

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

CLEANUP AND ABATEMENT ORDER NO. R2-2012-0090  
CALIFORNIA DEPARTMENT OF TRANSPORTATION, DISTRICT 4

FOR THE AREA LOCATED

WEST OF STATE ROUTE 29 AND NORTH OF STATE ROUTE 37  
BETWEEN LEWIS BROWN DRIVE, BROADWAY STREET, AND STATE ROUTE 37 ADJACENT TO  
BOTH BANKS OF CHABOT CREEK  
CITY OF VALLEJO, SOLANO COUNTY

This Cleanup and Abatement Order (Order) is issued to the California Department of Transportation, District 4 (Department), based on provisions of California Water Code sections 13223, 13304, and 13267, which authorize the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), or its Executive Officer as its delegate, to issue a cleanup and abatement order.

The Regional Water Board hereby finds the following:

- 1) **Purpose of Order:** This Order requires the Department to abate the effects of vegetation removal and earthmoving activities in creek, riparian, and wetland habitat areas adjacent to and within Chabot Creek and White Slough marshes. The Department conducted unauthorized and detrimental work in and adjacent to waters of the State between September 11 and 13, 2012, that resulted in impacts to the beneficial uses of those waters. Department maintenance crews conducted this work in response to a complaint of homeless encampments in the area.
- 2) **Discharger:** The Department is the discharger and responsible party because it directed and performed aquatic and riparian habitat destruction activities. The Department submitted a report describing these activities to the Regional Water Board on October 19, 2012.
- 3) **Site Location and Description:** Habitat destruction occurred in an area west of State Route 29 and north of State Route 37, between Lewis Brown Drive and Broadway Street, in the City of Vallejo (herein referred to as the Site). Attachment A depicts the impacted areas' boundaries and habitat types at the Site (submitted by the Department as Figure 3). The Site includes riparian, riparian-upland, seasonal wetland, and seasonal wetland–freshwater marsh habitats, and an area previously established as a wetland mitigation project for a Clean Water Act section 401 water quality certification (herein referred to as the Certification Mitigation Area).

- 4) **Beneficial Uses:** The Site either drains into Chabot Creek, which drains into a freshwater marsh portion of White Slough, or directly into freshwater marsh portions of White Slough. The San Francisco Bay Basin Water Quality Control Plan (Basin Plan) identifies the following beneficial uses for White Slough: commercial and sport fishing, estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, water contact recreation, and noncontact water recreation.
  
- 5) **Site History and Regulatory Status:** The Department used the Certification Mitigation Area as compensatory mitigation for a project approved by the Regional Water Board in 2001. The Certification Mitigation Area is subject to the terms of the Clean Water Act Section 401 water quality certification issued to the Department as described below:
  - a. On June 7, 2001, the Regional Water Board Executive Officer issued the Department the Clean Water Act Section 401 Water Quality Certification and Waiver of Waste Discharge Requirements for State Route 37 improvements in the City of Vallejo (herein referred to as the Certification).
    - (1) The Certification required the Department to create 5.0 acres of seasonal wetlands and riparian habitat by 2002. The Department started implementing work in 2001, when it graded a portion of the Site (approximately 0.16 acre) for wetland creation. The wetland was not created until 2007, when the mitigation vegetation was planted.
    - (2) The Certification required monitoring of the Certification Mitigation Area for a minimum of ten years and the submittal of annual monitoring reports to the Regional Water Board. The Regional Water Board has not received any monitoring reports from the Department.
  - b. The Regional Water Board Assistant Executive Officer issued a Notice of Violation to the Department on November 20, 2012, for failure to comply with mitigation requirements.
  
- 6) **Basis of Order:** The destruction of habitat by removal of vegetation created, or threatens to create, conditions of pollution in State waters, and negatively impacts water quality beneficial uses.
  - a. The Department submitted a "Chabot Creek Resource Agency Incident Report," to the Regional Water Board on October 19, 2012. The report includes the following estimates of the habitats impacted by the vegetation removal activities: a 0.57-acre impact to riparian habitat, a 1.45-acre impact to riparian-upland habitat, a 0.70-acre impact to seasonal wetland habitat, and a 0.54-acre impact to a freshwater marsh and seasonal wetland habitat. The Department is verifying the extent of impacts and types of habitats impacted. The initial estimates and boundaries of impacted areas (Appendix A) provided in the report will be revised as necessary.

- b. Removal of vegetation (trees, shrubs, and other herbaceous layers), mechanical scraping, and disturbance of upland, wetland, creek bed and bank, and floodplain soils significantly increases the Site's vulnerability to erosion and the likelihood of detrimental discharges of sediment to State waters.
  - c. Removal of the riparian canopy not only removed a food source for aquatic life, but may also lead to higher water temperatures, increased algal growth, and lower levels of dissolved oxygen in the creek.
  - d. Removal of vegetation may have eliminated habitat used by a rare and endangered species, the California black rail. A report<sup>1</sup> prepared for the Department identified California black rail at and in the immediate vicinity of the Site.
- 7) **Technical Reports Required:** This Order requires the Department to submit technical reports to the Regional Water Board pursuant to Water Code section 13267. The reports are needed to determine the best ways to mitigate for water quality impacts in Chabot Creek and White Slough. The burden on the Department to provide these technical reports is substantially outweighed by the resulting benefits to water quality and wildlife habitat.
- 8) **CEQA:** This action is an order to enforce the laws and regulations administered by the Regional Water Board. As such, this action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to section 15321 of the Resources Agency Guidelines in Article 19, Division 3, Title 14 of the California Code of Regulations.

**IT IS HEREBY ORDERED**, pursuant to Water Code sections 13304 and 13267, that the Department, or its agents, successors, or assigns, shall clean up and abate the effects described in the findings as follows:

**A. PROHIBITIONS**

- 1) Removal of vegetation within waters of the State, or within riparian areas that provide benefit to these waters, without authorization from the Regional Water Board and other applicable resource agencies is prohibited.
- 2) Discharge of sediment-laden runoff to surface waters is prohibited.
- 3) Discharge of rubbish, refuse, or other solid wastes, or the placement of such materials at any place where they could potentially be discharged to surface waters, such as flood plain areas, is prohibited.

---

<sup>1</sup> "California Clapper Rail and California Black Rail Napa-Sonoma Wildlife Area: White Slough Unit: Year 2000 Breeding Season," dated May 3, 2000

## **B. CLEANUP AND ABATEMENT TASKS**

The submittals required in tasks 1, 2, and 3, below, shall be submitted as soon as practicable, but no later than the dates shown below. The plans required in tasks 2 and 3 shall include schedules for implementation that are as short as practicable. The proposed actions and implementation schedules are subject to the acceptance of the Executive Officer.

### **1) IMPACT ASSESSMENT**

COMPLIANCE DATE: December 17, 2012

The Department shall submit an inventory and conditional assessment of creek, riparian, and wetland habitat areas adjacent to and within Chabot Creek and White Slough marshes at the Site.

### **2) HABITAT MITIGATION AND MONITORING PLAN**

COMPLIANCE DATE: May 15, 2013

The Department shall submit a Mitigation and Monitoring Plan (Plan) to abate existing and potential impacts to State waters. The Plan shall include the following:

#### **a. Compensation for impacts to the Certification Mitigation Area**

The Plan shall include a proposal for restoration and rehabilitation, or creation, of at least 5.0 acres of wetlands and riparian habitat to mitigate for the destruction of habitat at the Certification Mitigation Area. This may involve onsite restoration and rehabilitation or an offsite proposal. If the Department proposes offsite mitigation, the proposal shall also include measures to stabilize disturbed areas onsite to prevent discharge of sediment laden runoff. Any proposed offsite mitigation shall provide a minimum of 5.0 acres of created wetland and riparian habitat, with no less than 2.5 acres of created wetland.

The Plan shall also propose an additional amount to compensate for temporal loss of habitat functions and values for the time of loss in September 2012 until completion of onsite restoration and rehabilitation or completion of offsite mitigation. This additional mitigation for temporal loss shall be located in the general vicinity of White Slough or the lower Napa River watershed.

**Hydrology** - The Plan shall establish protocols to monitor the hydrology of the mitigation wetlands and riparian habitat and establish success criteria to determine whether the wetlands and riparian habitat are fully functional. The monitoring effort shall include installation of piezometers to monitor

groundwater levels and site visits between January and April following periods when precipitation has been sufficient to saturate or flood mitigation site soils. During these site visits, soil saturation, flooding, and groundwater levels shall be documented. In addition, documentation of flood-related inundation shall be provided following significant storm events to determine site inundation depth. It may be necessary to compare results with a suitable reference wetland and riparian habitat. If the Department proposes to restore and rehabilitate the Certification Mitigation Area to meet the requirement, the Certification Mitigation Area must meet the hydrology success criteria based on a minimum of three years of monitoring using the established protocols.

**Vegetation** - The Plan shall include a planting and monitoring plan for riparian and seasonal wetland vegetation and success criteria. Monitoring of riparian forest plants shall include survival counts and growth measurements of installed plants. Monitoring shall first be conducted 90 days following plant installation and annually each August for 10 years. Seasonal wetland vegetation shall be monitored using plant percent cover estimates along permanently established transects. The success criteria shall be adequate to determine whether the vegetation is successfully established, which may include comparison with suitable reference sites. Results shall be assessed on an annual basis and compared with the success criteria to determine if mitigation goals are being met. Photographs shall also be taken at selected, permanent photo points for year-to-year visual comparison.

- b. **Mitigation for delayed Certification Mitigation Area implementation**  
The Certification required mitigation implementation no later than 2002. Mitigation implementation did not occur until approximately 2007. The Department shall propose additional mitigation for the temporal loss associated with delayed implementation. This proposal shall include appropriate elements of the hydrology and vegetation monitoring and of the success criteria described in B.2)a., above.
- c. **Mitigation for impacts outside of the Certification Mitigation Area**  
To compensate for the permanent and temporal loss of Site habitat outside of the Certification Mitigation Area, the Department shall propose to restore all impacted seasonal wetland and riparian habitats. The Department shall also propose additional riparian and wetland mitigation to compensate for temporal loss of habitat functions and values.

The Department may propose compensatory mitigation offsite if the Department provides justification, and the Regional Water Board, the California Department of Fish and Wildlife, and the U.S. Army Corps of Engineers agree

with the justification. For offsite mitigation, additional mitigation may be required.

The seasonal wetland mitigation, whether onsite or offsite, shall directly benefit the California black rail.

The Plan shall include appropriate elements of the hydrology and vegetation monitoring and of the success criteria described in B.2)a, above, and be located in the general vicinity of White Slough or the lower Napa River watershed.

### 3) **SITE REVEGETATION AND MAINTENANCE PLAN**

COMPLIANCE DATE:                      May 15, 2013

The Department shall submit a proposal to re-vegetate all disturbed areas of the Site. The Department shall also submit a maintenance plan that proposes Site maintenance activities. The proposed maintenance activities shall be fully protective of State waters. Maintenance activities shall be implemented according to the plan, or as amended by the Executive Officer.

## C. **NOTIFICATIONS AND PROVISIONS**

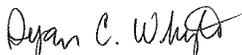
- 1) **Cost Recovery:** The Department is and shall be liable, pursuant to Water Code section 13304, to the Regional Water Board for all reasonable costs actually incurred by the Regional Water Board and associated agencies to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order. Such costs include, but are not limited to, staff time for investigation of the discharge, preparation of this Order, work to complete the directives specified in this Order, and communications between Regional Water Board staff and parties associated with the cleanup and abatement of the discharge wastes, including the Department, interested members of the public, and other regulatory agencies. If the Department 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. Any disputes raised by the Department over reimbursement amounts or methods used in that program shall be consistent with the dispute resolution procedures for that program.
- 2) **Contractor/Consultant Qualifications:** The Department's reliance on qualified professionals promotes proper planning, implementation, and long-term cost-effectiveness of investigation, and cleanup and abatement activities. Professionals shall be qualified, licensed where applicable, and competent and proficient in the fields pertinent to the required activities. California Business and Professions Code sections

6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgment be performed by or under the direction of licensed professionals.

- 3) **Report Any Changes in Ownership or Occupancy:** The Department shall file a written report on any changes in the Site's ownership or occupancy. This report shall be filed with the Regional Water Board within 30 days following a change and shall reference the number of this Order.
- 4) **Delayed Compliance:** The Department shall notify the Regional Water Board Executive Officer if it is delayed, interrupted, or prevented from meeting any of the compliance dates specified in this Order or a key milestone in an approved plan required by the Order (i.e., the Habitat Mitigation and Monitoring Plan and the Site Revegetation and Maintenance Plan). The Department may request in writing an extension for compliance dates, stating the basis for its request and what new compliance dates it is requesting.
- 5) **Good Operation and Maintenance:** The Department shall maintain in good working order and operate as efficiently as possible any facility or control system installed to achieve compliance with the requirements of this Order.
- 6) **California Wetlands Portal:** The Department shall use the California Wetlands Standard Form to provide information describing impacts and mitigation measures no later than 30 days from acceptance of the Plan by the Executive Officer. An electronic copy of the form can be downloaded at:  
<http://www.waterboards.ca.gov/sanfranciscobay/certs/shtml>.  
The completed California Wetlands form shall be submitted electronically to [habitatdata@waterboards.ca.gov](mailto:habitatdata@waterboards.ca.gov) or shall be submitted as a hard copy to both: (1) The Regional Water Board, 1515 Clay St., Suite 1400, Oakland, CA 94612, to the attention of California Wetlands Portal; and (2) San Francisco Estuary Institute, 4911 Central Ave., Richmond, CA 94804, to the attention of Mike May.
- 7) **Reporting of Hazardous Substance Release:** If any hazardous or toxic substance is discharged in or on any waters of the State, or discharged or deposited where it is, or probably will be, discharged in or on any waters of the State, the Department shall report such discharge to the Regional Water Board (in addition to reporting to the California Emergency Management Agency pursuant to California Health and Safety Code). To report, call (510) 622-2369 during regular office hours, and file a written report within five working days.
- 8) **Enforcement:** If the Department fails to comply with the requirements of this Order, this matter may be referred to the Attorney General for judicial enforcement. Failure to comply with this Order may result in the assessment of administrative civil liability up to \$1,000 per day for each day the report is not received under Water Code section

13268, and up to \$5,000 for each day of violation under Water Code section 13350. The Regional Water Board reserves its right to take any enforcement actions authorized by law.

- 9) **State Water Board Petition:** Any person aggrieved by this action may petition the State Water Board to review the action in accordance with Water Code section 13320 and Title 23, California Code of Regulations, section 2050 et al. The State Water Board, Office of Chief Counsel, must receive the petition by 5:00 p.m., 30 days after the date this Order becomes final (if the thirtieth day falls on a weekend or state holiday, the petition must be received by the next business day). This Order is effective upon the date of signature.
- 10) **Periodic Review:** The Regional Water Board may review this Order periodically and may revise it when necessary.

  
for

---

Bruce H. Wolfe  
Executive Officer

11/29/12

Date

Attachment A – Chabot Creek Area Impacted Habitat Types (Figure 3)



**Legend**

— Planting Area Boundaries (3.53 ac.)	■ Riparian (0.57 ac.)
□ impact boundary	■ Riparian - Upland (1.45 ac.)
+ Cut Mitigation Trees and Shrubs	■ Seasonal Wetland (0.70 ac.)
	■ Seasonal Wetland - Freshwater Marsh (0.54 ac.)
	■ Reference Mitigation Site (0.21 ac.)

N

0      150      300

Feet

**Figure 3. Chabot Creek Area Impacted Habitat Types**

Solano County  
State Route 37 at State Route 29