

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SIERRA CLUB,
Plaintiff,
v.

LEHIGH SOUTHWEST CEMENT COMPANY,
and HANSON PERMANENTE CEMENT, INC.
Defendants.

Case No.: 5:11-cv-06392-HRL
Judge: Hon. Howard R. Lloyd

CONSENT DECREE

Date Lodged: April 24, 2013

Date Entered _____

I. RECITALS

1. On December 19, 2011, Plaintiff Sierra Club (“Plaintiff” or “Sierra Club”) filed a Complaint for Declaratory and Injunctive Relief and for Civil Penalties in this federal Clean Water Act case against Defendants Lehigh Southwest Cement Company and Hanson Permanente Cement, Inc. (“Defendants”) pertaining to Defendants’ quarry, cement plant and associated facilities, located in Santa Clara County, California. Sierra Club and Defendants are collectively referred to herein as “Parties,” and individually referred to as “Party.”

2. The Complaint alleges that Defendants have, and continue to, discharge pollutants from the quarry pit into Permanente Creek without an authorizing national pollutant discharge elimination system (“NPDES”) permit and in violation of their storm water discharge permit.

3. The Complaint also alleges that Defendants have caused fill, including but not limited to mining wastes, overburden and sediment, to enter the bed and banks of Permanente Creek, and that such fill degrades, and continues to degrade, the water quality, habitat and natural function of the Creek.

4. Defendants deny all of Plaintiff’s allegations and claims in the Complaint.

5. The Parties, through their authorized representatives and without either adjudication of Plaintiff’s claims or admission by Defendants of any alleged wrongdoing have

United States District Court
For the Northern District of California

1 chosen to resolve in full Plaintiff's Complaint through settlement and avoid the cost and
2 uncertainties of further litigation.

3 6. The Parties agree that this Consent Decree has been negotiated in good faith and
4 will avoid further litigation among the Parties, and that this Decree is fair, reasonable and in the
5 public interest.

6 NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED,
7 ORDERED AND DECREED as follows:

8 II. JURISDICTION AND VENUE

9 7. This Court has subject matter jurisdiction in this matter pursuant to 33 U.S.C. §
10 1365(a)(1)(A) (citizen suit provision of the Clean Water Act) and 28 U.S.C. § 1331 (federal
11 question statute). The relief required is authorized pursuant to 28 U.S.C. §§ 2201 and 2202
12 (declaratory judgment), and 33 U.S.C. §§ 1319 and 1365 (Clean Water Act).

13 8. Venue in the Northern District of California is proper pursuant to 33 U.S.C. §
14 1365(c)(1) (Clean Water Act citizen suit provision) because Defendants' discharges are located
15 in this District. Venue also lies in the Northern District of California, pursuant to 28 U.S.C.
16 § 1391(b) and (e), because the property that is the subject of this action is in Santa Clara County,
17 California, and because Defendants' Facility is located in Santa Clara County, California.

18 9. Plaintiff and Defendants consent to this Court's jurisdiction to enter and enforce
19 this Consent Decree, and consent to venue in this judicial district.

20 III. APPLICABILITY

21 10. The provisions of this Consent Decree apply to and are binding on Plaintiff and
22 Defendants, any of their respective successors and/or assigns, officers, agents, servants, and
23 employees, and any other entities who are in active concert or participation with Plaintiff or
24 Defendants.

25 11. No transfer of ownership or operation of the Facility shall relieve Defendants of
26 their obligation to comply with the terms of this Consent Decree. Moreover, prior to any transfer
27 of ownership or operation, the transferee shall provide written confirmation to the Court and
28

1 Plaintiff acknowledging the terms of the Consent Decree and consenting to be bound by its
2 terms.

3 12. Defendants shall provide a copy of this Consent Decree to all officers,
4 employees, agents, performance guarantors, consultants and contractors whose duties include the
5 implementation of any provision of this Consent Decree.

6 IV. DEFINITIONS

7 13. Terms used in this Consent Decree that are defined in the federal Clean Water
8 Act, 33 U.S.C. §§ 1251, *et seq.*, (“CWA”), or in regulations issued pursuant thereto, shall have
9 the meanings assigned to them therein, unless otherwise provided in this Decree. Whenever the
10 terms set forth below are used in this Consent Decree, the following definitions shall apply:

11 (a) “Applicable chronic water quality standard for Selenium” means 5 micrograms per
12 liter (µg/l) of total Selenium.

13 (b) “Complaint” shall mean the Complaint filed by Sierra Club in this action on
14 December 19, 2011.

15 (c) “Consent Decree” or “Decree” shall mean this Consent Decree and the
16 exhibits attached hereto.

17 (d) “Creek” shall mean Permanente Creek.

18 (e) “Day” shall mean a calendar day unless expressly stated to be a business
19 day. In computing any period of time under this Consent Decree, where the last day would fall
20 on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the
21 next business day.

22 (f) “Effective Date” shall mean the date this Decree is entered by the Court.

23 (g) “Facility” shall mean Defendants’ Permanente quarry, cement plant and associated
24 works and property, located in Santa Clara County, California.

25 (h) “Final treatment system” shall mean a water pollution abatement system and
26 associated flow modulation facilities designed, constructed and operated to achieve continuous
27 compliance with all NPDES permit limits, and all water quality standards applicable to
28 Permanente Creek, for all discharges to Permanente Creek from the Facility, including quarry pit

1 water and process waters currently associated with Pond 4A (quarry pit and primary crusher
2 washdown), Ponds 9 & 11 (cement plant process waters in Pond 11 that flow through Pond 9),
3 and Pond 20 (cement plant truck wash), and only excluding authorized storm water discharges
4 from Pond 9 (after Pond 11 no longer flows to Pond 9), Pond 13, Pond 20 (after truck wash
5 water no longer flows to Pond 20), and Pond 30. To the extent Defendants' future NPDES
6 permit contains an effluent limit for nickel that differs from the water quality standard for nickel,
7 such NPDES nickel effluent limit shall control.

8 (i) "Interim treatment system" shall mean a water pollution abatement system and
9 associated flow modulation facilities designed, constructed and operated to treat up to 24,000
10 gallons per hour of the quarry pit water currently associated with Pond 4A (quarry pit and
11 primary crusher washdown) for the primary purpose of substantially reducing Selenium in the
12 quarry pit water prior to discharge. Operation of this interim treatment system is also intended to
13 inform the final design and successful operation of the final treatment system.

14 (j) "Meet and confer" shall mean to communicate at the same time in person, by phone,
15 or through any video or other virtual electronic method.

16 (k) "NPDES" shall mean National Pollutant Discharge Elimination System.

17 (l) "Parties" shall mean Plaintiff and Defendants.

18 (m) "Quarry pit water" shall mean that surface and ground water that is pumped by
19 Defendants to facilitate quarry mining.

20 (n) "Reach" shall mean that length of Permanente Creek that has been assigned a
21 numerical value from 1 to 22 as shown in the URS profile and site layout map set forth as
22 Exhibit A.

23 (o) "Regional Water Board" shall mean the San Francisco Bay Regional Water Quality
24 Control Board.

25 (p) "Section" shall mean a portion of this Consent Decree identified by a Roman
26 numeral.

27 (q) "Station" shall mean the numerical value (from 0 to 192) assigned to a location on
28 Permanente Creek as shown on the URS profile set forth in Exhibit A.

1 (r) "EPA" shall mean the United States Environmental Protection Agency
2 and any of its successor departments or agencies.

3 (s) "Work", as that term is used in Section X, shall mean all activities necessary to
4 satisfy the Permanente Creek restoration obligations described in Section VI of this Decree,
5 including but not limited to design, contracting, permitting, construction and monitoring
6 activities.

7 V. DISCHARGE TREATMENT

8 14. Within 45 days of the date of lodging of this Decree, Defendants shall supplement
9 their November 30, 2011 application for an individual NPDES permit for the Facility by
10 submitting an amended Report of Waste Discharge, or procedurally similar document, to the
11 Regional Water Board that includes requirements no less stringent than those set forth in
12 Paragraphs 15 through 32 below.

13 A. Interim Quarry Pit Water Discharge Compliance

14 15. No later than August 1, 2013, Defendants shall execute one or more contracts for
15 the engineering, procurement, and construction of the interim treatment system. No later than
16 January 17, 2014, Defendants shall commence construction of the interim treatment system.

17 16. No later than October 1, 2014, Defendants shall have installed and commenced
18 operation of the interim treatment system.

19 17. Beginning no later than October 1, 2014, and continuing no later than September
20 30, 2017, Defendants shall direct all quarry pit water to the interim treatment system.
21 Defendants shall treat no less than 24,000 gallons per hour of quarry pit water with the interim
22 treatment system, except at those times when only flows less than 24,000 gallons per hour are
23 available from the flow modulation facilities, in which case Defendants shall treat all lesser
24 flows. Beginning no later than December 1, 2014, Defendants shall either remove, on a
25 continuous basis, at least 50 percent of the total Selenium from the totality of such quarry pit
26 water flow to be treated, or achieve a concentration of no greater than 10 µg/l of total Selenium
27 in such quarry pit water flow to be treated when the concentration of total Selenium in the quarry
28 pit water entering the interim treatment system is 20 µg/l or less, prior to its discharge into

1 Permanente Creek. Notwithstanding the above, Defendants shall operate the treatment system at
2 all times to maximize the reduction of Selenium in the quarry pit discharge.

3 18. To determine the flow rates described above, Defendants shall use automatic,
4 continuous flow measuring equipment with continuous data logging to monitor the total gallons
5 per hour of quarry pit water entering the interim treatment system. Defendants shall also monitor
6 the total gallons per hour of all quarry pit water treated by the interim treatment system and
7 discharged to Permanente Creek, and the total gallons per hour of any quarry pit water that is not
8 treated by the interim treatment system and discharged to Permanente Creek.

9 19. Beginning on October 1, 2014, and continuing through September 30, 2017,
10 Defendants shall monitor, on no less than a weekly basis, the total Selenium in the untreated
11 quarry pit water at the inlet to the interim treatment system, and at the outlet from the interim
12 treatment system. The inlet and outlet samples shall be taken at the same time, and shall consist
13 of a composite of twelve equal aliquots collected evenly over a 24-hour period. Data generated
14 from this monitoring shall be used to assess compliance with Paragraph 17 on a weekly basis.

15 20. No later than March 31, 2015, Defendants shall provide Plaintiff with a report
16 summarizing the performance of the interim treatment system since October 1, 2014, including
17 but not limited to the measured concentration of total Selenium in the water discharged from the
18 interim treatment system to Permanente Creek.

19 21. No later than June 30, 2015, Defendants shall provide Plaintiff with a report
20 summarizing what additional treatment facilities or operational changes, if any, are necessary to
21 ensure that quarry pit water treated by the interim treatment system will comply with the
22 applicable chronic water quality standard for Selenium. If the water discharged from the interim
23 treatment system is in compliance with the applicable chronic water quality standard for
24 Selenium at that time, no additional treatment facilities or operational changes must be identified
25 by Defendants, and in that case, after June 30, 2015 Defendants shall comply with such standard,
26 in lieu of the 50 percent removal requirement set forth in Paragraph 17.

27 22. No later than December 31, 2015, Defendants shall have installed and shall
28 commence operation of additional treatment facilities, if any, necessary to ensure that quarry pit

1 water treated by the interim treatment system will comply with the applicable chronic water
2 quality standard for Selenium.

3 23. No later than March 31, 2016, the water discharged from the interim treatment
4 system shall comply with the applicable chronic water quality standard for Selenium, in lieu of
5 the 50 percent removal requirement set forth in Paragraph 17, unless compliance with the
6 applicable chronic water quality standard for Selenium was achieved by June 30, 2015 pursuant
7 to Paragraph 21.

8 24. No later than September 30, 2013, and continuing no later than September 30,
9 2017, Defendants shall have installed and commenced operation of treatment facilities at Pond 9,
10 for the discharge of water from Pond 11, and compliance with the Regional Water Board's
11 discharge limits for pH, turbidity, and total suspended solids shall be attained and maintained.

12 25. Defendants shall provide to Plaintiff on a quarterly basis, in .pdf electronic
13 format, all monitoring results from the interim treatment facility and Pond 9 discharges from the
14 previous calendar quarter, within 30 days of the last day of each calendar quarter, including but
15 not limited to the results of all flow and Selenium monitoring.

16 B. Final Facility Discharge Compliance

17 26. No later than August 1, 2016, Defendants shall execute contract(s) for
18 engineering, procurement, and construction of the final treatment system. No later than February
19 1, 2017, Defendants shall commence construction of the final treatment system.

20 27. Beginning no later than September 30, 2017, Defendants shall have installed and
21 commenced operation of the final treatment system.

22 28. Beginning no later than September 30, 2017, Defendants shall not discharge any
23 quarry pit water, or any process water, or stormwater mixed with process water, from the Facility
24 into Permanente Creek unless such discharge is treated by the final treatment system and is in
25 compliance with all applicable NPDES permit effluent limits, and all applicable receiving water
26 quality standards, including but not limited to the applicable chronic Selenium and chronic
27 toxicity standards.

28

1 29. Compliance with the chronic toxicity standard shall be determined by EPA’s
 2 whole effluent toxicity (WET) test, based on: (1) survival and reproduction of Ceriodaphnia
 3 (water flea) (EPA/821/R-02/013 (Test Method 1002.0), (2) survival and growth of pimephales
 4 promelas (fathead minnow), EPA/821/R-02/013, Test Method 1000.0 (2002), and (3) growth of
 5 Selenastrum (algae), EPA/821/R-02/012, Test Method 1003.0 (2002). If Defendants’ NPDES
 6 permit requires a different method for determining compliance with the chronic toxicity water
 7 quality standard, Defendants’ compliance with the chronic toxicity water quality standard shall
 8 be determined by such method.

9 30. For the first six months of operation of the final treatment system, compliance
 10 sampling and analysis for conventional constituents and metals, including Selenium, shall take
 11 place on no less than a weekly basis. To determine compliance with the chronic toxicity
 12 standard, sampling and analysis shall take place on no less than a monthly basis consistent with
 13 Paragraph 29 immediately above.

14 31. Beginning on the seventh month of operation of the final treatment system, and
 15 continuing thereafter, Defendants’ compliance with all applicable water quality standards and
 16 effluent limits shall be determined by the monitoring requirements in Defendants’ individual
 17 Facility NPDES permit.

18 32. Defendants shall provide to Plaintiff on a quarterly basis, in .pdf electronic
 19 format, all monitoring results required by this Decree and Defendants’ NPDES permit, from the
 20 previous calendar quarter within 30 days of the last day of each calendar quarter.

21 **VI. CREEK RESTORATION**

22 A. Permanente Creek Restoration.

23 33. The parties agree that the objectives of the Permanente Creek restoration
 24 requirements set forth below include the following:

- 25 • Provide for sustainable anadromous fish passage and year-round habitat;
- 26 • Remove mining-related fill and sediments in the bed, banks and adjacent hill
 27 slopes;
- 28 • Layback creek banks and adjacent hill slopes to provide stable slopes sufficient to
 prevent fill from entering the creek;

- Require work recommended by URS in the March 11, 2011 Permanente Creek Long-Term Restoration Plan (“URS Plan”), as proposed or as modified as described below; and
- Require restoration that is no less stringent than any restoration that is approved or required by any agency, including but not limited to the Santa Clara County Planning Department and the Regional Water Board, and that is to be performed in a period of time no greater than any restoration that is approved or required by any agency, including but not limited to the Santa Clara County Planning Department and the Regional Water Board.

34. Reaches 19-20-21. Defendants shall provide for sustainable fish passage throughout reaches 19, 20 and 21, and improve holding and rearing habitat during summer low-flow periods as follows. Using hand tools and small engine implements as necessary, Defendants shall create at least two self-sustaining, self-scouring rock-step pools in each reach, with each pool designed and constructed to maintain a depth of at least 12 inches and a surface area of at least 60 square feet (approximately 6 feet wide, 10 feet long), at locations where water has the greatest potential to remain in the pools year-round. Immediately above each pool, Defendants shall design and construct a rock reinforced drop that maximizes the scouring of the downstream pool. The downstream ends of the pools may be narrowed with logs on the banks to force the flow to the center to promote additional scouring. Defendants shall design the rock step pools and drops to withstand a 100-year storm event assuming the use of hand tools and small engine implements. If Defendants believe implementation of such design is infeasible using hand tools and small engine implements, and if Defendants notify Plaintiff prior to July 30, 2014, the parties will meet and confer to determine appropriate alternative design criteria. If the parties cannot agree regarding the appropriate design criteria, Defendants may invoke the dispute resolution provisions in this Decree.

35. Reaches 17-18. Defendants shall provide for sustainable fish passage between stations 138 and 119 in reaches 17-18 by excavating and permanently exporting overburden and mining-related sediment from the creek bed, banks, and from upland slopes (to the extent upland slope materials pose a risk of entering the creek), sufficient to restore creek alignment and slopes and to eliminate subsurface flow through the overburden and mining-related sediment.

1 In particular, Defendants shall layback and re-grade the north overburden slope to
2 provide a stable slope no steeper than 2:1 (50% grade) and shall remove sufficient material to
3 move the north toe of the slope at least 25 feet northward from its current location and elevation.
4 Defendants shall establish a creek channel and flood plain proportionally following the
5 conceptual modified trapezoidal cross-section as shown in Exhibit B, while preserving the flood
6 capacity geometry set forth therein. Fish passage design approaches for all reconstructed Creek
7 portions shall follow the California Department of Fish & Wildlife's California Salmonid Stream
8 Habitat Restoration Manual, 4th Edition (Vols. I-II, 2010) ("DFW Restoration Manual"), attached
9 as Exhibit C, or its revision if approved by Plaintiff, and shall incorporate channel lengthening
10 meanders and stepped pool and grade control complexes. The course of the Creek shall follow
11 exposed bedrock, and large native boulders with sands and gravels. Defendants shall either
12 create a berm along both reaches at the toe of the north slope, parallel to the creek (but set-back
13 above the 100-year flood high water line) or install other structures (*e.g.*, benches along the north
14 slope) to prevent overburden and sediment from entering the Creek.

15 Defendants shall remove the relic concrete structure at approximately Station 128, and
16 evaluate the feasibility of removing the old crusher foundation at approximately Station 116. No
17 later than June 30, 2013, Defendants shall provide to Plaintiff an evaluation of the environmental
18 advantages and disadvantages of removing the old crusher foundation. No later than July 15,
19 2013, Defendants shall meet and confer with Plaintiff regarding such evaluation. Defendants
20 shall seek agency approval to remove the old crusher foundation consistent with this Decree
21 unless (a) the Parties otherwise agree, or (b) Defendants do not believe the old crusher
22 foundation should be removed in which case Defendants may invoke the dispute resolution
23 provisions of this Decree.

24 36. Reaches 14-15-16. Defendants shall provide for sustainable fish passage
25 throughout reaches 14, 15 and 16 and improve holding and rearing habitat during summer low-
26 flow periods as follows. Using hand tools and small engine implements as necessary,
27 Defendants shall create at least two self-sustaining, self-scouring rock-step pools in each reach,
28 with each pool designed and constructed to maintain a depth of at least 12 inches and a surface

1 area of at least 60 square feet (approximately 6 feet wide, 10 feet long), at locations where water
2 has the greatest potential to remain in the pools year-round. Immediately above each pool,
3 Defendants shall design and construct a rock reinforced drop that maximizes the scouring of the
4 downstream pool. The downstream ends of the pools may be narrowed with logs on the banks to
5 force the flow to the center to promote additional scouring. Defendants shall design the rock
6 step pools and drops to withstand a 100-year storm event assuming the use of hand tools and
7 small engine implements. If Defendants believe implementation of such design is infeasible
8 using hand tools and small engine implements, and if Defendants notify Plaintiff prior to July 30,
9 2014, the parties will meet and confer to determine appropriate alternative design criteria. If the
10 parties cannot agree regarding the appropriate design criteria, the Defendants may invoke the
11 dispute resolution provisions in this Decree.

12 37. Reach 13. Defendants shall provide for sustainable fish passage through this
13 reach by removing the dam infrastructure at Pond 13 and the half-culvert immediately
14 downstream, including the removal of all concrete and metal structures and deposited sediment.
15 The new channel and flood plain shall proportionally follow the conceptual modified trapezoidal
16 cross-section as shown in Exhibit B, while preserving the flood capacity geometry set forth
17 therein. Fish passage design approaches for all reconstructed creek portions shall follow the
18 DFW Restoration Manual, and shall incorporate channel lengthening meanders and stepped pool
19 and grade control complexes. The course of the Creek shall follow exposed bedrock, and large
20 native boulders with sands and gravels.

21 38. Reaches 10-11-12. Defendants shall provide for sustainable fish passage
22 throughout reaches 10, 11 and 12 by removing all culverts, riprap, and the road on top of the
23 creek (concrete ramp), and by sufficiently setting back the road and aggregate rock pile to
24 provide more room for a natural streambed and banks. Defendants shall narrow the road and
25 accompanying vehicle barrier to a reduced total width no greater than 28.5 feet at any point,
26 measured from the toe of the inside slope to the top of the creek-side vehicle barrier. The vehicle
27 barrier height shall not exceed 5 feet, and the slopes of the vehicle barrier shall be no less than
28 1.5 to 1 (67% slope). Defendants shall establish an enlarged creek channel that contains the

1 features set forth in the conceptual modified trapezoidal cross-section as shown in Exhibit B
 2 except the south side slope shall meet existing slope conditions and the north side slope shall be
 3 modified up to a 1.5 to 1 slope. Fish passage design approaches for all reconstructed creek
 4 portions shall follow the DFW Restoration Manual, and shall incorporate channel lengthening
 5 meanders and stepped pool and grade control complexes. The course of the creek shall follow
 6 exposed bedrock, and large native boulders with sands and gravels.

7 39. Reaches 8-9. Defendants shall provide for sustainable fish passage throughout
 8 reaches 8 and 9 by sufficiently setting back the road and associated slopes to provide more room
 9 for a natural streambed and banks. Defendants shall narrow the road and accompanying vehicle
 10 barrier to a reduced total width no greater than 28.5 feet at any point, measured from the toe of
 11 the inside slope to the top of the creek-side vehicle barrier. The vehicle barrier height shall not
 12 exceed 5 feet, and the slopes of the vehicle barrier shall be no less than 1.5 to 1 (67% slope).
 13 Defendants shall establish an enlarged creek channel that contains the features set forth in the
 14 conceptual modified trapezoidal cross-section as shown in Exhibit B except the south side slope
 15 shall meet existing slope conditions and the north side slope shall be modified up to a 1.5 to 1
 16 (67% slope).¹ Fish passage design approaches for all reconstructed creek portions shall follow
 17 the DFW Restoration Manual, and shall incorporate channel lengthening meanders and stepped
 18 pool and grade control complexes.

19 Defendants shall remove the culvert in the vicinity of Station 59 and, if replaced, replace
 20 it with a concrete box culvert with a sustainable, natural gravel bottom. Fish passage design
 21 approaches for all rehabilitated or replaced culverts shall follow the DFW Restoration Manual.
 22 Lehigh shall remove, and not replace, any culvert in the vicinity of Station 48. Defendants may
 23 leave the culvert in the vicinity of Station 42 as is, unless such culvert has greater than a 2%
 24 grade and/or does not have a gravel bottom in which case it shall be removed, and if replaced, it
 25 shall be replaced with a concrete box culvert with a sustainable, natural gravel bottom designed

26
 27 ¹ Box culverts referred to in this Paragraph do not need to contain the features set forth in
 Exhibit B.

28

1 in accordance with the DFW Restoration Manual.

2 Defendants shall remove the alluvial fan of gravel deposited on the floodplain located
3 upstream of the culvert crossing in the vicinity of Stations 61-62. Defendants shall remove the
4 gravel from the channel and banks located in the ephemeral drainage from a storage area in the
5 vicinity of Stations 61-62 and take all other necessary measures to prevent further mining-related
6 sediment and material from reaching Permanente Creek in the future from this drainage.
7 Defendants shall revegetate the floodplain and ephemeral channel with native vegetation.

8 40. Reaches 6-7. Defendants shall provide for sustainable fish passage throughout
9 reaches 6 and 7 by making sufficient modifications to the existing concrete-lined channel to be
10 consistent with the fish passage design approaches set forth in “Fish Passage Design for Road
11 Crossings: an Engineering Document Providing Fish Passage Design Guidance for Caltrans
12 Projects,” Caltrans 2007, attached as Exhibit D, or its revision if approved by Plaintiff. The
13 design shall ensure the passage of adult and juvenile fish during high and low flows, and provide
14 for resting areas.

15 Defendants shall also create at least two (2) sustainable, shaded pools for migrating fish,
16 located at approximately Stations 25-27 and 17. Each pool shall be at least fifteen (15) feet long,
17 at least seven (7) feet wide, and have a depth of at least three (3) feet. The bottom of each pool
18 shall be at, or lower than, the bottom elevation of the existing concrete channel. Defendants
19 shall partially backfill the pools with a gradation of rock to simulate a natural pool. Larger rocks
20 shall be used at the upstream end of the pool to provide resting places for fish within the scour
21 pool. A gradation of larger to smaller rocks shall be used downstream (beginning no closer than
22 five (5) feet to the upstream end) towards the weir and the next drop to transition from the three
23 (3) feet deep area to a shallower depth at the downstream weir.

24 Defendants shall also remove the culverts in the vicinity of Stations 28-29 and
25 Stations 34-37 and, if replaced, replace them with concrete box culverts with sustainable, natural
26 gravel bottoms. Any box culvert installed at Stations 34-37 shall provide for permanent passive
27 lighting at approximately every fifty (50) feet sufficient to illuminate the floor of the culvert
28 during the day to the same level of illumination that exists twenty (20) feet from either end of the

1 culvert. Defendants may leave the culverts in the vicinity of Stations 38-39 and 31-32 as they
2 are, unless any culvert has greater than a 2% grade and/or does not have a gravel bottom in
3 which case it shall be removed, and if replaced, it shall be replaced with a concrete box culvert
4 with a sustainable, natural gravel bottom designed in accordance with the DFW Restoration
5 Manual. Fish passage design approaches for all rehabilitated or replaced culverts shall follow
6 the DFW Restoration Manual.

7 41. Reaches 2-3-4-5. Defendants shall provide for sustainable fish passage
8 throughout reaches 2, 3, 4 and 5 as follows. Defendants shall remove the Pond 22 steel diversion
9 structure, culverts, and ancillary concrete structure at the pond outlet, leaving the concrete dam
10 structure in place. Immediately downgradient of the concrete dam structure, Defendants shall
11 create an appropriate step pool transition channel profile to ensure sustainable fish passage up
12 and over the concrete dam structure. Defendants shall leave Pond 14 in place for California red-
13 legged frog use. Defendants shall make modifications to the Pond 14 bypass channel, if any, to
14 ensure it is the main creek channel suitable for fish passage in accordance with the DFW
15 Restoration Manual. Where the Pond 14 outfall channel meets the bypass channel, Defendants
16 shall install a permanent drop structure barrier to discourage the passage of fish up to Pond 14.
17 Defendants shall place rock to armor the channel, stabilizing it under clear-water discharge
18 conditions.

19 42. After completing the required restoration work in each reach, Defendants shall
20 revegetate the Creek banks and disturbed areas with native vegetation including willows, alders,
21 elderberries, blackberries, rushes, and sedges. Defendants shall incorporate willow fascines
22 along the edges of banks and spillways where high bank shear stress is expected.

23 43. By no later than July 1, 2013, Defendants shall correctly and permanently stake
24 all reach boundaries and stations identified in this Decree at locations adjacent to the Creek that
25 will not be disturbed by the restoration activities required by this Decree. The stakes shall be
26 permanently labeled by applicable number and their location recorded using a professional “sub-
27 foot” GPS. By no later than September 1, 2013, Defendants shall provide to Plaintiff a plan view
28 topographic map (in hard copy and electronic format) showing the professional “sub-foot” GPS

1 locations of all stakes, the current thalweg and bank slope toes of the Creek, and all other current
2 features such as road dimensions and pond and culvert locations referred to in this Decree.

3 B. Permanente Creek Restoration Permitting and Performance Deadlines.

4 44. The Parties anticipate that approvals will be required prior to the implementation
5 of the Creek restoration work required above, including but not limited to approvals from:

- 6 • U.S. Army Corps of Engineers (Section 404 permit)
- 7 • Regional Water Board (NPDES permits and Section 401 certification)
- 8 • California Department of Fish & Wildlife (Section 1602 Streambed Alteration Agreement)
- 9 • U.S. Fish & Wildlife Service and National Marine Fisheries Service (Section 7 Endangered Species Act consultation)
- 10 • U.S. Fish & Wildlife Service and National Marine Fisheries Service (Section 7 Endangered Species Act consultation)
- 11 • Santa Clara County (Reclamation Plan amendment)

12 Defendants intend to secure authorization and access from Union Pacific Railroad, if necessary,
13 for restoration activities at Pond 22 and Reaches 2-7. Applicable environmental review
14 processes (*e.g.*, CEQA and/or NEPA) must also be satisfied prior to proceeding with any creek
15 restoration activities.

16 45. To ensure a timely permit application and approval process with respect to the
17 creek restoration work required above, Defendants shall complete the tasks below by the
18 following deadlines:

19 (a) June 1, 2013: Notify all pertinent agencies of Consent Decree restoration
20 requirements, design and permitting milestones, and anticipated transmittal of Conceptual
21 Restoration Plan (30% design level) by October 7, 2013. Request agency meeting and/or
22 meetings to be calendared in November 2013 through January 2014.

23 (b) September 10, 2013: Complete Conceptual Restoration Plan, submit to Plaintiff for
24 review and comment.

25 (c) October 7, 2013: Submit Conceptual Restoration Plan to all pertinent agencies.

26 (d) November 2013 through January 2014: Participate in agency meetings regarding
27 Conceptual Restoration Plan and permitting. To the extent one or more agency meetings do not
28

1 take place by January 2014, the parties shall meet and confer to determine whether subsequent
 2 deadlines can and should be modified. If the parties cannot agree, then Defendants may invoke
 3 the dispute resolution provisions of this Decree.

4 (e) July 30, 2014: Complete Draft Restoration Plan (70% design level) and permit
 5 applications, submit to Plaintiff for review and comment.

6 (f) August 30, 2014: Submit all necessary permit and approval applications to appropriate
 7 agencies. This submission shall include all conditions reasonably calculated to be necessary to
 8 secure approval.

9 46. Defendants shall complete all restoration work required in Reaches 19-21, 14-16
 10 and 2-5 within one year of receipt of all necessary permits and approvals. Defendants shall
 11 provide Plaintiffs with a schedule showing commencement and expected completion dates for all
 12 restoration activities in these reaches within thirty (30) days of receipt of such permits and
 13 approvals.

14 47. Defendants shall complete all restoration work required in reaches 6-13 and 17-
 15 18, within two years of receipt of all necessary permits and approvals. Defendants shall provide
 16 Plaintiffs with a schedule showing commencement and expected completion dates for all
 17 restoration activities in these reaches within thirty (30) days of receipt of such permits and
 18 approvals.

19 48. This Consent Decree shall not relieve Defendants of their obligation to comply
 20 with all applicable federal, state and local laws, regulations and permits. To the extent there is
 21 any conflict between any provision in this decree and any other applicable requirement, the most
 22 stringent requirement shall apply.

23 C. Alternative Permanente Creek Restoration.

24 49. Should any regulatory agency not provide one or more legally necessary
 25 approvals to conduct the actions specified in Section VI.A., or place one or more unexpected
 26 conditions on the approval of any given action, Paragraphs 50-53 shall apply.

27 50. For purposes of this Section, “unexpected conditions” shall mean: (i) one or more
 28 conditions placed by a regulatory agency on the approval to undertake a creek restoration activity

1 in addition to the conditions specified in Paragraph 45(f), (ii) such conditions exceed the costs
 2 specified in subparagraph (b) below, and (iii) Defendants are unwilling to expend the additional
 3 costs of such conditions.

4 (a) For purposes of this Section, the initial total estimated cost to Defendants of the
 5 Permanente Creek restoration project is ten (10) million dollars. This estimated cost shall be
 6 adjusted annually consistent with the Engineering News-Record construction cost index for the
 7 Bay Area or, if unavailable, an equivalent cost index. The parties agree that the estimated total
 8 cost of the project is projected to be allocated within the Reaches of Permanente Creek as
 9 follows:

10 **Reaches 2 – 7:** Forty percent (40%) of total project cost

11 **Reaches 8 – 13:** Forty percent (40%) of total project cost

12 **Reaches 14 - 21:** Twenty percent (20%) of total project cost

13 (b) Unexpected conditions occur if the cost of the conditions of approval exceed the
 14 following amounts:²

15 **Reaches 2 – 7:** Conditions cause the cost of creek restoration actions in these reaches to
 16 exceed twenty percent (20%) of the total project cost, as adjusted.

17 **Reaches 8 – 13:** Conditions cause the cost of creek restoration actions to exceed the
 18 total project cost by twenty percent (20%) of the total estimated cost, as adjusted.

19 **Reaches 14 - 21:** Conditions cause the value of creek restoration actions to exceed
 20 the total project cost by ten percent (10%) of the total estimated cost, as adjusted.

21 51. For purposes of this Section, if Defendants believe any unexpected conditions
 22 will be or have been placed upon the approval or authorization to undertake one or more Creek
 23 restoration activities, Defendants shall notify Plaintiff within thirty (30) days of becoming aware
 24 of such unexpected conditions. The Parties shall meet and confer regarding any unexpected
 25 conditions.

26 _____
 27 ² These percentages were derived by multiplying the allocated percentage by reach group times
 28 fifty percent. Thus, for Reaches 2-7, 40% allocation x 50% cost buffer = 20% of the total
 estimated cost of the restoration project.

1 52. In the event any unexpected conditions become final, within thirty (30) days of
 2 such event, Defendants shall notify Plaintiff and provide Plaintiff with a written demonstration
 3 explaining why the conditions are unexpected. The Parties shall meet and confer within fourteen
 4 (14) days of such notice. If Plaintiff does not agree that unexpected conditions have been
 5 imposed, Defendants may invoke the dispute resolution provisions of this Decree. If Plaintiff
 6 agrees unexpected conditions have been imposed, the Parties may stipulate to an alternative
 7 method of achieving the purposes of this Decree and present it to the Court for approval.
 8 Otherwise, without a stipulated agreement, and in lieu of implementing the relevant Creek
 9 restoration actions required by this Decree, for the affected reaches, Defendants shall pay the
 10 value of the project cost specified in Paragraph 50(a) above, plus the additional value specified in
 11 Paragraph 50(b) above, as follows: Defendants shall pay the funds to the Rose Foundation for
 12 Communities and the Environment (“Rose Foundation”), 1970 Broadway, Suite 600, Oakland,
 13 California 94612, to be held in a separate Permanente Creek restoration account. Such funds
 14 shall be subject to the condition that they only be distributed by the Rose Foundation after a
 15 competitive application process, and that such funds, after satisfying any Rose Foundation
 16 administrative costs,³ shall only be used for the purpose of Permanente Creek restoration,
 17 including steelhead re-introduction, unless such restoration activity is unavailable, in which case,
 18 the funds shall be used for other local watershed restoration projects including those on Stevens
 19 Creek.

20 53. In the event any regulatory agency does not provide a legally necessary approval
 21 to conduct an action specified in Section VI.A, either by actual notice or constructively through
 22 inaction, the Parties shall meet and confer within fourteen (14) days of such event. If Plaintiff
 23 disagrees that a necessary approval has not been provided, Defendants may invoke the dispute

24 ³ Rose Foundation administrative costs shall not exceed the following amounts: for funds paid of
 25 \$500,000 or less, administrative costs shall not exceed ten percent of the total funds paid; for
 26 funds greater than \$500,000 but no more than \$1,500,000, administrative costs shall not exceed
 27 eight percent of the total funds paid; for funds greater than \$1,500,000 but no more than
 28 \$3,000,000, administrative costs shall not exceed seven percent of the total funds paid; and for
 funds greater than \$3,000,000, administrative costs shall not exceed six percent of the total funds
 paid.

1 resolution provisions of this Decree. If Plaintiff agrees that a necessary approval has not been
2 provided, the Parties may stipulate to an alternative method of achieving the purposes of this
3 Decree and present it to the Court for approval. Otherwise, without a stipulated agreement, and
4 in lieu of implementing the relevant creek restoration actions required by this Decree, for the
5 affected reaches, Defendants shall pay the value of the project cost specified in Paragraph 50(a)
6 above, plus the additional value specified in Paragraph 50(b) above, to the Rose Foundation in
7 the same manner and for the same purposes as specified in Paragraph 52 above.

8 **VII. REPORTING REQUIREMENTS**

9 54. All reports shall be submitted to the persons designated in Paragraph 96 of this
10 Consent Decree.

11 55. The reporting requirements of this Consent Decree do not relieve Defendants of
12 any reporting obligation required by the CWA or its implementing regulations, or by any other
13 federal, state or local law, regulation, permit or other requirement.

14 56. Any information provided pursuant to this Consent Decree may be used by
15 Plaintiff in any proceeding to enforce the provisions of this Consent Decree and as otherwise
16 permitted by law.

17 **VIII. SITE INSPECTIONS**

18 57. Defendants shall provide access to Plaintiff to inspect the interim and final
19 treatment systems and related facilities, and to Permanente Creek and adjacent lands, at such
20 intervals and times sufficient for Plaintiff to assess compliance with the terms of this Decree. At
21 a minimum, access shall be provided to Plaintiff to inspect the interim and final treatment
22 systems during construction and within six (6) months of the completion of construction of such
23 systems. At a minimum, access shall also be provided to Plaintiff to inspect any Creek
24 restoration work within five (5) days of the commencement of work in any Reach, at thirty (30)
25 day intervals during restoration work in any Reach, and within six (6) months of the completion
26 of any work in any Reach.

27 58. Plaintiff shall provide Defendants written notice of the date of any requested
28 inspection at least five (5) days in advance of any inspection, and the requested inspection shall

1 take place on that date unless Defendants propose a different date in which case the Parties shall
 2 meet and confer to determine the best date for an inspection within a period no greater than
 3 fourteen (14) days after Plaintiff's notice.

4 **IX. STIPULATED PENALTIES**

5 59. In any calendar month in which Defendants violate any provision of this Decree,
 6 Defendants shall pay all accrued stipulated penalties to the Rose Foundation as specified in
 7 Paragraph 62 below within ten (10) days after the end of such month, without written demand
 8 from Plaintiff, except for penalties due under Paragraph 60(d). Stipulated penalties due under
 9 Paragraph 60(d) shall be due and payable to the Rose Foundation within 25 months of the
 10 violation if mandatory minimum penalties have not been paid to the State of California for the
 11 same violation. To the extent Defendants believe their non-compliance is due to a force majeure
 12 event, the funds shall be paid into an escrow account until such issue is resolved.

13 60. Defendants shall pay stipulated penalties for each failure to comply with the
 14 interim and final treatment system terms of this Decree as follows:

15 (a) For each failure to meet the obligation to install and operate the interim treatment
 16 system after October 1, 2014, as specified in Section V, Paragraph 16, per violation per day:

17 (1) 1st through 30th day after deadline - \$1,000/day

18 (2) 31st through 60th day after deadline - \$2,000/day

19 (3) Beyond 60th day - \$5,000/day

20 (b) For each failure to meet the obligations to install and operate the final treatment
 21 system after September 30, 2017, as specified in Section V, Paragraph 27, per violation per day:

22 (1) 1st through 30th day after deadline - \$1,000/day

23 (2) 31st through 60th day after deadline - \$2,000/day

24 (3) Beyond 60th day - \$5,000/day

25 (c) For each failure to comply with any interim discharge limit in Paragraph 17, \$3,000
 26 per violation per week up to fifteen weeks, and \$10,000 per week after the fifteenth week, and
 27 for each failure to comply with any interim discharge limit in Paragraph 23 of this Decree,
 28 \$3,000 per violation per day;

1 (d) For each failure to comply with any discharge (effluent) limit set forth in the NPDES
2 Permit applicable to the final treatment system, \$3,000 per violation per day unless mandatory
3 minimum penalties of the same or greater amounts for the same discharge limit are paid by
4 Defendants to the State of California within 24 months of the violation.

5 61. Defendants shall pay stipulated penalties for each failure to comply with the
6 stream restoration terms of this Decree as follows:

7 (a) For each day after August 30, 2014, or any later date that the parties agree to pursuant
8 to Paragraph 45(d), that Defendants fail to submit all necessary permit and approval applications
9 to all appropriate agencies pursuant to Paragraph 45(f).

10 (1) 1st through 30th day after deadline - \$1,000/day

11 (2) 31st through 60th day after deadline - \$2,000/day

12 (3) Beyond 60th day - \$5,000/day

13 (b) For each day that Defendants fail to complete all restoration work required in Reaches
14 19-21, 14-16 and 2-5 within one year of receipt of all necessary permits and approvals or any
15 later date that the parties agree to pursuant to Section XI:

16 (1) 1st through 30th day after deadline - \$1,000/day

17 (2) 31st through 60th day after deadline - \$2,000/day

18 (3) Beyond 60th day - \$5,000/day

19 (c) For each day that Defendants fail to complete all restoration work required in Reaches
20 6-13, and 17-18 within two years of receipt of all necessary permits and approvals or any later
21 date that the parties agree to pursuant to XI.

22 (1) 1st through 30th day after deadline - \$1,000/day

23 (2) 31st through 60th day after deadline - \$2,000/day

24 (3) Beyond 60th day - \$5,000/day

25 62. Defendants shall pay the stipulated penalty funds to the Rose Foundation in the
26 same manner and for the same purposes as specified in Paragraph 52 above.

27 63. During any period of dispute resolution where a stipulated penalty may run,
28 Defendants may request that the Court reduce or eliminate any such penalty that accrued during

1 the dispute resolution period if the Court deems that, although Defendants did not prevail in the
2 dispute, the Defendants pursued the dispute in good faith and not for purposes of delay.

3 64. Stipulated penalties are not the Plaintiff's exclusive remedy for violations of this
4 Decree. Plaintiff reserves its right to pursue any other remedies to which it is entitled, which
5 may include, but are not limited to, additional injunctive relief or statutory penalties for
6 Defendants' violations of the Decree or the Clean Water Act. The obligation to pay stipulated
7 penalties under this Decree shall not relieve Defendants from any obligation to pay penalties for
8 violations of any term or condition of any permit issued under the Act, including any NPDES
9 permit. Any amounts paid by Defendants as stipulated penalties may be asserted by Defendants
10 in response to any action requesting the imposition of additional civil penalties.

11 **X. PERFORMANCE GUARANTEE**

12 65. In order to ensure the full and final completion of the Work required in Section
13 VI, Defendants shall establish and maintain an irrevocable performance guarantee, initially in the
14 amount of \$12 million, to ensure the completion of such Work after issuance of a Work
15 Takeover Notice and determination of Work Takeover as provided for below. The performance
16 guarantee shall state it is for the exclusive benefit of the U.S. District Court, Northern District, to
17 fund the actions required by Section VI of this Decree, immediately upon issuance of Plaintiff's
18 Work Takeover determination.

19 66. The parties agree that the irrevocable surety bond set forth in Exhibit E, is an
20 acceptable form of performance guarantee for the Work to be performed as required in Sections
21 VI.

22 67. Within ten (10) days of entry of this Decree, Defendants shall execute or
23 otherwise finalize all instruments and other documents required in order to make the selected
24 performance guarantee(s) legally binding in a form substantially identical to the documents
25 attached hereto as Exhibit E, and such performance guarantee(s) shall thereupon be fully
26 effective.

27 68. In the event that Plaintiff determines at any time that a performance guarantee
28 provided by Defendants pursuant to this Section is no longer sufficient, whether due to an

1 increase in the estimated cost of completing the work required in Section VI or for any other
2 reason, or in the event that Defendants become aware of information indicating that the
3 performance guarantee is insufficient, whether due to an increase in the estimated cost of
4 completing the work required or for any other reason, Defendants, within thirty (30) days after
5 receipt of notice of Plaintiff's determination or, as the case may be, within thirty (30) days after
6 any Defendant becoming aware of such information, shall obtain and present to Plaintiff for
7 approval a proposal for a revised performance guarantee. Within thirty (30) days after receiving
8 Defendants' revised performance guarantee proposal, or within sixty (60) days after Plaintiff's
9 insufficiency determination notice, Plaintiff shall provide to Defendants its determination of the
10 additional amount of performance guarantee that is necessary to ensure completion of the work
11 required by Section VI. Defendants may dispute this determination pursuant to the dispute
12 resolution provisions of this Decree, but only after they have provided the additional amount of
13 performance guarantee consistent with Plaintiff's insufficiency determination.

14 69. In the event Plaintiff determines that Defendants have (1) ceased implementation
15 of any portion of the Work, or (2) are seriously or repeatedly deficient or late in their
16 performance of the Work, Plaintiff may issue a written notice ("Work Takeover Notice") to
17 Defendants. Any Work Takeover Notice issued by Plaintiff will specify the grounds upon which
18 such notice was issued and will provide Defendants a period of ten (10) days within which to
19 cure the circumstances giving rise to Plaintiff's issuance of such notice. Within five (5) days of
20 receipt of a Work Takeover Notice, Defendants shall establish the Permanente Creek Restoration
21 escrow account to which performance guarantee funds shall be deposited if a Work Takeover is
22 determined as described in Paragraph 70. Funds deposited into the Permanente Creek
23 Restoration escrow account shall be accessible by the Court-appointed trustee described in
24 Paragraph 70.

25 70. If, after expiration of the ten-day cure period specified above, Defendants have
26 not remedied to Plaintiff's satisfaction the circumstances giving rise to Plaintiff's issuance of the
27 relevant Work Takeover Notice, Plaintiff may at any time thereafter notify the Court,
28 Defendants, and Defendants' Guarantor in writing (which writing may be electronic) that all or

1 any portion(s) of the Work will be completed with performance guarantee funds (“Work
 2 Takeover”). Within fourteen (14) days of such notice to the Court, Defendants, and Defendants’
 3 Guarantor, Defendants’ Guarantor shall convey all funds held as a performance guarantee to the
 4 Permanente Creek Restoration escrow account. Plaintiff shall provide to the Court the names of
 5 three (3) potential trustees from which the Court may select one trustee to take all necessary
 6 measures to complete the unfinished work required by Section VI of this Decree using the
 7 performance guarantee funds deposited in the Permanente Creek Restoration escrow account.

8 71. If Plaintiff triggers a Work Takeover, and actions are undertaken to complete the
 9 Work required in Section VI, the Defendants fully release Plaintiff, any Court-appointed trustee,
 10 any independent contractor, and any of their respective officers, employees, agents, successors,
 11 or assigns from any and all claims and demands, either at law or in equity, as to the sufficiency
 12 of actions taken to complete the work required in Section VI.

13 72. When Defendants believe they have completed all Work required by this Decree,
 14 they may notify Plaintiff of their determination, which determination shall include sufficient
 15 evidence of such completion. If Defendants receive written notice from Plaintiff that the Work
 16 has been fully and finally completed in accordance with the terms of this Consent Decree,
 17 Defendants may thereafter release, cancel, or discontinue the performance guarantee. Only after
 18 Plaintiff provides such notice may Defendants release, cancel, or discontinue any performance
 19 guarantee. In the event of a dispute, Defendants may release, cancel, or discontinue the
 20 performance guarantee(s) required hereunder only in accordance with a final judicial decision
 21 resolving such dispute pursuant to the dispute resolution provisions of this Decree.

22 **XI. FORCE MAJEURE**

23 73. For the purposes of this Decree, a “force majeure event” is defined as any event
 24 arising from causes beyond the reasonable control of Defendants or any entity controlled by
 25 Defendants (including, without limitation, Defendants’ contractors and subcontractors, and any
 26 entity in active participation or concert with Defendants with respect to the obligations to be
 27 undertaken by the Defendants pursuant to this Decree), that delays or prevents or can reasonably
 28

1 be anticipated to delay or prevent compliance with the obligations of this Decree, despite
2 Defendants' best efforts to meet such deadlines. The requirement that Defendants exercise
3 "best efforts" to meet the deadlines includes using best efforts to avoid any force majeure event
4 before it occurs, and to use best efforts to mitigate the effects of any force majeure event as it is
5 occurring, and after it has occurred, such that any delay is minimized to the greatest extent
6 possible.

7 74. Without limitation, unanticipated or increased costs or changed financial
8 circumstances shall not constitute a force majeure event. The absence of any regulatory approval
9 shall not constitute a force majeure event, unless Defendants demonstrate that, as appropriate to
10 the approval: (a) they made timely and complete applications for such approval(s) to meet the
11 deadlines set forth in Sections V and VI of this Decree; (b) they reasonably complied with all
12 requirements to obtain such approval(s); (c) they diligently sought such approval, (d) they
13 diligently and timely responded to all requests for additional information, and (e) without such
14 approval, Defendants will be required to act in violation of law to meet one or more of the
15 obligations set forth in this Decree.

16 75. If any event occurs which causes or may cause a delay by Defendants in meeting
17 any deadline in this Decree, whether or not attributable to a force majeure event, Defendants
18 shall notify Plaintiff in writing within ten (10) days of the time Defendants first knew, or within
19 thirty (30) days of when Defendants reasonably should have known that the event is likely to
20 cause a delay. Defendants shall be deemed to have notice of any circumstance of which its
21 contractors or subcontractors had or reasonably should have had notice, provided that
22 those contractors or subcontractors were retained by Defendants to implement, in whole or in
23 part, the requirements of this Decree. Within fifteen (15) days thereafter, Defendants shall
24 provide in writing to Plaintiff a report containing: (a) an explanation and description of the
25 reasons for the delay; (b) the anticipated length of the delay; (c) a description of the activity(ies)
26 that will be delayed; (d) all actions taken and to be taken to prevent or minimize the delay; (e) a
27 timetable by which those measures will be implemented; and (f) a schedule that fully describes
28 when Defendants propose to meet any deadlines in this Decree which have been or will be

1 affected by the claimed force majeure event. Defendants shall include with any notice their
2 rationale and all available documentation supporting its claim that the delay was or will be
3 attributable to a force majeure event.

4 76. If Plaintiff agrees that the delay has been or will be caused by a force majeure
5 event, the Parties may stipulate to an extension of the deadline for the affected activity(ies) as is
6 necessary to complete the activity(ies). Plaintiff shall take into consideration, in establishing any
7 new deadline(s), evidence presented by Defendants relating to weather, outage schedules and
8 remobilization requirements. In the event the Parties cannot agree to the length of the extension,
9 Defendants may invoke the dispute resolution procedures set forth in this Decree.
10 Notwithstanding the foregoing, if Plaintiff finds that a force majeure event may delay
11 Defendants' compliance with the terms of this Decree for more than six (6) months, Plaintiff may
12 seek further relief from the Court to fulfill the purposes of this Decree.

13 77. If Plaintiff does not agree that the delay or anticipated delay has been or will be
14 caused by a force majeure event, it will notify Defendants in writing of this decision within
15 twenty (20) days after receiving Defendants' report alleging a force majeure event, and will not
16 extend the deadline for any activity identified in this Decree. If Defendants seek review of this
17 decision, the matter shall be resolved through the dispute resolution procedures set forth in this
18 Decree.

19 78. At all times, Defendants shall have the burden of proving that any delay was
20 caused by a force majeure event (including proving that Defendants had given proper notice and
21 had made "best efforts" to avoid and/or mitigate such event), and of proving the duration and
22 extent of any delay(s) attributable to such event.

23 79. Failure by Defendants to fulfill in any way the notification and reporting
24 requirements of this Section shall constitute a waiver of any claim of a force majeure event as to
25 which proper notice and reporting was not provided.

26 80. Any extension of one deadline based on a particular incident does not necessarily
27 constitute an extension of any subsequent deadline(s) unless agreed to by the Parties or directed
28 by this Court.

United States District Court
For the Northern District of California

1 81. If Defendants fail to perform an activity by a deadline in this Decree due to a
2 force majeure event, Defendants may only be excused from performing that activity or activities,
3 and paying stipulated penalties for such failure, for that period of time excused by the force
4 majeure event.

XII. DISPUTE RESOLUTION

5
6 82. Plaintiff and Defendants may invoke the dispute resolution procedures of this
7 Section to the extent provided for in this Decree. The dispute resolution procedures of this
8 Section shall be the exclusive mechanism to resolve such disputes with respect to such
9 provisions of this Decree.

10 83. To invoke dispute resolution, a Party must provide written notice to the other
11 party within thirty (30) days of the occurrence of the disputable event. The notice shall include
12 all reasons the Party has for raising the disputed issue. Within thirty (30) days of receiving
13 written notification, the other Party shall provide a written response and the Parties shall
14 thereafter meet and confer within ten (10) days of such response. Failure of any party to fulfill
15 this notification or response requirement shall constitute a waiver of the Party’s right to dispute
16 the issue(s).

17 84. If the Parties cannot resolve a dispute within fifteen (15) days of the Parties’ meet
18 and confer process above, the disputed issue shall be deemed to have been withdrawn unless the
19 Party that raised the dispute files a petition or application with the Court to have the Court
20 resolve the issue. Such petition or application shall include a description of the matter in dispute
21 (but shall only rely on matters previously disclosed in writing in the dispute resolution process,
22 unless information that was unavailable at the time of the filing of the initial dispute has come to
23 light), the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any,
24 within which the dispute must be resolved to ensure orderly implementation of this Decree. The
25 other Party shall have thirty (30) days from receipt of any petition or application to file a
26 response.

27 85. In judicial proceedings on any dispute under this Section, the disputing Party shall
28 carry the burdens of proof and persuasion.

1 86. The invocation of dispute resolution procedures under this Section shall not
2 extend, postpone or affect in any way any obligation under this Decree not directly in dispute,
3 unless the other Party or the Court agrees otherwise. Stipulated penalties with respect to the
4 disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the
5 dispute as provided in this Section. Notwithstanding the stay of payment, stipulated penalties
6 shall accrue from the first day of noncompliance with any applicable provision of this Decree
7 until or unless no violation is established. In the event that the Defendants do not prevail on the
8 disputed issue, stipulated penalties shall be assessed and paid as provided in Section IX.

9 87. If Defendants' invoke the dispute resolution provisions of this Decree, Defendants
10 shall pay Plaintiff's costs if Plaintiff substantially prevails, including reasonable attorney and
11 expert witness fees, associated with such dispute.

12 **XIII. FEES AND COSTS**

13 88. Defendants agree that, pursuant to Section 505(d) of the Clean Water Act, 33
14 U.S.C. §1365(d), Plaintiff is both eligible and entitled to recover its reasonable costs of litigation
15 in this action, including attorney and expert witness fees. The issue of the amount of such costs
16 is reserved. If Defendants and Plaintiff are unable to reach an agreement regarding the amount
17 of such costs, Plaintiff may petition the Court for a determination of such amount. Furthermore,
18 Plaintiff expressly reserves its right to petition the Court for recovery of additional costs and fees
19 incurred after it signs this Decree, and Defendants reserve their right to oppose any such petition.

20 **XIV. MUTUAL RELEASE AND COVENANT NOT TO SUE**

21 89. This Decree constitutes a complete and final release of all civil claims for
22 violations alleged in the Complaint through the effective date of this Decree.

23 90. Nothing in this Decree shall be construed to create any rights in or grant any
24 cause of action to any person not a Party to this Decree. The preceding sentence shall not be
25 construed to waive or nullify any rights that a person not a signatory to this Decree may have
26 under applicable law, including any regulatory agency with jurisdiction over Defendant's
27 activities at the Facility. Plaintiff expressly reserve all rights, defenses, claims, demands, and
28 causes of action that it might have against Defendants with respect to any matter, transaction, or

1 occurrence relating to the Facility that is not addressed in this Decree. Defendants expressly
 2 reserve all rights and defenses that they may have to any claim, demand, or cause of action
 3 relating to the Facility that is not addressed in this Decree. The Parties expressly reserve all
 4 rights, defenses, claims, demands, and causes of action which each Party may have against any
 5 person not a Party to this Decree with respect to any matter, transaction, or occurrence relating to
 6 the Facility. Nothing in this Decree shall be construed as a waiver of any privilege by a Party.

7 91. For the duration of this Decree, Plaintiff covenants not to sue Defendants, their
 8 officers, employees, agents, successors, or assigns for matters alleged in the Complaint. Nothing
 9 herein shall prevent Plaintiff from seeking any legal or equitable remedy to enforce the
 10 requirements of this Decree. This covenant not to sue does not pertain to any matters not alleged
 11 in the Complaint.

12 92. This Decree shall not be used to establish the liability of Defendants in any action,
 13 except to enforce the provisions of this Decree.

14 **XV. MISCELLANEOUS PROVISIONS**

15 93. **Severability.** In the event that any one of the provisions of this Consent Decree is
 16 held by a Court to be unenforceable, the validity of the enforceable provisions shall not be
 17 adversely affected.

18 94. **Construction.** The language in all parts of this Consent Decree, unless otherwise
 19 stated, shall be construed according to its plain and ordinary meaning.

20 95. **Choice of Law.** This Consent Decree shall be governed by the laws of the United
 21 States.

22 96. **Third Party Beneficiary.** This Consent Decree and its attachments are made for
 23 the sole benefit of the Parties, and no other person or entity shall have any rights or remedies
 24 under or by reason of this Consent Decree unless otherwise expressly provided for therein.

25 97. **Notices.** Any notices or documents required or provided for by this Consent
 26 Decree shall be sent by U.S. Mail, postage prepaid, and addressed as follows or, in the
 27 alternative, shall be sent by electronic mail transmission to the email addresses listed below:
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United States District Court
For the Northern District of California

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For Plaintiff Sierra Club:

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, Wyoming 82070
Tel: (307) 745-7979
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George E. Hays
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San Francisco, CA 94127
Office: (415) 566-5414
e-mail: georgehays@mindspring.com

For Defendants:

Kari Saragusa, President, Region West
Greg Knapp, Director Environmental Region West
Lehigh Hanson, Inc.
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Email: KSaragusa@lehighcement.com
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With copies sent to:

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Irving, Texas 75028
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Fax: (972) 653-6185
E-mail: michael.hyer@hanson.com

Nicole E. Granquist
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4601
Tel: 916-444-1000
Fax.: 916-444-2100
E-mail: ngranquist@downeybrand.com

Each Party shall promptly notify the other of any change in the above-listed contact information.

98. **Termination of Decree.** This Decree shall remain an enforceable order of the Court until Plaintiff agrees, or the Court determines in response to a petition by Defendants, that (a) Defendants have satisfied in full all requirements of this Decree, (b) Defendants have

1 installed all treatment systems and have demonstrated compliance with all applicable NPDES
2 permit limits for at least twelve (12) consecutive months, (c) Defendants have completed all
3 required creek restoration work, and (d) Defendants have paid any stipulated penalties due under
4 this Decree.

5 99. **Negotiated Agreement.** This Consent Decree shall be deemed to have been
6 drafted equally by the Parties, and shall not be interpreted for or against any Party on the ground
7 that any such party drafted it.

8 100. **Full Settlement.** This Consent Decree constitutes a full and final settlement of
9 this matter. The Parties expressly understand and agree that each Party has freely and voluntarily
10 entered into this Consent Decree with and upon advice of counsel.

11 101. **Integration Clause.** This Consent Decree and the attachments contain all of the
12 final terms and conditions agreed upon by the Parties relating to the matters covered by the
13 Consent Decree, and supersede any and all prior and contemporaneous agreements, negotiations,
14 correspondence, understandings, and communications of the Parties, whether oral or written,
15 respecting the matters covered by this Consent Decree.

16 102. **Modification.** This Consent Decree may be amended or modified only by a
17 writing signed by the Parties or their authorized representatives, and then by order of the Court.

18 103. **Counterparts.** The Consent Decree may be executed in one or more counterparts
19 which, taken together, shall be deemed to constitute one and the same document. An executed
20 copy of this Consent Decree shall be valid as an original.

21 104. **Authority.** The undersigned representatives of Plaintiff and Defendants are
22 authorized to execute this Consent Decree on behalf of the Party or Parties whom he/she
23 represents.

24 105. **Electronic or Facsimile Signatures.** Telecopy, pdf, and/or facsimile copies of
25 original signatures shall be deemed to be originally executed.

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XVI. NOTICE OF DECREE

106. Pursuant to 33 U.S.C. § 1365(c)(3) and 40 C.F.R. § 135.5, this Decree shall be lodged with the Court and simultaneously presented to the United States for review and comment for a period not to exceed forty-five (45) days.

107. After the review period, the Decree may be entered by the Court. If the Decree is not entered by the Court, the Parties shall retain all rights they had in this litigation before the lodging of the Decree.

108. The Parties agree to cooperate in good faith to obtain prompt review of this Decree by the United States and the Court. If the United States or the Court comment on the Decree, and as a consequence the Decree is not entered, the Parties agree to discuss such comments and attempt to make such revisions as necessary to obtain entry of the Decree.

XVII. FINAL JUDGMENT

109. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the Plaintiff and Defendants.

SO ORDERED, THIS _____ DAY OF _____, 2013.

UNITED STATES DISTRICT COURT JUDGE

United States District Court
For the Northern District of California

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1 FOR PLAINTIFF:

2 Mike Ferreira
3 Mike Ferreira
4 Sierra Club Loma Prieta Chapter
5 3921 E Bayshore Road
6 Palo Alto, CA 94303

April 4, 2013
Dated

6 Approved as to form:

7
8 Reed Zars
9 Reed Zars
10 Attorney at Law
11 910 Kearney Street
12 Laramie, Wyoming 82070
13 Tel: (307) 745-7979
14 E-mail: rzars@lariat.org

4/22/13
Dated

12
13 George E. Hays
14 George E. Hays
15 Attorney at Law
16 236 West Portal Avenue, #110
17 San Francisco, CA 94127
18 Tel: (415) 566-5414
19 E-mail: georgehays@mindspring.com

April 5, 2013
Dated

United States District Court
For the Northern District of California

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1 **FOR DEFENDANTS:**

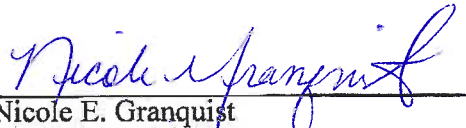
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Kari Saragusa, President, Region West
Lehigh Hanson, Inc.
12667 Alcosta Blvd., Suite 400
San Ramon, CA 94583
Tel: (925) 244-6500
Email: KSaragusa@lehighcement.com

April 22, 2013
Dated

Approved as to form:



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621 Capitol Mall, 18th Floor
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E-mail: ngranquist@downeybrand.com

April 23, 2013
Dated

United States District Court
For the Northern District of California

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EXHIBITS TO CONSENT DECREE

Sierra Club v. Lehigh Southwest Cement, 5:11-cv-06392-HRL

- Exhibit A: URS Permanente Creek profile and site layout map.
- Exhibit B: Conceptual modified trapezoidal channel cross-section.
- Exhibit C: California Department of Fish & Wildlife’s California Salmonid Stream Habitat Restoration Manual, 4th Edition (Vols. I-II, 2010) (cover page and table of contents only attached here, due to size constraints; complete document available on date of lodging at <http://www.dfg.ca.gov/fish/resources/habitatmanual.asp>).
- Exhibit D: Fish Passage Design for Road Crossings: an Engineering Document Providing Fish Passage Design Guidance for Caltrans Projects,” Caltrans 2007 (cover page and table of contents only attached here, due to size constraints; complete document available on date of lodging at <http://www.dot.ca.gov/hq/oppd/fishPassage/index.htm>).
- Exhibit E: Irrevocable surety bond.

United States District Court
For the Northern District of California