CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO.R5-2005-0711

FOR
PRESTON AND LOIS AVERY
CONTRA COSTA COUNTY

This Order is issued to Preston and Lois Avery based on provisions of California Water Code Section 13304, which authorizes the Regional Water Quality Control Board, Central Valley Region (Regional Board) to issue a Cleanup and Abatement Order (Order).

The Executive Officer of the Regional Board, finds that:

1. Preston and Lois Avery of 10315 Moretti Drive, Cupertino, CA 95014 (hereafter Discharger) owns approximately 70-acres of land (3000 block) of Willow Road West, Bethel Island in Contra Costa County. The Discharger has been filling wetlands on the property for 11 years. The property is in Section 3, Township 2 North, Range 3 West, MDB&M. Runoff from the site discharges to Piper Slough, tributary to the Sacramento-San Joaquin Delta. The Discharger owns the property (APN 029-010-017).

2. On 27 May 2005, Regional Board staff, responding to local complaints, inspected the property and observed a backhoe operator installing culverts and filling wetlands with soil and other earthen materials. On 28 May 2005, as reported by neighbors, truckloads of fill material were dumped on the property. On 29 May 2005, Regional Board staff observed the Discharger, pushing the soil and sediment into waters of the state "wetlands."

3. The U.S. Army Corps of Engineers (Corps) in 1994 determined the area contained jurisdictional wetlands. The Corps issued an order requiring the Discharger to cease wetland fill activities, remove fill material and to obtain an "after-the-fact" Section 404 permit for the activities. The Discharger failed to remove the fill material and over an eleven-year period accepted earthen materials, soil and sediment, which was discharged to wetlands.

4. The discharge of soil and sediment deposited into waters of the state constitute "waste" as defined in California Water Code section 13050. The Discharger, who owns and operates the site, has discharged waste, i.e., earthen material, soil, and sediment, directly into surface waters. The Discharger, through this activity, has caused waste to be discharged where it has caused a condition of pollution or nuisance by increasing levels of sediment, settleable and suspended material.

5. Contra Costa County issued a stop work order on 28 May 2005, for un-permitted grading, requiring the Discharger to cease activities prior to obtaining a grading permit.

6. On 7 June 2005, Regional Board staff received a complaint that tires and other waste were being discharged as part of the fill materials.

7. Clean Water Act (CWA) Section 404 requires any person proposing to discharge dredged or fill material into navigable waters of the United States to obtain a Section 404 permit prior to such discharge. CWA Section 401 requires that any person obtaining a Section 404 permit, obtain water quality certification from the State in which the discharge occurs. California Water Code (CWC) Section 13376 requires, that any person who is proposing to discharge pollutants or dredged or fill material into waters of the state to submit a report of waste discharge pursuant to CWC Section 13260 prior to such discharge. The Discharger failed to obtain a Section 404 permit, a Section 401 Water Quality Certification and failed to file a Report of Waste Discharge.

8. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition*, (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation programs for achieving objectives, and incorporates by reference, plans and policies adopted by the State Water Resources Control Board. The beneficial uses of the Sacramento-San Joaquin Delta as identified in Table II-1 of the Basin Plan are municipal and domestic supply; industrial; and agricultural supply; contact and other non-contact recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources.

9. The Basin Plan lists specific water quality objectives for inland surface waters. These objectives include limitations on sediment, settleable and suspended material, and turbidity. Based on staff observations, the Discharger's fill activities have resulted in the discharge of waste, e.g., sediment and soil, into surface waters and surface water drainage courses and placed waste in areas where it threatens to discharge into surface water drainage courses during subsequent storm events. The discharge of waste and pollutants to surface waters has created a condition of pollution and threatens to continue to create a condition of pollution or nuisance when earthen materials are transported in stormwater during the rainy season to downstream receiving waters increasing levels of sediment, settleable and suspended material.

10. Section 13304(a) of the California Water Code provides that:

> "Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirements or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney

General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the fact may warrant."

11. Section 13304(c)(1) of the California Water Code provides that:

"If the waste is cleaned up or the effects of the waste are abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by any governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of waste within the meaning of subdivision (a), are liable to that governmental agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action. The amount of the costs is recoverable in a civil action by, and paid to, the governmental agency and state board to the extent of the latter's contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds."

12. Section 13267(b)(1) of the California Water Code provides that:

"In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste outside of its region that could affect the quality of waters of the state within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."

13. The technical reports required by this Order are necessary to assure compliance with this Order and to protect the waters of the state. The technical reports are necessary to demonstrate that appropriate methods will be used to clean up waste discharged to surface waters and to ensure that cleanup complies with Basin Plan requirements.

14. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act, pursuant to Section 15321(a)(2), Title 14, California Code of Regulations.

15. Any person adversely affected by this action of the Regional Board may petition the State Water Resources Control Board (State Board) to review the action. The petition must be received by the State Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions may be found on the Internet at www.waterboards.ca.gov/centralvalley or will be provided upon request.

IT IS HEREBY ORDERED THAT, pursuant to Sections 13267 and 13304 of the California Water Code, Preston and Lois Avery shall:

1. Cease the discharge of earthen materials, soil, and sediment to waters of the state and clean up and abate, in accordance with the schedule in No. 2 below, the condition of earthen materials, soil, and sediment discharged or placed into wetlands, surface waters and surface water drainage courses.

2. Compliance with No. 1 above shall include, but not necessarily be limited to, the following measures:

   (a) By **1 August 2005**, submit a Cleanup and Restoration Plan. The Cleanup and Restoration Plan must describe how the impacts of the discharge will be resolved, demonstrate how the cleanup and restoration will be completed, and evaluate the effectiveness of the cleanup and restoration. The Cleanup and Restoration Plan is to be prepared by a professional knowledgeable and experienced in wetlands restoration.

   (b) By **1 August 2005**, submit a forensic wetland delineation of your property (APN 029-010-017) prepared by a professional wetland delineator approved by the Executive Officer and the Sacramento Office of the U.S. Army Corps of Engineers, Regulatory Branch.

   (c) Clean up all earthen materials, soil and sediment discharged to wetlands, surface waters and surface water drainages in accordance with the Cleanup and Restoration Plan as approved by the Executive Officer.

   (d) Restore and stabilize the affected area to its natural condition prior to the illegal fill.

   (e) By **30 September 2005,** complete the implementation of the Cleanup and Restoration Plan. The Discharger shall provide staff access to areas of the property, as needed.

3. If requested, reimburse the Regional Board for reasonable costs associated with oversight of actions taken in response to this Order. By **1 July 2005** submit the name and address to be used for billing purposes for oversight charges.

4. The Executive Officer may refer this matter to the Attorney General for judicial enforcement or issue a complaint for Administrative Civil Liability.

5. Failure to comply with a cleanup and abatement order or the dates specified may result in further enforcement actions, including actions under section 13350, 13385, and 13387 of the California Water Code, which allows for administrative civil liability up to a maximum of five thousand dollars ($5,000) for each day of violation.

THOMAS R. PINKOS, Executive Officer

Jack S. Del Conte

10 June 2005
(Date)