

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement Order No. R1-2004-0077

For

Windsor Oaks Associates LP

Sonoma County

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

1. Windsor Oaks Associates LP (hereinafter Discharger), owner of the Windsor Oaks Vineyards Property, conducted filling and culverting activities in wetland habitat and several intermittent streams that are tributary to Starr Creek, tributary to the Russian River, on the Windsor Oaks Vineyards Property, located at 10810 Hillview Road, Windsor, Sonoma County (APN 086-180-013) (hereinafter Site), that were unauthorized and therefore were in violation of the California Water Code (CWC) and the Clean Water Act, Section 401 (CWA Section 401).
2. On February 28, 2004, Regional Water Board staff members Mr. Andrew Baker and Mr. Andrew Jensen (hereinafter Staff) met with Mr. Douglas Lumgair of Windsor Oaks Winery and Vineyards and conducted an initial inspection of the Windsor Oaks Vineyards site, located directly adjacent to the Diamond Springs Property, in response to a referral from Mr. Kevin Doble of County of Sonoma Permit and Resource Management Department's (PRMD). Staff took several photos and conducted a preliminary assessment of the potential impacts on both properties. Staff determined that there appeared to have been filling of waters of the state on the Site, and that a follow-up site visit should be scheduled and include the California Department of Fish and Game (DFG) and the U.S. Army Corps of Engineers (ACOE).
3. On May 12, 2004, Staff conducted a second inspection of the Site with Mr. Lumgair and Mr. David Long of Brelje and Race Civil Engineers, and discussed the issue of potential filling of waters of the state. Staff requested copies of aerial photographs of the Site that showed pre-project and post-project conditions. The group discussed the extent of filling of intermittent stream and wetland habitat that had occurred on the Site, and the permitting requirements associated with such activities. The group agreed to meet at the Site on May 21, 2004, along with representatives from the DFG and the ACOE.

4. On May 21, 2004, Staff met with Mr. Lumgair and Mr. Andy Laird of Windsor Oaks Vineyards, and Ms. Sue Nelson and Mr. David Long of Brelje and Race, and conducted an additional inspection of the Windsor Oaks Vineyards site to determine the extent of filling of jurisdictional waters. Staff assessed several locations identified by Mr. Doble as potential areas of impact, and determined that it appeared that several intermittent creeks and wetland habitat, had been culverted and filled over, to create vineyards. Once again Staff requested copies of aerial photos, pre-project and post-project, from Mr. Lumgair and Brelje and Race, to assist in the assessment of the potential impacts to waters of the state. Staff also stated that it would be necessary to have the ACOE and DFG come out to the site for a follow-up inspection, and to coordinate potential enforcement actions. Staff referred the findings and photos from the site inspection to staff at the ACOE and DFG and requested that they assist in the case. Ms. Katerina Galacatos of the ACOE and Mr. Liam Davis of DFG contacted Staff to schedule a site visit, which was set for June 14, 2004.
5. On June 14, 2004 Staff participated in an interagency inspection of the Windsor Oaks Vineyards site, with Ms. Katerina Galacatos and Mr. Dan Martel of the ACOE, Mr. Liam Davis of DFG, and representatives of Windsor Oaks Vineyards including Mr. Douglas Lumgair of Windsor Oaks Vineyards, Mr. Jason Booth Attorney at Law with Dongell Lawrence Finney LLP Lawyers, Mr. Timothy Simpson of Geomatrix, and Mr. David Long of Brelje and Race. The purpose of the inspection was to have ACOE and DFG staff assess the locations of potential impacts to jurisdictional areas that were assessed during the May 21, 2004 inspection. The group conducted inspections of each of the sites that were identified as areas that were culverted and filled, and were potentially waters of the U.S. and/or state. The following is a list of the specific sites identified as having been potentially filled and culverted, in the order observed on-site:

Impacted intermittent Stream - Field 1:

There was an historic waterway that runs through an existing historic vineyard, which was converted in the 1970's, that has been altered yearly through disking. The drainage feature lacks any riparian and offers no real habitat value. There is evidence of erosion associated with the continuous disking of the drainage feature. Staff recommended that the Discharger not disc the row that contains the drainage feature, and to implement some erosion control Best Management Practices (BMPs) to help control erosion from the feature. The Discharger agreed to the recommendations (Photo 1).

Culverted Stream Section - Field 8:

Field 8 is located up gradient of an existing reservoir. It appeared that an intermittent drainage feature had been culverted and filled during a vineyard conversion in 2001. The group reviewed aerial photographs of the area, and determined that a small water feature was present above the pond feature, and had been culverted and filled over to facilitate vineyard plantings (Photo 2).

Unauthorized Culvert Crossing – Top of Field 8:

An existing culvert was replaced apparently during the summer of 2001 with a corrugated plastic pipe, without the necessary resource agency approvals, to facilitate a road crossing. The intermittent tributary that the culvert was installed in is identified as Starr Creek Tributary #8 (T-8) on the improvement plans prepared by Kenneth Carr and Associates, November 17, 2002. Staff notified the Discharger of the permitting requirements and stated that an “after-the-fact” permit would be required for the crossing. The Discharger agreed to submit an application for an after-the-fact permit (Photo 3).

Wetland Impacts and Culverted Stream Section (Starr Creek T-3)– Field 6:

Mr. Martel of the ACOE determined that there was a wetland feature at the base of Field 6 that had been impacted by the vineyard conversion performed sometime between 2001 and 2003. Mr. Martel identified another wetland area below the road and Field 6, which has been impacted by the installation of culverts. In addition, the Discharger gave permission to the adjacent property owner, Mr. Rich Carnation and Brookfield Investors, LLC, to extend a culvert from the Diamond Springs Property onto the Site, to capture flow of Starr Creek T-3, which was culverted through Field 6, as described below, and subsequently through the Diamond Springs Property. In addition, at the top of Field 6 an intermittent tributary of Starr Creek, identified as Starr Creek Tributary #3 (T-3) on the improvement plans prepared by Kenneth Carr and Associates dated November 17, 2002, had been culverted and filled to facilitate the planting of the vineyard unit. Mr. Martel also determined that an ordinary high water channel was evident above Field 6, which was culverted and filled through Field 6. Another small intermittent tributary appears to have been filled directly to the west of T-3. The Discharger did not obtain any resource agency approvals for the culverting and filling of the intermittent tributary or to impact the wetland habitat. Staff requested copies of pre-project and post-project aerial photographs from the Discharger to help determine the extent of impacts (Photo 4-5).

Culverted Stream Section Field 7:

The ACOE determined an intermittent tributary of Starr Creek T-8 to be Waters of the U.S. during the site inspection. The small intermittent tributary has a defined channel above Field 7, but has been culverted and filled with a 20-foot fill prism, through Field 7 to facilitate vineyard development. Above Field 7 the intermittent tributary has a well-established riparian zone and appears to provide some high quality habitat. Below Field 7, the culverted tributary daylights and flows into Starr Creek T-8. Staff requested copies of pre-project and post-project aerial photographs from the Discharger to help determine the extent of impacts (Photos 6-7).

The Regional Water Board did not authorize the mass grading, and filling/culverting of intermittent tributaries and wetland habitat on the Site. The unauthorized work impacted water quality and beneficial uses and constitutes a violation of provisions of the California Water Code.

6. The intermittent streams are tributary to Starr Creek, tributary to the Russian River, with beneficial uses, as designated in the Water Quality Control Plan for the North Coast Region (Basin Plan), that include:
 - a. Municipal and domestic supply
 - b. Agricultural supply
 - c. Industrial supply
 - d. Industrial service supply
 - e. Groundwater recharge
 - f. Navigation
 - g. Hydropower generation
 - g. Water contact recreation
 - h. Non-contact water recreation
 - i. Commercial and sport fishing
 - j. Warm freshwater habitat
 - k. Cold freshwater habitat
 - l. Rare, threatened, or endangered species
 - m. Wildlife habitat
 - n. Migration of aquatic organisms
 - o. Spawning, reproduction, and/or early development
 - p. Estuarine habitat
 - q. Aquaculture
7. The Basin Plan contains specific standards and provisions for maintaining high quality waters of the state that provide for the beneficial uses listed above. The Action Plan for Logging, Construction and Associated Activities (Action Plan) included in the Basin Plan includes two prohibitions:
 - Prohibition 1 - *“The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.”*
 - Prohibition 2 - *“The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.”*

8. 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.”
9. 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.
10. The following sections of the Porter-Cologne Water Quality Control Act authorize the Regional Water Board to require persons to prepare technical reports and to remediate unpermitted discharges of waste:
 - Section 13267(a) - *“A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement or authorized by this division, may investigate the quality of any waters of the state within its region.”*
 - Section 13267(b) - *“In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or proposes to discharge waste within its region...that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires.”*

- Section 13267(c) - *“In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with. The inspection shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant.”*
 - Section 13304(a) - *“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.”*
11. As described above, the Discharger has culverted and discharged fill material into several intermittent streams, impacted wetland habitat, and has installed a culvert crossing on Starr Creek T-8, resulting from mass grading and vineyard installation of the Site, and has therefore caused a discharge of waste into waters of the state.
 12. The culverting and filling of the intermittent tributary streams, caused the direct loss of intermittent stream, riparian and wetland habitat and associated functions and values, which is deleterious to wildlife, and other beneficial uses, and therefore violates Prohibitions 1 and 2 in the Action Plan. Stream habitat and associated riparian and wetland habitat generally consists of linear habitat that perform important functions related to water quality including but not limited to: providing habitat for aquatic species and wildlife; water quality enhancement; flood peak attenuation and flood water storage; and potential habitat for rare and endangered species. Removal of this habitat due to the discharge and threatened discharge of sediment is deleterious to aquatic species and wildlife, and other beneficial uses, and therefore violates Prohibitions 1 and 2 in the Action Plan as described in finding 6 above. These detrimental effects also constitute the creation of pollution or nuisance. The discharge of the dirt fill material and culverting of these waterways is therefore subject to cleanup and abatement under California Water Code Section (CWC) 13304.
 13. A restoration workplan required by this Order 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. More detailed information is available in the Regional Water Board’s public file on this matter.

14. This is an enforcement action by a regulatory agency, being taken 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 (CCRs), Title 14, Sections 15308 and 15321.
15. Failure to comply with the terms of this Order may result in enforcement under the CWC. Any person failing to provide technical reports containing information required by this Order by the required date(s) or falsifying any information in the technical reports is, pursuant to CWC Section 13268, subject to potential criminal penalties and administrative civil liabilities of up to five thousand dollars (\$5,000.00) for each day in which the violation occurs. Additionally, any person failing to cleanup or abate threatened or actual discharges as required by this Order is, pursuant to CWC Section 13350(e), subject to administrative civil liabilities of up to five thousand dollars (\$5,000.00) per day or ten dollars (\$10) per gallon of waste discharged.
16. Any person affected by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with CWC Section 13320 and Title 23, CCRs, Section 2050 et seq. The State Water Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Water Board, any person affected by this Order may request the Executive Officer to reconsider this Order. To be timely, such request must be made within 30 days of the date of this Order. Note that even if reconsideration is sought, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner's legal rights. Additionally, if 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 CWC Sections 13267(b) and 13304:

The Discharger shall coordinate and perform the following cleanup and abatement actions:

1. Submit copies of aerial photographs of the Site, showing both pre-project conditions and post-project conditions by September 24, 2004.
2. Submit a copy of the drainage map showing the limits of grading, and the locations and extent of all underground piping that was installed on the Site, by September 24, 2004.
3. Submit a restoration workplan to the Regional Water Board, for Executive Officer concurrence, on or before October 22, 2004, that includes the following:

- a. A Workplan for removing the linear culverts and fill material from the intermittent tributaries that have been filled on the Site. The Workplan shall include information regarding the location and suitability of a chosen disposal site for the excavated fill material;
 - b. a detailed restoration plan that addresses the timely restoring of all stream habitat on the Site affected by the culverting and filling activities. The plan shall contain a time schedule for restoration activities, success criteria to judge the success of the restoration project, and a monitoring proposal to evaluate whether the success criteria are being met;
 - c. a plan to provide additional mitigation to account for the temporal loss of stream habitat that has occurred as a result of the unauthorized filling activities. Such mitigation can include restoration and/or creation of stream habitat elsewhere in the watershed, restoration of intermittent stream habitat and associated riparian and/or wetland habitat elsewhere on the Site; and
 - d. an erosion control plan for the Site, which outlines specific Best Management Practices (BMPs) to be implemented to control erosion on the graded areas of the Site. The plan shall also include a time schedule for installation and a maintenance schedule to ensure that the BMPs are functioning properly.
4. Submit an application for a Water Quality Certification and/or Waste Discharge Requirements for Dredge/Fill Projects (Enclosure 3), and appropriate processing fees, to the Regional Water Board, for Executive Officer concurrence, to cover activities associated with the restoration Workplan and for the unauthorized stream crossing on Starr Creek T-8, by November 30, 2004.
 5. Following Executive Officer written concurrence, implement the restoration workplan. The Workplan shall be implemented during the summer season of 2005. All work to remove the culverting and associated fill material and restore the affected stream, riparian and wetland habitat shall be completed after June 15, 2005 and before October 16, 2005.

If, for any reason, the Dischargers are unable to perform any activity or submit any documentation in compliance with the deadlines in the workplan implementation schedule submitted pursuant to this Order and concurred with by the Executive Officer, the Dischargers may request, in writing, an extension of the time as specified. The written extension request shall include justification for the delay and shall be received by the Regional Water Board not less than 15 calendar days prior to the deadline sought to be extended. An extension may be granted for good cause, in which case this Order will be accordingly revised.

This CAO 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 facility consistent with California Water Code. This CAO may be revised by the Executive Officer as additional information becomes available.

Ordered by _____

Catherine E. Kuhlman
Executive Officer

August 25, 2004

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Enclosure 2 – Site Photos taken May 21, 2004 and June 14, 2004.

Photo 1. View of impacted drainage feature that flows through Field 1. 5/21/04.



Photo 2. View of intermittent drainage feature had been culverted and filled during a vineyard conversion in 2001, through Field 8. 5/21/04.



Photo 3. View of the unauthorized corrugated plastic pipe crossing that was installed in Starr Creek Tributary #8 (T-8), for a road crossing. 6/29/04.



Photo 4. View of a culvert that has been installed in a designated wetland area on the Site. Diamond Springs Property filling activities shown in background. 5/21/04.



Photo 5. View of intermittent tributary, facing downstream, that has been culverted and filled through the Field 6 vineyard unit. 5/21/04



Photo 6. View of intermittent tributary of Starr Creek T-8 that had been culverted and filled with a 20+-foot fill prism, through Field 7, to facilitate a vineyard conversion. View from the fill prism, looking upstream at the remnant of the intermittent tributary. 6/14/04.



Photo 7. Photo of the outfall of the culverted intermittent tributary shown in Photo 6, that flows through Field 7. Outfall daylights the intermittent tributary approximately 30 feet upslope of Starr Creek T-8. 6/14/04



Enclosure 3 – Application for Report of Waste Discharge for Dredge and Fill Projects.