

California Regional Water Quality Control Board  
North Coast Region

COMPLAINT NO. R1-2001-20  
FOR

ADMINISTRATIVE CIVIL LIABILITY

IN THE MATTER OF

HAWTHORNE TIMBER COMPANY, LLC;  
THE CAMPBELL GROUP;  
CAMPBELL TIMBERLAND MANAGEMENT;  
HTC LOG CORPORATION;  
AND  
WESTERN BLASTING TECHNOLOGIES, INC.

FOR

VIOLATIONS OF WASTE DISCHARGE PROHIBITIONS  
CONTAINED IN THE WATER QUALITY CONTROL PLAN  
FOR THE NORTH COAST REGION

Mendocino County

The Executive Officer of the California Regional Water Quality Control Board, North Coast Region (hereinafter the "Regional Water Board"), hereby gives notice that:

1. Hawthorne Timber Company, LLC ("Hawthorne"), owns approximately 194,000 acres of timberland in California, including a "borrow pit" located within the Northwest 1/4 of Section 13, Township 17 North, Range 16 West, Mount Diablo Baseline & Meridian in Mendocino County (Mendocino County Assessor's Parcel Number 021-110-29). The borrow pit site is shown on the map included herein as Attachment 1. The borrow pit is located within one hundred feet (horizontal distance) of Two Log Creek, a fish-bearing tributary of Big River. The borrow pit is hereinafter referred to as the "Site."
2. The Campbell Group, dba Campbell Timberland Management (collectively, "Campbell"), manages and partially owns Hawthorne. Pursuant to a contract with Hawthorne, Campbell operates Hawthorne lands including the Site on behalf of and for the benefit of Hawthorne.
3. HTC Log Corporation ("HTC"), a subsidiary of Hawthorne, exists to transact business on behalf of Hawthorne. Pursuant to a contract, HTC is also managed by Campbell. Hawthorne, Campbell and HTC are hereinafter collectively referred to as the "Hawthorne Entities."
4. Western Blasting Technologies (hereinafter referred to as "Western") is a blasting company hired by HTC, through its manager Campbell Timberland Management, to blast 5500 cubic yards of rock at the Site.

5. On July 6, 2000, the contracted blasting occurred, which resulted in an estimated 226 cubic yards of rock, soil, wood debris and other earthen material being discharged into Two Log Creek. The blasting also deposited more than 500 cubic yards of rock, soil, wood debris and other earthen material on the adjacent sideslopes where it could be discharged into Two Log Creek.
6. The Hawthorne Entities and Western each violated prohibitions contained in the Water Quality Control Plan for the North Coast Region (Basin Plan), by negligently discharging waste into waters of the State, and creating a condition of pollution for which the Regional Water Board may impose administrative civil liabilities under Section 13350 of the California Water Code (CWC).
7. The Executive Officer, therefore, seeks to assess civil liabilities as provided herein against both the Hawthorne Entities and Western. Unless waived, a hearing on this matter will be held before the Regional Water Board within 60 days following issuance of this Complaint. The Hawthorne Entities and Western both will have an opportunity to address and contest the allegations against it in this Complaint and the imposition of civil liability before the Regional Water Board. The hearing is scheduled for the Regional Water Board meeting to be held on May 24, 2001, in Santa Rosa California. An agenda showing the meeting location and the time set for the hearing will be mailed to the Hawthorne Entities and Western not less than 10 days before the hearing.

At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed civil liabilities, to refer the matter to the Attorney General for recovery of judicial liability, or take other enforcement actions.

8. The following facts are the basis for the administrative civil liability against the Hawthorne Entities and Western:
  - a. On June 15, 2000, HTC, through its manager Campbell Timberland Management, entered into a General Services Agreement (“Agreement”) with Western, through which it contracted for blasting and rock crushing activities on Hawthorne lands in Mendocino County, including the Site.
  - b. On July 6, 2000, Western conducted the contracted blasting at the Site that resulted in an estimated 226 cubic yards of earthen material being discharged into Two Log Creek. The Report of Blasting (No. 1052), dated July 6, 2000, indicates that the blast was accomplished with one shot with blast holes drilled on 10-foot spacing.
  - c. On July 13, 2000, National Marine Fisheries Service (NMFS) verbally notified Regional Water Board staff of potential water quality impacts, resulting from rock blasting at the Site.
  - d. On July 14, 2000, Regional Water Board and NMFS staff conducted an inspection of the Site to evaluate the impact of the unauthorized discharge of earthen materials, including large diameter rocks, into Two Log Creek. The discharged material created an instream impoundment or dam that filled Two Log Creek 4-16 feet in depth for approximately 70 lineal feet. Additional rock and earthen materials were perched along

the steep slopes leading into the watercourse and were placed in such a position that it threatened to discharge into Two Log Creek. During the inspection, the Hawthorne Entities' staff documented a decrease in stream flow and increased water temperatures associated with the earthen material impoundment. Temperatures were 1<sup>0</sup> C higher and flows were measurably less below the impoundment following the blast.

Two Log Creek is a fish-bearing tributary of Big River that supports threatened species under the federal Endangered Species Act ("ESA"). The discharge and resulting dam blocked summer migration of juvenile salmonids for a period of approximately two months, degraded rearing habitat for steelhead trout and coho salmon (threatened species under the ESA) and adversely affected benthic organisms, an essential element of the fish rearing food chain.

- e. On July 20, 2000, Regional Water Board staff conducted an inspection of the Site and its vicinity with representatives of NMFS and the California Department of Fish and Game ("DFG") to assess damage to the aquatic and riparian habitat of Two Log Creek. Regional Water Board staff measured the longitudinal profile and transects of the impacted area. Field measurements indicated that approximately 226 cubic yards of earthen material were discharged into the stream channel within the bankfull width. Bankfull width is the stream width at bankfull discharge, which represents the average 1-2 year high water level. The field measurements are documented in a July 21, 2000 interoffice memorandum. Additional debris were deposited along the very steep banks leading into the watercourse. The volume of material deposited along the adjacent slopes leading into the watercourse has been estimated to be greater than 500 cubic yards, based upon field measurements collected by Regional Water Board staff and the Hawthorne Entities' consultant on August 2 to August 3, 2000. This discharged material was placed in a position where it could enter the watercourse following significant winter rains.
- f. During the July 12, 2000 visit to the Site, an employee of Campbell Timberland Management indicated that his crews and equipment were available and could move in immediately to remove the blasted material. Staff acknowledged the offer but stressed the need for permits and an approved plan of action for the removal of the material.
- g. On July 21, 2000, the Executive Officer of the Regional Water Board sent an Order, pursuant to California Water Code 13267(b), to Hawthorne requiring submittal of technical reports relating to the cleanup and restoration of the Two Log Creek and measures to be taken to prevent future erosion, sedimentation, dust and further discharges as a result of blasting or other activities at the Two Log Creek rock quarry.
- h. On August 10, 2000, Regional Water Board staff received a copy of a letter (dated August 4, 2000) from Western to Campbell. This letter confirmed Western's willingness to remove instream and perched earthen material resulting from the July 6, 2000 blast.
- i. On August 14, 2000, MFG Inc., on behalf of Hawthorne Entities, submitted a work plan for debris removal and restoration of Two Log Creek. The work plan proposed a

three phased approach. The approach included Phase One: site preparation, Phase Two: debris removal, and Phase Three: stabilization, erosion control and restoration.

- j. On August 21, 2000, Regional Water Board staff commented on and concurred with the revised work plan. The approved work plan did not comply with all of the requirements of the July 21, 2000 13267(b) Order, although it was adequate for initial work to begin.
- k. On August 21, 2000, Regional Water Board staff met with representatives of the Hawthorne Entities to discuss the discharge and potential civil liabilities arising therefrom, at which time the representatives denied any wrong doing by the Hawthorne Entities for the discharge. The representatives characterized the discharge as a result of a blasting accident.
- l. On August 23, 2000, Regional Water Board staff sent a letter to Hawthorne Entities' consultant commenting on portions of the August 21, 2000 work plan. The letter included a reminder that the work plan was deficient in addressing measures to prevent discharges as a result of future blasting and other activities at the Site.
- m. On August 24, 25, and 28, 2000, Regional Water Board staff inspected the Site to evaluate ongoing work. Cleanup of earthen material, installation of erosion control measures, including re-vegetation work was evaluated during the onsite inspections.
- n. On September 1, 2000, Regional Water Board staff received a debris removal completion report from MFG Inc.
- o. On September 5, 2000, Regional Water Board staff inspected the Site for compliance with the work plan. During the inspection, Regional Water Board staff determined that Phase 1 (site preparation) and Phase 2 (debris removal) of the approved work plan had been adequately completed. Submittal of the Phase 3 (stabilization, erosion control, and restoration) completion report was extended until September 29, 2000 by order of the Executive Officer. Additional restoration and stabilization measures described in the work plan and the September 29, 2000 completion report were implemented by November 2, 2000, with the exception of the *Maintenance and Effectiveness Monitoring Plan* which continues for a three year period.
- p. On September 14, 2000, Regional Water Board staff met with Western and the attorney representing Western's insurance carrier to discuss Western's role in the blasting and the resultant waste discharge to Two Log Creek. Western revealed it did not know prior to the blast that Two Log Creek was located near the Site. According to Western, the Hawthorne Entities never expressly informed Western verbally of the proximity of Two Log Creek to the Site. Two Log Creek was identified in a topographical map attached as an exhibit to the Agreement between HTC and Western. According to Western, had it known about Two Log Creek, it would have shot the blast in a different direction so as to avoid the creek to the maximum extent possible. Furthermore, Western indicated that the Hawthorne Entities knew and directed that the rock be blasted towards the road located between the Site and Two Log Creek. Western also indicated that the Hawthorne Entities required that Western provide heavy equipment at

the Site to keep the road open for truck traffic. Western also indicated at the meeting that the blasting was conducted by a single blast, as opposed to several blasts, for safety reasons.

- q. In subsequent investigations, Regional Water Board staff has learned that the Hawthorne Entities had prior knowledge of the proximity of Two Log Creek to the area blasted at the Site. The Hawthorne Entities also had prior knowledge of the presence of fish species listed as “threatened” under the ESA in Two Log Creek. This knowledge is documented in the cumulative watershed effects analysis and surveys contained in its Timber Harvest Plans for timber operations within the Two Log Creek watershed (e.g. THP 1-00-154 MEN, THP 1-00-393, THP 1-99-320 MEN, THP 1-99-430 MEN).
- r. On September 19, 2000, the Managing Director of HTC and Campbell, sent a letter to the Regional Water Board with a description of measures to be taken to prevent erosion, sedimentation, dust and further discharges as a result of blasting or other activities at the Site. These measures included a commitment to advise future contractors of the location of Two Log Creek and the presence of coho and steelhead species in the creek, and to require future contracts to install physical barriers at the outside edge of the road both during blasting and extraction to prevent the discharge of coarse and fine sediments to the Two Log Creek.
- s. On October 10, 2000, Regional Water Board staff re-inspected the Site to observe completed work described in the September 29, 2000 Two Log Creek Final Completion Report and to collect measurements of the distance of the rock blasting activities, including the excavation activities, from Two Log Creek. Measurements collected by staff confirmed that the blasting and excavation activities, including the removal of blasted rock and debris from the road, were within 100 feet (horizontal distance) of the fish-bearing Two Log Creek. The Mendocino County Water Agency has confirmed that the Two Log Creek is within 100 horizontal feet from the Site.
- t. On December 12, 2000, the Executive Officer of the Regional Water Board responded to the September 19, 2000 letter from the Hawthorne Entities. The Executive Officer specified that measures described in the September 19, 2000 letter were inadequate to assure that no further discharges from blasting and related activities at the Site would occur. The Executive Officer required, pursuant to CWC 13260, submittal of a Report of Waste Discharge (ROWD) and the measures to be taken to prevent erosion, sedimentation, dust and further discharges as a result of blasting or other activities at the Two Log Creek rock quarry site. The December 12, 2000 letter further reminded the Hawthorne Entities that an extension had not been requested for the July 21, 2000 deadline. This letter did extend the deadline for submittal of the ROWD to March 1, 2001.

#### **Proposed Civil Liability Against the Hawthorne Entities**

1. The Hawthorne Entities violated prohibitions contained in the Basin Plan, by negligently discharging waste into waters of the State, and creating a condition of pollution for which the Regional Water Board may impose administrative civil liability under CWC Section 13350 as follows:

- a. The Hawthorne Entities violated the following prohibitions described in the “Action Plan for Logging, Construction and Associated Activities” contained in the Basin Plan (page 4-28.00):

The discharge of soil, silt, bark, 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.

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

- b. The Hawthorne Entities also exceeded the following water quality objectives set forth in the Basin Plan, which the Regional Board must consider in determining violations of discharge prohibitions:

- Turbidity shall not be increased more than 20 percent above naturally occurring background levels.
- Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.
- The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause a nuisance or adversely affect beneficial uses.

- c. Pursuant to the Basin Plan, including State Water Resources Control Board Resolution No. 88-63, the existing and potential beneficial uses of Big River, including its tributary Two Log Creek, include: cold freshwater habitat; migration of aquatic organisms; municipal and domestic supply; groundwater recharge; industrial supply; water contact recreation; non-contact recreation; estuarine habitat; and wildlife habitat.

Big River and its tributary, Two Log Creek, are listed as impaired under Section 303(d) of the federal Clean Water Act due to excessive amounts of instream sediment.

- d. The Hawthorne Entities negligently discharged, or caused or permitted waste to be deposited where it is discharged, into the waters of the state.

Hawthorne, as the landowner, had a duty to exercise ordinary care to provide adequate supervision for the activities conducted on its behalf on its property, especially dangerous activities such as blasting, and to ensure that all necessary precautions are undertaken to prevent damage to natural resources and violations of environmental laws. Hawthorne breached that duty as it failed to provide adequate supervision for the blast and failed to ensure its agents and operators take all precautionary measures prior to the blasting. Hawthorne could have, but failed to, provide specific instruction and supervision to its agents and operators regarding the need for precautionary measures

when contracting for blasting activities on its property. The duty of care commensurate with allowing dangerous activities on its property is high, yet Hawthorne took no discernable steps to provide adequate supervision and/or training of its agents and operators in connection with contracting for blasting on its property. Moreover, Hawthorne took no steps to ensure that the blasting activities on its property are undertaken with all the necessary precautionary measures to prevent harm to natural resources and violations of environmental laws.

Campbell, as the operator of Hawthorne lands including the Site, had a duty to exercise ordinary care to adequately manage and operate Hawthorne lands, and the activities thereon (especially dangerous activities such as blasting), so as not to cause damage to natural resources and violate environmental laws. Campbell breached that duty by allowing blasting at the Site in such close proximity to Two Log Creek; by failing to take any precautionary measures in connection with the blast to ensure that earthen material would not be discharged into Two Log Creek, which is within 100 horizontal feet from area blasted; by directing blasted material towards the road adjacent to Two Log Creek, which a reasonable person would know could enter Two Log Creek; and by failing to expressly warn and discuss with Western the close proximity of Two Log Creek to the area blasted and the existence of threatened species in Two Log Creek. The only indication of the proximity of Two Log Creek to the Site is a topographic map used to locate the Site attached to the Agreement. Campbell was not at all mindful of the existence of Two Log Creek and the threatened species contained therein and did not consider, or take steps to minimize, risks associated with an activity as dangerous and inherently risky as blasting so close to the creek. By contrast, a reasonable operator would have considered Two Log Creek and not contracted for blasting at the Site, or, at the very least, would have required the use of precautions to ensure that the Site was properly prepared and the Two Log Creek was protected from blasted material. Further, a reasonable operator would have informed and discussed with contractors the existence of the Two Log Creek and the presence of federally listed species of coho and steelhead.

HTC had a duty to exercise ordinary care to ensure that dangerous blasting activities for which it contracts are conducted with all the necessary precautionary measures to minimize risks, including risk of damage to natural resources, and do not violate environmental laws. HTC breached that duty by contracting for blasting in such close proximity to Two Log Creek, a threatened fish bearing stream; by failing to take any precautionary measures whatsoever to prevent and/or minimize earthen material from entering into Two Log Creek; and by failing to expressly warn or discuss with Western the proximity of Two Log Creek to the area blasted.

But for the combined negligent acts of Hawthorne, Campbell, and HTC, the discharge of earthen material into Two Log Creek would not have occurred. For example, had the Hawthorne Entities not contracted for blasting in such close proximity to Two Log Creek, the discharge would not have occurred. In addition, had the Hawthorne Entities taken some precautionary measures to prevent earthen material from entering into Two Log Creek, the extent of the discharge would not have been as severe. Also, had the Hawthorne Entities expressly warned and actively discussed the existence of Two Log Creek with Western, the discharge would not have occurred to the extent it did.

Additional precautionary measures could have been undertaken, such as shooting the blast in a different direction to avoid the Two Log Creek and the road between the Site and the creek. Finally, the negligent acts of the Hawthorne Entities were the stimulus for Western's blasting, resulting in the earthen material to be discharged into Two Log Creek, harming the beneficial uses thereof. Western's blasting was the natural and probable result of the negligence of the Hawthorne Entities such that the Hawthorne Entities remain liable for their negligent conduct.

- e. The discharge of the waste into Two Log Creek has created a condition of pollution in that the waste has unreasonably affected the water body for beneficial uses, including cold freshwater habitat and migration of aquatic organisms. Specifically, the discharge dammed a watercourse supporting threatened species under the ESA and other fisheries, causing blockage to summer migration of juvenile salmonids and degradation of habitat.
2. The Hawthorne Entities violation of the Basin Plan prohibitions, by negligently discharging waste into waters of the State, and creating of a condition of pollution subjects the Hawthorne Entities to civil liability under CWC Section 13350(a). Section 13350(e)(1) authorizes the Regional Water Board to assess civil penalties in an amount not to exceed \$10 for each gallon of waste discharged.
  3. It is estimated that at least 226 cubic yards, or approximately 45,441 gallons, of waste were directly discharged into Two Log Creek (within the bankfull width) from the Site as a result of the July 6, 2000 blast. This yields a maximum civil liability of \$456,429.
  4. In determining the amount of civil liability to be assessed to the Hawthorne Entities, the Regional Water Board must take into consideration the factors described in Section 13327 of the California Water Code. The factors described include:
    - the nature, circumstances, extent, and gravity of the violation,
    - whether the discharge is susceptible to cleanup or abatement,
    - the degree of toxicity of the discharge,
    - with respect to the discharger, the ability to pay and the effect on ability to continue in business,
    - any voluntary cleanup efforts undertaken,
    - any prior history of violations,
    - the degree of culpability,
    - the economic savings, if any, resulting from the violation, and
    - other such matters as justice may require.

#### Nature, Circumstance, Extent and Gravity of the Violation

Hawthorne, through HTC and Campbell, authorized Western (via the Agreement) to engage in blasting activity at the Site, which is adjacent to Two Log Creek. The blasting activity resulted in the discharge of rock, soil and wood debris into Two Log Creek, a watercourse that supports fish species listed as "threatened" under the federal ESA as well as other fish species. The NMFS have preliminarily indicated that the impacts of this blast resulted in a "Take" of at least four coho salmon based on the average number fish of this



species present in this impacted area. The discharge also resulted in violation of Basin Plan prohibitions and water quality objectives. The discharged material created an instream impoundment or dam that filled approximately 70-lineal feet of Two Log Creek. As a result of the discharge, the 70-foot section of Two Log Creek was buried under 4 to 16-feet of rock and other earthen material, and the stream was impounded and surface flow reduced until removal of rock and earthen material from the Two Log Creek had been completed. The impounded waters were not free flowing for approximately two months after the blast. During remediation work in Two Log Creek, fish exclusion zones were established immediately downstream of the filled in section of the Two Log Creek. A total of eight coho salmon and six steelhead juvenile fish were removed with buckets to a location approximately 500 feet upstream where they would not further suffer from fluctuations in local stream flow and turbidity created by the work. Although the fish in the immediate area were removed, other salmonids and aquatic organisms may have suffered downstream from the effects of reduced flow and turbidity.

The impoundment (dam) created a blockage to summer migration of these juvenile fish and other fish in the area from the time of the blast until the impoundment was removed. The summer survival of coho salmon is limited by their ability to move up and downstream to avoid high daytime summer temperatures and low summer streamflow. The discharge and resulting dam that caused a blockage to summer migration of juvenile salmonids, also degraded rearing habitat for steelhead trout and coho salmon, and adversely affected benthic organisms which are an essential element of the fish rearing food chain.

The discharge occurred during a critical period in the life stage of coho salmon and steelhead trout. The long-term consequences of this discharge are the loss of salmonids, including the threatened coho salmon and steelhead trout, and other aquatic organisms. Stream flows during the summer period are relatively low and water temperatures relatively high. On July 14, 2000, Hawthorne staff documented a decrease in stream flow and increased water temperatures associated with earthen material impoundment. Temperatures were 1<sup>0</sup> C higher and flows were measurably less below the impoundment following the blast. These altered conditions can have serious effects on coho salmon, especially when, as here, the stream temperatures are already within a few degrees of the critically high temperatures for coho salmon. The increased temperatures and reduced flows may have caused additional loss of coho salmon due to added temperature stress and reduction of fisheries rearing habitat.

#### Susceptibility to Cleanup Efforts Undertaken

Despite the proximity of Two Log Road to the impacted portion of Two Log Creek, heavy equipment could not readily access the watercourse due to the steep slopes between the road and the watercourse. The distance from the road to the impacted area exceeded the reach capabilities of equipment such as excavators or cranes. Suspended cable type equipment lacked the precision crucial to prevent excessive disturbance of the native stream bank and bed.

Stream flow was bypassed around the work site during instream activities. Bypass flow was pumped out of the stream channel to minimize the discharge of turbid water into the watercourse during removal activities. The natural geometry and flow pattern in the stream

was reestablished as quickly as possible to minimize adverse impacts to fish and to prevent additional discharge during high flow conditions.

The above conditions required the use of track excavator type equipment and dump trucks to remove the material to a safe storage site. This type of equipment required a road be built to gain access to the impacted area. An existing truck road on the opposite side of the stream and an old abandoned tractor skid road provided access to within 100 feet of the impacted area. The bank immediately adjacent to the discharge area was excavated and streamside trees had to be removed to permit the excavator to move onto the impounded material to set up and load the material onto trucks.

The cleanup effort itself caused stress and unknown offsite effects on the resident salmonids and other aquatic organisms. De-watering the stream, electrofishing and moving fish to occupied habitat caused further stress to organisms. These stressors combined with the downstream effects of disrupted flow and turbid waters created by the operation must be considered as serious side effects of both the discharge and the resulting cleanup effort. Despite restoration efforts, the pool that existed prior to the blast was eliminated and was not restored by cleanup efforts. The area of the pool is now a long riffle section.

Thus, the discharge was not readily susceptible to clean up. Together, the impacts of the discharge and cleanup on the aquatic environment have caused serious immediate impacts. The long-term consequences of this discharge and the associated cleanup are the loss of salmonids and other aquatic organisms, the loss of the pool habitat, and the loss of streamside canopy, especially on the east bank. These trees had previously provided important shade in the afternoon during the critical warm summer periods. This impact will be felt for many years to come.

#### Degree of Toxicity of Discharge

The Regional Water Board staff have no knowledge of any discharge of toxic substances resulting from the blasting incident.

#### Ability to Pay and Ability to Continue Business

Hawthorne owns approximately 194,00 acres in Mendocino County and 530,000 acres in the Pacific Northwest. Its projected long-term sustained annual yield off the 191,581 acres of timberland in Mendocino County is 133.9 million board feet of timber. Campbell generated over \$170 million in revenues last year and owns \$1.1 billion in timberland assets. Hawthorne is an investment entity managed and partially owned by the Campbell. HTC exists to transact business on behalf of Hawthorne. The Hawthorne Entities have conceded that the proposed civil liability will not impact their ability to continue business.

#### Voluntary Cleanup Efforts Undertaken

Hawthorne acted promptly to begin cleanup of the Site.

The Hawthorne Entities took swift action to begin clean up of the discharge and have worked cooperatively with NMFS, Regional Water Board, and the California Department

of Fish and Game to obtain the approvals for this operation. Most of the work has been completed. Monitoring and maintenance of remedial measures is expected to continue in accordance with the September 29, 2000 work plan and completion report.

#### Prior History of Violations

The Regional Water Board staff have no knowledge of citations having been issued by regulatory agencies for past violations associated with rock blasting activities on Hawthorne lands.

#### Degree of Culpability

The Hawthorne Entities are responsible and culpable for the discharge into Two Log Creek, as detailed above in *Proposed Civil Liability Against the Hawthorne Entities* No. 3 above. When all of the facts are considered, it is evident that the Hawthorne Entities did not take the necessary steps to operate the Site in a manner that is protective of the stream and negligently allowed waste to be discharged into Two Log Creek.

#### Economic Savings

The exact economic savings to the Hawthorne Entities realized, as a result of the discharge is unknown.

#### Other Matters as Justice May Require

The Site is located within 100 feet (horizontal distance) of Two Log Creek, which is a Class I (fish-bearing) watercourse. Surface Mining and Reclamation Act (SMARA) includes exemptions for excavation of materials for roadbed and construction maintenance conducted in connection with timber operations. These exemptions do not apply to excavation and grading that occurs within 100 feet of a Class I watercourse or 75 feet of a Class II watercourse [Public Resources Code Division 2, Chapter 9, Article 1 Section 2714 (j)(1)]. Because quarry operations at this Site are not exempt from SMARA, the Hawthorne Entities failed to comply with provisions of SMARA (Public Resources Code, Division 2, Chapter 9, Section 2770). These provisions include obtaining the required permit, submittal, and approval of a reclamation plan and approval of the financial assurances for reclamation at the Site. The lead agency for SMARA oversight on Hawthorne's ownership is Mendocino County. Mendocino County staff has inspected the site and has verified that the operation is within 100 feet (horizontal distance) of Two Log Creek. Regional Water Board staff has contacted the Mendocino County Planning Department regarding the need for the development and implementation of a reclamation plan for the Site. Other sites on the Hawthorne ownership may also require reclamation plans under SMARA.

SMARA regulations also apply to erosion control requirements related to borrow pit or rock quarry management. Surface runoff and drainage must be controlled to prevent erosion, gullyng, sedimentation, and contamination of surrounding land and water resources [Public Resources Code Division 2, Chapter 9, Article 1 Section 3706 (f)]. Erosion control, drainage improvements, reshaping of spoil piles, and creation of a

sediment detention basin were seen as existing problems onsite by the consultants and were dealt with by the work plan submitted by MFG Inc.

There is no record of a general stormwater National Pollution Discharge Elimination System (NPDES) Permit for any borrow pit or rock quarry on the Hawthorne ownership. Regional Water Board staff responsible for rock quarries have been notified of the potential Basin Plan violations and lack of stormwater NPDES permits.

As detailed above, Hawthorne failed to timely comply with the Executive Officer's July 21, 2000, Order requirement for submission of measures to be taken to prevent erosion, sedimentation, dust and further discharges as a result of future blasting or other activities at the Two Log Creek rock quarry site.

NMFS has been investigating whether a "Take" of a threatened species occurred as a result of this discharge. They have concluded that a take of approximately 4 fish occurred as a result of the blast. NMFS may take enforcement action under its own federal authority.

5. Based on the above factors, I hereby propose that of the maximum administrative civil liability set forth in *Proposed Civil Liability Against the Hawthorne Entities* No. 3 above, the Hawthorne Entities are jointly and severally liable in the amount of One Hundred and Fifty Thousand Dollars (\$150,000.00), which is due and payable by the Hawthorne Entities by April 12, 2001 if the Hawthorne Entities waive their rights to a hearing as provided below.

#### **Proposed Civil Liability Against Western**

1. Western violated prohibitions contained in the Basin Plan, by negligently discharging waste into waters of the State, and creating a condition of pollution for which the Regional Water Board may impose administrative civil liability under CWC Section as follows:
  - a. Western violated the same discharge prohibitions of the Basin Plan as Hawthorne (see *Proposed Civil Liability Against the Hawthorne Entities* No.1a), resulting in impacts to beneficial uses.
  - b. Western negligently discharged or caused or permitted waste to be deposited where it is discharged, into the waters of the State. Western had a duty to exercise ordinary care in conducting dangerous activities such as blasting. As part of that duty, Western should have undertaken efforts to be knowledgeable about the general characteristics of the Site and surrounding areas before undertaking blasting activities. Western breached that duty by not reviewing the Agreement, which disclosed the presence of Two Log Creek on an attached map. Western also failed to adequately investigate the Site vicinity to determine if a watercourse was within the blast zone. Had it done so, it may have discovered Two Log Creek near the area blasted, although the creek is not readily visible, and the discharge may have been avoided, or minimized.
  - c. The discharge of the waste into Two Log Creek has created a condition of pollution in that the waste has unreasonably affected the water body for beneficial uses, including cold freshwater habitat and migration of aquatic organisms. Specifically, the discharge

dammed a watercourse supporting threatened species under the ESA and other fisheries, causing blockage to summer migration of juvenile salmonids and degradation of habitat.

2. Western's violation of the Basin Plan prohibitions, negligent discharge of waste into waters of the State, and creation of a condition of pollution also subjects Western to the maximum civil liability for the discharge set forth in *Proposed Civil Liability Against the Hawthorne Entities* No. 3 above.
3. In determining the amount of civil liability to be assessed against Western, the Regional Water Board must take into consideration the following factors:
  - the nature, circumstances, extent, and gravity of the violation,
  - whether the discharge is susceptible to cleanup or abatement,
  - the degree of toxicity of the discharge,
  - with respect to the discharger, the ability to pay and the effect on ability to continue in business,
  - any voluntary cleanup efforts undertaken,
  - any prior history of violations,
  - the degree of culpability,
  - the economic savings, if any, resulting from the violation, and
  - other such matters as justice may require.

#### Nature, Circumstance, Extent and Gravity of the Violation

The blasting Western performed for Hawthorne resulted in the discharge of rock, soil and wood debris into Two Log Creek, a watercourse that supports fish species listed as "threatened" under the federal ESA as well as other fish species. NMFS have preliminarily indicated that the impacts of this blast resulted in a "Take" of at least four coho salmon based on the average number fish of this species present in this impacted area. The discharge also resulted in violation of Basin Plan prohibitions and water quality objectives. The discharged material created an instream impoundment or dam that filled approximately 70-linear feet of Two Log Creek. As a result of the discharge, the 70-foot section of Two Log Creek was buried under 4 to 16-feet of rock and other earthen material, and the stream was impounded and surface flow reduced until removal of rock and earthen material from the Two Log Creek had been completed. The impounded waters were not free flowing for approximately two months after the blast. During remediation work in Two Log Creek, fish exclusion zones were established immediately downstream of the filled in section of the Two Log Creek. A total of eight coho salmon and six steelhead juvenile fish were removed with buckets to a location approximately 500 feet upstream where they would not further suffer from fluctuations in local stream flow and turbidity created by the work. Although the fish in the immediate area were removed, other salmonids and aquatic organisms may have suffered downstream from the effects of reduced flow and turbidity.

The impoundment (dam) created a blockage to summer migration of these juvenile fish and the fish in the area from the time of the blast until the impoundment was removed. The discharge and resulting dam that caused a blockage to summer migration of juvenile

salmonids, also degraded rearing habitat for steelhead trout and coho salmon, and smothered benthic organisms which are an essential element of the fish rearing food chain.

The discharge occurred during a critical period in the life stage of coho salmon and steelhead trout. The long-term consequences of this discharge are the loss of salmonids, including the threatened coho salmon and steelhead trout, and other aquatic organisms. Stream flows during the summer period are relatively low and water temperatures relatively high. On July 14, 2000, the Hawthorne Entities' staff documented a decrease in stream flow and increased water temperatures associated with earthen material impoundment following the blast. Temperatures were 1<sup>0</sup> C higher and flows were measurably less below the impoundment. These altered conditions can have serious effects on coho salmon, especially when, as here, the stream temperatures are already within a few degrees of the critically high temperatures for coho salmon. The increased temperatures and reduced flows may have caused additional loss of coho salmon due to added temperature stress and reduction of fisheries rearing habitat.

#### Susceptibility to Cleanup Efforts Undertaken

The susceptibility of the waste discharged to cleanup efforts is described under *Proposed Civil Liability Against the Hawthorne Entities* No. 4 above and incorporated herein.

#### Degree of Toxicity of Discharge

The Regional Water Board staff have no knowledge of any discharge of toxic substances resulting from the blasting incident.

#### Ability to Pay and Ability to Continue Business

Western is a family-owned corporation with between 4 and 15 staff, depending on the time of year. Western showed a loss of \$145,623 from October 1, 1998 to September 30, 1999 on their Form 1120 U. S. Corporation Tax Return. Western's taxable income for this time period was \$224,341. It is unclear if Western's insurance carrier would cover the proposed civil liability. A letter Western's insurance carrier (Nobel Insurance Services) sent to Western states, "fines and penalties imposed by the North Coast Regional Water Quality Control Board or any other administrative body, which have not been reduced to a legal judgement in a court of law, do not represent a legal obligation for damages and the insuring agreement is not triggered for indemnity." Western should address at the hearing its ability to pay the civil liability and whether it would be able to continue business.

#### Voluntary Cleanup Efforts Undertaken

Western did not engage in any voluntary cleanup activities at the Site, nor did the Regional Water Board require cleanup since Western did not have legal access to the Site following cancellation of the Agreement. However, Western did send a letter to Campbell on August 4, 2000 indicating that they were "ready, willing, and able" to remove the blasted material from the Two Log Creek and sidelopes leading into the creek. The letter also confirms that this offer was made to Hawthorne Entities immediately after the blasting incident.

Prior History of Violations

Regional Water Board staff has no knowledge of any past violations by Western. According to the September 22, 2000 letter submitted by Western to Regional Water Board staff, Western has received no notices of violations in the past nor have any claims been submitted against their insurance policy.

Degree of Culpability

Western should have known about the existence of Two Log Creek. For example, a topographical map was attached to the Agreement showing the Two Log Creek borrow pit and the nearby creek. Western has stated that a representative of Campbell visited the Site with Western prior to the blast and never mentioned the presence of the Two Log Creek. However, Western did not review its contract adequately, or the area surrounding the proposed blast to determine if a watercourse was within the blast zone. As a result, Western failed to take the necessary precautions to protect the stream from the harmful effects of blasting.

Economic Savings

The Regional Water Board staff has no knowledge of Western's economic savings as a result of the discharge.

Other Matters as Justice May Require

Regional Water Board staff is unaware of any other matters relative to Western actions that justice may require.

16. Based on the above factors, I hereby propose that of the maximum administrative civil liability set forth under *Proposed Civil Liability Against the Hawthorne Entities* No. 3, Western is liable in the amount of Twenty-five Thousand Dollars (\$25,000.00), which is due and payable by Western by April 12, 2001 if Western waives its right to a hearing as provided below.
17. This action is an enforcement action and is, therefore, exempt from the California Environmental Quality Act, pursuant to Title 14, California Code of Regulations, Section 15321.

**Waiver of Hearing**

The Hawthorne Entities and/or Western may waive the right to a future hearing. If you wish to waive the hearing, please sign the enclosed waiver and return it together with a cashier's check or money order, made payable to the "State Water Resources Control Board," for the amount of civil liability proposed above by April 12, 2001 to the California Regional Water Quality Control Board, North Coast Region, 5550 Skylane Boulevard, Suite A, Santa Rosa, CA 95403. This settlement will not become effective until after a 30-day public comment period.

Ordered by \_\_\_\_\_

Lee A. Michlin  
Executive Officer

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