



March 17, 2009

Sent via email and certified mail

California Regional Water Quality Control Board
Central Valley Region
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Rancho Cordova, California 95670-6114
ATTN: Sue McConnell
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**Re: Draft Cleanup and Abatement Order for El Dorado County Dept. of Transportation,
Rubicon Trail, El Dorado County**

Ms. McConnell and members of the Regional Board,

Please accept this letter on behalf of the Center for Biological Diversity (the Center), a national, non-profit organization, with over 9,700 members in California and approximately 200,000 members and online activists across the nation who care about protecting the environment. The Center is dedicated to protecting endangered species and wild places through science, policy, education, and environmental law.

We are writing to express our support for the draft cleanup and abatement order (CAO) issued on January 23, 2009 by the Central Valley Regional Water Quality Control Board (Regional Board) to the Eldorado County Department of Transportation. The Center has long been concerned about the abusive and unchecked off-road vehicle use (ORV) resulting in ongoing resource damage and ever-increasing social conflicts on the Rubicon Trail. We support the Regional Board's effort to prevent this situation from worsening even further and believe that such actions are long overdue.

If adopted, this order would be a positive first step in addressing the ORV use that is causing the degradation of water quality in the area and creating a threat to both human and environmental health, including the destruction of rare riparian habitat. In addition, this order is necessary to ensure that El Dorado County complies with laws and regulations governing the management of water quality, public trust resources, and associated biological resources. We support the adoption of the CAO and ask that it be complemented by closure of the trail until such time as a full environmental review is conducted and appropriate measures taken to avoid, mitigate and minimize impacts from future motorized use of the trail, if any.

Even if the Regional Board determines that complete trail closure is not necessary at this time, at a minimum the trail should be closed to all wet season use and any ongoing use should be limited to street legal vehicles in order to minimize the amount of erosion and subsequent sediment being discharged into waterways. Wet season use of these fragile areas is particularly damaging and largely contributes to the discharge of sediment into waters of the state and non-street legal vehicles tend to cause greater damage than street legal vehicles. These important

interim measures will have immediate and noticeable benefits to the ecosystem and the water quality.

I. The CAO is a necessary first step in curbing the negative environmental impacts of ORV use on the Rubicon Trail

Inspections conducted by the Regional Board staff during the summer of 2008 found that the Rubicon Trail has not been adequately managed, and this mismanagement has resulted in water quality impacts that include both sediment discharges to surface waters and soil and water contamination from petroleum-based automotive fluids. In this letter and the accompanying appendix we outline our concerns about the impacts to water quality and also express scientifically based concerns about other environmental impacts to the fragile species and riparian resources that are effected by ORV use of the Rubicon trail. It is our hope that the CAO will prevent, or at the very least minimize, these damaging results of inappropriate ORV use.

Sediment discharge to surface waters as a result of ORV use

According to the CAO, El Dorado County has allowed ORV users to access the Rubicon Trail throughout the year, and minimal work has been completed to effectively drain the trail surface and prevent or reduce sediment discharges to waters of the state. As a result of heavy trail use, the trail does not drain properly causing run-off from rain and snow to carry sediment to stream crossings. Water also collects in large puddles and mud bog depressions in many locations along the trail, which are continuously driven through by ORVs, thereby accelerating trail erosion and sedimentation of water bodies.

Regional Board staff conducted studies showing that sedimentation is a problem on the Rubicon Trail. A short-term sediment study was conducted along the Rubicon Trail during July and August 2008 whereby staff identified segments of the Rubicon Trail that are hydrologically connected to watercourses tributary to Loon Lake and the Rubicon River, and quantified the sediment volume along these trail segments by measuring the dust layer. Results estimate that between 75 and 100 cubic yards (or approximately 8 to 10 10-yard dump trucks) of sediment is likely discharging from the El Dorado County portion of the Rubicon Trail to waters of the state annually. According to the CAO, "this discharge has impaired or has the potential to impair beneficial uses in these waterbodies."

The results of a pebble count survey at the Ellis Creek crossing of the Rubicon Trail showed that the influx of sediment into this perennial fish-bearing stream is affecting the material downstream of the crossing, filling spawning gravels and reducing aquatic habitat. The study concludes that this has the potential to carry contaminants from vehicle operations on the trail into waters of the state and that this discharge has impaired or has the potential to impair beneficial uses in Ellis Creek. By minimizing winter use and requiring repair and restoration of the trail, the CAO would begin the process necessary to avoid future sediment discharges.

Soil and water contamination from petroleum-based automotive fluids.

In an evaluation of the impacts of ORV use of the Rubicon Trail on water quality, low levels of oil and grease were identified in water and soil samples and low levels of copper and cadmium were identified in soil samples. The study concluded that this contamination is due to motor oil, grease, and other petroleum-based fluids spilling and leaking from ORVs that have overturned or

have damaged mechanical components while traversing rocky segments of the trail. The CAO would help to stop such blatant and detrimental pollution of our limited water resources.

Other environmental impacts

In addition to water quality impacts, evidence of further degradation of the landscape is apparent when one visits the area. While in the past the trail had little or no motorized winter use, extreme vehicles now use the trail all winter and their huge tires are able to penetrate several feet of snow. The results, in terms of erosion and potential impacts to vegetation, burrowing wildlife and habitat, are devastating.

A trip to the Rubicon trail provides evidence of increased erosion, soil compaction, and damage to plants and animals. This damage is particularly apparent when the Rubicon is compared to the adjacent Desolation Wilderness. The Rubicon passes through high alpine forests identical to those in the Desolation Wilderness; the difference between the two areas is striking and appalling. The Forest Service limits use in Desolation through a quota system and a permit fee and limits winter use of other roads within the forest on a seasonal basis. The County should provide similar measures to protect water quality and other resources impacted by the Rubicon Trail.

Removing the threat of off-road vehicle abuse from this area is especially important because impacts to these resources are magnified many-fold due to the rarity of remaining riparian habitat in the arid regions of California. The remaining riparian habitat in the California is believed to represent far less than 10% of the historic riparian habitat. The Atlas of the Biodiversity of California states that a 1984 study “estimated that riparian vegetation in the Central Valley and desert regions represented from two to five percent of the pre-1850 amount.” (California Department of Fish and Game, 2003) Moreover, riparian areas support a disproportionate share of the State’s biodiversity and preservation of these vegetation communities is critical to the survival of rare, sensitive, threatened and endangered plants and wildlife (California Department of Fish and Game, 2003). **(See Appendix A for a further discussion of impacts of off-road vehicles on riparian areas and the species impacted by the Rubicon trail).**

Preservation and restoration of the remaining riparian habitat is even more important when seen from a regional and statewide perspective. The CAO is extremely important in this sense as well because protecting water quality will also result in maintaining and enhancing the riparian habitat and riparian-dependent resources. The CAO is thus consistent with the science, as well as the laws, regulations and policies governing the sustainable use and enjoyment of public lands.

All of the above described impacts are unacceptable. They pose a risk to Californians, they may violate the Porter-Cologne Act and the federal Clean Water Act, and they are easily preventable in a number of ways. For example, the draft CAO requires that the County take all reasonable steps to cease the discharge of sediment and other wastes due to motorized use of the Rubicon Trail to waters of the state and prepare a vehicle use reduction plan to address wheeled motorized use during wet weather conditions.

A move to prevent these impacts is especially important because, regardless of the validity of the County’s claim that the Rubicon is a “county road”, the lands surrounding it include many

National Forest lands – lands that belong to all of us and make up our national heritage. These lands are being destroyed by off-roaders who refuse to stay on the trail, compounded by the failure of the County and the Forest Service to implement and enforce strong regulations. Allowing this type of damage to continue perpetuates cross country travel and the proliferation of illegal routes through the Forest and is expressly counter to the intent of the federal travel management planning rule and route designation process on National Forests in California.

Off-road groups may argue that a formal order is not necessary because the environmental impacts can be mitigated by volunteer efforts and because the off-road community can police themselves to ensure that damage does not occur. Experience has shown that this is not the case. It is important to note that Regional Board staff saw the trail *after* an asserted 30,000 volunteer man-hours were expended to mitigate impacts, so it is clear that volunteers with shovels and garbage bags after the fact are not going to solve the enormous engineering and reconstruction needs of the trail. Clearly, efforts by volunteers to pick up their own trash are well-intentioned; however these efforts cannot solve the problems caused by inappropriate use. It is also clear that no level of self-policing has worked as of yet to prevent damage or illegal behavior.

II. The CAO is necessary because inadequate management exists and this would be a first step toward ensuring the County complies with state and federal regulations and laws

In 2003, the County started the planning process for the Rubicon trail, but it was abandoned and work on the EIR/Master Plan process has stopped ostensibly due to budget constraints. A final EIR for the Rubicon Trail has not been completed to date and according to the County, there are no plans to reinstate the process.

El Dorado County has asserted ownership of the Rubicon as an “unmaintained county road.” Regardless of the validity of that claim, the County has assumed responsibility for ensuring that use of the trail does not violate water quality standards or other environmental regulations. As is evidenced by the fact that the planning process has been abandoned and by the Regional Board’s findings, the County has yet to fulfill this responsibility and is not taking meaningful steps toward doing so. The Regional Board’s CAO and the requests therein are well within the bounds of enforcement permitted under the Porter-Cologne Act.

The CAO states that:

El Dorado County has not adequately managed the Rubicon Trail for OHV use, and this mismanagement has resulted in sediment and other waste discharges to waters of the state, human sanitation problems, soil contamination of metals, and water contamination of petroleum-based fluids. Thus, the Discharger has caused or permitted waste to be discharged or deposited where it will be discharged to waters of the state. The Discharger has created or threatens to create a condition of pollution or nuisance.

As a result of this determination by the Regional Board, the requirements of the CAO are well within the bounds of what is legally valid and required according to Water Code section 13304(a) which provides that:

Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirements or other order or prohibition issued

by a Regional Water 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 the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water 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. A cleanup and abatement order issued by the state board or a Regional Water Board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

Similarly, the fact that the CAO requires the submission of an Operation and Maintenance Plan and reports regarding trail use and maintenance activities are well within the bounds of what is outlined in Water Code section 13267(b) which provides that:

In conducting an investigation specified in subdivision (a), the Regional Water Board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste outside of its region that could affect the quality of waters of the state within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the Regional Water Board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

In addition to compliance with state regulations, the adoption and implementation of the CAO by the Regional Board would ensure compliance with the Clean Water Act. The discharges of sediment into surface water on the Rubicon Trail may violate the Clean Water Act as well as the Porter-Cologne Act. The County has a duty to comply with federal law and is vulnerable to the consequences associated with failing to do so, including liability under the citizen suit provisions of the Clean Water Act, 40 U.S.C. § 1365. The Regional Board should require that El Dorado County take all steps necessary to ensure that no additional discharges and/or violations occur.

III. Adopting the CAO is a step toward protecting the health of citizens of California

The Rubicon trail receives visits from 35,000 vehicles a year and many of these occur in concentrated periods, specifically on busy holiday weekends. During these times, there is evidence of the trend by off-roaders to inappropriately dispose of human waste which eventually finds its way into the waters. For example, in 2004, the El Dorado County Board of Supervisors issued a state of local emergency due to the significant amount of human fecal waste littered

around the Spider Lake area. As a result, the Spider Lake area was closed to camping. The amount of fecal waste was determined to pose a health and safety threat to users of the trail and to streams and lakes that are tributary to the Rubicon River and the Middle Fork American River.

The fact that this has been allowed to continue unchecked for years is appalling and we support the Regional Board's action to prevent the continued degradation of this area and the surrounding watershed by issuing this CAO.

Conclusion

The historic Rubicon trail traverses a spectacularly beautiful and sensitive part of California and our National Forests including the Eldorado, the Tahoe and Lake Tahoe Basin Management Unit. A trip out to the Rubicon Trail shows the horrendous degradation that has occurred in recent years, which has increased dramatically with the introduction of "extreme vehicles," or modified trucks with specialized suspensions. A shift in use has occurred as the extremists who can afford highly specialized vehicles have driven out traditional "jeep" drivers. These rock crawlers deliberately damage the trail in order to create more challenging conditions. Wet season use of these fragile areas is particularly damaging and largely contributes to the discharge of sediment into waters of the State while non-street legal vehicles tend to cause greater damage than street legal vehicles. The current uses affect the quality of our waters and the surrounding area, as well as sensitive and rare riparian habitat.

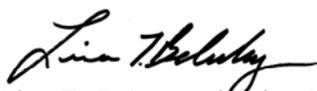
We strongly commend the Regional Board and staff for your excellent assessment of the impacts on the Rubicon from ORVs and the steps needed to stop this damage from continuing. We also commend you for finally taking action - action that in our opinion is long overdue. In short, we support the adoption of the CAO.

The CAO states that the county must take "all reasonable steps to cease the discharge of sediment and other wastes due to motorized use of the Rubicon Trail to waters of the state." "All reasonable steps" should include an *immediate closure* of the trail until specific, enforceable measures are adopted for its management. However, even if the Regional Board does not decide that a complete closure is necessary at this time, the trail should, at a minimum be closed to all winter use and any ongoing use should be limited to street legal vehicles in order to minimize the amount of erosion and subsequent sediment being discharged into waterways. These important interim measures will have immediate and noticeable benefits to the ecosystem and water quality and we urge the Regional Board to push the County to adopt these for the long-term. These measures will promote recovery of the area and provide protection of water quality.

Respectfully,



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