

DANIEL F. GALLERY  
JESSE W. BARTON  
PAUL T. JOHNSON

**GALLERY & BARTON**  
A PROFESSIONAL LAW CORPORATION  
1112 I STREET, SUITE 240  
SACRAMENTO, CA 95814-2865

P: (916) 444-2880  
F: (916) 444-6915  
WWW.GALLERYBARTONLAW.COM

WRITER'S E-MAIL: jbarton@gallerybartonlaw.com

March 31, 2009

Wendy S. Wyels, Chief  
Compliance and Enforcement Section  
Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive #200  
Rancho Cordova, CA 95670

**RE: Draft Cleanup and Abatement Order, Rubicon Trail, El Dorado County**

Dear Ms. Wyels:

This office represents the Rubicon Trail Foundation ("RTF") and hereby registers its comments regarding the draft Cleanup and Abatement Order (the "CAO") for the Rubicon Trail (the "Trail"). RTF is a federally recognized 501(c)(3) non-profit public benefit corporation established in 2004 for the sole purpose of enhancing the health and use of the Rubicon Trail, while ensuring responsible motorized year-round access to the Trail. RTF acts as one source of financial support for Trail projects and as a liaison with Friends of the Rubicon (FOTR) and local government organizations. This support can range from getting approval for projects from the appropriate government agencies, to feeding the volunteers, to offering comments on government actions involving the Trail, to buying supplies needed to maintain the Trail. Due to RTF's significant interest in this matter, it requests status as a party pursuant to Title 23, California Code of Regulations, Sections 648 and 648.1.

RTF appreciates the opportunity to review the CAO prepared by the Regional Board; however, as prepared, the CAO goes far beyond the Regional Board's jurisdiction, lacks adequate evidentiary support to carry to burden of proof, and does not comply with the California Environmental Quality Act (CEQA). If adopted as written, the CAO would be successfully challenged either in the administrative appeal or the judicial process.

Actions taken by the Regional Board pursuant to Water Code Section 13304 (Cleanup and Abatement Orders), are subject to review by the State Water Resources Control Board (SWRCB) pursuant to Water Code Section 13320. The SWRCB's and the Regional Board's actions are subject to further review pursuant to Water Code Section 13330, and therefore ultimately by Section 1094.5 of the Code of Civil Procedure. Thus, the Regional Board must show that it: (a) proceeded on matters within its jurisdiction; (b) conducted a fair hearing; and (c) did not abuse its discretion. Abuse of discretion is established if the Regional Board did not proceed in the manner required by law, the order is not supported by the findings, or the findings are not supported by the evidence. In addition, in a discretionary action, the Regional Board must show compliance with CEQA, if not specifically exempted from CEQA's provisions. In order to

legitimately claim a CEQA exemption, the Regional Board must show that there is no substantial evidence of a reasonable possibility the CAO would have a significant effect on the environment.<sup>1</sup> Failure to prove each element subjects the Regional Board's action to reversal.

For ease in reference, our comments will correspond to the numbered paragraphs in the CAO.

## BACKGROUND

5. The finding that "El Dorado County has allowed OHV users to access the Rubicon Trail throughout the year, and minimal work has been completed to effectively drain the trail surface and prevent or reduce sediment discharges to waters of the state" is inaccurate and unsupported by the evidence. El Dorado County and other organizations have accomplished the following over the past several years:
  - a. 2001
    - Friends of the Rubicon (FOTR) and Placer County completed the Lahontan District Mitigation measures, which included installing several dozen water bars in the Tahoe Basin on the Rubicon Trail. The water bars significantly reduced the amount of water flowing over the Trail and reduced the associated erosion.
  - b. 2002
    - FOTR, El Dorado County, El Dorado National Forest, and many private property owners constructed a new trail segment across primarily granite to relocate the existing path away from Loon Lake. The existing route was too close to a shoreline and sensitive meadow habitat. Signs were posted at both ends of the new trail segment alerting drivers to the new trail location.
    - FOTR, working in conjunction with El Dorado County, filled three pits near Walker Hill with locally available cobble. These pits were filled to reduce erosion on the Trail.
    - FOTR, working with El Dorado County, installed Trail marking signs from the western entry points up to Ellis Creek. The signs were installed to keep users aware of the location of the Trail.
  - c. 2003
    - FOTR, working in conjunction with the El Dorado National Forest, performed a variety of maintenance on the Wentworth Springs Road and Campground. This work prepared the campground for seasonal use.
    - FOTR, working in conjunction with Jeep Jamboree USA, El Dorado County and El Dorado National Forest, repaired a historic bypass around Little Sluice.
    - FOTR, working with El Dorado National Forest, performed maintenance at the Gatekeeper portion of the Trail to reduce erosion and sedimentation.

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<sup>1</sup> *Azusa Land Reclamation v. Main San Gabriel Basin* (1997) 52 Cal.App.4<sup>th</sup> 1165, 61 Cal.Rptr.2d 447.

- FOTR, working with El Dorado County, performed an erosion control project on Walker Hill. The obstacle had become so difficult that bypasses were being created. Repair of the obstacle allowed the bypasses to be blocked and abandoned.
- FOTR, working with El Dorado County, installed the remaining Trail marking signs from the western entry points all the way to Lake Tahoe. The signs were installed to keep users aware of the location of the Trail.
- FOTR, working with El Dorado National Forest, acquired and prepared a kiosk to be installed at Loon Lake. The kiosk would be used to store materials and as a source of public education.
- FOTR escorted members and attendees of the Rubicon Oversight Committee to the Rubicon as part of an agency outreach and education program. FOTR performed the same function later this year for Congressman Doolittle.
- FOTR assisted El Dorado County and its DOT survey crew to GPS the Trail from Loon Lake to Little Sluice.

d. 2004

- FOTR moved the kiosk to its current location at Loon Lake.
- FOTR, working with El Dorado County, performed a waste clean-up at Spider Lake.
- FOTR, working with the Department of Fish and Game, restored Miller Creek to its original path. In 1997, a flood caused the creek to move onto a portion of the Trail. By restoring the creek to its original path, water could be kept off of the Trail.
- FOTR, working with private property owners and El Dorado County, removed a logjam at Rubicon River Bridge that was threatening the integrity of the bridge.
- FOTR, working with El Dorado National Forest, performed additional maintenance at the Gatekeeper portion of the Trail to reduce erosion and sedimentation.
- FOTR escorted sixteen law enforcement personnel (judges, attorneys and police officers) on a tour of the Trail. The tour was organized by the County of El Dorado. FOTR provided vehicles and lunch.

e. 2005

- FOTR performed the Fourth of July traffic survey.
- FOTR provided vehicle transport to El Dorado County personnel to obtain water samples on various locations on the Trail. The water samples were used to establish a baseline for the Rubicon Trail Master Plan.
- FOTR marked portions of the Trail with reflectors.
- FOTR worked with the El Dorado National Forest to define Trail and parking locations on the Lake Tahoe staging area.
- FOTR worked with Tahoe National Forest to block an unauthorized bypass near Cadillac Hill and Miller Creek to keep vehicles on the Trail.
- FOTR assisted El Dorado County and El Dorado National Forest with

blasting to reduce the protruding rock size in the Gatekeeper obstacle to realign the Trail and avoid the existing ephemeral spring.

f. 2006

- FOTR worked with El Dorado County to walk the Loon Lake Intertie to determine the scope of future work.
- FOTR, in conjunction with El Dorado County, finished repairs to the Gatekeeper obstacle left over from the previous season. FOTR and the County also implemented erosion control and drainage in that area to keep water off the Trail.
- FOTR, in conjunction with Tahoe National Forest (TNF) and Placer County, worked on four projects: (1) filled an incised section and armoring the bottom with cobble at the Potato Patch, (2) blocked bypasses at the Potato Patch, (3) maintained drainage at the Potato Patch, and (4) did additional water bar work in the Miller Lake area.
- FOTR, in conjunction with El Dorado County, performed additional water bar work to mitigate erosion on, above, and below Walker Hill. In addition, steps were taken to block and close a bypass beginning to be used at Walker Hill.

g. 2007

- FOTR in conjunction with TNF and Placer County completed work on last year's Potato Patch Project, which included backfilling and armoring the bottom of an incised portion of the Trail.
- FOTR, in conjunction with El Dorado County, private property owners, and El Dorado National Forest, performed five improvement projects on the Trail: (1) installed range fences near Loon Lake trailhead to block illegal bypasses, (2) installed range fences at the bottom of the bowl to block illegal bypasses, (3) installed additional signs on Ellis Intertie and Wentworth to Ellis trail sections, (4) armored the Trail at Gatekeeper obstacle, and (5) performed maintenance work on the Loon Lake kiosk (painting, repairs).
- FOTR, in conjunction with El Dorado County, installed a gabion shoring structure to reduce erosion and repaired the sideslope to address safety and trail widening concerns at the Loon Lake SMUD bypass.
- FOTR, in conjunction with El Dorado County, backfilled and armored a ½ mile Trail section in Wentworth Springs area as well as repairing the water bars near Wentworth Springs.
- FOTR, in conjunction with TNF and Placer County, backfilled and armored a Trail section west of Barker trail junction.

h. 2008

- FOTR, in conjunction with El Dorado National Forest and El Dorado County, continued work on the Wentworth Springs hardening project, installed a range fence at the bottom of the granite bowl at Loon, added trail markers to key areas of Granite Bowl and Wentworth slab, maintained cobble at gatekeeper area, surveyed west end of trail for future projects.

- FOTR and Jeepers Jamboree, in conjunction with Placer County and TNF, realigned an ephemeral creek drainage to original creek bed on upper Cadillac Hill, installed a gabion and backfilled with cobble on lower Cadillac Hill for erosion prevention and to reduce trail widening, and blocked multiple illegal bypasses to prevent erosion and trail widening.

In addition, the following work is planned for the upcoming years:

- A Trail assessment for the purpose of prioritizing erosion mitigation work has been completed by the California Geological Survey and is due to be delivered by the end of March 2009.
  - El Dorado County DOT has applied for grant funds for development of operating procedures and training of volunteers and DOT workers on Trail construction.
  - El Dorado County DOT has completed study work for installing bridges at both Gerle Creek and Ellis Creek.
  - RTF has begun the process of implementing a study to be undertaken each season to get an accurate count of Trail users.
  - RTF has applied for grant funds for construction of a vehicle designed, licensed, and permitted for the removal of human waste from approved vault toilets on the Trail.
  - El Dorado County has applied for grant funds for conducting a feasibility study for placement of toilet facilities along the Trail.
  - El Dorado County Environmental Management Department has for the last four seasons, with volunteers assisting, conducted a highly effective Automotive Fluid Spill Prevention and Control Program (discussed below).
  - El Dorado County Environmental Management Department has for the last four seasons, with volunteers assisting, conducted a highly effective waste disposal education program (discussed below).
6. The finding that “35,000 vehicles access the Rubicon Trail entry areas during the three summer months” is unsupported by the evidence in the record. This statement appears to be derived from page 3.3-1 of the Rubicon Trail Master Plan-Draft Environmental Impact Report (SCH#2006032117) (the “RTMP”), but that statement is in passive voice and refers to no study to support this conclusion. To the contrary, El Dorado County states on page 3.3-3 that “El Dorado County DOT traffic counts do not represent volumes solely associated with Rubicon Trail use and the portion of these vehicles that were Rubicon Trail users was not determined by DOT.” It is possible that the 35,000 figure was acquired from the 2001 report prepared by Dan Totheroh on waste removal options on the Trail. However, this report claims “that 35,000 *people* days would be a reasonable figure to use for the total *annual* use on the Rubicon OHV Trail.” (Emphasis added.) Note that Mr. Totheroh refers to “people,” not vehicles, and “annual use,” not a three-month period. Thus, the “35,000” vehicle finding must be struck from the CAO as unsupported by the evidence.

All Traffic Data and Friends of the Rubicon performed the only reliable traffic counts on the Trail. The results of these counts are found in Tables 3.3-1 and 3.3-4 of the RTMP. All Traffic Data’s study, performed in 2003, counted vehicles at the Rubicon Trail intertie at Ellis Creek. Based upon the actual traffic counts in Table 3.3-1, 323 vehicles

used the Trail during July 24 and 25 (a Thursday and Friday), and 382 vehicles used the Trail on August 30 and 31 (a Saturday and Sunday). This is an average of 176 vehicles for each of these four days. Worth noting is that July 24 and 25 marked the beginning of the Jeepers Jamboree for that year (held Thursday through Sunday), which is a very popular event and results in a high turnout. In addition, August 30 and 31 marked the beginning of the Labor Day weekend for that year, also a high turnout event. Monday, Tuesday, and Wednesday traffic counts are not available, and traffic on those days would be expected to be much less than days leading up to and including the weekend.

To survey Trail use a few years later, also during a busy holiday weekend, Friends of the Rubicon performed traffic counts at the same location (Rubicon Trail intertie at Ellis Creek) over the entire 2005 Fourth of July holiday weekend (Friday morning to Monday afternoon). The results of this study are found in Table 3.3-4 of the RTMP. Based upon this study, 372 vehicles were counted on the Trail, with an average of 1.78 people per vehicle. This amounts to an average of only 106 per day, which is a 40% reduction from the study performed in 2003. Only 74% of the vehicles counted were 4x4s (or 275 4x4s), as 16% were either quads, motorcycles, or sand rails.

Detailed findings of each study are attached to this letter as **Exhibit A**.

The statement that “over 600 people relied on individual human waste disposal methods for the four-day holiday period” is similarly unsupported by the evidence in the record and is also unfair. First, based upon a review of the RTMP and the Regional Board’s administrative records obtained by this office, there is no study on human waste disposal for this period of time on the Trail. Second, this statement does not reflect the fact that many of these people camped at and used the pit toilets at Rubicon Springs. Third, this statement is written in a manner that leads one to believe that all of the waste eliminated was left on the Trail. A large number of Trail users bring portable waste elimination kits with them and pack the waste out. And fourth, this statement does not reflect the fact that between the years 2003 and 2007, the County of El Dorado has purchased 7,152 WAG (Waste Activated Gel) bags, 399 disposable cardboard toilets, 55 plastic toilet units, and 15 full PET waste elimination systems (plastic commode and tent). These items were purchased with the help of a grant from the California Off Highway Motorized Vehicle Recreation (OHMVR) Division<sup>2</sup> and a grant from the federal Recreational Trails Program.<sup>3</sup> Once purchased, the items were distributed between 2003 and 2007 by county employees, RTF, Friends of the Rubicon, and volunteers at various locations on the Trail and sometimes directly to groups such as the Jeepers Jamboree prior to their scheduled events on the Trail. In addition, El Dorado County has purchased an additional 1,500 WAG bags and 240 disposable cardboard toilets for the 2009 season. In addition, El Dorado County recently installed a restroom at the Loon Lake entrance point, which is the most popular location to enter the Trail.

## ENVIRONMENTAL IMPACTS

7. While the County of El Dorado did declare a state of local emergency on July 13, 2004, it is important to note that water quality sampling done at Spider Lake prior to the

<sup>2</sup> <http://ohv.parks.ca.gov/>

<sup>3</sup> <http://www.fhwa.dot.gov/environment/rectrails/>

declaration did not reveal any water quality problems in or around Spider Lake. Attached to this letter as **Exhibit B** are the lab results of water quality testing done on July 1, 2004, and on July 6, 2004. Note that none of the samples detected total coliform or E. coli in amounts that exceeded California Department of Health or Environmental Protection Agency standards.

8. The Regional Board states:

Low levels of oil and grease were identified in water and soil samples collected on the Rubicon Trail, and low levels of copper and cadmium were identified in soil samples. This contamination is due to motor vehicle oil, grease, and other petroleum-based fluids spilling and leaking from OHVs that have overturned or have damaged mechanical components while traversing rocky segments of the trail.

However, the Regional Board confuses two issues in this paragraph. On the one hand, we have oil and grease “identified” in water samples along the Trail, and on the other hand, we have oil and grease “identified” in sediment samples along the Trail. With respect to the former, the Regional Board would have jurisdiction if true; with respect to the latter, the Regional Board does not, unless the discharge to land will “probably” cause the discharge to be “discharged into water of this state and creates, or threatens to create, a condition of pollution or nuisance.”<sup>4</sup>

Water Samples and Water Quality in and around the Trail

If we focus for the time being on the oil and grease “identified” in water samples, a close reading of the RTMP and the attached water quality study does not support the Regional Board’s statement. On page 7 of the water quality study performed by the Center for Regional Environmental Science and Technology (CREST), attached here as **Exhibit C**, it is disclosed that the method utilized to test water for oil and grease is the hexane extraction method followed by gravimetric analysis. Under this method, all hexane extractable organic materials (HEOM) are removed from the water and weighed. But HEOM is not limited to automobile oils and grease. HEOM includes relatively non-volatile hydrocarbons, vegetable oils, animal fats, waxes, soaps, greases, plant extracts, and related materials.<sup>5</sup> CREST admits as much on page 8 stating that “in addition to the oil, grease, gasoline and diesel vehicle contamination, decomposing plant material would also be extracted in the process.” CREST elaborates on page 14 that “oil and grease from vehicle contamination represents only a subset of the possible organic compounds which may be extracted via the hexane extraction method utilized in this portion of the study. There are also some naturally occurring compounds which would also be extractable by the techniques employed here.”

The only way to determine the true origin of the HEOM detected in the water samples is by gas chromatography, which CREST performed for the sediment samples, but not the water samples. CREST states on page 14 that “recommendations for future study suggests that the water extracts be further analyzed by gas chromatography and mass

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<sup>4</sup> California Water Code § 13304

<sup>5</sup> Drum, Bauman, Shugar, Environmental Field Testing and Analysis Ready Reference Handbook (2000, McGraw-Hill Professional), page 3.94.

spectrometry which would provide direction information regarding the type (and source) of compounds included in the extracts.”

Thus, without this additional testing, the HEOM detected in the water quality samples cannot be ascribed to vehicular sources. The only legally defensible statement with respect to the water quality testing is that the testing revealed the presence of HEOM materials, which may, or may not, be vehicular in origin. It is entirely possible that some, or perhaps all, of the HEOM detected was from natural sources. This would be consistent with the other findings in the CREST study. For example, on page 15, CREST writes:

The vast majority of sampling sites showed very small quantities of HEOM. Oil and grease is largely insoluble in water and less dense than water. As a result of these properties, oil and grease contamination would be expected to form a grease-like thin film on the top of the water and to accumulate near the shore-line with the winds blowing toward shore. Particular attention was paid to water sampling in these locations.

For example, Spider Lake was sampled on the shore with the wind blowing toward the sampling direction. Any oil and grease would be expected to accumulate near this sampling site. Very little HEOM was obtained from samples collected on the June 28<sup>th</sup> sampling at any of the water sampling locations.

Thus, CREST took water samples in locations that were expected to produce the largest concentrations of oil and grease. Yet testing in these locations failed to produce the expected results. This suggests that the HEOM detected in the water samples is not oil and grease at all; it is more likely that the HEOM detected is from other sources, which would include decaying plant matter.

There is additional support for this in the CREST study. Figure 2, page 15, shows the results of water quality tests from various locations along the Trail. Note that in two of the five locations, detected HEOM actually went down as the recreation season progressed. If the detected HEOM was actually of vehicular origin, HEOM would be expected to increase commensurate with the increase in vehicular traffic, but it does not. As the recreation season progressed, HEOM in Rubicon Springs and Mud Lake went down.

CREST admits on page 27 that “the definitive fate of the oil and grease has not been fully determined” and that the “small increase in oil and grease [i.e. HEOM] contamination in the nearby water bodies sampled on November 9<sup>th</sup> does not support the theory that these contaminants are fully washed into nearby water bodies. In fact, preliminary core sample results indicate a strong possibility that some of the oil and grease may be carried deeper in the sediment where it may sequester and concentrate in soil layers.” Thus, according to CREST, it has not been determined whether the HEOM detected in the nearby water bodies is from oil and grease deposits in the soil. Instead, it is a “strong possibility” that the oil and grease detected in the sediment remains in the sediment.

There is other evidence that use of the Trail has not adversely impacted any of the local water bodies. The first of three studies, **Exhibit D**, is a water quality control study performed by Devine Tarbell & Associates, Inc., for the Sacramento Municipal Utility District’s (SMUD) Upper American River Project (the “UARP”), as part of SMUD relicensing its hydroelectric facilities with the Federal Energy Regulatory Commission.

The purpose of the water quality study was to assess the water quality and associated elements impacted by the project to determine if baseline water quality requirements are being met. The study area included all reservoirs associated with the UARP, which includes: Rubicon, Rockbound, Buck Island, Loon Lake, Gerle Creek, Ice House, Union Valley, Junction, Camino, Brush Creek, Slab Creek and Chili Bar. The study area also included all stream reaches below the dams and, to the extent necessary, tributary inflows into the reservoirs and reaches. All of the sampling locations are shown on the map attached to the last page of **Exhibit D**. The results of the study are contained on pages 27-70. Briefly summarized, the results are as follows:

- Zero water samples from Buck Island Lake, Loon Lake, and Gerle Creek tested exceeded the fecal coliform recreational objective set forth in the Central Valley Regional Water Quality Control Board's Basin Plan. However, several samples tested in Union Valley Reservoir exceeded the objective (pages 28-29). Worth noting is that the sampling period included samples taken on either the Independence Day or Labor Day weekends.
- All of the UARP reservoirs were sampled for oil and grease during the fall and spring of 2002-2003, and all reservoirs and stream reaches were tested in the summer of 2003. "During the sampling events, no evidence of surface sheens that might indicate the presence of oil or grease was observed. All 136 samples analyzed...were below the [Central Valley Regional Water Quality Control Board's] reporting limit" (pages 58-59).
- The UARP's reservoirs were also tested for sediment load. Buck Island, Loon Lake and Gerle Creek all tested below 1 mg/l in all of the samples taken (page 60). This is the lowest value of all water samples taken.
- Lastly, UARP reservoirs and stream reaches were tested in 2002-2003 and in 2004 for cadmium, copper, lead, nickel, silver, and zinc. The 2002-2003 testing revealed no reservoir samples exceeding CCC or CMC levels for cadmium, although two samples from Gerle Creek outflow from Loon Lake did exceed the CCC and CMC levels for cadmium and copper, as did several other locations on the Rubicon River, Brush Creek, the South Fork American River, the South Fork Silver, and Little Silver creeks. Note the discussion on page 66 that emphasizes testing done during 2002-2003 was done in *total recoverable solids*, rather than *dissolved solids*, which results in an overestimation of concentrations. The 2004 testing revealed two Loon Lake samples and two Gerle Creek samples below Loon Lake exceeded the CCC or CMC levels for cadmium. Twenty-one percent of all samples from all UARP reservoirs, and sixteen percent of all UARP streams exceeded the CCC or CMC for copper. However, note the comment on pages 64 and 65 that at the time of the testing, a snow sample was also collected, which *snow sample exceeded the CCC and CMC levels for cadmium, copper, and lead* (pages 62-68, Appendices A50a and A51a).

Thus, according to this comprehensive study of Loon Lake, Buck Island Lake, and Gerle Creek, the water bodies most likely to be affected by the Trail, there is simply no evidence that use of the Trail is adversely impacting these water bodies with sediment, oil and grease, fecal coliform, or heavy metals. There is more evidence suggesting that snow is the source of the heavy metals.

The second study, attached as **Exhibit E**, is a water quality control study performed by Placer County Water Agency (PCWA) Middle Fork American River Project (the "MFARP"), as part of PCWA relicensing its hydroelectric facilities with the Federal Energy Regulatory Commission. This study evaluated water quality at MFARP reservoirs French Meadows, Hell Hole, and Ralston Afterbay and various stream reaches between these reservoirs. A map showing the testing locations is attached as the last page to **Exhibit E**. While we are aware that most of the studied water bodies are somewhat lower in the watershed than the Trail, we are also aware that a variety of unsupported statements have been made that accuse Trail users of impairing the entire Rubicon River watershed. The results of this study are summarized below:

- During the sampling events, all testing for heavy metals and other general water quality parameters in and near Hell Hole Reservoir, the reservoir most likely to be affected by use of the Trail, met the Central Valley Regional Water Quality Control Board's Basin Plan, and other water quality requirements (pages 13-14, 19).
- During fecal coliform testing, all locations in and around Hell Hole Reservoir met Basin Plan objectives (pages 17-19).

Thus, there is no evidence that use of the Trail is adversely affecting beneficial and protected uses further down in the Rubicon River watershed.

The final study is a geomorphology study performed by Placer County Water Agency (PCWA) for the same Middle Fork American River Project (the "MFARP"). The geomorphology study is attached as **Exhibit F**. The purpose of this study was to measure the amount of sediment being deposited into the MFARP since originally built and determine if that sediment load is unusual in any way. The conclusion of the report is that the sediment accumulation rate in Hell Hole Reservoir is consistent with watersheds that yield low sediment loads (page 26). Unfortunately, we have been unable to locate a similar report for Loon Lake due to the short amount of time we have had to prepare this comment letter.

#### Sediment Samples in and around the Trail

This brings us to the oil and grease "identified" by CREST in the soil samples. We first note that CREST focused its sediment tests on Little Sluice (Table 5, page 43, **Exhibit C**). As a general comment, the Little Sluice is a worst-case scenario. Over the years, some users with extreme vehicles have blocked the trail with huge boulders as a challenge to their skills and equipment. Unfortunately, this has resulted in rollovers and damaged equipment resulting in a number of oil and grease spills. However, this location and these users do not represent the rest of the Trail or the other responsible users of the Trail.

Furthermore, we believe the CREST sediment study has been unfairly represented to mean something it clearly does not. The levels of oil and grease, and heavy metals, are going to be found in higher concentrations if only high-use locations are evaluated. If not properly put into context, this creates an image of the Trail as one long grease patch in

the middle of a national forest. Nothing could be further from the truth.

We also note that the Regional Board's authority is limited to those discharges to land that will "probably" cause the discharge to be "discharged into water of this state and creates, or threatens to create, a condition of pollution or nuisance."<sup>6</sup> Put differently, the discharge to land must both cause the discharge to be discharged into water and it must create, or threaten to create, a condition of pollution or nuisance.

If we assume, without admitting, that the discharge of oil and grease on the Trail will cause oil and grease to be discharged into waters of this state, we need to focus on the requirement that the discharge create, or threaten to create, a condition of pollution or nuisance. For the purposes of the California Porter-Cologne Water Quality Control Act, "pollution" and "nuisance" are defined in Water Code Section 13050 as follows:

- (1) 'Pollution' means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:
  - A. The waters for beneficial uses. [Beneficial uses are those uses of waters of the state that may be protected against degradation, which include, but are not limited to, domestic, municipal, agricultural, and industrial supply; power generation, recreation, aesthetic enjoyment, navigation, and preservation and enhancement of fish, wildlife, and other aquatic resources.]<sup>7</sup>
  - B. Facilities which serve these beneficial uses.
- (2) 'Pollution' may include 'contamination.' [Contamination means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease.]<sup>8</sup>

'Nuisance' means anything which meets all of the following requirements:

- (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
- (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
- (3) Occurs during, or as a result of, the treatment or disposal of wastes.

Thus, in order for the Regional Board's authority to reach oil and grease deposited on the Trail, the discharge must either result in a condition of "pollution" or "contamination." The Regional Board has set forth no evidence in the CAO that would allow it to make such findings.

- There is no evidence that the small amounts of oil and grease detected in the Trail sediment have resulted in an unreasonable impact on beneficial uses (let alone any impact).
- There is no evidence that the small amounts of oil and grease detected in the Trail sediment have resulted in an unreasonable impact on facilities which serve beneficial uses.
- There is no evidence that the small amounts of oil and grease detected in the Trail sediment have resulted in "contamination" (i.e. an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease).

<sup>6</sup> California Water Code § 13304

<sup>7</sup> Water Code § 13050(f).

<sup>8</sup> Water Code § 13050(k).

- There is no evidence that the small amounts of oil and grease detected in the Trail sediment have resulted in a “nuisance.” If the Trail were truly a nuisance, the Trail would not attract the number of visitors it sees each year.

Therefore, if the Regional Board adopts the CAO without substantially changing paragraph 8, it will have abused its discretion because the order is not supported by the findings, the findings are not supported by the evidence, and it will have proceeded on matters beyond its jurisdiction.

9. In this paragraph, the Regional Board relies upon a short-term sediment study entitled “Assessment of Sediment Delivery from the Rubicon Jeep Trail” (the “Study”) to arrive at the conclusion “that between 75 and 100 cubic yards (or approximately eight to ten, 10-yard dump trucks) of sediment is likely discharging from the El Dorado County portion of the Rubicon Trail to waters of the state annually.”

This conclusion is not supported by the Study or any other evidence in the record. To begin, the Study claims at equation (1), erosion on an OHV trail can be described by the following equation:

$$E_t = E_b + E_s$$

Where  $E_t$  is equal to the total erosion rate,  $E_b$  is the baseline erosion rate of the trail surface in the absence of OHV traffic, and  $E_s$  is the accelerated erosion due to OHV traffic.

Assuming, without admitting, at this point that this is even the correct formula for the Regional Board to use, the Regional Board did not properly calculate the inputs of the formula. The Regional Board derived this formula from a 1974 study from W.F. Megahan. In the 1974 study, Megahan states that:

$$E = f(h, p, f)$$

Where  $E$  is equal to surface erosion rate;  $h$  is equal to inherent soil erosion hazard and includes such factors as soil detachability and slope gradient;  $p$  is equal to protection afforded the soil surface by vegetation and litter; and  $f$  is equal to force applied by raindrops, overland flow, etc.

Yet the Regional Board jumps to the second equation on page 1 of the Megahan study without determining any of the background factors the author sets forth as the basis for the equation. Most notable is that the Regional Board has failed to account for arguably the most important factor in the formula, which is the force exerted by precipitation. On page 10 of the Megahan study, the author writes:

...the erodability index, defined as the kinetic energy of rainfall (foot-tons per acre-inch of rainfall) times the maximum 30-minute rainfall intensity (inches per hour) was a reliable index of the forces available for surface erosion.

Without an “index of the forces available for erosion,” the Regional Board Study is incomplete and inaccurate. To illustrate this point, imagine the formula employed by the

Regional Board being utilized in the Sahara desert. The Sahara desert covers 9,000,000 square kilometers and is the largest desert in the world.<sup>9</sup> Suffice to say the Sahara has a significant dust layer depth. If we accept the Regional Board analysis, all of this sediment is washed into the Niger River to the south, or the Atlantic Ocean to the west, or the Mediterranean Sea to the north, or the Red Sea to the east, each year. However, the problem with such an analysis is that it only rains about 0.79 inches per year in much of the Sahara. There is a significant lack of “forces available for erosion.” The same is true for the Trail, as very little precipitation falls in the summer. While much precipitation falls in the winter as snow, snow does not have the same “force available for erosion.” To quote from the Megahan study relied upon by the Regional Board, “No calculations were made when a snowpack existed because the erodibility index is irrelevant during such times.”<sup>10</sup> And from the attachment to Mr. Drew Coe’s email dated August 1, 2008, addressed to Mary Hartzell, Sue McConnell, Wendy Wyels, Tom Celio and Diane Rubiaco, “However, this assumption may only be valid if the first storm event(s) are rain rather than snow, as very light rain or early snow can provide cohesion to the dust layer (Coe, 2006).”

In fact, all of the studies principally relied upon by the Regional Board in its Study incorporate rainfall into their models and calculations. For example, one by Ziegler (2001) was based upon rainfall events and the propensity of those events to transport sediment. “In this work we use rainfall simulation to investigate sediment production associated with one common maintenance practice in northern Thailand, and to study sediment detachment by motorcycles and pickup trucks on unpaved roads...we focus on processes that determine sediment production during typical season storms.”<sup>11</sup> Thus, without precipitation data, which includes intensity of precipitation, the Study is nothing more than guesswork that results in conclusions that cannot be supported.

On page 4 of the Study (in the future this commentator suggests that the Regional Board number the pages of documents it releases for public comment), it is revealed that “[f]or the purposes of this study we assume that  $E_b$  is equal to zero and that  $E_t$  is equal to  $E_s$ .” Thus, the Study *did not even calculate the baseline level of erosion in the absence of OHV traffic*. Without establishing a baseline, this Study proves nothing about the erosive impact of OHV travel. This is akin to claiming all highway deaths are the sum of two groups, those related to alcohol and those that are not; then assuming that non-alcohol related deaths are zero, and stating that therefore ALL highway deaths are alcohol related. Such an assumption is not legally adequate evidence.

The only thing the Study calculated was a theoretical erosion total, which has additional flaws. For example, the Study assumes on page 4 that  $E_s = dA$  (equation 3) and on page 5 that “[a]nnual sediment delivery was assumed to [be] 100% when the trail drained directly into the stream channel.” However, no basis for these assumptions is provided. Sediment delivery into hydrological systems is affected by a number of factors including sediment source, texture, size, nearness to the main stream, channel density, basin area,

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<sup>9</sup> <http://en.wikipedia.org/wiki/Sahara>

<sup>10</sup> Megahan (1974), page 10.

<sup>11</sup> Ziegler, A.D., R.A. Sutherland, and T.W. Giambelluca. 2001. Interstorm surface preparation and sediment detachment by vehicle traffic on unpaved mountain roads. *Earth Surface Processes and Landforms*. 26:235-250

slope, length, land use/land cover, and rainfall intensity and runoff factors.<sup>12</sup> “Additionally, the impact of vehicle detachment of sediment is a function of numerous variables related to the vehicle, the road surface, the rain event and topography.”<sup>13</sup> Yet only two of these ten factors are considered in equation 3 used in the Study. Instead, equation 3 simply assumes that all of the loose sediment will drain directly into the streambed, without accounting for the size of the sediment, its texture, the slope of the trail, precipitation rates, distance from the stream, etc. Such an assumption is erroneous and not legally adequate evidence.

In sum, the findings made in paragraph 9 are not supported by the evidence and it would be arbitrary and capricious for the Regional Board to rely on a study that is clearly erroneous.

10. The Beneficial Use Impairment assessment, Section 3.4 on page 7 in the Study, is similarly flawed for several reasons.

First, the methodology for calculating the median surface grain size ( $D_{50}$ ) is not disclosed. We need to know the sample size, sampling methods, and channel features to evaluate the Study. We cannot assess the accuracy of the calculation without this information.

Second, the finding that the purported sediment load into Ellis Creek is filling “spawning gravels and reduces aquatic habitat” is not supported by the evidence. A review of the record relied upon by the Regional Board in drafting the CAO suggests the only source of evidence for this statement is set forth in the Study referred to above, and specifically the “Beneficial Use Impairment” statement in that Study. In turn, the “Beneficial Use Impairment” is based solely upon a single research paper entitled The Sizes of Salmonid Spawning Gravels by G. Mathias Kondolf and M. Gordon Wolman. Upon review, the research paper does not support the conclusions for which it is cited.

The purpose of the research paper was to compile “published and original size distribution data to determine distinguishing characteristics of spawning gravels and how gravel size varies with size of the spawning fish” (page 2275). Yet the Study’s Beneficial Use Impairment states on page 7 that

data indicate that the  $D_{50}$  above Ellis Creek is suitable for rainbow trout, brook trout, and brown trout, whereas the  $D_{50}$  below the Ellis Creek crossing is below the published range of spawning gravel for these trout species (Kondolf and Wolman, 1993) (Figure 4).

In addition, at Figure 4, page 8, it is stated the

horizontal lines represent the range of  $D_{50}$  preferred by trout species (Kondolf and Wolman, 1993). Note that the  $D_{50}$  below the Ellis Creek crossing is below the published range of  $D_{50}$  preferred by brook, brown, and rainbow trout for spawning.

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<sup>12</sup> Da Ouyang and Jon Bartholic. 1997. Predicting Sediment Delivery Ratio in Saginaw Bay Watershed, Institute of Water Research, Michigan State University. [www.iwr.msu.edu/~ouyangda/sdr/sag-sdr.htm](http://www.iwr.msu.edu/~ouyangda/sdr/sag-sdr.htm)

<sup>13</sup> Ziegler, A.D., R.A. Sutherland, and T.W. Giambelluca. 2001. Interstorm surface preparation and sediment detachment by vehicle traffic on unpaved mountain roads. *Earth Surface Processes and Landforms*. 26:235-250.

Nowhere in the research paper do the authors claim that the gravel sizes associated with a particular species represent that which is “preferred” by that species, nor does the research paper support the claim that sediment “reduces aquatic habitat.” The purpose of the research paper was to evaluate whether gravel sizes utilized by a particular species in a certain geographic location were associated with the size of the spawning fish—it was not designed to determine “preferred” gravel sizes or at what point a gravel size “impairs” usability for spawning purposes.

In fact, the authors go to great lengths to qualify the extent and applicability of the research paper. On page 2276, the authors set forth the “limitations of the data.” Among these are the following:

- **Definition of Course and Fine Tails of Size Distributions-** Many studies did not define the upper limit of the largest size class and some studies did not adequately define distribution of the finer sediments. This led to results that did not correctly define the upper and lower limits of gravels utilized by a particular species.
- **Spatial and Temporal Variability-** Most of the data entries represented averages of multiple samples from a single stream at a single point of time. Such a myopic review does not adequately consider fluctuations in stream flows that over time greatly influence the size of sediment. In the authors’ view, some “gravel deposits themselves may be subject to complete washout and replacement in some years.” In a stream system such as Ellis Creek, this is particularly applicable. Since the creek is high in the Sierra, it is subject to extremely high flows in the spring as the snow melts, but then greatly reduced flows during the late summer as the available snow pack subsides.
- **Influence of Study Site Selection-** “The choice of ‘representative’ sampling sites may influence observed gravel size and hydraulic conditions. Atypical sites, which could illustrate the adaptability of the fish, may be less often studied. For example, the use of radiotagging revealed that the large (> 100 cm in length) Chinook salmon of the Kenai River, Alaska, utilize depths and velocities far greater than recorded elsewhere. Chum salmon of the Susitna River select sites with upwelling current to spawn because the upwelling prevents freezing of the eggs. These fish commonly excavate 30 cm of silt before locating gravel in which to deposit their eggs. *Standards based on representative sites would have indicated these to be unsuitable for spawning.*” (Emphasis added, citations omitted.)

In addition to the authors’ own qualifications, we note an additional limitation of the data. None of the brook, brown, and rainbow trout study locations are within California. All of the studies were conducted in different states, and in some cases in different countries such as Canada and England. This is significant, because in the authors’ view “the relation between fish size and spawning gravel size is best viewed as defining an envelope curve, *with the gravel sizes actually used by fish determined largely by availability.*” (Emphasis added.) Thus, this study concludes that fish use gravel that is available in that particular location, and it does not stand for the proposition that a particular species of fish “prefers” gravel of a certain size. The only defensible proposition that can be gleaned from the research paper is, in the authors’ own words, the conclusion: “In general, fish can spawn in gravels with a median diameter up to about

10% of their body length.”

Instead of Kondolf’s 1993 study, the Regional Board should have considered using Kondolf’s 2000 study entitled Assessing Salmonid Spawning Gravel Quality, or perhaps hiring a qualified fishery biologist. Kondolf makes note that

to assess whether the interstitial fine sediment of the potential spawning gravel is so high as to interfere with incubation or emergence, the percentage of fine sediment of the potential spawning gravel should be adjusted for probable cleansing effects during redd construction...<sup>14</sup>

In other words, gravel within a constructed redd typically has less fine sediment than it did before redd construction due to the fish behavior in constructing the redd. This factor was not accounted for in the Regional Board’s Study and weakens its reliability. In fact, Kondolf recommends a nine-step, life-stage-specific assessment to determine spawning gravel adequacy for salmonids (pages 273-275), and the Regional Board does not appear to have utilized, or correctly applied, any of these nine steps.

Therefore, the conclusions made in paragraph 10 about beneficial uses being impaired are also unsupported by the evidence. The research paper relied upon in the Study simply does not support the propositions for which it is cited.

## **EL DORADO COUNTY PLANNING PROCESS**

14. In this paragraph the Regional Board explains why the El Dorado National Forest has not been named as a party to this action. However, we learned on Friday, March 27, 2009, that the United States Forest Service (USFS) may nevertheless be made a party. Since this action has occurred so close to the public comment deadline, and because we have received no formal announcement of the addition of a party, or whom to contact, if in fact the USFS has been added, we believe the USFS should have an appropriate amount of time to review and respond.

## **REGULATORY CONSIDERATIONS**

15. The statement that “El Dorado County has not adequately managed the Rubicon Trail for OHV use” is not supported by the evidence. The Regional Board should consider the following regarding El Dorado County’s management of the Rubicon Trail:
  - El Dorado County Department of Transportation has only had control of the Trail for nine months. For these nine months, significant work has been accomplished, and significantly more is planned, as outlined in our response to Paragraph 5 above.
  - Trail use when snow is on the ground is reasonable. Contrary to what some may say about winter four-wheeling, it does not destroy the landscape or contribute to problems with sedimentation. For the most part, vehicles travel

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<sup>14</sup> Kondolf, G.M. 2000. Assessing Salmonid Spawning Gravel Quality. American Fisheries Society, 129: 262-281.

on the top of the snow with no contact with the soil below. Consider the attached summary of winter use of the Rubicon Trail (**Exhibit G**).

- In 2004, El Dorado County implemented an Automotive Fluid Spill Prevention and Control Plan for the Trail. This Plan included building and installing permanent collection facilities, outreach and education, distribution of spill kits, advertising, and collection. Since its inception, El Dorado County has purchased approximately 15,000 oil spill kits with funds made available by the California Off Highway Motorized Vehicle Recreation (OHMVR) Division, distributed approximately 3,000 of the kits, and collected over 600 lbs of used spill kits for proper disposal. A portion of this program also included on-the-ground surveys of people who were entering the Trail. Based upon those surveys, the vast majority of people (an average in excess of 90%) attempt to stop leaks or catch the liquid in a container, and if the fluid ends up on the ground, they use absorbent pads to soak it up, then scoop up the soil, put it in a spill kit, and transport the material to a disposal site. An outline of the Plan, results from the surveys, and pictures of some of the collected materials are attached as **Exhibit H**.

For the reasons cited herein above, we disagree with each conclusion made in this paragraph.

16.-19. We have no comments on these paragraphs.

20. The Regional Board has made two critical and significant errors by declaring the CAO exempt from the California Environmental Quality Act (CEQA):

- A. The cited exemptions do not apply to the actions the Regional Board is requiring the County to take. Before the County can take the actions necessary to comply with the CAO, it must first comply with CEQA and possibly the National Environmental Policy Act (NEPA), and the Regional Board has not provided the County with enough time to do so.
- B. The exemptions relied upon by the Regional Board do not apply because they create a reasonable possibility that they will have a significant impact on the environment due to unusual circumstances.

Therefore, the Regional Board must either: (a) amend the CAO to provide the County with enough time to comply with CEQA, or (b) comply with CEQA itself and amend the CAO to address the unusual circumstances and the significant impacts on the environment due to those circumstances.

With respect to A. above, the Regional Board relies upon four CEQA exemptions in the draft CAO. California Code of Regulations, title 14, Section 15307, which provides:

Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. *Construction activities are not included in this exemption.* (Emphasis added.)

Section 15308, which provides:

Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. *Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.* (Emphasis added.)

Section 15321(a)(2), which provides, in relevant part:

Class 21 consists of:

(a) Action by regulatory agencies to enforce...a law, general rule, standards, or objective, administered or adopted by the regulatory agency.

(b) (omitted here for clarity)

(c) *Construction activities undertaken by the public agency taking the enforcement or revocation action are not included in this exemption.* (Emphasis added.)

And Section 15330, which provides, in relevant part:

Class 30 consists of any minor cleanup actions taken to prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release of a hazardous waste or substance which are small or medium removal actions costing \$1 million or less.

However, the first two exemptions require that "procedures" be in place for the protection of the environment. The Regional Board has identified no such procedures in the draft CAO, and there are no such procedures in the California Code of Regulations that outline what the Regional Board can and cannot do when taking actions purportedly to protect the environment.

Furthermore, the first three exemptions state in various forms that "construction activities are not included in this exemption." Yet the Regional Board demands in paragraph 3 of the Order portion of the CAO that the County must submit an Operation and Maintenance (O&M) Plan to the Regional Board within twelve weeks that involves the construction of road drainage structures, stream crossings, and new trail segments. These construction activities must be implemented by September 2009 (Paragraphs 4, 5, 6, and 7 of the Order), with no requirements that the construction activities comply with CEQA. The Regional Board cannot demand that the County perform these activities without first giving the County adequate time to comply with CEQA, to the extent the County as Lead Agency deems appropriate. While the Regional Board can certainly *request* that the County undertake the necessary actions to address the purported water quality impacts, it cannot demand that the County undertake construction activities by a date certain without giving the County adequate time to comply with CEQA. The exemptions upon which the Regional Board relies do not extend this far. The SWRCB Order *In the Matter of the Petition of Lindsay Olive Growers* (1993) Order No. WQ 93-17, California State Water Resources Control Board, is applicable on this point.

In *Lindsay Olive Growers*, the SWRCB heard an appeal from certain olive growers regarding the discharge of wastewater to disposal ponds. A portion of the appeal dealt with whether the Regional Board's action was exempt from CEQA under Section 15321. In addressing this question, the SWRCB noted that "some of the alternatives which petitioner may choose to comply with the CAO may have 'a significant effect on the environment,'" but that "independent CEQA review will occur at the time that Petitioner chooses a remedy and seeks the appropriate permits and approvals. If the chosen alternatives will indeed have a significant adverse effect on the environment, then a categorical exemption would be inappropriate" (page 8). Thus, even the SWRCB (which will review the instant CAO if the Regional Board does not amend it in a manner to address our concerns) recognizes that actions undertaken pursuant to a CAO are not exempt from CEQA if those actions could have a significant impact on the environment. This could include all of the construction activities discussed in the CAO, but we will not know until the County goes through the CEQA process.

However, since the CAO discusses a variety of actions the County must undertake to remedy the purported water quality impacts, which will include construction activities, it follows under the law that therefore every requirement made in the CAO requires compliance with CEQA. *Association for a Cleaner Environment [ACE] v. Yosemite Community College* (2004) 116 Cal.App.4<sup>th</sup> 629, 10 Cal.Rptr.3d 560, is directly on point.

In *ACE*, a citizens group filed action against the community college for failure to comply with CEQA in connection with the college's decision to close and remove a campus shooting range and transfer certain classes to a range off campus. The community college, among other things, claimed the action was exempt from CEQA pursuant to California Code of Regulations, title 14, section 15330 (quoted above).

The Association, however, contended that the actions to be analyzed included not only the cleanup of the facility, but also the closure and destruction of the shooting range, and the transfer of the operations to a new location, which transfer effectively created an extension campus at another location. (*Id.* at 638.)

In ruling against the community college, the court noted first that "the requirements of CEQA cannot be avoided by chopping up proposed projects into bite-sized pieces which, when taken individually, may have no significant adverse effect on the environment." (*Id.* at 638, citations omitted.) Instead, "CEQA must be construed to effectuate its purpose of protecting the environment" and that therefore "we conclude that the closure and removal of the [shooting] range, the cleanup activity, and the transfer of shooting range activity and classes to another range are all part of a single, coordinated endeavor. As a result, those activities constitute the whole of the action that we consider for purpose of determining the existence of a 'project' for purposes of CEQA." (*Id.* at 639.)

In addressing specifically the community college's claim that even if the activity was a "project" for purposes of CEQA, it was nevertheless exempt pursuant to Section 15330, the court wrote that Section 15330 "does not cover the whole of the action that constitutes the project. Therefore, the [community college] cannot rely on this exemption to relieve it of its responsibility to undertake an initial study of the project." (*Id.* at 640.)

In other words, Section 15330 is too narrow of an exemption to exempt all of the activities contemplated by the community college in *ACE*. Therefore the college had to comply with CEQA for every action involved in closing down the shooting range.

*ACE* applies to the draft CAO prepared by the Regional Board. As noted above, the draft CAO requires the County to prepare an O&M plan that requires the construction of culverts, bridges, and new trail segments. However, the CAO also requires the County to undertake a variety of other actions which include the preparation of a vehicle use reduction plan (which in and of itself is an action that may result in a significant environmental impact, as discussed below) (Paragraph 2), and the preparation of a variety of trail assessments, operation procedures, and permitting systems (Paragraph 3). Due to the requirement that the County must perform construction activities to comply with the CAO, and those construction activities must be examined under CEQA, the entire CAO, which is the whole of the project for the purposes of CEQA, should be examined under CEQA. Thus, while the Regional Board can require these actions to be taken, it must also allow the County adequate time to comply with CEQA in the manner that the County, as Lead Agency, determines.

All of this assumes, however, that the activities involved are not "financed, assisted, conducted, regulated, or approved by federal agencies" such as the U.S. Forest Service.<sup>15</sup> As the Regional Board notes, portions of the Trail are located on federal land, which means construction activities the County undertakes may also be required to comply with NEPA.

Section 15330, the last exemption relied upon by the Regional Board, does not apply for two reasons. First, *ACE*, as discussed above, declared that Section 15330 cannot apply to a situation where more than the cleanup of a hazardous waste is involved. And second, the Regional Board has not identified any element in any study that would classify the HEOM detected in water or soil samples as a hazardous waste or hazardous substance, as defined by the Health and Safety Code § 25140 et seq., the Water Code § 13050(p)(1), or the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq). In fact, Section 311(b)(2) of the FWPCA specifically excludes oil from the definition of "hazardous substances." Various compounds of cadmium are listed as hazardous substances, but no study has identified these specific compounds on the Trail. Therefore, the Regional Board can rely on none of the cited exemptions as a way to circumvent CEQA and require the County to perform construction activities on the Trail.

With respect to B. above, California Code of Regulations, title 14, section 15300.2(c) provides:

A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

"The analysis of the applicability of this exception involves two distinct issues: (1) whether the project raises the 'reasonable possibility' that a 'significant effect on the environment' may occur, and (2) whether this possibility is due to 'unusual

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<sup>15</sup> 40 C.F.R. § 1508.18(a).

circumstances.”<sup>16</sup>

Paragraph 2 of the Order portion of the CAO and the issues associated with the Trail satisfies both requirements. In paragraph 2, the Regional Board requires the County to prepare and implement a “vehicle use reduction plan” to reduce or eliminate vehicle travel on the Trail during wet weather conditions until the County prepares an Operations and Maintenance Plan. This “vehicle use reduction plan” must be submitted to the Regional Board within 12 weeks of the CAO becoming final. However, as discussed above, the County is going to be required to comply with CEQA before *any* of the elements of the Regional Board’s CAO can be implemented, so the 12-week requirement is not going to be met. If the 12-week requirement cannot be met, then the County “must” reduce or eliminate vehicle travel on the Trail during wet weather conditions until the CEQA process is complete, which could take several years.<sup>17</sup> This means that the people who would have used the Trail during these wet weather periods will be forced to use *other* trails during wet weather periods. Based upon the Regional Board’s own CAO, up to 35,000 vehicles use the Trail during the three summer months,<sup>18</sup> or as many as 372 vehicles containing 662 people use the Trail during a busy four-day weekend (paragraph 6 of CAO Background). If these people can no longer recreate on the Trail, they will simply move themselves, and the environmental impacts they purportedly create, to another location.

The fact that these people will simply shift the location of their recreation, rather than stop, is more than a matter of sheer speculation. We have attached as **Exhibit I** the signed affidavits of 1,643 Trail users who have affirmed that if the Rubicon is closed, for any reason, at any time of the year, they will simply move to another location to recreate in their off-highway vehicles. Thus, by closing the Trail, the Regional Board is not stopping an environmental impact; it is simply moving the environmental impacts associated with the Trail (i.e. sediment, water quality, waste disposal, etc.) to another location, which in addition to the original impacts, creates additional impacts (e.g. traffic impacts, air quality impacts, socio-economic impacts, etc.), without performing CEQA. The Regional Board cannot do this. The courts have a long history of requiring CEQA analysis of indirect impacts that are a foreseeable consequence of the action.<sup>19</sup> In addition, they have a long history of striking down a lead agency’s reliance on a CEQA exemption when Section 15300.2(c) applies.<sup>20</sup>

For example, in *Lewis v. Seventeenth District Agricultural Association* (1985) 165 Cal.App.3d 823; 211 Cal.Rptr. 884, the Association approved a three-year contract

<sup>16</sup> Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (11<sup>th</sup> Ed. 2007), p. 138.

<sup>17</sup> The current draft RTMP was initiated in June 2003. After numerous meetings, the draft RTMP was circulated in October 2007.

<sup>18</sup> We realize, of course, that we argued earlier in this comment letter that the 35,000 number was unsupported by any evidence in the record. But to the extent that the Regional Board continues to rely on this number as evidence that an extremely large number of people use the Trail each year, then we will use the number as evidence of the impact the CAO will have on other trails throughout the State.

<sup>19</sup> *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 217 Cal.Rptr. 893; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App. 4<sup>th</sup> 1184, 22 Cal.Rptr.3d 203; *El Dorado Union High School District v. City of Placerville* (1983) 144 Cal.App.3d 123, 192 Cal.Rptr. 480.

<sup>20</sup> *Azusa Land Reclamation v. Main San Gabriel Basin* (1997) 52 Cal.App.4<sup>th</sup> 1165, 61 Cal.Rptr.2d 447; *Lewis v. Seventeenth District Agricultural Association* (1985) 165 Cal.App.3d 823; 211 Cal.Rptr. 884.

authorizing continued use of a racetrack in a county fairgrounds. In approving the contract, the Association relied upon Class 23 of the categorical exemptions, which exempts "the normal operations of existing facilities for public gatherings for which the facilities were designed." CEQA Guidelines, § 15323. The Court of Appeal, citing section 15300.2(c), held this exemption inapplicable. Due to the "unusual circumstances" of the track's adjacency to residential neighborhoods, an initial study was required to determine whether significant environmental impacts could result from the project.

Therefore, although the Association's action fit squarely within the exemption, the Court held that due to the unusual circumstance of this particular racetrack being located in a residential area, the exemption did not apply. We have similar situation before us here. While shutting down an off-road trail in many situations would normally be expected to result in the reduction of environmental impacts, this is not so in the case of the Rubicon Trail. No other trail in the world attracts the attention that the Rubicon Trail does. Numerous entities and publications describe it as one of the (if not the) greatest trails in the world,<sup>21</sup> and this is why thousands visit the Trail each year. If these people are turned away, they are not the type of people who are going to go back home and watch television. These thousands of people are going to move to the next available trail.

### Conclusion

Based upon our above comments, the CAO appears significantly flawed. The studies and statements unfortunately relied upon by the Regional Board in making its findings appear to be either erroneous, the result of misinterpreted or misunderstood data, or based upon the exaggerated claims of others. This is true to such an extent that it would appear that the Regional Board has failed to carry its burden of proof. At an administrative hearing, the agency has the burden of proof, including the burden of going forward and the burden of persuasion.<sup>22</sup> Due to these shortcomings, we fail to see how the evidence can support the Regional Board's findings. "When findings are uncertain or otherwise defective, the trial court should generally remand to the agency to make appropriate findings."<sup>23</sup> Lastly, the Regional Board's proposed action appears to go far beyond the scope of activities contemplated to be covered by the claimed CEQA exemptions.

This is not to suggest that RTF does not believe significant improvements remain to be made on the Trail. To the contrary, RTF believes these improvements can, and should, be made promptly to address what appear to be relatively small impacts of Trail use on the surrounding water bodies. However, RTF believes that this work can be more quickly, and correctly, implemented without the threat of \$10,000/day fines being levied against El Dorado County. We disagree strongly that fines are the appropriate vehicle to accomplish the actions the Regional Board seeks.

We therefore respectfully request that the Regional Board take one of three actions. First, it can hold the draft CAO in abeyance for a period of time sufficient to give El Dorado County the

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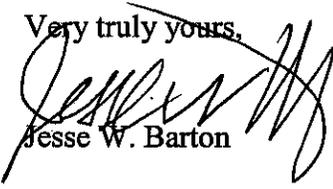
<sup>21</sup> El Dorado County Department of Parks and Recreation, <http://co.el-dorado.ca.us/Rubicon/index.html>; Sacramento Bee, January 28, 2009, pp B1; Friends of the Rubicon, [www.friendsoftherubicon.com](http://www.friendsoftherubicon.com); Four Wheeler magazine, [http://www.fourwheeler.com/eventcoverage/129\\_0902\\_2008\\_rubicon\\_trail\\_adventure/index.html](http://www.fourwheeler.com/eventcoverage/129_0902_2008_rubicon_trail_adventure/index.html).

<sup>22</sup> *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 228 Cal.Rptr. 567, n5;

<sup>23</sup> Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed. 2009) § 6.174, p. 300.

ability to implement the projects already being discussed for this year. Second, it can prepare an Initial Study and determine the type of CEQA document needed to take the actions contemplated in the draft CAO. Or third, it can amend the CAO in a manner that corrects all the defects outlined above and gives El Dorado County more discretion and time to implement the projects already being discussed for this year.

Very truly yours,

  
Jesse W. Barton

Enc (Exhibits A-I)