

PROSECUTION TEAM
REBUTTAL TO MORITZ ARGUMENT

The Prosecution Team submits the following as its rebuttal to the Argument submitted by Dr. Moritz on January 23, 2009.

MORITZ'S ARGUMENTS ARE UNMERITORIOUS.

1. In adopting a Cleanup and Abatement Order under Water Code Section 13304, there is no requirement to consider economic factors.

Moritz argues that the Regional Board must consider such economic factors as the projected cost of implementation of the CAO and the Moritz' own financial situation. Moritz argues that the requirement to consider economics is set forth in Water Code Section 13241. However, that is not the case. Section 13241 actually applies solely to that function of the Regional Board involving basin planning. The statutory scheme of the Water Code separates the function of basin planning from investigation of discharges and remediation. The latter function is set forth in Section 13304, which does not require the consideration of economic factors.

When Moritz embarked on his project to discharge fill in the stream, pipe it, and alter its natural course—all without appropriate permits—he acted at his own peril. The action is a violation of the Water Code and this Regional Board's Basin Plan. Even if there were a requirement to consider economic factors, Moritz should not now be permitted to claim that he cannot afford to repair the damage he has caused to the stream.

Even if the Board were required to consider economic considerations, it could not do so in the present case. That's because, while Moritz has provided information about the potential cost to conduct the required work, he has failed to provide any information about his ability to pay those costs, and it is too late to submit additional evidence. The Hearing Notice in this case set January 23, 2009 for Moritz to submit evidence related to his economic situation. That deadline was some two weeks after the Prosecution Team's deadline to submit evidence and argument. Moritz cannot claim that he has not had time to submit evidence on this topic, and the Prosecution Team would object to the introduction of any such evidence, including at the hearing. If he were permitted to do so, the Prosecution Team would be prejudiced in that it would not have sufficient time at this late date to test that evidence and to develop rebuttal evidence.

2 The Cleanup and Abatement Order is appropriate and does not run afoul of the Section 13360 requirement not to dictate manner and method of compliance.

The Order requires that the stream be restored to pre-project configuration. That is, to put it back to the way it was. That is the bottom line. The CAO goes on to provide more detail about what is required to accomplish restoration in order to avoid misinterpretation. It has been held that an order such as this is in compliance with Section 13360. Water Code Section 13360 prohibits the Regional Board from specifying the design, location, type of construction, or particular manner in which a discharger may comply with a requirement. However, when there is really only one way to achieve the requirement, in this case, restoration of the creek, the State Water Board has held that the lack of available alternatives allows the Regional Board some room to suggest methods of compliance. See *In the Matter of Vacaville* (2002), Order WQO 2002-0015, at page 23.

This argument has already been tested at the State Water Board in this very case. Moritz presented this same argument to the State Water Board in his petition regarding the original CAO. The State Water Board reviewed that decision and all other arguments and decided to dismiss the petition because it "...failed to raise substantial issues that are appropriate for review by the State Water Resources Control Board." (See Rebuttal Attachment No. 1 attached hereto)

Additionally, the Prosecution Team would note that the proposed restoration plan that Moritz submitted contained variations from the language of the CAO requirements, including a wider, deeper trapezoidal channel that was originally in place that Moritz' engineers asserted would provide for better water flow, thus providing additional protection for the Moritz' property. Regional Board staff reviewed, commented, on and accepted Moritz' proposal. Thus, as a practical matter, it cannot be credibly argued in this case that the Regional Board is dictating the terms of compliance.

3. Moritz undertook the stream alteration activities on his own without the appropriate permits and is solely responsible for restoration of the stream. There is no need to name any other parties.

Moritz undertook to alter the stream bed and its original course. Moritz asserts that the City should be named in the CAO because it is responsible for upstream conditions and that these conditions have contributed to the condition on his property. He goes on to argue that the City failed to clearly communicate with him about whether or not he was authorized to perform the work on his property. Finally, he seems to argue that the City should be liable for the conditions on the

property because it has failed to properly meet its responsibilities under the Municipal Stormwater Permit (R9-2007-0001).

Any failures by the City to implement the Municipal Stormwater Permit are a matter that the Staff of the Regional Board would and should address directly with the City. However, any such failures have absolutely no connection to the unpermitted stream work conducted by Moritz. Instead, Moritz took it upon himself to "correct" conditions on his property that were caused by alleged and unproven upstream conditions. If indeed there are conditions that require improved efforts by the City, the Regional Board staff will address those conditions at the appropriate time. However, Moritz' unpermitted stream work must be addressed regardless. Mr. Moritz seeks to shift responsibility away from himself for actions that he took on his own.

Moritz' allegations that the City was unclear in its instructions to him are not credible in light of its clear letters to stop work and informing him that he was in violation. Moreover, those communications--however unclear they were to Mr. Moritz--are irrelevant to whether or not the Board should uphold the CAO under 13304. The relevant issue is, who damaged the stream? Moritz damaged the stream and he must repair the damage he caused.

4. The project altered the condition of the stream and altered its pre-project course. Moritz' activities clearly created or threatens a condition of pollution or nuisance for purposes of Water Code Section 13304.

Moritz asserts that the Regional Board staff has not conducted monitoring of water quality upstream, on the property, or downstream. Therefore, according to Moritz, the CAO should be dismissed because the staff has presented no evidence of degradation of water quality. Moritz' argument fails. Discharging sediment in a stream course, removing it's hydrological and ecological functions and altering the course are per se PROHIBITED by the Basin Plan because those acts are inherently destructive of water quality conditions and, in dry conditions, at least threaten release of pollutants. For those reasons, there are very clear and strict requirements provided in, for example, the State Water Resources Control Board's construction stormwater permit that require implementation of Best Management Practices (BMPs) in order to minimally disrupt the stream's character. Moritz' argument is misplaced.

5. There is no requirement under Section 13304 that there be an actual discharge of waste to waters of the state before a CAO can issue.

That is because Section 13304 also authorizes prevention of threatened releases. Moritz' activities create such a threatened release when the disturbed soils and sediments are driven by rain or other waters downstream to Rattlesnake Creek. In making his argument Moritz focuses on "fill" activities.

However, his work also involved trenching and grading, which also caused the release of soils and sediments in the stream itself and eventually downstream. See State Water Board "Statewide General Waste discharge Requirements for Dredged or Fill Discharges to Waters Deemed by the U.S. Army Corps of Engineers to be Outside of Federal Jurisdiction (General WDRs), WQO No. 2004-DWQ, May 4, 2004. In the General WDRs, the State Water Board makes completely clear that "headwaters," such as the ephemeral stream in this case are "waters of the state" that require protection from discharges and the threat of discharge.

6. While Moritz may be constitutionally entitled to protect his property, no one is entitled to violate the Water Code on or off their property.

Moritz claims that his actions were related to his "concerns" about damage to the property and threat of future damage from fires and sediment. First, it is unclear how his work in the stream addresses his concerns. He has not explained with any precision what connection the work would have with prevention of fires or prevention of sediment transport. In fact, his work exacerbated the conditions for sediment transport. Second, even if there were some kind of connection, from a regulatory standpoint, there is a right way and a wrong way to accomplish his property protection goals. He was required to obtain appropriate permits BEFORE embarking on the work he conducted in the stream and he was required to implement BMPs to protect against water quality issues caused by the work. He did neither.

7. No application, in the form of a report of waste discharge, has been submitted that would justify the issuance of a waiver of waste discharge requirements.

Moritz states that the Regional Board should issue a waiver of WDRs. However, he has not submitted a report of waste discharge nor addressed issues under the California Environmental Quality Act. When and if those requirements are addressed, a waiver can be considered. However, this does not obviate the need to issue a CAO to require Moritz to remediate the damage he has caused.

Mr. Moritz' arguments amount to an effort to shift blame away from himself and to evade responsibility for the remediation work that must be conducted. The CAO must be issued and implemented. Failure to do so would leave the stream in its altered and damaged state indefinitely. It would also send a message to others who might be tempted to act now and apologize later instead of getting permission, that they can get away with such illegal conduct. As in this case, that conduct only leads to unnecessary waste of public resources and the need to spend more to conduct restorative work. The Prosecution Team respectfully requests that the Regional Board send the proper message to Mr. Moritz and others that they must abide by the required permitting process before conducting

such significant work in streambeds, even if they are ephemeral, in order to protect against environmental damage.

**MORITZ' ARGUMENT CONTAINS FACTUAL CLAIMS
THAT ARE NOT SUPPORTED BY THE EVIDENCE.**

Additionally, the Prosecution Team notes several mischaracterizations and statements without any factual foundation whatsoever in Moritz' argument. For example, Moritz makes the assertion that the City of Poway Fire Department "expressed disappointment that they could not drive over his property." (Argument, Page 2.) The record is devoid of any factual evidence to support that claim. Additionally, City of Poway Attorney Lisa Foster stated at the August 25, 2008 meeting (see Prosecution Supporting Document No. 7) that the City Fire Marshall did not agree with that assertion and the existing roads offered adequate protection.

At page 6 of his Argument, Moritz asserts that he believed that submittal of an application for a Streambed Agreement was the final step with regard to the Department of Fish & Game (DFG) process because Kelly Fisher, a DFG employee allegedly said, "That's it." Actually, to complete the application process, as the name implies, the Department of Fish & Game must AGREE. That is, it must expressly concur with the proposed action. Moritz' subjective belief is irrelevant. The fact is, there was no valid permit authorizing him to conduct the work.

At page 7 of his argument, Moritz asserts that after receipt of the May 19, 2008 City of Poway Notice of Violation (Prosecution Supporting Document No. 4) he understood the notice to be the City's demand to "complete the work" on his property. Moritz then asserts that he wrote a letter to the City of Poway dated May 21, 2008 (See Rebuttal Attachment No. 2 attached hereto), advising the City that he had not heard back from them and that he would be proceeding with his plan to fill the stream and install a drainage pipe, as outlined in his Fish & Game Streambed Alteration Agreement package (Moritz Exhibit 9). A review of the City of Poway files paints a very different picture. The City of Poway did receive a letter, dated May 21, 2008 from Moritz (See Rebuttal Attachment No. 3 attached hereto), which when compared to Moritz' Exhibit 12 strikes a very different tone. The letter the City actually received on May 27, 2008 states that Moritz was in receipt of the NOV, would be contacting City engineering staff, and that Moritz would:

"...make every effort to complete to complete the repairs to our property
By June 2, 2008, per your instruction."

The City of Poway shows no record of ever receiving the letter included in Moritz Exhibit 12, and the City's prior instruction in no way sanctioned the activities Moritz engaged in over the Memorial Day Weekend (May 24-26). City Offices

were closed for the Memorial Day weekend, and upon return to work on May 27, 2008, City of Poway staff received an anonymous complaint that grading work had been conducted over the Holiday (Prosecution Supporting Document 3, page 5). The City sent out an inspector to investigate, and the City issued a second NOV on May 28, 2008 (See Rebuttal Attachment No. 4 attached hereto), requesting that “all grading activities cease and desist immediately”.

CONCLUSION

Moritz’s arguments fail to address the central issue in this case. That issue is whether or not he has engaged in activity that discharged or threatens to discharge waste to waters of the state under Water Code Section 13304. If he had received the appropriate permits to conduct the pipe installation and fill work, then he could credibly argue that the work was sanctioned by the appropriate regulatory agencies. However, it is undisputed that he failed to actually obtain the appropriate permits. His unpermitted work, therefore, creating a threat of discharge is in violation of Water Code Section 13304 and He is solely responsible for correcting the damage that he has done. For all the reasons set forth in the draft Cleanup and Abatement Order and in this rebuttal brief, the Board is respectfully requested to adopt the Cleanup and Abatement Order. Doing so will require that Moritz restore the creek to its pre-project conditions without further delay.

Rebuttal Attachments

1. October 3, 2008 SWRCB Moritz Petition Dismissal Letter.
2. Moritz Exhibit 12.
3. Signed & Date Stamped May 21, 2008 Letter from Bill Moritz to City of Poway.
4. May 28, 2008 Second NOV (with City of Poway fax cover to Chris Means).