

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement and 13267 Order
No. R1-2009-0054

For

HW3 LLC
Ocean Heights Residential Subdivision

Del Norte County

The California Regional Water Quality Control Board, North Coast Region (Regional Water Board), finds that:

1. HW3 LLC (Brookings Oregon) (hereinafter Discharger) owns land adjacent to Ocean View Drive in Smith River, identified as Del Norte County Assessor's Parcel Numbers 102-016-004 and 102-016-009 (hereinafter Site). The Discharger has conducted cut and fill activities and landslide remediation at the Site over the past four years. The Site discharges stormwater runoff into an unnamed tributary to the Smith River Estuary; both of which are waters of the State. The Discharger's activities at the Site have resulted in discharges, and continued threatened discharges, of sediment to waters of the State, including both the unnamed tributary and the Smith River Estuary.
2. The Discharger obtained permit coverage for a residential subdivision under the State Water Resources Control Board's Construction General Permit (CGP) in March 2005. The CGP requires the Discharger to install Best Management Practices for erosion and sediment control in order to prevent and/or minimize the discharge of sediments and other pollutants of concern from construction sites to waters of the State.
3. On February 24, 2006, Regional Water Board staff (Staff) inspected the Site. At the time of this initial inspection, extensive cutslope and fillslope road work had been performed on the Site. Staff observed evidence of extensive sediment erosion and land movement, primarily due to the extensive period of sustained precipitation that occurred during the last week of 2005. Staff noted that existing erosion and sediment control practices onsite had been severely damaged by the storm water runoff flows. (Photographs 1-3). Staff verbally warned the Discharger that the Site needed extensive erosion and sediment control upgrades. Due to ineffective erosion and sediment controls, the Regional Water Board issued the Discharger a Notice of Violation (NOV) for the Site on March 6, 2006.
4. As a followup to the NOV, on October 24, 2006 Staff again inspected the Site, and observed that the Discharger had made considerable efforts to

control sediment discharges. Landslide debris had been removed and replaced with several large rock buttresses. Seed and erosion control blankets covered much of the Site. (Photographs 4-6). Staff determined that the site was in compliance with the CGP at that time.

5. On January 2, 2008, Staff inspected the Site, observing that the site erosion and sediment control measures had deteriorated. Land movement had caused erosion control blankets to tear apart, and numerous rills and gullies had formed. (Photographs 7-12). It appeared that the Discharger was not actively attempting to control sediment discharges. On January 16, 2008, the Regional Water Board issued a second NOV for the Site, due to the threatened discharge of sediments from the Site to waters of the State. In response to the NOV, the Discharger submitted plans to the Regional Water Board revealing all existing land movements and detailing efforts made to arrest prior land movements and planned efforts to arrest more recent land movement. The Discharger did not include a schedule for the additional work to be performed.
6. On September 30, 2008, Staff inspected Site. Staff found that sediment traps at the Site were filling and in need of immediate maintenance. Staff contacted the Discharger regarding maintenance of the sediment traps. The Discharger subsequently cleaned out the sediment traps (Photograph 13). Staff noted additional land movement that was impacting onsite drainage ditches and constituted a continued threat of discharge of sediment laden storm water to receiving waters during the approaching rain season.
7. On January 2, 2009, the Discharger notified Staff that a large landslide had occurred at the Site. On January 9, 2009, Staff and the Del Norte County engineer met with the Discharger to inspect the landslide. Approximately 8,000-10,000 yards of material had released from the hillside, discharging sediments and creating the potential for significant additional discharges of sediments to waters of the state. (Photographs 14-17). Staff advised the Discharger to take immediate steps to route all runoff from subsequent storms and from onsite springs away from the active landslide, and to buttress the toe of the slide so as to prevent its migration towards waters of the state.
8. On March 23, 2009, Staff inspected the Site, noting that a large rock buttress had been placed at the toe of the landslide, temporarily preventing any additional significant land movement. Spring flows and storm water runoff had been re-directed around the active face of the slide. Drainage pipes were installed in lower sections of the landslide in order to dewater the slide mass. (Photographs 18-20).
9. On May 5, 2009, the Regional Water Board Timber Division Staff participated in a Pre-Harvest inspection focusing on the unstable features and road system within both the adjacent timber plan area and the Site. During this inspection, staff noted a high risk potential for significant

discharges of sediment from the Site onto the timber plan area and ultimately into waters of the State.

10. Beneficial uses of the Lower Smith River and its tributaries are designated in the Water Quality Control Plan for the North Coast Region (Basin Plan), and include:
 - a. Municipal and domestic supply (MUN)
 - b. Agricultural supply (AGR)
 - c. Industrial service supply (IND)
 - d. Freshwater replenishment (FRSH)
 - e. Navigation (NAV)
 - f. Water contact recreation (REC-1)
 - g. Non-contact water recreation (REC-2)
 - h. Commercial and sport fishing (COMM)
 - i. Cold freshwater habitat (COLD)
 - j. Rare, threatened, or endangered species (RARE)
 - k. Wildlife habitat (WILD)
 - l. Migration of aquatic organisms (MIGR)
 - m. Spawning, reproduction, and/or early development (SPWN)
 - n. Estuarine Habitat (EST)
 - o. Native American culture (CUL)

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

11. 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 pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited."*
12. The "Guidelines for Implementation and Enforcement of Discharge Prohibitions Relating to Logging, Construction or Associated Activities" (Guidelines) set forth within the Action Plan states: "where investigations indicate that the beneficial uses of water may be adversely affected by waste discharges, the staff shall require the submission of Reports of Waste Discharge." (Basin Plan, Ch. 4, Implementation Plans, Action Plan for

Logging, Construction, and Associated Activities, Investigation and Coordinating Activities, § B, at 4.28.00.)

13. The Guidelines identify objectives that are considered of particular importance in protecting the beneficial uses from unreasonable effects due to discharges from logging, construction, or associated activities, such as the Discharger's activities, and include the following:
 - Color: Waters shall be free of coloration that causes nuisance or adversely affects beneficial uses.
 - Suspended Material: Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.
 - Settleable Material: Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.
 - Sediment: The suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.
 - Turbidity: Turbidity shall not be increased more than 20 percent above naturally occurring background levels. Allowable zones within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.
14. As described above, the Discharger placed sediment where it could enter into an unnamed tributary to the Smith River in quantities that may be deleterious to fish, wildlife and other beneficial uses, violating both Prohibitions 1 and 2 in the Action Plan, as described in Paragraph 11, above. This includes potential impacts to fish migration, spawning and rearing habitat during the 2009/2010 rainy season.
15. The potential for sediment discharges from the Site grading activities to waters of the State threaten to create a condition of pollution. Water Code Section 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.
16. The beneficial uses of the Smith River are threatened by the discharge of the sediments at the Site. As described above, the cut and fill activities at the Site threaten fish migration, spawning and rearing habitat with subsequent rain events, are therefore subject to cleanup and abatement under California Water Code section 13304.
17. Water Code section 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 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.”

18. Water Code section 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. Water Code section 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. A restoration workplan required by this Order, pursuant to Water Code section 13267, is necessary to ensure that future threat to water quality created by activities on the Site, which resulted in the potential discharges described above, are properly assessed, abated and controlled.
19. 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, section 21000 *et seq.*), in accordance with California Code of Regulations, title 14, sections 15308 and 15321.
20. 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 Water Code section 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.
21. 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 Water Code section 13320 and title 23, California Code of Regulations, section 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. 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 Water Code section 13304 and 13267, the Discharger shall provide the following information and perform the following cleanup and abatement actions at the Site:

1. Take immediate steps to cease any future discharges of earthen materials, soil, and sediment that can result in violations of Water Quality Objectives to waters of the State, including the Smith River Estuary and its unnamed tributary.
2. Submit a Cleanup and Abatement plan for Regional Water Board Executive Officer approval, before July 15, 2009 that includes a revised Stormwater Pollution Prevention Plan (SWPPP) showing all erosion and sediment transport control best management practices that will be implemented on the Site to prevent sediment discharges from all potential sediment sources to the unnamed tributary and the Smith River Estuary during the 2009/2010 rain season. The SWPPP must include a plan for the complete removal and safe storage of all landslide materials resulting from the January 2009 landslide.
3. Submit a long-term restoration workplan to the Regional Water Board, for Executive Officer concurrence, on or before August 15, 2009, that includes the following:
 - a. A restoration plan that describes and shows in detail how the Discharger proposes to stabilize all graded areas at the Site. The plan shall contain engineering design for hydrological restoration components, a county approved Site drainage plan, a time schedule for restoration activities, criteria to judge the success of the restoration project, and a monitoring proposal to evaluate whether the restoration is successful.
 - b. A description of future land disturbances and drainage modifications associated with the Discharger's tentative subdivision map for the Site, including future residential development plans for the property; wastewater treatment and discharge plans; and how the Smith River Estuary and its unnamed tributary creek will be protected from subsequent sediment, drainage and/or wastewater discharges as a result of project build-out. If the plan cannot provide reasonable assurance that future construction will not result in discharges of pollutants to waters of the state, further permitting and/or enforcement actions may be warranted.
4. Following Executive Officer written concurrence, the Discharger shall implement the Cleanup and Abatement plan. All work to prevent further or potential discharge of sediments from the Site to the unnamed tributary shall be completed prior to the onset of the 2009/2010 rainy season.

5. 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.

6. 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
June 11, 2009