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## North Coast Regional Water Quality Control Board

August 9, 2012

Mr. Dennis Wendt  
WWW.Perssard.inc  
1660 Newburg Road  
Fortuna, CA 95540

Dear Mr. Wendt:

**Subject:** Notice of Applicability for Coverage under the State Water Resources Control Board General 401 Water Quality Certification Order for Certification of U.S. Army Corps of Engineers 2012 Nationwide Permits Order Number SB12002GN  
U.S. Department of Justice docket number CV-12-2225

**File:** Strongs Creek Residential Subdivision,  
Cleanup and Abatement Order R1-2007-0104  
WDID No. 1B12126WNHU

On July 10, 2012, the North Coast Regional Water Quality Control Board (Regional Water Board) received your Notice of Intent (NOI) to comply with the terms of General 401 Water Quality Certification Order for *Certification of U.S. Army Corps of Engineers 2012 Nationwide Permits* (General 401 Certification Order) for Wendt Strongs Creek Plaza Littlefield Property EPA Enforcement Restoration Project (Project). The Project will cause disturbances to waters of the State and United States associated with the Eel River in the Ferndale Hydrologic Sub Unit No. 111.11, Eel River Hydrologic Unit No. 111.00. Application is for coverage under Order No. SB1200002GN for Nationwide Permit: NWP 32 – Completed Enforcement Actions. The primary purpose of the Project consists of removal of illegally placed fill material and surface debris to support restoration and enhancement of wetlands to reverse previous construction activities that resulted in illegal filling of wetlands/waters of the State and United States.

This project is restoration work that the U.S. EPA, U.S. Department of Justice, U.S. Army Corps of Engineers, California Department of Fish and Game, and the Regional Water Board requires as part of their coordinated enforcement action against Mr. Wendt for unpermitted discharges of dredged and fill material into waters of the State and United States. USEPA and US Department of Justice lead the enforcement effort. A Consent Decree, U.S. Department of Justice Docket number CV-12-2225, contains specific information on the specific requirements of the coordinated enforcement. Issuance of this General 401 Certification Order does not permit activities that require permitting under the authority of other agencies.

Work will be as described in *Mitigation and Monitoring Plan for the East Littlefield and Strongs Creek Plaza Properties, Fortuna, California, EPA-Approved Final* produced by Winzler & Kelly/GHD, dated May 2012.

The City of Fortuna, as the lead CEQA agency, has produced a Mitigated Negative Declaration for the Project and filed it with the State Clearinghouse, (SCH No 2012062057), pursuant to CEQA guidelines. Additionally, for the purpose of this Order, the U.S. Army Corps of Engineers Nationwide Permit number 32 - Completed Enforcement Actions is exempt from CEQA under Categorical Exemption number 15321-Enforcement Action by Regulatory Agencies, and meets the eligibility requirements for coverage under the General 401 Certification Order.

After subject work is completed as specified, and if you decide to proceed with further development of the site, you will need to address concerns raised in our February 5, 2009, letter (attached). Specifically, you will need to provide us with complete plans for all phases of development of the site so that we can ensure that there is adequate protection of waters of the state, including wetlands and streams. Protective measures include incorporation of buffer areas/setbacks and storm water treatment measures; use of low-impact development techniques to treat runoff from the site prior to it entering storm drain systems, wetlands or streams; and to mitigate for hydromodification impacts at the site caused from the increase in impervious area.

Please be aware that work at the site that is not permitted under the NWP 32 may require additional approval from the Regional Water Board, and such additional approval may require compliance with CEQA.

Receiving Water: Fortuna Hydrologic Sub Unit No. 111.11,  
Eel River Hydrologic Unit No. 111.00

Filled or Excavated Area: Area Permanently Impacted: 9.13 Acres

Latitude/Longitude: 40.580112°N, 124.142879°W

Regional Water Board staff has determined that the proposed activities may proceed under the General 401 Certification Order. If you have any questions or comments, please call Stephen Bargsten at (707) 576-2653.

Sincerely,

Original Signed By Luis Rivera For

Matthias St. John  
Executive Officer

120809\_SKB\_ef\_Wendt\_Strongs\_Creek\_Plaza\_Littlefield\_Property\_EPA\_EnforcementRestoration\_NOA

Certified-Return Receipt Requested

Enc: February 5, 2009 Letter

cc: Mr. Misha Schwarz, Winzler & Kelly, 633 Third Street, Eureka, CA 95501-0417

Mr. Richard Smith, Esq., The Harland Law Firm LLP, 622 H Street, Eureka, CA 95501

Mr. Bill Orme, SWRCB, 401 Program Manager

Ms. Samantha Olson, SWRCB, Office of the Chief Counsel

Ms. Jane Hicks, U.S. Army Corps of Engineers, Regulatory Functions, 1455 Market Street, San Francisco, CA 94103-1398

Mr. Kelly Reid, U.S. Army Corps of Engineers, Eureka Field Office, 601 Startare Drive, Box 14, Eureka, CA 95501

Mr. Gordon Leppig and Mr. Michael van Hattem, CDFG, 619 Second Street, Eureka, CA 95501

Mr. Duane Rigge, City Manager, City of Fortuna, 621 11th Street, Fortuna, CA 95540

Mr. Stephen Avis, City Planner, City of Fortuna, 621 11th Street, Fortuna, CA 95540

Mr. Vincent Griego, Senior Fish and Wildlife Biologist, Coast Bay Delta Branch, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W-2605, Sacramento, CA 95825

Ms. Melissa Scianni and Mr. Wilson Yee, EPA, U.S. EPA Region 9, 75 Hawthorne Street, (WTR-8), San Francisco, CA 94105

Mr. Dan Free, NOAA Fisheries, Arcata Area Office, 1655 Heindon Road, Arcata, CA 95521

Mr. Randy Brown, U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, CA 95521



Linda S. Adams  
Secretary for  
Environmental Protection

**California Regional Water Quality Control Board**  
**North Coast Region**  
**Bob Anderson, Chairman**

[www.waterboards.ca.gov/northcoast](http://www.waterboards.ca.gov/northcoast)  
5550 Skylane Boulevard, Suite A, Santa Rosa, California 95403  
Phone: (877) 721-9203 (toll free) • Office: (707) 576-2220 • FAX: (707) 523-0135



Arnold  
Schwarzenegger  
Governor

February 5, 2009

Mr. Dennis Wendt  
Wendt Construction  
1660 Newburg Road  
Fortuna, CA 95540

Dear Mr. Wendt:

**Subject:** Comments on the Proposed Removal and Restoration Plan and Monitoring Well Installation Request

**File:** Strong's Creek Residential Subdivision Enforcement Case Cleanup and Abatement Order No. R1-2007-0104 - WDID No. 1B08146WNHU Fortuna, Humboldt County

On December 15, 2008, the Regional Water Board received (via email) a copy of the "Draft Removal and Restoration Plan for East Littlefield Property Fortuna, California," dated December 2008, and prepared by Winzler and Kelly Consulting Engineers. Although the second paragraph on the first page of the Removal and Restoration Plan (RRP) states that the purpose of the RRP is to satisfy requirements set forth by the U.S. EPA, the Regional Water Board and the U.S. Army Corps of Engineers, the RRP does not expressly reference our Cleanup and Abatement Order (CAO) 2007-0104, which was issued to you November 30, 2007. The Regional Water Board is, therefore, unclear whether you intended for the RRP to be used to, in part, address the requirements of CAO 2007-0104, which required, among other things, that you submit to us a work plan for restoring the wetlands at the site and mitigating for the temporal loss of that habitat.

As was explained by my staff during a conference call on November 19, 2008, the Regional Water Board is willing to accept, for purposes of moving forward with the restoration and mitigation of the impacts to waters of the state at your site, the map provided by the U.S. EPA in their "Order for Compliance". This map will serve as a delineation of the waters of the state at the site, with the additional understanding that setbacks of at least 100 feet from the top of bank of Strong's Creek must be included, in order to protect water quality. This map must also include any additional wetlands delineated during your recent field work, or that are subsequently found on-site. Similarly, staff also indicated to you that it would not have any objection to your use of a

**California Environmental Protection Agency**

Recycled Paper

RRP prepared for the U.S. EPA to fulfill your obligation under CAO 2007-0104 to provide the Regional Water Board with a work plan that describes how you will comply with the CAO, including removing fill from the site, restoring the areas affected, and mitigating for temporal loss of the wetland habitat at the site. As discussed more fully below, although the RRP addresses some of the CAO's requirements, there are some fundamental problems with the RRP that make it a deficient response to the CAO. If you intend for the RRP to be used to fulfill the requirements of the CAO, you need to review the requirements of the CAO, and tailor the RRP to specifically address the requirements set forth in section 2 of the CAO. The work plan required by the CAO is long overdue, and because the current RRP does not meet the requirements of the CAO, you are currently in violation of the CAO, and potentially subject to administrative civil liability.

The biggest problem with the RRP submitted in December to the U.S. EPA is the same problem that my staff identified during the November 19<sup>th</sup> conference call during which you requested to be able to continue with infrastructure development on Phase I of your project. This problem is that, without an overall understanding of your plans for the site, which includes all phases of development, we are unable to understand if the restoration and mitigation that you are proposing makes sense. During the November 19<sup>th</sup> conference call, my staff explained to you that an understanding of the entirety of the plans for the site was critical to our being able to work with you to allow additional work at the site. Without such understanding, however, it is impossible for us to move forward, even with approval of the restoration work. This is because we need to know where areas proposed for restoration will be located in relation to areas that will be developed. Stormwater, irrigation water and other activities from your proposed development could adversely affect wetland and riparian areas, and it is essential that appropriate setbacks are maintained for those areas. Underground utility lines could alter ground water flow patterns and may threaten existing and restored wetland areas. Although you offered to have your consultants from Winzler & Kelly meet with my staff to explain the totality of your plans, no such contact has been made.

One of the principles of our enforcement actions for failure to obtain proper permits is that the outcome of the project must not result in any less protection for water quality than if you properly obtained permits for your project prior to filling wetlands at the site. Ultimately, it is important that we do not unintentionally reward those who skirt the law by making the requirements for settlement less stringent than they otherwise would have been had the proper permits been obtained. This means that not only will the Regional Water Board require restoration and temporal mitigation for those areas that were filled and will be restored, but it will also require mitigation for any areas that you intend to be permanently filled. Section 2(b) of CAO 2007-0104 stated that in the alternative to providing a plan to restore wetlands at the site, you also have the option to submit a 401/Waiver of Waste Discharge Requirements application that includes adequate mitigation for the loss of wetland area and beneficial uses. The process for permitting multi-phase residential subdivision developments that involve the discharge of fill into waters of the State requires a Clean Water Act section 401 permit or Waste Discharge Requirements for Dredge and Fill Activity. Any further development work at

the site will, therefore, require submittal of a 401/Waiver of Waste Discharge Requirements application. I have enclosed an application for your review, and an electronic application packet may be found at:

[http://www.waterboards.ca.gov/northcoast/water\\_issues/programs/water\\_quality\\_certification.shtml](http://www.waterboards.ca.gov/northcoast/water_issues/programs/water_quality_certification.shtml).

As you can see from the information required to obtain a 401 Certification/WDRs, you must provide to our agency numerous items, including a detailed description of your entire project, which includes not only Phase I, but also the other several phases that we understand that you are intending to build. It also requires the following:

- Evidence of compliance with the California Environmental Quality Act;
- Proposed plans for mitigation and avoiding or minimizing impacts;
- Proposed erosion control measures;
- Proposed storm water treatment measures, such as low-impact development techniques, to treat runoff from the site prior to it entering storm drain systems, wetlands or streams and to mitigate for hydromodification impacts resulting from an increase in impervious area;
- Proposed measures to reduce sources of pollutants, fertilizers, pesticides and sediments from entering waters of the state;
- A bioassessment of the site, including Strongs Creek, to determine impacts to threatened or endangered species; and
- A plan for monitoring the success for these proposals.

Without all of this information, it is impossible for the Regional Water Board to determine whether the mitigation proposed in RRP will be sufficient. Mitigation may be more efficiently and appropriately sized and located when all factors of all phases of the project are taken into consideration.

Because of the insufficiency of information about the proposed project, the Regional Water Board is not able to approve or concur with the RRP or Wetland Restoration Workplan submitted by your consultants. Nonetheless, the following are some specific comments on the RRP intended to help you understand specific items that are of concern to the Regional Water Board:

- There are no buffers on the wetlands where streets are adjacent. Buffers on wetlands will need to be adequate to protect beneficial uses and biological function;
- Buffers and wetlands need to be protected in perpetuity with a legal document, such as deed restrictions and/or conservation easements, and maintained by a responsible entity (this could entail an endowment);
- Wetland buffers should not be on private lots owned by homeowners, as proper protection cannot be assured;

- There is not an adequate buffer or riparian zone planned along Strongs Creek. A buffer of 100 feet from top of bank, with appropriate restoration and revegetation, will help protect water quality and beneficial uses;
- There does not appear to be post-construction storm water treatment incorporated within the residential development, and;
- There needs to be more detailed restoration plans, including more soil profile type and elevation survey data (generally approximately 20 soil pits/acre is appropriate), description of how mitigation/restoration wetlands will be constructed, flow paths, interconnections, depth, revegetation planting plans, vegetation sources, maintenance and monitoring plans, and designation of what entity will maintain the mitigation areas.

In the opinion of the Regional Water Board staff, this multi-phase subdivision development project should be redesigned to take into consideration the need for adequate setbacks from Strongs Creek, existing wetlands or other waters of the State, and any area proposed for the creation of wetland features. This will require the entirety of the development to be set out in detail and shared with the agencies as part of your application for permits. To avoid problems, it is essential that you and your consultants coordinate with all agencies, including the City of Fortuna. It is premature to decide on any restoration or mitigation efforts before the all phases of the residential development project, including all necessary on-site mitigation, required storm water treatment facilities and utility plans are designed and approved. For my staff to spend time reviewing the RRP and the Wetland Restoration Plan before that information is available is not a good use of our limited resources.

Please contact Stephen Bargsten of our staff at (707) 576-2653 if you have any questions.

Sincerely,

  
Original signed by Luis Rivera

 Catherine Kuhlman  
Executive Officer

020509\_SKB\_Wendt\_Summary\_update

Enclosure: 401 Water Quality Certification application

cc: Mr. Misha Schwarz, Winzler & Kelly, 633 Third Street,  
Eureka, CA 95501-0417  
Mr. Richard Smith, Esq., The Harland Law Firm LLP, 622 H Street,  
Eureka, CA 95501  
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Ms. Kim Niemeyer, SWRCB, Office of the Chief Counsel

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**WATER QUALITY CERTIFICATION AND/OR  
WASTE DISCHARGE REQUIREMENTS (Dredge/Fill Projects)**

**What is it?** A Clean Water Act (CWA) Section 401 Permit (Water Quality Certification) is a finding from the Regional Water Quality Control Board that the proposed project will comply with CWA Sections 301, 302, 303, 306 and 307, State laws, and will be protective of beneficial uses. At a minimum, any beneficial uses lost must be replaced by a mitigation project of at least equal function, value and area. Waste Discharge Requirements Permits are required pursuant to California Water Code Section 13260 for any persons discharging or proposing to discharge waste, including Dredge/Fill, that could affect the quality of the waters of the State.

**Who Needs It?** Anyone proposing to conduct a project that requires a federal permit or may result in a discharge to U.S. surface waters and/or "Waters of the State", including wetlands (all types), year round and seasonal streams, lakes and all other surface waters.

**How do you get it?** Submit a complete Water Quality Certification / Waste Discharge Requirements application packet to:

*North Coast Regional Water  
Quality Control Board  
5550 Skylane Blvd., Suite A  
Santa Rosa, CA 95403  
(707) 576-2220*

**What happens to your application?** Your application is reviewed, staff determine if it is complete, and you will be contacted within 30 days of submittal if the application is found to be incomplete. Staff will then continue the review process and be available to answer any questions you may have.

