

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement Order
No. R1-2008-0096

For

Mr. Robert O'Brien
APN 061-040-047
Graton

Sonoma County

The California Regional Water Quality Control Board, North Coast Region (Regional Water Board), finds that:

1. Mr. Robert O'Brien (hereinafter Discharger) owns approximately 61 acres of land at 9170 Occidental Road, Graton, identified as Sonoma County Assessor's Parcel Numbers 061-040-047, 130-270-005, and 061-030-015 (hereinafter Site). The Discharger has conducted unauthorized dredge and fill activities within and adjacent to a creek (hereinafter Tributary) that is tributary to Atascadero Creek; both creeks are waters of the State. The Discharger also illegally constructed a stream bypass channel that changed the hydrologic conditions of the Tributary, Atascadero Creek, and the surrounding wetland complex. The bypass channel is located within an apparent wetland area. The Discharger's activities at the Site have resulted in a threatened discharge of sediment to downstream waters of the State, in addition to draining wetlands and rerouting a creek on the Site.
2. On June 20, 2008, Regional Water Board staff (Staff) received a citizen complaint reporting heavy equipment activities in wetlands located on the Site. That same day, Regional Water Board staff inspected the Site. Staff observed the following:
 - a) Evidence that the onsite Tributary had recently been widened by an average of 8-10 feet and deepened an average of 3 feet. (Photo 1)
 - b) A 48" culvert that had been installed to provide construction equipment access across the Tributary in order to construct a drainage ditch. (Photo 2)
 - c) A drainage ditch, which is approximately 4 feet wide, 4 feet deep, and more than 200 feet long. The drainage ditch reroutes the confluence of the wetlands, Tributary and Atascadero Creek; a portion of the flows from Atascadero Creek now backflow through the Tributary to the drainage ditch; the wetlands also drain through the drainage ditch; the ditch drains to a lower portion of

Atascadero Creek. (Photo 3). None of the excavated areas were stabilized and all have the potential for discharging sediment to downstream waters.

- d) Soils excavated from the Tributary and drainage ditch were side-cast adjacent to the Tributary and ditch, filling wetlands and posing additional threatened discharges of sediment to waters of the State. (Photo 4)
3. After the inspection, Staff reported the Tributary dredging, and wetland dredging and draining, to the California Department of Fish and Game and United States Army Corps of Engineers. Representatives of those agencies advised Staff that the Discharger had neither sought nor received the required authorization under Fish and Game Code section 1600 or section 404 of the Clean Water Act for the activities that had been conducted on the Site; the Discharger also has not secured necessary permits from the Regional Water Board for those activities. These activities constitute an unauthorized discharge or threatened discharge that could adversely affect water quality in violation of various provisions of the Water Code and the Clean Water Act.
 4. The Tributary, and Atascadero Creek are tributary to the Russian River, with beneficial uses designated in the Water Quality Control Plan for the North Coast Region (Basin Plan), including:
 - a. Municipal and domestic supply
 - b. Agricultural supply
 - c. Industrial supply
 - d. Industrial service supply
 - e. Groundwater recharge
 - f. Navigation
 - g. Water contact recreation
 - h. Non-contact water recreation
 - i. Commercial and sport fishing
 - j. Warm freshwater habitat
 - k. Cold freshwater habitat
 - l. Rare, threatened, or endangered species (RARE)
 - m. Wildlife habitat
 - n. Migration of aquatic organisms
 - o. Spawning, reproduction, and/or early development
 - p. Estuarine habitat
 - q. Aquaculture
 5. The wetlands have beneficial uses designated in the Basin Plan of water quality enhancement (WQE), flood peak attenuation / floodwater storage (FLD), and wetland habitat (WET). The WQE beneficial use includes erosion control,

filtration and purification of naturally occurring water pollutants, streambank stabilization, maintenance of channel integrity, and siltation control. The FLD beneficial use helps buffer flows to receiving waters and thus prevents downstream flooding, erosion, and sediment transport. The WET beneficial use includes entire ecosystem functions provided by wetlands such as unique vegetation, fish, shellfish, invertebrates, insects, and wildlife habitat.

6. The Russian River and its tributaries are listed on the Clean Water Act section 303(d) list for a number of impairments including sediment/siltation and temperature.
7. The Basin Plan contains specific standards and provisions for maintaining high quality waters of the state that provide protection to the beneficial uses listed above. The Basin Plan's Action Plan for Logging, Construction and Associated Activities (Action Plan) includes two prohibitions:
 - Prohibition 1 - *"The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited."*
 - Prohibition 2 - *"The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited."*
8. The Action Plan states: "where investigations indicate that the beneficial uses of water may be adversely affected by waste discharges, the staff shall require the submission of Reports of Waste Discharge."
9. Section 3 of the Basin Plan contains water quality objectives that specify limitations on certain water quality parameters not to be exceeded as a result of waste discharges. The water quality objectives (pages 3-2.00 and 3-3.00) that are considered of particular importance in protecting the beneficial uses from unreasonable effects due to discharges from logging, construction, or associated activities, such as the Discharger's activities, include the following:
 - Color: Waters shall be free of coloration that causes nuisance or adversely affects beneficial uses.
 - Suspended Material: Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.

- Settleable Material: Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.
 - Sediment: The suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.
 - Turbidity: Turbidity shall not be increased more than 20 percent above naturally occurring background levels. Allowable zones within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.
10. As described above, the Discharger dredged and filled wetlands and diverted and culverted a perennial creek, adversely affecting the creek and adjacent wetland habitat at the Site (photographs enclosed). This caused soil to be discharged into the creek and wetlands, and placed where it could pass into the Tributary and wetlands, in quantities deleterious to fish, wildlife and other beneficial uses, including beneficial uses associated with wetlands, such as enhancing water quality, attenuating flood peaks, and providing flood water storage. This is a violation of Prohibitions 1 and 2 in the Action Plan, as described in Paragraph 7, above.
 11. In addition to violating Prohibitions 1 and 2, the discharges from the dredge and fill activities to the Tributary and wetlands, and to areas where additional sediment may enter the Tributary and wetlands, have created, or threaten to create, a condition of pollution. Water Code Section 13050(l) defines "pollution" as an alteration of the quality of the waters of the state by waste to a degree that unreasonably affects the waters for beneficial uses. Here, beneficial uses of the Tributary and the wetlands have been unreasonably affected by the discharge of the sediment. Such beneficial uses include not only the beneficial uses described in paragraph 9 above, but also providing habitat for aquatic species and wildlife, including rare and endangered species. The discharge of sediment into the wetlands, Tributary and associated riparian habitat, unreasonably affects these beneficial uses. The unauthorized filling activity is therefore subject to cleanup and abatement under California Water Code section 13304.
 12. Water Code section 13304, subdivision (a) provides: "Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state and creates, or threatens to create a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of

threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.”

13. Water Code section 13267, subdivision (a) provides that the Regional Water Board may investigate the quality of any waters of the state within its region in connection with any action relating to the Basin Plan. Water Code section 13267, subdivision (b) provides that the Regional Water Board, in conducting an investigation, may require a discharger to furnish, under penalty of perjury, technical or monitoring program reports. A restoration workplan required by this Order, pursuant to Water Code section 13267, is necessary to ensure that the prior harm and future threat to water quality created by the discharges described above are properly assessed, abated and controlled.
14. This is an enforcement action taken by a regulatory agency for the protection of the environment, and is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, section 21000 *et seq.*), in accordance with California Code of Regulations, title 14, sections 15308 and 15321.
15. Failure to comply with the terms of this Order may subject Discharger to an enforcement action under the Water Code, including administrative civil liabilities under Water Code section 13385, subdivision (c), in an amount not to exceed the sum of ten thousand dollars (\$10,000) per day and ten dollars (\$10) per gallon of waste discharged in excess of 1,000 gallons.
16. Any person affected by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with Water Code section 13320 and title 23, California Code of Regulations, section 2050-2068. The State Water Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Water Board, any person affected by this Order may request the Executive Officer to reconsider this Order. To be timely, such request must be made within 30 days of the date of this Order. Note that even if reconsideration is sought, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner’s legal rights. Additionally, if you choose to request reconsideration of this Order or file a petition with the State Water Board, be advised that you must comply with the Order while your request for reconsideration and/or petition is being considered.

THEREFORE, IT IS HEREBY ORDERED that, pursuant to Water Code section 13304 and 13267, the Discharger shall provide the following information and perform the following cleanup and abatement actions:

1. Cease the discharge of earthen materials, soil, and sediment to waters of the State, including the Tributary and the wetlands, and cleanup and abate, in accordance with requirement numbers 2 and 3 below, the earthen materials, soil, and sediment discharged or placed adjacent to or into wetlands, surface waters and surface water-drainage courses.
2. Submit a short-term workplan to the Regional Water Board, for Executive Officer concurrence, on or before September 1, 2008 that includes the following:
 - a. Proposed measures to be taken in the short-term to prevent any further draining of the affected wetland and any further rerouting of the Tributary. Measures to be considered include the placement of checkdams into excavated ditches to preclude discharges of ground and surface water to downstream areas.
 - b. A full U.S. Army Corps of Engineers jurisdictional delineation of all waters of the State and waters of the U.S. on all three parcels. The delineation must be performed by a qualified professional experienced in wetland delineation.
 - c. A plant survey to identify any rare and/or endangered plant and animal species on site to determine the impacts to the RARE beneficial uses of waters of the state.
 - d. An analysis of the affected area, including a determination of the extent of wetland and riparian impacts. The analysis of impacts should include the volumes of dredge removed and fill added, the types of vegetation and wildlife in the area, and the extent of impacts to those species.
 - e. A description of the Discharger's activities at the Site, including the purpose of the dredge, fill, and creek rerouting, a chronology of actions taken, future plans for the property, and how all waters of the state will be protected in perpetuity; and chronology of events related to the unauthorized dredge, fill, and creek rerouting activities.
 - f. A list, description, and plan/map showing all erosion and sediment transport control best management practices that are being implemented on the Site to prevent further discharge to/from wetlands and streams.
3. Submit a long-term workplan to the Regional Water Board, for Executive Officer concurrence, on or before October 1, 2008, that includes the following:
 - a. A restoration plan that details how the Tributary and affected wetlands will be restored to their natural conditions. The plan shall contain an engineering and biological design for any hydrological restoration components, a time schedule for restoration activities, criteria to judge the success of the restoration project, and a monitoring proposal to evaluate whether the

- restoration is successful. The restoration plan must be prepared by a professional experienced in wetland restoration and must be approved by the Executive Officer.
- b. Mitigation to account for the temporal loss of wetland habitat that has occurred because of the unauthorized filling. Such mitigation shall include restoration and/or creation of wetland habitat elsewhere in the watershed, and/or restoration and/or creation of wetland habitat in upland areas on the site, and/or the purchase of wetland mitigation credits at an approved wetland mitigation bank.
4. Following Executive Officer written concurrence, the Discharger shall implement the workplans. All work to remove/replace the fill, restore the affected wetland habitat, and mitigate for total wetland impacts shall be completed, with the exception of continuing monitoring requirements, before further construction activities commence.
 5. If the Discharger is unable to perform any activity or submit any documentation in compliance with the deadlines in this Order, the Discharger may request, in writing to the Executive Officer, an extension of the time schedule as specified. The written extension request shall describe how the delay is beyond the reasonable control of the Discharger and shall be received by the Regional Water Board no less than 15 calendar days prior to the respective deadline. An extension may be granted by the Executive Officer, for good cause, in which case this Order will be accordingly revised.
 6. This Order in no way limits the authority of this Regional Water Board to institute additional enforcement actions or to require additional investigation and cleanup at the Site consistent with the California Water Code. This Order may be revised by the Executive Officer as additional information becomes available.

Ordered by

Catherine Kuhlman
Executive Officer

July 30, 2008

Photo 1: June 20, 2008 tributary widening and deepening



Photo 2: June 20, 2008 culvert in tributary enabling construction equipment access to create drainage ditch



Photo 3: June 20, 2008 drainage ditch



Photo 4: June 20, 2008 excavated sediments side-cast into wetlands from tributary creek

