

STAFF REPORT

Date: May 15, 2019

To: TRPA Governing Board

From: TRPA Staff

Subject: Resolution of Enforcement Action: California Department of Transportation and Stewart Engineering; Failure to Install and Maintain Temporary BMPs Resulting in Material Damage to Trees and Discharge of Construction Material to Stream Environment Zone, TRPA Project ERSP2017-1037, CA Highway 89 Emerald Bay, El Dorado County, Assessor's Parcel Number 520-201-00.

Summary and Staff Recommendation:

Staff recommends that the Governing Board accept the proposed Settlement Agreement (Attachment A) in which California Department of Transportation ("Caltrans") and Stewart Engineering ("Stewart") agree to pay a \$50,000 penalty to TRPA for unauthorized site disturbance during the winter construction season at CA Highway 89 Emerald Bay, El Dorado County, Assessor's Parcel Number 520-201-00. ("Bayview Project Site").

Required Motions:

In order to approve the proposed violation resolution, the Board must make the following motion, based on this staff summary:

A motion to approve the Settlement Agreement as shown in Attachment A.

In order for the motion to pass, an affirmative vote of any 8 members of the Board is required.

Violation Description/Background:

In the fall of 2017 TRPA approved the Caltrans Bayview project which included the installation of a retaining wall to protect roadway integrity. On May 21, 2018, TRPA staff received a complaint regarding construction activities on the Bayview Project Site that included a video of a large boulder being released from the roadside and causing damage to a large sugar pine below the project. That same day, TRPA staff inspected the site and found evidence of tree damage, slope de-stabilization, and violations of the permit. Specifically, the failure to maintain the required BMPs or install additional protection resulted in sediment and boulders leaving the construction area boundary and causing damage to several trees including the large sugar pine in the complaint video. In addition to the tree damage, boulders and other construction debris were found in the stream environment zone directly below the project site.

After further investigation and discussing the issue with Caltrans and Stewart Engineering, Contractor for the Bayview project, TRPA staff determined that the unauthorized construction activities occurred in violation of the following Code Sections:

- **Material damage to trees** in violation of TRPA Code Section 61.1.5 (Any of the following activities or alterations to a live tree that would require a permit to remove; (1) topping; (2) the removal of live limbs within the upper two thirds of the total tree height; (3) girdling; (4) the application of chemicals harmful to the tree; (5) purposefully exposing the cambium layer; or (6) other damage to the tree that will potentially result in its death or disfigurement, or in a significant increase in its susceptibility to insects or disease); Code Section 33.6.1: (Vegetation shall not be disturbed, injured, or removed except in accordance with the Code or conditions of project approval during construction); Code Section 33.6.10 (All trees designated to be retained during construction shall be protected); TRPA Permit Condition 8 (Any trees to be removed shall be shown on the approved drawings. All other trees within areas of construction not shown to be removed shall be retained and protected from damage during construction. In no case shall any additional trees be removed without the written approval of the TRPA); TRPA Permit Condition 12 (Vegetation shall not be disturbed, injured or removed except in accordance with the TRPA Code or the conditions of project approval. All trees, major roots, and other vegetation, not specifically designated or approved for removal shall be protected according to methods approved by TRPA. All vegetation outside the construction site/project area boundary shall not be disturbed).
- **Failure to install and maintain temporary BMPs** in violation of TRPA Code Section 60.4.3.A (Temporary BMPs in accordance with the Handbook of Best Management Practices, and as required in Section 33.5, shall be implemented on construction sites and maintained throughout the construction period until winterization and permanent BMPs are in place); Code Section 33.6.9B (No material or equipment shall enter or be placed in the areas protected by fencing or outside the construction areas without prior approval from TRPA); and TRPA Permit Condition 6 (Temporary Best Management Practices (BMPs) are to be installed and maintained prior to excavation and during all phases of the proposed project).
- **Discharge of construction material to stream environment zone** in violation of Code Section 33.3.2.B (Indirect discharges to the waters of the region are prohibited unless controlled by discharge devices approved by TRPA); and TRPA Permit Condition 14 (The discharge of petroleum products, construction waste and litter or earthen materials to the surface waters of the Lake Tahoe Region is prohibited. All surplus construction waste materials shall be removed from the project site and disposed of at approved points of disposal).
- **Disposal of construction material without TRPA approval** in violation of TRPA Code Section 33.3.4 (The disposal of solid or liquid materials, including soil, silt, clay, sand, or other organic or earthen materials must be review and approved by TRPA).

Caltrans and Stewart have been very cooperative and explained that the release of boulders and any unauthorized disposal of material was not intentional and occurred mostly due to limitations of the project site. TRPA has a good long-standing relationship with Caltrans and feels that Caltrans has full knowledge of TRPA's BMP requirements and is responsible for all contracted work on their sites. The Settlement Agreement requires Caltrans and Stewart, as the Settling Parties, to pay a penalty of \$50,000 to TRPA. Although the details of this violation are slightly different, the Settlement is consistent with the

\$50,000 penalty issued to Tahoe Shores and the \$40,000 penalty issued to Martin Brothers Construction where both violations included failure to implement or maintain BMPs resulting in discharge or other damage to the environment.

Regional Plan Compliance:

The Tahoe Regional Planning Compact Article VI (k), Compliance, provides for enforcement and substantial penalties for violations of TRPA ordinances or regulations. The proposed resolution complies with all requirements of the TRPA Goals and Policies, Plan Area Statements, and Code of Ordinances.

Contact Information:

For questions regarding this agenda item, please contact Steve Sweet, Code Compliance Program Manager at (775) 589-5250 or ssweet@trpa.org.

Attachments:

A. Settlement Agreement

Attachment A

Settlement Agreement

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

This Mutual Release and Settlement Agreement Is made by and between California Department of Transportation (“Caltrans”), Stewart Engineering, Inc. (“Stewart Engineering”), California State Parks (“CA State Parks”), and the Tahoe Regional Planning Agency (TRPA) (hereinafter collectively referred to as the “Parties”). This Settlement Agreement represents the full and complete compromise and settlement of certain violations alleged by TRPA, as described below:

In June 2018, The Tahoe Regional Planning Agency (TRPA) inspected TRPA project ERSP2017-1037, CA Highway 89 Emerald Bay, El Dorado County, Assessor’s Parcel Number 520-201-00 (“Project”) and made the following findings (“Findings”):

- **Material damage to trees** in violation of TRPA Code Section 61.1.5 (Any of the following activities or alterations to a live tree that would require a permit to remove; (1) topping; (2) the removal of live limbs within the upper two thirds of the total tree height; (3) girdling; (4) the application of chemicals harmful to the tree; (5) purposefully exposing the cambium layer; or (6) other damage to the tree that will potentially result in its death or disfigurement, or in a significant increase in its susceptibility to insects or disease; Code Section 33.6.1: Vegetation shall not be disturbed, injured, or removed except in accordance with the Code or conditions of project approval during construction); Code Section 33.6.10: All trees designated to be retained during construction shall be protected); TRPA Permit Condition 8 (Any trees to be removed shall be shown on the approved drawings. All other trees within areas of construction not shown to be removed shall be retained and protected from damage during construction. In no case shall any additional trees be removed without the written approval of the TRPA); TRPA Permit Condition 12 (Vegetation shall not be disturbed, injured or removed except in accordance with the TRPA Code or the conditions of project approval. All trees, major roots, and other vegetation, not specifically designated or approved for removal shall be protected according to methods approved by TRPA. All vegetation outside the construction site/project area boundary shall not be disturbed).
- **Failure to install and maintain temporary BMPs** in violation of TRPA Code Section 60.4.3.A (Temporary BMPs in accordance with the Handbook of Best Management Practices, and as required in Section 33.5, shall be implemented on construction sites and maintained throughout the construction period until winterization and permanent BMPs are in place); Code Section 33.6.9B (No material or equipment shall enter or be placed in the areas protected by fencing or outside the construction

areas without prior approval from TRPA); and TRPA Permit Condition 6 (Temporary Best Management Practices (BMPs) are to be installed and maintained prior to excavation and during all phases of the proposed project).

- **Discharge of construction material to stream environment zone** in violation of Code Section 33.3.2.B (Indirect discharges to the waters of the region are prohibited unless controlled by discharge devices approved by TRPA); and TRPA Permit Condition 14: The discharge of petroleum products, construction waste and litter or earthen materials to the surface waters of the Lake Tahoe Region is prohibited. All surplus construction waste materials shall be removed from the project site and disposed of at approved points of disposal)
- **Disposal of construction material without TRPA approval** in violation of TRPA Code Section 33.3.4 (The disposal of solid or liquid materials, including soil, silt, clay, sand, or other organic or earthen materials must be review and approved by TRPA);

This Settlement Agreement is conditioned upon approval by the TRPA Governing Board. Execution of the Agreement prior to Board action shall not be binding on either party in the event that the Board does not authorize settlement on the terms set forth below:

In order to fully resolve the matter, without admitting to liability, the parties have agreed to settle the Findings set forth above. This Agreement represents full and final settlement of the Findings. In consideration of the mutual covenants set forth below, the Parties agree and stipulate as follows:

1. The California Department of Transportation and Stewart Engineering shall pay TRPA \$50,000 within 30 days of Governing Board approval of this Settlement Agreement ("Settlement Payment").
2. The Settling Parties shall restore the disturbed areas pursuant to the TRPA approved restoration plan approved in November 2018. The restoration area will be monitored for three years. If the restoration is not complete and established within 3 years a new plan will be submitted to TRPA and CA State Parks. If needed, the new plan will be implemented within 60 days of approval. It will be the responsibility of Caltrans to remove an invasive vegetation that appears from the restoration. The restoration has been inspected and found to be completed per the approved plan by both TRPA and CA State Parks. The monitoring period will be from November 16, 2018 to November 16, 2021.
3. The Parties acknowledge that all matters arising out of the above-referenced Findings by TRPA on the Project are fully compromised and settled. Effective upon receipt of the Settlement Payment and upon restoration of the disturbed areas as set forth in paragraph 2 above, including the monitoring period, TRPA hereby releases and forever

discharges Caltrans and its divisions, departments, agencies, administrators, successors and assigns, and each of their respective past, present and future employees, attorneys, insurers, agents, representatives, offices, and directors and Stewart Engineering and its officers, directors, shareholders, partners, subsidiaries, successor and assigns from any and all liability arising from the above Findings.

4. The Parties to this Agreement have been advised or have had the opportunity to be advised by their legal counsel with respect to the terms of this Agreement and understand and acknowledge the significance and consequences of it. The signer of this Agreement hereby represents and covenants that he or she is authorized to execute this Agreement on behalf of the party for which he or she is signing.
5. This Agreement is binding upon all of the Parties, as well as their past and present subsidiaries, parents, divisions, affiliates, partners, successors, assigns, officers, directors, agents, servants, employees, attorneys, representatives, and beneficiaries.
6. Each party to this Agreement is to bear its own costs and attorneys' fees.
7. This Agreement contains the entire agreement between the Parties hereto. The terms of this Agreement are contractual in nature and not a mere recital. This Agreement is executed without reliance upon any representation by any person concerning the nature or extent of damages or legal liability therefor, and the signer of this Agreement has carefully read and understood the contents of this Agreement and signs the same as his or her own free act.
8. Should any dispute arise hereunder, this Agreement shall be governed by and interpreted pursuant to California law.
9. The Parties agree to execute any and all reasonable documents in furtherance of this Agreement to effectuate its terms.
10. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Delivery of an executed Agreement by one party to the other may be made by electronic transmission.

[signatures on following page]

Signed:

California Department of Transportation

Date

Stewart Engineering, Inc.

Date

Joanne S Marchetta, Executive Director
Tahoe Regional Planning Agency

Date