



VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT AND ELECTRONIC MAIL

July 18, 2007

State Water Resources Control Board
Office of the Chief Counsel
Attn: Jeannette L. Bashaw, Legal Secretary
P.O. Box 100
Sacramento, CA 95812-0100

Re: PETITION FOR REVIEW AND REQUEST FOR HEARING FOR ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2007-0054: IN THE MATTER OF TEHAMA MARKET ASSOCIATES, LLC and ALBERT GARLAND, LINKSIDE PLACE SUBDIVISION, BUTTE COUNTY

Dear Chief Counsel:

Enclosed please find the *Petition for Review and Request for Hearing for Administrative Civil Liability Order No. R5-2007-0054: In The Matter Of Tehama Market Associates, LLC and Albert Garland, Linkside Place Subdivision, Butte County* ("Order"), adopted by the Central Valley Regional Water Quality Control Board on June 21, 2007. On behalf of Tehama Market Associates, LLC and Mr. Garland, we request review of this petition and a hearing for the purpose of presenting oral argument.

Please contact me if you have any questions regarding our petition for review.

Very truly yours,
O'LAUGHLIN & PARIS LLP

By: 
KENNETH PETRUZZELLI

Enclosure

Cc: Pamela Creedon, Executive Officer, Central Valley Regional Water Quality Control Board
James Pedri, Asst. Executive Officer, Central Valley Regional Water Quality Control Board, Redding Office
Albert Garland

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10 **STATE WATER RESOURCES CONTROL BOARD**

11 **STATE OF CALIFORNIA**

12 ADMINISTRATIVE CIVIL LIABILITY
13 ORDER NO. R5-2007-0054

PETITION NO.: _____

14 IN THE MATTER OF TEHAMA MARKET
15 ASSOCIATES, LLC and ALBERT
GARLAND, LINKSIDE PLACE
16 SUBDIVISION, BUTTE COUNTY

PETITION FOR REVIEW
(Water Code §13320)

17 Petitioners /
18 _____

19 This is a Petition for Review filed by Tehama Market Associates LLC and Albert G.
20 Garland (collectively "Petitioners") pursuant to Water Code §13320 and Title 23, California
21 Code of Regulations §2050, from "Administrative Civil Liability Order No. R5-2007-0054, In
22 re Tehama Market Associates LLC and Albert G. Garland," ("Order") issued by the California
23 Regional Water Quality Control Board, Central Valley Region ("CVRWQCB") on June 21,
24 2007. The Order imposed administrative civil liability for the discharge of pollutants to waters
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1 **3. DATE ON WHICH THE CENTRAL VALLEY REGIONAL WATER QUALITY**
2 **CONTROL BAORD ACTED**

3 June 21, 2007

4 **4. STATEMENT OF REASONS FOR THE PETITION**

5 Petitioners' statement of reasons why the Order and the findings therein were
6 inappropriate and improper is attached hereto as Exhibit B, which is incorporated herein by
7 reference.

8 **5. THE MANNER IN WHICH PETITIONER IS AGRIEVED**

9 Petitioners' statement of reasons why they are aggrieved by the findings and actions of
10 the Order are attached hereto as Exhibit B, incorporated herein by reference.

11 **6. SPECIFIC ACTION REQUESTED**

12 The SWRCB is requested to do the following: (1) vacate the Order; (2) revise the
13 Order so that the Order is legally adequate, supported by the findings, and the findings are
14 supported by substantial evidence; (3) hold a hearing for the purpose of oral argument; or (4)
15 remand the matter to the CVRWQCB, and direct the CVRWQCB revise the Order so that it is
16 legally adequate, supported by the findings, and the findings are supported by substantial
17 evidence.
18 evidence.

19 **7. STATEMENT OF POINTS AND AUTHORITIES ON LEGAL ISSUES**

20 Petitioners' points and authorities on legal issues are fully set forth in Exhibit B, which
21 is incorporated herein by reference, and seek review of the following issues:

- 22
- 23 ■ The CVRWQCB was barred by laches, because it unreasonably delayed more
24 than three years after discovering the facts sufficient for liability under Porter-
25 Cologne.
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10. COPY OF REQUEST FOR RECORD SENT TO CENTRAL VALLEY
REGIONAL WATER QUALITY CONTROL BOARD

Exhibit C includes a request that the CVRWQCB prepare its record and hearing transcript in this matter and send the record to the SWRCB.

Respectfully submitted,

O'LAUGHLIN & PARIS LLP

Date: July 18, 2007

By: 
KENNETH PETRUZZELLI
Attorneys for Petitioners
Tehama Market Associates, LLC
Albert Garland

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2007-0054
IN THE MATTER OF

TEHAMA MARKET ASSOCIATES, LLC
AND
ALBERT GARLAND
LINKSIDE PLACE SUBDIVISION
BUTTE COUNTY

This Administrative Civil Liability Order is issued to Tehama Market Associates, LLC, and Albert Garland based on a finding of violations of the Clean Water Act (CWA) Section 301 and California Water Code (CWC) Section 13376, pursuant to the provisions of Section 13385 of the CWC, which authorizes the imposition of administrative civil liability.

The Regional Water Quality Control Board, Central Valley Region (hereafter Central Valley Water Board) finds the following:

1. Tehama Market Associates, LLC was the owner and developer of an 18.6-acre residential development known as Linkside Place Subdivision from December 2003 through October 2004. The site was being developed into approximately 65 single-family residences with utilities, roads and open space located on the south side of Highway 162, four miles west-southwest of Oroville, in Butte County. (Assessor Parcel Number 030-260-021). The contractor for the project was E-Ticket Construction.
2. Runoff from the site discharges to the north to unnamed ephemeral drainages and wetlands that are tributary to Thermalito Afterbay, which is tributary to the Feather River and to the east southeast to unnamed ephemeral drainages and wetlands that are tributary to the Feather River. Central Valley Water Board staff have followed and surveyed the drainages courses from the construction site to Thermalito Afterbay and the Feather River and confirmed that ephemeral drainages and wetlands into which the site drains are hydraulically connected to waters of the United States. Because they are tributary to navigable waters of the United States, the ephemeral drainages and wetlands into which runoff from the site discharges are themselves waters of the United States. (*Headwaters v. Talent Irrig. Dist.* (9th Cir. 2001) 243 F.3d 526; see also *San Francisco Baykeeper v. Cargill Salt Division* (9th Cir., March 8, 2007) 481 F.3d 700 (9th Cir 2007) WL 686352 [affirming *Headwaters* as controlling law on Clean Water Act coverage of tributaries].) Therefore, an NPDES permit is required by the CWA for discharge of storm water from the construction site into the ephemeral drainages and wetlands. The existing beneficial uses of the Feather River designated in the Regional Board Water Quality Control Plan for the Sacramento and San Joaquin Rivers-4th Edition 1998 (Basin Plan) are municipal and domestic supply, agricultural irrigation; contact recreation, canoeing and rafting; non-contact recreation; warm and cold freshwater habitat; warm and cold water migration; warm and cold water spawning and wildlife habitat.

3. In 1972, the Federal Water Pollution Control Act (also referred to as the Clean Water Act [CWA]) was amended to provide that the discharge of pollutants to waters of the United States from any point source is unlawful unless the discharge is in compliance with an National Pollutant Discharge Elimination System (NPDES) permit. The 1987 amendments to the CWA added Section 402(p) which establishes a framework for regulating municipal and industrial storm water discharges under the NPDES Program. On 16 November 1990, the U.S. Environmental Protection Agency (USEPA) published final regulations that establish storm water permit application requirements for specified categories of industries. The regulations provide that discharges of storm water to waters of the United States from construction projects that encompass five (5) or more acres of soil disturbance are effectively prohibited unless the discharge is in compliance with an NPDES Permit.
4. On 19 August 1999, the State Water Resources Control Board (State Water Board) adopted Order No.99-08-DWQ, NPDES General Permit No. CAS00002 (NPDES), implementing the Waste Discharge Requirements for discharges of storm water runoff associated with construction activity. The General Permit requires that dischargers of storm water to surface waters associated with construction activity, including clearing, grading, and excavation activities, file a Notice of Intent (NOI) to obtain coverage under the General Permit, and requires dischargers to implement best management practices (BMPs) to implement Best Available Technology and Best Conventional Pollutant Control Technology (BAT/BCT) to prevent storm water pollution.
5. A. Notice of Intent (NOI) to comply with terms of the NPDES General Permit to discharge storm water associated with construction activities at the Linkside Place Subdivision was submitted on 14 October 2003, by Albert Garland, on behalf of the property owner at that time, William Isaac. They received confirmation and WDID No. 5R04C324269 on 23 October 2003. William Isaac subsequently conveyed the Linkside Place Subdivision to Tehama Market Associates, LLC in December 2003. Tehama Market Associates, LLC owned the Linkside Place Subdivision at the time of the noted violations on 18 February 2004 and 25 February 2004.
6. A Storm Water Pollution Prevention Plan (SWPPP) was received for Linkside Place Subdivision on or about 5 December 2003. The SWPPP called for the implementation of a number of best management practices (BMPs) at Linkside Place Subdivision to prevent or minimize pollutants in storm water discharged from the site.
7. On 18 February 2004 and 25 February 2004, Central Valley Water Board staff inspected Linkside Place Subdivision and observed a lack of erosion and sediment controls and the discharge of turbid water leaving the site.
8. On 23 November 2004, an Administrative Civil Liability Complaint (ACLC) No. R5-2004-0541 was issued to Linkside Place, LLC in the amount of one hundred thousand dollars (\$100,000) for violations of the CWA Section 301, and the NPDES General Permit No. CAS000002 (Order No. 99-08-DWQ).

9. While the necessary paperwork was not done to transfer coverage under the General Permit from Mr. Isaac to Tehama Market Associates, LLC, the SWPPP was received the month the property was conveyed to Tehama Market Associates, LLC. Albert Garland, who filed the NOI on behalf of Mr. Isaac, continued in a managing role over the subdivision after it was transferred to Tehama Market Associates, LLC. The contractor for the site apparently undertook to comply with the General Permit—albeit with insufficient effort.
10. Subsequent to issuance of ACLC No. R5-2004-0541, Central Valley Water Board staff conducted research of the property ownership of Linkside Place subdivision and found that the property had changed ownership several times since obtaining coverage under the General Permit and that the original administrative civil liability complaint may not have named the appropriate discharger. Extensive research by staff from the State Water Board and Central Valley Water Board determined that Linkside Place, LLC was not a discharger. The same research determined that Tehama Market Associates, LLC was the discharger as title to the subdivision was transferred to Tehama Market Associates, LLC just prior to the period of noted violations subject to this complaint. Tehama Market Associates, LLC retained title to the property until October 2004 at which time title was transferred back to Linkside Place, LLC.
11. Based on this new ownership information, on 25 January 2006, ACLC No. R5-2004-0541 was rescinded and replaced by ACLC No. R5-2006-0501. This new ACLC named Tehama Market Associates, LLC the owner of the property at the time relevant to the alleged violations, as the discharger. ACLC No. R5-2006-0501 was rescinded on 10 April 2006 because the Central Valley Water Board had been unable to hold a hearing within 90 days of the date the complaint was served as required by CWC section 13323.
12. Albert Garland is a responsible corporate officer of Tehama Market Associates, LLC. The responsible corporate officer doctrine states, in general, that a corporate officer or manager of a limited liability company is liable for a violation committed by the company if: (1) the individual is in a position of responsibility that allows the person to influence company policies or activities; (2) there is a nexus between the individual's position and the violation in question such that the individual could have influenced the company's unlawful actions; and (3) the individual either took actions that facilitated the violations or through inaction failed to prevent the violations. (See *In re: Original Sixteen to One Mine, Inc.* (SWRCB 2003) Order No. WQO 2003-0006, pp. 6-7; *In re: Mr. Kelly Engineer/All Star Gas* (SWRCB 2002) Order No. WQO 2002-0001, p. 5; *People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1213-1216 [managers of limited liability companies treated same as corporate officers]) see also Annot., “Responsible Corporate Officer” Doctrine or “Responsible Relationship” of Corporate Officer to Corporate Violation of Law (2004) 119 A.L.R.5th 205)
13. Albert Garland is the sole officer of Professional Resources Systems International, Inc., which is the corporation designated as the “manager” of Tehama Market Associates, LLC. In this capacity, Mr. Garland had the ability to control activities at the site and Mr. Garland did, in fact, exercise control and oversight of the development activities at the Linkside Place Subdivision. He was vested with control over the Linkside Place Subdivision by the former property owner, William Isaac, and exercised control over the entitlements for the

site. He signed the NOI, with the NPDES, which was received on 23 October 2003, as owner and manager of Linkside Place. He served as the contact person for Central Valley Water Board staff and appeared to direct the contractors who performed development work on the Linkside Place property. In this role, Mr. Garland had the responsibility to ensure that the work conducted at Linkside Place adhered to applicable laws, including the General Permit. Mr. Garland could have, on behalf of Tehama Market Associates, LLC applied for coverage under the General Permit and could have exercised sufficient control over the contractors to ensure the compliance with the General Permit, but failed to do so. Accordingly, Albert Garland is a responsible corporate officer liable for violations committed by Tehama Market Associates, LLC, in discharging pollutants into waters of the United States without an NPDES permit.

14. It is clear that William Isaac had coverage under the NPDES General Permit due to submission of a NOI by Mr. Isaac's agent, Albert Garland. There is no evidence in the Central Valley Water Board's record, however, that Tehama Market Place, LLC obtained coverage under the General Permit following transfer of the property from Mr. Isaac. Tehama Market Place, LLC did not have coverage under the NPDES General Permit and discharged storm water to waters of the United States and created conditions of pollution and nuisance and violated the Clean Water Act and California Water Code by discharging stormwater from the construction site without an NPDES permit.

In response to a Notice of Public Hearing in March 2006, for ACLC No. R5-2006-0501 the Discharger failed to assert that it was not covered by the NPDES General Permit.

15. On 26 October 2006, another complaint ACLC No. R5-2006-0525 was issued to Tehama Market Associates, LLC and Albert Garland collectively designated as the discharger responsible for the discharge of storm water in violations of the NPDES General Permit. The complaint was issued in preparation of a hearing on 25/26 January 2007. On 27 November 2006, a tentative Administrative Civil Liability order and a Notice of Public Hearing was sent to the Discharger and publicly noticed for a hearing on 25 or 26 January 2007.
16. On 21 December 2006, in response to the hearing notice the discharger, through their legal counsel, submitted a letter dated 20 December 2006 containing "*points & authorities opposing administrative civil liability complaint R5-2006-0525*" in response to the complaint, tentative ACL order and staff report. The points and authorities argues that the Central Valley Water Board can not issue a complaint based on violations of the NPDES al Permit when their client did not file a NOI or obtain coverage under the NPDES General Permit. Argument IV, D. 2, at pages 11-12, states in part:

... "All of the violations alleged by ACLC R5-2006-0525 are of the General Permit, even though TMA {Tehama Market Associates LLC} never submitted a NOI, vicinity map, or fee. (ACLC R5-2006-0525,p2 para.7.) TMA therefore never had a General Permit, was not covered by the General Permit, and was not subject to its terms."

17. Based upon available information and the "points and authorities" the discharger discharged storm water from the construction site into waters of the United States and its

tributaries without an NPDES permit in violation of CWA Section 301 and CWC Section 13376 and failed to obtain coverage under the NPDES General Permit No. CAS000002 Order No. 99-08-DWQ.

18. Based on, but not limited to Finding Nos. 1-17, Tehama Market Associates, LLC and Albert Garland are hereby designated as the Discharger.
19. On 20 April 2007, an ACLC No. R5-2007-0500 was issued to Tehama Market Associates, LLC and Albert Garland in the amount of one hundred fifty thousand dollars (\$150,000) for violations of the CWA Section 301, and CWC Section 13776.
20. Section 301 of the CWA and Section 13376 of the CWC prohibit the discharge of pollutants to surface waters except in compliance with an NPDES permit.
21. The Discharger owned and operated a construction site from December 2003 through October 2004 without coverage under an NPDES permit, specifically the General Permit. Pursuant to CWC Section 13385 (a), civil liability may be imposed based on the following facts concerning conditions at Linkside Place:
 - (a) **Pumped Storm Water.** On 18 February 2004, Central Valley Water Board staff observed a gasoline-powered pump in use to discharge ponded storm water into ephemeral drainages and wetlands adjacent to the site.
 - i. The dewatering pump was leaking fuel into the nearby waterway. The surface of the water in the vicinity of the pump exhibited a visible petroleum hydrocarbon sheen. The pump was discharging the petroleum hydrocarbon-polluted storm water off-site into ephemeral drainages and wetlands adjacent to the site.
 - ii. The pumped discharge was sediment-laden and highly turbid and caused an exceedance of the Basin Plan turbidity water quality objective.
 - (b) **Other Storm Water Discharges.** On 18 and 25 February 2004, Central Valley Water Board staff observed sediment-laden storm water runoff discharging from the site into ephemeral drainages and wetlands adjacent to the site.
 - i. On 18 and 25 February 2004, Central Valley Water Board staff collected water samples documenting an exceedance of Basin Plan objectives for turbidity and total suspended solids in receiving water. The discharge of sediment-laden storm water was therefore causing or threatened to cause pollution, contamination, or nuisance.
22. In response to these violations Central Valley Water Board staff issued the following:

On 7 April 2004, Central Valley Water Board staff issued a Notice of Violation based on violations observed during the 18 February and 25 February 2004 inspections.

On 23 November 2004, the Executive Officer issued an ACLC No. R5-2004-0541 to Linkside Place, LLC for violations observed during the 18 February and 25 February 2004 inspections.

On 11 July 2005, the Executive Officer reissued a revised ACLC No. R5-2004-0541, including William Isaac, Linkside Place, Inc. and Linkside Place, LLC as dischargers.

On 25 January 2006, the Acting Executive Officer rescinded and replaced ACLC No. R5-2004-0541, with ACLC No. R5-2006-0501 naming Tehama Market Associates, LLC as the discharger. ACLC No. R5-2006-0501 was rescinded on 10 April 2006 because the Central Valley Water Board had been unable to hold a hearing within 90 days of the date the complaint was served.

On 26 October 2006, the Assistant Executive Officer replaced ACLC No. R5-2006-0501 with ACLC No. R5-2006-0525 naming Tehama Market Associates, LLC and Albert Garland as the discharger for violations observed during the 18 February and 25 February 2004 inspections.

On 20 April 2007, the Assistant Executive Officer replaced ACLC No. R5-2006-0525 with ACLC No. R5-2007-0500 for discharging storm water on 18 February and 25 February 2004 without a NPDES permit.

23. 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 (Public Resources Code Section 21000 et seq.), in accordance with Title 14 California Code of Regulations, Section 15321(a)(2).
24. On 20 April 2007, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R5-2007-0500 to the Discharger, proposing a \$150,000 Administrative Civil Liability pursuant to CWC section 13385. The amount of the liability was established based upon a review of the factors cited in CWC section 13385 and the State Water Board's Water Quality Enforcement Policy. The Staff Report contains a detailed discussion of the evidence and factors, and is hereby incorporated by reference as findings in this Order.

Liability under Water Code Section 13385

25. CWC Section 13385 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.

(5) Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of Clean Water 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 sum of both of 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 any 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.”

25A. A violation of Clean Water Act section 402 consists of several elements. A violator must have (1) discharged (2) a pollutant (3) to navigable waters of the United States (4) from a point source. (*Committee to Save Mokelumne River v. East Bay Municipal Utility District* (9th Cir. 1993) 13 F.3d 305, 308.) The Discharger contends that the Prosecution Team has not established (1) discharge and (2) to a water of the United States. For completeness, however, the rationale supporting each of the elements is presented below:

(1) Discharge. The “discharge of a pollutant” means any “addition of any pollutant to navigable waters from any point source.” (33 U.S.C. § 1362(12)(A).) Observations by field inspectors (including photographs) documenting the transport of pollutants from a construction site to navigable waters is sufficient evidence of a “discharge” in violation of the Clean Water Act. (*North Carolina Shellfish Growers Association v. Holly Ridge Associates, LLC* (E.D.N.C. 2003) 278 F.Supp.2d 654, 675-676; see also *California Sportfishing Protection Alliance v. Diablo Grande, Inc.* (E.D. Cal. 2002) 209 F.Supp.2d 1059, 1077-1078.) The Staff Report provides detailed evidence demonstrating that pollutants “discharged” to waters of the United States. Photographs document the transport of turbid storm water off the site. Water samples show elevated concentrations of total suspended solids and turbidity (far in excess of water quality standards) that reached receiving waters.

An alternative rationale is also available to demonstrate that a discharge occurred even if the pollutants do not directly enter waters of the United States. Were the receiving waters abutting the site not waters of the United States (although they are as discussed below), a violation can still occur if the pollutants indirectly discharge to waters of the United States. (*Rapanos, supra*, 126 S.Ct. at p. 2227 [plurality opn].) In such a case, the government is not required to show that the pollutants actually reached the downstream navigable waters. A discharge to a tributary to a navigable water is

sufficient. (*United States v. Ashland Oil and Transportation Co.* (5th Cir. 1974) 504 F.2d 1317, 1329.)

As discussed above, the Staff Report provides detailed evidence showing that the pollutants from the site discharged into ephemeral drainages and wetlands. The follow-up field study performed by Central Valley Water Board staff in March 2006 demonstrates that these waterbodies are tributary to the Feather River, which is a navigable water of the United States.

(2) Pollutant. Sediment of the type discharged from the site in storm water is clearly a pollutant under the Act. (*North Carolina Shellfish Growers Association, supra*, 278 F.Supp.2d at pp. 676-677 [sand and dirt, the main components of sediment, are named specifically within the definition of “pollutant.”].)

(3) Water of the United States.

Intermittent tributaries. The U.S. Court of Appeals for the Ninth Circuit recently clarified that *Rapanos v. United States* (2006) 126 S.Ct. 2208 interpreted the extent of the ability of the U.S. Army Corps of Engineers to regulate adjacent wetlands, not other hydrologic features. (*San Francisco Baykeeper v. Cargill Salt Division* (9th Cir. 2007) 481 F.3d 700, 707.) The court noted that questions concerning Clean Water Act coverage over intermittent tributaries, even post--*Rapanos*—are still answered using *Headwaters v. Talent Irrig. Dist.* (9th Cir. 2001) 243 F.3d 526. (*Id.* at 708.) The *Headwaters* case held that tributaries of navigable waters, regardless of whether they flow intermittently, are still waters of the United States. (*Id.* at p. 533.) The court explained the basis for that finding in the words of the Eleventh Circuit:

“Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... [I]t makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a “water of the United States” under the Act.”

(*Ibid.*, quoting *U.S. v. Eidson* (11th Cir. 1997) 108 F.3d 1336, 1342.)

The ephemeral drainages and wetlands into which storm water from the site was discharged are tributaries to downstream navigable waters.

The Linkside Place subdivision is in western Oroville on the south side of State Highway 162. Adjacent to the east of the subdivision is the Table Mountain Golf Course and immediately east of the golf course is the Oroville Municipal Airport. Both the golf course and airport are owned by the City of Oroville. In 1992 the City of Oroville began the process of expanding the airport runways to the south. The City hired Jones & Stokes Associates, Inc to prepare a “Wetland Delineation for the Oroville Municipal Airport Expansion Area”. The wetland delineation found a total of 9.4 acres of jurisdictional waters including wetlands. On 4 December 1992 the US

Army Corps of Engineers (Corps) issued a verification letter of the 9.4 acres of wetlands. The Jones & Stokes report detailed a channelized tributary that flows from west to east across the study area (future airport expansion). The channel carries irrigation runoff from the adjacent golf course (Table Mountain Golf Course), flows across the airport through culverted crossings under two runways and Larkin Road, and eventually flows into the large recreational area east of the airport. Because the channelized tributary is perennial, it supports a dense cover of cattail and tule for the entire length of the airport property. Although the channel is obviously human-made, it intercepts water from natural drainages and swales and appears to be part of the natural surface tributary system.” In May 2006, Central Valley Water Board staff walked this drainage from the Linkside Subdivision and confirmed that it enters the recreational area and the Feather River.

In 1998 the City of Oroville conducted a drainage analysis for Table Mountain Golf Course, because of flooding fairways and poor water transfer and storage. The study found that off-site flows from the west (of approximately 42 cfs) contribute more than 50% of water discharged downstream to the southeast of the golf course. This caused water to backup throughout the golf course, flooding the lower fairways. In addition, the soils substratum of the site, that consisted of unrelated cementitious materials, prevented percolation of storm water. This study was prepared before Linkside Place subdivision was proposed or constructed.

In a letter dated 29 November 2004, the Corps verified that the site contained 6.7 acres of waters of the United States including wetlands and was tributary to the Feather River, a water of the United States. However after additional review the Corps in a letter dated 3 August 2005 disagreed with the information submitted by the consultant and denied the verification, because it did not meet the minimum standards for Corps acceptance and the estimate of jurisdictional wetlands from the previous assessment was low. Nevertheless, the Corps reiterated in a letter dated 11 January 2007 that its “determination that these waters were subject to [r]egulation under Section 404 of the Clean Water Act did not change.” And, again, in a 29 March 2007 email from its counsel to counsel for the Discharger, the Corps stated “The Corps has determined that we have 404 jurisdiction on the Linkside site. We confirmed this determination in a letter to Mr. Garland dated 11 January 2007.” Accordingly, the regulatory actions by the Corps bolsters the conclusion that the drainages and wetlands adjoining the site are tributary to the Feather River, a navigable water of the United States. These tributaries, regardless of frequency/duration of their flow, are themselves waters of the United States. (*Headwaters, supra*, 243 F.3d at p. 533; see also *Idaho Rural Council v. Bosma* (D. Idaho 2001) 143 F.Supp. 1169, 1178-1179 (pond discharging through fractured bedrock to a spring and then to a stream tributary to a navigable water is a water of the United States).

Effects on Interstate Commerce. In addition to tributaries, the Clean Water Act extends to “non-navigable waterbodies whose use or misuse could affect interstate commerce.” (40 C.F.R. § 122.2 (“waters (c)”; *San Francisco Baykeeper, supra*, 481

F.3d at p. 704.) The reason is that they provide habitat for endangered species, which are regulated by the United States because of their cumulative effects on interstate commerce. (*GDF Realty Investments, Ltd., v. Norton* (5th Cir. 2003) 326 F.3d 622, 627-647 (effect on interstate commerce determined by aggregating the effects on one endangered species with effects on all others); see also *Palila v. Hawaii Department of Land & Natural Resources* (D. Haw. 1979) 471 F.Supp. 985, affd. (9th Cir. 1981) 639 F.2d 495 [discussing Endangered Species Act's effects on interstate commerce.]

The wetland delineation report determined the airport expansion area contained vernal pools and swales that were habitat for vernal pool fairy shrimp, Conservancy fairy shrimp, California linderiella, and vernal pool tadpole shrimp. These invertebrates are known to occur in Butte County and each species has been documented to inhabit the types of vernal pools observed in the project area.

In 1995 the United States Air Force installed the Next Generation Weather Radar System (NEXRAD) west of the golf course. Prior to installation the USAF requested Formal Section 7 (ESA) Consultation from U.S. Department of Interior, Fish and Wildlife Service (Fish and Wildlife Service) because of the vernal pools and swales on-site that contained Conservancy fairy shrimp, longhorn fairy shrimp, vernal pool tadpole shrimp and the vernal pool fairy shrimp. The Fish and Wildlife Service issued a ESA Section 7 with the following terms: "...All vernal pools, swales and associated upland habitat adjacent to the proposed project site will not be damaged, trespassed on, or otherwise impacted during and following project implementation."

In 2002, Mr. Isaac/Linkside Place LLC applied for a tentative subdivision map for Linkside Place. The tentative subdivision map required the normal California Environmental Quality Act (CEQA) process. The City of Oroville proposed a mitigated negative declaration for the project and received comments from numerous agencies including the Central Valley Water Board. Central Valley Water Board staff required compliance with CWA Section 401 water quality certification for wetlands impacts and permitting under CWA Section 402 for construction storm water activities. The City of Oroville required the developers to conduct wetlands surveys because of their previous experience with projects in the area. The City required Mr. Isaac/Linkside Place LLC to obtain an ESA Section 7 or Section 10 consultation from the Fish and Wildlife Service and a CWA Section 404 permit from the Corps because of vernal pool wetlands and endangered species.

In May 2002, a wetland delineation was performed by Albert Beck, Eco-Analysis and he stated in his report "It was my assessment that vernal pools on this property had a high probability of supporting listed fairy shrimp." Mr. Beck recommended additional assessment of vernal pool species. Additional assessment was performed by ECORP Consulting, Inc and identified vernal pool fairy shrimp (*Branchinecta lynchi*) (federally listed threatened) in a few pools. They provided that information to the Fish and Wildlife Service as required by their federal collecting permit. Accordingly, because the ephemeral drainages and wetlands on and

abutting the site are occupied by species covered by the ESA, those hydrologic features are covered by the Clean Water Act on the grounds that harm to the endangered species inhabiting them would have a substantial effect, in the aggregate, on interstate commerce.

(4) Point Source. A construction site of more than five acres in size is a “point source” as defined by the Clean Water Act. (40 C.F.R. § 122.26(b)(14)(x); California Sportfishing Protection Alliance, 209 F.Supp.2d at p. 1077.) The Linkside Place property encompasses over 18 acres and therefore is a point source.

26. The following factors were used to establish the amount of the liability:

Enforcement Considerations

The Central Valley Water Board may impose an ACL pursuant to CWC Section 13385(a) for violations of the General Permit or for discharges of pollutants to waters of the United States without permit coverage. Pursuant to CWC Section 13385(c), the Central Valley Water Board may impose civil liability in an amount up to \$10,000 for each day in which the violation occurs, and where there is a 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 \$10 per gallon multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

Nature and Circumstances

The initial investigation was to a site that had storm water permit coverage and a SWPPP. Central Valley Water Board staff found the site failed to have effective BMPs using BAT/BCT performance standards, which led to the discharge of pollutants to waters of the United States from the Linkside Place subdivision construction site. The Discharger failed to properly implement and maintain effective BMPs using BAT/BCT performance standards to minimize leaks of petroleum hydrocarbons from a gasoline-powered dewatering pump and to minimize the sediment content of the water prior to pumping offsite. These failures led to the repeated discharge of sediment-laden and petroleum hydrocarbon-laden storm water to ephemeral drainages and wetlands adjacent to the site. The resulting discharges of sediment-laden storm water resulted in exceedances of Basin Plan objectives for turbidity and TSS and therefore also caused or threatened to cause pollution, contamination, or nuisance.

However, in response to a Notice of Public Hearing the Discharger through their legal counsel has admitted discharging storm water from the construction site without permit coverage in violation of the CWA and the CWC.

Extent and Gravity

During February 2004, Central Valley Water Board staff documented two days of sediment-laden discharge to waters of the State. Central Valley Water Board staff observed and sampled the discharge on 18 February and 25 February 2004. Central Valley Water Board staff observed the pumped discharge of ponded storm water on 18 February 2004 and estimated based on information obtained from E-Ticket Construction, the Discharger's contractor. Mr. John Montgomery of E-Ticket Construction estimated that the pumped discharge occurred from 0800 hours to approximately 1630 hours (8½ hours). Based on Mr. Montgomery's information, the pumped volume discharged to waters of the United States is conservatively estimated to be 6 gallons per minute (gpm), or 3,060 gallons.

The quantity of sediment-laden storm water runoff discharged to waters of the United States from the site for two separate days that a discharge was directly observed (18 and 25 February 2004) was conservatively estimated at 641,000 gallons. Runoff from the site for each day of discharge was estimated using the rational method ($Q=CIA$), with a low runoff coefficient of 0.40, rainfall data collected at the Oroville Dam and Sewerage Commission of Oroville Regional (SCOR) Wastewater Treatment Plant (averaged and divided by 24), and a watershed area of 18.6 acres was used. Rainfall data from the two Oroville rain gauges confirmed storm events beginning on 15 February through 18 February 2004 and again starting on 22 February through 26 February 2004. These storm events would have produced 880,000 gallons and 520,000 gallons of sediment-laden storm water discharges respectively. However, these additional days and possible additional locations of discharge were not considered in this calculation, as staff did not directly observe such discharges. Additional days of discharge most likely occurred based on precipitation data; however, these days were not considered in the calculation. During the rainy season of 03/04 there were 13 rainfall events that exceeded 0.2 inches of precipitation. These events would have resulted in discharges from the site. Of the 13 rainfall events staff only sampled 2 events.

Included in the quantity of sediment-laden storm water runoff discharged from the site, is the Central Valley Water Board staff calculation of discharge during their time on-site. On 18 February 2004 the discharge from one culvert was conservatively estimated at 2,430 gallons (27 gpm for 1½ hours). On 25 February 2004, the discharge flow of sediment laden storm water from two culverts on the east side of the project was conservatively estimated at 9,450 gallons (combined flow of 63 gpm for 2½ hours).

Susceptibility of the Discharge to Cleanup and Abatement

The discharge of sediment-laden storm water from the project site cannot be cleaned up or abated because any attempts to do so would cause disruption of the ephemeral drainages and wetlands resulting in more silting of these waters. Once sediment and other pollutants enter the wetlands, they would not be readily susceptible to cleanup.

Degree of Toxicity of the Discharge

The discharges likely added petroleum and suspended matter to the wetlands and surface waters, which has the ability to impair respiration by organisms that depend on gills to obtain oxygen from the water column. The discharges also likely added silt and sediment to the wetlands and streambed, which may have changed the benthic condition of the stream. However, no aquatic bio-assessment of the stream has been completed.

Ability to Pay

The Discharger is an established developer in good financial standing. The Discharger has not submitted evidence of inability to pay the penalty or ability to continue in business.

Prior History of Violations

There was no prior history of violations at the site.

Degree of Culpability

Albert Garland signed and submitted a NOI to comply with terms of the General Permit to discharge storm water associated with construction activity for William Isaac (Linkside Place LLC). The NOI for Linkside Place Subdivision was submitted on 14 October 2003, on behalf of the property owner at that time, William Isaac. They received confirmation and WDID No. 5R04C324269 on 23 October 2003. A SWPPP was received for Linkside Place Subdivision on or about 5 December 2003. The SWPPP called for the implementation of a number of best management practices (BMPs) at Linkside Place Subdivision to prevent or minimize pollutants in storm water discharged from the site. William Isaac subsequently conveyed the Linkside Place Subdivision to Tehama Market Associates, LLC in December 2003. Tehama Market Associates, LLC owned the Linkside Place Subdivision at the time of the noted violations on 18 February 2004 and 25 February 2004.

Albert Garland is a responsible corporate officer of Tehama Market Associates, LLC. Albert Garland is the sole officer of Professional Resources Systems International, Inc., the corporation designated as the "manager" of Tehama Market Associates, LLC. In this capacity, Mr. Garland had the ability to control activities at the site and Mr. Garland did, in fact, exercise control and oversight of the development activities at the Linkside Place Subdivision. He was vested with control over the Linkside Place Subdivision by the former property owner, William Isaac and exercised control over the entitlements for the site. He signed the NOI with the General Permit. He served as the contact person for Central Valley Water Board Staff and directed the contractors who performed development work on the Linkside Place property. In this role, Mr. Garland had the responsibility to ensure that the work conducted at Linkside Place adhered to applicable laws, including obtaining coverage under the General Permit. Mr. Garland was aware of his responsibility when he signed and certified the General Permit NOI for William Isaac, which states:

"I certify under penalty of law that this document and all attachments were prepared under my direction and 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 or imprisonment. In addition, I certify that the provisions of the permit, including the development and implementation of a Storm Water Pollution Prevention Plan and a Monitoring Program Plan will be complied with."

Despite having assumed the responsibility to ensure compliance with the General Permit for the previous owner and possessing the authority to control the construction activities on the Linkside Place property, Mr. Garland failed to apply for coverage under the General Permit for the new owners Tehama Market Associates LLC, of which he was the managing partner, resulting in storm water discharges in violation of the CWA and CWC and is therefore culpable.

On 21 December 2006, in response to the hearing notice the Discharger, through their legal counsel, submitted a letter dated 20 December 2006 containing "*points & authorities opposing administrative civil liability complaint R5-2006-0525*" in response to the complaint, tentative ACL order and staff report. The points and authorities argues that the Central Valley Water Board can not issue a complaint based on violations of the General Permit when their client did not file a NOI or obtain coverage under the General Permit. Argument IV, D. 2, pages 11-12 states in part:

... "All of the violations alleged by ACLC R5-2006-0525 are of the General Permit, even though TMA {Tehama Market Associates LLC} never submitted a NOI, vicinity map, or fee. (ACLC R5-2006-0525, p2 para.7.) TMA therefore never had a General Permit, was not covered by the General Permit, and was not subject to its terms."

This development indicates a level of culpability not previously evident from the prior submittals in this matter. Mr. Garland, as an agent of Mr. Isaac, initially submitted an NOI to comply with the General Permit, which establishes his prior knowledge of the General Permit and the requirement for activities at Linkside Place Subdivision to be covered under it. Yet, through his counsel, Mr. Garland now appears to assert that he chose not to re-file an NOI on behalf of Tehama Market Associates, LLC. The refusal to seek coverage under the General Permit despite evident knowledge of the requirement to do so shows enhanced culpability on the part of the Discharger.

Economic Benefit or Savings Resulting from the Violation

The Discharger gained an economic benefit by conducting extensive earthwork activities during the rainy season without appropriate erosion and sediment control measures. Scheduling earthwork activities to occur during the dry season is a fundamental BMP for construction activities. The economic benefit for failure to comply with General Permit is \$41,850 by not implementing adequate erosion and sediment control BMPs. This amount is based on a cost of \$2,500 per acre, which is the average

cost for erosion and sediment control BMPs that are necessary to provide erosion control for late fall grading activities and erosion control. The Discharger did install some sediment controls around the periphery of the construction site. Sediment controls were deployed in approximately 10 percent of the total area disturbed. The Discharger should have installed, at a minimum, an effective combination of erosion and sediment control on all disturbed areas during the rainy season. The construction site is approximately 18.6 acres in size.

In addition, by not submitting a NOI and applying for coverage under the General Permit, the Discharger saved filing fee and the cost of a new SWPPP.

Other Factors

Central Valley Water Board staff costs are estimated to be \$24,000 (based on estimated staff time of 300 hours at \$80 per hour) to inspect the site, and prepare Administrative Civil Liability related documents.

Statutory Maximums and Minimums

As provided under CWC Section 13385, the discharger could be held liable for each day on which pollutants were discharged from Linkside Place Subdivision to waters of the United States without coverage under the General Permit. The Discharger's violations are subject to a total maximum civil liability of \$6,420,000, which includes daily discharge violations and volume of discharge. From November 2003 through February 2004 the Discharger discharged from a point source to waters of the United States without a NPDES permit. During that period Central Valley Water Board staff documented surface water discharges that exceeded Basin Plan water quality objectives for turbidity and suspended solids on 18 February 2004 and 25 February 2004. The discharge of sediment-laden storm water off-site on 18 and 25 February 2004 was conservatively estimated at 641,000 gallons. Staff observed the pumped petroleum hydrocarbon-laden storm water discharges and estimated the volume at 3,060 gallons; this amount is included within the 641,00 gallons. The maximum civil liability for days of observed violations is \$20,000. The maximum civil liability for discharge of sediment-laden storm water is determined by multiplying 640,000 gallons (641,000 gallons minus 1,000 gallons) by \$10 to obtain \$6,400,000.

27. Under CWC Section 13385(e), an Administrative Civil Liability must recover at least the economic benefit/cost savings derived from the acts that constitute the violations, which in this case is estimated as \$41,850.
28. The Discharger has asserted that this administrative proceeding is barred by the affirmative equitable defense of laches. The violations occurred in February 2004, and ACLC No. R5-2007-0500 was issued in April 2007. The record clearly reflects that the Discharger, through its counsel, was responsible for a substantial portion of the delay, by requesting extensions of time and taking inconsistent positions regarding the central issue of permit coverage. Therefore, the defense of laches is unavailable to the Discharger.

29. The Discharger has disputed several key portions of evidence and the conclusions proffered by Central Valley Water Board staff and contained in the above findings, including most notably the Central Valley Water Board staff's calculations of the number of gallons of sediment-laden runoff from the Discharger's site and the status of the immediately down-gradient tributaries. Even viewing the disputed evidence in a light favorable to the Discharger, it is clear from the record that the Discharger discharged pollutants from its site as a result of its construction activities, and that a sufficient number of gallons of those pollutants either directly or indirectly reached waters of the United States to sustain an administrative civil liability of \$250,000.00. In issuing this Order, the Central Valley Water Board notes that the amount of the administrative civil liability is based on the totality of the circumstances, and that the dominant factor in determining the amount of administrative civil liability was the Discharger's knowing disregard for the requirements of the storm water permit, rather than any of the specific evidence disputed by the Discharger.

IT IS HEREBY ORDERED that Tehama Market Associates, LLC and Albert Garland shall pay \$250,000 in administrative civil liability as follows:

Within 30 days of adoption of this order, the Discharger shall pay \$250,000 by check, which contains a reference to "ACL Order No. R5-2007-0054" and is made payable to the *State Water Pollution Cleanup and Abatement Account*.

Certification:

I, PAMELA C. CREEDON, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 21 June 2007.

Original Signed

PAMELA C. CREEDON, Executive Officer

EXHIBIT B

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6
7 *Attorneys for Petitioners*
8 *Tehama Market Associates, LLC*
Albert G. Garland

9
10 **STATE WATER RESOURCES CONTROL BOARD**

11 **STATE OF CALIFORNIA**

12 ADMINISTRATIVE CIVIL LIABILITY) POINTS AND AUTHORITIES IN SUPPORT
13 ORDER NO. R5-2007-0054) OF PETITION FOR REVIEW OF
14 IN THE MATTER OF TEHAMA MARKET) ADMINISTRATIVE CIVIL LIABILITY
15 ASSOCIATES, LLC and ALBERT) ORDER NO. R5-2007-0054
16 GARLAND, LINKSIDE PLACE)
17 SUBDIVISION, BUTTE COUNTY)
18 Petitioners)

19 **I. INTRODUCTION**

20
21 On June 21, 2007, the Central Valley Regional Water Quality Control Board
22 (“CVRWQCB”) adopted Administrative (“ACL”) Order No. R5-2007-0054 (“Order”) (*see*
23 Exhibit A: CVRWQCB Administrative Civil Liability Order R5-2007-0054, *In re Tehama*
24 *Market Associates, LLC and Albert G. Garland, Linkside Place Subdivision, Butte County*
25 (June 21, 2007)), which imposed administrative civil liability on Tehama Market Associates
26 LLC and Mr. Albert G. Garland (collectively “Petitioners”) for the discharge of pollutants
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1 associated with construction-related activities from the Linkside Place subdivision
2 (“Linkside”) into the Feather River and Thermalito Afterbay Powerhouse Tailchannel on
3 February 18, 2004 and February 25, 2004. The Order was issued after five administrative
4 civil liability complaints, repeated briefings in opposition to administrative civil liability, and
5 three public hearings that were noticed and then cancelled when the CVRWCB realized its
6 ACL complaint was insufficient. The Order was inequitably adopted after significant and
7 unreasonable delay by CVRWQCB and when it finally was adopted, it not only lacked
8 necessary findings, but also lacked substantial evidence supporting its findings, both that that
9 a hydrologic connection existed with waters of the United States and that a significant nexus
10 existed with waters of the United States. Finally, adopted findings based on evidence the
11 findings found to be irrelevant.
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13 **II. FACTS**

14
15 Linkside Place is a parcel of real property located on the south side of Highway 162,
16 in Butte County, Assessor Parcel Number 303-260-021. (ACLC R5-2007-0500 Staff Report,
17 p7.) Highway 99 is west of Linkside Place, Highway 70 is east, and the city of Oroville is
18 four miles east northeast. (Id.) The Table Mountain Golf Course (“Golf Course”) is east of
19 Linkside Place, with the NEXRAD Radar facility access road (“NEXRAD Road”) separating
20 the two properties. (Id.) The Oroville Municipal Airport (“Airport”) is southeast of the Golf
21 Course, with Larkin Road, and then the Clay Pit State Vehicular Recreation Area (“Clay
22 Pit”), east of the Airport. Beyond the Clay Pit lies the Feather River. (Id.) There are two cul-
23 de-sacs on the eastern side of Linkside Place - Logan Court, the northeastern cul-de-sac, and
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1 Zachary Court, the southeastern cul-de-sac.¹ (Petitioner Attachment 15: ACLC R5-2004-
2 0541 Staff Report, p18 Figure 3.) Phase I, where 65 single-family residences are planned,
3 constitutes the northern 18.6 acres of Linkside Place. (ACLC R5-2007-0500 Staff Report,
4 p7.)

5 Linkside Place LLC obtained a General Permit on October 23, 2003. (ACLC R5-
6 2007-0500 Staff Report, p1.) Pursuant to the General Permit, Linkside Place LLC prepared a
7 Storm Water Pollution Prevention Plan (“SWPPP”). (Id.) It hired Sean O’Neill, of Genesis
8 Engineering, to prepare the plan. Linkside Place was conveyed to Petitioners on December
9 31, 2003. (Id.) Linkside Place LLC did not notify the Regional Board of the change in
10 ownership and Petitioners did not obtain a new General Permit, but continued work on the
11 SWPPP. In October 2004, TMA conveyed title of Linkside Place back to Linkside Place
12 LLC. (Id. at 16.) Linkside Place LLC consists of Mr. William Isaac, with Mr. Albert Garland
13 acting as its agent. (Id. at 1.) TMA consists of Professional Resources Systems International,
14 Inc. (Id. at 3.) Mr. Garland is the sole officer of Professional Resources Systems
15 International. (Id.) Mr. Isaac is uninvolved with Professional Resources Systems
16 International.
17 International.

18
19 Phase I drains in two directions – north and east. Water draining from the north side
20 of Linkside Place flows through two culverts running under Highway 162. Pastureland lies
21 north of Highway 162. (CVRWQCB Attachment 1.a2: Inspection Report (February 2004)
22 Attachment D, p1 Pictures 29-30.) The Thermalito Powerhouse Tail Channel, a canal
23 connecting the Thermalito Forebay and Thermalito Afterbay, lies to the north of the
24 pastureland and runs from west to east.
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27 ¹ The Clay Pit SVRA is a shallow pit, ringed by low hills, remaining from where the clay used to build the
28 Oroville Dam was taken. The site is now a state park serving as a recreation area for off-road motorcycle, all-
terrain vehicle, and dune buggy use. There is also a rifle range.

1 Water draining from the east of Linkside Place drains into a low depression between
2 the eastern border of Linkside Place and NEXRAD Road. (Attachment 1.a2: Inspection
3 Report (February 2004), p2; Attachment 1.a4: Inspection Photos (February 2004) Attachment
4 B, p9 Picture 17 and 18, p10 Picture 19; Attachment 1.a5: Inspection Photos (February 2004)
5 Attachment D, p9 Picture 45 and 46, p10 Picture 47 and 48.) Water draining into the low
6 depression from the northern portion of Linkside Place, which includes Phase I, moves south,
7 and water draining from the southern portions of Linkside Place, which were not graded in
8 February 2004, flows north into the low depression. (Attachment 1.a2: Inspection Report
9 (February 2004) Attachment D, p9 Picture #45.) When sufficiently high, water in the low
10 depression then flows east through a dual culvert running under NEXRAD Road.
11 (Attachment 1a2: Inspection Report (February 2004) Attachment D, p9 Picture #46.)
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14 Based on his observations on February 18, 2004 and February 25, 2004, further
15 research, and instructions from Regional Board management, Mr. Zaitz drafted a NOV for
16 Linkside Place LLC, which was issued on April 7, 2004.

17 III. PROCEDURAL HISTORY

18 ACLC R5-2007-0500 was the fourth ACLC associated with incidents occurring at the
19 Linkside Place subdivision, over three years prior, on February 18 and 25 of 2004.²
20

21 A. November 2004 – Administrative Civil Liability Complaint R5-2004-0541

22 The first complaint, ACLC R5-2004-0541, was issued on November 23, 2004,
23 against Linkside Place LLC. The complaint alleged a dozen permit term violations arising
24 from allegedly inadequate and ineffective storm water pollution prevention control measures,
25 a dewatering pump leaking fuel and a discharge through a culvert, one of a pair, on February
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27 ² If ACLC R5-2004-0541 (Revised) is counted as an additional complaint, then five ACLCs associated with the
28 same incident at Linkside Place were issued.

1 18, 2004, and discharges through the pair of culverts on February 25, 2004. (Petitioner
2 Attachment 14: ACLC R5-2004-0541, p3-4.)

3 Mr. Zaitz was served a subpoena deuces tecum in June 2005 and ordered to produce
4 all documents, including photographs, correspondence, notes and diary entries, written an
5 electronic memoranda, and all other materials associated with his inspections on February 18,
6 2004 and February 25, 2004. In his deposition on July 12, 2005, Mr. Zaitz was specific that
7 ACLC R5-2004-0541 alleged violations he personally witnessed while on the property.
8 (Petitioner Attachment 13: Depo. Scott Zaitz (July 2005), p69-70.)

9
10 While inspecting the property on February 18, 2004, Mr. Zaitz observed a pump
11 operating in Logan Court, pumping water out of the court, and leaking fuel into the pond.
12 (CVRWQCB Attachment 1.a2: Inspection Report (February 2004), p3.) Using a water
13 sample jar and stopwatch, he estimated the flow rate of the dewatering pump at 6 gallons per
14 minute (“gpm”). (Id.) After the inspection he contacted Mr. John Montgomery of E-Ticket
15 Construction, informed him of the inspection and that the dewatering pipe was operating and
16 leaking fuel. (Id. at 4.) In a subsequent telephone conversation on February 19, 2004, Mr.
17 Montgomery informed Mr. Zaitz that the pump had been operating for 8 ½ hours. (Id.) Based
18 on Mr. Montgomery’s statement, Mr. Zaitz estimated total pumped discharge at 3,060
19 gallons. (Attachment 1.a2: Inspection Report (February 2004), p3.) Regional Board Staff
20 later calculated the flow rate at 16 gpm, for an estimated total discharge of 8,160 gallons, the
21 discharge volume of the dewatering pump subsequently alleged in ACLC R5-2004-0541.
22 (Petitioner Attachment 14: ACLC R5-2004-0541, p3; *see also* Attachment 13: Depo. Scott
23 Zaitz (July 2005), p30-31.) The pump was not operating when Mr. Zaitz next inspected the
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1 property on February 25, 2004. (CVRWQCB Attachment 1.a2: Inspection Report (February
2 2004), p6.)

3 Off the property, Mr. Zaitz also observed storm water from Linkside Place
4 discharging through a dual culvert. (CVRWQCB Attachment 1.a2: Inspection Report
5 (February 2004), p3.) In estimating the discharge through the culverts, Mr. Zaitz based the
6 calculation on the time he was on the property witnessing potential violations. (Petitioner
7 Attachment 13: Depo. Scott Zaitz (July 2005), p25, 70.) As a result of a “management
8 decision,” the ACL alleged a discharge had occurred through both culverts on February 25,
9 2004, but only one on February 18, 2004. (Petitioner Attachment 14: ACLC R5-2004-0541,
10 p4; Petitioner Attachment 13: Depo. Scott Zaitz (July 2005), p27-28.) Mr. Zaitz did not
11 measure the culvert dimensions or other aspects of the culverts until November 2004.
12 (Petitioner Attachment 13: Depo. Scott Zaitz (July 2005), p24.)
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14
15 The total runoff for each day was estimated using the rational method. (Petitioner
16 Attachment 13: Depo. Scott Zaitz (July 2005), p69.) The “rational method” includes in its
17 calculation a coefficient based on the character of the property representing the percentage of
18 runoff leaving the property. (Petitioner Attachment 13: Depo. Scott Zaitz (July 2005), p65.)
19 For Linkside Place, Regional Board Staff engineer Mr. Jerry Bruns used a coefficient of 0.3
20 as most representative of Linkside Place, for a runoff calculation of 223,600 gallons on
21 February 18, 2004 and 131,800 gallons on February 25, 2004, for a total of 355,400 gallons.
22 (Id.) However, ACLC R5-2004-0541 did not use the rational method estimate in alleging the
23 extent and gravity of harm, because it specifically only alleged violations that Mr. Zaitz
24 would have observed while on site. (Petitioner Attachment 13: Depo. Scott Zaitz (July 2005),
25 p68.)
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1 Mr. Zaitz also based his jurisdictional determinations on an undocumented telephone
2 conversation with a staff person from the United States Army Corps of Engineers (“ACOE”)
3 and low-quality aerial photographs and satellite images, none of which included topographic
4 or drainage information, flow data, or anything else relevant to determining drainage courses.
5 (Petitioner Attachment 13: Depo. Scott Zaitz (July 2005), p37-38.)
6

7 The Regional Board however, decided it had failed to name all of the necessary
8 parties and issued a revised complaint on July 11, 2005 (“ACLC R5-2004-0541 (revised)”)
9 adding Mr. William Isaac. A few weeks later, Regional Board Staff realized that Linkside
10 Place LLC did not own the property when the alleged discharges occurred. (ACLC R5-2007-
11 0500 Staff Report, p15-16.)
12

13 **B. January 2006 – Administrative Civil Liability Complaint R5-2006-0501**

14 ACLC R5-2004-0541 was never scheduled for hearing, eventually “replaced” with
15 ACLC R5-2006-0501 on January 25, 2006, and scheduled for hearing on at the Regional
16 Board’s meeting on March 16 and 17 of 2006. (Id. at 16.) ACLC R5-2006-0501 named TMA
17 as the discharger and was issued against TMA only. (Id.) Mr. Isaac and Mr. Garland were not
18 named. (Id.) On March 14, 2006, after counsel for Petitioners submitted briefing (Attachment
19 4: O’Laughlin and Paris Points and Authorities 8 March 2006 re ACLC No. R5-2006-0501),
20 the Regional Board realized that when Linkside Place was conveyed to TMA, the permit had
21 not been transferred and Petitioners had not filed a new NOI. (Petitioner Attachment 18:
22 Schneider Briefing Request (March 17, 2006).) Since the allegations in ACLC R5-2006-
23 0501, and the method of calculating damages in particular, were based entirely on violations
24 of the General Permit, the Regional Board doubted the sufficiency of its own complaint and
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1 whether it had jurisdiction. (Petitioner Attachment 18: Schneider Briefing Request (March
2 17, 2006).)

3 To determine whether it had jurisdiction, then-Regional Board Chair, Mr. Robert
4 Schneider, requested briefing on the issue of whether the Regional Board could impose civil
5 liability for violating the General Permit if Petitioners had no General Permit. (Id.) Since
6 Chairman Schneider would have issued a new or heavily amended ACLC in light of the
7 briefing and no hearing could be held within 90 days of the issuance of ACLC R5-2006-
8 0501, as required by Water Code §13323, the Chairman Schneider requested that Petitioners
9 waive their right to a hearing. (Id.) Petitioners did not, no hearing was held, and ACLC R5-
10 2006-0501 was rescinded. (Id.)

11
12 Briefing submitted in opposition to ACLC R5-2006-0501 made numerous objections
13 to the evidence supporting ACLC's alleged jurisdiction under the Clean Water Act.
14 (Attachment 4: O'Laughlin and Paris Points and Authorities 8 March 2006 re ACLC No. R5-
15 2006-0501, p9.) It objected to evidence used to support jurisdiction for discharges to the
16 Thermalito Afterbay to the north, because the evidence consisted of undocumented telephone
17 conversations with staff from the ACOE. It further objected based on lack of personal
18 knowledge for evidence used to support discharges to the Feather River to the east, because
19 Mr. Scott Zaitz, who conducted the site inspections, only walked as far as the Golf Course.
20 (Attachment 4: O'Laughlin and Paris Points and Authorities 8 March 2006 re ACLC No. R5-
21 2006-0501, p8.) In response, Mr. Scott Zaitz and Mr. James Pedri, Assistant Executive
22 Director of the Regional Board, immediately conducted a drainage survey at Linkside Place
23 Phase I on March 13, 2006, two days before the scheduled hearing, in order to determine
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1 how and where storm water runoff from the site discharges. (CVRWQCB Attachment 2.b1:
2 Inspection Report (March 13, 2006), p1.)

3 **C. October 2006 – Administrative Civil Liability Complaint R5-2006-0525**

4 The Regional Board Executive Officer replaced ACLC R5-2006-0501 with a third
5 complaint, ACLC R5-2006-0525, on October 26, 2006, against Mr. Garland and TMA.
6 (ACLC R5-2007-0500 Staff Report, p18.) The Regional Board, having received, reviewed,
7 and analyzed briefing in opposition to ACLC R5-2006-0501, attempted to redress many of
8 the shortcomings of the prior complaints in ACLC R5-2006-0525. It alleged that the drainage
9 courses from Linkside Place to Thermalito Afterbay and the Feather River had been
10 “followed and surveyed” and hydrologic connections to waters of the United States had been
11 confirmed as a result of the survey conducted on March 13, 2006 by Messrs. Zaitz and Pedri.
12 (Petitioner Attachment 19: ACLC R5-2006-0525, p1 para. 2.) ACLC R5-2006-0525 used the
13 same staff report as ACLC R5-2006-0501, but bolstered it with the new March Site
14 Inspection Report. (Petitioner Attachment 19: ACLC R5-2006-0525, p1 para. 2.)

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17 ACLC R5-2006-0525 now alleged that Linkside Place had discharged a total of
18 641,000 gallons over the two days, based on the rational method. (Id. at 7.) Instead of using a
19 coefficient of 0.3 however, the Regional Board Staff instead used 0.4, without explaining
20 why. (Petitioner Attachment 19: R5-2006-0525, p6 para.17.) Since the estimated total runoff
21 included water discharged through the culverts, ACLC R5-2006-0525 no longer alleged
22 discharges through the culverts as separate violations. (Petitioner Attachment 19: R5-2006-
23 0525, p6.)
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1 The rational method estimate was also added only after briefing from Petitioners
2 informed the Regional Board of the insufficient evidentiary support for the discharge
3 volumes from both the pump and the culverts. (Petitioner Attachment 19: R5-2006-0525,
4 p6.) Although only added later, a rational method estimate was made at the beginning, but
5 only included, because Regional Board Staff only deemed violations directly observed
6 sufficient reliable to allege in a complaint. (Petitioner Attachment 13, p69-70.) Once they
7 discovered there was no evidentiary basis for discharges through the culverts and dewatering
8 pipe, the rational method estimate was all the Regional Board had.

10 The complaint also altered its allegations regarding the dewatering pump, now
11 alleging that it only discharged at a rate of 6 gpm, for a total of 3,060 gallons, the amount
12 originally estimated by Mr. Zaitz in his inspection report and based on his personal
13 observations, as opposed to the 8,160 gallons calculated by a Regional Board Staff engineer
14 and alleged in the first two ACLCs. (Id.)

16 The Regional Board removed the alleged discharges through the culverts and changed
17 the 8,160 gallons discharged by the dewatering pipe to 3,060 gallons in direct response to
18 objections raised in briefing submitted by Petitioners. (Attachment 4: O’Laughlin and Paris
19 Points and Authorities 8 March 2006 re ACLC No. R5-2006-0501, p14-16.) Flow rates for
20 both the culverts and the dewatering pipe were calculated using the Manning Equation, based
21 on the slope of the pipe, surface material in the pipe, and depth of water in the pipe, which
22 Mr. Zaitz did not measure on either day. (Petitioner Attachment 13, p24-25.) Without
23 accurate measurements of the water levels in the culverts or pipe, the Regional Board’s
24 calculated discharge volumes lacked any evidentiary support.

1 Relying on the rational method calculation for the discharge volume substantially
2 increased the maximum potential civil liability. Subtracting 1,000 gallons, as required by
3 Water Code §13385, the total discharge volume alleged in ACLC R5-2006-0525 and subject
4 to fine was 643,060 gallons, for a maximum alleged civil liability of \$6,430,600, a significant
5 increase in the amount alleged in prior complaints, especially considering the underlying
6 facts were unchanged. (ACLC R5-2006-0525, p7 para. 20) The prior complaints, by
7 comparison, only alleged a maximum civil liability of \$310,400. (Petitioner Attachment 14:
8 ACLC R5-2004-0541, p5 para.11; Petitioner Attachment 16: ACLC R5-2006-0501, p8 para.
9 19.)

11 Upon receiving ACLC R5-2006-0525, Petitioners submitted a public records act
12 request for “all documentation, including, but not limited to, all drafts, comments, reports,
13 notes, documents, memorandums, e-mails, spreadsheets, electronic spreadsheets,
14 communications, and internal memorandums, whether in physical or electronic form,”
15 related to the finding contained in paragraph 2, page 1, of ACL Complaint No. R5-2006-
16 0525, wherein:

18 “Central Valley Water Board staff have followed and surveyed the
19 drainages courses from the construction site to Thermalito Afterbay
20 and the Feather River, and confirmed that ephemeral drainages and
21 wetlands into which the site drains are hydraulically connected to
waters of the United States.”

22 CVRWQCB Redding Staff responded with the March 13, 2006 Inspection Report.
23 (CVRWQCB Attachment 2.b1: Inspection Report (March 2006), 2.b2: Drainage photos 1-13
24 North Side (March 2006), 2.b3: Drainage Photos 14-28 Southeast (March 2006).) No other
25 documents were provided and no privileges were asserted.
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1 After receiving briefing in opposition to its complaint (CVRWQCB Attachment 5:
2 O’Laughlin and Paris Points and Authorities December 20, 2006 re ACLC No. R5-2006-
3 0525), the Regional Board once again decided its complaint was insufficient, because
4 Petitioners had not filed a NOI, had no General Permit, and, therefore, could not be liable for
5 violating the terms of the permit. (ACLC R5-2007-0500, p18.) This was however, nothing
6 new, as the Regional Board had rescinded ACLC R5-2006-0501 when, upon receiving the
7 opposition briefing and realizing Petitioners did not have a General Permit when the alleged
8 discharges occurred, was unsure whether it had jurisdiction. No hearing was held and ACLC
9 R5-2006-0525 was rescinded on February 13, 2007. (Petitioner Attachment 20: Pedri Letter
10 Rescinding R5-2006-0525, p1.)
11

12 **D. April 2007 – Administrative Civil Liability Complaint R5-2007-0500**
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14 On April 20, 2007, the Regional Board “replaced” ACLC R5-2006-0525, even
15 though it had already been rescinded, and issued the fourth ACLC associated with incidents
16 occurring at the Linkside Place subdivision on February 18 and 25 of 2004, ACLC R5-2007-
17 0500. (ACLC R5-2007-0500, p8.) ACLC R5-2007-0500 concurs with the opposition briefing
18 that Petitioners lacked a general permit. (ACLC R5-2007-0500, p4.) Although no further
19 investigation or analysis is described, ACLC R5-2007-0500 required an additional 150 hours
20 of investigation and staff time.³ (Id. at 7 para. 27.) ACLC R5-2007-0500 also demanded
21 \$150,000 as settlement, \$50,000 more than before. (Id. at 8.) Most significantly however,
22 ACLC R5-2007-0500 dispensed with alleged violations of the General Permit, which were
23 all of the allegations contained in the prior ACLCs, and instead alleged solely that Petitioners
24 had violated various provisions of the Clean Water Act, specifically §301 (33 U.S.C §1311),
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27 ³ ACLC R5-2006-0525 alleged that 150 hours were spent investigating the incidents and drafting the complaint.
28 (Attachment 19: ACLC R5-2006-0525, p7 para. 21.) By comparison, ACLC R5-2007-0500 alleges 300 hours
were spent investigating the incidents and drafting the complaint. (ACLC R5-2007-0500, p7 para. 27.)

1 and Porter Cologne, specifically Water Code §13376, both of which prohibit discharging
2 pollutants into waters of the United States without, or in violations of, an NPDES permit.

3 During the comment period, a letter was submitted to Regional Board Chairman Karl
4 Longley, informing him of potential statute of limitations issues (Petitioner Attachment 21:
5 Letter from O’Laughlin & Paris LLP to Chairman Karl Longley, CVRWQCB, re Statute of
6 Limitations (May 17, 2007).) Office of the Chief Counsel at the State Water Resources
7 Control Board responded, on June 1, 2007, that administrative actions are not subject to
8 general statutes of limitations for described in the Code of Civil Procedure. (Petitioner
9 Attachment 22: SWRCB Response to May 17, 2007 O’Laughlin & Paris Letter re Statute of
10 Limitations June 1, 2007.)

11 On June 11, 2007, the CVRWQCB released its agenda and agenda items were made
12 available. Upon their review, the CVRWQCB Prosecution Team proposed revising ACLC
13 Order No. R5-2007-0500 and revising Finding 8 to include alleged violations of Clean Water
14 Act §402 (33 U.S.C. §1362), based on a chain of correspondence between the ACOE, Mr.
15 Garland, and persons acting as representatives, in various capacities, for Mr. Garland and
16 TMA. (Petitioner Attachments 9-12.)

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19 **E. June 21, 2007 – Hearing on Administrative Civil Liability Complaint R5-2007-**
20 **0500**

21 After more than three years and five complaints, the CVRWQCB finally heard the
22 issues regarding the alleged discharge of pollutants from Linkside Place on February 18,
23 2004 and February 25, 2004. When the hearing commenced, Petitioners were informed of
24 new proposed findings for the draft Order. The proposed findings had never been seen by
25 TMA and a copy was provided only upon request.
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1 Petitioners made numerous objections at the start of the hearing. Several objections
2 were made based on the lack of relevance of the dewatering pump, issue of whether
3 Petitioners had a General Permit, the March 13, 2006 Site Inspection Report, rainfall on days
4 other than February 18, 2004 and February 25,2004, and insinuated violations that could
5 have occurred on days other than February 18, 2004 and February 25,2004. Many other
6 objections were made based on hearsay – Mr. John Montgomery’s statement regarding the
7 amount of time the dewatering pump operated, discussions with the City of Oroville,
8 discussions with the ACOE, and correspondence with the ACOE.

10 Throughout the hearing, the CVRWQCB would refer to evidence in their file that was
11 unavailable for the hearing and not provided among their prosecution material. Petitioners
12 objected that such evidence lacked foundation and proven relevance, but were overruled.
13 Cross-examination of CVRWQCB Staff, particularly Messrs. Pedri and Zaitz, showed their
14 inspection was far less thorough than described. (ACL Order No. R5-2007-0054 Tr. (June
15 21, 2007)⁴.) They did not, as stated in the March 13, 2006 Inspection Report “physically”
16 walk the entire drainage course. Rather, they walked approximately 420 yards north to a tree
17 through an ephemeral drainage swale to Snake Creek. (CVRWQCB Attachment 2b.2, p5
18 Picture 9.) They did not, however, walk the length of Snake Creek to the Thermalito
19 Powerhouse Tailchannel or otherwise “physically” walk the entire drainage course. (Id.)
20 Neither did they cite or reference any maps, surveys, or other sources that would have
21 indicated how they “confirmed” the northern drainage course. (Id.) Then turning their
22 attention to the south, they walked through the Golf Course, drove around the Airport, and
23 then through the Clay Pit to where drainage from the entire area discharged through a breach
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27 ⁴ The transcript, although requested, was unavailable at the time this petition was submitted. An amended Points
28 & Authorities, with pinpoint citations to the transcript, will be submitted when the transcript is available.

1 in the levee and into the rest of the Oroville Wildlife Area. (Id.) They did not specifically cite
2 to or reference any other maps or materials to verify the remaining drainage and no such
3 citations, references, or other materials were provided in response to Petitioners' request for
4 public records. (Id.; *see also* CVRWQCB Attachment 2.b1: Inspection Report (March
5 2006).)

6
7 Furthermore, although the ACL specifically alleged only violations on February 18,
8 2004 and February 25, 2004 and the Prosecution Team admitted that no rain fell on February
9 18, 2004 and, as a result, used an average precipitation figure from other days as a basis for
10 the extent and gravity of the violation for February 18, 2004. The Prosecution Team's
11 rational method discharge calculation was based on an average and deemed appropriate by
12 Chairman Longley, because some "storage" was built into the equation, but the findings
13 nevertheless were based solely on violations occurring on February 18, 2004 and February
14 25, 2004 and did not adjust runoff calculations to account for water that only would have
15 drained on February 18, 2004.
16

17 At the close of the hearing, the CVRWQCB adopted the Order, with several proposed
18 changed, and imposed administrative civil liability in the sum of \$250,000.
19

20 **IV. ARGUMENT**

21 **A. Standard of Review**

22 Civil liability for a violation of Water Code §13385(c) is imposed pursuant to Water
23 Code §13323. Judicial review of proceedings under Water Code §13323 is governed by Civil
24 Code §1094.5. (Water Code §13330.) The inquiry by the reviewing court extends to whether
25 the agency proceeded without, or in excess of, jurisdiction, whether there was a fair trial, and
26 whether there was a prejudicial abuse of discretion. (Civil Code §1094.5(b).) Abuse of
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1 discretion is established if the agency failed to proceed in a manner required by law, if the
2 order or decision is unsupported by the findings, or if the findings are unsupported by the
3 evidence. (Id.)

4 **1. The Agency Must have Proceeded in the Manner Required by Law**

5 A failure to proceed in a manner required by law occurs if the agency has committed
6 prejudicial error by violating the Due Process Clause, Administrative Procedure Act, or its
7 governing statutes and regulations. (Code Civ. Pro. §1094.5(b).) Whether an agency has
8 proceeded in a manner required by law is a question of law subject to independent review by
9 the trial court. (Yamaha Corp. v. State Bd. Of Equalization (1998) 19 Cal. 4th 1, 7; SWRCB
10 Cases, supra 136 Cal.App.4th at 722.)

11 **2. The Order Must be Supported by Findings**

12 An agency rendering an adjudicatory opinion reviewable pursuant to Code of Civil
13 Procedure §1094.5 must set forth findings bridging the analytic gap between raw evidence
14 and the decision or order. (Topanga Assn. for a Scenic Community v. County of Los Angeles
15 (1974) 11 Cal.3d 506, 515.) If there are no findings, the agency's error is prejudicial and the
16 decision must be vacated and remanded for the agency to make proper findings. (Usher v.
17 County of Monterey (1998) 65 Cal.App.4th 210, 220.) Findings must be made before the
18 agency makes its decision, not after, and cannot act as post-hoc rationalization for a decision
19 already made. (Bam, Inc. v. Bd. of Police Comm'rs (1992) 7 Cal.App.4th 1343, 1346.) In
20 making findings, the agency must make legally relevant sub-conclusions supporting its
21 ultimate decision, thereby minimizing the likelihood the agency will randomly leap from
22 evidence to conclusion. (Id.)

1 In making findings, an agency must expose its method of analysis with findings
2 relevant to the conclusions and sub-conclusions drawn in supporting its ultimate conclusion.
3 (Topanga Assn. for a Scenic Community, *supra* 11 Cal.3d at 517 fn16; *see also* S. Pacific
4 Transp. Co. v. St. Bd. Of Equalization (1987) 191 Cal.App.3d 938, 954.) Conclusory
5 statements merely citing or quoting a statute or code section are insufficient. (Topanga Assn.
6 for a Scenic Community, *supra* 11 Cal.3d at 517 fn16.)
7

8 Findings must support each element of the cause of action. The Regional Board, as
9 the party making a claim for relief, also has “the burden of proof as to each fact the existence
10 or nonexistence of which is essential to the claim for relief or defense that he is asserting.”
11 (Evidence Code §500.)
12

13 **3. Findings Must Be Supported by Substantial Evidence**

14 If the issue is whether findings are supported by sufficient evidence, in all cases other
15 than those in which the reviewing court is authorized to exercise its independent judgment,
16 abuse of discretion is established if, in light of the whole record, the findings are unsupported
17 by substantial evidence. (Civil Code §1094.5(d).) Since the independent judgment test does
18 not apply to orders issued pursuant to Water Code §13323, such orders are reviewed for, and
19 must be supported by, substantial evidence. (Water Code §13330.)
20

21 “Substantial evidence” is evidence of “ponderable legal significance”, which is
22 “reasonable in nature, credible and of solid value.” (Mohilef v. Janivici (1996) 51
23 Cal.App.4th 267, 305 n28; Newman v State Personnel Bd. (1992) 10 Cal.App.4th 41, 47;
24 Pennel v. Pond Union High School Dist. (1973) 29 Cal.App.3d 832, 837 n2.) Substantial
25 evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion
26 supported by facts. (Pub. Res. Code §21080(e)(1).) Speculation, argument, and unfounded
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1 conclusions are not “substantial evidence.” (Public Resources Code §21080(e)(2); 14 Cal.
2 Code Regs. §15064(f)(5); Citizens Committee to Save Our Village v. City of Claremont
3 (1995) 37 Cal.App.4th 1157, 1172; Citizen Action to Serve All Students et al. v. Thornley
4 (1990) 222 Cal.App.3d 748, 756 .)

5 **B. The Regional Board Failed to Bring its Action Within the Statute of Limitations**
6 **Period**

7 A statute of limitation limits the period in which a plaintiff can bring a cause of
8 action. (Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.App.4th 797, 806.) Statutes of
9 limitations protect parties from “defending stale claims, where factual obscurity through the
10 loss of time, memory or supporting documentation may present unfair handicaps” and
11 “stimulate plaintiffs to pursue their claims diligently.” (Id.) The statute of limitation period
12 begins when the cause of action accrues, which occurs when the plaintiff learns, or has
13 reason to learn of, the facts essential to the claim. (Id. at 807.) The cause of action accrues
14 even if the plaintiff suspects every fact of every specific legal element of the cause of action.
15 (Id.) Only suspicion of one or more of the elements of a cause of action, coupled with
16 knowledge of any remaining elements, is sufficient for the cause of action to accrue and
17 trigger the statute of limitations period. (Id.) Even if the plaintiff is merely on inquiry notice,
18 i.e. the plaintiff should have discovered the cause of action and diligently pursued it, the
19 cause of action accrues. (Id. at 808.)

22 **1. The Regional Board Failed to Hold a Hearing within 90 Days of Issuing**
23 **ACLC R5-2004-0541**

24 Under Water Code §13323, an administrative civil liability complaint issued for
25 enforcing Porter-Cologne must be heard within 90 days of notice. (Water Code §13323(c).)
26 The only exception to the 90 day statute of limitations is if the discharger waives its right to a
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1 hearing. (Water Code §13323(b).) At no time did Mr. Garland, Mr. Isaac, TMA, or Linkside
2 Place LLC ever waive their rights to a hearing.

3 Although the parties and legal theories changed, all of the administrative civil liability
4 complaints were issued for the same transaction and occurrence, involving the same
5 operative set of facts. One was revised and three were rescinded and then reissued. The
6 Regional Board lacked the statutory authority for such an action however. Once issuing a
7 each administrative civil liability complaint, it was required to hear the matter unless TMA,
8 Mr. Garland, Mr. Isaac, or Linkside Place LLC waived a right to a hearing. The statute
9 provides no other exception for enforcement actions proceeding under Water Code §13323
10 and the Regional Board never demonstrated an excusable inability to hold a hearing within
11 the limitations period.
12

13
14 **2. The Regional Board Failed to Issue ACLC R5-2007-0500 Within the
 Limitations Period**

15 Under Code of Civil Procedure §338(i), the statute of limitations is three years for:

16
17 An action commenced under the Porter-Cologne Water Quality
18 Control Act (Division 7 (commencing with Section 13000) of the
19 Water Code). The cause of action in that case shall not be deemed to
20 have accrued until the discovery by the State Water Resources Control
21 Board or a regional water quality control board of the facts
22 constituting grounds for commencing actions under their jurisdiction.

23 (CCP §338(i).)

24 The authority of the State Water Resources Control Board (“SWRCB”) and the
25 regional boards to act as the State’s water quality control and enforcement agencies, for the
26 purposes of implementing the Clean Water Act (33 U.S.C.A. §1251 et seq.) derives from the
27 Porter-Cologne Water Quality Control Act (“Porter-Cologne”) (Water Code §13000 et seq.)
28 ACLC R5-2007-0500 specifically alleges violations of Clean Water Act §301 (33 U.S.C.

1 §1311) and Water Code §13376. (ACLC R5-2007-0500, p1, 5 para. 19.) ACLC R5-2007-
2 0500 alleges liability pursuant to Water Code §13385. (Id. at 1.) Violations of §402 (33
3 U.S.C. §1362) were later recommended as additions by the Prosecution Team. Although an
4 administrative civil liability enforcement proceeding is administrative, it is nevertheless a
5 civil proceeding.

6
7 Regional Board Staff knew of the incidents at Linkside Place the days they occurred,
8 having inspected the property on both days. (CVRWQCB Attachment 1.a2: Inspection
9 Report (February 2004), p3, 6.) The causes of action therefore accrued on February 18, 2004
10 and February 25, 2004. ACLC R5-2007-0500 however, was issued on April 20, 2007, more
11 than three years after Regional Board Staff learned of the incidents at Linkside Place.

12 **C. The Regional Board was Barred by Laches in Bringing its Action**

13
14 Even assuming the Regional Board was correct that the statute of limitations in CCP
15 §338(i) does not apply to ACLs, ACLC R5-2007-0500 was nevertheless barred by laches. In
16 civil actions, laches bars equitable relief and applies to quasi adjudicative proceedings to
17 dismiss an action on motion of the defendant where it is not diligently prosecuted. (Brown v.
18 State Personnel Bd. (1985) 166 Cal.App.3d 1151, 1158.) In the interest of expediting justice,
19 a proceeding before a board or agency exercising quasi-judicial functions must be dismissed
20 if the agency fails to diligently prosecute the action and allows an unreasonable amount of
21 time to elapse. (Id.; *see also* Lam v. Bureau of Security & Investigative Services (1995) 34
22 Cal.App.4th 29, 36.) In addition to unreasonable delay, the defense of laches also requires
23 either acquiescence in the act about which the plaintiff complains or that the delay
24 disadvantaged or prejudiced the other party. (City of Oakland v. Public Employees'
25 Retirement System (2002) 95 Cal.App.4th 29, 51; Brown, supra 166 Cal.App.3d at 1159.)
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1 The Regional Board issued ACLC R5-2007-0500 after three years had expired and after
2 repeatedly issuing and withdrawing complaints, yet never holding a hearing.

3 **1. The Regional Board Unreasonably Delayed**

4 **a. Delay Can Be Unreasonable, as a Matter of Law, Based on a**
5 **Strongly Analogous Statute of Limitations.**

6 Since the circumstances giving rise to laches can vary widely depending on the
7 interplay between prejudice and delay, there is no fixed rule as to the circumstances or the
8 period of time that must elapse before the doctrine of laches applies appropriately. (Brown,
9 *supra* 166 Cal.App.3d at 1159.) However, delay can be unreasonable as a matter of law. (Id.)
10 If no statute of limitations directly applies, but a statute of limitations governs an analogous
11 action, courts will “borrow” the period as a measure of the outer limit of reasonable delay in
12 determining laches. (Id.) Borrowing a strongly analogous statute of limitations does not
13 “backdoor” a limitation solely applicable in courts of justice to administrative proceedings.
14 (Fountain Valley Regional Hospital & Medical Center v. Bonta (1999) 75 Cal App.4th 316,
15 325.) Whereas a statute of limitations would completely bar the administrative action,
16 recognizing an analogous statute of limitations shifts the burden to the agency to present facts
17 excusing its delay. (Id.)

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20 Whether or not such a borrowing should occur depends upon the strength of the
21 analogy. (Id.) No statute of limitations directly limited the period in which disciplinary
22 charges could be filed against employees at the California State University of Sacramento in
23 Brown v. State Personnel Bd. (*supra*, 166 Cal.App.3d at 1158.) However, the Government
24 Code provided a three year limit on filing administrative disciplinary actions against a broad
25 range of public employees and thereby provided a “compelling” indication of the outer limit
26 of reasonable time for prosecuting disciplinary actions against employees in the state
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1 university system. (Id. at 1160.)

2 Even limitation periods for general civil actions have been deemed sufficiently
3 analogous in administrative proceedings. (Fountain Valley Regional Hospital & Medical
4 Center v. Bonta (1999) 75 Cal App.4th 316, 325.) When no statute of limitations directly
5 applied to revised Medi-Cal reimbursements by the Department of Health Services (“DHS”),
6 for which it would have recouped payment from a hospital, the court cited several statutes of
7 limitations as sufficiently analogous, even though they applied to more general civil actions,
8 including a four-year limitation on book accounts (CCP §338(a)), a three-year limit on
9 actions for liability created by statute other than for forfeiture (CCP §338(d)), and a three-
10 year limitation on actions for fraud or mistake. (Fountain Valley Regional Hospital &
11 Medical Center, supra 75 Cal App.4th at 325.) If the plaintiff has violated an analogous
12 statute of limitations, then plaintiff has the burden to establish that the delay was excusable
13 and the defendant was neither prejudiced nor disadvantaged. (Lam v. Bureau of Security &
14 Investigative Services (1995) 34 Cal.App.4th 29, 36.)

17 **b. The Regional Board’s Delay was Unreasonable as a Matter of Law**

18 There is no specifically prescribed statute of limitations for issuing an administrative
19 civil liability for liability under Porter-Cologne complaint. Code of Civil Procedure §338(i),
20 specifically limits actions commenced under Porter-Cologne to three years after the State
21 Water Resources Control Board (“State Board”) or regional water quality control boards
22 (collectively “water boards”) learn of the facts constituting a cause of action.⁵ (CCP §338(i).)

26 ⁵ No other statute of limitation period specifically addresses Porter-Cologne. Other potentially analogous
27 limitation periods include a one-year limitation on “an action upon a statute for a penalty or forfeiture,” (CCP
28 §340) which has been recognized as a limitation period for nuisance actions, and would be even shorter than the
period allowed by §338. (Shamsian v. Atlantic Richfield Co. (2003) 107 Cal.App.4th 967, 978.)

1 If the statutes of limitations established in the Code of Civil Procedure only apply to
2 actions initiated courts of justice, then CCP §§338(i) only applies when the water boards
3 refer actions to the Attorney General. (Petitioner Attachment 23: Water Quality Enforcement
4 Policy, p24.) Although only the Attorney General can pursue criminal actions or injunctive
5 relief such as temporary restraining orders, preliminary injunctions, and permanent
6 injunctions upon referral by the water boards, either the water boards or Attorney General,
7 upon referral by the water boards, may seek civil penalties (Water Code §§13262, 13264,
8 13304, 13331, 13340 and 13386; Water Code §§13350, 13385.) There are no statutory
9 requirements dictating when, or in what circumstances, the water boards must refer
10 enforcement actions to the Attorney General, but as a matter of policy, the water boards may,
11 in their discretion, refer actions meriting a “significant enforcement response, but where an
12 ACL would be inappropriate or ineffective,” such as major oil spills, wherein several state
13 agencies could seek civil monetary relief remedies under different state laws, but a single
14 civil action by the Attorney General would be more efficient than actions by multiple
15 agencies. (Petitioner Attachment 23: Water Quality Enforcement Policy, p24.)

18 Although actions filed by the Attorney General are heard in courts and ACLs brought
19 by the water boards are administrative, both are civil actions. Both involve the same laws,
20 regulations, facts, and actors. Although the procedures are different, the water boards’
21 adjudicative procedures nevertheless provide for the presentation of witnesses and testimony,
22 with cross-examination and opportunities for objections. (23 CCR §648.5.) Furthermore,
23 since all civil actions brought by the Attorney General are referred by the water boards, every
24 action under Porter Cologne, whether administrative or legal, starts at the administrative
25 level. Enforcement actions under Porter-Cologne, whether brought by the water boards or by
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1 the Attorney General, are even more analogous than the statutes of limitations for fraud and
2 mistake that courts have recognized as sufficiently analogous.

3 The Regional Board did not dispute that Code of Civil Procedure §338(i) was
4 insufficiently analogous. As a result, the Regional Board did not dispute that, as a matter of
5 law, its delay was unreasonable.

6
7 **2. The Order Does Not Excuse the Regional Board’s Delay**

8 If the statute of limitations is sufficiently analogous, prejudice is presumed, and the
9 agency must rebut the presumption by demonstrating the delay was excusable. (Fountain
10 Valley Regional Hospital & Medical Center, *supra* 75 Cal App.4th at 324.) “In order to
11 excuse delay, [the responsible party] must show exceptional circumstances prevented earlier
12 action,” such as a where the public agency lacks knowledge of grounds for the action. (Ponce
13 v. Graceous Navigation, Inc. (1981) 126 Cal.App.3d 823, 829.)

14
15 The Order does not attempt to excuse delay due to lack of knowledge or any other
16 reason, even finding that the Notice of Violation issued on April 7, 2004 was based on
17 violations observed during the February 18 and 25, 2004 inspections (Order, p2 Finding 7, 5
18 Finding 22, 15 Finding 28.) Regional Board Staff never disputed that they knew about the
19 alleged violations from the days they occurred. Mr. Zaitz inspected Linkside Place on both
20 days. (Order, p2 Finding 7.) Immediately after the inspections, Regional Board Staff
21 analyzed the samples, collected data, and issued a Notice of Violation by April 7, 2004, more
22 than three years before it issued ACLC R5-2007-0500. (Order, p5 Finding 22.)

23
24 The Regional Board, at the least, had inquiry notice since January 2006 at the latest
25 that it could not impose administrative civil liability based on General Permit violations. As
26 late as January, 2006, when it issued ACLC R5-2006-0501, the Regional Board should have
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1 known that since its file lacked documentation regarding the change in ownership, that TMA,
2 upon gaining ownership, never would have obtained a General Permit. ACLC R5-2006-0501
3 nevertheless ignored such a possibility. Petitioners informed the Regional Board in briefing
4 twice, once in response to ACLC R5-2006-0501 and again in response to ACLC R5-2006-
5 0525 that Petitioners lacked a General Permit and, as a result, administrative civil liability
6 could not be imposed. It was not until April 2007, over three years later, that the Regional
7 Board finally issued an ACLC pursuing civil liability based on Clean Water Act violations.
8

9 **3. The Regional Board not Only Acquiesced to the Delay, it Created the**
10 **Delay**

11 **a. The Regional Board Created the Delay**

12 Acquiescence by the prosecuting agency alone can be enough to demonstrate
13 prejudice in a laches defense. (*City of Oakland, supra* 95 Cal.App.4th at 51; *Brown, supra*
14 166 Cal.App.3d at 1159.) Rather than attempting to excuse its delay based on lack of
15 knowledge, the CVRWQCB instead argued that delays were caused by Petitioners, because
16 counsel for TMA, Linkside Place LLC, Mr. Garland, Mr. Isaac, and E-Ticket Construction
17 requested extensions and took inconsistent positions regarding permit coverage. (Order, p15
18 Finding 28.)
19

20 Counsel requested extensions while the parties conducted settlement negotiations in
21 good faith. (Petitioner Attachment 15: ACLC R5-2004-0541 Staff Report, p9.) The
22 extensions were agreed to and granted by the Executive Officer. (*Id.*) However, from March
23 2005, the Executive Officer denied all extension requests. (*Id.*) This last request was also
24 made less than a year after the Regional Board issued the Notice of Violation months.
25 (CVRWQCB Attachment 1.a1: Notice of Violation April 2004.) Eleven months, less than the
26 limitations period prescribed by §338(i) of the Code of Civil Procedure, is not, as a matter of
27
28

1 law, an unreasonable amount of time, especially in light of the on-going good faith attempts
2 at settlement.

3 The “inconsistent positions” described by the Order are irrelevant in showing lack of
4 acquiescence.⁶ (Order, p15 Finding 28.) In rendering an adjudicative decision, an agency
5 must make findings supported by substantial evidence. (Water Code §13330; Cal. Code Civ.
6 Pro. §1094.5(b).) A lack of supporting substantial evidence, even when there is no evidence
7 to the contrary, is still a lack of supporting substantial evidence. The Regional Board, as the
8 prosecuting agency, had the duty to conduct an investigation. It was not Petitioners’ job to
9 conduct the Regional Board’s investigation or refute allegations lacking concrete, reliable
10 evidence. Regional Board Staff had access to everything they needed in their file to know
11 whether Linkside Place LLC and then Petitioners were covered by the General Permit or, at
12 the least, investigate the matter.
13
14

15 The delays became unreasonable when the Regional Board, in its complete discretion,
16 continually cancelled the public hearings. ACLC R5-2004-0541 was initially set for hearing
17 in June 2005. When Mr. Zaitz was subpoenaed for deposition, the public hearing was
18 cancelled. ACLC R5-2004-0541 (Revised) was issued the day before Mr. Zaitz was deposed,
19 but never scheduled for a hearing.⁷
20

21 ACLC R5-2006-0501 was issued in January 2006 and set for public hearing in March
22 2006, but within days of receiving Petitioners’ opposition brief, the Regional Board
23 requested an extension, because it realized upon receiving the briefing that Petitioners lacked
24

25 ⁶ Admittedly, briefing submitted for ACLC R5-2006-0501 stated that “TMA obtained a General Permit on
26 October 23, 2003.” (Attachment 4: O’Laughlin and Paris Points and Authorities 8 March 2006 re ACLC No.
27 R5-2006-0501, p2.) This was a typographical error, which should have read “Linkside Place LLC,” and was
28 corrected in subsequent briefings. TMA has always maintained that the General Permit was not transferred from
Linkside Place LLC and that it did not file a NOI.

⁷ Counsel for Linkside Place LLC were informed of the revised complaint at the deposition, but did not receive it until after.

1 a permit when the alleged violations would have occurred. (Petitioner Attachment 18:
2 Schneider Briefing Request (March 17, 2006).) Petitioners wanted to take the matter to
3 public hearing and resolve it. The Regional Board instead cancelled the hearing and had to
4 rescind ACLC R5-2006-0501. The Regional Board could have held a hearing within the 90
5 days required by Water Code §13323, but chose not to. Having issued the “Late Revisions” a
6 mere 10 days before the June 2007 Public Hearing, it has shown itself capable of revising
7 findings at the last minute. Regional Board Staff, obviously deciding their ACL needed non-
8 hearsay evidence to bolster its allegations, conducted the March 2006 survey immediately
9 after receiving opposition briefing from Petitioners and before the March 2006 public
10 hearing. ACLC R5-2006-0525, issued in October 2006, was scheduled for hearing in January
11 2007. Once again, the hearing was cancelled only days after the Regional Board received
12 briefing from Petitioners.
13

14
15 Time and again, once immediately after witnessing the deposition of Mr. Zaitz and
16 twice after receiving opposition briefing, the Regional Board cancelled the public hearing,
17 rescinded the ACL complaint, and then issued a new ACL complaint attempting to redress
18 the shortcomings of the prior ACL complaint. The pattern was obvious. Regional Board Staff
19 was either too lazy or too incompetent to adequately and diligently investigate the matter at
20 Linkside Place and issue an adequate complaint. They had more than enough time to do so, but
21 instead “slept on their rights.”
22

23 **b. There is No Substantial Evidence Delay Did Not Disadvantage**
24 **Tehama Market Associates**

25 The Order lacks a finding or any substantial evidence that the delay did not
26 disadvantage Petitioners. In reality, the evidence would only show that delay advantaged the
27 Regional Board.
28

1 At the start the Regional Board had discretion in choosing whether to refer the
2 Linkside Place matter to the Attorney General. When it chose to pursue enforcement through
3 administrative civil liability, it exercised its discretion and chose that the statute of limitations
4 established in Code of Civil Procedure §338 would not directly apply. In so doing, the
5 Regional Board immediately gained an advantage. It could spend all the time it wanted, years
6 even, investigating, surveying, issuing inadequate complaints, soliciting comments,
7 correcting insufficiencies in its complaints, both in regard to evidence and legal theories.
8

9 Petitioners could fight the allegations or settle, but fighting the allegations only
10 worked to the Petitioners' disadvantage and the Regional Board's advantage. Petitioners'
11 briefing told the Regional Board where its ACLCs lacked legal and evidentiary support.
12 Upon receiving Petitioners' briefing, the Regional Board could, and did, gather additional
13 evidence, rescind ACLCs, in which it obviously lost confidence as a result of Petitioners'
14 briefing, and then issued new ACLCs with new legal arguments and new evidence. In
15 response to briefing submitted for ACLC R5-2006-0501, which objected to the Regional
16 Board's evidence supporting the existence of hydrologic connections to waters of the United
17 States on hearsay grounds, Regional Board Staff surveyed the lands surrounding Linkside
18 Place. (CVRWQCB Attachment 2.b1: Inspection Report (March 2006); Petitioner
19 Attachment 19: R5-2006-0525, p1.) When the Regional Board issued the next ACLC, ACLC
20 R5-2006-0525, it dispensed with hearsay-based evidence, which had been its entire basis for
21 Clean Water Act jurisdiction, and instead relied upon the survey. (Petitioner Attachment 19:
22 R5-2006-0525, p1.) Then, when Petitioners, for the second time, informed the Regional
23 Board that Petitioners lacked a General Permit, the Regional Board again cancelled the
24 hearing, rescinded ACLC R5-2006-0525, and issued a new ACLC, ACLC R5-2007-0500.
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1 ACLC R5-2007-0500 proceeded on an entirely new legal theory based on violations of the
2 Clean Water Act and Porter Cologne, rather than violations of the General Permit. By the
3 time ACLC R5-2007-0500 was issued however, over three years had passed.

4 **c. There is No Substantial Evidence that Tehama Market Associates**
5 **was Not Prejudiced by the Delay**

6 The Order has finding and no substantial evidence that delay did not prejudice
7 Petitioners. At some point, there must be finality and for businesses, unreasonable delay
8 exceeding the analogous statute of limitations period has, by itself, been sufficient to
9 demonstrate prejudice. (Fountain Valley Regional Hospital & Medical Center, *supra* 75 Cal
10 App.4th at 325.) When the DHS attempted to recoup Medi-Cal reimbursements from a
11 hospital, the court concluded that such delay was prejudicial, final reimbursements had been
12 made and the hospital, considering the issue resolved, would have allocated funds DHS
13 sought to reassess elsewhere. (Id.)

14
15 Petitioners, throughout the process of issued, rescinded, and reissued ACLCs, never
16 knew whether a recently rescinded ACLC would be the last or a new one would be issued.
17 Every time an ACLC was issued, Petitioners had to post bond for title insurance with funds
18 that could have been invested or spent elsewhere. As in Fountain Valley Regional Hospital &
19 Medical Center, Petitioners had to be free to go about their business at some point, knowing
20 they could invest and trade assets without fearing the necessity to reserve such assets to post
21 bond, pay penalties, or fund litigation, and the statute of limitations prescribed by Civil Code
22 §338(i) provides the only indication of when inaction by the Regional Board indicate no
23 further action will occur.
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1 **D. The Findings Do Not Support Liability Under Clean Water Act §301 or Water**
2 **Code §13376 and Neither Does Any Substantial Evidence Support Such Findings**

3 The Order imposed administrative civil liability for violations of Clean Water Act
4 §301 (33 U.S.C. §1311) and Water Code §13376, both of which prohibit discharging
5 pollutants into waters of the United States without or not in compliance with an NPDES
6 permit. It was not disputed that Petitioners lacked a permit or that sediment-laden storm
7 water left the property, only whether the sediment-laden storm water that left the property
8 discharged into waters of the United States. However, neither establish coverage under the
9 Clean Water Act absent proof of both a tributary or hydraulic connection to waters of the
10 United States and, where there is no adjacency, a significant nexus thereto. (San Francisco
11 Baykeeper v. Cargill Salt Division (2007) 481 F.3d 700, 708.)

13 **1. There is No Finding for Violation of a Statute for Which the Regional**
14 **Board has Authority, under Water Code §13385, to Impose**
15 **Administrative Civil Liability**

16 The Order imposed administrative civil liability under Water Code §13385. (Order,
17 p6 Finding 25.) The Regional Board derives its authority to issue civil penalties for water
18 quality violations from California Water Code §13385(c). Under §13385, the Regional Board
19 may impose civil penalties for violations of either Water Code §§13375 or 13376, for
20 violations of Clean Water Act §§301, 302, 306, 307, 308, 318, or 405, and of orders and
21 permits, such the General Permit, that regulate compliance with the Clean Water Act. Water
22 Code §13376 requires a report of discharge if pollutants are discharged to waters of the
23 United States and Clean Water Act §301 (33 U.S.C. §1311) prohibits the discharge of
24 pollutants without or in violation of an NPDES permit. A necessary element for liability
25 under either statute is that the receiving water is a water of the United States.
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1 Although the Order alleges a violation of Water Code §13376 and includes a finding
2 that Petitioners lacked permit, the only finding that pollutants were discharged into waters of
3 the United States was made under Clean Water Act §402. The Regional Board did not allege
4 a §402 violation and, even if did, it lacks authority to impose administrative civil liability
5 pursuant to Water Code §13385 for such violations. Regardless of whether the required
6 elements for a cause of action under Clean Water Act §402 are the same as those required for
7 liability under §301, the Regional Board was required to make “legally relevant sub-
8 conclusions” tying §402 to §301. It did not and, as a result, the findings do not support the
9 Order imposing administrative civil liability for violating Water Code §13376 or Clean
10 Water Act §301.
11

12 **2. The Order Does Not Establish that the Receiving Waters were Covered**
13 **by the Clean Water Act**

14 Under Water Code §13373, “discharge”, “navigable waters”, and “pollutant” have the
15 same meaning as in the Clean Water Act. The Clean Water Act defines a “discharge of a
16 pollutant” as “any addition of any pollutant to navigable waters from any point source”. (33
17 USCA §1362(12); 40 CFR §122.1.) “Navigable waters” are waters of the United States. (33
18 USCA §1362(7).) Under the “tributary rule,” tributaries that “exchange waters” with water
19 with waters of the United States are waters of the United States. (Headwaters v. Talent
20 Irrigation District (2001) 243 F.3d 526, 533.)
21

22 A mere hydrologic connection, such as that of a non-navigable tributary, is not
23 always sufficient, because “the connection may be too insubstantial for the hydrologic
24 linkage to establish the required nexus with navigable waters as traditionally understood.”
25 (Rapanos v United States Army Corps of Engineers (2006) 126 S.Ct. 2208, 2251 (J.
26 Kennedy, concurring); *see also* Northern California River Watch v. City of Healdsburg
27
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1 (2006) 457 F.3d 1023, 1030.) Only waters possessing the required “significant nexus” fall
2 under the coverage of the Clean Water Act. (Rapanos, *supra* 126 S.Ct. at 2241 (J. Kennedy,
3 concurring); *see also* U.S. v. Cudiff (2007) 480 F.Supp.2d 940, 943.) The required nexus
4 must be assessed in terms of the Clean Water Act’s goals and purposes, i.e., restoring and
5 maintaining the “chemical, physical, and biological integrity of the Nation’s waters.” (Id. at
6 2251.)
7

8 **a. No Substantial Evidence Supports a Finding Receiving Waters**
9 **Directly Abutting Linkside Place Are Waters of the United States**

10 The Order finds that receiving waters abutting the site are waters of the United States,
11 but no substantial evidence supports the finding. “[T]here must be substantial evidence to
12 support... a board's ruling, and hearsay, unless specially permitted by statute, is not
13 competent evidence to that end.” (Furman v. Department of Motor Vehicles (2002) 100
14 Cal.App.4th 416, 421.) “Hearsay evidence” is evidence of a statement, offered for the truth of
15 the matter asserted, by a person other than the witness testifying at the hearing. (California
16 Evidence Code §1200.) Unless permitted by statute, hearsay evidence is not admissible. (Id.)
17 Before the Regional Board, “hearsay evidence may be used for the purpose of supplementing
18 or explaining other evidence but shall not be sufficient in itself to support a finding unless it
19 would be admissible over objection in civil actions.” (Daniels v. Department of Motor
20 Vehicles (1993) 33 Cal.3d 532, 538.; *see also* Government Code §11513(d) and Evidence
21 Code §1200.)
22

23 The Order based its finding that the receiving waters directly abutting Linkside Place
24 are waters of the United States based on wetlands surveys conducted by other agencies,
25 correspondence with the ACOE, and Endangered Species Act (“ESA”) §7 consultations with
26 the United States Fish & Wildlife Service (“FWS”). All of the documents are hearsay. No
27
28

1 testimony was offered to authenticate or summarize them. Although some of the documents
2 could be classified as “public records,” that does not make them non-hearsay, and none are
3 statements or assertions made under oath while subject to cross examination and deemed
4 credible and reliable by a fact finder. In general, they fall into two categories, those that were
5 offered into evidence and those that were not.

6
7 **i. Golf Course Drainage Analysis**

8 In support of the conclusion that waters directly abutting Linkside Place are waters of
9 the United States, the Order cites a drainage analysis of the Golf Course conducted by the
10 City of Oroville in 1998, which concluded that off-site flows from the west caused severe
11 flooding problems. (Order, p9; *see* CVRWQCB Attachment 2.b4: Table Mountain Golf
12 Course Drainage Analysis.) The Golf Course Drainage Survey is hearsay and the citation
13 inaccurately mischaracterizes the Golf Course drainage, as it neglects to note that the outfall
14 on the southeast corner of the Golf Course is 1.24 feet lower than the Airport, creating “a
15 condition of negative flow, backing up the system onto the course, instead of transporting the
16 storm water downstream to the point of discharge.” (CVRWQCB Attachment 2.b4: Table
17 Mountain Golf Course Drainage Analysis, p7.) As a result, the Golf Course would receive
18 water from the Airport, rather than discharging water to the Airport. This conclusion actually
19 contradicts the Regional Board’s position that water discharges off the Golf Course, through
20 the Airport, and into the Oroville Wildlife Area.

21
22
23 **ii. Correspondence with the ACOE**

24 In support of the conclusion that waters directly abutting Linkside Place are waters of
25 the United States, the Order cites correspondence with the ACOE, wherein the ACOE
26 “verified,” under its Clean Water Act §404 jurisdiction, that Linkside Place contained 6.7
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1 acres of waters of the United States, including wetlands tributary to the Feather River.⁸
2 (Order, p9; *see* Petitioner Attachments 9-12.) The ACOE determinations are hearsay, but also
3 preliminary. Such determinations are not final until all appeals are exhausted and the time to
4 file an appeal has yet to expire. (33 CFR §331.12.) The determination was also made before
5 the ACOE and USEPA issued their new guidance document interpreting the Rapanos
6 decision and, as a result, may no longer be relevant. The determination is also incomplete,
7 because a delineation map was still required. (Petitioner Attachment 10: Clay e-mail (March
8 29, 2007).) Even if the determination were correct and final, without a map, the Regional
9 Board cannot determine which wetlands on the Golf Course are waters of the United States
10 and whether Linkside Place flows into them. Without the delineation map whether Linkside
11 Place discharged pollutants into wetlands on the Golf Course that are waters of the United
12 States is only speculation and not substantial evidence.

13
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15 **iii. Other Documents were Both Hearsay and Never Offered**
16 **into Evidence**

17 The Order references various documents in concluding that that receiving waters
18 abutting Linkside Place are waters of the United States, but not only are they all hearsay,

19
20 ⁸ The Prosecution Team objected to the Board accepting TMA Attachment 24, “Clean Water Act Jurisdiction
21 Following the U.S. Supreme Court’s Decision in Rapanos v. United States and Carabell v. United States,” a
22 guidance document issued by the ACOE and United States Department of the Interior to implement the Court’s
23 decision. The objection was based on lack of relevance and because the guidance document was an
24 interpretation of a regulation by another agency, was issued as guidance in implementing Clean Water Act
25 §404, when ACLC R5-2007-0500 alleged violations of §301. By the Prosecution Team’s own reasoning, none
26 of the ACOE correspondence should have been admitted, because they were based on interpretations of
27 regulation by the ACOE, not the Regional Board, and because they were issued pursuant to Clean Water Act
28 §404.

29 Oddly, the Prosecution Team objected to the Regional Board accepting the ACOE Rapanos Guidance into
30 evidence, in part because it was an interpretation of a statute by another agency and because it was issued as
31 guidance for Clean Water Act §404 jurisdiction, whereas the Order was based on a Clean Water Act §301
32 violation. If correct, then the ACOE correspondence would similarly lack relevance, because it is, first, based
33 on statutory interpretations by another agency and, second, because it was issued pursuant to the ACOE’s Clean
34 Water Act §404 jurisdiction, not under §301. Even the Order cites to comments submitted by the CVRWQCB
35 on the negative declaration for Linkside Place, wherein the CVRWQCB required compliance with §401
36 certification and with §402 for storm water activities. By the Prosecution Team’s own argument, the ACOE
37 correspondence should have been excluded.

1 none were offered into evidence. The following documents were referenced, but not offered
2 into evidence and not otherwise cited:

- 3 ▪ The Wetland Delineation for the Airport expansion area, prepared by Jones & Stokes
4 Associates for the City of Oroville in 1992, which found 9.2 acres of wetlands in the
5 Airport expansion area containing vernal pools and swales that were habitat for vernal
6 pool fairy shrimp. (Order, p9.)
- 7
8 ▪ Regional Board Staff walked the drainage from the Linkside Place subdivision and
9 “confirmed” that it entered the recreational area and the Feather River in May 2006.
10 (Order, p9.) There is no inspection report for such a survey and none was ever
11 described. The only inspection reports submitted into evidence were for February 18
12 and 25, 2004 and March 13, 2006.
- 13
14 ▪ If 1995, the United States Air Force installed the NEXRAD system and consulted
15 with the FWS, under §7 of the ESA because the vernal pools and swales on-site
16 contained fairy shrimp. (Order, p10.)
- 17 ▪ In 2002, the City of Oroville required the Mr. Isaac/Linkside Place LLC to conduct
18 wetlands surveys because of their previous experience in the area and obtain an ESA
19 §7 or §10 consultation from the FSW and a Clean Water Act §404 permit from the
20 ACOE because of vernal pool wetlands and endangered species. (Order, p10.)
- 21
22 ▪ May 2002 delineation performed by Albert Beck, of Eco-Analysis, wherein he stated
23 “it was my assessment that vernal pools on this property had a high probability of
24 supporting listed fairy shrimp.” (Order, p10.)
- 25 ▪ Additional assessment performed by ECORP Consulting, Inc that identified vernal
26 pool fairy shrimp in a few pools. (Order, p10.)
- 27
28

1 During the hearing, the Prosecution Team frequently referenced items in their “file” that
2 were not offered into evidence. However, evidence is only substantial evidence if relevant.
3 (Western States Petroleum Assn. v. Superior Court of Los Angeles (1995) 9 Cal.4th 559,
4 570.) Even if the documents were in the Staff file, the Board could not determine whether
5 they were relevant unless and until they were offered into evidence and a foundation
6 provided, identifying and authenticating the document and describing the legal proposition it
7 is offered to support. As a result, any decision that such evidence is relevant, and in turn any
8 finding based on such evidence, could only be arbitrary and capricious.
9

10 **iv. No Non-Hearsay Evidence in the Record Supported the**
11 **Conclusion that Waters of the United States Directly**
12 **Abutted Linkside Place**

13 Nothing offered into evidence that was not hearsay supported the conclusions
14 receiving waters directly abutting Linkside Place were waters of the United States or
15 otherwise subject to the Clean Water Act. On cross-examination, Mr. Zaitz testified that he
16 had neither observed or was aware of any species in the area that, under either the state or
17 federal ESA, were listed as threatened or endangered. (ACL Order No. R5-2007-0054 Tr.
18 (June 21, 2007).) Neither was any additional testimony or non-hearsay evidence provided
19 describing, let alone locating, the wetlands ACOE referenced in its correspondence. Nothing
20 other than unsupported hearsay supports the proposition Linkside Place discharged directly
21 into waters of the United States and, as a result, the finding is not supported by the evidence.
22

23 **b. Substantial Evidence Does Not Support the Existence of a**
24 **Significant Nexus Between Linkside Place and Traditional**
25 **Navigable Waters**

26 The Order finds that “[w]ere the receiving waters abutting the site not waters of the
27 United States (although they are as discussed below), a violation can still occur if the
28

1 pollutants indirectly discharge to waters of the United States.” (Order, p7 Finding 25A (citing
2 Rapanos, *supra* 126 S.Ct. at 2227 (J. Scalia, plurality).) The Order fails to note that such
3 violations are possible only if there is a significant nexus with waters of the United States.
4 (Rapanos, *supra* 126 S.Ct. at 2241 (J. Kennedy, concurring); *see also* U.S. v. Cudiff (2007)
5 480 F.Supp.2d 940, 943.) The Order also lacks any finding of a significant nexus and neither
6 is there any substantial evidence supporting the existence of a significant nexus.
7

8 The required nexus must be “assessed in terms of the statute's goals and purposes,”
9 based on the integral relationship of the “chemical, physical, and biological characteristics”
10 of tributaries and their adjacent wetlands:

11 Wetlands possess the requisite nexus, and thus come within the
12 statutory phrase “navigable waters,” if the wetlands, either alone or in
13 combination with similarly situated lands in the region, significantly
14 affect the chemical, physical, and biological integrity of other covered
15 waters more readily understood as “navigable.” When, in contrast,
16 wetlands' effects on water quality are speculative or insubstantial, they
17 fall outside the zone fairly encompassed by the statutory term
18 “navigable waters.”

19 (Rapanos, *supra* 126 S.Ct. at 2248 (J. Kennedy, concurring).)

20 **c. The Record Lacks Any Substantial Evidence of a Significant
21 Nexus with Traditional Navigable Waters**

22 The Order cites no evidence that drainage from Linkside Place, either alone or in
23 combination with similarly situated lands in the region, significantly affects the chemical,
24 physical, and biological integrity of other covered waters more readily understood as
25 navigable. Linkside Place is over a mile from the Powerhouse Tailchannel and three miles
26 from the Feather River. (ACLC R5-2007-0500 Staff Report, p7.) No water samples were
27 made of beyond the area immediately surrounding Linkside Place, no evidence of how much
28 storm water runoff from Linkside Place would have discharged north and how much

1 southeast, and, to what degree, if any, the runoff in either direction would have impacted a
2 traditional navigable body of water. There was no evidence of how much land area north of
3 Linkside Place drained into the Thermalito Afterbay or of how much land area to the
4 southeast of Linkside Place drained into the Feather River. Neither was there any evidence or
5 analysis of what hydrologic circumstances would be required for Linkside Place drainage to
6 discharge into the Powerhouse Tailchannel or Feather River or whether such hydrologic
7 events occurred. Although Petitioners offered sediment and flow data for the Feather River
8 and reservoir storage data for the Thermalito Afterbay for February 18 and 25, 2004, the
9 Prosecution Team objected to its introduction on the basis of relevance, even though such
10 data is critical in determining the existence of a significant nexus.
11

12 Site inspections of the property and surrounding area have been limited. On February
13 18 and 25, 2004, Mr. Zaitz only walked as far as the freeway. On cross-examination, he
14 testified that he did not whether the Powerhouse Tailchannel had a levee, which he likely
15 would if he had ever been there. (ACL Order No. R5-2007-0054 Tr. (June 21, 2007).) As a
16 result, Mr. Zaitz could not testify as to the authenticity of a box culvert (Slide 17), where it
17 was located, or how it related to drainage from the area.
18

19 Even when subsequent inspection was performed in March 2006, although the report
20 asserts that Messrs. Zaitz and Pedri “physically” walked the entire drainage course, they
21 testified that they actually walked about 400 yards to a tree. (ACL Order No. R5-2007-0054
22 Tr. (June 21, 2007).) No other material was referenced and no other evidence provided,
23 pursuant to the public records made by Petitioners pursuant to Government Code §6253 on
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1 November 16, 2006,⁹ to support the finding that runoff from Linkside Place discharged a
2 mile to the north, across pastureland, and into the Powerhouse Tailchannel.

3 Even if the Linkside Place drainage somehow discharged into the Thermalito
4 Afterbay, the impact could not have been substantial. On February 18, 2004 the Thermalito
5 Afterbay had 42,425 acre-feet, or 13,826,307,500 gallons, in storage. (Petitioner Attachment
6 25: California Data Exchange Flow Data for February 18, 2004 and February 25, 2004 and
7 Declaration in Support Thereof, p3.) On February 25, 2005 there were 37,175 acre-feet, or
8 12,115,332,500 gallons. (Id.) If approximately half of the total runoff from Linkside Place for
9 the two days, 300,000 gallons,¹⁰ discharged into the Thermalito Afterbay, the discharge
10 would have accounted for only 0.002 percent of the storage volume on either day. (Id.) The
11 Prosecution Team neither cited to nor submitted any evidence of turbidity data for the
12 Thermalito Afterbay for either day, no water samples of were ever taken from the Thermalito
13 Afterbay, and the California Data Exchange Center¹¹ does not report turbidity data for the
14 Thermalito Afterbay. As a result, determining whether storm water discharged from Linkside
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18 ⁹ Specifically, TMA requested “all documentation, including, but not limited to, all drafts, comments, reports,
19 notes, documents, memorandums, e-mails, spreadsheets, electronic spreadsheets, communications, and internal
20 memorandums, whether in physical or electronic form, related to the finding contained in paragraph 2, page 1,
of ACL Complaint No. R5-2006-0525, wherein:

21 Central Valley Water Board staff have followed and surveyed the drainages courses
22 from the construction site to Thermalito Afterbay and the Feather River, and
confirmed that ephemeral drainages and wetlands into which the site drains are
hydraulically connected to waters of the United States.”

23 ¹⁰ When ACLC R5-2006-0525 was issued, the discharge from Linkside Place estimated with the rational
24 method was increased from 355,400 gallons to 641,000 gallons. None of the ACLCs, staff reports, or other
Regional Board documents indicated how much of the 641,000 gallons would have discharged on either day.

25 ¹¹ The California Data Exchange Center (“CDEC”) is an extensive hydrologic data collection network providing
26 a centralized location for real-time hydrologic information, such as rain, snow, temperature, wind, atmospheric
pressure, humidity, and stream stage data, gathered by various agencies throughout California, including the
27 National Weather Service, United States Bureau of Reclamation, United States Army Corps of Engineers,
Pacific Gas & Electric, Sacramento Municipal Utility District, and the United States Geological Survey.
(Attachment 24: United State Army Corps of Engineers Rapanos Guidance (June 5, 2007), p1.) CDEC
28 information is publicly available on the Internet at <http://cdec.water.ca.gov/>. (Id.)

1 Place had a significant, if at all measurable, impact on turbidity in the Thermalito Afterbay is
2 not possible and never will be.

3 Inspections to the southeast were just as cursory. On February 18 and 25, 2004, Mr.
4 Zaitz only walked as far as the Golf Course and, as a result, would not have known whether
5 the culverts were properly functioning. (Petitioner Attachment 13: Depo. Scott Zaitz (July
6 2005), p37.) Contrary to the March 2006 Site Inspection Report, they did not “physically”
7 walk all the way to the Feather River, but instead only went as far as the southeast edge of
8 the Clay Pit, where drainage discharged into the rest of the Oroville Wildlife Area into what
9 Mr. Pedri described as the Feather River floodplain. (CVRWQCB Attachment 2.b3:
10 Drainage Photos 14-28 Southeast (March 2006), p15 Picture 28.)

11 On cross-examination, Messrs. Zaitz and Pedri testified that they did not drive the
12 Western Canal levees and did not identify any other culverts or levee breaches. (ACL Order
13 No. R5-2007-0054 Tr. (June 21, 2007).) They had extreme difficulty identifying the course
14 of their survey and where various photographs were taken. While viewing an aerial
15 photograph, Mr. Pedri speculated on an area where there could be a levee breach or culvert to
16 provide drainage, but neither he nor Zaitz ever personally identified such a feature. He
17 referenced “maps” used to verify drainage southeast of the Clay Pit, but no such maps are
18 specifically cited in the March 2006 Inspection Report and none were offered into evidence.
19 No water samples were taken.

20 Feather River flow on February 18, 2004 averaged 2,182 cfs, over 4,320 acre-feet or
21 1,407,888,000 gallons. (Petitioner Attachment 25: California Data Exchange Flow Data for
22 February 18, 2004 and February 25, 2004 and Declaration in Support Thereof, p2.) On
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1 February 25, 2004 it was 13,994 cfs, over 27,708 acre-feet, or 9,030,037,200 gallons.¹² (Id.)
2 If approximately 300,000 gallons of storm water were discharged from Linkside Place on
3 each day and all of it discharged into Feather River, it would have accounted for 0.02 percent
4 and 0.003 percent of the Feather River’s volume of flow, respectively, on February 18, 2004
5 and February 25, 2004.
6

7 On cross-examination, Mr. Pedri speculated that the Clay Pit drained the entire area
8 southeast of Linkside Place, potentially thousands of acres. (ACL Order No. R5-2007-0054
9 Tr. (June 21, 2007).) If true, the possibility that storm water runoff from 18 acres, when
10 considered in the context of runoff from thousands of acres, could significantly affect water
11 quality of the Feather River, is only further refuted. Turbidity in the Feather River averaged
12 7.71 NTUs on February 18, 2004 and 7.40 NTUs on February 25, 2004. (Id. at 3.) The
13 applicable Water Quality Control Plan, the Water Quality Control Plan for the Sacramento
14 River and San Joaquin River Basin (“Basin Plan”) provides that surface waters “shall be free
15 of changes in turbidity that cause nuisance or adversely affect beneficial uses” and, if the
16 natural turbidity is between 5 and 50 NTUs, prohibits increases attributable to controllable
17 factors greater 20 percent (“Turbidity Objective”). (Petitioner Attachment 26.) The Order has
18 no finding that storm water from Linkside Place would have caused an exceedance of the
19 turbidity objective in the Feather River and neither is there any evidence that it could have.
20 Neither is there a finding, and neither was there an allegation in ACLC R5-2007-0500, of
21 nuisance.
22
23

24 There is no evidence that storm water discharged from Linkside Place on February 18
25 and 25, 2004 had any substantial effect on water quality in either the Feather River or the
26

27 ¹² A flow of 1 cubic foot per second is approximately 1.98 acre-feet per day or 7.48 gallons per second. An
28 acre-foot, which will cover an acre of land with one foot of water, is 325,900 gallons.

1 Thermalito Afterbay. Furthermore, since there is no evidence and no analysis of how much
2 of the runoff from Linkside Place discharged to the north and how much went southwest, no
3 analysis of how much the Feather River or Thermalito Afterbay would have been affected is
4 possible.¹³ There is no non-hearsay evidence of any other waters falling within the Clean
5 Water Act. The effect of storm water discharge from Linkside Place on the quality of water
6 of either the Feather River or Thermalito Afterbay is speculative and insubstantial and falls
7 “outside the zone fairly encompassed by the statutory term navigable waters. It is therefore
8 not covered by the Clean Water Act and would not constitute a violation of either Clean
9 Water Act §301 or Water Code §13376.
10

11 **E. The Finding of the Extent and Gravity of Violations on February 18, 2004 Was**
12 **Not Based on Legally Relevant Sub-Conclusions or Evidence**

13 **1. The Discharge Volume was Based on Data the Order Deemed Irrelevant**

14 In making findings, the agency must make legally relevant sub-conclusions
15 supporting its ultimate decision. (Bam, Inc. v. Bd. of Police Comm’rs (1992) 7 Cal.App.4th
16 1343, 1346.) The Order is specific that the “extent and gravity” of violations are only for
17 those observed on February 18 and 25, 2004, but nevertheless relies on precipitation data
18 from other days. (Order, p12.)
19

20 Neither the Order nor the Staff Report indicate the amount of storm water the rational
21 method estimated would have been discharged on February 18, 2004, only that on the two
22 days combined, a “conservative estimate” of 641,000 gallons was discharged. (Order, p12.)
23 The estimate was calculated using rainfall data from three stations collected from February
24

25 _____
26 ¹³ In addition, since there is no evidence of how much water discharged to the north and how much discharged
27 to the southeast, and the maximum statutory penalty was based on the total discharge from Linkside Place, if
28 either findings or the evidence fail to support a discharge in even one direction, then there is no basis for
calculating a total discharge. As a result, the maximum civil penalty permitted by Water Code §13385 would be
\$20,000.

1 15 through 18, 2004, and from February 22 through 26, 2004. (Id.) Although the rain gauges
2 recorded precipitation on other days, the Order excluded them from estimating the runoff,
3 because “staff did not directly observe such discharges.” (Id.) Rather, discharges were only
4 observed, and therefore only alleged, on February 18 and 25, 2004.

5
6 Regional Board Staff identified three nearby rain gauge stations, the Feather River
7 Fish Hatchery, located 4.75 miles northeast of Linkside Place, Oroville Dam, located 8.5
8 miles east, and Sewerage Commission of Oroville Regional Wastewater Treatment Plant
9 (“SCOR”), located 3.5 miles east. (CVRWQCB Attachment 1.a2: Inspection Report
10 (February 2004), p2.) Even though Mr. Zaitz testified that rainfall in the area was “spotty,”
11 the rational method estimate averaged precipitation from the Oroville Dam and SCOR.
12 ((ACL Order No. R5-2007-0054 Tr. (June 21, 2007); *see also* Order, p12.) SCOR recorded
13 no rainfall for February 18, 2004. (CVRWQCB Attachment 1.a2: Inspection Report
14 (February 2004), p2.) Given the admittedly “spotty” nature of precipitation in the area, one
15 would think that a rain gauge 3.5 miles away would be more indicative of precipitation than
16 one 8.5 miles away.

17
18 Mr. George Day, Assistant Executive Officer at the Redding Office, who performed
19 the rational method calculation, had no reason for using the Oroville rain gauge rather than
20 the SCOR gauge. If the Order were only alleging violations that would have occurred on
21 February 18 and 25, 2004, and no precipitation was recorded on February 18, 2004, then,
22 consistent with the allegation made in ACLC R5-2007-0500, the Order, and cross-
23

1 examination of Mr. Zaitz, the rational method would have calculated an “extent and gravity”
2 of zero gallons of discharge.¹⁴ (ACL Order No. R5-2007-0054 Tr. (June 21, 2007).)

3 Based on the allegation in the Order, which is specifically limited to violations
4 directly observed by Staff, the “extent and gravity” calculated with the rational method can
5 only be zero for February 18, 2004. Furthermore, since neither the Order nor the Staff Report
6 apportion the rational method estimate between February 18, 2004 and February 25, 2004,
7 there is no independent evidence, substantial or otherwise, of the “extent and gravity” of
8 discharge for February 25, 2004. The finding is unsupported by neither legally relevant sub-
9 conclusions nor relevant substantial evidence and should therefore be stricken from the
10 Order.
11

12 **2. The Discharge Volume was Based on Data the Order Deemed Irrelevant**

13 Regional Board Staff also arbitrarily changed the coefficient used in performing the
14 rational method estimate. A constant of 0.3 was initially deemed “conservative,” but
15 nevertheless accurate. (Petitioner Attachment 13: Depo. Scott Zaitz (July 2005), p65.) When
16 the Regional Board issued ACLC R5-2006-0525, it inexplicably decided that a constant of
17 0.4 would still be conservative and accurate, even though it would increase the estimated
18 discharge, and maximum civil liability, by a third. (Petitioner Attachment 19: R5-2006-0525,
19 p6.) On cross-examination, Mr. Day had no reason for the change or why 0.4 would be a
20 better reason than 0.3 and suggested a 0.8, or almost any other number, could have been
21 used. (ACL Order No. R5-2007-0054 Tr. (June 21, 2007).) The calculation was therefore
22 arbitrary and should be removed from the Order.
23
24
25

26 _____
27 ¹⁴ Chairman Longley noted that the rational method included a storage component, but neither the Order nor the
28 Staff Report indicated how much runoff would have occurred on February 18, 2004 as a result of the storage
component.

1 **F. The Volume Discharged Through the Culverts is Not Based on Relevant Data**¹⁵

2 The “Extent and Gravity” finding of the Order is based in part on storm water
3 discharged through one culvert on February 18, 2004 and two culverts on February 25, 2004.
4 The discharge was calculated using the Manning Equation, based on measurements taken by
5 Mr. Zaitz in the field. (Petitioner Attachment 13: Depo. Scott Zaitz (July 2005), p23-24.)
6 However, Mr. Zaitz did not measure the culverts, or the depth of water within, until
7 November 4, 2004. (Id. at 24.) Based on materials supplied pursuant to the subpoena deuces
8 tecum served on Mr. Zaitz, it was determined that nothing indicated how either the pipe slope
9 or the water depth were determined, even though both critical variables in calculating
10 Manning’s Equation. (CVRWQCB Attachment 8: Memo to Ken Petruzzelli, O’Laughlin and
11 Paris from MBK Engineers (September 15, 2005), p2.) Since Mr. Zaitz did not measure the
12 water depth during his inspections and no other basis was given for the water depth used in
13 the Regional Board calculation, the volume discharged through the culverts has no basis and
14 no proven relevance to discharges on February 18 and 25, 2004. Since it has no rational
15 connection, its inclusion is arbitrary and capricious. The paragraph referencing the storm
16 water discharge through the culverts should therefore be stricken from the Order.¹⁶

17
18
19 **G. The Pumped Storm Water Volume Was Irrelevant and Based Solely on Hearsay**

20 The Order cites a total of 3,060 gallons discharged from the dewatering pump.
21 (Order, p15.) The pumped volume calculated was based on a conversation with Mr. John
22 Montgomery of E-Ticket Construction. (Order, p12.)
23
24

25 ¹⁵ This issue was also extensively discussed in prior briefing submitted by TMA. (CVRWQCB Attachment 4:
26 O’Laughlin and Paris Points and Authorities 8 March 2006 re ACLC No. R5-2006-0501, p14-16.)

27 ¹⁶ ACLC R5-2004-0541 and ACLC R5-2006-0501 both relied on the discharge through the culverts to calculate
28 and allege the total pollutant discharged from Linkside Place. After TMA submitted briefing informing the
Regional Board that the calculation could have no basis since the water depth was not measured during the
inspections, the allegation was removed from subsequent complaints.

1 The pumped storm water volume was removed from calculated total runoff.
2 Regardless of whether operation of the dewatering pump was relevant and regardless of the
3 relevance of whether some of the storm water discharged from Linkside Place included
4 petroleum products, the pumped discharge no longer factored into the total volume of
5 pollutant discharged. It became irrelevant to any fact in dispute and was only prejudicial.
6

7 The pumped discharge volume was also based entirely on hearsay. To estimate the
8 volume, Mr. Zaitz timed how fast the pump filled one of his water sample bottles and
9 converted the fill-rate to gallons per minute. (CVRWQCB Attachment 1.a2: Inspection
10 Report (February 2004), p3.) Then, he contacted Mr. Montgomery by phone. (Id. at 3.)
11 According to the Inspection Report for February 18 and 25, 2004, Mr. Montgomery admitted
12 that the pump had been operating for 8 ½ hours. (Id.) Based on Mr. Montgomery's
13 admission, Mr. Zaitz estimated the pumped discharge at 3,060 gallons. (Id.) Mr.
14 Montgomery's statement was, however, an out of court statement made for the truth of the
15 matter asserted (the pumped storm water volume) and therefore hearsay. He was subpoenaed
16 and present at the public hearing on June 21, 2007, but the Prosecution Team did not call him
17 to testify. No other evidence supports the pumped storm water discharge volume. Any
18 reference to the telephone conversation with Mr. Montgomery or to the pumped storm water
19 discharge volume should therefore be stricken from the Order.
20
21

22 **H. The Findings do Not Support Holding Mr. Garland, as an Officer of Tehama**
23 **Market Associates, Personally Liable, and Neither Does Substantial Evidence**
24 **Support Such Findings**

25 Corporations Code §17158(a) provides that “No person who is a manager or officer
26 or both a manager and officer of a limited liability company shall be personally liable under
27 any judgment of a court, or in any other manner, for any debt, obligation, or liability of the
28

1 limited liability company, whether that liability or obligation arises in contract, tort, or
2 otherwise, solely by reason of being a manager or officer or both a manager and officer of the
3 limited liability company.” Consequently, directors or officers of a corporation do not incur
4 personal liability for torts of the corporation merely by reason of their official position,
5 unless they participate in the wrong or authorize or direct that it be done. (United States
6 Liability Ins. v. Haidinger-Hayes, Inc. (1970) 1 Cal.3d 586, 594.)
7

8 When the State Board has considered imposing personal liability on responsible
9 corporate officers, all supporting jurisprudence imposed such liability based on fraud,
10 criminal conduct, or an “alter ego” theory. (In re: Original Sixteen to One Mine, Inc.
11 (SWRCB 2003) Order No.2003-0006, p6-7.) Personal liability could be based on fraud.
12 (Wyatt v. Union Mortgage (1979) 24 Cal.3d 773; U.S. v. Alisal Water Corp. (2000) 224
13 F.Supp.2d 927938-939.) Personal liability also could have been based on the “alter ego”
14 theory, wherein “there is such a unity of interest and ownership that the individuality, or
15 separateness, of such person and corporation has ceased” (Associate Vendors, Inc. v.
16 Oakland Meat Co. (1962) 210 Cal.App.2d 825, 837.) The vast majority of jurisprudence cited
17 by the State Board however, imposed personal liability based on criminal conduct. (US v.
18 Cooper (1999) 173 F.3d 1192; US v Iverson (1998) 162 F.3d 1015; US v. Park (1975) 421
19 U.S. 658, 773-4; People v. Pacific Landmark (2005) 129 Cal.App.4th 1203, 1213-1261.)
20
21

22 The Order lacks a finding of criminal or fraudulent conduct or of an “alter ego” and
23 lacks any evidence that would support such a finding even if one were made. (Order, p3
24 Finding 12-13.) Although the Order claims Mr. Garland signed the NOI on behalf of
25 Linkside Place LLC. It also alleged that he acted as the contact, but no documents or other
26 evidence were cited in support and none were offered. (Order, p13-14.) The finding also
27
28

1 notes that Mr. Garland “appeared” to direct the contractors, but there is no description of how
2 he “appeared” to direct the contractors, no citations to any document or correspondence, and
3 no testimony from Mr. Garland himself, who could have been subpoenaed to testify. The
4 finding is legally deficient, not based on substantial evidence, and should therefore be
5 stricken from the Order.
6

7 **I. The Order Incorrectly Determined the Amount of Money Saved by Non-
8 Compliance by Using the Average Cost of Compliance.**

9 In determining civil penalty for violations of the Clean Water Act a court must
10 calculate the economic benefit of non-compliance by using the least costly method of
11 compliance. (U.S. v. Allegheny Ludlum Corp., (2004) 366 F.3d 164.) Additionally, the
12 Regional Board must justify, in the record, its method of determining economic savings,
13 which must account for sums spent on compliance. (In re: Weyrich Development Company
14 (SWRCB 2003) Order No. WQO 2003-0004 (2003 WL 21224470), p2-3.) Whether erosion
15 and sediment controls were deployed, properly or otherwise, Genesis Engineering had
16 previously been hired by Linkside Place LLC to develop the SWPPP, but SWPPP
17 development costs were not included in the calculation of economic benefit. (Order, p14-15.)
18 Although Petitioners submitted no NOI, it continued working with Genesis Engineers and
19 then, as acknowledged by the ACLC R5-2007-0500 Staff Report, it subsequently retained
20 Hanover Environmental to eliminate potential storm water violations. (ACLC R5-2007-0500
21 Staff Report, p13.) A later inspection found the site in compliance with the General Permit.
22 (ACLC R5-2007-0500 Staff Report, p14.)
23
24

25 The economic benefit estimated by the Regional Board, \$2,500 per acre, is based on
26 the “average” cost of “installation and maintenance of typical erosion and sediment controls
27 for the unprotected 90 % of the 18.6 acres prior to the 18 and 25 February 2004 events.”
28

1 (Order, p14-15.) As an “average” cost of compliance, rather than a “minimum”, the
2 estimated compliance cost of \$2,500 per acre is too high. The minimum cost for typical
3 erosion and sediment controls estimated by the ACLC R5-2006-0501 Staff Report is \$1,500
4 per acre.¹⁷ (Id.) For 90% of the 18.6 acres of Linkside Place, this would total \$25,110.
5

6 Even if use of “average” compliance cost is appropriate, neither the Order nor the
7 Staff Report describe how the “average” cost per acre was determined. (Order, p14-15;
8 ACLC R5-2007-0500 Staff Report, p23.) The ACLC R5-2006-0501 Staff Report described
9 “typical costs” in the range of \$1,500 to \$8,000 per acre, depending on slope, soil type, and
10 time of deployment, and \$4,000 to \$8,000 per acre for “late season” erosion and sediment
11 controls, but not how such costs would “average” \$2,500. (Petitioner Attachment 17: ACLC
12 R5-2006-0501 Staff Report, p16.)
13

14 **J. No Evidence Supported the Finding that Tehama Market Associates Could Pay
15 the Penalty**

16 In determining the amount of any liability imposed, the Regional Board must
17 consider, among other factors, the ability of the violator to pay. (Water Code §13385(e).)
18 Further, any order issued pursuant to §13323 must be based on substantial evidence. (Water
19 Code §13330.) A conclusion, even in the absence of contrary evidence, is not substantial
20 evidence, but mere speculation. No evidence was cited in support of the finding that
21 Petitioners were developers in good standing, only an observation that Petitioners had not
22 submitted evidence of an inability to pay or an inability to continue in business. (Order, p13.)
23
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26 ¹⁷ This estimated cost of compliance is also inconsistent with the cost estimated in the prior ACLCs, which both
27 estimated costs at only \$2,000 per acre, for a total cost of \$33,480. (ACLC R5-2004-0541, p5; ACLC R5-2006-
28 0501, p8.) The ACLC R5-2006-0501 Staff Report estimated compliance costs at \$4,000 per acre, resulting in a
total cost of \$66,960. (See Attachment 16: ACLC R5-2006-0501 Staff Report, p16.) The Staff Report provides
no rationale for the differences in costs.

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V. CONCLUSION

The Order was issued after four attempts by the Regional Board to impose administrative civil liability for the same transaction and occurrence. Over three years prior, Regional Board Staff observed the incidents at Linkside Place, and for over three years the Regional Board controlled the entire process, issuing, rescinding, revising, and reissuing ACLCs, often in direct response to Petitioners' briefing, which described the legal and evidentiary insufficiencies of the ACLCs. Over three years passed before the current ACLC was issued and at some point Petitioners had to be free to go about their business. Even upon issuing the Order, the Regional Board nevertheless relies on hearsay and legally irrelevant sub-conclusions. Some findings lack any substantial evidence. Most importantly, the sub-conclusion of direct discharge into waters of the United States is based on nothing but hearsay and there is no substantial evidence of a significant nexus with waters of the United States. The Order should either be rescinded entirely or remanded to the Regional Board for further proceedings consistent with the State Board's decision.

Respectfully submitted,

O'LAUGHLIN & PARIS LLP

Date: July 18, 2007

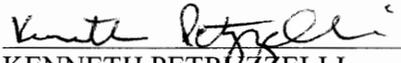
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EXHIBIT C

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9
10 **STATE WATER RESOURCES CONTROL BOARD**

11 **STATE OF CALIFORNIA**

12
13 ADMINISTRATIVE CIVIL LIABILITY
14 ORDER NO. R5-2007-0054

**REQUEST FOR ADMINISTRATIVE
RECORD**

15 IN THE MATTER OF TEHAMA MARKET
16 ASSOCIATES, LLC and ALBERT
17 GARLAND, LINKSIDE PLACE
SUBDIVISION, BUTTE COUNTY

18 Petitioners
19 _____/

20 **TO THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,**
21 **CENTRAL VALLEY REGION:**
22

23 **YOU ARE HEREBY REQUESTED** by TEHAMA MARKET ASSOCIATES, LLC
24 and ALBERT GARLAND, as parties in the above-entitled administrative proceedings, to
25 prepare and deliver to the State Water Resources Control Board, Office of Chief Counsel,
26 located at 1001 I St., 22nd Floor Sacramento, California, 95814, the entire record of
27 administrative proceedings, including the hearing transcript, adopting Administrative Civil
28

1 Liability Order No. R5-2007-0054 on June 21, 2007, "In re Tehama Market Associates, LLC
2 and Albert Garland, Linkside Place Subdivision, Butte County," pursuant to §2050.5, Title 23,
3 of the California Code of Regulations.

4 Please also deliver a copy of the administrative record and hearing transcript to counsel
5 for Petitioners, who may be contacted to arrange for copying services and costs, if necessary.
6

7 DATED: July 18, 2007

Respectfully submitted,

O'LAUGHLIN & PARIS LLP

9 By: 
10 KENNETH PETRUZZELLI
11 Attorneys for Petitioners
12 TEHAMA MARKET ASSOCIATES, LLC; and
13 ALBERT G. GARLAND
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PROOF OF SERVICE BY MAIL
(Government Code §11440.20)

I, CORRINE D. HAYES, declare that:

I am employed in the County of Butte, State of California. I am over the age of eighteen years and not a party to the within cause. My Business address is 2571 California Park Drive, Suite 210, Chico, California 95928. I am familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service pursuant to which practice all correspondence will be deposited with the United States Postal Service the same day as it is placed for collection in the ordinary course of business.

On July 18, 2007, I served the within **ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2007-0054 IN THE MATTER OF TEHAMA MARKET ASSOCIATES, LLC and ALBERT GARLAND, LINKSIDE PLACE SUBDIVISION, BUTTE COUNTY PETITION FOR REVIEW** on the parties in said cause, via electronic mail and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and placed each for collection following ordinary business practices:

See attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 18, 2007, at Chico, California.


CORRINE D. HAYES

SERVICE LIST

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2007-0054

IN THE MATTER OF TEHAMA MARKET ASSOCIATES, LLC and ALBERT GARLAND, LINKSIDE PLACE SUBDIVISION, BUTTE COUNTY

BEFORE THE STATE WATER RESOURCES CONTROL BOARD,
STATE OF CALIFORNIA

Party	Title
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James Pedri, Assistant Executive Officer Central Valley Regional WQ Control Board Redding Branch Office 415 Knollcrest Drive, Suite 100 Redding, CA 96002 Email: James Pedri (jpedri@waterboards.gov)	Courtesy Copy
Bert Garland Linkside Place LLC 2865 Coldwater Canyon Drive Beverly Hills, CA 90210 Bert Garland (garlandcanv@msn.com)	Courtesy Copy