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

Response to Written Comments for
Tehama Market Associates, LLC
Albert Garland
Linkside Place Subdivision
Administrative Civil Liability

The following are responses to written comments received from interested parties in response to the Administrative Civil Liability Complaint Order No. R5-2007-0500 and proposed Administrative Civil Liability Order for Tehama Market Associates, LLC and Albert Garland, Linkside Place Subdivision distributed on 20 April 2007. Written comments from interested parties on the proposed Order were required to be received by the Regional Water Quality Control Board (Regional Water Board) by 18 May 2007 in order to receive full consideration. Comments were received from the following:

1. Tehama Market Associates, LLC (by attorneys O'Laughlin & Paris LLP) (received on 9 March 2006 dated 8 March 2006)
2. Tehama Market Associates, LLC & Albert Garland (by attorneys O'Laughlin & Paris) (received on12 December 2006 dated 20 December 2006)
3. Tehama Market Associates, LLC & Albert Garland (by attorneys O'Laughlin & Paris) (received on 21 May 2007 dated 17 May 2007)

Written comments from the above interested parties are summarized below, followed by the response of the Regional Board Prosecution Team.

TEHAMA MARKET ASSOCIATES/ALBERT GARLAND COMMENTS

Tehama Market Associates – Comment #1: *The Regional Board cannot hear ACLC R5-2007-0500 because the three-year statute of limitations has expired. Tehama will not spend additional time on the Linkside matter until this issue is resolved.*

Response: The three-year period, one of the two claimed as a statute of limitations in this case, does not apply here. While the source of that restriction is not contained in the Discharger's letter, presumably the Discharger means to cite Code of Civil Procedure 338(i). That statute states that an "action" under the Porter-Cologne Water Quality Control Act must be filed within 3 years after discovery by the State or Regional Water Quality Control Board.

While the statute seems applicable on its face, in fact it does not control. Section 338(i), like the other statutes of limitation adopted by the Legislature in the Code of Civil Procedure (beginning at section 312), apply only to "actions." And that term is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22.) Accordingly, the statutes of limitations in the Code of Civil Procedure apply to cases filed in court, not administrative proceedings such as this one. (See *City of Oakland v. Public Employees Retirement System* (2002) 95 Cal.App.4th 29, 48; *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361-1362; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal.App.4th 325, 329; *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 515; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405(2), p. 510.)

While not subject to any statute of limitations, the general legal doctrine could apply to restrict the timing of this matter. That doctrine is discussed below.

Tehama Market Associates – Comment #2: *The Regional Board cannot hear ACLC R5-2007-0500 because it failed to hear ACLC R5-2006-0525. By continually rescinding and reissuing ACLCs, the Regional Board circumvented the 90-day statute of limitations contained in Water Code section 13323(b) to revise and improve its complaints and gather new evidence to address insufficiencies raised by TMA's briefing. In so doing, the Regional Board severely abused the process and denied TMA a right to a hearing and speedy resolution of its dispute.*

Response: The Discharger appears confused about what statute of limitations it thinks applies in this action. In its most recent correspondence, discussed above, the Discharger asserts that a three-year statute of limitations governs. But in December 2006, the Discharger argued that Water Code section 13323(b) creates a 90-day statute of limitations. This argument too, fails to stand up to scrutiny.

Background. To provide the factual context for the Discharger's argument, it is important to understand the underlying reasons for the series of ACL Complaints issued by the Regional Board Prosecution Team in this matter. The Discharger characterizes it metaphorically as a player in draw poker selecting new cards after viewing an opponent's hand. To be complete, however, the analogy requires that the opponent have access to its own deck of cards from which to draw new ways to evade enforcement.

The first ACL Complaint (R5-2004-0501), issued to Linkside Place, LLC, on 23 November 2004, was followed by a series of communications by the discharger's attorneys regarding settlement discussions. Initially, the Regional Board heard from Mr. Bartley S. Fleharty, who requested an extension of time to decide whether to pay the proposed penalty. Later, Mr. Timothy O'Laughlin became involved and eventually was given lead attorney status. Despite that designation, a series of contacts over a six-

month period with Mr. Fleharty on one hand, and Mr. O'Laughlin, on the other, indicated a significant amount of confusion regarding legal representation. The communications were at least partly responsible for the failure to hold a hearing during the required 90-day period after issuance of the Complaint.

The second ACL Complaint (R5-2004-0541) was issued to Linkside Place, LLC, on 11 July 2005. This Complaint named another possible owner of the site, William Isaac, as a discharger.

Shortly after issuing this complaint, Regional Board staff determined that the wrong owner had been named. This error resulted from a series of unexplained land transactions:

- Walter & Shirley Brewer granted title to William Isaac on 26 September 2000
- William Isaac granted title to Linkside Place, LLC on 9 April 2002
- Linkside Place, LLC. granted title back to William Isaac on 26 September 2002
- On 22 October 2002 William Isaac issued a letter to Albert Garland giving him authorization to *"sign any documents necessary to further the progress on the subdivision in Oroville.*"
- William Isaac granted title to Tehama Market Associates, LLC on 31 December 2003
- Tehama Market Associates, LLC granted title back to Linkside Place, LLC on 4 October 2004

Within the space of just 4 years, the Linkside Place Subdivision changed hands 5 times. The most notable series witnessed the property passing from Linkside Place, LLC, to Tehama Market Associates, LLC, and then back to Linkside Place, LLC. The reasons for these transfers are unknown. Nevertheless, the frequency and number of them meant that the Regional Board staff ended up naming Linkside Place, LLC, instead of Tehama Market Associates.

A third complaint, R5-2006-0501, naming the correct owner, Tehama Market Associates LLC was issued on 25 January 2006. Prior to reaching a hearing, the complaint was removed by the Regional Board in consultation with the Advisory Team. The reasons were explained in a 13 March 2006 letter to Mr. Tim O'Laughlin, on behalf of Tehama Market Associates, and Jim Pedri, on behalf of the Prosecution Team. An issue had evidently arisen prior to the hearing regarding whether Tehama Market Associates was actually covered by the General Permit, as assumed by the ACL Order. Mr. Albert Garland had obtained coverage under the General Permit on behalf of William Isaac by submitting an NOI in September 2003. Subsequently, however, Isaac transferred the property to Tehama Market Associates, but no documentation to transfer permit coverage was filed, either by him or Mr. Garland. The question posited by the 13 March 2006 letter, therefore, was:

> "Does he proposed ACL Order appropriately allege that Tehama Market Associates (Tehama) violated the terms of the . . . General Permit . . ., given that the Order states that Tehama did not file an NOI and was not covered by the terms of the General Permit during the time period when the alleged violations occurred?"

The letter requested that Tehama Market Associates and the Prosecution Team both submit briefs addressing this question by April 3, 2006.

Mr. O'Laughlin, on behalf of Tehama Market Associates, flatly refused:

> "Tehama Market Associates . . . will not submit briefing to clarify the issue of whether Tehama is subject to administrative civil liability for violating the terms of the [General Permit]. As the party asserting a claim for relief, the Regional Board must allege jurisdiction. If it does not, then it fails to state a claim upon which relief can be granted and its complaint should be dismissed. If the Regional Board doubts the sufficiency of its own complaint, then it should either rescind the complaint or issue on that is sufficient."

(Letter dated 23 March 2006 from Tim O'Laughlin to Regional Board Chair Robert Schneider.)

Without a definitive resolution of the issue, the Prosecution Team set about determining how to redraft the ACL Complaint to account for the issue of permit coverage. The team ultimately determined to reissue the Complaint presuming that Mr. Isaac intended to transfer the permit coverage he had obtained to the subsequent owner, Tehama Market Associates. The Prosecution Team accordingly issued the fourth ACL Complaint (R5-2006-0525) on 26 October 2006.[1] The ACL explained the supporting rationale for presuming Tehama Market Associates was covered by the General Permit at the time of the violations:

> "While the necessary paperwork does not appear to have been done, from other material facts it is reasonable to conclude that coverage under the General Permit transferred from Mr. Isaac to Tehama Market Associates, LLC. The SWPPP was received less than a month before the date 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,

[1] The Complaint also added Mr. Albert Garland as a named Discharger, on the grounds he was a "responsible corporate officer" in control of Tehama Market Associates, LLC, at the time of the violations.

> LLC. The contractor for the site undertook to comply with the General Permit—albeit with insufficient effort. Despite the ongoing enforcement process culminating in this Complaint, Staff is unaware of any attempt by Mr. Garland or Tehama Market Associates LLC to dispute coverage under the General Permit. Finally, as the storm water discharges in question would be clearly unlawful without permit coverage, it is more reasonable to conclude that permit coverage was effectively transferred from Mr. Isaac to Tehama Market Associates, LLC."

(Complaint No. R5-2006-0525, Finding 7.)

Accordingly, the Complaint gave the Dischargers the benefit of the doubt about General Permit coverage.

Nevertheless, to the surprise of the Prosecution Team, the Dischargers responded by denying they had General Permit coverage. 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 Water Board can not issue a complaint based on violations of the General Construction storm water permit when their client did not file a "Notice of Intent" or obtained 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 [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."*

As Complaint R5-2006-0525 had presumed the General Permit applied, the response prompted the Prosecution Team to redraft the complaint yet again, this time alleging an un-permitted discharge in violation of the Clean Water Act. This Complaint (R5-2007-0500)—the fifth in the series—was issued on April 20, 2007. It also recommended an increased amount of civil liability ($150,000 instead of $100,000) because the blatant failure to transfer permit coverage indicated enhanced culpability.

Thus, this unusual sequence of multiple revised ACL complaints is explained largely by the actions of the Discharger, rather than gamesmanship by the Regional Board staff. Failed settlement discussions led to termination of the first complaint. The second and third derived from the confusion about ownership resulting from the strange sequence of conveyances and re-conveyances of title. And then finally the fourth complaint could

have been avoided altogether had the Discharger just candidly announced that they had decided to forego General Permit coverage. Instead, the Discharger withheld this information until it submitted written comments on the complaint (which, incidentally, were received on the last possible day to comply with the deadline). The Discharger's tactics reveal that it must share considerable responsibility for the delay in bringing this matter to hearing.

90-Day Hearing Requirement. The Discharger's view of the statute of limitations seems to have shifted over time. The most recent claim that a three-year statute of limitations applies is discussed above. Initially the Discharger argued a different statute of limitations, based on the 90-day hearing requirement in Water Code Section 13323, operated to bar this action. That claim too is wrong.

The Discharger is correct that Water Code Section 13323 states that a hearing must be held within a specified time: [WC 13323]

The mere presence of a time limit does not, however, indicate that the Legislature intended to impose a statute of limitations.

> "Time limits are usually deemed to be directory unless the Legislature clearly expresses a contrary intent. In ascertaining probable intent, California courts have expressed a variety of tests. In some cases focus has been directed at the likely consequences of holding a particular time limitation mandatory, in an attempt to ascertain whether those consequences would defeat or promote the purpose of the enactment. [Citations.] Other cases have suggested that a time limitation is deemed merely directory unless a consequence or penalty is provided for failure to do the act within the time commanded. . . . The consequence or penalty must have the effect of invalidating the government action in question if the limit is to be characterized as 'mandatory.'"

(*California Correctional Peace Officers Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145 [internal citations and quotations omitted].)

Accordingly, the appropriate inquiry—which the Discharger never bothers to undertake in its comments—requires a search for a consequence or penalty for failure to do the act within the time commanded or, alternatively a review of the underlying policy of the statute to determine whether the time limit in question is mandatory (i.e., essentially a "statute of limitations") or directory (i.e., aspirational, but not required).

The hearing timeframe in Water Code Section 13323 resembles a similar requirement analyzed in *Cox v. California Highway Patrol* (1997) 51 Cal.App.4th

1580. In that case, the court considered Vehicle Code Section 10751. That statute provides a mechanism for determining the ownership of a seized vehicle with altered identification number. Before disposing of such a seized vehicle, a court must provide notice and a hearing no more than 90 days after seizure. The court held that the hearing requirement was directory, not mandatory, reasoning that the purpose of the statute was to direct law enforcement to ascertain the rightful owner of a seized vehicle and that permitting more time for an investigation than allowed by the statute's hearing deadline would further, not conflict with that overall purpose. (*Id.,* at p. 1589.)

Section 13323 does not provide any consequences for failing to hold a hearing on an ACL complaint within 90 days, which militates against finding the time limit mandatory.

Moreover, to strictly enforce the 90-day requirement would not further any apparent aim of Section 13323 or the enforcement structure of the Porter-Cologne Act in general. Re-issuance of complaints in response to comments enables the Regional Board to correct errors in its enforcement actions. Occasionally, as in this case, a complaint might name the incorrect responsible party or may contain other incorrect alleged violations. To enable those to be fixed prior to a hearing on the matter promotes administrative efficiency because the Regional Board is spared from dealing with errors that could have been rectified earlier in the process. It also does not come at the cost of due process, because even when a complaint is renoticed, the Discharger still receives notice and an opportunity to be heard on the complaint. One potential benefit of the timeline is speedy resolution of enforcement actions. The statutory scheme does not mandate that the Regional Board expedite enforcement actions, however. Because there is no statute of limitations, as discussed above, requiring strict compliance with the 90-day hearing requirement would not prevent the Regional Board from delaying indefinitely the issuance of the complaint. The statutory scheme is therefore not designed to force the Regional Board into premature enforcement actions. Strict enforcement of the timeframe would therefore not further the main objectives of the statute. This requirement is therefore properly viewed as discretionary rather than mandatory and therefore is non-binding.

Laches. The equitable doctrine of laches, was not raised by the Discharger. Accordingly, this defense is waived. (*Caviglia v. Jarvis* (1955) 135 Cal.App.2d 415, 420.)

Even if the defense were timely pled, however, the facts here do not support a claim that this action should be barred by laches.

> The doctrine of laches is a court-made principle based on notions of fairness. Like a statute of limitations, laches can act to bar an action. But with a statute of limitiations, the only relevant factor is delay prior to bringing the action. Laches considers other factors besides delay.
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> "[T]here is no fixed rule as to the circumstances that must exist or as to the period of time which must elapse before the doctrine of laches can be appropriately applied." (*Brown v. State Personnel Board* (1941) 43 Cal.App.2d 70, 78.) The burden to establish laches, however, falls squarely on the party raising it. (See, e.g., *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App. 4th 596, 628.) Where there is "no showing of manifest injustice to the party asserting laches, and where application of the doctrine would nullify a policy adopted for the public protection, laches may not be raised against a governmental agency." (*Id.* at p. 629.)
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> The Discharger characterizes the series of complaints as a player in draw poker selecting new cards after viewing an opponent's hand. To be complete, the analogy requires that the opponent have access to its own deck of cards from which to draw new ways to evade enforcement. As discussed above, the Regional Board Prosecution Team has diligently pursued the Discharger despite its actions that have prolonged this matter. No dilatory tactics have been pursued by the Prosecution Team here. Moreover, the burden to establish prejudice from delay falls on the Discharger. No showing has been made of any specific "manifest injustice" beyond the mere fact that the hearing on this matter has been delayed and several complaints have issued. That showing is insufficient and laches therefore does not apply.

Tehama Market Associates – Comment #3: *Anything not relevant to the discharge of pollutants into waters of the United States should be dismissed and stricken from the record. Evidence regarding the dewatering pump, the adequacy of the SWPPP, the condition of the property, and the implementation of BMPs, erosion, and sediment controls should be stricken as a waste of time, prejudice TMA, and create confusion by obscuring the central issues. Such facts are only relevant as factors the Regional Board may apply in determining the amount of any liability pursuant to 13385(e).*

Response: The commenter concedes that the evidence complained of is, at a minimum, relevant to the consideration of the factors in 13385(e). The commenter accordingly admits that the information is relevant for at least that purpose. The evidence is therefore admissible and should be considered by the Regional Board. The matter of the discharge from the dewatering pump also lends support to the contention pollutants were discharged from a point source (the pipe coming from the pump).

Tehama Market Associates – Comment #4: *The Regional Board has the burden to prove a discharge occurred. And an order imposing civil liability must be based on substantial evidence.*

The complaint fails to establish jurisdiction in that it does not allege, or establish, a "significant nexus" to waters of the United States.

Response: The Discharger claims that the Prosecution Team has failed to establish that the Discharger violated the Clean Water Act. 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 Discharger claims that the Prosecution Team must prove a discharge actually occurred, not just that one "may" or "could" have occurred. No further elaboration is provided to elucidate exactly how the evidence presented by the Prosecution Team is lacking. 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.

Perhaps because there can essentially be no dispute about this element of the violation, the Discharger does not contend that the material in question (sediment) leaving the Linkside Place Subdivision is a "pollutant" within the definition of the Clean Water Act. Such sediment is indeed 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.

The Discharger contends that the Prosecution Team has not demonstrated that the waterbodies receiving storm water from the site were "waters of the United States." For non-navigable waters to be covered by the Clean Water Act, in the Discharger's view, they must possess a "significant nexus" to downstream navigable waters per the recent U.S. Supreme Court decision, *Rapanos v. United States* (2006) 126 S.Ct. 2208. Because such a nexus does not exist for the ephemeral drainages and wetlands bordering the Linkside Place Subdivision, the Discharger argues, those waterbodies are beyond the reach of the Clean Water Act.

The Discharger is wrong for two reasons: (1) *Rapanos* concerned the issue of Clean Water Act coverage of adjacent wetlands, not intermittent tributaries; and (2) where, as here, the impacts on endangered species in the wetlands and tributaries could affect interstate commerce, jurisdiction is established without the need to establish "significant nexus" to downstream navigable waters.

> **Intermittent tributaries.** The U.S. Court of Appeals for the Ninth Circuit recently clarified that *Rapanos* 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:
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> > "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.

Again, an issue undisputed by the Discharger. 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.

* * *

In summary, the foregoing demonstrates that the storm water flows which are the subject of this complaint constitute a discharge of pollutants to a water of the United States in violation of the Clean Water Act and Water Code Section 13385.

Tehama Market Associates – Comment #5: *The complaint fails to establish jurisdiction in that the Regional Board lacks the authority to use the General Construction Storm Water Permit as a basis for civil liability. The permit expired and, in any event, Tehama Market Associates did not obtain coverage under that permit.*

Response: Previously some confusion existed over whether the Discharger had obtained coverage under the General Permit. Mr. Garland initially obtained coverage on behalf of the property owner, Mr. Isaac, and on behalf of Linkside Place, LLC. When the property transferred to Tehama Market Associates, LLC, therefore, the Regional Board surmised that Mr. Garland had intended to transfer coverage to the new owner. The letter from O'Laughlin & Paris LLP dated December 20, 2006, clarified that Mr. Garland made no attempt to transfer coverage to Tehama Market Associates, LLC or in any other way to secure coverage under the General Permit for that property owner. Accordingly, the complaint now claims that Tehama Market Associates, LLC and Mr. Garland unlawfully discharged pollutants without an NPDES permit. The General Permit is therefore no longer claimed as a basis for liability.

Tehama Market Associates – Comment #6: *The complaint fails to establish jurisdiction in that the allegations in it are insufficient to hold Mr. Garland personally liable. The complaint does not establish a sufficient "unity of interest and ownership" between Mr. Garland and Tehama Market Associates for Mr. Garland to be personally liable.*

Response: The comment misinterprets the claim against Mr. Garland. The comment appears to base its contention on "alter ego" liability, asserting that the complaint fails to properly establish that claim.

The Discharger has confused two different theories of liability. The "alter ego" theory referred to by the Discharger is a form of the doctrine known as "piercing the corporate veil," by which a court may disregard the corporate form and hold individual shareholders responsible for acts of

the corporation. (*Babbitt Engineering & Machinery v. Agricultural Labor Relations Board* (1984) 152 Cal.App.3d 310, 340-341.) The responsible corporate officer doctrine is distinct from piercing the corporate veil and explicitly expands liability beyond veil piercing. (*Commissioner, Indiana Dept. of Environmental Management v. Roland* (Ind. 2001) 775 N.E.2d 556, 563, citing *United States v. Dotterweich* (1943) 320 U.S. 277, 282.)

Thus, Mr. Garland's liability based on "responsible corporate officer" liability stands as alleged in the ACL Complaint.

Tehama Market Associates – Comment #7: *Mr. Montgomery's statement supporting the volume of pumped storm water discharge is based on hearsay and must be excluded.*

Response: While Mr. Montgomery's statement is potentially hearsay, Mr. Montgomery will be subpoenaed to affirm that prior statement at the hearing. Providing such live testimony will cure any potential hearsay issue. Additionally, Mr. Montgomery's statement is only tangentially relevant at this point. As the Discharger points out, the gallonage discharged by the dewatering pump is subsumed within the calculation for the overall discharge from the site. His

Tehama Market Associates – Comment #8: *The Regional Board incorrectly calculated civil penalties. The maximum penalty for the number of days of violation ($10,000 per day) should be $20,000.*

Response: Now that the complaint reflects an unpermitted discharge on two days, the amount of civil liability for each day of violation has dropped from $70,000 to $20,000 because discharges without a permit in violation of the Clean Water Act were observed on two days.

Tehama Market Associates – Comment #9: *The Regional Board double-counted the discharge from the dewatering pump. The discharge from the pump was subsumed within the 641,000 gallons estimated to have been discharged from the entire site.*

Response: The discharge from the dewatering pump, in the original complaint, amounted to a separate violation of the General Permit because of the petroleum discharged. Because the new complaint no longer uses the General Permit as a basis for the violations, the commenter is correct that the discharge from the dewatering pump is subsumed into the discharge from the site. The ACL Order will be accordingly revised.

Tehama Market Associates – Comment #10: *The ACLC does not allege how much storm water from the Linkside Place Subdivision actually discharged to waters of the United States. The estimate that 641,000 gallons discharged from the site is not accompanied by an explanation of how much went north and how much went south/southeast. Without an allegation that all the runoff discharged to waters of the United States, the complaint is insufficient to support the per-gallon penalty in Water Code Section 13385(c)(2).*

Response: During February 2004, Regional Water Board staff documented two days of sediment-laden discharge to waters of the State. Regional Water Board staff observed and sampled the discharges on 18 February and 25 February 2004. Regional 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) 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).

The gallons calculated is a conservative estimate using the rational method. The site soils are clay and the site was saturated so percolation was low. The calculation does not differentiate on the direction of flow from the site. Staff is aware that the site slopes from northwest to southeast, as provided in the Drainage Analysis of the Table Mountain Golf Course, the adjacent golf course. Staff did observed some stormwater from the north portion of the site flow to the north drainage, but would estimate that discharge as less then 10 percent of the total off-site flow.

Linkside Place is located on the south side of Highway 162 between Highway 99 to the west and Highway 70 to the east, four miles west southwest of Oroville, in Butte County (Assessor Parcel Number 030-260-021). Linkside Place is adjacent to and west of the NEXRAD Radar Facility (NEXRAD). The subdivision will be built out in multiple phases with Phase I consisting of 18 acres (developed into approximately 65 single-family residences with utilities, roads and open space). Table Mountain Golf Course (Golf Course) is on the east side of the NEXRAD. The mass grading of the site produced a gentle slope from west to east. The majority of runoff from the site discharges to unnamed ephemeral drainages and wetlands shared with the NEXRAD and Golf Course to the east/southeast and flows generally from the north to south. The ephemeral drainages and wetlands then flow to the southeast by the Oroville Airport discharging into the Feather River. Runoff from the northern part of the development discharges north towards Highway 162 and is conveyed under Highway 162 by three roadside drains where it is discharged into ephemeral drainages. The ephemeral drainages are tributary to Thermalito Afterbay, which is tributary to the Feather River. On 10 March 2006 Regional Water Board staff followed and surveyed the drainages courses from the construction site to Thermalito Afterbay and the Feather River and confirmed that ephemeral drainages and wetlands are hydraulically connected to waters of the United States. Therefore, an NPDES Permit is required by the CWA for discharge of storm water from the construction site into the ephemeral drainages and wetlands.

Soils in the Linkside Place area have high clay content which, when disturbed and exposed to rain and storm water, produce very turbid runoff because of the colloidal suspension of clay particles. These colloidal clays and suspended materials cannot be adequately removed by short term settling alone. (See Goldman et al. (1986) Erosion and Sediment Control Handbook, pp. 5.5-5.4.) Removal of this suspended material by settling requires extended detention times and/or chemical addition and filtration.

Tehama Market Associates – Comment #11: *The Regional Board staff, in choosing the "average" cost of compliance, rather than the least costly method of complying, overestimated the cost of compliance. There is no basis for the Staff Report's estimate that the Linkside Place lots could sell for $150,000 or more.*

Response: Regional Board staff did not choose the average cost of compliance as the Discharger asserts. An agency is not required, when estimating economic benefit, to achieve perfection. Instead, only a "reasonable approximation" is required. (*Borden Ranch Partnership v. U.S. Army Corps of Engineers* (E.D. Cal., Nov. 8, 1999) 1999 WL 1797329, *17.

["The precise economic benefit a polluter has gained by violating [the Clean Water Act] may be difficult to prove, so reasonable approximations of economic benefit will suffice. [internal citations and quotations omitted].)

To obtain an estimate of the cost of adequate compliance, the Regional Board staff took a survey of costs per acre for storm water controls. Staff was concerned that the lowest estimates may not be adequate to control storm water as required by the General Permit. The purpose of taking an average was to ensure that the figure picked would fund adequate storm water controls. This method of calculation constitutes a reasonable approximation of the cost of compliance. Notably, economic benefit does not define the amount of civil liability to be assessed. Economic benefit or cost saved from the violation must be recovered. (Water Code Section 13385(e).) Accordingly, economic benefit or cost savings operates as a floor on the amount of civil liability the Regional Board must impose. The Board is free to impose a greater amount based on the evaluation of other factors in 13385(e).