

California Regional Water Quality Control Board
North Coast Region

ORDER NO. R1-2004-0084

FOR

ADMINISTRATIVE CIVIL LIABILITY

IN THE MATTER OF

JON AND DEANN GREEN

JCG CONSTRUCTION

AND

GREEN RIGHT O'WAY CONSTRUCTORS INC

FOR

FAILURE TO SUBMIT TECHNICAL REPORTS
REQUIRED UNDER SECTION 13267(b)
OF THE CALIFORNIA WATER CODE

AND

FAILURE TO COMPLY WITH A
CLEANUP AND ABATEMENT ORDER REQUIRED
UNDER SECTION 13304(a)
OF THE CALIFORNIA WATER CODE

AND

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

Mendocino County

This civil liability Order (Order) is issued to Jon and Deann Green, JCG Construction, and Green Right O'Way Constructors, Inc., pursuant to California Water Code (CWC) Section 13268 for violations of a CWC section 13267(b) Order issued June 12, 2001, and pursuant to CWC Section 13350 for violations of Cleanup and Abatement Order No. R1-2002-0103, which was issued on December 3, 2002; and for violations of the Water Quality Control Plan for the North Coast Region.

WHEREAS, the California Regional Water Quality Control Board, North Coast Region (Regional Water Board), hereby finds that:

1. Jon and Deann Green are listed by the Mendocino County Assessor's Office as the landowners of approximately 520 acres of land (hereinafter "Property") located at 22341 Tomki Road, in Mendocino County. Jon Green is identified as the sole owner of JCG Construction. Jon and Deann Green are listed as the only employees of Green Right O'Way Constructors, Inc. For the purposes of this Order, Jon and Deann Green, JCG Construction and Green Right O'Way Constructors, Inc., are hereinafter referred to as the "Dischargers."

2. The Dischargers failed to comply with a previous order issued by the Executive Officer of the Regional Water Board to submit technical reports, pursuant to (CWC) Section 13267(b). Under CWC Section 13268(a), any person failing to submit reports required under CWC Section 13267(b) is guilty of a misdemeanor and may be held civilly liable.
3. The Dischargers also failed to comply with a Cleanup and Abatement Order issued by the Executive Officer pursuant to CWC Section 13304(a). Under CWC Section 13350(a), any person failing to comply with any Cleanup and Abatement Order issued by the Regional Water Board under Section 13304(a) shall be liable civilly.
4. The Dischargers also violated prohibitions contained in the Water Quality Control Plan for the North Coast Region for which the Regional Water Board may impose civil liability under CWC Section 13350(a)(2).
5. The Regional Water Board hereby assesses civil liabilities as provided herein this Order.
6. The following facts are the bases for the violations in this matter:
 - a) On May 18, 2001, Regional Water Board staff inspected the Property, in response to a report by the California Department of Forestry and Fire Protection (CDF) of possible logging and land clearing without an approved Timber Harvest Plan or Timberland Conversion Permit. During the inspection, Regional Water Board staff observed extensive evidence of heavy equipment operations including logging, land clearing, grading, and grubbing on approximately 65 acres of the Property (hereinafter Site).
 - b) During the May 18, 2001 site visit, staff determined that there was no evidence of a sediment discharge to watercourses at that time. However, staff determined that the project posed a threat to water quality because the Dischargers had exposed and disturbed a great deal of soil, had not installed adequate erosion control measures, and had not developed drainage or grading plans. In addition, Jon Green informed staff that he planned to re-contour the vineyard area by excavating a portion of the ridge and placing the excavated material in a deep ravine and Class III watercourse. Staff estimated that this project would result in the placement of roughly 70,000 to 140,000 cubic yards of earthen materials into the ravine and/or into the watercourse.
 - c) On June 12, 2001, the Regional Board Executive Officer issued a CWC Section 13267(b) Order requiring that the Dischargers submit the following information within 30 days of receipt of the Order:
 - i) Engineering plans and design information for earthen fill embankment(s).
 - ii) Verification that all necessary permits from CDF, California Department of Fish and Game (CDFG), Mendocino County Permit and Resource Management Department, and the United States Army Corps of Engineers had been obtained.
 - iii) A vineyard drainage and erosion control plan.
 - iv) Documentation that all drainage and erosion control devices had been designed to withstand 100-year storm events.
 - d) On June 28, 2001, the Dischargers requested an extension to September 15, 2001 to submit the information required in the June 12, 2001 CWC Section 13267(b) Order. On July 20, 2001, the Executive Officer granted the requested extension, contingent on the Dischargers postponing earthwork for the proposed vineyard until the following

year and implementing adequate erosion control measures prior to the upcoming rainy season (October 15, 2001). The Executive Officer's letter noted that Jon Green had informed Regional Water Board staff, on July 9, 2001, that he would postpone the vineyard development activity until the following year, and that he would implement erosion control measures by October 15, 2001.

- e) The Dischargers did not submit the required information by September 15, 2001. As of May 27, 2004, the date the Executive Officer issued Administrative Civil Liability Complaint R1-2004-0045 (as set forth in finding "y," below), the Dischargers had not submitted the required information.
- f) On July 26, 2002, staff again visited the Site and observed that the Dischargers had conducted further earthwork, including placing extensive fills in the head of at least eight watercourses. Staff observed evidence of extensive erosion and sediment discharge into three watercourses that drain from the Site. Staff again recommended that the Dischargers work with their engineer to implement preliminary erosion control measures and to develop and implement a plan for final erosion control and fill stabilization measures prior to October 15, 2002. Jon Green and his attorney, Ginevra Chandler, agreed to cooperate with staff's request.
- g) On September 27, 2002, staff again visited the Site and observed that some drainage and sediment control structures had been installed, but that considerable additional work would be necessary to stabilize the Site and to prevent additional discharges. In addition, staff observed extensive sediment deposits in a number of tributaries downstream of the Site, including the fish bearing Scott Creek and Tomki Creek. Staff observed a marked difference in the sediment conditions of Scott Creek up and downstream of the discharge points from the Site, indicating that the sediment in Scott Creek had originated on the Site. California Department of Fish and Game (DFG) and National Marine Fisheries Service staff reported that fish habitat had been adversely impacted by sediment deposits that had originated from the Site. Had the Dischargers complied with the 13267(b) Order and implemented effective soil erosion control measures in a timely fashion, these discharges and impacts to beneficial uses could have been avoided.
- h) On November 14, 2002, staff again inspected the Site to evaluate implementation of erosion control measures (required to have been completed by October 15, 2002) and to assess whether there had been further impacts as a result of the first rains of the season. During the inspection, staff observed that the Dischargers had not installed adequate erosion control measures and, in some places, had not installed erosion control measures at all. Staff also observed additional erosion on the Site, additional sediment in Scott Creek and several watercourses that drain from the Site, and additional severe impacts to fish habitat.
- i) On December 3, 2002, the Executive Officer issued Cleanup and Abatement Order (CAO) No. R1-2002-0103 under CWC Sections 13304 and 13267, requiring the Dischargers to perform the following tasks and to submit the following documents by January 2, 2003:
 - i) Clean up and abate the effects of earthen materials that are threatened to be discharged into tributaries of Scott Creek, Tomki Creek, and the Eel River. Perform the work under the supervision of a California licensed engineer or

geologist experienced in erosion control.

- ii) Submit an emergency erosion control plan, prepared by a California licensed engineer or geologist experienced in erosion control, road, fill, and earthen embankment construction and design.
 - iii) Submit plans for longer-term erosion control, grading, and drainage for the Property, prepared by a California licensed engineer or geologist experienced in erosion control, road, fill, and earthen embankment construction and design.
 - iv) Submit engineering certification that all earthen fill and earthen fill embankments are constructed to proper engineering standards to prevent the discharge of additional sediment to waters of the State.
- j) On December 30, 2002, Jon Green requested that the Executive Officer extend the January 2, 2003 deadline to July 31, 2003. Mr. Green indicated that he had almost fully implemented his erosion control plan and that the Site had been stabilized except in a few areas.
- k) On January 8, 2003, staff inspected the Site and found that there had been little progress in installing erosion control measures, that the Site was continuing to erode, and that drainage patterns had been altered to direct site runoff around sediment basins.
- l) On March 17, 2003, the Executive Officer sent a letter directing the Dischargers to comply with all provisions of the CAO by no later than April 7, 2003.
- m) On or about April 7, 2003, Jon Green submitted engineering drawings entitled Preliminary Erosion Control Plan, and a two-page unsigned, unstamped document entitled LaurAl Ridge Ranch Preliminary Erosion Control Plan Modification. At the time that he submitted these documents, Mr. Green indicated to Regional Water Board staff that the submittal was lacking and that he would submit additional documentation in the very near future to satisfy the CAO. As of May 27, 2004, the date the Executive Officer issued Administrative Civil Liability Complaint R1-2004-0045; Mr. Green had not submitted any further information.
- n) Upon review of the documents submitted by Mr. Green in April 2003, staff noted a number of deficiencies both in the design and the specifications. In addition, during a November 14, 2003 visit to the Site, staff observed that many of the items specified in the plans had not been implemented and that further earthwork had changed Site configuration to the point where the plans no longer accurately reflect existing conditions at the Site. Thus, staff do not believe that the April 7, 2003 submittal adequately addressed any of the provisions of the CAO or the 13267(b) Order. Staff discussed the inadequacies with Mr. Green when he brought the submittal to the Regional Water Board office, during April 2003, and again in a letter dated December 16, 2003.
- o) During the November 14, 2003 visit to the Site, staff observed that the Dischargers had performed further earthwork since the January 3, 2003 inspection, that the Site had not been properly stabilized, that further erosion had occurred, that areas that had previously appeared to be stable were now once again disturbed and eroding, and that sediment and rocks were eroding and entering watercourses as staff inspected the Site. Staff noted that fill prisms appeared to be saturated and unstable, and that they could

potentially fail catastrophically and deliver substantial amounts of sediment into receiving waters. Staff also measured a small percentage of the gullies in the fill prisms above watercourses, and calculated that a minimum of 420 cubic yards of soil had eroded from the fill prism faces and delivered into the watercourses. Staff would have measured additional gullies to further estimate the discharge, however, Mr. Green expressed concern that staff was damaging fill faces and causing additional erosion. Staff also decided that fill faces were too steep and unstable to safely access and decided to postpone further assessment work until after the rainy season when soil conditions dry out and stabilize.

- p) On December 5, 2003, staff inspected watercourses downstream of the Site and observed new deposits of sediment in watercourses which drain from or which receive drainage from the Site. Staff also observed sediment deposits in fish habitat in Scott Creek. DFG staff informed staff that Chinook salmon, listed as threatened under the Endangered Species Act, were actively spawning in Tomki Creek during November. Tomki Creek, which has been the recipient of considerable publicly funded watershed restoration efforts, is considered a very important salmon producing stream by the California Department of Fish and Game.
- q) In a letter dated December 16, 2003, the Regional Board Executive Officer notified the Dischargers of the present status of their noncompliance with the 13267(b) Order and the CAO, and advised them of the potential penalties and number of days of violation as of December 1, 2003.
- r) On December 19, 2003, Regional Water Board staff inspected the Site to observe the condition of the slopes, erosion and sediment control measures, and watercourses on the Site. Staff noted that grass was beginning to sprout on some of the fill slopes and observed an additional large fill failure and severe gully erosion that was not observed during the November 14, 2003 inspection. Staff also observed a number of sediment devices in disrepair, as well as devices which were not functioning properly due to sediment buildup and lack of maintenance. Staff also noted sediment in a number of the watercourses draining from the Site. Staff did not observe evidence that any further new earthwork had occurred since the November 14, 2003 inspection.

During the December 19 inspection, staff asked Jon Green if he intended to submit any of the required items as described in the December 16, 2003 letter. Mr. Green indicated that he did intend to do so, and would submit a letter describing what he was planning to do and when.

- s) On December 31, 2003, Mr. Green sent a letter to the Executive Officer indicating among other things that Mr. Green recommended scheduling a meeting with staff, himself, and his engineering consultant as soon as possible. However, the letter stated that his engineering consultant, Mr. Lin, would be out of the country until February 3, 2004. On February 17, 2004, staff phoned Mr. Green and left a voice mail message requesting an update on his efforts to comply with the CAO. Mr. Green returned staff's call and left a voice mail message stating that he was planning to have his engineer visit the Site on February 27, 2004 and would schedule a meeting with staff sometime thereafter.
- t) On February 17, 2004, the Mendocino County District Attorney in the Superior Court of the State of California filed a complaint for Injunction and Civil Penalties, and other

Relief (Case Number 041879) against the Dischargers alleging violations of the California Fish and Game Code and the Business and Professions Code.

- u) On March 16, 2004, staff phoned Mr. Green to follow up on the February 17, 2004 voice mail messages between Mr. Green and staff and the planned February 27, 2004 visit to the Site by his engineer (see finding “s” above). Mr. Green informed staff that he was advised not to allow staff on the Site until after he met with the Mendocino County District Attorney. He also informed staff that he was advised not to further discuss the matter with staff.
 - v) On April 29, 2004, the Superior Court Of the State of California in and for Mendocino County issued an Order for Preliminary Injunctive Relief to Defendants Jon and Deann Green and Green Right O’Way Constructors. The Order restrained and enjoined the Defendants from performing any earthwork at the Defendants property at 22341 Tomki Road unless: (1) Defendants comply with procedures outlined in Fish and Game Code Sections 1602 and 1603 and (2) Defendants obey the previous orders issued by the Executive Officer of the North Coast Regional Water Quality Control Board.
 - w) On September 2, 2004, after being denied access for several months, staff again inspected the Site to further evaluate discharge volumes and to meet with the Discharger’s consultants to discuss possible erosion control measures. During the inspection staff, once again observed recent grading or heavy equipment operations, including road building and sediment basin reconstruction work, in violation of the April 29, 2004 Order issued by the Superior Court restraining the Dischargers from performing additional earthwork. During the inspection, staff estimated the discharge from the earthen fill slopes that the Dischargers constructed to be 620 cubic yards or 125,224 gallons of soil. This is a conservative estimate and does not take into account the sediment that was delivered from the vast majority of the Site. The Discharger also agreed to comply with the CAO and to submit a plan for emergency erosion control work to be performed prior to the upcoming rainy season, October 15, 2004.
 - x) On September 13, 2004, the Mendocino District Attorney’s office sent James Jackson, Esq., the Dischargers’ attorney, a letter serving warning that the Dischargers had violated the Order for Preliminary Injunctive Relief (see finding “v” above) for conducting significant earthwork including road construction and alteration of a sedimentation basin.
 - y) On May 27, 2004, the Executive Officer issued Administrative Civil Liability Complaint No. R1-2004-0045 for \$200,000 for failure to submit technical reports required under CWC Section 13267(b), failure to comply with a Cleanup and Abatement Order required under CWC Section 13304(a) and for violations of Waste Discharge Prohibitions contained in the Water Quality Control Plan for the North Coast Region.
7. The Dischargers failed to comply with the Order of the Executive Officer of the Regional Water Board to submit technical reports, pursuant to CWC Section 13267(b). Section 13267(b) provides as follows:

“In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of discharging or who 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 13268 of the CWC provides for the imposition of civil liabilities against Dischargers for failing or refusing to furnish technical or monitoring reports up to \$1,000 per day. Specifically, Section 13268 of the CWC states the following:

“(a) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267 ...is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).

(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5(commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs...”

The Dischargers also failed to comply with the Order of the Executive Officer by not cleaning up and abating soil discharges, pursuant to Section 13304(a), and submitting or completing the other items required under the CAO. Section 13304(a) provides as follows:

“Any person who has discharged or discharges waste into the water of this state in violation...of any waste discharge requirement or other order...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...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.”

Section 13350(e) of the CWC provides for the imposition of civil liabilities against any person for failing or refusing to comply with a cleanup and abatement order up to \$5,000 per day or ten dollars (\$10) per gallon of waste discharged.

Section 13350(e)(1)(A) of the CWC also provides that where there is a discharge and a cleanup and abatement order issued, the civil liability must be at least \$500 per day, unless findings pursuant to Section 13327 of the CWC are made to support assessing a lower amount.

8. The Dischargers failed or refused to furnish technical or monitoring program reports as required by the 13267(b) Order and the CAO. Pursuant to Section 13268 of the CWC, a day of violation has accrued every day that: 1) the engineering plans for design of the fill embankments and verification of all necessary permits were past due, from September 15, 2001 through the date of this Order and; 2) the vineyard drainage and erosion control plan and documentation that all erosion control devices have been designed to withstand 100-year storm events were past due, from September 15, 2001, through the date of this Order. The days of violation for each document, report, or plan not submitted are summarized as follows:

Item	Due Date	Date Received	Days Overdue	Comments
Plans for design of fill embankments	9/15/01	Not received	969	
Vineyard drainage and EC plan	9/15/01	Not received	444	Superceded by CAO
100-year storm certification	9/15/01	Not received	444	Superceded by CAO

9. In addition, pursuant to Section 13350 of the CWC, a day of violation has accrued for every day that the Discharger: 1) did not clean up and abate the effects of earthen materials threatened to be discharged into receiving waters and; 2) did not submit an emergency erosion control plan; longer term erosion control, grading, and drainage plan for the Site; and engineering certification that all earthen fill and earthen fill embankments were constructed to proper engineering standards to prevent the discharge of additional sediment to waters of the State, since April 7, 2003. As of May 1, 2004, the date that penalties were calculated for the May 27, 2004 Administrative Civil Liability Complaint, it had been 390 days that each of these items had been past due.
10. In addition to the failure to comply with specific provisions of the CAO, as described in 9., above, the Dischargers have violated the Order and prohibitions contained in the Basin Plan, by intentionally or negligently discharging waste, or causing or permitting waste to be deposited where it is discharged into the waters of the State, and creating a condition of pollution or nuisance. Specifically, the Dischargers violated the following prohibitions contained in the Water Quality Control Plan for the North Coast Region (page 4-1.00)

Section 4. IMPLEMENTATION PLANS

DISCHARGE PROHIBITIONS:

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.

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.

The Basin Plan also contains water quality objectives (page 3-2.00-3.00) including:

Section 3. WATER QUALITY OBJECTIVES

OBJECTIVES FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES:

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 sediment 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 of dilution within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.

On several site inspections conducted after issuance of the CAO, Regional Water Board staff observed evidence of sediment discharges from the site into receiving waters. Regional Water Board staff estimate that the minimum volume of sediment delivered to waters of the state from the active erosion sites is approximately 420 cubic yards (yd³), based on measurements made by staff on November 14, 2003. Further measurements conducted by staff on September 2, 2004 indicate that at least 620 cubic yards of sediment have been delivered to receiving waters through winter 2003-04. These discharges have been deposited as fine sediment in waters of the state. These fine sediments are deleterious to beneficial uses, particularly fish habitat. As Dan Torquemada, NMFS investigator, remarked, the Dischargers' activity makes this site one of the top five worst among hundreds in his experience. As documented by the Regional Water Board Staff Report, on numerous occasions staff observed sediment discharges into waters of the state from the Dischargers' fill slopes. The discharges have harmed fish habitat. According to Mr. Dennis Halligan, fisheries biologist, the Dischargers' actions have likely resulted in the loss of three year classes of salmonids in Scott Creek downstream of the Class III watercourse directly impacted by the clearing and filling. The sediment erosion from the Dischargers' landclearing activities and fill slopes discharges are therefore deleterious to fish, wildlife, or other beneficial uses in violation of the Basin Plan. Pursuant to Section 13350 of the Water Code, waste discharges to waters of the State in violation of a CAO are subject to potential fines of up to \$10 per gallon (\$2020 per cubic yard).

11. As of May 1, 2004, the total civil liability that could be imposed against the Dischargers in this matter is calculated as follows:

From finding 8: $(969 \times 1) + (444 \times 2) = 969 + 888 = 1857$ days of violation at \$1,000 per day = \$ 1,857,000 for failure to comply with three provisions of the Executive Officer's 13267 Order.

From finding 9: $(390 \times 4) = 1560$ days of violation at \$5,000 per day = \$7,800,000 (maximum penalty) for failure to comply with four provisions of the CAO.

From finding 10: 620 cubic yards of discharged waste at \$2020 per cubic yard = \$1,252,400 for waste earthen material discharged to waters of the State after issuance of the CAO.

In sum, the Dischargers are subject to maximum potential civil liabilities of \$10,909,400 and minimum civil liabilities of \$780,000 (unless findings under Section 13327 of the CWC indicate a lesser amount).

12. A duly noticed hearing to take evidence on and, affirm, reject, or modify Administrative Civil Liability Complaint No. R1-2004-0045 was held before the Regional Water Board on November 29, 2004, in the Regional Water Board Meeting Room, 5550 Skylane Boulevard, Suite A, Santa Rosa, California.
13. In determining the amount of civil liability actually assessed, pursuant to California Water Code Section 13327, the Regional Water Board considered the following factors:
 - a) The Nature, Circumstances, Extent, and Gravity of the Violations:

The Dischargers have refused and/or failed to submit the required documents, reports, and plans, as required in the 13267(b) Order and the CAO. Additionally, since at least 2001, the following has occurred:

- 65 acres of land have been cleared and left subject to erosion.
- Fill has been placed at and in the upper portion of at least 17 watercourses.
- Fill slopes have not been demonstrably engineered nor constructed in such a way to ensure their stability – slopes are at very steep angles and material does not appear to have been adequately compacted.
- Sediment basins have been located directly against the top of large fill areas, without provision to prevent saturation into the fill material.
- Sediment deposits, causing observable impacts to fish habitat have been directly traced to the project site.
- The Dischargers have been notified in writing of the need to submit design information, etc., multiple times, since before there was a water quality problem; and also have been advised in the field and by telephone on numerous occasions.

The engineering plans for design of fill embankments would have ensured that proposed fills above and in the top of at least 17 watercourses on-site were properly designed, constructed, and maintained to minimize or prevent chronic or acute (catastrophic) discharges of sediment to receiving waters.

The verification of all permits from relevant agencies would have demonstrated that the project had been designed and had undergone appropriate environmental review to increase the likelihood that environmental resources, including water quality, would be protected.

The vineyard drainage and erosion control plan would have ensured that grading, drainage, and erosion control measures throughout the Site were designed and constructed in such a way that erosion and discharges of sediment to receiving waters would be minimized or prevented, both over the construction and the post-construction period.

Documentation that all drainage and erosion control devices had been designed to withstand 100-year storm events would have ensured that structures constructed during the project would maintain integrity over time and minimize or prevent adverse impacts to receiving waters and beneficial uses.

Had the Dischargers supplied the above four documents by September 15, 2001, it is likely that none of the subsequently observed discharges to receiving waters and impacts to beneficial uses would have occurred, or at a minimum, would have been drastically reduced.

Had the Dischargers cleaned up and abated the effects of earthen materials threatened to be discharged to receiving waters by January 2, 2003, as required in the CAO, sediment discharges and adverse impacts to receiving waters would have been mainly limited to those which occurred in 2001 and 2002. Staff photographic documentation of downstream watercourses shows that deposits observed in 2002 had flushed out of the tributaries, and out to the Eel River, by early 2003, but that further sediment had discharged from the Site to the Scott and Tomki tributaries by late 2003.

Had the Dischargers submitted and implemented the required emergency and long term erosion control plans by summer 2003, the sediment discharges and instream sediment deposits staff observed in November 2003 would not have occurred. Had the Dischargers hired an engineer to evaluate and certify the stability of the constructed fills, it would have enabled the Dischargers to identify and remove or repair improperly constructed fills in order to prevent or minimize further sediment discharges from these fills.

At this time, sediment from throughout the Property continues to discharge to waters of the State, with insufficient, inadequate and ineffective efforts to prevent it.

b) Degree of Culpability:

Regional Water Board staff have notified the Dischargers of this Board's water quality concerns and the need to design, submit, and implement plans to prevent or minimize discharges to receiving waters on numerous occasions, in writing, by telephone, and in person, for nearly three years. Jon Green has indicated to staff on several occasions that he intended to submit the required plans, yet to date has not done so, though he has continued to increase the amount of soil disturbance and fill construction in and adjacent to watercourses. In short, the Dischargers' responses to the identification of the problems have been largely to delay action, and to take actions that have increased, not decreased the discharges. The Dischargers were repeatedly notified of this Regional Water Board's requirements and given ample opportunity to come into compliance without incurring civil liabilities. Their actions demonstrate a willful disregard of the law and a high level of culpability.

c) Prior History of Violations:

Regional Water Board staff are not aware of any prior history of CWC violations. However, during 2002, the Attorney General's Office of the State of California levied a \$15,000 stipulated administrative civil penalty, Case No. CP-01-06, against Jon Green for failure to obtain an approved Timber Harvest Plan, Timberland Conversion Permit, and Environmental Impact Report (or Negative Declaration) prior to logging, and converting the Site to another land use.

d) Susceptibility to Cleanup and Voluntary Cleanup Efforts Undertaken:

Significant volumes of sediment from the Property have entered downstream watercourses, including Scott Creek and Tomki Creek, and ultimately the Eel River.

As recently as December 2003, Regional Water Board staff observed evidence of ongoing severe erosion, accumulations of sediment in watercourses and failed sediment control devices. It is likely that the Dischargers could remove the sediment that has been discharged into watercourses without further harm to aquatic habitat. In addition, if the Dischargers comply with the 13267(b) Order and the CAO, it may be possible to correct the problems at the Property before winter 2004/2005, thus avoiding further sediment discharges from the project beyond this rainy season. Regional Water Board staff believe that, at this point, the magnitude of the problem the Dischargers have created is such that a substantial amount of work will be necessary in order to correct the problem and to protect receiving waters from further discharges from the Property.

Regional Water Board staff have no knowledge of any voluntary cleanup efforts undertaken by the Dischargers. Under pressure from Regional Water Board staff and the Executive Officer's Orders, the Dischargers have implemented some minimally effective or ineffective short-term erosion control measures.

e) Economic Savings:

The Dischargers have conducted a massive engineering project in absence of any apparent pre-project engineering design by qualified professionals, and in absence of any relevant regulatory permits. "Savings" to date would include the filing fees for all necessary permits, as well as fees to appropriate qualified professionals to develop designs, plans, reports, etc. as required by this Regional Water Board and any other agencies, and cost to implement the designs, plans, etc. Regional Water Board staff do not know what the sum total cost of these components would amount to. If or when the Discharger does acquire these necessary designs and permits and implements them, these costs will be paid, and the economic savings will be the money saved by delay in financing these measures.

f) Ability to Pay and Ability to Continue in Business:

The Regional Water Board received evidentiary documents and testimony concerning the Dischargers' ability to pay. As stated above, Section 13350(e)(1)(A) of the CWC requires that the Regional Water Board impose a minimum liability of \$780,000 unless it makes findings that justify reducing the amount. Accordingly, the CWC imposes the burden of justifying a lesser amount of civil liability on the Dischargers. Green Right 'O Way Constructors, Inc., as shown in its tax return, possesses considerable assets in addition to the roughly \$1.2 million of personal assets reported by Jon and Deann Green. Additionally, the Dischargers own more than 500 acres of land in Mendocino County. Jon Green is identified as sole owner of JCG Construction, and Jon and Deann Green are identified as the only employees of the corporation Green Right O'Way Constructors, Inc. The Dischargers have asserted that their financial resources are exhausted, but have not provided sufficient justification. Without such justification, the Regional Water Board cannot lower the amount of civil liability based on ability to pay.

g) Other Matters as Justice May Require

Regional Water Board staff costs, as of the hearing date on this matter, approach \$100,000.

Regional Water Board staff recommend reducing the minimum required penalty of \$780,000, as set forth in finding 11 above, to more consistently reflect penalties issued by this Board for similar violations in this Region.

14. The issuance of this Order is an enforcement action to protect the environment, and does not have the potential to result in a physical change in the environment and is therefore not a “project” subject to the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000 et seq.). This Order is also exempt from CEQA in accordance with Title 14, California Code of Regulations, Section 15321(a)2).
15. Payment of the Civil Liability does not satisfy the Dischargers’ obligation to comply with the tasks required by the Order, nor does it avoid potential liability for discharges or other violations that are not specifically addressed herein. The Cleanup and Abatement Order remains in full force and effect.
16. Any person affected by this action of the Board may petition the State Water Resources Control Board to review the action in accordance with Section 13320 of the California Water Code and Title 23, California Code of Regulations, Section 2050. The petition must be received by the State Water Resources Control Board within 30 days of the date of this Order. Copies of the law and regulation applicable to filing petitions will be provided upon request.
17. The Regional Water Board did not consider the Biological and Physical Habitat Assessment Report in Response to an Inland Waters Pollution Spill, dated August 11, 2003, but was offered by Ms. Sue Michaelson, attorney for the Dischargers, to rebut Regional Water Board staff’s case. Except for that limited use as rebuttal evidence, the Regional Water Board excludes the Report, together with any references to it (such as those in Mr. Mullin’s Arrest/Investigation Report dated August 21, 2003) from the record on this ACL Order.

THEREFORE, IT IS HEREBY ORDERED that Jon and Dean Green, JCG Construction, Green Right O’Way Constructors, Inc., pay the administrative civil liability in the amount of \$250,000 due and payable within 30 days of the adoption of this Order.

Certification

I, Catherine Kuhlman, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, North Coast Region, on November 29, 2004.

Catherine E. Kuhlman
Executive Officer