

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
LAHONTAN REGION**

**CLEANUP AND ABATEMENT ORDER  
NO. R6V-2016-0046**

**REQUIRING THE CALIFORNIA DEPARTMENT OF TRANSPORTATION DISTRICT 8  
TO CLEAN UP AND ABATE THE EFFECTS OF THE DISCHARGE OF DREDGE AND  
FILL MATERIAL TO WATERS OF THE STATE AT THE CALIFORNIA HIGHWAY 138  
WIDENING PROJECT AT SHEEP CREEK**

\_\_\_\_\_ San Bernardino County \_\_\_\_\_

The California Regional Water Quality Control Board, Lahontan Region (Water Board), finds:

**BACKGROUND**

1. The California Department of Transportation (Caltrans) is responsible for the design, construction, management, and maintenance of the State's highway system, including freeways, bridges, maintenance facilities, and related properties. Phase I of the State Route 138 Widening Project (Project) consists of widening State Route 138 from two lanes to four lanes with a median left turn lane and realignment of portions of the mainline to improve traffic operation and safety. The Project location in San Bernardino County includes the highway segment from the Interstate 15/State Route 138 interchange to the State Route 138/Acorn Road interchange near the City of Phelan. The Project is approximately 13 miles long and extends from Post Mile (PM) 15.2 to PM 2.2. Project activities involve horizontal realignment, pavement rehabilitation, drainage improvements, turning lanes, traffic system management, wildlife crossings, bridge improvements, structure widening, and an addition of a vista point.
2. On January 15, 2014, the State Water Resources Control Board (State Water Board) issued Caltrans a *Clean Water Act Section 401 Water Quality Certification for California Department of Transportation State Route 138 Widening Project Phase 1, San Bernardino, California* (401 certification) for project-related activities taking place or impacting waters of the United States. Because the Project affects waters within multiple regions, the State Water Board has responsibility for the Project. The 401 certification notes that "this Water Quality Certification applies to all aspects of the Project except for impacts to Sheep Creek and non-federal waters of the state in that vicinity. Impacts to those non-federal waters will be addressed separately through Waste Discharge Requirements."

3. On February 24, 2015, Caltrans submitted a Notice of Intent to enroll under the *General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities*, Order No. 2010-0014-DWQ (Construction General Permit). Caltrans was subsequently enrolled under the Construction General Permit on March 10, 2015. Similar to the 401 certification, the Construction General Permit applies to all aspects of the Project except for discharges from construction activities to Sheep Creek and non-federal waters of the state in that vicinity.
  
4. Staff of the Santa Ana Regional Water Quality Control Board conducted two inspections of the Project on June 5, 2015 and June 16, 2015. On September 29, 2015, staff from the State Water Board’s Office of Enforcement and Division of Water Quality conducted a follow-up inspection of the Project accompanied by staff of the Lahontan and Santa Ana Regional Water Quality Control Boards (collectively referred to as “Board staff”) and Caltrans. All inspection attendees were onsite to inspect Project activities near Sheep Creek, a non-federal water of the state. As of the September 29<sup>th</sup> inspection, individual waste discharge requirements (WDRs) had not been obtained for the work within Sheep Creek and Drainage Systems 1, 2, 3, 4, 5, and 6 (collectively referred to as “Sheep Creek project”). According to the Resident Engineer of the Project, Sheep Creek project activities began along the southern upstream side of Highway 138, on May 18, 2015. The permanent impacts to waters of the state resulting from the unauthorized activities as observed during Board staff’s September 29<sup>th</sup> inspection are tabulated below.

Drainage System	Sheep Creek	1	2	3	4	5	6	Total
<b>“Unauthorized” Permanent Impacts to Waters of the State (acres)</b>	0.0121	0.0065	0.0010	0.0083	0.0117	0.0105	0.002	<b>0.0521</b>

5. Staff observed that extensive in-channel work had been conducted within the creek bed and along banks of Sheep Creek. Staff also observed an absence of adequate best management practices (BMPs) along the banks of the creek and debris accumulation upstream of footings from previous storm events. Sediment, turbidity, and oil and grease are some of the pollutants of concern which pose a threat to waters of the state due to unpermitted Sheep Creek project activities. Furthermore, the Sheep Creek project is neither covered by the 401 certification nor the Construction General Permit as the activities are taking place in non-federal waters of the state. At the time of the September 29<sup>th</sup> inspection, Caltrans was not engaging in active construction in Sheep Creek. Rather, Caltrans indicated to Board staff that Sheep Creek project activities ceased in August 2015.

6. Subsequent to Board staff's inspection, Caltrans sent a letter to its contractor, Flatiron/Hardy & Harper A Joint Venture, on October 16, 2015. The letter acknowledges that partial work took place in five out of six drainages of Sheep Creek (Drainage Systems 1, 2, 3, 4, and 6) between June 29, 2015 and July 14, 2015. Additionally, the letter notes that all work in Sheep Creek ceased on August 26, 2015. Although Caltrans did not identify Drainage System 5 as an area where it conducted work, Board staff notes that Drainage System 5 is a water of the state and that impacts to Drainage System 5 did occur from the partial work conducted by Caltrans (also referred to as DS #59 and #59a).
7. The Sheep Creek activities conducted without first obtaining WDRs are unauthorized and activities conducted by Caltrans prior to August 26, 2015 caused or permitted waste to be discharged to waters of the state. Though Caltrans directed its contractor to cease Sheep Creek project activities, sediment from previously impacted areas (in Sheep Creek and Drainage Systems 1, 2, 3, 4, 5 and 6) remain a threat to water quality and create or threaten to create a condition of pollution, particularly during the rainy season, due to an absence of adequate erosion and sediment control BMPs as observed by Board staff during the September 29, 2015 inspection.
8. Caltrans is responsible for Phase I of the State Route 138 Widening Project. Additionally, pursuant to the Construction General Permit, the Caltrans District Director is the Legally Responsible Person (LRP) for the Project. Caltrans was also an applicant for WDRs which would establish requirements and authorize the Sheep Creek project activities. On April 20, 2016, the State Water Board received a Notice of Intent (NOI) to enroll under and comply with the terms of Water Quality Order No. 2004-0004-DWQ (General WDRs). The NOI is for impacts to waters of the state associated with the Sheep Creek project. On June 2, 2016, the State Water Board issued Caltrans a Notice of Applicability (NOA) of the General WDRs for the Sheep Creek project.
9. Though the General WDRs require Caltrans to implement compensatory mitigation for future impacts from project completion, past impacts in Sheep Creek and Drainage Systems 1, 2, 3, 4, 5, and 6 are not similarly addressed by the General WDRs. Therefore, this Order requires Caltrans to submit and implement a Compensatory Mitigation Plan for past impacts resulting from the unauthorized activities in waters of the state conducted prior to the issuance of the State Water Board's NOA and future impacts authorized by the General WDRs. One final Compensatory Mitigation Plan may be submitted to address the requirements of this Order and the General WDRs.
10. The *Water Quality Control Plan for the Lahontan Region* (Basin Plan) contains policies that the Water Board uses with other laws and regulations to protect the quality of the waters of the state within the Lahontan Region. The Basin Plan

sets forth water quality standards for surface water and groundwater's of the Region, which include designated beneficial uses as well as narrative and numerical objectives that must be maintained or attained to protect those uses. The Basin Plan can be accessed via the Water Board's website at [http://www.waterboards.ca.gov/lahontan/water\\_issues/programs/basin\\_plan/references.shtml](http://www.waterboards.ca.gov/lahontan/water_issues/programs/basin_plan/references.shtml). Sheep Creek is located within the Mojave Hydrologic Unit 628.00, El Mirage Hydrologic Area 628.10. The designated beneficial uses of surface waters within the El Mirage Hydrologic Area are provided in Chapter 2 of the Basin Plan and include MUN, AGR, GWR, FRSH, REC-1, REC-2, WARM, WILD, and RARE. Drainage Systems 1, 2, 3, 4, 5, and 6 are located within the Antelope Hydrologic Unit 626.00, Rock Creek Hydrologic Area 626.80. The designed beneficial uses of surface waters within the Rock Creek Hydrologic Area are MUN, AGR, GWR, REC-1, REC-2, WARM, and WILD.

### **LEGAL REQUIREMENTS - AUTHORITY**

11. California Water Code section 13304, subdivision (a) states in part:

*Any person...who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is...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...*

12. California Water Code section 13267, subdivision (b) states in part:

*In conducting an investigation [of the quality of any waters of the state within its region] the regional board may require any person who has discharged waste within its region...[to] furnish, under penalty of perjury, technical or monitoring program reports which the regional 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 requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.*

Water Code section 13267, subdivision (b) authorizes the Water Board to require technical and monitoring reports to investigate the quality of waters of the state within its region. The information required by this Order, including technical and/or monitoring reports, are necessary to ensure that Caltrans' past unauthorized impacts to Sheep Creek and Drainages 1, 2, 3, 4, 5, and 6 are mitigated appropriately. Based on the nature and possible consequences of the discharges described in Findings No. 1 through 10 above, the burden of providing the required reports is low and the requirement to submit a

Compensatory Mitigation Plan for past impacts is similar to the mitigation plan requirement in the General WDRs for future impacts. Therefore, the burden bears a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.

13. Pursuant to Water Code section 13304, the Water Board is entitled to, and may seek, reimbursement for all reasonable costs actually incurred by the Water Board to investigate unauthorized discharges of wastes or to oversee cleanup of waste, abatement of the effect thereof, or other remedial action pursuant to this Order.
14. This Order requires Caltrans to take necessary remedial and preventative measures to ensure that further discharges of sediment and/or sediment laden storm water from the disturbed Sheep Creek project area to Sheep Creek, a non-federal water of the state, do not occur. These remedial and preventative measures required by this Order are designed to protect water quality in Sheep Creek. This Order does not authorize Caltrans, or its contractor, to engage in construction work. Instead, the NOA and General WDRs establish requirements for Caltrans to engage in construction work moving forward.
15. **California Environmental Quality Act (CEQA) Compliance:** The issuance of this Order is an enforcement action taken by a regulatory agency and is categorically exempt from the provisions of CEQA pursuant to section 15321(a)(2), Chapter 3, Title 14 of the California Code of Regulations. Implementation of the required corrective action activities outlined by this Order are considered to be minor actions performed to assure the maintenance, restoration, enhancement, or protection of the environment and therefore generally be exempt pursuant to California Code of Regulations, Title 14, section 15308. Furthermore, Caltrans previously conducted the required environmental review for the State Route 138 Widening Project. On June 20, 2012, Caltrans completed its Initial Study with Mitigated Negative Declaration and Environmental Assessment. On January 17, 2014, the State Water Board, as Responsible Agency, approved the project and filed its Notice of Determination stating that it would not have a significant effect on the environment.

## **ORDER**

**THEREFORE, IT IS HEREBY ORDERED** that pursuant to Water Code sections 13267 and 13304, Caltrans shall take necessary remedial action to prevent discharges and threatened discharges of sediment, sediment-laden stormwater, and other construction-related constituents of concern, to waters of the state. Caltrans shall comply with the General WDRs subject to the conditions set forth in the NOA issued on June 2, 2016. In relation to this Order, Caltrans shall comply with the following provisions of this Order:

1. Implementation of Best Management Practices:

1.1 Effective immediately upon issuance of this Order, Caltrans shall implement and maintain the erosion and sediment controls described in Section 500.3 "BMP Selection for Erosion and Sediment Control" of its *Storm Water Pollution Prevention Plan (SWPPP) for Widening Highway, Bridges and Construction Retaining Walls on Route 138* at the Sheep Creek project site during periods of active and inactive construction as described in Attachment D to Order 2009-0009-DWQ and as amended by Order 2010-0014-DWQ.

1.2 Effective immediately upon issuance of this Order, Caltrans shall continuously implement effective handling, storage, use, and disposal practices described in Section 500.4 "BMP Selection for Construction Site Management" of its *Storm Water Pollution Prevention Plan (SWPPP) for Widening Highway, Bridges and Construction Retaining Walls on Route 138* at the Sheep Creek project site during periods of active and inactive construction as described in Attachment D to Order 2009-0009-DWQ and as amended by Order 2010-0014-DWQ.

2. Compensatory Mitigation Requirements:

2.1 By August 1, 2016, Caltrans shall submit the following information. The information shall be submitted in narrative form in written report and may contain plan drawings or schematics as attachments to the written report. The report shall include:

2.1.1 Proposed compensatory mitigation for the Sheep Creek project to compensate for the 0.0521 acres of permanent impacts to waters of the state that resulted from construction activities that occurred prior to coverage under the General WDRs.

2.1.1.1 If Caltrans intends to satisfy the compensatory mitigation requirement through Transition Habitat Conservancy, it must submit the following minimum information:

- 2.1.1.1.1 Transition Habitat Conservancy point of contact information to include: name and title, phone number, email address, and mailing address;
  - 2.1.1.1.2 A detailed map and delineation of the waters of the state proposed for preservation;
  - 2.1.1.1.3 A copy of the proposed land protection instrument, e.g. a deed restriction or conservation easement;
  - 2.1.1.1.4 A long-term management plan for the proposed mitigation lands; and
  - 2.1.1.1.5 The quantity and cost of the mitigation lands proposed for purchase, including funding of long-term management.
- 2.1.1.2 If Caltrans does not intend to satisfy the compensatory mitigation requirement through the Transition Habitat Conservancy, it must submit a comprehensive plan as outlined and required by 40 CFR § 230.94, subdivision (c) or 40 CFR 230.94, subdivision (c)(5) and (6) only for mitigation bank or in-lieu fee plans.
- 2.1.1.3 The Mitigation Ratio for proposed compensatory mitigation involving restoration and enhancement is 3:1. The Mitigation Ratio for proposed compensatory mitigation involving preservation is 5:1. These ratios are consistent with the ratios required under the NOA for the General WDRs.
- 2.1.1.4 Compensatory mitigation may be described in the same Compensatory Mitigation Plan for unauthorized past impact covered by this Order and future impacts authorized by the General WDRs.
- 2.1.1.5 The Compensatory Mitigation Plan is subject to State Water Board approval with Water Board concurrence.
- 2.1.2 Caltrans shall complete implementation of its Compensatory Mitigation Plan for past unauthorized impacts within six (6) months of State Water Board approval.

## General Provisions

### 3. Plan Approval and Implementation

All plans required by this Order require the Water Board staff's approval, and shall be incorporated and implemented as part of this Order whether expressly stated above or not. Any violation of an approved plan required by this Order shall be considered a violation of this Order.

### 4. Certifications for all Plans and Reports

All technical and monitoring plans and reports required in conjunction with this Order are required pursuant to Water Code section 13267 and shall include a statement by an authorized representative of Caltrans, certifying under penalty of perjury the following:

*I certify under penalty of perjury under the laws of the State of California that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

Engineered plans shall be prepared or directly supervised by, and signed and stamped by a Professional Geologist or Civil Engineer, registered in California. It is expected that all interpretations and conclusions of data in these documents to be truthful, supported with evidence, with no attempts to mislead by false statements, exaggerations, deceptive presentation, or failure to include essential information.

### 5. Submission of Documents

All reports shall be submitted electronically via email to [Lahontan@waterboards.ca.gov](mailto:Lahontan@waterboards.ca.gov) and reference the Cleanup and Abatement Order Number. In addition, all reports, work plans, etc., must be submitted in hardcopy to both the Victorville office of the Lahontan Regional Water Quality Control Board and the State Water Resources Control Board's Division of Water Quality:

Jan Zimmerman  
Lahontan Regional Water Quality Control Board  
14440 Civic Drive, Suite 200  
Victorville, California 92392



Brian Dailey  
Division of Water Quality  
State Water Resources Control Board  
1001 "I" Street, 15<sup>th</sup> Floor  
Sacramento, California 95814

7. Liability for Oversight Costs Incurred by the Water Board

Caltrans shall be liable, pursuant to Water Code 13304, to the Water Board for all reasonable costs incurred by the Water Board to investigate unauthorized discharges of waste, or to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, pursuant to this Order. Caltrans shall reimburse the Water Board for all reasonable costs associated with site investigation, oversight, and cleanup. Failure to pay any invoice for the Water Board's investigation and oversight costs within the time stated in the invoice (or within thirty days after the date of invoice, if the invoice does not set forth a due date) shall be considered a violation of this Order. If this site is enrolled in a State Water Board-managed reimbursement program, reimbursement shall be made pursuant to this Order and according to the procedures established in that program.

8. No Limitation of Water Board Authority

This Order in no way limits the authority of this Water Board to institute additional enforcement actions or to require additional investigation or implementation of remedial or preventative measures consistent with the Water Code. This Order may be revised by the Executive Officer as additional information becomes available.

9. Enforcement

Failure to comply with the requirements, terms, or conditions of this Order will result in additional enforcement action that may include the imposition of administrative civil liability pursuant to California Water Code sections 13268 and 13350, or referral to the Attorney General of the State of California for civil liability or injunctive relief. The Water Board reserves its rights to take any enforcement action authorized by law.

10. Permits or Approvals

This Order does not alleviate the responsibility of Caltrans to obtain necessary local, state, and/or federal permits to construct or operate facilities or take actions necessary for compliance with this Order. This Order does not prevent imposition of additional standards, requirements, or conditions by any other regulatory agency.

11. Right to Petition

Any person aggrieved by this action of the Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, section 2050 and following. The State Water Board shall receive the petition by 5:00 p.m., 30 days after the date this Order is issued, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition shall be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: [http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitions/water_quality) or will be provided upon request.

Ordered by:   
PATTY Z. KOUYOUMDJIAN  
EXECUTIVE OFFICER

Dated: 8/16/2016

Attachment: 1. September 29, 2015 Inspection Report