

Ed Henke
Historical Research
769 Lisa Lane • Ashland, Oregon 97520 • 541-482-9578
E-mail: mickedhenke@aol.com

March 24, 2008

Copy

Honorable Jerry Brown
Attorney General, State of California
State Justice Department
455 Golden Gate Avenue
San Francisco CA 94102

SUBJECT: RESPECTFULLY REQUEST FROM THE STATE OF CALIFORNIA'S NO. 1 LITIGATOR, AND CALIFORNIA'S NO. 2 RANKING STATE OFFICER, A WRIT-OF-MANDAMUS REGARDING THE LONG-LINGERING, UNRESOLVED ISSUES HAVING ONGOING DELETERIOUS IMPACTS ON AN INVALUABLE ENDANGERED SPECIES, THE SOUTHERN STEELHEAD, ONCORHYNCHUS MYKISS IRIDEUS, HAPLOTYPE V – A PUBLIC TRUST ASSET, THE PEOPLE'S PROPERTY

ENCLOSED: SIX-PAGE HARD-SCIENCE, ON-SITE EVIDENCE-BASED DOCUMENT CREATED BY BEN PITTERLE, DIRECTOR OF WATERSHED PROGRAMS, SANTA BARBARA CHANNELKEEPER, SANTA BARBARA, CALIFORNIA, JANUARY 16, 2008, FOR YOUR REVIEW AND THE PRIME BASIS FOR THIS REQUEST

Dear Attorney General Brown:

The following is a brief outline of why, as a resident of Oregon, I'm so involved with an issue in California.

- I was born in southern California and grew up in Ventura; graduated from Ventura High in 1945; Ventura College in 1947; a BS Ed Degree from USC in 1952; MA Degree from Stanford in 1956 following two years in the military. Was drafted by the San Francisco 49ers in 1950 and my wife and I remained Bay Area residents until 1987. My two brothers, a sister, and two daughters and their families remain permanent residents of California.
- Following my retirement from the business world in 1993, I began an historical research project in 1994 on anadromous salmonids in Ventura and Santa Barbara Counties, and after 14 years of research, hope to finish this project soon.
- My brother Ben and I, like many others, enjoyed the great steelhead and trout fishing that abounded at that time (1930s and 1940s) in both Ventura and Santa Barbara Counties. During these growing-up years, like many others of our time and prior, we had irreplaceable experiences and established values that will remain with us forever – and that's why I'm so emotionally engaged with this issue.
- The First North Fork of Matilija Creek of the Ventura River system is the location under discussion, and basically the only reliable perennial up-river segment of the Ventura River system that still has a measure of refugia area habitat remaining for the endangered southern steelhead to procreate, if and when they have enough water, and access, to migrate/emigrate (progeny) to/from this segment.

- Prior to the 1946 building of Matilija Dam located on Matilija Creek, the uppermost segment of the main Ventura River, no Instream Flow Requirements (IFR) were considered or mandated as a pre-project objective.
- In 1956 when the Casitas Dam project was funded, along with its Robles Diversion-Dam and Canal, no IFRs were established as a pre-project objective. The Fisheries people didn't think there would be any return of fish following the project, however, the California Department of Fish and Game (CDFG) kept the option open for the building of a fish-ladder/fish-way at the Robles Diversion-Dam in the event steelhead were still coming up a basically intermittent-to-dry riverbed below. George Warner of the CDFG indicated in correspondence that they didn't think the US Bureau of Reclamation would come up with \$25,000 (in 1959) to build the fish-way/fish-ladder. The fish-way/fish-ladder was recently completed at a cost of approximately \$8 million, and the Casitas Municipal Water District is now suing the federal government for the cost of the water to make the fish-way function as designed. Matilija Dam is now scheduled for removal, with a price tag of \$130± million.
- A January 15, 1959 US Fish and Wildlife Service (USFWS) "Follow-up Report, Ventura River Project, California" stated per previous report of May 1954 (p. 1, no. 6) "Fishery: Prior to 1946 supported runs of steelhead." This statement implies steelhead no longer migrated/remained in the Ventura River system, which includes Santa Ana and Coyote Creeks that are blocked by the Casitas Dam's earthen wall. This implication is totally false.
- In July 1960 the US Department of Interior, Fish and Wildlife Service "Supplementary Follow-up Report for the Ventura River Project, California," stated: " 'Fishery: Before project construction [1957] and prior to 1946, Ventura River during years of sufficient run-off supported runs of steelhead trout. However, since then drought and more complete use and control of river and tributary streams prevented the migration of steelhead trout...' (p. 2b)."
- In "Case Study Report 74 Casitas Dam, Ventura County, III Project Development" (Charles Hazel, et al.) both the CDFG and USFWS were quoted regarding prior studies conducted on the Ventura River below the proposed Casitas Dam (Coyote Creek): "... Because there was no record of steelhead migration immediately prior to the construction [1957] of the Casitas Project, no mitigating features or in-stream flow considerations [IFRs] were included in the project development.... (pp. 5-7)." [Henke emphasis] I have historical photos of people and steelhead that were caught in the Ventura River and Coyote/Santa Ana Creek system in the years 1946, 1947, 1948, 1949, 1950s, 1952, 1953, 1956, 1958, and 1959.
- The last quoted statement is more or less a repeat of the prior two statements. First, there obviously was no evidence presented nor any hard-science, on-site, evidence-based studies done to scientifically justify these statements. Additionally, I have conclusive evidence through three recorded oral history sessions with old-timers, plus back-up photo documentation, that these quotes by government agencies were false and misleading statements used to justify not providing any mitigating measures for the survival of the southern steelhead of the Ventura River system. Such repetition of non-factual information can best be described as a form of cognitive dissonance.

- Numerous steelhead were seen trying to skirt the Casitas Dam's spillway on Coyote Creek in January 1958 during Casitas Dam's construction, and there is additional evidence of steelhead in the Ventura River system in probably all years prior to its construction. My brother Ben called CDFG's Region V Office about the numerous steelhead trapped below the spillway, with some trying to jump over, reporting that all were congregated below the spillway with nowhere to go. CDFG never responded.
- Section 5937 of the California Department of Fish and Game Code (previously Section 525 established in 1915) prohibits water diversions from harming fish migrations: "The owners of any dam shall allow sufficient water at all times to pass ... to keep in good condition any fish that may exist below the dam." The CDFG was directed (in 1989) to implement the policies of its Section 702. In The Appellate Court finding in reviewing *California Trout v. Water Resources Control Board, et al.* [207CalApp.3d585 (1985)] the Appellate Court ruled that the California Department of Fish and Game Code Section 5937 is an expression of both the California Constitution and the California Legislature for protecting the state's in-stream values as an ecosystem and fish resources that utilize the ecosystem. The effect of that provision is to limit the amount of water that may be appropriated by diversion by requiring that sufficient water be released to insure that the fish-life below the dam/diversion is maintained in good condition. In-stream values are held in trust by the state and are better defined as public trust assets, the people's property.

(Note: The previous eight bulleted statements were selected to amplify the importance of a natural, uninhibited and free-flowing First North Fork of Matilija Creek to the very survival of the endangered southern steelhead and other indigenous fluvial fauna and invertebrate life-forms)

- "DFG's Failure to Defend Habitat" ¹

"The Department of Fish and Game, trustee of California's plant, fish and wildlife resources, has an affirmative duty to prevent parties from using the public trust resources of threatened or endangered species habitat in a harmful manner." ²

"Existing Law" ²

"Section 1755 of the State Fish and Game Code affirms that it is state policy: to maintain sufficient populations of all species of wildlife and native plants and the habitat necessary to insure their continued existence at the optimum levels (and to) perpetuate native plants and all species of wildlife for their intrinsic and ecological values."

"Section 2051, 2052 of the Fish and Game Code finds that: the adverse modification of habitat is a significant threat to the listing of the species." [The federal government listed the southern steelhead of the Ventura River system as an "endangered species" in September 1997, eleven years ago. — Henke]

"It is the policy of the state to protect, conserve, enhance and restore endangered species and their habitats." ²

- "The California Supreme Court clearly requires the state as a trustee of public trust resources to prevent parties from using the public trust resources in a harmful manner. The Court held that '...the public trust is more than an affirmation of state power to use public property for public purposes. **It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands....**' (Id. at 441) [Henke emphasis] As this opinion will establish, CESA [California Endangered Species Act] includes the protection of the habitat of threatened and endangered species. Therefore, the Department [California Department of Fish and Game], as trustee, has an affirmative duty to prevent parties from using the public trust resources of threatened or endangered species habitat in a harmful manner. (See also Cal. Fish and Game Code § 2055.)" ², p. 3, pt. 3.

¹ *Does the Department of Fish and Game Protect Fish and Game? Staff Report to the Senate Committee on Natural Resources and Wildlife*, Senator Tom Hayden, Chair, May 8, 1996. In "Habitat Unprotected" segment.

² Quotes from memorandum to Mr. Boyd Gibbons, Director, CDFG, from Eugene V. Toffoli, Legal Adviser, June 19, 1992, Title: "Interpretation of the California Endangered Species Act (CESA)," in "Habitat Unprotected" segment of *Does the Department of Fish and Game Protect Fish and Game? Staff Report to the Senate Committee on Natural Resources and Wildlife*, Senator Tom Hayden, Chair, May 8, 1996.

- My own historical research findings indicate that this First North Fork system segment of the Ventura River system historically provided an estimated 8.25 streambed miles of potential spawning and rearing refugia area habitat for the endangered southern steelhead. Historically there was an estimated total of 132.75 streambed miles of potential spawning and rearing habitat within the Ventura River system's 228-mile watershed area. The First North Fork system now represents only an estimated 6.2 percent of what was historically available habitat for the southern steelhead to procreate. This is being further disrupted by an ongoing rock mining operation and compounded by extensive water diversions and groundwater extractions involving public trust assets, the people's property.
- Based upon a formulization process I established to help estimate the historical population densities of anadromous salmonids in the southern California area, the results suggest that per streambed mile 109 adult southern steelhead averaging 4 pounds migrated annually into the First North Fork when the natural processes were conducive, for a total of 899 adult spawners. Prior to the building of Matilija Dam in 1946, the California Division of Fish and Game estimated that 5,000 adult steelhead (average weight?) continued to migrate into the Ventura River system. Major water exploitation of Ventura River system water began very early, following the arrival of the Spaniards in the 1700s.

I, along with many others, feel very strongly that what has happened here to a small but important and invaluable piece of California's heritage should be placed on the table for your evaluation and adjudication. We need a prompt, just, and decisive decision which discards past conventional wisdom and present day status quo. In my personal judgment, this has now become a major public trust issue, and your office's adjudication appears to be the only just solution remaining.

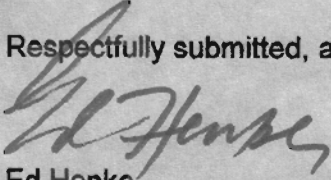
Honorable Jerry Brown
Attorney General, State of California

March 24, 2008
page 5

I hope that the content of the 6-page enclosure is worthy of your office's professional evaluation and response.

Best personal regards.

Respectfully submitted, and many thanks for your indulgence,

A handwritten signature in dark ink, appearing to read "Ed Henke", written in a cursive style.

Ed Henke

cc: Various

P.S. Please give my regards to Charles Getz. Thank you.



Protecting and Restoring the Santa Barbara Channel and Its Watersheds

714 Bond Avenue Santa Barbara CA 93103 Tel (805) 563 3377 Fax (805) 687 5635 www.sbck.org

January 16, 2008

Kim Rodriguez
Ventura County Planning Division
800 South Victoria Avenue
Ventura, CA 93009

Steve Bennet, First District Supervisor
Ventura County
800 S. Victoria Avenue
Ventura, CA 93009

Tracey Egoscue, Executive Officer
Los Angeles Regional Water Quality Control
Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013-2343

Ed Pert, Acting Regional Manager
Department of Fish and Game Region 5
4949 Viewridge Avenue
San Diego, CA 92123

Col. Thomas H. Magness IV, Commander
United States Army Corps of Engineers
Los Angeles District
P.O. Box 532711
Los Angeles, CA 90053-2325

Rodney McInnis, Regional Administrator
National Marine Fisheries Service
Southwest Regional Office
501 West Ocean Boulevard
Long Beach, CA 90802-4213

Re: Ongoing Clean Water Act and Endangered Species Act Violations at Mosler Rock Ojai Quarry

To Whom It May Concern:

Santa Barbara Channelkeeper, along with the undersigned concerned organizations, is writing to express our concern about the significant adverse environmental impacts to North Matilija Creek that are resulting from ongoing operations at the Mosler Rock Quarry. Santa Barbara Channelkeeper is a non-profit organization dedicated to protecting and restoring the Santa Barbara Channel and its watersheds through citizen action, education, field work and enforcement. We have been conducting monthly water quality monitoring in the Ventura River and North Matilija Creek since 2000 and have documented significant barriers to fish passage and impairments to water quality that are directly attributable to quarry operations. By bringing this problem to your agencies' attention through this letter, Channelkeeper seeks to secure a commitment from your agencies to work together to take any and all appropriate actions to ameliorate the environmental problems caused by this facility as soon as possible.

In previous correspondence with the Department of Fish and Game (DFG), the Los Angeles Regional Water Quality Control Board (RWQCB), Ventura County Planning Department (County), and the US Army Corps of Engineers (USACE), Channelkeeper has been assured that the rock quarry is in compliance with all relevant regulations, permits, and cleanup and abatement orders. Despite these assurances, a significant barrier to steelhead trout migration has persisted in North Matilija Creek since March 2006 when a large landslide resulted in the deposit of approximately 250 to 400 cubic yards of

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boulder-sized sandstone directly into the creek.¹ Additionally, the quarry's historic mining operations, the construction of mining roads directly adjacent to the creek, and the continual operation of heavy machinery used to transport rock and fill have resulted in a severely unstable streambank extending the entire length of the property. These conditions are directly contributing to the substantial discharge of sediment and rock material into the creek.

After conducting multiple reviews of available public records pertaining to these problems at the quarry, Channelkeeper has determined that this mining operation has an extended history of non-compliance with various permit conditions to which it is subject. We are extremely concerned that, despite years of effort by various regulatory agencies to bring the operation into compliance, such compliance has only sporadically been met on paper and has never resulted in the actual protection of the environment as intended by the Clean Water Act, the National Environmental Protection Act, the Endangered Species Act, and other relevant laws and permits.

Although the landslide occurred during a storm in March 2006, sufficient photographic and written records exist to demonstrate that landslide conditions were directly caused by operations at the quarry while subject to the oversight of multiple regulatory agencies. Channelkeeper has compiled historic records that also demonstrate incidences of direct filling of the creek with quarry product. The USACE is the lead agency responsible for regulating discharges of fill material under Section 404 of the Clean Water Act.

According to the May 2002 Final Rule on Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," the term "fill material" means "any material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." Examples of such fill material include, but are not limited to: *rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States*" (emphases added). In the preamble to the rule, the agencies made clear that *mountaintop mining/valley fills and fill used to create liners, berms, and other infrastructure associated with solid waste landfills* is subject to regulation under Section 404 (emphasis added).

The conditions at Mosler Quarry, as illustrated in Attachment A, clearly meet this definition of fill material. The resulting debris from this landslide constitutes an illegal discharge of fill material without a permit, which has never been addressed by the USACE. In addition to this event, historic photographic records clearly demonstrate that similar discharges have been occurring for years absent any enforcement action to address the problem. In the above-referenced January 2007 memo, the USACE opined that they considered this a "very, very small violation," and that other agencies, including the DFG and NOAA Fisheries had not contacted them regarding elevated concerns about the site.

The Mosler Rock Ojai Quarry currently operates under a Conditional Use Permit (No.3489-2) granted by the County of Ventura. In 1993, the Ventura County Resource Management Agency approved the Final Environmental Impact Report (FEIR) for the Schmidt Rock Quarry, CUP 3489-2. In the FEIR, the County cited overriding considerations that justify unavoidable, significant adverse impacts to the environment. These considerations largely stem from the fact that the quarry provides the majority of rip-rap material for County flood control projects. However, both biological and slope stability impacts are deemed mitigable in the FEIR. Our extensive research of County records reveals an extended history of non-compliance by the quarry with conditions outlined in CUP 3489-2, which includes a Visual Mitigation Program, a Geology and Soils Mitigation Program, and a Biological Mitigation Program. Despite the CUP and efforts by County staff and the present quarry owner to bring the

¹ Memo from John Markham, North Coast Project Manager, US Army Corps of Engineers, April 25, 2006, 2007. *Ongoing Clean Water Act and Endangered Species Act violations at Mosler Rock Ojai Quarry*

operation into compliance, significant impacts to Matilija Creek have never been adequately mitigated per the original intent of the EIR.

Channelkeeper notes that the RWQCB issued a Cleanup and Abatement Order² (CAO) to the owner of the quarry in June 2006, which required the quarry to:

- 1) Effectively stabilize the right half of the slope adjacent to Matilija Creek, and reduce or eliminate erosion from mining areas. (Completion date: September 1, 2007; progress reports due on January 1, 2007 and June 30, 2007.)
- 2) Effectively stabilize the left half of the slope adjacent to Matilija Creek, and reduce or eliminate erosion from mining areas. (Completion dates: September 1, 2007 and June 30, 2007, respectively; progress report due on September 1, 2007.)
- 3) Apply for a 401 certification to clean out discharged boulders and other nuisance into Matilija Creek immediately. (Completion date: June 28, 2006.)

Based on the attached photographs (Attachment B), it is evident that the right half of the slope adjacent to Matilija Creek has NOT been effectively stabilized. Similarly, minimal progress has been made on stabilizing the left half of the slope. Based on our review of public records conducted on January 30, 2007, the Permittee had not applied for, and the RWQCB had not issued, a Water Quality Certification as required by the CAO. Nor had the Permittee submitted required progress reports on stabilization efforts. Because of these circumstances, we find that Mosler Rock Ojai Quarry is in violation of the June 2006 CAO.

California's Porter-Cologne Water Quality Control Act provides for the issuance of a cleanup or abatement order to a person who has discharged, or "threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state."³ The existing condition of the left and right streambanks caused by quarry operations constitutes such a threat. The Act further states that, "Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order."⁴

Porter Cologne further provides that, "If the regional board determines there is a threatened or continuing violation of any cleanup or abatement order... the regional board may issue an order establishing a time schedule and prescribing a civil penalty which shall become due if compliance is not achieved in accordance with that time schedule."⁵

Channelkeeper argues that the time has come for this and other enforcement actions.

On December 18, 2007, Channelkeeper visited the site during a rain event. We collected photographs, videos, and water quality data that demonstrate the enormously significant impact the quarry is having on North Fork Matilija Creek. Despite significant rainfall, turbidity measurements directly upstream of the quarry averaged approximately 100 Nephelometric Turbidity Units (NTUs). Upon further investigation, it was determined that most of the sediment entering the creek above the quarry originated from several dirt pullouts on Highway 33. Approximately one-quarter mile upstream from the quarry, turbidity measurements were less than 5 NTUs. As illustrated in Attachment C, however, the quarry is causing significant adverse impacts on water quality beginning immediately upstream of where the 2006 landslide occurred, where a gushing stream of turbid water bypassed ineffective BMPs.

² Los Angeles Regional Water Quality Control Board, Cleanup and Abatement Order No. R4-2006-0052, June 28, 2006.

³ Sec. 13304(a), California Water Code.

⁴ Id.

⁵ Sec. 13308(a), California Water Code.

Turbidity immediately downstream of the quarry exceeded the maximum detection limits of our equipment (1,100 NTUs). Photographs and videos we took during this rainfall event depict a heavy discharge of highly turbid stormwater runoff and failing or bypassed BMPs. Figure 11 of Exhibit C depicts the striking contrast between water quality in Matilija Creek and North Fork Matilija Creek at their confluence just meters downstream of the quarry.

In addition to the disastrous ecological consequences of such an event, we are highly concerned that these water quality impacts are negatively affecting the Casitas Water District's ability to supplement its domestic water supply via the Robles Diversion, which is located approximately two miles downstream of the quarry. On January 10, 2007, the Casitas Water District submitted a letter to the RWQCB seeking assurance that the water quality impacts emanating from the quarry would not be allowed to continue. Despite this request, the quarry continues to severely degrade water quality.

Based upon discussions with DFG staff, we have determined that several agencies have met with the quarry owner on multiple occasions since the February 2006 landslide. During these meetings, corrective actions were outlined that were deemed necessary to bring the quarry into compliance and to protect environmental resources. As a result of these meetings, DFG decided to issue a Streambed Alteration Agreement (SAA) to the quarry in August 2006. The SAA states that rock resulting from the 2006 landslide is blocking steelhead migration and causing water to undercut Highway 33, and further notes that steelhead trout are present in a pool immediately upstream of the rocks and throughout the site.⁶

We understand that as a result of subsequent meetings between the quarry owner and DFG biologists, a small selection of rocks were targeted for removal and were marked with spray paint last summer (Attachment A). Sometime in September 2007, these rocks were removed from the creek by the quarry owner. Despite this effort, stream flow was not restored and continued to flow sub-surface through the landslide area.

Subsequently, Channelkeeper contacted both DFG and NOAA fisheries staff to express concern about this inadequate cleanup effort. Both agencies communicated to us that their preferred alternative was to wait (through yet another steelhead migration season) to see if winter rains would wash out the blockage. Channelkeeper finds this decision particularly disturbing since, there was no guarantee that winter rains would effectively remove the fish barrier. Secondly, after nearly two years, neither the quarry owner nor any government agency had ever conducted a substantial effort to design a remediation plan that both restores fish passage and accounts for the significant slope instability at the site. In the presence of such significant, ongoing slope stability hazards, this site requires engineering that agency biologists *can not* and *should not* provide.

On December 11, 2007, Channelkeeper conducted a site inspection with Ed Zapel, a certified professional engineer who specializes in fish passage projects. His findings are recorded in a memo (Attachment E). To summarize, he determined that the condition of the landslide after the September remediation effort still posed a critical impediment to fish passage. Mr. Zapel noted that even under sufficient flow conditions the, "steep downstream slope of the slide debris (well in excess of 10 percent) will present difficult challenges to adult steelhead and is highly likely to be impassable by resident trout and juveniles."

Attachment D depicts the landslide area on January 7, 2008, immediately following a significant rainfall event, which demonstrates that heavy rains have in fact not cleared the fish passage barrier. Although much of the smaller material did wash out, most of the larger rocks and boulders still remain. During our January 7 site visit, the water level was high and flows were all above ground. Conditions still remained far less than ideal for fish passage, as a combination of complicated cascades, including a section of sheet flow over the rock face remain. Additionally, these conditions represent a narrow

⁶ California Department of Fish and Game, Streambed Alteration Agreement #1600-2006-0107-R5, August 2, 2006. *Ongoing Clean Water Act and Endangered Species Act violations at Mosler Rock Quarry*

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window of potential navigation that quickly degraded as stream flows dropped within days after the rain event.

DFG staff met Channelkeeper at the site on this date, at which time they agreed that further remediation would be required to make the creek passable. Still, however, no action has been taken to design a long-term solution to fish passage and slope stability at the site.

Channelkeeper and the undersigned organizations are extremely concerned that operations at the Mosler Rock Ojai Quarry continue to significantly degrade environmental resources. Over the last decade, millions of public dollars have been invested in restoring the Ventura River watershed. Millions more are being spent today on restoration efforts that will ultimately lead to the removal of the Matilija Dam. Every agency mentioned in this letter, along with countless other organizations and concerned citizens, have directly invested in these efforts. In this particular circumstance, however, those same regulatory agencies have utterly failed to protect the very resources they are concurrently working to restore elsewhere. This failure constitutes a breach of the Public Trust and a negation of restoration efforts made thus far.

We understand that this issue is highly complicated, involving several agencies, multiple quarry owners, and decades of landscape modification, including significant disturbance to the site resulting from historic highway construction. Such complexity, however, does not justify the ongoing degradation of a valuable environmentally sensitive area. Further, based on our review of agency records and correspondence, we are extremely concerned that a lack of coordination between agencies has resulted in an ineffective and often conflicting mismanagement of quarry operations.

We, as concerned stakeholders, jointly demand that the relevant agencies work in a coordinated manner with Mosler Rock Ojai Quarry to immediately require a remediation of North Fork Matilija Creek. Such an effort should include:

1. The effective removal of the fish migration barrier resulting from the 2006 landslide;
2. The elimination of polluted stormwater discharges from Mosler Rock Ojai Quarry;
3. The restoration of stream banks to restore riparian habitat and effectively provide long-term stream bank stabilization along the entire length of the quarry operation.
4. Additional stream restoration along the entire length of the quarry operation to eliminate all potential fish barriers resulting from historic deposit of large boulders into the creek.

We thank you for your time and look forward to your timely response.

Sincerely,

Ben Pitterle
Director of Watershed Programs
Santa Barbara Channelkeeper

Cc: Natasha Lohmus, Streambed Alteration Team, California Department of Fish and Game
Mary Larson, California Department of Fish and Game

Ongoing Clean Water Act and Endangered Species Act violations at Mosler Rock Ojai Quarry

Heather Wylie, Regulatory Branch, US Army Corps of Engineers, Ventura Field Office
Ejigu Solomon, Stormwater Unit Chief, Los Angeles Regional Water Quality Control Board
Stan Glowacki, National Marine Fisheries Service