

PROSECUTION STAFF REPORT
CONSIDERATION OF CLEANUP AND ABATEMENT ORDER

FOR
EL DORADO COUNTY AND
UNITED STATES DEPARTMENT OF AGRICULTURE, ELDORADO NATIONAL FOREST
RUBICON TRAIL
EL DORADO COUNTY

Introduction

The Rubicon Trail is an internationally known, historic off-highway vehicle (OHV) trail in the Sierra Nevada Mountains. It was first used as a stagecoach route in the 1880's to connect two resort hotels near Georgetown in El Dorado County and Homewood at Lake Tahoe. After the resorts went out of business, the trail's condition deteriorated and in the 1953 it was used for the first Jeoper's Jamboree, the "grand daddy of all four wheeling events". Today, significant numbers of OHV enthusiasts drive the trail each year. The Rubicon Trail ranges in condition from a well-defined dirt road to granite domes, ledges, and rock debris that creates moderate to difficult passage for street legal vehicles and OHVs. A map of the El Dorado County portion of the trail is found as Attachment A to this staff report.

El Dorado County, through its Department of Transportation (DOT), currently conducts maintenance operations and is planning additional improvements to the Rubicon Trail, while the U.S. Forest Service is the fee title owner to the land underlying the Rubicon Trail right-of-way. The trail also passes through some private land, over which El Dorado County has jurisdiction. Unregulated year-round use of the trail has caused significant water quality issues. Petroleum-based automotive fluids have spilled on the trail, and a threat of contamination exists from human waste deposited along the trail. Although the OHV user groups hold workdays to maintain the trail, large segments of the trail have severe erosion and other conditions of concern, which results in sediment discharges to waters of the state after from rainfall and snow melt events.

In 2002, El Dorado County formed an ad-hoc committee to coordinate management and maintenance efforts on the Rubicon Trail. As part of this process, El Dorado County received grant funding to complete an Environmental Impact Report and Master Plan. Central Valley Water Board (Board) staff started receiving complaints from concerned citizens and environmental groups in March 2008 when El Dorado County stopped the environmental impact review process for the Rubicon Trail. In the summer of 2008, Board staff conducted field visits with concerned citizens and environmental groups, and also with El Dorado County and Eldorado National Forest staff. Board staff tried to coordinate a field visit with a representative of the OHV user groups; however, we did not receive a response to our requests. In addition, Board staff completed a short-term sediment study on a portion of the Rubicon Trail in July and August 2008 to estimate the approximate volume of sediment discharging to streams and lakes adjacent to the Rubicon Trail.

Based on our field inspections and multiple meetings with the Dischargers and interested parties, Board staff issued a draft Cleanup and Abatement Order (CAO) in January 2009 and requested comments within four weeks. Following this date, staff attended additional meetings with various stakeholders and members of the El Dorado County Board of Supervisors. During

these meetings, we received multiple requests to extend the comment period and therefore the comment period was extended an additional five weeks.

Water Quality Issues on the Rubicon Trail

According to a recent study being completed by the California Geological Survey¹, the El Dorado County portion of the Rubicon Trail crosses at least 32 watercourses (most of which are ephemeral), and approximately 6,400 feet of the trail is subject to seasonal flooding. Streams enter approximately 1,800 feet of trail and flow down it for some length. The land surrounding the Trail drains to Ellis Creek, Gerle Creek, Loon Lake, and the Rubicon River. There are also numerous other small lakes and ponds within the watershed of the Trail, and portions of the Trail runs along or through wetlands and/or boggy areas.

The California Department of Fish and Game has reviewed the biological resources in jeopardy from the existing use of the Rubicon Trail, and lists seven fish species, one frog species, and one plant as among the terrestrial and aquatic species that are at risk from water quality impacts along the trail. The Mountain Yellow Legged Frog is designated as a species of concern, and has been found in the vicinity of the trail. Stream siltation has significant impacts on several stages of this frog's life. Ellis Creek is known to contain Rainbow Trout, Brown Trout, and Golden Trout, and CDFG states that stream siltation can have a "significant adverse effect on the ability of these fish to spawn successfully." The CDFG also states that most of the seven fish at risk are also found in Loon Lake.

Water Board staff has identified three sources of water quality concerns due to use of the trail: sediment, petroleum products, and human waste. Each item is discussed below.

Sediment

The discharge of sediment is the leading water quality issue on the Rubicon Trail. Currently, OHV users drive the Rubicon Trail throughout the year. Although the user groups have spent numerous hours maintaining the trail, Water Board staff's inspections have found that there are numerous areas in which appropriate trail drainage structures have not been installed to minimize or cease sediment discharges to waters of the state. The trail has become incised due to the heavy use. Water from rainfall and snowmelt events is intercepted by the incised trail and then transported along with sediment to stream crossings. Water also collects in large puddles and mud bog depressions in many locations along the trail. These areas are continuously driven through by OHVs, thereby accelerating trail erosion and sedimentation of water bodies. Many of these puddles and bogs become hydrologically connected to the stream network when trail runoff exceeds the capacity of the depression.

Board staff completed a rapid assessment sediment study along the Rubicon Trail during July and August 2008 to document the relative magnitude of sediment delivery to stream channels. Staff identified several segments of the Rubicon Trail that are hydrologically connected to watercourses that are tributary to Loon Lake and the Rubicon River, and quantified the sediment volume along these trail segments by measuring the dust layer. With this information, staff

¹ Verbal communication from CGS staff during a meeting on 19 March 2009 to present the draft findings of its Rubicon Trail survey.

estimated that between 60 and 80 cubic yards (or approximately 6 to 8, 10-yard dump trucks) of sediment is likely discharging each year from a one-mile portion of the trail to waters of the state. This sediment discharge rate was compared to the sediment discharge rates from native surfaced logging roads and erosion from the Rubicon Trail suggests that it is an order of magnitude higher than the logging roads. The draft staff report (submitted for peer review) "*Assessment of Sediment Delivery from the Rubicon Jeep Trail, Summer 2008*" is included as Attachment A to the CAO.

Board staff also completed a pebble count survey in August 2008 at the Ellis Creek crossing of the Rubicon Trail and identified that the influx of sediment into this perennial fish-bearing stream is causing a fining of bed material downstream of the crossing. This increased sediment load can fill spawning gravels and reduce aquatic habitat, and has the potential to carry contaminants from vehicle operations on the trail into waters of the state. A complete report of the pebble count survey is included in the draft staff report (submitted for peer review) "*Assessment of Sediment Delivery from the Rubicon Jeep Trail, Summer 2008*", which is included as Attachment A to the CAO.

Human Waste

The Rubicon Trail is in a remote, rugged section of the Sierra Nevada mountains, and there are no toilet facilities along the trail. With the increased number of users over the last 50 years, the accumulation of human waste has become a large problem. In December 2001, a study was completed to evaluate human waste removal issues² on the trail. The author states that 15,000 people were counted entering the area from Loon Lake during the weekends in July, August, and September (assumed to be the year 2001), and estimated that on an annual basis, 25,000 people (measured as people-days) would use the Forest Service land portion the Rubicon Trail. The annual waste generated on public land along the Rubicon Trail would be 75,000 pounds or 8,800 gallons each year. A toilet was installed at the Loon Lake trailhead in the fall of 2008, which decreases the amount of backcountry waste to approximately 8,000 gallons annually. The author discussed the use of vault toilets, septic tanks and leach fields, dehydration and evaporation stations, and pack-it-out strategies for dealing with the human waste, and recommended the "pack-it-out" method followed by the vault toilet option. The author states that education and user acceptance is needed before people would be willing to carry containers of human waste in their vehicle in order to pack-it-out.

In July 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. 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. As a result, the Forest Service and County closed the Spider Lake area to camping for a period of time. The Forest Service has recently implemented its Travel Management Plan, and people are prohibited from driving from the Trail to areas around Spider Lake. Therefore, the number of people camping around the lake has decreased but it is assumed that the human waste impacts have moved to other areas along the trail.

² *Human Waste Removal Report* by licensed civil engineer Dan Tothoroh dated 12 December 2001. Funded by a grant from DPR OHV division.

Preliminary water quality monitoring along the Rubicon Trail was completed by El Dorado County's environmental consultant in the summer of 2005. One of four water samples collected from Spider Lake and tested positive for fecal coliform. As reported by the consultant, the fecal coliform test does not differentiate between human or animal sources; however, the sampler noted that human excrement was observed at various locations along the trail. While Water Board staff commend the County for collecting water quality samples, it is believed that the best time to collect samples would be after the "first flush" rainfall or snow melt event that would mobilize the human waste and cause it to enter waterbodies.

No public sanitation facilities are available along the Rubicon Trail or at the Ellis Creek, Spider Lake, or Buck Island Reservoir primitive camping areas, and trail users must rely on individual human waste disposal methods. Trail volunteers and County staff have provided human waste WAG (Waste Alleviation and Gelling) bags free of charge to trail users since 2003; however, the Dischargers have not initiated a program to enforce the use of WAG bags or to track their use to determine if this voluntary waste disposal method is working. During Water Board staff's trail evaluation in July and August 2008, we observed multiple areas along the trail with visible human excrement and toilet paper. In the fall of 2008, the County and Forest Service cooperatively installed a vault toilet at the Loon Lake Trailhead. Staff are encouraged that there are now toilets at each trailhead to the Rubicon, but human waste is still a major concern for the interior of the trail.

Petroleum contamination

All along the Rubicon Trail, petroleum-based automotive products have spilled onto rocks and the soil. This is especially prevalent in areas where drivers tend to tip or overturn their vehicles, or damage mechanical components while traversing rocky segments of the trail. Preliminary water quality monitoring along the Rubicon Trail is documented in El Dorado County's draft EIR. Low levels of oil and grease were identified in water and soil samples collected along the Rubicon Trail during the summer of 2005, and low levels of copper and cadmium were identified in soil samples.

During our field visits to the Rubicon Trail in July and August 2008, Board staff visually observed motor oil, grease, and other petroleum-based fluids as stains and drippings along the trail. Some spills and/or leaks are concentrated in one area as if a vehicle was parked and the fluids leaked or were drained out. In some areas like the Little Sluice Box, which is a section of the trail strewn with large boulders, the odor of petroleum-based automotive fluids is very strong and the rocks and soils are stained black from contact with tires and automotive fluids. Board staff did not conduct water quality sampling to quantify the impact. However, based on our professional judgment and on the data provided by El Dorado County's consultant, petroleum products spilled along the Rubicon Trail have impacted, and have the potential to impact, water quality.

In an effort to address the petroleum spills, El Dorado County has received grant funding from the State's used oil recycling funds to buy and hand out approximately 3,000 petroleum spill kits. In addition, the County has collected approximately 650 pounds of saturated absorbent (over three years) at the trailhead collection stations it installed. The County also prepared an educational brochure and completed a user survey to inform the OHV users of the need to clean up the spills. Board staff recognizes the work completed by the County, but believe that additional steps need to be completed to ensure that users clean up or prevent spills of

automotive fluids. For example, an OHV user group has suggested that the large boulders at the Little Sluice Box be removed. These boulders were not part of the original Rubicon Trail, but were winched into the trail by users. Because of the extreme difficulty of navigating this unnatural part of the trail, many vehicles overturn or otherwise spill fluids. The CAO requires that the Responsible Parties take additional steps to prevent spills of petroleum products, and to address the issues at Little Sluice Box.

Carrying Capacity of the Trail

An accurate count, accepted by all of the user groups, of the number of the annual or seasonal users on the Rubicon Trail has not been completed to date. El Dorado County's environmental consultant used El Dorado County's traffic counts and additional surveys, and estimated that approximately 35,000 vehicles use the Wentworth Springs and Ice House roads during the three summer months. However, this count does not represent traffic solely associated with Rubicon Trail use. Friends of the Rubicon, an OHV user group, completed a trailhead user survey during the July 4th weekend in 2005, and identified that 372 vehicles with a total of 662 people used the Rubicon Trail during the four-day weekend. As described earlier, the human waste study estimates that 25,000 people use the public portions of the trail annually.

Board staff has referred to these estimates for informational purposes; however, we realize that there is not yet consensus as to the volume of use on the trail. An accurate count of trail users is necessary for the Responsible Parties to adequately manage the Rubicon Trail, especially with regard to the issue of human waste. The Order requires the Responsible Parties to complete a trail user count during 2009 and 2010.

Actions by Other Agencies

Cease and Desist Order issued by the Lahontan Water Board

As it traverses the crest of the Sierra, the Rubicon Trail crosses from El Dorado County into Placer County, and from an area regulated by the Central Valley Water Board into an area regulated by the Lahontan Water Board. In July 1993, Lahontan Water Board staff inspected the section of the Rubicon Trail known as the McKinney-Rubicon Springs Road, and found severe damage to the road from vehicle use following spring snowmelt. In October 1993, Lahontan Water Board staff obtained samples of road runoff entering McKinney Creek and found violations of the Lahontan Basin Plan water quality objectives.

In 1994, the Lahontan Water Board issued Cease and Desist Order (CDO) No. 6-94-20, which required Placer County to cease and desist discharging wastes from the McKinney-Rubicon Springs Road in violation of the Basin Plan for the North Lahontan Basin. The CDO required Placer County to submit a water quality improvement plan within three months of the date of adoption and to implement the plan four months after the date of adoption. The plan was required to include an annual operation and maintenance plan, an annual maintenance financing plan, a capital improvement plan, and a capital improvements financing plan.

The CDO also required Placer County to implement an operational plan during the wet season or propose other acceptable actions to prevent increased discharge of waste earthen materials to McKinney Creek. This operational plan was to be implemented if Placer County was not able

to construct the capital improvements or complete the annual maintenance necessary to prevent waste from discharges to McKinney Creek.

In 2000, the Lahontan Water Board's Executive Officer issued a Notice of Violation to Placer County for violations of the CDO. Lahontan Water Board staff found that while Placer County constructed improvements on the lower portion of the Rubicon Road in 1994 -1997, the County did not complete improvements on the upper section of the road. In response, Placer County submitted a repair, reconstruction and water quality improvement plan for the Rubicon Road in June 2001 and implemented the plan during the summer of 2001, with the help of the OHV user group Friends of the Rubicon.

In October 2001, Placer County submitted an annual operation and maintenance plan committing to monitor and maintain the improvements with the help of the Lake Tahoe Hi-Lo's 4-Wheel Drive Club and the Friends of the Rubicon. Based on this information, the Lahontan Water Board rescinded the CDO.

Although Placer County does not formally close access to the Rubicon Trail in the winter, in effect, it is closed through the County's snow removal actions. The McKinney-Rubicon trailhead is accessed through a housing development, and Water Board staff understands that as the County clears snow in the area, a large wall (10-12 feet high in a normal year) of snow forms at the trailhead. In effect, people cannot access the Rubicon Trail from the Placer County side until there is significant snowmelt. Because the first two miles of the trail were paved as a result of the CDO, driving on this section of the trail during the wet conditions created by snowmelt should have less impact on water quality than driving on a dirt road.

U.S. Forest Service

The U.S. Forest Service is in the process of developing and implementing "travel management plans" for its various forests. In April 2008, the Eldorado National Forest was one of the first to complete its travel management plan, in compliance with a Federal court order³. In January 2009, the Eldorado National Forest began implementing the plan, which includes (a) restricting all motor vehicles to designated roads and trails and (b) a seasonal closure of all dirt roads and trails between January 1 and March 31 of each year. The seasonal closures may last longer if the roads or trails are wet and susceptible to damage. The Eldorado National Forest's website explains the need for the closure: *"During the winter and spring months vehicle use on dirt roads and trails is prohibited. Use of soaked roads and trails contributes to sedimentation of streams and costly trail damage that can be prevented by avoiding use when trails are holding water. By allowing roads and trails to dry sufficiently, users will ensure quality trail opportunities in the future."*

According to some of the comment letters, this seasonal closure has an impact on the OHV community as it restricts the trails that may be driven during the winter. However, Board staff understands that there are numerous paved, non-plowed roads within the Eldorado National Forest. These paved roads are not closed during the winter, and OHV users are free to drive on the snowpack on top of these roads.

³ Case Civ-S-02-0325 Lkk/Jfm, August 16, 2005, Senior Judge Lawrence K. Karlton, Eastern Court of California

The Eldorado National Forest also manages the Rock Creek recreational trail system near Georgetown. This area has been used by OHV enthusiasts, as well as other forest users, since the 1950s. The Forest has completed a decades long environmental and planning process to improve the OHV recreational management within the Rock Creek area. In order to protect damage to the resources, including surface waters, the Eldorado Forest closes the Rock Creek trails when there are wet weather conditions. This closure is not based on specific dates, but on the amount of rain or snow. The trail is closed to all OHVs, bicycles, and equestrians when there is 0.5 inches of rain in a 24-hour period for first rain event, over 1.5 cumulative inches of rain during wetter conditions, or a major snow event. The trails are reopened 24-hours after a first rain event, 48-hours after the snow melts, or after assessments have determined that the trails are reasonably safe to use. While the rest of the Eldorado Forest follows the date-specific seasonal closure of non-paved roads described above (from Jan 1 to March 31), Rock Creek follows this more labor-intensive closure process that is dependant upon the weather and snow melt. This allows users more access to dirt trails during a dry winter. It has been suggested that the Rubicon Trail be closed seasonally based on the weather, following the same procedure as at Rock Creek.

The Eldorado National Forest is not alone in implementing a travel management plan with seasonal closures. The USFS Lake Tahoe Basin Management Unit also has implemented seasonal closures to roads and trails, and other national forests in California that are currently developing their travel management plans include seasonal road closures in their analysis of alternatives.

Dept of Parks and Recreation, OHMVR Division

The Off-Highway Motor Vehicle Recreation (OHMVR) Division of California State Parks is guided by the Public Resources Code Section 5090.01, et seq. to “expand, add to, and manage existing areas, facilities, and opportunities according to the standards and provisions in the OHMVR Act so as to sustain lands for off-highway motor vehicle recreation”. The program achieves this purpose through working collaboratively with agencies and organizations throughout the state, providing advice, consultation and financial assistance, developing regulations and standards (e.g. the soil standard) and managing the State Vehicular Recreation Areas (SVRAs).

Financial assistance is provided through the Grants and Cooperative Agreements Program to local, state, federal agencies, tribal governments as well as nonprofit organizations and educational institutions. The two agencies responsible for managing the Rubicon Trail (US Forest Service and El Dorado County), as well as volunteer organizations who work to support responsible trail use, have a history of participation and funding through this program. A review of grants allocated for Rubicon Trail work between 1984 and 2006 shows that the OHV division provided approximately \$675,000 for maintenance and other activities on the Placer County portion of the Rubicon, and approximately \$1.2 million for maintenance and other activities on the El Dorado County portion of the Rubicon Trail. Since that time, OHV has awarded additional grants to El Dorado County for work on the Rubicon Trail.

Within El Dorado County, grants have allowed for construction of a group campsite, easement access, County acquisition of land, operation and maintenance activities, purchase of vehicles

for the sheriff's department, seasonal law enforcement patrols, development of a trail map, visitor monitoring and surveys, installation of the Loon Lake kiosk, implementation of the Master Plan process, engineering and environmental documentation for bridge crossings of Gerle Creek and Ellis Creek, and installation of a toilet at the Loon Lake trailhead.

California Geological Survey

The California Geological Survey (CGS) works cooperatively with the OHMVR Division on land management projects involving geology, soils, and erosional processes. For example, CGS assesses road and trail networks on State Park lands and on lands with OHV use. In the summer of 2008, CGS received funding from the OHMVR Division to conduct an assessment of the El Dorado County portion of the Rubicon Trail. The project includes a GPS survey, and an assessment of the trail-related erosion and sedimentation issues. Trail segments and water crossings have been prioritized on a high-medium-low basis for maintenance work, and the draft report proposes several alternate bypasses to move the trail away from areas with high water quality impacts. The project also includes a customizable GIS database and the ability to integrate pictures of trail conditions at specific locations, allowing a determination of the changes in the trail over time. El Dorado County has stated that it will use the trail assessment as the basis for a comprehensive maintenance plan. Water Board staff understand that the OHV user groups will also use the trail assessment to guide their volunteer work.

Actions by El Dorado County

As described in its comment letter, "El Dorado County in the past has voluntarily spent its time and money improving the Rubicon Trail to decrease the adverse effects of users, utilizing public monies from its general fund, grants awarded by the OHMVR Commission, and funds from other sources."

The County formed the Rubicon Oversight Committee (ROC) in June 2002 as an ad-hoc committee that is supported County staff. The general purpose of the ROC is to provide a forum for the County and other interested parties to engage in coordination of management and maintenance efforts associated with the Rubicon Trail. The ROC has met on a monthly basis since its formation and has worked on a variety of Rubicon Trail related issues such as trail signage, winter use, sanitation and the Rubicon Trail Master Plan (discussed below). All ROC meetings are open to the public. Currently, the ROC serves as an advisory body to the County's Department of Transportation.

El Dorado County received approximately \$400,000 in grant funds from the OHMVR Commission to complete a Rubicon Trail Master Plan (including an environmental impact document). The County began the planning process by releasing the Rubicon Trail Phase I Report in June 2003. After four years of work, on 9 October 2007, El Dorado County distributed the Draft EIR (also referred to as the Rubicon Trail Master Plan) for public review and comment. In the Draft EIR, El Dorado County identified the following tasks under Alternative A:

- The trail would be closed to recreational vehicles from November 1 to April 30 if El Dorado County and Rubicon Oversight Committee representatives determined that there is a potential for soil erosion to occur during saturated soil conditions.

- County would determine a carrying capacity for the Rubicon Trail within the first five years of plan implementation.
- The County would develop a Trail Use Agreement (TUA) document and sticker which would be issued to individuals who purchase and commit to the TUA. The TUA would form a legally binding contractual commitment between trail users and the County and would be effective for one season.
- The TUA fee would be determined annually by the County and would be based on the actual costs associated with Rubicon Trail management activities and projects.
- The County would develop an ordinance proclaiming that trail modifications without the written approval of, and authorization from, the County DOT is in violation of the County Code.
- The County would implement the “pack-it-in, pack-it-out” policy which requires the users dispose of their own solid waste, including human waste, motor oils, and lubricants.
- Pending available funding the County, in cooperation with the USFS, would continue to identify appropriate locations and technologies for additional toilet facilities along the trail
- The County would install bear-proof solid waste and portable sanitation disposal bins at the Loon Lake Kiosk and Wentworth Springs Trailhead.
- Contents of the solid waste and portable sanitation disposal bins and/or toilet facilities would be disposed of/maintained by the County or its contractors on a weekly basis or as needed during high-use periods.

Alternative B of the Draft EIR was developed by El Dorado County after more than a year of internal County agency review of the Consultant-Recommended Draft RTMP. Alternative B identified fewer management responsibilities than Alternative A, and contained the following elective elements as resources allowed: an ordinance regarding trail modification as discussed above; requiring users to utilize the “pack-it-in, pack-it-out” policy and to carry an oil spill kit when operating vehicles and equipment on the Trail; and identification of appropriate locations and technologies for additional toilet facilities along the trail.

El Dorado County has recently commented that the Draft EIR and Rubicon Trail Master Plan were developed by the County’s consultant and had not been vetted for legality, and that therefore many of the items listed in the draft EIR, including restricting vehicle use, requiring permits, or requiring payment of fees, are not legally feasible. However, Board staff does not believe that this statement is consistent with the Rubicon Oversight Committee’s meeting minutes. The July 2006 ROC minutes include the following statement, “...the Administrative Draft EIA (Admin DEIR) had been circulated to various County departments, including County Counsel, DOT and General Services.” All the ROC minutes thereafter in 2006 contains a discussion regarding County review of the CEQA documents. The February 2007 ROC minutes contain the following, “...the unified set of County comments was being prepared and would be

submitted to ESP in the next week. ESP would then provide the County with a revised Administrative Draft EIR which would be reviewed by the County. Following County review and approval of the revised Admin DEIR the Draft EIR would be released for the 45-day public comment period." The DEIR was released for public review in October 2007. It would appear that the County reviewed the CEQA documents for more than a year and had an input to their development, including the legality of a seasonal closure.

Actions by the Rubicon Trail Foundation

The Rubicon Trail Foundation is a non-profit, public benefit corporation that was established in 2004 with a "sole purpose of enhancing the health and use of the Rubicon Trail, while ensuring responsible motorized year-round access to the Trail." The Foundation provides a source of funds for projects on the Rubicon Trail and acts as a liaison with governmental agencies and the OHV user group, Friends of the Rubicon. As detailed in its comment letter, RTF (in conjunction with El Dorado County, the USFS, and others) has completed numerous actions on the Rubicon Trail since 2002, including: moving a portion of the Ellis Creek Intertie away from a wetland area, maintenance on the Walker Hill portion of the trail, installation of trail signs, maintenance on the Wentworth Springs campground and nearby trail section, repairing a bypass around Little Sluice, maintenance on the Gatekeeper portion of the trail, installation and maintenance of a kiosk at the Loon Lake trailhead, human waste clean-up at Spider Lake, restoration of Miller Creek to its original channel, removal of a log-jam at the Rubicon River bridge, performance of a traffic survey, transportation for County personnel to obtain water samples, organizing tours for law enforcement officials and other government officials, definition of Trail parking areas, blocking an unauthorized bypass near Cadillac Hill, maintenance at Potato Patch, maintenance at Miller Lake, installing range fences to block illegal bypasses, maintenance on the Barker trail junction, surveyed the trail for future projects, realigned an ephemeral creek drainage on upper Cadillac Hill, and performed maintenance on lower Cadillac Hill.

Legal Issues

The delineation of responsibility between El Dorado County and the Department of Agriculture, Eldorado National Forest, is complicated due to the fact that the road currently exists as a right-of-way created pursuant to a federal statute known as Revised Statute 2477 (RS 2477). This law, when enacted by Congress in 1866, was an open grant to the public of rights-of-way over federal lands, which were to assist in the settlement of the western frontier. Although similar in some respects to easements created under state law, the legal dimensions of the property interest created by the acceptance of an RS 2477 grant remain murky.

What is clear, however, is that El Dorado County and the federal government share the primary responsibility for the maintenance and management of the Rubicon Trail. The County, in addition to affirmatively acting to maintain and manage the roadway, has made resolutions affirming the status of the Rubicon Trail as a non-maintained public road in El Dorado County. Eldorado National Forest, because it owns the land underlying the right-of-way, in addition to owning most of the land immediately adjacent to the Rubicon Trail (where a significant amount of the threats to water quality originate), shares in the responsibility for the water-quality related effects that use of the trail has on waters of the state.

Public Comments on the Draft Cleanup and Abatement Order

The Draft CAO was released for public review on 23 January 2009. The public comment period closed 67 days later, at 8:00 a.m. on 1 April 2009. The adjudicatory team extended the public comment period for the US Forest Service and the California Department of Parks and Recreation, OHMVR Division to 3 April 2009. Written comments were received from the following 18 organizations within the comment period:

- El Dorado County Department of Transportation (Discharger)
- U.S. Forest Service, Eldorado National Forest (Discharger)
- California Department of Fish and Game
- California Department of Parks and Recreation, OHMVR Division
- Public Employees for Environmental Responsibility (PEER)
- California Sportsfishing Protection Alliance (CSPA)
- Center for Biological Diversity (CBD)
- Trout Unlimited
- Rubicon Trail Foundation (RTF)
- Sierra Club, Maidu Group
- Georgetown Divide Resource Conservation District (RCD)
- Center for Sierra Nevada Conservation (CSNC)
- California Native Plant Society
- Snowlands Network
- Butte Environmental Council (BEC)
- California Association of 4 Wheel Drive Clubs (CA4WDC)
- California Trout
- Winter Wildlands Alliance

In addition, to letters from the above 18 organizations, staff received 121 separate letters from individuals and about 3,700 form letters from individuals. The Friends of the Rubicon comment package included 1,643 signed affidavits from Trail users.

Due to the volume of comments, it is not possible to attach every one to the staff report. However, copies of all individual letters and example form letters have been posted on the Water Board's website at http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/. In order to provide an overview of the types of comments received, staff have attached comment letters from the individuals and organizations that were invited to attend the informational meeting hosted by El Dorado County and the Regional Water Board on 12 March 2009. These letters are from: El Dorado County; the U.S. Forest Service, Eldorado National Forest; Rubicon Trail Foundation; California Department of Fish and Game; California Department of Parks and Recreation, OHMVR Division; California Sportsfishing Protection Alliance; Karen Schambach (representing Center for Sierra Nevada Conservation and PEER); Rich Platt; Monte Hendricks; Scott Johnston; John Stewart; Mark Richards; John Arenz; and Jacquelyne Theisen. Due to the volume of comments attached to this report, most appendices were not included. However, all appendices are found on the web site.

Staff has prepared a Response to Comments document, which is found as Attachment B to this staff report.

Requirements of the Cleanup and Abatement Order

Responsible Parties

El Dorado County and the U.S. Department of Agriculture, Eldorado National Forest have been identified as the responsible parties for the Rubicon Trail. El Dorado County asserted a right-of-way for the public over the Rubicon Trail via historic declarations and resolutions dating back to 1887, and has conducted extensive maintenance and management activities on the Trail. Under the former direction of the County Parks and now under the Department of Transportation, El Dorado County regulated activities on the trail by requiring permits for special events, forming and managing the Rubicon Oversight Committee, obtaining Rubicon Trail-related grants from the OHV Division, contracting with Environmental Stewardship & Planning, Incorporated to prepare a Draft Environmental Impact Report for the Rubicon Trail, completing road and trail maintenance near the Wentworth Springs Campground, and has obtaining a public road easement from the U.S. Forest Service for the Ellis Creek Intertie.

The U.S. Forest Service owns the majority of the land that the Rubicon Trail crosses, including most of the land underlying the right-of-way, and owns the land where many of the trail users are parking and camping. The Draft CAO only listed El Dorado County as the Discharger; however, during stakeholder meetings it was determined that the U.S. Department of Agriculture, Eldorado National Forest must be added as a responsible party because it shares responsibility for the maintenance and management of the trail El Dorado County by virtue of its ownership interest in the land and its management of the surrounding areas.

Seasonal Closure

Board staff concurs with the numerous comments that vehicle use when the Trail's soil is saturated has the potential to significantly contribute to sediment discharges into streams. We recognize that, to protect water quality, the Eldorado Forest's Travel Management Plan prohibits vehicles from driving on non-paved roads between 1 November and 31 March each year, and that these dates may be extended during wet period, for example, during a late spring snowmelt. The proposed Order requires the Responsible Parties develop a *Rubicon Trail Saturated Soil Water Quality Protection Plan* addressing the water quality impacts caused by vehicle use (excluding snowmobiles) during saturated soil conditions and during over-the-snow travel. This plan must clearly show how its implementation will protect water quality by minimizing or preventing the mobilization of sediment to surface waters. The plan should consider trail closures using hard dates (similar to those used within most of the Eldorado National Forest) or dates that are dependant upon weather conditions (such as the Eldorado National Forest's Rock Creek closure method). In addition, the plan must include an education component, an implementation component, and an enforcement component.

Long Term Management Plan

In discussions with El Dorado County and the USFS, everyone agreed that it would be beneficial to fully define the responsibility of each party with regard to the Rubicon Trail. The draft CAO required submittal of an Operations and Maintenance Plan; that task has been modified to require the submittal of a Long Term Management Plan. A number of the tasks are

the same as those listed in the draft Order, although the language may have been revised to provide more specificity. Several additional tasks must be completed before the Long Term Management Plan is submitted, for example, a count of the of the actual number of trail users must be concluded and the results submitted as part of the Long Term Management Plan. Another item which must be completed and submitted as part of the Long Term Management Plan is a determination regarding the location of, and width of, the Rubicon Trail. It is not possible to fully manage the trail unless it is legally defined.

Those items that can be completed in 2009, prior to submittal of the Long Term Management Plan, are now listed separately. These two items are (a) an acknowledgement of the work that El Dorado County has committed to completing in 2009, and (b) preparation of a Construction and Maintenance Procedures Plan. This plan is necessary to ensure that County, Federal, and volunteer groups construct trail improvements to recognized, effective standards.

Law Enforcement

In discussions with stakeholders, law enforcement has been identified as one of most needed elements on the Rubicon Trail. Staff understands that El Dorado County Sheriffs, Forest Service Rangers, and Forest Protection Officers have all responded to problems on the Rubicon Trail. However, due to the remoteness and slow travel along the trail, if the law enforcement is not present at the time of the incident, they are often not effective. Law enforcement problems occurring on the trail include the need for public safety, protection of property, and the protection of natural resources.

El Dorado County Sheriffs are peace officers and can enforce all county and state laws and ordinances. Forest Service Rangers are Law Enforcement Officers (LEOs); however, on non-federal lands, they can only protect federal employees and federal property. Forest Protection Officers (FPOs) do not carry firearms, and can only write citations for Code of Federal Regulations violations (including fire restrictions). According to county and federal employees, there have been incidences where county sheriffs cannot enforce county laws on federal land, and Forest Service Rangers and FPOs cannot enforce federal requirements on privately-owned lands. The Long Term Management Plan specifically requires an assessment of the number and type of law enforcement officers needed for the trail, as well as the frequency of their patrols. In addition, the Plan must include a discussion as to how this level of law enforcement will be achieved on an annual basis.

Periodic Reporting

The CAO requires the submittal of three different periodic reports. The first is a quarterly update as to the progress being made in developing the Long Term Management Plan. These updates will allow staff to monitor the progress being made, and to take any needed actions to ensure that the final product will be submitted in accordance with the CAO.

Each December, an *Annual Rubicon Trail Summary* shall be submitted. This report is include a description of trail and maintenance activities, educational activities, and enforcement activities completed during the previous season.

Each May, an *Annual Trail Maintenance and Activities Plan* shall be submitted. This report shall list the projects to be completed during the upcoming field season, including those projects

proposed to be completed by volunteer groups. The report shall also evaluate the previous year's success in preventing the deposition of human waste and cleaning up spilled petroleum products, and shall describe the activities proposed in these areas for the coming year.

Each July, an *Annual Review of the Saturated Soil Water Quality Protection Plan* shall be submitted. This report shall describe the steps taken to implement the Plan during the previous winter, how successful the implementation was in terms of protecting water quality, the types and hours of enforcement activities to ensure the success, and any proposed changes for the next winter.

Staff Summary and Recommendations

It is obvious from the thousands of comment letters that the term "Rubicon Trail" evokes a strong emotional response. Many of the OHV community have been using this trail for generations and feel a very strong connection to the land. Many of the non-motorized users have similarly strong feelings for this rugged, dramatic area of the Sierras. Water Board staff commend the OHV user groups for the thousands of hours they have spent to voluntarily maintain the trail. We also commend El Dorado County for taking the initiative to organize the Rubicon Oversight Committee in 2002, and for the many projects it has completed to maintain the trail. We also recognize the efforts undertaken by the Eldorado National Forest to manage the entire Loon Lake area for all users, motorized and non-motorized.

After reading OHV websites and blogs, Water Board staff understands that the nature of the Rubicon Trail has changed. For many in the OHV community, it is no longer about the challenge of crossing the Sierras without creating any vehicle damage, but it is a test of what an extreme vehicle can do. Damage to the vehicle is expected and possibly encouraged. Rocks have been winched into the trail to make passage harder, vehicles drive at a 45 degree angle along the incised sides of the trail, and the trail has widened in some areas as drivers seek out harder obstacles. These activities have lead to increased sedimentation and increased spills of automotive fluids, and therefore have a greater impact on water quality.

The Central Valley Water Board's mandate is to protect the waters of the state. Despite the years of voluntary efforts by the user groups and the County, the Rubicon Trail still impacts, and threatens to impact, water quality. The purpose of this Cleanup and Abatement Order is to provide a framework for management of the Rubicon Trail, and to provide a timeline for implementation. Prosecution staff recommends that the Central Valley Water Board adopt the Cleanup and Abatement Order as proposed.

Attachments: see next page

Attachments

Attachment A: Rubicon Trail map

Attachment B: Response to Public Comments

Attachment C: Representative comment letters:

- El Dorado County (three letters)
- U.S. Forest Service, Eldorado National Forest
- California Department of Fish and Game
- Rubicon Trail Foundation
- California Department of Parks and Recreation, OHMVR Division
- California Sportsfishing Protection Alliance
- Karen Schambach (Center for Sierra Nevada Conservation and PEER)
- Rich Platt
- Monte Hendricks
- Scott Johnston
- John Stewart
- Mark Richards
- John Arenz
- Jacquelyne Theisen

Note: all comments received during the public comment period may be found on the Water Board's website at http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/.

WMH/SYM/WSW: 9 April 2009
23/24 April 2009 Regional Water Board meeting