

WATER RESOURCES CONTROL BOARD

FOR THE

STATE OF CALIFORNIA

PHILBRICK FAMILY PARTNERSHIP,

Petitioner,

v.

CATHERINE KUHLMAN, Executive Officer,
North Coast Regional Water Quality Control
Board

Respondent.

PETITION FOR REVIEW OF
CLEANUP AND ABATEMENT
ORDER No. R1-2010-0050; AND FOR
A STAY PENDING COMPLETION OF
ITS REVIEW OF SAID ORDER

Now comes PHILBRICK FAMILY PARTNERSHIP, (herein “Petitioner”) by and through its attorney, Bryan W. Gaynor who does hereby petition the Water Resources Control Board, (herein the “Board”) as follows: (i) For the Board to review the decision of CATHERINE KUHLMAN, (herein “Respondent”) Executive Officer, North Coast Regional Water Quality Control Board (herein the “Regional Board”) to issue Cleanup and Abatement Order No. R1-2010-0050 (herein the “Philbrick CAO”); (ii) To revise the terms of the Philbrick CAO as herein requested; and (ii) To issue a stay of the Philbrick CAO until this Petition can be heard and decided by the Board.

1. The Petitioner’s Name is the Philbrick Family Partnership whose address is 1221 West Standley Street Ukiah 95482. Petitioner’s sole manager is Chris Philbrick; Mr. Philbrick’s address is %Bryan W. Gaynor, Attorney at Law, 1160 G. Street, Suite A., Arcata CA 95521; Phone No. 707-633-8330; Email bwgaynor@gmail.com.
2. The Action being petitioned is Philbrick CAO, Order Number 7:
“All work to remediate site grading activities and to restore all affected areas at Site shall be completed, with the exception of continuing monitoring requirements, prior to **October 15, 2010.**” (Emphasis in the original).
3. The date of the Philbrick CAO is May 19, 2010.
4. The Philbrick CAO, Order Number 7, is unreasonable for the reasons set forth in the Declaration of Christopher J. Watt, CEG which are summarized as follows:

The remediation work required in other parts of the Philbrick CAO with respect to removal of the water impoundment structure will require permits from the California Department of Fish and Game, Mendocino County Building Department and the North Coast Regional Water Quality Control Board. Each of these agencies has an independent permitting process with its own specific filing requirements and timelines for review and decision on the application for permit. The permit application and review process by all these agencies is independent of and not subject to control by the Petitioner, except for matters related to timing of the filing of each application and the content of the applications. Therefore Order Number 7 puts Petitioner in an impossible situation with respect to completing all restoration work by October 15, 2010 because Petitioner cannot control the time within which all required permits will be issued by the responsible agencies and cannot start remediation work until after all required permits have been issued. In addition to the permitting timing issue, the Philbrick CAO fails to take into consideration weather conditions, which, upon the onset of early rains, could make the remediation work impossible to complete by October 15, 2010.

5. Petitioner is entitled to a stay of the Philbrick CAO for the reasons set forth in the attached Declaration of Christopher J. Watt, CEG.

6. Petitioner is aggrieved because the Philbrick CAO, Order Number 7, is arbitrary, capricious and unreasonable inasmuch as it specifies a timeline, which does not account for the permitting timelines of all agencies involved and is therefore beyond the control of Petition. Additionally it does not allow for weather conditions that could make the remediation work impossible to complete by October 15, 2010. Nevertheless, the Philbrick CAO imposes financial penalties should Petitioner fail to comply with the October 15, 2010 timeline (see Philbrick CAO, Finding Number 16).

7. Petitioner requests the Board to modify the Philbrick CAO to provide that the Petitioner will complete application process with all agencies having jurisdiction over the removal of the impoundment facilities on or before June 18, 2010 and that Petitioner will complete all remediation work required by all agencies with permitting authority over the matter by October 15, 2010 unless, (i) one or more of such agencies has failed, through no fault of Petitioner's, to issue a required permit prior to September 15, 2010;

and (ii) weather conditions are not consistent with completing the remediation work after the issuance of all required permits in a timely manner.

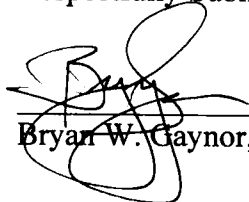
8. Substantive due process under the United States and California constitutions prohibits governmental interference with person's fundamental right to life, liberty, or property by unreasonable or arbitrary official action. (See, *In re Marilyn H.* (1993) 19 Cal.Rptr.2d 544, 5 Cal.4th 295, 851 P.2d 82).

9. A copy of this Petition has been sent to the Respondent together with a request that the Respondent reconsider the provisions of the Philbrick CAO and amend them as shall be reasonable and consistent with the relief prayed for in this Petition.

10. The Regional Board and the Respondent were aware of the impoundment facility located on the Philbrick property in February 2010 and had all the necessary information to file the Philbrick CAO at that time, however, for no apparent reason and without explanation the Respondent delayed issuing the Philbrick CAO until May 6, 2010. Additionally, Petitioner was not informed of any of the terms and provisions of the Philbrick CAO until it was issued on May 19, 2010 and therefore had no opportunity to object to its terms in advance of the issuance thereof. As of today's date Petitioner has also filed with the Regional Board a request for the Respondent to reconsider and modify the Philbrick CAO as herein requested.

Respectfully Submitted,

Date: June 7, 2010



Bryan W. Gaynor, Attorney for Petitioner

CALIFORNIA REGIONAL QUALITY CONTROL BOARD
FOR THE NORTH COAST REGION

PHILBRICK FAMILY PARTNERSHIP

Petitioner,

v.

CATHERINE KUHLMAN, Executive Officer,
North Coast Regional Water Quality Control
Board

Respondent.

PETITION FOR RECONSIDERTION
AND REVISION OF CLEANUP AND
ABATEMENT ORDER No. R1-2010-
0050

Now comes the PHILBRICK FAMILY PARTNERSHIP, (herein "Petitioner") by and through its attorney, Bryan W. Gaynor who does hereby petition CATHERINE KUHLMAN, (herein "Respondent") Executive Officer, North Coast Regional Water Quality Control Board for, (i) Reconsideration and revision of Cleanup and Abatement Order No. R1-2010-0050 by Respondent on the basis of the facts and argument set forth in the attached Petition to the Water Resources Control Board and supporting Declaration of Christopher J. Watt; and (ii) Revision of the terms of Cleanup and Abatement Order No. R1-2010-0050 as requested by Petitioner in said Petition.

Respectfully Submitted,

Date: June 7, 2010



Bryan W. Gaynor, Attorney for Petitioner

WATER RESOURCES CONTROL BOARD

FOR THE

STATE OF CALIFORNIA

PHILBRICK FAMILY PARTNERSHIP

Petitioner,

v.

CATHERINE KUHLMAN, Executive Officer,
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Respondent.

DECLARATION OF CHRISTOPHER J.
WATT IN SUPPORT OF PETITION
FOR REVIEW OF CLEANUP AND
ABATEMENT ORDER No. R1-2010-
0050 AND FOR A STAY

DECLARATION OF CHRISTOPHER J. WATT

I, Christopher J. Watt, declare:

1. The facts set forth in this declaration are within my own personal knowledge and are filed in support of the above referenced Petition. If called as a witness, I would be competent to testify to these facts.

2. I am a Certified Engineering Geologist (CEG No. 2415) licensed to practice in the State of California

3. There will be substantial harm to the petitioner and to the public interest if a stay is not granted in as much as the timeline to complete all work to remediate site-grading activities and to restore the water impoundment site is October 15, 2010. Remediation involving earthwork cannot be conducted without permits from the Mendocino County Building Department, the California Department of Fish and Game and the California Regional Board for the North Coast Region. I am familiar with the requirements of each of these agencies and know that each has its own specific permitting requirements and timelines for reviewing and approving permit applications. The permit review process is independent of and beyond the reasonable control of the Petitioner and its consultants. This puts the Petitioner in a potential violation situation, which is beyond

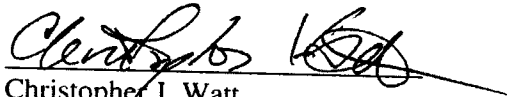
its reasonable control. In short, the Cleanup and Abatement Order in this matter indiscriminately specifies timelines, which do not account for permitting timelines.

4. Additionally, the Order does not take into consideration the risk that delays in the permitting process, not due to the Petitioner and beyond its control may result in the issuance of the final permits by all agencies at a time that will not allow sufficient time to complete all remediation work beyond the onset of winter rains. Work undertaken after the onset of winter rains will likely result in significant sediment transport and degradation of water quality in the affected the Class II watercourse.

5. There will be no substantial harm to other interested persons and to the public interest if a stay is granted in as much as the Petitioner does not plan to withdraw water from the impoundments and the risk of catastrophic failure due to over-topping has diminished given the onset of the dry season.

6. There is a substantial question of fact as to whether it will be feasible to obtain all necessary permits in sufficient time to permit completion of the required remediation work by October 15, 2010.

I declare under the penalty of perjury that the foregoing is true and correct.
Executed this 7th day of June 2010, at Ukiah California.


Christopher J. Watt

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement Order
No. R1-2010-0050

For

Philbrick Family Partnership
APN # 125-280-72

Mendocino County

This Cleanup and Abatement Order (Order) is issued to Philbrick Family Partnership, (hereafter Discharger), based on provisions of California Water Code (CWC) §13304, which authorizes the California Regional Water Quality Control Board, North Coast Region (Regional Water Board) to issue a Clean and Abatement Order, and CWC §13267, which authorizes the Regional Water Board to require preparation and submittal of technical and monitoring reports.

The Executive Officer of the Regional Water Board finds that:

1. The Discharger owns land located at 25830 Comptche-Ukiah Road, Comptche, in Mendocino County, identified as Mendocino County Assessor's Parcel Number (APN) 125-28-072 (Site). The Site is situated within the Navarro River watershed. Drainage from the Site discharges to an unnamed tributary to Johnson Creek. Johnson Creek is tributary to John Smith Creek, which flows to the Navarro River.
2. On November 23, 2009, the Regional Water Board received a complaint from CAL FIRE, reporting that a recent timber-related inspection of the Site revealed that extensive earthwork activities had been performed on the Site that appeared to have created or resulted in water quality violations.
3. On January 14, 2010, staff from the Regional Water Board, CAL FIRE, National Oceanographic Atmospheric Administration (NOAA), Department of Fish and Game (DFG), California Geologic Survey (CGS), Mendocino County Air Quality Control Management District (AQ) and the Discharger's representative inspected the Site. Staff observed the following:
 - a. Earthen fill has recently been deposited within the banks of an unnamed tributary to Johnson Creek, apparently with the intent to impound water. The fill appeared to be poorly compacted with numerous tension cracks throughout and loose soils at the impoundment edges. In addition, the earthen fill materials were observed to be eroding and slumping into the unnamed tributary. The earthen fill impoundment is conservatively estimated to include about 360 cubic yards of earthen material, based on estimated dimensions of 75' length, 18.5' average width, and 7' height.
 - b. Recent roadwork on an existing rural ranch road accessing the site included installation of an inside ditch that extended approximately 2600 feet with only two drainage break points draining to the flood plain of the adjacent stream. One of the delivery points on the Site drains directly to an unnamed

ephemeral stream that leads to the previously described unnamed tributary to Johnson Creek.

4. Sediment, when discharged to waters of the state, constitutes a “waste” as defined in Water Code section 13050.
5. The *Water Quality Control Plan for the North Coast Region (January 2007)*, (Hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation programs for achieving objectives, and incorporates by reference, plans and policies adopted by the State Water Resources Control Board. The beneficial uses for the Navarro River Hydrologic Area ¹, as identified in Table 2-1 of the Basin Plan are:
 - a. Municipal and domestic supply
 - b. Agricultural supply
 - c. Industrial service supply
 - d. Industrial process supply
 - e. Groundwater recharge
 - f. Freshwater replenishment
 - g. Navigation
 - h. Water contact recreation
 - i. Non-contact water recreation
 - j. Commercial and sport fishing
 - k. Cold freshwater habitat
 - l. Rare, threatened, or endangered species (RARE)
 - m. Wildlife habitat
 - n. Migration of aquatic organisms
 - o. Spawning, reproduction, and/or early development
 - p. Estuarine habitat
 - q. Aquaculture
6. The Discharger’s activities, as described in Paragraph 3, above, have resulted in the discharge of waste into surface waters, which have created, or threaten to create, a condition of pollution or nuisance by altering the quality of waters in the Navarro River watershed to a degree that unreasonably affects their beneficial uses.
7. The Basin Plan’s Action Plan for Logging, Construction, and Associated Activities (Action Plan) includes two prohibitions:
 - Prohibition 1 - *“The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.”*
 - Prohibition 2 - *“The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could*

¹ Beneficial uses of any specifically identified water body generally apply to all of its tributaries.

pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.”

8. The Discharger’s activities, as described in Paragraph 3, above, have resulted in the discharge of waste into surface waters in violation of the Basin Plan Prohibitions set forth above.
9. CWC §13304, subdivision (a) provides:

Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.
10. CWC §13267, subdivision (a) provides that the Regional Water Board may investigate the quality of any waters of the state within its region in connection with any action relating to the Basin Plan. CWC §13267, subdivision (b) provides that the Regional Water Board, in conducting an investigation, may require a discharger to furnish, under penalty of perjury, technical or monitoring program reports. The burden of these technical reports shall bear a reasonable relationship to the need for these reports and the benefits to be obtained from them.
11. CWC §13050(l) defines “pollution” as an alteration of the quality of the waters of the state by waste to a degree that unreasonably affects the waters for beneficial uses.
12. As described in findings 3 through 8, the Discharger is subject to an Order pursuant to CWC §13304 because the Discharger has caused or permitted waste to be discharged or deposited where it has discharged to waters of the state in violation of a prohibition issued by the Regional Water Board and has created, and continues to threaten to create, a condition of pollution or nuisance. The condition of pollution is a priority violation and issuance or adoption of a cleanup and abatement order pursuant to CWC §13304 is appropriate and consistent with policies of the Water Board.
13. Pursuant to CWC §13304 (c)(1), the Regional Water Board is entitled to and can seek reimbursement for reasonable costs incurred to investigate the unauthorized discharge of wastes, to oversee clean up of the wastes, supervising clean up and abatement activities, or taking other remedial actions required by this order.
14. The technical reports required pursuant to this Order are needed to provide information to the Regional Water Board regarding the condition of pollution caused or contributed by the Discharger’s activities to waters of the state. The benefits to be obtained from a technical report include enabling the Regional Water Board to determine the impacts of the condition of pollution on beneficial uses and to provide information that will be used to determine what corrective actions are

necessary to assess, abate, and control the pollution. Based on the nature and possible consequences of the discharges, the burden of providing the required reports bears a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.

15. This is an enforcement action taken by a regulatory agency for the protection of the environment and is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, §§21000 *et seq.*), in accordance with California Code of Regulations, title 14, §§15308 and 15321.
16. Failure to comply with the terms of this Order may subject the Discharger to an enforcement action under the Water Code, including administrative civil liabilities under CWC §13350, in an amount not to exceed the sum of five thousand dollars (\$5,000) per day and ten dollars (\$10) per gallon of waste discharged in excess of 1,000 gallons.
17. Any person affected by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with CWC §13320 and title 23, California Code of Regulations, §§2050-2068. The State Water Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Water Board, any person affected by this Order may request the Executive Officer to reconsider this Order. To be timely, such request must be made within 30 days of the date of this Order.
18. Note that even if reconsideration is sought, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner's legal rights. Additionally, if the Discharger chooses to request reconsideration of this Order or file a petition with the State Water Board, the Discharger is hereby advised that it must comply with the Order while its request for reconsideration and/or petition is being considered.

THEREFORE, IT IS HEREBY ORDERED that, pursuant to CWC §§13304 and 13267, the Discharger shall provide the following information and perform the following cleanup and abatement actions:

1. Submit an Erosion Control Plan for road related erosion by **June 18, 2010** that includes the following:
 - a. Inventory of existing and potential sediment sources,
 - b. Design and construction standards for corrective work on inventoried sediment sources,
 - c. Design and construction standards for correction of the inside ditch drainage on the access road,
 - d. A Time Schedule for repair of sediment sources,

- e. A map of the road system and property identifying the location of sites requiring corrective action.
2. By **June 18, 2010**, submit a work plan to the Regional Water Board, for Executive Officer concurrence, that includes the following:
 - a. A restoration plan that describes and shows in detail how the Discharger proposes to completely remove the earthen impoundment from the Class II watercourse. The plan shall contain a description of how the earthen materials will be removed and where and how the spoils will be safely disposed.
 - b. A plan including design and construction standards for stream restoration, design standards for post construction native vegetation planting, a time schedule for restoration activities, criteria to judge the success of the restoration project, and a monitoring proposal to evaluate whether the stream restoration is successful. The restoration plan must be prepared by a licensed professional experienced in stream restoration and must be approved by the Executive Officer.
 3. By **June 18, 2010**, submit a Monitoring and Reporting Plan to the Regional Board Executive Officer, that includes:

Monthly Progress reporting on restoration, clean up, and road work due on **July 1, 2010, August 1, 2010, September 1, 2010, and October 1, 2010**, until conclusion of cleanup and abatement activities.
 4. By **August 1, 2010**, submit a Restoration Monitoring Plan for review and concurrence, to be implemented following restoration activities to assess and document successful abatement of sediment from the site and/or identify problems that develop subsequently and require further work. Reports must be submitted three times per year until the restoration is completed to the satisfaction of the Regional Water Board. Reports are due **December 31, March 31, and June 30**.
 5. Submit the following information by **June 18, 2010**:
 - a. List of employees, contractors, and/or subcontractors involved with the design, grading, and filling of the stream. Include all contact information such as telephone numbers, mailing addresses, and professional license numbers.
 - b. Copies of any permits, engineering design, installation, and construction details used to create the impoundments, type of equipment used, and any photographs or other documents to support the information.
 - c. Dates grading occurred and waste, earthen materials, soil, and rock was discharged into the stream to form the impoundments of water
 - d. Description of any erosion and sediment control used during the implementation of soil removal, excavation of riparian vegetation and filling the Class II watercourse,

- e. Cubic yards volume estimate of the impoundment materials.
6. Following Executive Officer written concurrence, the Discharger shall implement and fully complete all necessary long term cleanup and abatement work including: 1) correction of road related erosion, 2) removal of the impoundment on the Site, 3) restoration of the stream channel, 4) stabilization of the restored areas with plantings of native vegetation, and 5) Monitoring and Reporting as required above.
 7. All work to remediate site grading activities and to restore all affected areas at the Site shall be completed, with the exception of continuing monitoring requirements, prior to **October 15, 2010**.
 8. By **November 15, 2010**, submit a report summarizing and confirming completion of all cleanup and abatement work.
 9. If the Discharger is unable to perform any activity or to submit any documentation in compliance with the deadlines in this Order, the Discharger may submit a written request to the Executive Officer for an extension of the time schedule. The written extension request shall explain why the delay is beyond the reasonable control of the Discharger and must be received by the Regional Water Board no less than 15 calendar days prior to the respective deadline. An extension may be granted by the Executive Officer, for good cause, in which case this Order will be accordingly revised.
 10. This Order in no way limits the authority of this Regional Water Board to institute additional enforcement actions or to require additional investigation and cleanup at the Site consistent with the California Water Code. This Order may be revised by the Executive Officer as additional information becomes available.

Ordered by

Catherine Kuhlman
Executive Officer

May 19, 2010