

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement and 13267 Order No. R1-2013-0007

For
Don Roberts
and
Steven G. and Taylor Whitley
for
Roads Constructed on
Mendocino County Assessor Parcel Number
APN# 014-060-26 (AKA 014-060-44)

Mendocino County
WDID# 1B12063CNME

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

1. Mr. Don Roberts is identified as the owner of the parcel of land located at 320 Branscomb Rd., in Laytonville (hereinafter Site). Mr. Roberts allegedly allowed the construction of a road through a wetland, pond and series of streams on his property. The road was allegedly constructed by Mr. Steven G. Whitley to allow Mr. Whitley and his wife, Mrs. Taylor Whitley, more direct access to the town of Laytonville from their home located at 541 Tenmile Road, in Laytonville. Don Roberts, Steven G. Whitley and Taylor Whitley are collectively referred to herein as the Dischargers.
2. The Dischargers and/or their agents have constructed a road and placed earthen materials in and adjacent to a wetland and pond and in and adjacent to Tenmile Creek and tributaries thereof, all tributaries to the South Fork Eel River, which is a water of the State and of the United States. The Dischargers' activities at the Site have resulted in discharge, and threatened discharge of sediment and debris, as described herein, to waters of the South Fork Eel River watershed.
3. On April 6, 2012, Regional Water Board staff (Staff) inspected the Site and observed the following:
 - a) Recently constructed roads comprising the placement of approximately 16,400 yds³ (24,000-32,000 tons) of earthen materials into a wetland and pond, and including 8 culverted watercourse crossings in a wetland, a pond, Tenmile Creek, and two unnamed tributaries of Tenmile Creek;
 - b) The 8 culverts are likely undersized, installed above grade, and do not appear adequate to allow the passage of all life stages of fish.

- c) The road construction and associated land disturbance activities resulted in the filling of approximately 44,000-64,000 feet² (1-1.47 acres) of wetlands and/or aquatic habitat.
 - d) During the April 6 inspection, Staff interviewed both Mr. and Mrs. Whitley, and were advised that they had constructed the road, placing the earthen fill, rock and asphalt grindings in the wetland, pond, and streams, with the permission of Mr. Don Roberts.
4. Placement of the materials used in road construction constitutes a discharge and threatened discharge of sediment and debris to waters of the State and of the United States.
5. The Water Quality Control Plan for the North Coast Region (Basin Plan) designates the following beneficial uses for the South Fork Eel River:
 - a. Municipal and domestic supply
 - b. Agricultural supply
 - c. Industrial process supply
 - d. Groundwater recharge
 - e. Freshwater replenishment
 - f. Navigation
 - g. Water contact recreation
 - h. Non-contact water recreation
 - i. Commercial and sport fishing
 - j. Cold freshwater habitat
 - k. Commercial Sport Fishing
 - l. Wildlife habitat
 - m. Rare threatened or endangered species
 - n. Migration of aquatic organisms
 - o. Spawning, reproduction, and/or early development
 - p. Estuarine habitat
 - q. Aquaculture
6. Recently constructed features on the Site have directly impacted the beneficial uses of water because of the negative or potentially negative impacts associated with the introduction of earthen material and sediment directly into a wetland, a pond, and into the channels and flood plains of three streams that likely provide fish habitat and/or that contribute to downstream fish habitat for Coho salmon, Chinook salmon, and steelhead trout. Construction of the roads has resulted in negative effects to a

number of beneficial uses including those related to fish and fisheries, aquatic habitat, and wetlands.

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 (Page 4-26 of the 2007 Basin Plan):
 - 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 federal Clean Water Act (CWA) section 301 prohibits the discharge of any pollutant to waters of the United States except for when such discharge is in compliance with sections 302, 306, 307, 318, 401, 402, and 404. In this case, the activities that led to the discharges of waste described in this Order were not conducted in compliance with sections 401, 402, and 404.
9. Construction activities that result in the disturbance of an acre or more of land are subject to the requirements of State Water Resources Control Board General Construction Storm Water Permit, Order 2009-0009-DWQ. We have no record that a Notice of Intent to comply with the Stormwater permits was filed for the road construction activities on the subject parcel.
10. Placement of fill in waters of the United States, including wetlands, ponds, and streams requires Clean Water Act section 401 Water Quality Certification from the Regional Water Board and a Clean Water Act section 404 permit from the United States Army Corps of Engineers. Anyone proposing to conduct a project that requires a federal permit or may result in a discharge to waters of the United States and/or waters of the State, including wetlands (all types), rivers, streams (including perennial, intermittent, and ephemeral streams) lakes, estuaries, harbors, bays, and the Pacific Ocean, must file an application for 401 Water Quality Certification and/or waste discharge requirements with the Regional Water Board. We have no record of such an application being filed for the road construction activities on the subject parcel.

11. 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 that are considered of particular importance in protecting the beneficial uses from unreasonable effects due to discharges from construction, or associated 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 sediment 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.
12. As described above, the Dischargers and/or their agent(s) have placed earthen materials and debris into a pond, wetland, and multiple watercourses or where it can pass into the pond, wetland, and watercourses, in quantities deleterious to fish, wildlife and other beneficial uses. This discharge violates Prohibitions 1 and 2 in the Action Plan, as described in finding 7, and violates the federal CWA, as described in findings 8, 9 and 10.
13. The conditions on the Site are therefore subject to cleanup and abatement under California Water Code (Water Code) section 13304. 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."
14. As stated in finding 7, above, the Basin Plan's Action Plan contains two separate prohibitions against the discharge or placement 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. As explained herein, the Dischargers' activities on the Site have violated both of these prohibitions and the federal CWA; therefore, the Dischargers are subject to this Order pursuant to Water Code section 13304.

15. Pursuant to Water Code §13304 (c)(1), the Regional Water Board is entitled to and can seek reimbursement for reasonable costs incurred to investigate the unauthorized discharge of wastes, to oversee cleanup of the wastes, supervising cleanup and abatement activities, or taking other remedial actions required by this Order.
16. Water Code section 13267, subdivision (a), authorizes the Regional Water Board to 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 Dischargers to furnish, under penalty of perjury, technical or monitoring program reports. A technical report, and wetland delineation, restoration and monitoring 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. Due to the importance of protecting water resources as explained herein, the costs associated with developing a restoration work plan bear a reasonable relationship to the benefits that will be realized once the work plan is implemented.
17. 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.
18. Failure to comply with the terms of this Order may subject the Dischargers to administrative civil liability, pursuant to sections 13350 of the Water Code in an amount of up to five thousand dollars (\$5,000) per day of violation or ten dollars (\$10) per gallon of waste discharged.
19. 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. Additionally, if you choose to file a

petition with the State Water Board, be advised that you must comply with the Order while your petition is under consideration.

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

1. Immediately cease all activities that cause or threaten to cause the discharge of sediment to Tenmile Creek and any other waters of the State or United States (or tributaries thereto) located on or downstream of the Site.
2. Develop an interim erosion control plan to control erosion from the constructed road, monitor the roads and watercourse crossings, and develop an inspection and reporting schedule through the winter period of October 15, 2012 through May 1, 2013. Submit the plan to the Regional Water Board Executive Officer for review and approval by **February 15, 2013**. Upon approval, implement the plan no later than **February 28, 2013**.
3. Develop and submit a technical report that includes the following details on road construction no later than **February 15, 2013**:
 - How many days were spent constructing the road;
 - A list of all contractors, and or operators that worked on the road construction;
 - How many truckloads of each construction material were imported, including earthen materials, rock, and asphalt grindings;
 - The equipment, (trucks, excavators, etc.) used to construct the road;
 - Receipts for all equipment, including excavation bulldozing and trucks used, by the Dischargers and any other contractors involved;
 - How the road was constructed and what methods were used for compaction, including what compaction standards were applied, and any other technical details identifying that the road was adequately built to support the designated use;
 - Copies of any and all plans or as builts, or diagrams used to guide road construction;
 - Method(s) used and any calculations associated with sizing the culverts;
 - Construction standards, performance standards or other guidelines used to install the culverts;
 - Source(s) of earthen material and/or rock used for road construction, including any highway construction projects, and volume(s) of material sourced from those sites/projects;
 - Source(s) and volume(s) of asphalt grindings obtained from each of those sources;
 - Copies of any contracts or agreements regarding mobilization and/or storage of earthen spoils rock or asphalt grindings from highway projects or other sources to be delivered to and/or stored at the Laytonville Quarry or the subject property; and

- Copies of receipts for the heavy equipment time and length of use in constructing the road, copies of any truck logs, or truck hauling information regarding the hauling of the earthen materials, rock, and asphalt grindings to the subject property, and/or to the Laytonville Quarry.
4. Retain a qualified licensed professional experienced in wetland, stream and aquatic restoration, erosion control, and design and construction of engineered fills, to delineate the full extent of wetlands and develop a restoration plan to remove all illegally placed earthen material and restore the functionality of the damaged wetlands, streams, and pond(s). The plan must include design and construction standards, and a monitoring plan for the following:
- a. Delineation of the extent and typing of all wetland/riparian habitats filled and/or impacted by the construction of the roads at the Site; delineation must comply with United States Army Corps of Engineers standards and requirements. The United States Army Corps of Engineers must approve the delineation as a jurisdictional determination.
 - b. The removal and stabilization of earthen fill materials, and other wastes. All material removed from State and/or federal waters must be disposed of in a proper manner and/or stabilized in a location where there is no potential for discharge. Disposal locations must be described and design standards must be provided for stabilizing removed earthen materials and debris.
 - c. Restoration of natural drainage paths in streams, wetlands, and the pond functionality including re-vegetation as necessary. The restoration plan must include: a map(s) at 1:12000 or larger scale (e.g., 1:6000) 1) delineating wetlands and 2) illustrating all restoration plan work points, watercourses, roads, spoil disposal sites, re-vegetation planting, and any other factor that requires mapping or site construction details to complete the scope of work; design and construction standards for earthen material and woody debris stabilization; soil compaction; re-planting of exposed soils; and erosion control for unanticipated precipitation during remediation.

To ensure a successful re-vegetation/earthen stabilization effort, site restoration and any necessary plantings shall be monitored and maintained (including irrigation if necessary) for five years. All tree and shrub plantings shall have a minimum of 85% success of thriving growth at the end of five years with a minimum of two consecutive years (two growing seasons) of monitoring after the removal of irrigation. In the event the re-vegetation fails and requires re-planting, the monitoring shall be extended until the 85% success rate of vegetation re-establishment is accomplished. The Dischargers are responsible for replacement planting, additional watering, weeding, invasive exotic eradication, or any other

practice to achieve these goals. In addition, the plan must include a time schedule for completing the work including receiving any necessary permits from State, County and/or federal agencies that may be required.

- d. A monitoring plan for all site remediation activities and features, to assess and demonstrate the success of sediment remediation efforts and re-vegetation. The monitoring plan must include regularly scheduled inspections for five years or until the Site is restored, vegetation is re-established, erosion is no longer ongoing and monitoring is no longer necessary. Each monitoring event must include a report within 30 days that describes the inspection findings, and provides corrective actions for any failures of the Site(s); failures include but are not limited to erosion controls and re-vegetation success. Each year an annual monitoring report shall be submitted documenting verbally and photographically any necessary mitigation and evidence of successful restoration and Site recovery, for five years or until the Site is recovered.
5. The Dischargers must submit the entire restoration and monitoring plan to the Regional Water Board by **May 15, 2013** (inclusive of wetland delineation, restoration designs, and monitoring and reporting requirements, and time schedules described herein).
6. Progress reports are due the first of each month starting **February 1, 2013**, until the completion of restoration efforts triggers the required monitoring and reporting program described above. Progress reports can be submitted via email or regular mail to Stormer Feiler (stormer.feiler@waterboards.ca.gov) and should describe the steps taken to comply with the Order, and any problems encountered that may affect the dischargers' ability to comply in a timely manner.
7. Following Executive Officer written concurrence, and consistent with the directives of and in compliance with any necessary approvals and/or permits from the California Department of Fish and Wildlife, and other agencies, the Dischargers shall implement the work plan. The Dischargers must complete all work to restore the site by **October 15, 2013**.
8. In the event that compliance with any deadlines set forth in this Order becomes impossible, despite the timely good faith efforts of the Dischargers, due to circumstances beyond the control of the Dischargers or their agents, employees, contractors, consultants and any other person acting on the Dischargers' behalf, and which could not have been reasonably foreseen and prevented or minimized by the exercise of due diligence by the Dischargers, the Dischargers shall notify the Executive Officer in writing within five (5) days of the date that the Discharger first knew of the event or circumstance that caused or would cause a violation of this Order, and in any event no later than the applicable compliance deadline. The written notice shall

describe the reason for the nonperformance and specifically refer to this Paragraph. The Dischargers shall take all reasonable measures to avoid and minimize such delays. The written notice shall also describe the anticipated length of time the delay may persist, the cause or causes of the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The determination as to whether the circumstances were beyond the control of the Dischargers and their agents will be made by the Executive Officer. Where the Executive Officer concurs that compliance was or is impossible, despite the timely good faith efforts of the Dischargers, due to circumstances beyond the control of the Dischargers that could not have been reasonably foreseen and prevented by the exercise of reasonable diligence by the Dischargers, a new final compliance deadline shall be established. Where the Executive Officer does not concur that compliance was or is impossible, the Dischargers may be subject to additional enforcement action for failure to comply with this Order.

9. 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 Water Code.

Ordered by:

Original Signed By

Matthias St. John
Executive Officer

January 15, 2013