October 15; 2004, the contractor has implemented several additional BMPs, such as blanketing the lower third of the site with erosion control fabric, installing a series of storage tanks, plate filters, sand filters, a flocculent dispenser to aid in settling clay particles, and an elaborate pump system to direct storm water runoff to the detention basin and then through the filtration system. [These statements regarding additional BMPS are correct. However, it should be noted that these BMPs were implemented only under threat of enforcement and that they replaced a series of BMPs that appeared clearly inadequate for the site. Our. view is that they should have been in place prior to the beginning of the rainy season]

The Project is utilizing a detention basin to store storm water runoff and groundwater collected from the Project. The detention basin has the capacity to store approximately $2^{\prime \prime}$ to $3^{\prime \prime}$ of continuous rainfall before overflowing into the storm drain system leading to Chimes creek. [This statement appears to be incorrect. We have not been able to locate information that would substantiate these numbers, and we would strongly recommend that you obtain the following information prior to making this
response: the volume of the upper pond available for use to detain runoff; the volume of the lower pond available for use to detain runoff: the totalarea of the catchment-including the area above the site that drains down to the main basin; and, the engineering analysis used to do the lower pond's constructionstage water quality design. The Discharger's SWPPD states that there is an initial site area of 128 acres, and then a postconstruction site area of 153 acres. However, it's our understanding that the total catchment contributing to the downstream basin is more like 230 or 240 acres. As far as we can tell, the detention pond detains about 3.3 acre-feet, according to our on-site discussions with the Discharger's representatives.
If these numbers are correct, then the pond would detain about 0.2 inches of runoff, rather than the $2-3$ inches you indicate. If we use the numbers stated in the Discharger's SWPPP (i.e., assume that about 120 acres drain to the basin), then the pond would detain only about 0.3 inches of runoff. Desilva assumed a site runoff coefficient of 0.45 , so that translates to rainfalls of $0.4-0.7$ inches, respectively. These are substantially below the numbers you give. Your numbers appear to be calculated for the detention pond's flood flow capacity, which we understand is about 33 acre-feet. However, clearly, the pond is detaining nowhere near that kind of volume for water quality. As we discussed on the site, for public safety reasons, it is not acceptable for the water quality portion of the pond to take up the flood flow storage volume.

In its design calculations for the upper detention pond, dated September 1, 2004, the Discharger notes the Construction Stormwater Permit standard of 3,600 cubic feet of capacity per acre of catchment. If we assume a 120 -acre catchment for the lower pond, then it should have a detention volume of at least 9.9 acre-feet to meet this standard. If we assume what we understand to be the actual contributing catchment-more like 230 acres-then the lower pond would have a volume of 19 acre-feet. It might be reasonable to subtract the volume of the upper pond, but it is unclear what detention volume is regularly available in that pond-that is; the upper pond seems to pond water for extended periods of time, so that its effective detention volume may be lower than the design volume.

We know that the Dischargers implemented treatment system has a flow rate of about 350 gallons per minute, or 0.78 cfs. As such, if the lower pond is full to 3.3 acre-feet, and no more water is coming in, it would take that treatment system more than 2 days to empty the lower pond. Therefore, it will work effectively only when relatively small storms come along in a widely spaced manner. This pumping time, combined with the relatively low apparent pond volume relative to the upstream catchment, suggest that the pond and treatment system remain undersized] The majority of the storm water runoff and ground water enters the detention pond, where it is pumped into a settling and filtration system to clean the water of any sediments, and then released into the storm drain system and Chimes Creek. This system has
proven to be very effective in reducing turbidity levels of discharges from the site. [We would not make a statement like this, given the Discharger's own reporting, which shows regular exceedances of the Basin Plan standard for turbidity. We might note that the system appears to have functioned effectively for small storms, and that it appears to be more effective than not having the system. $]$

On December $7^{\text {th }}$, the small sediment pond overflowed from the rim of the pond onto the inlet at Mountain Blvd. The pond is lined with plastic and the overflowing water was filtered with hay bales. This response should note that your inspectors and Board inspectors have observed that these hay bales are inadequate to control turbidity in discharge from the small pond. Also, this overflow indicates an inadequate BMP design. It would be helpful to state here the Discharger's response to the observed inadequate design]

The discharges on December 8,2004 were the result of the site receiving approximately 3 inches of rainfall in a 48 -hour period. The detention pond was not able to hold this large quantity of runoff, and overflowed before treatment. The small sediment pond also overflowed. $\qquad$

On December 27, 2004, there was no discharge from the site other than clean water from the filter system. [This statement does

> not appear to respond to the Discharger's reported exceedence, as reported in its "Stormwater Sampling Results october 26 through January $3,2005, "$ sent on January 12,2005 . Two copies of this report were forwarded to Marcel. In that report, the Discharger appears to self-report analytical results showing an exceedance. Thus, there seems to be a contradiction between the Discharger's reported exceedance and the City's statement that only clear water was discharged from the site.]

On December 30, 2004, another heavy storm occurred and the only discharge from the site was from the filter system. [See our note for December 27].
on December $31^{\text {st }}$, with continuous rain for two days, there was a discharge from the square opening due to the runoff exceeding the capacity of the detention pond. The discharges were from the surface of the stored water. [The last sentence would be more significant if the discharge was from a site with very largegrained sediment, because a surface discharge would then potentially have been significantly cleaner than water from lower down. However, finer-grained sediments have shown up in this site's discharges, and with the added mixing that may have been caused by inflows to the pond and rainfall, it's not clear that the water at the top would have been much cleaner. See also our discussion regarding pond volume and treatment system capacity, above. 1

On January 3,2005 , there was no rain but the construction area was wet." The water level at the detention pond was high and a discharge occurred when the contractor adjusted the elevation of the weir in the square opening. The contractor attempted repair procedures to increase the long-term capacity of the detention pond, and a momentary release of turbid water from the detention pond occurred. None of these discharges were considered avoidable and the contractor was not fined for turbid discharges. [Since the Discharger had a treatment system and an upper pond, it appears methods were available to help it reduce lower pond volume prior to doing work, and thus avoid such a discharge. This response does not explain the question that naturally comes, 'why was the Discharger not able to avoid this turbid discharge?' To me, the characterization of the discharge as a "momentary" discharge indicates that it occurred over a minute, or perhaps a few minutes, or less. Is that a correct characterization? Can you simply instead estimate the volume of discharge? Based on the Discharger's reported sampling, the turbidity levels in its discharge at 7 am , while in exceedance of Basin Plan standards, Were still relatively low, at about 69 NTU. So you might mention that. However, perhaps there was a separate discharge of turbid water that was not captured by the reported sampling.

Overall, the draft response does not seem to substantively address the comment, given the known site conditions and applied BMPs ${ }^{\circ}$

Also, we would note that giver our further analysis of the detention pond for construction, it is unclear to us how this pond can be expected to function adequately to treat postconstruction runoff from the project site. A typical design would require the pond to treat the runoff resulting from about 1 inch of rain; however, it appears that the pond's postconstruction water quality volume falls well below the necessary Volume. Similarly, even for small storms, runoff ponds in the basin to depths of at least several feet, rendering flow-through treatment of the kind described in the project's CEQA documents ineffective. Is it possible that the city has not yet completed an engineering review of the basin's water quality design features to ensure it would meet some basic minimum standards? This is particularly of concern, since the city appears to have determined that no other stormwater treatment BMPS will be constructed in the project (aside from the basin). When we met with you last, you indicated that the City had performed an analysis of the project to come to the CEQA-document-required Conclusion that no other BMPs were feasible. However, you did not have that analysis handy at the time. Nould it be possible for you to forward that analysis to us?


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