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8 BEFORE THE CALIFORNIA  
9 STATE WATER RESOURCES CONTROL BOARD

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11	THOMAS AND PATRICIA PLOWRIGHT, )	Case. No.
	)	
12	Petitioner, )	PETITION FOR REVIEW BY THE
	)	CALIFORNIA STATE WATER
13	v. )	RESOURCES CONTROL BOARD
	)	(HELD IN ABEYANCE) AND
14	)	PETITIONER FOR RECONSIDERATION
	)	BY THE EXECUTIVE OFFICER
15	CALIFORNIA REGIONAL WATER )	OF THE NORTHCOAST REGIONAL
16	QUALITY CONTROL BOARD – NORTH )	WATER BOARD
	COAST REGION, )	
	)	
17	Respondent. )	[Cal. Water Code § 13320]
	)	
18	)	

19 This petition for review is submitted on behalf of Thomas and Patricia Plowright  
20 (“Petitioner”) pursuant to California Water Code (“WC”) § 13320 for review of Cleanup and  
21 Abatement Order No. R1-2011-0014 (“CAO”) issued by the California Regional Water Quality  
22 Control Board – North Coast Region (“Regional Board”) on January 18, 2011.

23 **I. Name and Address of Petitioners**

- 24 1) Thomas and Patricia Plowright  
25 5662 Meridian Ave.  
26 San Jose, CA 95118

1 With copy to Petitioners' Counsel:

- 2           2)     Law Office of Duncan M. James  
3                     Donald J. McMullen  
4                     445 North State Street  
5                     Ukiah, CA 95482  
6                     (707) 468-9271

7           **II.     Regional Board Action for Review**

8           Petitioners request reconsideration by the North Coast Regional Board Executive Officer of  
9           the CAO issued on January 18, 2011. Petitioner also requests that review by the California State  
10           Water Resources Control Board ("SWRCB") be held in abeyance pending reconsideration by the  
11           North Coast Regional Water Board.

12           **III.    Date of Regional Board's Action.**

13           The North Coast Regional Board issued the CAO on January 18, 2011.

14           **IV.    Statement of Reasons Why Regional Board's Action Was Inappropriate or  
15           Improper.**

16           Petitioner believes that the CAO inappropriately and improperly characterizes grading and  
17           bulldozing work performed on Petitioners' real property as necessitating a CAO. Petitioners believe  
18           the CAO constitutes a prejudicial abuse of discretion for several reasons including, but not limited  
19           to, the following:

20           1) Petitioner did not perform grading or bulldozing work, nor did they use or remove a  
21           caterpillar tractor, which was located near Little Mill Creek. Petitioners do not know who  
22           performed the grading and bulldozing work.

23           2) While at least a portion of the grading work was done to petitioner's property, some of  
24           the grading work was also performed on a neighboring piece of property.

25           3) The caterpillar tractor which the CAO characterizes as "stuck in the middle of Little Mill  
26           Creek" was not on petitioner's property. The CAO's characterization that the tractor was on  
27           petitioner's property was improper.

1           4) Recent work has been performed to reduce the potential that sediment may enter Little  
2 Mill Creek. Once again, Petitioners do not know who has performed the work in question.

3           5) The grading work performed on petitioner's property has not resulted in a "discharge" of  
4 any substance, or potential discharge, in an amount that could be considered deleterious to fish,  
5 wildlife or other beneficial use of a stream or watercourse.

6           6) The time-line stated for completion of certain phases in the CAO, including a progress  
7 report within 45 days of issuance of the CAO, is not supported by findings and upon substantial  
8 evidence and is unduly burdensome.

9           7) The issuance of this CAO also follows issuance of an eleven count criminal complaint by  
10 the Mendocino County District Attorney's Office for alleged violations of the Fish and Game Code  
11 related to the alleged activity in the CAO. Petitioners have been embroiled in defending those  
12 charges and have expended significant time, money and other resources therein. Piling on with the  
13 CAO, at a time when Petitioners are economically and emotionally at their weakest, violated due  
14 process of law. It should also be noted that due to a conflict of interests with the Mendocino County  
15 District Attorney's Office, the Attorney General's Office is now handling the prosecution of the  
16 criminal complaint.

17           **V.     How Petitioners Are Aggrieved**

18           The CAO issued by the Regional Board could result in the imposition of significant fines  
19 and penalties and requires that Petitioners expend significant time and money to remedy alleged  
20 violations, despite the fact Petitioners did not perform the work in question, nor do they know who  
21 performed the work. Furthermore, recent work has been performed, once again by an unknown  
22 entity, which appears to remedy the alleged violations. Therefore, if adopted as is, the CAO stands  
23 to put a ruinous burden – both financially and as property owners – on Petitioners.

24           In conjunction with the criminal prosecution related to the alleged activities in the CAO,  
25 issuance of the CAO can be seen as nothing more than an attempt to bankrupt Petitioners, both  
26

1 economically and emotionally without due process of law and in violation of their right to equal  
2 protection of the law.

3 **VI. Actions Petitioners Request the SWRCB to Take**

4 The SWRCB should look at the “whole picture” and realize that the State’s priorities herein  
5 have been misguided – focusing on pressuring the Petitioners to first defend against onerous  
6 criminal charges. Given the fact that recent work has been performed to reduce the potential that  
7 sediment may enter Little Mill Creek, the SWRCB should order the Regional Board to reconsider  
8 the CAO and provide an updated status which may result in recall of the CAO in its entirety.

9 In addition, Petitioners believe that it would be appropriate for SWRCB to coordinate with  
10 the Attorney General’s Office and weigh in on the criminal complaint filed in this county. This  
11 criminal complaint has done nothing but allege specious charges and caused Petitioner to divert  
12 significant resources from what should be the SWRCB’s and Regional Board’s primary concern –  
13 ensuring that, if there is any actual water quality issues on Petitioner’s property, they get fixed.

14 Petitioners request reconsideration/review of the North Coast Regional Board’s CAO. More  
15 specifically, by this petition, Petitioners request reconsideration by the Executive Officer of the  
16 North Coast Regional Water Board. Furthermore, Petitioners request review by the State Water  
17 Resources Control Board be held in abeyance pending reconsideration by the North Coast Regional  
18 Water Board. Petitioners submit this petition to the Regional Board and the State Water Board at  
19 this time to preserve the appeal process at the State Water Board level, as outlined in the cover letter  
20 accompanying the CAO.

21 **VII. Statement of Points and Authorities**

22 The following is a brief statement of points and authorities related to the issues.

23 **A. The Actions Complained of in the CAO Do Not Sufficiently State A**  
24 **Complaint for Violations of the Regional Board’s Basin Plan.**

25 The CAO alleges that activities upon the Petitioners’ property have violated prohibitions of  
26 the Regional Board’s Basin Plan:

1                   “Prohibition 1 – ‘The discharge of soil, silk, bark, slash, sawdust, or other organic  
2 and earthen material from any logging, construction, or associate activity of whatever nature  
3 into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other  
4 beneficial uses of property.’

5                   “Prohibition 2 – ‘The placing or disposal of soil, silk, bark, slash, sawdust, or other  
6 organic and earthen material from any logging, construction, or associate activity of  
7 whatever nature at locations where such material could pass into any stream or watercourse  
8 in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses  
9 is prohibited.’”

10                   To support issuing a CAO based upon alleged violations of the above referenced  
11 prohibitions, the CAO merely asserts that:

12                   “Dischargers and/or their agent(s) have cleared soil on the Site and operated heavy  
13 equipment within a watercourse channel. This caused soil to be discharged into a watercourse and  
14 to be placed where it could pass into that watercourse and thence, to higher order watercourses  
15 downstream, in quantities deleterious to fish, wildlife and other beneficial uses...” (CAO ¶ 11.)

16                   The CAO, however, does not attempt to quantify any amount of sediment discharged such  
17 that it can be determined whether it was “deleterious to fish, wildlife or other beneficial uses” – a  
18 requirement to show a violation of either prohibition listed above.

19                   Additionally, the Basin Plan specifically defines a stream or watercourse – as used in the  
20 above referenced prohibitions – as a “[n]atural watercourse as designated by a solid line or dash and  
21 three dots symbol shown in blue on the largest scale United States Geological Survey Topographic  
22 Map most recently published.” (Basin Plan 4-27.00.) However, nowhere does the CAO consider  
23 whether Little Mill Creek fall within this specific definition – which Petitioners believe it does not.

24                   In other words, the prohibitions apply to “streams or watercourses” as defined in the Basin  
25 Plan and it is such a stream where considerations of whether a discharge was “deleterious to fish,  
26 wildlife or other beneficial uses” must be made. The CAO therefore inappropriately and improperly  
assesses the amount of sediment discharge and its location.

**B.       The CAO Inappropriately and Improperly Characterizes Installation of  
Culverts.**

1 The Regional Board's staff alleges that, "[i]t is unknown whether the culverts are properly  
2 sized for the crossing; it does not appear that the culverts are properly installed, and soil exposed or  
3 moved during culvert installation has not been adequately stabilized. (CAO ¶ 2b.) However, the  
4 CAO simply refers to "observations" of some staff members and makes no reference to actual facts,  
5 measurements or testing performed by any staff member to support such allegations. Furthermore,  
6 there is no evidence Petitioners installed the culverts in question.

7 **C. The CAO Inappropriately and Improperly Characterizes All the**  
8 **Grading Work as Being Done on Petitioner's Property.**

9 As previously discussed, Petitioners did not perform grading or bulldozing work, nor did  
10 they use or remove a caterpillar tractor, which was located near Little Mill Creek. Petitioners do not  
11 know who performed the grading and bulldozing work. Additionally, while at least a portion of the  
12 grading work was done to Petitioner's property, some of the grading work was also performed on a  
13 neighboring piece of property. Furthermore, the caterpillar tractor which the CAO characterizes as  
14 being stuck on Petitioner's property was not on petitioners' property. Thus, the CAO's  
15 characterization of the location of the grading work and tractor was improper.

16 **VIII. Statement of Service Upon Regional Water Board and Discharger**

17 Petitioners are sending a copy of this Petition to the North Coast Regional Water Board  
18 Executive Officer and to the alleged discharger.

19 **IX. Explanation of Why Petitioner Could Not Raise Objections Before the Regional**  
20 **Board.**

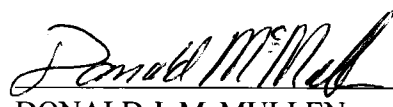
21 By this Petition, Petitioner is raising the objections with the North Coast Regional Water  
22 Board. However, the CAO cover letter dated January 18, 2011, states petitioner must also petition  
23 the State Water Board within 30 days from receipt of the CAO. Therefore, by this petition,  
24 Petitioners are preserving their appeal process with the State Water Board as outlined in the CAO  
25 cover letter. Petitioners request reconsideration by the North Coast Regional Water Board.  
26

1 Furthermore, Petitioners request review by the State Water Resources Control Board be held in  
2 abeyance pending reconsideration by the North Coast Regional Water Board.

3 Dated: February 17, 2011

Respectfully submitted,

LAW OFFICE OF DUNCAN M. JAMES

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DONALD J. McMULLEN  
JONAH S. WALSH  
Attorneys for Petitioners

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California Regional Water Quality Control Board  
North Coast Region

Cleanup and Abatement Order No. R1-2011-0014

For

Patricia Plowright and Thomas Rider Plowright III  
Assessor Parcel Number  
026-234-05

Mendocino County

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

1. Patricia Plowright and Thomas Rider Plowright (hereinafter Dischargers) own the parcel of land identified as Mendocino County Assessor's Parcel Number 026-234-05 (hereinafter Site). The Dischargers and/or their agents have conducted grading and bulldozing of earthen materials in and adjacent to Little Mill Creek, a watercourse tributary to Mill Creek that is on the Site and is tributary to the Navarro River, a water of the State and the United States. The Dischargers' activities at the Site have resulted in a discharge and threatened discharge of sediment to waters of the Navarro River watershed.
2. On May 4, 2010 and August 3, 2010, Regional Water Board staff (Staff) inspected the Site with staff from California Department of Fish and Game (CDFG). Staff also briefly visited the Site with staff from CDFG on July 13, 2010. During the inspections and site visit, Staff observed the following:
  - a) Earthen materials placed with heavy equipment into and adjacent to Little Mill Creek. Cleared ground around the cabin site to facilitate access to the parcel, resulting in a significant amount of bare, erodible soil. Trees and slash pushed into Little Mill Creek along with earthen materials.
  - b) Two culvert stream crossings with bare soil over and around the culvert. It is unknown whether the culverts are properly sized for the crossing; it does not appear that the culverts are properly installed, and soil exposed or moved during culvert installation has not been adequately stabilized.
  - c) During the May 4, 2010 inspection, Staff also observed a caterpillar tractor stuck in the middle of Little Mill Creek on the private road below the entrance gate to the subject property. The landowner was attempting to remove the tractor from the stream. On the July 13, 2010 site visit, CDFG staff advised Staff that the owner of the tractor had been identified and recently notified of the location of his tractor, and was visiting the Site that day intending to remove the tractor from the watercourse. CDFG staff also indicated that they had received emergency funds to help pay for the tractor removal and some post-removal stream restoration work. On the August 3, 2010 inspection, Staff confirmed that the tractor had been removed, but that there were still unstabilized earthen fill materials at the site where the tractor had been stuck.



3. The culvert stream crossings, bare soils on the Site, and un-stabilized fill material at the Site where the tractor had been stuck are discharging sediment and are likely to result in ongoing threatened discharges of sediment and debris to waters of the State and United States.
4. The Site is the subject of an active criminal case with the Mendocino County District Attorney's office, relative to California Department of Fish and Game violations associated with the deposition of earthen materials and operations of heavy equipment in and adjacent to Little Mill Creek.
5. The Navarro River has beneficial uses designated in the Water Quality Control Plan for the North Coast Region (Basin Plan), including:
  - a. Municipal and domestic supply
  - b. Agricultural supply
  - c. Industrial service supply
  - d. Industrial process supply
  - e. Groundwater recharge
  - f. Freshwater replenishment
  - g. Navigation
  - h. Water contact recreation
  - i. Non-contact water recreation
  - j. Commercial and sport fishing
  - k. Cold freshwater habitat
  - l. Rare, threatened, or endangered species (RARE)
  - m. Wildlife habitat
  - n. Migration of aquatic organisms
  - o. Spawning, reproduction, and/or early development
  - p. Estuarine habitat
  - q. Aquaculture
6. The discharge of organic and earthen material in the Navarro River watershed is especially problematic because, as noted above, the Navarro River watershed is listed as an impaired water body under Section 303(d) of the Clean Water Act due to sedimentation/siltation and temperature. The sources of the impairment are identified in the Navarro River Total Maximum Daily Load (TMDL) as road related erosion, legacy road erosion, landslide, vineyard erosion, and harvest related surface erosion. These sources can affect beneficial uses of water through sedimentation, threat of sedimentation, impaired spawning and rearing habitat, and reduction in cold water and available cold water habitat.
7. The activities conducted on the Site increase the potential for impacts to the beneficial uses of water through sediment introduction directly into a stream that flows to fish bearing habitat approximately ½ mile downstream.

8. The Basin Plan contains specific standards and provisions for maintaining high quality waters of the state that provide protection to the beneficial uses listed above. The Basin Plan's Action Plan for Logging, Construction and Associated Activities (Action Plan) includes two prohibitions (Page 4-26 of the 2007 Basin Plan):
  - 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."*
9. 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."
10. Section 3 of the Basin Plan contains water quality objectives that specify limitations on certain water quality parameters not to be exceeded as a result of waste discharges. The water quality objectives (pages 3-2.00 and 3-3.00) that are considered of particular importance in protecting the beneficial uses from unreasonable effects due to discharges from logging, construction, or associated activities, 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.

11. As described above, the Dischargers and/or their agent(s) have cleared soil on the Site and operated heavy equipment within a watercourse channel. This caused soil to be discharged into a watercourse and to be placed where it could pass into that watercourse and thence, to higher order watercourses downstream, in quantities deleterious to fish, wildlife and other beneficial uses as described in Finding 5 above. This deleterious impact is a violation of Prohibitions 1 and 2 in the Action Plan, as described in Paragraph 8, above.
12. The conditions on the Site are therefore subject to cleanup and abatement under California Water Code (Water Code) section 13304. 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."
13. As noted in Paragraph 8 above, the Basin Plan's Action Plan contains two separate prohibitions against the discharge or placement 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. As explained herein, the Dischargers' activities on the Site have violated both of these prohibitions; therefore, the Dischargers are subject to this Order pursuant to Water Code section 13304.
14. As explained in Paragraph 12, Water Code section 13304 authorizes the Regional Water Board to issue a Cleanup and Abatement Order to any person 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." Section 13050 of the Water Code defines the term "pollution" to include "an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects the waters for beneficial uses." Additionally, sediment, when discharged to waters of the state, constitutes a "waste" as defined in Water Code section 13050. As explained herein, the Dischargers' activities on the Site have caused or permitted, cause or permit, and threaten to cause or permit a condition of pollution, as well as a discharge of waste, because these activities either have, or threaten to, violate water quality objectives and negatively impact beneficial uses as defined in the Basin Plan.
15. Water Code section 13267, subdivision (a) authorizes the Regional Water Board to 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 the prior harm and future threat to water quality created by the discharges described above are properly assessed, abated and controlled. Due to the importance of protecting water resources as explained herein, the costs associated with developing a restoration work plan bear a reasonable relationship to the benefits that will be realized once the work plan is implemented.

16. 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.
17. Failure to comply with the terms of this Order may subject Dischargers to future enforcement actions under state law, including administrative civil liabilities pursuant to Water Code section 13385, subdivision (c), in an amount not to exceed the sum of ten thousand dollars (\$10,000) per day and ten dollars (\$10) per gallon of waste discharged in excess of 1,000 gallons.
18. 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 reconsideration of this Order by the Executive Officer of the Regional Water Board. To be timely, such request must be made in writing within 30 days of the date of this Order. Please note that even if reconsideration by the Executive Officer 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 you choose to request reconsideration of this Order or file a petition with the State Water Board, be advised that you must comply with the Order while your request for reconsideration and/or petition is being considered.

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

1. Immediately cease all activities that cause or threaten to cause the discharge of sediment to Little Mill Creek and any other waters of the State or United States (or tributaries thereto) which exist on the Site.

2. Under the direction of a qualified licensed professional experienced in erosion control and in stream restoration, develop a plan to restore the streams at the site of the stuck tractor and at Plowright Property cabin site. The restoration plan must include design and construction standards, and a monitoring plan for the following:
  - a. The removal and stabilization of excess earthen fill materials and woody debris; all excess fill materials and woody debris must be stabilized in a location where there is no potential for discharge.
  - b. A plan for restoration of the stream segments impacted with sediment and woody debris; the plan must include a map (1:12000 or larger scale the map must illustrate all restoration plan work points, all roads, unstable features, unstable fills, spoil disposal sites, impoundments, restoration planting and any other factor required to complete the scope of work) design and construction standards for stream bank stabilization, stream bed stabilization, clear water diversion of flows during restoration construction work, and riparian re-planting of exposed soils.
  - c. A monitoring plan for all restored areas that evaluates the restoration to determine the success of restoration plantings, and sediment remediation efforts. The monitoring plan must include regularly scheduled inspections after each rain event of greater than 1 inch in a 48 hour period. Each monitoring event must be followed by a report that describes the inspection findings, and provides corrective actions for any failures of the restoration site(s); failures are including but not limited to, failures in planting success and in sediment stabilization.
  - d. The entire plan must be submitted to the Regional Water Board by April 15, 2011 (inclusive of all restoration designs and monitoring and reporting requirements described herein). Progress reports are due the first of each month starting March 1, 2011 until the completion of restoration efforts triggers the required monitoring and reporting program described above.
3. Following Assistant Executive Officer written concurrence, and consistent with the directives of and in compliance with any necessary approvals and/or permits from the Mendocino County District Attorney's office, CDFG, and other involved agencies, the Discharger shall implement the work plan. All work to restore the site shall be completed by October 15, 2011.
4. If the Discharger is unable to perform any activity or submit any documentation in compliance with the deadlines in this Order, the Discharger may request, in writing to the Assistant Executive Officer, an extension of the time schedule as specified. The written extension request shall describe how the delay is beyond the reasonable control of the Discharger and shall 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 Assistant Executive Officer, for good cause, in which case this Order will be accordingly revised.

5. 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 Water Code.

Ordered by

---

Luis G. Rivera  
Assistant Executive Officer

January 18, 2011