



California Regional Water Quality Control Board

San Diego Region



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September 24, 2008

In reply refer to:
CAU:jcofran
Place ID: 725271

Mr. Jeff O'Connor
San Elijo Hills Development Company
1903 Wright Place, Suite 220
Carlsbad, CA 92008

CERTIFIED MAIL
Registration Number
7007 1490 0003 8753 5698

Dear Mr. O'Connor:

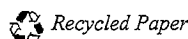
INVESTIGATIVE ORDER NO. R9-2008-0119, DISCHARGE OF MATERIAL INTO UPPER COPPER CREEK, SAN MARCOS, CALIFORNIA

Enclosed is Investigative Order No. R9-2008-0119 (Order) of the California Regional Water Quality Control Board, San Diego Region (Regional Board) concerning the discharge of material for the installation of a grouted riprap structure in Copper Creek.

The Order is issued pursuant to California Water Code (CWC) Sections 13267 and 13383 and directs the San Elijo Hills Development Company (SEH) to submit a technical report **by October 20, 2008** that provides information about the discharge and structure. Pursuant to CWC Section 13268, a violation of a CWC Section 13267 requirement may subject the SEH to civil liability of up to \$1,000 per day for each day in which the violation occurs. Pursuant to CWC Section 13385, a violation of a CWC Section 13383 requirement may subject the SEH to civil liability of up to \$10,000 per day for each day in which the violation occurs.

Based on the available information, the SEH is the property owner of the affected portion of Copper Creek (at the time that the mitigation installation occurred and presently) and, thus, is at least partly responsible for the discharge of the riprap structure within affected portion of Copper Creek. Evidence supporting the basis for the Order is noted within the Order, including an inspection by Regional Board staff, information provided by the City of San Marcos regarding Clean Water Act Section 401 Water Quality Certification 03C-067, and SEH's enrollment in the Statewide Construction Permit (Order 99-08-DWQ). More detailed information is available in the Regional Board's public file on this matter.

California Environmental Protection Agency



Any person affected by this action of the Regional Board may petition the State Water Resources Control Board (State Water 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 Board, Office of Chief Counsel, P.O. Box 100 Sacramento, 95812 within 30 days of the date of this order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

Any person affected by this action of the Regional Board may request an evidentiary hearing before the Regional Board. The Regional Boards' Executive Officer may elect to hold an informal hearing or a paper hearing in lieu of scheduling a hearing before the Board itself. If you decide to request an evidentiary hearing, send your request to Michael McCann attention Jeremy Haas. Please consider the following carefully:

1. The San Diego Water Board must receive your request within 30 days of the date of this Final Order.
2. Your request must include all comments, technical analysis, documents, reports, and other evidence that you wish to submit for the evidentiary hearing. However, please note that the administrative record will include all materials the Regional Board has previously received regarding this site. You are not required to submit documents that are already in the record.
3. The Executive Officer or San Diego Water Board may deny your request for a hearing after reviewing the evidence.
4. If you do not request an evidentiary hearing, the State Water Board may prevent you from submitting new evidence in support of a State Water Board petition.
5. Your request for an evidentiary hearing, if you submit one, does not stay the effective date of the Final Order, whether or not a hearing is scheduled.
6. A request for a hearing does not extend the 30-day period to file a petition with the State Water Board. However, we suggest that you ask the State Water Board to hold the petition in abeyance while your request for a hearing is pending. (See, 23 Cal. Code of Regs. § 2050.5(d).) The Final Order includes additional information about State Water Board petitions."

Mr. O'Connor
San Elijo Hills Development Company
Investigative Order No. R9-2008-0119


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September 24, 2008

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to." In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter. If you have any questions regarding this letter, please contact Mrs. Joann Cofrancesco at 858-637-5589 or jcofrancesco@waterboards.ca.gov.

Respectfully,



 MICHAEL P. McCANN
Assistant Executive Officer

MPM:ma;jh;jlc

Enclosure: Investigative Order No. R9-2008-0119

cc (by email):

Jerry Backoff, City of San Marcos, Development Services Department,
jbackoff@ci.san-marcos.ca.us

John Lormon, Procopio, Cory, Hargreaves & Savitch LLP

Mayumi Okamoto, State Water Board, Office of Enforcement, mokamoto@waterboards.ca.gov

San Elijo Hills Community Association, jsalvia@waltersmanagement.com

Tamara Spear, California Dept. of Fish and Game, TSpear@dfg.ca.gov

Chiara Clemente, San Diego Regional Water Board cclemente@waterboards.ca.gov

Robert Smith, U.S. Army Corps of Engineers, San Diego Field Office,
robert.r.smith@usace.army.mil

Bill Orme, State Water Board, Section 401 Program bome@waterboards.ca.gov

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**INVESTIGATIVE ORDER NO. R9-2008-0119
FOR
SAN ELIJO HILLS DEVELOPMENT COMPANY
DISCHARGE OF MATERIAL INTO UPPER COPPER CREEK,
SAN MARCOS, SAN DIEGO COUNTY**

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board) finds that:

1. California Water Code (CWC) Sections 13267(b) and 13383 contain criteria that allow the Regional Board to conduct investigations and to establish technical, monitoring, inspection, entry, reporting, and record keeping requirements from any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste. Pursuant to CWC Section 13267, this Regional Board may investigate the quality of waters of the state by requiring dischargers to submit technical or monitoring reports.
2. On February 20, 2004, the Regional Board issued the City of San Marcos (hereinafter City) a Clean Water Act Section 401 Water Quality Certification and Waiver of Waste Discharge Requirements for Discharge of Dredged and/or Fill Materials for the San Elijo Road – County Dip Segment Project (Certification 03C-067). Pursuant to §401 Certification 03C-067, the City would mitigate permanent degradation of 0.30 acres of herbaceous wetland and un-vegetated waters of the U.S through the creation of 0.86 acres of wetlands in Copper Creek.
 - a. According to the conceptual mitigation plan submitted to support the §401 Certification application, a continuous wetland corridor would be created adjacent to an existing downstream mitigation area. (*Draft Jurisdictional Delineation and Biological Assessment*, County Dip Segment of San Elijo Road, Prepared for City of San Marcos, URS Project No.27644265.05050, April 4, 2003, received by the Regional Board on June 2, 2003)
 - b. Pursuant to Mitigation Condition 11 of §401 Certification 03C-067, a final mitigation plan was submitted to the Regional Board on March 4, 2004 (*Wetland Mitigation Plan – San Elijo Road, County Dip Portion* (URS Corporation, March 2, 2004)
 - c. In the final *Wetland Mitigation Plan*, the City of San Marcos is listed as the Responsible Party and San Elijo Hills Development Company is listed as the Project Coordinator.

3. On May 7, 2008, Regional Board inspectors observed a grouted riprap structure within the streambed of the proposed mitigation area in Copper Creek. This riprap structure was not included in the *Wetland Mitigation Plan* or other plans submitted as part of the City's Certification application or requirements. Mitigation monitoring plans subsequently submitted by the City on June 9, 2008 identify the location of the riprap structure relative to the March 2, 2004 Wetland Mitigation Plan submitted pursuant to Certification 03C-067 (Attachment 1).
4. The location of the riprap structure within Copper Creek is south of San Elijo Road, between Hope Street and Questhaven Road, San Marcos, California 92078 (approximate latitude/longitude is 33.101580 North and -117.190340 West).
5. The Regional Board has not received a report of waste discharge pursuant to CWC Section 13260 or issued waste discharge requirements¹ to any party for the discharge of grouted riprap to the affected portion of Copper Creek.
6. Discharge of grouted riprap to the affected portion of Copper Creek, without coverage under a waiver or waste discharge requirements, may constitute the initiation of a discharge under CWC Section 13264. If the Regional Water Board finds that a discharge has in fact been initiated, then enforcement actions pursuant to CWC Section 13265² could be pursued.
7. The Regional Board has not issued a Clean Water Act Section 401 Water Quality Certification³ to any party for the discharge of grouted riprap to the affected portion of Copper Creek.
8. The Basin Plan designates the following beneficial uses to the affected portion of Copper Creek (HA 904.5): agricultural supply, contact and non-contact water recreation, and warm freshwater and wildlife habitat.

¹ CWC Section 13260(a) requires that any person discharging waste or proposing to discharge waste within any region, other than to a community sewer system, which could affect the quality of the waters of the State, file a report of waste discharge (ROWD). The discharge of dredged or fill material may constitute a discharge of waste that could affect the quality of waters of the State. CWC Section 13263(a) requires that waste discharge requirements (WDRs) be prescribed as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge.

² CWC Section 13265 provides that "Any person discharging waste in violation of Section 13264, after such violation has been called to his attention in writing by the regional board, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b). Each day of such discharge shall constitute a separate offense.

³ Clean Water Act Section 401 requires any applicant for a Federal license or permit to conduct any activity which may result in any discharge into the navigable waters, to provide the licensing or permitting agency a certification from the State water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with water quality standards and implementation plans. The fundamental requirement of a Regional Board Certification Order is that it describes the discharge, proposed mitigation, and any conditions in adequate detail to protect beneficial uses and allow effective enforcement if necessary.

9. The permanent discharge of grouted riprap to Copper Creek degrades the beneficial uses by eliminating substrate and vegetation essential to supporting wildlife and certain recreational uses. In addition the structure is inconsistent with the habitat mitigation plan approved as a condition of §401 Certification 03C-067. The structure prevents attainment of the mitigation plan's objectives by eliminating the wetland connectivity to downstream wetland habitats proposed in the habitat mitigation plan.
10. The San Elijo Hills Development Company applied for coverage under the State Water Resources Control Board Order 99-08-DWQ, NPDES General Permit No. CAS000002, *Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity*, to perform construction activities in the vicinity of Copper Creek and was issued WDID 937S309763.
11. The City has reported to the Regional Board that San Elijo Hills Development Company was the property owner of the affected portion of Copper Creek at the time that the City's mitigation installation occurred.
12. The City has reported to the Regional Board that San Elijo Hills Development Company and the San Elijo Hills Community Association are the present owners of the affected portion of Copper Creek.

IT IS HEREBY ORDERED, that pursuant to Sections 13267 and 13383 of the California Water Code, the San Elijo Hills Development Company shall conduct a technical investigation, and prepare and submit the following technical report to the Regional Board:

1. The technical report shall contain, but is not limited to, the following information, and shall be submitted no later than **October 20, 2008**.
 - a. Describe the involvement of the San Elijo Hills Development Company (including predecessors and successors) in the placement of the grouted riprap structure in the affected portion of Copper Creek, including, but not limited to, how the San Elijo Hills Development Company (including predecessors and successors) was involved in the design, selection, and installation of the structure.
 - b. Identify the WDID number assigned by the State Water Board pursuant to Order No. 99-08 DWQ, NPDES General Permit No. CAS000002 for construction activities in the affected portion of Copper Creek.
 - c. Identify any local, state, and federal permits or other types of approvals for the placement of the structure within Copper Creek (e.g., streambed alteration agreement, Clean Water Act Section 404 permit, etc.). Include the applicable permit number and date of issuance.

- d. Provide as-built drawings for the structure within Copper Creek, which includes, but not limited to, the dimensions of the structure and the types of material used in the structure.
- e. Identify alternatives considered in lieu of the existing grouted riprap structure and why these alternatives were rejected in favor of the existing grouted riprap structure within Copper Creek.
- f. Provide a timeline of all the activities related with the affected portion of Copper Creek by San Elijo Hills Development Company (including predecessors and successors), including, but not limited to, the development of the plans, each modification made to the plans, implementation of each step of the plans, construction of the riprap structure, and meetings and correspondences with the City of San Marcos and/or their hired contractor(s) regarding work within the affected portion of Copper Creek,.
- g. Describe the involvement of the San Elijo Hills Development Company in the plans proposed in the conceptual mitigation plans and final Wetland Mitigation Plan (dated March 2, 2004), including, but not limited to, the selection of the upper Copper Creek as the mitigation site for the San Elijo Road – County Dip Segment, development of the mitigation plans, review and approval of the final mitigation plan, and implementation of the mitigation plans.

2. Signatory Requirements

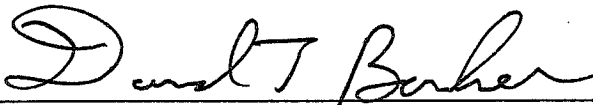
All reports required under this Order shall be signed and certified by either a principal executive officer or ranking elected official or the person with overall responsibility for environmental matters for that municipality. Any person signing a document under this provision shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

3. Notifications

- a. Requirements established pursuant to CWC Sections 13267(b) or 13383 are enforceable when signed by the Executive Officer or Assistant Executive of the Regional Board.

- b. Pursuant to CWC Section 13268, any person failing or refusing to furnish technical or monitoring program reports as required by CWC Section 13267, or falsifying any information provided therein, is guilty of a misdemeanor, and may be liable civilly in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs
- c. Pursuant to CWC Section 13385, a violation of a requirements established pursuant to CWC Section 13383 may subject you to civil liability of up to \$10,000 per day for each day in which the violation occurs.
- d. CEQA Compliance. This enforcement action is being taken for the protection of the environment and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 et seq.) in accordance with section 15308, Chapter 3, Title 14 of the California Code of Regulations. The issuance of this Order is also an enforcement action taken by a regulatory agency and is exempt from the provisions of CEQA pursuant to section 15321(a)(2), Chapter 3, Title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.



sm MICHAEL P. McCANN
Assistant Executive Officer

09/29/2008

Date

Attachments: Figure 1. Location of Riprap Structure

CIWQS Entries:

Regulatory Measure ID: 351359

Place ID: 725271

Party ID: 288905

Attachment 1. Project Location

Figure 1. Vicinity of Copper Creek Location

Upper Copper Creek lies south of San Elijo Road. Riprap structure is south of Sunnyside Ave., near the bend in Genoa Way.

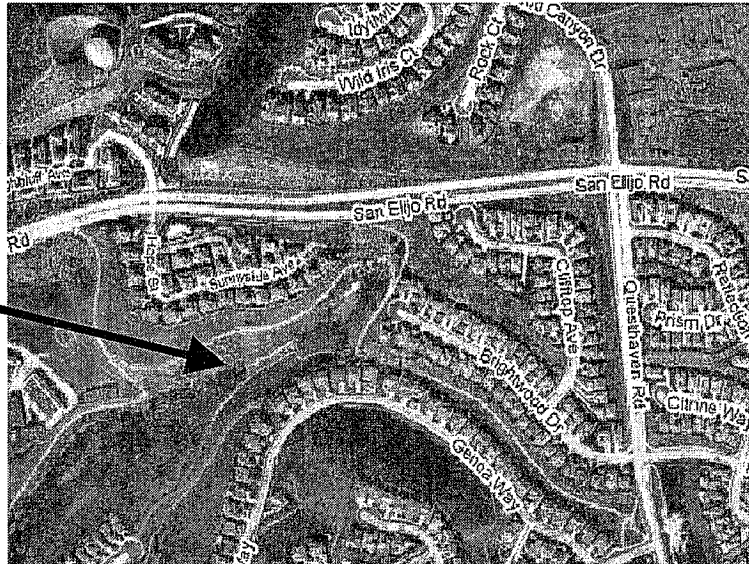


Figure 2. Location of Grouted Riprap Structure as Depicted in City of San Marcos Mitigation Monitoring Report (Report Year 2005, Wetland Mitigation and Monitoring, First Year Report for San Elijo Road, County Dip Portion, Prepared for City of San Marcos, URS Project No. 27655006.02000, January 2006).

Riprap structure within Copper Creek is outlined in blue in the monitoring report figure.

