

Regional Water Quality Control Board  
Central Valley Region  
Board Meeting-21/22 June 2007

Proposed Changes to Draft Order  
Tehama Market Associates, LLC  
Albert Garland  
Linkside Place Subdivision  
Administrative Civil Liability

The following are revisions to the Draft ACL Order that the Prosecution Team wishes to propose for the Regional Board to consider:

Revise Finding No. 8 to read as follows:

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).

Add new Finding No. 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 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 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, Regional 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 backup though out the golf course, flooding the lower fairways. In addition, the soils substratum of the site, that consisted of unrelated cementitious materials, prevent 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 January 11, 2007.” Accordingly, the regulatory actions by the Corps of Engineers 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 USAF 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 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 U.S. 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 Endangered Species Act, 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.