CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

CLEANUP AND ABATEMENT ORDER No. R2-2013-1031

MR. FLOYD LOUIS DEMIGUEL

for the property located at:

25205 PALOMARES ROAD, CASTRO VALLEY
ALAMEDA COUNTY

This Cleanup and Abatement Order (Order) is issued to Mr. Floyd Louis DeMiguel (Discharger) for the discharge of waste and fill material into waters of the United States and State, pursuant to provisions of California Water Code (Water Code) sections 13304 and 13267.

The San Francisco Bay Regional Water Quality Control Board (Regional Water Board) hereby finds the following:

1. **Purpose of Order**: This Order requires the Discharger to cleanup and abate the effects of unauthorized fill associated with channel excavation and culvert construction in stream and riparian habitat areas of Palomares Creek and an unnamed tributary to Palomares Creek.

2. **Named Discharger**: The Discharger is a discharger under Water Code section 13304 because he discharged waste into waters of the State in connection with channel excavation and culvert construction in stream and riparian areas of Palomares Creek and its tributary.

3. **Site Location and Description**: The Discharger owns about 9 acres of land approximately one mile south of Interstate 580 at 25205 Palomares Road, Castro Valley, identified in Alameda County records as Assessor's Parcel Number 85A-2500-17 (herein after referred to as the Site). The Discharger's activities impacted two streams: Palomares Creek and an unnamed tributary to Palomares Creek. Palomares Creek drains into Don Castro Reservoir and San Lorenzo Creek, all of which are waters of the United States and State.

4. **Beneficial Uses**: The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) identifies the following beneficial uses for San Lorenzo Creek: municipal and domestic water supply, freshwater replenishment, groundwater recharge, cold freshwater habitat, fish migration, fish spawning, warm freshwater habitat, wildlife habitat, water contact recreation, and noncontact water recreation. Beneficial uses of any specifically-identified water body generally apply to all its tributaries.

5. **Site History and Regulatory Status**: The Site has no prior regulatory oversight or history with the Regional Water Board.

6. **Basis for Cleanup and Abatement Order**: California Water Code section 13304 authorizes the Regional Water Board to issue orders requiring a discharger to cleanup and abate waste where the discharger has caused or permitted waste to be discharged in violation of any order or prohibition of the board, or any discharger who has caused or permitted waste to be discharged or deposited where it is or probably will be discharged into waters of the State and creates, or threatens to create, a condition of pollution or nuisance.

a. Staff from the Alameda County Public Works Agency and the California Department of Fish and Wildlife inspected the Site on August 8, 2013, and notified Regional Water Board staff on August 16, 2013, of an illegal creek re-alignment.

b. On August 28, 2013, representatives of the Regional Water Board, the California Department of Fish and Wildlife, the U.S. Army Corps of Engineers (Corps), and the Alameda County Public Works Agency met with the Discharger at the Site. Regional Water Board staff observed the following:

   i. A 100-foot-long channel was excavated to bypass a meander in the channel of Palomares Creek, changing the course of flow;

   ii. Earthen fill from the excavation and other grading at the Site was placed within and adjacent to Palomares Creek; and

   iii. About 300 linear feet of an unnamed tributary to Palomares Creek was filled to construct a culvert.

   These findings are discussed in an inspection report and Notice of Violation dated November 12, 2013.

c. The Discharger's activities were conducted without required regulatory agency approvals, which include but are not limited to:

   i. A federal Water Pollution Prevention and Control Act (Clean Water Act) section 401 water quality certification from the Regional Water Board;

   ii. Waste discharge requirements (WDRs) under Water Code section 13263 from the Regional Water Board;

   iii. A Clean Water Act section 404 permit from the Corps;

   iv. Approval from the U.S. Fish and Wildlife Service pursuant to section 7 or 10 of the federal Endangered Species Act; and

   v. A Streambed Alteration Agreement from California Department of Fish and Wildlife.

d. The Discharger has caused waste to be discharged or deposited into waters of the State and the United States, in violation of the Basin Plan, the Clean Water Act, and the Water Code.

   i. The Basin Plan prohibits the discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses.

   ii. Under Clean Water Act section 301, the discharges of any pollutant except as authorized is prohibited. The discharge of dredged or fill material into waters of the United States requires a Clean Water Act section 404 permit. The Corps is responsible for issuing section 404 permits. These permits require a Clean Water Act section 401 certification from the Regional Water Board that the permitted activity complies with applicable State water quality standards and other appropriate requirements. Neither the Corps nor the Regional Water Board has issued a permit or certification, as applicable, for the Discharger's activities.

iii. Water Code sections 13376 and 13260 require any person who proposes to discharge dredged or fill material into navigable waters of the United States and any person who proposes to discharge waste that could affect waters of State to submit a report of waste discharge (ROWD). Water Code section 13376 prohibits the discharge of fill material, except as authorized by WDRs. Failure to submit a report of waste discharge and obtain waste discharge requirements constitutes a violation of the Water Code sections 13260, 13264, 13376, and 13385. The Discharger did not file a ROWD or obtain WDRs from the Regional Water Board for his activities.

e. This Order contains requirements for the cleanup of the discharged waste and restoration to abate impacts to Palomares Creek, its unnamed tributary, and associated downstream waters.

f. Following the initial inspection and while issuance of this Order was pending, the Discharger has been responsive to staff concerns about the potential for increased soil erosion from the earthmoving activities. The following documents have been submitted to satisfy the requirements of this Order's Tasks B.1 and B.2 below:

i. Clearwater Hydrology. 2013. *Engineering Design Basis Report for the Palomares Creek Remediation Project, 25205 Palomares Road, Castro Valley, CA*. September 19. Berkeley, CA.

ii. Clearwater Hydrology. 2013. *As-Built Report and Plan for Palomares Creek Remediation Project, DeMiguel Property, Castro Valley, CA*. November 12. Berkeley, CA.

7. **Basis for Requiring Reports**: The reports required under this Order are required pursuant to Water Code section 13267. The reports are necessary to ensure that the harm and future threat to water quality created by activities on the Site, which resulted in the discharges described above, are properly assessed, abated and controlled. The evidence supporting requiring the Discharger to submit the reports is available in the record for this matter.

8. **CEQA**: This Order is an action to enforce the laws and regulations administered by the Regional Water Board. As such, this action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to section 15321 of Title 14 of the California Code of Regulations.

IT IS HEREBY ORDERED, pursuant to Water Code sections 13304 and 13267, that the Discharger shall provide the following information and shall cleanup and abate the waste he discharged as follows:

A. PROHIBITIONS

1. Removal of vegetation within waters of the State, or within riparian areas that provide benefit to these waters, without authorization from the Regional Water Board and other applicable resource agencies is prohibited.

2. Discharge of sediment-laden runoff to surface waters is prohibited.

3. Discharge of silt, sand, clay, or other earthen materials from any activity, in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses is prohibited.

B. CLEANUP AND ABATEMENT TASKS

The submittals required in the tasks below shall be submitted as soon as practicable but no later than the compliance deadlines stated below. The required actions and implementation schedules shall comply with all requirements in order to be acceptable to the Executive Officer.

1. INTERIM CORRECTIVE ACTION PLAN

COMPLIANCE DATE: COMPLETED (FINDINGS 6.F ABOVE)

In consultation with Regional Water Board staff, the Discharger shall, by the compliance date, prepare and start to implement an Interim Corrective Action Plan that is certified by a qualified and licensed professional (as appropriate) and is acceptable to the Executive Officer. The Interim Corrective Action Plan shall describe work to prevent adverse impacts during the 2013-2014 wet weather season resulting from the unauthorized fill associated with channel excavation of Palomares Creek. The Discharger shall block flow from entering the newly excavated channel so that flow in Palomares Creek is restored back to its original channel. The Discharger shall either remove spoil piles from the vicinity of the creek channel or stabilize the spoil piles to prevent them from being eroded into the creek channel.

2. COMPLETION OF INTERIM CORRECTIVE ACTION AND SUBMITTAL OF TECHNICAL REPORT

COMPLIANCE DATE: COMPLETED (FINDING 6.F. ABOVE)

The Discharger shall complete work described in the Interim Corrective Action Plan, as approved, and submit a technical report, acceptable to the Executive Officer, to the Regional Water Board. This technical report shall include a description of the interim corrective actions taken and documentation (including photographs and maps) showing Site conditions before and after implementation of corrective actions.

3. RESTORATION AND MONITORING PLAN FOR PALOMARES CREEK

COMPLIANCE DATE: FEBRUARY 28, 2014

The Discharger shall submit to the Regional Water Board a Restoration and Monitoring Plan, acceptable to the Executive Officer, to adequately stabilize the bed and banks and restore the riparian zone at all impacted areas along Palomares Creek. This plan shall contain, at a minimum, design specifications and drawings, interim and final performance criteria (used to assess the success of the creek restoration), a proposed implementation schedule, and a monitoring plan for the following:

a. Revegetation – Planted vegetation shall be irrigated, as necessary, to ensure that the vegetation becomes self-sustaining. Monitoring shall include at least a 10-year period of documenting percent survival; height, health, and vigor of shrubs and trees; percent cover of grasses and forbs; and monitoring and control of invasive plants. At end of year 10, percent survival shall be at least 75%; health and vigor of foliage for each plant species shall be at least 67%; and, percent ground cover shall be at least 70%.

b. Channel Stability – Annual assessments of the stability of the stream channel shall include reporting of scour, rills, or slumps visible on the stream banks, head cuts or nick points along the thalweg, and accumulation of sediment in the project reach.

4. RESTORATION AND MONITORING PLAN FOR UNNAMED TRIBUTARY TO PALOMARES CREEK

COMPLIANCE DATE: FEBRUARY 28, 2014

The Discharger shall submit to the Regional Water Board a Restoration and Monitoring Plan, acceptable to the Executive Officer, to daylight the 300 linear feet of the tributary to Palomares Creek that was culverted. The plan shall include plans for the removal of all fill and the culvert pipe from the channel of the unnamed tributary to Palomares Creek, as well as plans for the establishment of geomorphically stable channel bed and banks and a vegetated riparian zone. This plan shall contain, at a minimum, design specifications and drawings, adequate interim and final performance criteria (used to assess the success of the tributary restoration), a proposed implementation schedule, and a monitoring plan for the following:

a. Revegetation – Planted vegetation shall be irrigated, as necessary, to ensure that the vegetation becomes self-sustaining. Monitoring shall include at least a 10-year period of documenting percent survival; height, health, and vigor of shrubs and trees; percent cover of grasses and forbs; and monitoring and control of invasive plants. At end of year 10, percent survival shall be at least 75%; health and vigor of foliage for each plant species shall be at least 67%; and, percent ground cover shall be at least 70%.

b. Channel Stability – Annual assessments of the stability of the stream channel shall include reporting of scour, rills, or slumps visible on the stream banks, head cuts or nick points along the thalweg, and accumulation of sediment in the project reach.

5. COMPLETION OF RESTORATION AND MONITORING

COMPLIANCE DATE: OCTOBER 1, 2014

The Discharger shall complete the work described in the Executive Officer-approved Restoration and Monitoring Plans required by tasks B.3 and B.4 above.

6. SUBMITTAL OF TECHNICAL REPORT

COMPLIANCE DATE**:** DECEMBER 1, 2014

The Discharger shall submit an as-built report to the Regional Water Board. The report shall document that the plans in tasks B.3 and B.4 to restore both Palomares Creek and its unnamed tributary have been fully and adequately implemented. The report shall also include pre- and post-construction photographs of the Site.

7. SUBMITTAL OF ANNUAL REPORTS AND REPORTS IN YEARS SEVEN, NINE AND TEN

COMPLIANCE DATE: NO LATER THAN DECEMBER 31 EACH YEAR MONITORING IS REQUIRED

The Discharger shall submit annual reports to the Regional Water Board for the work required in tasks B.3 and B.4, above by December 31 for the first five years of the initial ten year

monitoring period. Thereafter, reports shall be submitted by December 31 of years seven, nine, and ten. Each report must summarize each year's monitoring results over the reporting period and include all the information specified in the monitoring plans and any corrective measures taken (e.g., re-planting or bank stabilization).

The reports shall compare data to previous years and describe progress towards meeting final performance criteria. At the end of year ten, a comprehensive final report shall be prepared that includes summaries of the monitoring data and document if the Site meets the final performance criteria in the monitoring plans. All reports shall include representative photographs and site maps.

If any interim or final performance criteria are not met, a report must identify remedial measures to be undertaken, including extension of the monitoring period, until the criteria are met. Success of the creek restoration will be determined by Regional Water Board Executive Officer. If the project reach of Palomares Creek or its tributary is not geomorphically stable at the end of year ten, the Discharger shall work with the Regional Water Board to prepare an analysis of the cause of the instability. If deemed necessary by the Regional Water Board Executive Officer, the Discharger will be required to conduct additional remedial actions.

C. NOTIFICATIONS AND PROVISIONS

1. **Cost Recovery**: The Discharger is and shall be liable, pursuant to Water Code section 13304, to the Regional Water Board for all reasonable costs actually incurred by the Regional Water Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order. Such costs include, but are not limited to, staff time for investigation of the discharge, preparation of this Order, work to complete the directives specified in this Order, and communications between Regional Water Board staff and parties associated with the cleanup and abatement of the discharge wastes, including the Discharger, interested members of the public, and other regulatory agencies. If the Discharger is enrolled in a State Water Board-managed reimbursement program, reimbursement shall be made pursuant to this Order and according to the procedures established in that program. Any disputes raised by the Discharger over reimbursement amounts or methods used in that program shall be resolved consistent with the dispute resolution procedures for that program.

2. **Contractor/Consultant Qualifications**: The Discharger's reliance on qualified professionals promotes proper planning, implementation, and long-term cost effectiveness of investigation, and cleanup and abatement activities. Professionals shall be qualified, licensed where required, and competent and proficient in the fields pertinent to the required activities. California Business and Professions Code sections 6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgment be performed by or under the direction of licensed professionals.

3. **Report Any Changes in Ownership or Occupancy**: The Discharger shall file a written report on any changes in the Site's ownership or occupancy. This report shall be filed with the Regional Water Board within 30 days following a change and shall reference the number of this Order.

4. **Delayed Compliance**: The Discharger shall notify the Regional Water Board Assistant Executive Officer (currently, Dyan Whyte) if it is delayed, interrupted, or prevented from meeting any of the compliance deadlines specified in this Order or a key milestone in an approved plan required by the Order (i.e., the Restoration and Monitoring Plans). The deadlines in this Order may not be modified except by amendment of this Order.

5. **Good Operation and Maintenance**: The Discharger shall maintain in good working order and operate as efficiently as possible any facility or control system, including best management practices and post-construction permanent control measures installed, to achieve compliance with the requirements of this Order.

6. **Reporting of Hazardous Substance Release**: If any reportable quantity of hazardous substances is discharged in or on any waters of the State, or discharged or deposited where it is, or probably will be, discharged in or on any waters of the State, the Discharger shall report such discharge to the Regional Water Board (in addition to reporting to the California Emergency Management Agency at (800) 852-7550), pursuant to Water Code section 13271. To report to the Regional Water Board, call (510) 622-2369 during regular office hours and file a written report within five working days.

7. **Enforcement**: If the Discharger fails to comply with the requirements of this Order, this matter may be referred to the Attorney General for judicial enforcement. Failure to comply with this Order may result in the assessment of an administrative civil liability up to $5,000 per violation per day, pursuant to Water Code section 13350. In addition, the Regional Water Board reserves its right to take any enforcement actions authorized by law for the underlying violations related to the unauthorized discharge of waste and fill material into waters of the United States and State.

8. **State Water Board Petition**: Any person aggrieved by this action may petition the State Water Board to review the action in accordance with Water Code section 13320 and Title 23, California Code of Regulations, section 2050 et al. The State Water Board, Office of Chief Counsel, must receive the petition by 5:00 p.m., 30 days after the date this Order becomes final (if the thirtieth day falls on a weekend or State holiday, the petition must be received by the next business day). This Order is effective December 27, 2013.

9. **Periodic Review**: The Regional Water Board may review this Order periodically and may revise it when necessary.

Ordered by

Digitally signed by Bruce H. Wolfe
DN: cn=Bruce H. Wolfe, o=SWRCB, ou=Region 2, email=bwolfe@waterboards.ca.gov, c=US
Date: 2013.12.27 18:26:30 -08'00'

Bruce H. Wolfe
Executive Officer

Attachment A – Inspection Report – DeMiguel Property, August 28, 2013
Attachment B – 13267 Fact Sheet