

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ACL ORDER NO. R5-2008-0567

ADMINISTRATIVE CIVIL LIABILITY ORDER
IN THE MATTER OF

TML DEVELOPMENT LLC
THUNDER MOUNTAIN LODGE
AMADOR COUNTY

This Order is issued to TML Development, LLC (hereafter Discharger) pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability (ACL). This Order is based on findings that the Discharger violated the terms of National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002, Order No. 99-08-DWQ (General Permit).

The Executive Officer of the California Regional Water Quality Control Board, Central Valley Region (Regional Water Board) finds, with respect to the Discharger's acts, or failure to act, the following:

1. The Discharger is the owner and developer of Thunder Mountain Lodge, a construction project located within the Kirkwood Mountain Resort in Amador County. Runoff from the site discharges to an unnamed tributary of Kirkwood Creek, which flows into Kirkwood Creek and Kirkwood Meadow about a quarter mile downstream from the project site.
2. Palisade Builders, Inc. is employed by the Discharger to construct the project, and is named on the Notice of Intent to Comply with the Terms of the General Permit (NOI) submitted for the site. As the contractor that manages on-site operations, Palisade Builders, Inc. shares joint and several responsibility for implementation of the General Permit with the Discharger.
3. The Kirkwood Mountain Resort is an area that has undergone significant development over the past few years, and multiple resource agencies are currently making a concerted effort to protect the Kirkwood Meadow and Kirkwood Creek.
4. Kirkwood Creek is the headwaters of the South Fork of the American River. Headwaters are sensitive areas that provide aquatic and terrestrial invertebrates and organic detritus for downstream habitats. Impacts to headwaters can be detrimental to downstream waterways.
5. As described in the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (Basin Plan), the existing and potential beneficial uses of the American River are municipal and domestic water supply, agricultural supply, hydropower generation, water contact recreation, non-contact water recreation, cold and warm fresh water habitat, cold water spawning, and wildlife habitat.

6. On 19 August 1999, the State Water Resources Control Board adopted the General Permit, which implemented Waste Discharge Requirements for storm water discharges associated with construction activity.
7. The General Permit requires that those who discharge storm water associated with construction activity to surface waters file a Notice of Intent to obtain coverage under the General Permit and use best available technology economically achievable and best conventional control technology to reduce storm water pollution. The General Permit also authorizes non-storm water discharges only where they do not cause or contribute to a violation of any water quality standard and are controlled through implementation of appropriate Best Management Practices (BMPs) for elimination or reduction of pollutants.
8. The CWC requires that dischargers obtain coverage under the General Permit prior to commencing construction activities. The Discharger obtained coverage under the General Permit and was assigned WDID No. 5S03C346861 on 20 April 2007.
9. The General Permit states, in part, the following:

C. SPECIAL PROVISIONS FOR CONSTRUCTION ACTIVITY:

Discharges of non-storm water are authorized only where they do not cause or contribute to a violation of any water quality standard and are controlled through implementation of appropriate BMPs for elimination or reduction of pollutants.

10. The Discharger violated Special Provisions C.3 of the General Permit. The violation was caused by the Discharger's failure to implement appropriate BMPs for dewatering activities, which caused or contributed to a violation of the turbidity water quality objective.
11. The following General Permit violations were found at the Thunder Mountain Lodge site:
 - a. During an inspection on 7 June 2007, Regional Water Board staff found a serious violation of the General Permit. Staff observed that non-storm water had been discharged without sufficient BMPs, causing the discharge of extremely turbid water to an unnamed tributary to Kirkwood Creek and Kirkwood Meadow. The turbid condition continued downstream into the Kirkwood Meadow.
 - b. Staff took samples and measured the turbidity of the discharge at 1600 NTUs. Upstream of the runoff, staff noted that the water from the snowmelt was crystal clear. Turbidity measurements for clear water are most likely to be less than 10 NTUs and are definitely less than 100 NTUs. The Central Valley Regional Water Board's Basin Plan water quality objective for turbidity is based on background turbidity levels. Where natural turbidity is between 10 to 100 NTUs, increases in turbidity attributable to controllable water quality factors cannot exceed 20 percent. A discharge of 1600 NTUs is significantly greater than the 20% allowed increase, and would have, at a minimum, contributed to a violation of the water quality

objective for turbidity. Therefore, the discharge was a violation of the Basin Plan and the General Permit.

- c. On 27 June 2007, a Notice of Violation (NOV) was issued to the Discharger for the violation of the General Permit and the California Water Code.
 - d. On 13 July 2007, the Discharger responded to the General Permit portion of the NOV with documentation that settling tanks with a filtering mechanism had been installed and that perimeter BMPs and drain inlet protections were serviced. Regional Water Board staff believes that these BMPs should have been installed and operational before the Discharger's contractor began pumping any water.
12. As discussed above, the Discharger failed to comply with the General Permit by discharging non-storm water that contributed to a violation of a water quality standard. This discharge was not controlled through implementation of appropriate BMPs for elimination or reduction of turbidity.
13. CWC section 13385 of the states, in part:

(a) Any person who violates any of the following shall be liable civilly in accordance with this section:

(1) Section 13375 or 13376

(2) Any waste discharge requirements or dredged and fill material permit.

...

(5) Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act as amended."

...

(c) Civil liability may be imposed administratively by the State Board or a Regional Board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the... following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

...

(e) In determining the amount of liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation, or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior

history of violations, the degree of culpability, economic benefits or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

14. **Enforcement Considerations:** Pursuant to CWC section 13385(c), the Discharger has a maximum civil liability of \$10,000. The maximum liability is based on 1 day of violation. The day of violation was 7 June 2007.
15. **Consideration of Factors Under CWC 13385(e)**
 - a. **Nature:** The Discharger has violated Special Provision C.3.of the Construction Storm Water General Permit by discharging highly turbid non-storm water into an unnamed tributary to Kirkwood Creek without appropriate BMPs.
 - b. **Circumstances:** Regional Water Board staff observed a significantly sediment-laden discharge entering an unnamed tributary of Kirkwood Creek. Staff followed the discharge to its source and found a contractor using a sump pump to dewater a trench. Staff did not observe appropriate BMPs to control the turbidity in this non-storm water discharge and noted that the discharge created considerable turbidity downstream and well into Kirkwood Meadow.
 - c. **Extent and Gravity:** The Discharger failed to comply with the Construction Storm Water General Permit, which resulted in a discharge of highly turbid storm water into to Kirkwood Creek, a tributary to the American River.
 - d. **Susceptibility of the Discharge to Cleanup and Abatement:** Once the turbid runoff entered the unnamed tributary to Kirkwood Creek, there was no practical way to clean up to avoid impacts to water quality or beneficial uses.
 - e. **Degree of Toxicity of the Discharge:** Staff sampled the discharge and determined that the discharge was 1600 NTUs. Staff also noted that upstream, the water was very clear. The highly turbid runoff contained suspended sediments, which could have reduced habitat for aquatic life as well as caused deleterious effects due to physical impacts.
 - f. **Ability to Pay:** Thunder Mountain Lodge LLC is an established developer. As such, the monetary penalties associated with this administrative civil liability should not pose a significant financial hardship for the Discharger nor reduce the ability to continue in business. According to the Amador County Assessor's Office, TML Development LLC owns two adjoining parcels on Kirkwood Meadow Drive. The first parcel (No. 026-270-021-000) is valued at \$2,975,544 and the second parcel (No. 026-270-022-000) is valued at \$2,226,456. The total assessed value of the property owned by TML Development LLC in the Kirkwood area is \$5,202,000.

- g. Voluntary Cleanup Efforts Undertaken: As stated earlier, there was no practical way to clean up the impacted waterways once the turbid runoff entered the unnamed tributary to Kirkwood Creek.
 - h. Prior History of Violations: Water Board staff has no record of non-compliance by the Discharger.
 - i. Degree of Culpability: The Discharger obtained coverage under the General Permit and was assigned WDID No. 5S03C346861 on 20 April 2007. The Discharger was aware of the General Construction Permit requirements.
 - j. Economic Benefit or Savings Resulting from the Violation: The Discharger saved approximately \$6,000 by not implementing adequate BMPs for the dewatering activity.
16. Issuance of this Administrative Civil Liability Order to enforce CWC Division 7, Chapter 5.5 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, section 15321(a)(2).
17. On 15 March 2007, the Regional Water Board explicitly delegated to the Executive Officer the authority to issue orders to assess administrative civil liability where the matter is not contested by the discharger. (Resolution R5-2007-0009)
18. This Order rescinds ACL Complaint R5-2008-0528.
19. Any person aggrieved by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED that the Discharger shall pay a civil liability of \$10,000 as follows:

No later than 30 days after adoption of this Order, the Discharger shall pay ten thousand dollars (\$10,000) by check made payable to the *State Water Pollution Cleanup and Abatement Account*. The check shall have written upon it the number of this ACL Order.

PAMELA C. CREEDON, Executive Officer

15 September 2008

RHM/SYM/WSW: 12 September 2008