

**STAFF REPORT**  
**ADMINISTRATIVE CIVIL LIABILITY ORDER**  
**FOR**  
**TEHAMA MARKET ASSOCIATES, LLC**  
**AND**  
**ALBERT GARLAND**  
**LINKSIDE PLACE SUBDIVISION**  
**BUTTE COUNTY**

**CASE BACKGROUND**

On 14 October 2003 Albert G. Garland signed a Notice of Intent (NOI) for coverage under the National Pollutant Discharge Elimination System (NPDES) Permit for Storm Water Discharges Associated with Construction Activities (General Permit) for the construction of 65 residential housing lots on an 18.6-acre site near Oroville, Butte County. Mr. Garland was acting as an agent for Mr. William Isaac who is listed on the NOI as the property owner of Linkside Place Subdivision (hereafter Linkside Place). On 22 October 2002, Mr. William Isaac signed a letter giving Mr. Garland rights to sign any document necessary to further the progress on the subdivision in Oroville. Mr. Garland signed the NOI and listed Project owner and manager underneath his signature on the NOI. On 23 October 2003 the State Water Resources Control Board (State Water Board) confirmed coverage under the General Permit and issued identification Number WDID #5R04C324269. On 5 December 2003, the Central Valley Regional Water Quality Control Board (Central Valley Water Board), Redding Office received the Linkside Place Storm Water Pollution Prevention Plan (SWPPP). On 31 December 2003 Mr. William Isaac granted the property to Tehama Market Associates, LLC.

By signing the NOI Albert Garland certified the following:

*"I certify under penalty of law that this document and all attachments were prepared under my direction and supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment. In addition, I certify that the provisions of the permit, including the development and implementation of a Storm Water Pollution Prevention Plan and a Monitoring Program Plan will be complied with."*

In late Fall 2003, the site was cleared of vegetation and extensive grading and earthwork activities were conducted throughout the site. Central Valley Water Board Redding Office staff obtained an aerial photograph of Linkside Place taken on 21 November 2003. The aerial photograph shows that no erosion control Best Management Practices (BMPs) were deployed on the site and only a silt fence was deployed around the perimeter. During the winter of 2003-2004 construction activities started and two shallow cul-de-sacs were constructed on the eastern side (Logan and Zachary Courts) to provide storm water detention or treatment.

These shallow cul-de-sacs were greatly undersized and therefore inadequate to prevent the discharge of highly turbid water and sediment into nearby wetlands and ephemeral drainages.

A Storm Water Pollution Prevention Plan (SWPPP) was received for Linkside Place on or about December 5, 2003. The SWPPP called for the implementation of a number of best management practices (BMPs) at Linkside Place to prevent or minimize pollutants in storm water discharged from the site.

Central Valley Water Board staff received a citizen complaint regarding the discharge of sediment laden storm water from Linkside Place. Central Valley Water Board staff conducted inspections on 18 and 25 February 2004 and noted numerous violations of the General Storm Water Permit. On 7 April 2004 a Notice of Violation (NOV) was issued to William Isaac and Linkside Place, LLC. On 23 November 2004 the Central Valley Water Board Executive Officer issued an Administrative Civil Liability Complaint (ACL complaint) No. 5-2004-0541 to Linkside Place LLC, in the amount of \$100,000 for violations of the General Permit.

Subsequent to issuance of ACLC No. R5-2004-0541, Central Valley Water Board staff conducted research of the property ownership of Linkside Place subdivision and found that the property had changed ownership several times since obtaining coverage under the General Permit and that the original administrative civil liability complaint may not have named the appropriate Discharger. Extensive research by staff from the State Water Resources Control Board (SWRCB) and Central Valley Water Board determined that Linkside Place, LLC was not a Discharger. The same research determined that Tehama Market Associates, LLC was the Discharger as title to the subdivision was transferred to Tehama Market Associates, LLC just prior to the period of noted violations subject to this complaint. Tehama Market Associates, LLC retained title to the property until October 2004 at which time title was transferred back to Linkside Place, LLC. Based on this new ownership information, on 25 January 2006, ACLC No. R5-2004-0541 was rescinded and replaced by ACLC No. R5-2006-0501. This new ACLC named Tehama Market Associates, LLC the owner of the property at the time relevant to the alleged violations, as the Discharger. ACLC No. R5-2006-0501 was rescinded on 10 April 2006 because the Central Valley Water Board had been unable to hold a hearing within 90 days of the date the complaint was served as required by CWC section 13323.

Albert Garland is a responsible corporate officer of Tehama Market Associates, LLC. The responsible corporate officer doctrine states, in general, that a corporate officer or manager of a limited liability company is liable for a violation committed by the company if: (1) the individual is in a position of responsibility that allows the person to influence company policies or activities; (2) there is a nexus between the individual's position and the violation in question such that the individual could have influenced the company's unlawful actions; and (3) the individual either took actions that facilitated the violations or through inaction failed to prevent the violations. (See *In re: Original Sixteen to One Mine, Inc.* (SWRCB 2003) Order No. WQO 2003-0006, pp. 6-7; *In re: Mr. Kelly Engineer/All Star Gas* (SWRCB 2002) Order No. WQO 2002-0001, p. 5; *People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1213-1216 [managers of limited liability companies treated same as corporate officers]) see also Annot., "Responsible Corporate Officer" Doctrine or

“Responsible Relationship” of Corporate Officer to Corporate Violation of Law (2004) 119 A.L.R.5th 205)

Albert Garland is the sole officer of Professional Resources Systems International, Inc., which is the corporation designated as the “manager” of Tehama Market Associates, LLC. In this capacity, Mr. Garland had the ability to control activities at the site and Mr. Garland did, in fact, exercise control and oversight of the development activities at the Linkside Place Subdivision. He was vested with control over the Linkside Place Subdivision by the former property owner, William Isaac and exercised control over the entitlements for the site. He signed the Notice of Intent to comply with the General Permit, which was received on 23 October 2003, as owner and manager of Linkside Place. He served as the contact person for Central Valley Water Board Staff and appeared to direct the contractors who performed development work on the Linkside Place property. In this role, Mr. Garland had the responsibility to ensure that the work conducted at Linkside Place adhered to applicable laws, including the General Permit. Mr. Garland could have, on behalf of Tehama Market Associates, LLC applied for coverage under the General Permit and could have exercised sufficient control over the contractors to ensure compliance with the General Permit, but failed to do so. Accordingly, Albert Garland is a responsible corporate officer liable for the violations committed by Tehama Market Associates, LLC, in discharging pollutants into waters of the United States without an NPDES permit.

It is clear that William Isaac had coverage under the General Permit due to submission of a NOI by Mr. Isaac’s agent, Albert Garland. There is no evidence in the Central Valley Water Board’s record, however, that Tehama Market Place, LLC obtained coverage under the General Permit following transfer of the property from Mr. Isaac. Either:

- a. Tehama Market Place, LLC did not have coverage under the General Permit and discharged storm water to waters of the United States and created conditions of pollution and nuisance and violated the Clean Water Act and California Water Code by discharging storm water from the construction site without an NPDES Permit, or
- b. Tehama Market Place, LLC did have coverage under the General Permit, by notification from the previous owner, and discharged storm water to waters of the United States and created conditions of pollution and nuisance, and violated the General Permit.

In response to a Notice of Public Hearing in March 2006, for ACLC No R5-2006-0501 the Discharger did not argue that they where not covered by the General Permit.

On 26 October 2006, another complaint ACLC No.R5-2006-0525 was issued to Tehama Market Associates, LLC and Albert Garland collectively designated as the Discharger responsible for the discharge of storm water in violations of the General Construction storm water permit. The complaint was issued in preparation of a hearing on 25/26 January 2007. On 27 November 2006, a tentative Administrative Civil Liability order and a Notice of Public Hearing was sent to the Discharger and publicly notice for a hearing on 25 or 26 January 2007.

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 obtain coverage under the General Permit. Argument IV, D. 2, pages 11-12, states in part:

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

Based upon available information and the "points and authorities" the Discharger discharged storm water from the construction site into waters of the United States and its tributaries without an NPDES Permit in violation of CWA Section 301 and CWC Section 13376 and failed to obtain coverage under the NPDES General Permit No. CAS000002 Order No. 99-08-DWQ. On 29 January 2007, due to the Dischargers admission that the discharge was without a permit, staff rescinded complaint R5-2006-0525 and reissued based on a discharge without a permit.

On 20 April 2007, ACLC R5-2007-0500 was issued to Tehama Market Associates, LLC and Albert Garland in the amount of one hundred fifty thousand dollars (\$150,000) for violations of the CWA Section 301, and CWC Section 13776 and a hearing was schedule for 21 or 22 June 2007.

## **ISSUE**

Did Tehama Market Associates, LLC and Albert Garland (Discharger) discharge storm water without an NPDES Permit as required by the federal Clean Water Act and the California Water Code? Should the Central Valley Water Board adopt the ACL Orders naming Tehama Market Associates, LLC and Albert Garland in the amount of \$150,000? Or should the Central Valley Water Board consider another monetary amount?

## **GENERAL STORMWATER PERMIT BACKGROUND**

### **General Permit**

In 1972, the Federal Water Pollution Control Act (also referred to as the Clean Water Act [CWA]) was amended to provide that the discharge of pollutants to waters of the United States from any point source is unlawful unless the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. The 1987 amendments to the CWA added Section 402(p) which establishes a framework for regulating municipal and industrial storm water discharges under the NPDES Program. On 16 November 1990, the U.S. Environmental Protection Agency (USEPA) published final regulations that establish storm water permit application requirements for specified categories of industries. The regulations provide that discharges of storm water to waters of the United States from construction

projects that encompass five (5) or more acres of soil disturbance are effectively prohibited unless the discharge is in compliance with an NPDES Permit.

On 16 November 1990, the State Central Valley Water Board adopted a NPDES Permit for Storm Water Discharges Associated with Construction Activities (General Permit). The General Permit requires the owners of construction projects, which disturb greater than one acre to submit a NOI indicating that they will comply with the General Permit.

The General Permit requires the discharger to implement best management practices (BMPs) that constitute the best available technology (BAT/BCT) to reduce or eliminate storm water pollution. The General Permit authorizes the discharge of storm water to surface waters from construction sites, if the discharger implements BAT/BCT. The General Permit prohibits the discharge of materials other than storm water. The effluent limitations contained in the General Permit are narrative and include the requirement to implement appropriate BMPs. The BMPs must primarily emphasize source controls such as erosion and sediment controls and pollution prevention methods. The General Permit states that erosion control is the most effective way to retain soil and sediment on the construction site and that the most efficient way to address erosion control is to preserve existing vegetation where feasible, to limit disturbance, and to stabilize and revegetate disturbed areas as soon as possible after grading or construction.

The General Permit requires the discharger to prepare a Storm Water Pollution Prevention Plan (SWPPP). A SWPPP specifies the use of appropriately selected, correctly installed and maintained pollution reduction BMPs. The SWPPP has two major objectives: 1) to help identify the sources of sediment and other pollutants that affect the quality of storm water discharges, and 2) to describe and ensure the implementation of BMPs to reduce or eliminate sediment and other pollutants in storm water, and non-storm water discharges.

Albert Garland signed and submitted a NOI for coverage under the General Permit in October 2003, for William Isaac. As discussed above William Isaac was listed as owner of the Linkside Placer on the NOI, which was signed by Albert Garland as William Isaac's agent. An initial SWPPP was prepared by a consultant for the project and revised on several occasions. Through further research, it was determined that Tehama Market Associates, LLC was owner of Linkside Place during the period of the documented violations.

On 21 December 2006, in response to the hearing notice the Discharger, through their legal counsel, submitted "*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, on pages 11-12 states in part:

...*"All of the violations alleged by ACLC R5-2006-0525 are of the General Permit, even though TMA {Tehama Market Associates LLC} never submitted a NOI, vicinity map, or fee. (ACLC R5-*

*2006-0525,p2 para.7.) TMA therefore never had a General Permit, was not covered by the General Permit, and was not subject to its terms.”*

Based upon available information and that made in the ‘points and authorities” the Discharger discharged storm water from the construction site into waters of the United States and its tributaries without an NPDES Permit in violation of CWA Section 301 and CWC Section 13376 and failed to obtain coverage under the NPDES General Permit No. CAS000002 Order No. 99-08-DWQ.

### **Water Quality Objectives**

The Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan) presents water quality objectives for water quality constituents or characteristics to protect beneficial uses of water or prevent nuisance conditions.

The water quality objective for sediment is: *“The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.”*

The water quality objective for suspended material is: *“Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.”*

The water quality objective for turbidity includes both narrative and numeric objectives and states in part, *“Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases in turbidity attributable to controllable water quality factors shall not exceed the following limits:*

- *Where natural turbidity is between 0 and 5 Nephelometric Turbidity Units (NTUs), increases shall not exceed 1 NTU.*
- *Where natural turbidity is between 5 and 50 NTUs, increases shall not exceed 20 percent.*
- *Where natural turbidity is between 50 and 100 NTUs, increases shall not exceed 10 NTUs.*
- *Where natural turbidity is greater than 100 NTUs, increases shall not exceed 10 percent....”*

The implementation section of the Basin Plan contains a prohibition on the discharge of petroleum hydrocarbon which states: *“The Regional Board has prohibited the discharge of oil or any residuary product of petroleum to the waters of the State, except in accordance with waste discharge requirements or other provisions of Division 7, California Water Code.”*

### **Benchmarks**

Total suspended solids (TSS) include all particles suspended in water that will not pass through a 2.0µm filter. As levels of TSS increase, a water body begins to lose its ability to support a diversity of aquatic life. Some possible sources for TSS can be sediment from erosion of exposed land, and dirt from impervious areas. Sediment by itself can be very toxic to aquatic life because it covers feeding and breeding grounds, and smothers organisms that may live on the bottom of a water body. Toxic chemicals and other pollutants also adhere to sediment particles. This provides a medium for toxic or other pollutants to enter waterways and can ultimately impact human and aquatic life. Elevated TSS concentrations can block light from reaching submerged vegetation. As the amount of light passing through the water is reduced, photosynthesis slows down (reduced rates of photosynthesis causes less dissolved oxygen to be released into the water by plants).

Benchmarks were developed for the General Industrial Storm Water Permit that, in part, covers land disturbance at industrial facilities where soil erosion may occur as a result of industrial activity or storm water discharges associated with industrial activity. The TSS benchmarks are general guidelines and are not limits and offer guidance in determining whether storm water discharges from an industrial facility may be impacting beneficial uses of surface waters receiving the storm water discharge. The TSS benchmarks would also be relevant in the determination of whether a storm water discharge is having a deleterious impact to a water body for dischargers operating under the General Construction Storm Water Permit. Based on these benchmarks, TSS concentrations that exceed 30-50 mg/L are cause for concern (with possible investigation), and when TSS concentrations exceed 100 mg/L warrant a follow up investigation.

## **CENTRAL VALLEY WATER BOARD STAFF INSPECTIONS**

### **Site Location and Conditions**

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 (see Figure 1). 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 Central Valley 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 and such practices do not meet BAT/BCT to reduce or eliminate storm water pollution. Removal of this suspended material by settling requires extended detention times and/or chemical addition and filtration.

### **Central Valley Water Board Staff Inspections**

In February 2004, Central Valley Water Board staff received a complaint regarding very turbid storm water leaving Linkside Place and entering ephemeral drainages and wetlands on the eastern side of the development. The complainant also indicated that the wetlands in the northwest corner of Table Mountain Golf Course were very turbid.

18 February 2004 Inspection - On 18 February 2004, Central Valley Water Board staff inspected the Linkside Place site. Prior to the inspection, precipitation in the Oroville area had been heavy. Three rain gages located in the Oroville area recorded rainfall between 1.37 and 2.20 inches on 17 February 2004 and between 0.0 and 1.48 inches of rain on 18 February 2004. No one was on site at the time of the inspection. The entire site had been mass graded and there was extensive soil disturbance. There was no erosion control BMPs deployed at the site and the only sediment control BMP deployed was the placement of silt fence around the perimeter of the site (except two areas on the eastern boundary where the silt fence had been removed). The silt fence was in disrepair in numerous locations and did not appear to have been maintained. The entire site was muddy and turbid storm water was discharging from the site at numerous locations. Logan Court was being used as a storm water detention pond.

A dewatering pump was observed actively dewatering the highly turbid and sediment-laden Logan Court detention pond. The dewatering pump was also leaking fuel into the detention pond and there was visible petroleum hydrocarbon sheen in the vicinity of the pump. The pump was discharging the sediment laden and petroleum hydrocarbon polluted dewater off-site into ephemeral drainages and wetlands adjacent to the site. Additional discharges of sediment-laden runoff were being discharged from portions of the site not tributary to the detention pond. These discharges were also into ephemeral drainages and then onto the NEXRAD and Golf Course properties. The ephemeral drainages and wetlands also received run-on from the property directly to the south (this property will eventually be developed as subsequent phases of the Linkside Place development). The run-on was clear (not turbid or sediment-laden). Sample locations for 18 February 2004 are shown in Figure 1. Storm water samples were taken from the end of the pipe of the dewatering operations (Sample No. 1), from the ephemeral drainage on the Golf Course property that was receiving the dewatering discharge (Sample No. 2) and from a wet swale just over the site property line on the NEXRAD



site (Sample No. 3). Sample No. 3 had not been impacted by the Linkside Place storm water discharge and is representative of background conditions.

At the conclusion of the inspection, Central Valley Central Valley Water Board staff contacted John Montgomery, E-Ticket Construction, and informed him that the site was not in compliance with the General Permit. General Permit violations included a lack of BMP maintenance, lack of deployment of erosion control BMPs, sediment discharge to waters of the State and the discharge of unfiltered or untreated dewater from the site to waters of the State. Staff was not aware that Tehama Market Associates, LLC was the owner the site and that they had not filed an NOI for coverage under the General Permit.

Table 1 presents the results of the 18 February 2004 inspection samples documenting the discharge of sediment laden and turbid storm water to surface waters tributary to the Feather River.

<b>Table 1</b>				
Linkside Place Water Analyses for 18 February 2004				
Sample location	Turbidity NTU	Total Suspended Solids (TSS) mg/L	Comparison with TSS Benchmark Value (100 mg/L)	Comparison with BP Turbidity Objective
<b>Sample No. 1</b> -End of dewater pipe on Linkside Place property (discharge)	2,440	1,900	>19 times	>168 times
<b>Sample No. 2</b> -Discharge into ephemeral drainage on Golf Course property (discharge)	1,740	1,150	>11 times	>120 times
<b>Sample No. 3</b> -Wet swale adjacent to north side of NEXRAD (background)	12.1	<b>BACK</b> 7	<b>GROUND</b> <14 times	--

The Discharger was in violation of the Basin Plan for exceedance of the narrative water quality objective for sediment and suspended material. The Discharger was in violation of the Basin Plan for exceedance of the numerical objective for turbidity. The results of the storm water analyses (as shown above in Table 1) indicate that Linkside Place was discharging turbid and sediment-laden storm water to surface waters tributary to Feather River. The turbidity and TSS exceedances shown above for discharges into wetlands and surface waters tributary to Feather River violate the Basin Plan and the CWA.

19 February 2004 Telephone Conversation - Central Valley Water Board staff contacted Mr. Montgomery by phone and stated that: 1) the Discharger needed to comply with the General Permit, and 2) violations of the General Permit could make the Discharger liable for an administrative civil liability of \$10,000/day/violation. When Central Valley Water Board staff asked about the dewatering operations, Mr. Montgomery stated that he set up the dewatering pump and that the pump only ran on 18 February 2004 from 0800 hours to 1630 hours (8.5 hours). Central Valley Water Board staff measured the flow from the pump using a small (1/2 gallon) container and a watch at 6 gallons per minute. Conservative flow estimates was 3060 gallons within the 8-½ hour time frame. When Central Valley Water Board staff discussed the dewatering pump leaking fuel and of the petroleum hydrocarbon sheen on the storm water, Mr. Montgomery acknowledged that he knew the pump was leaking fuel.

23 February 2004 Inspection - On 23 February 2004 Central Valley Water Board staff inspected Linkside Place and observed that the Discharger had not deployed an effective combination of erosion and sediment control BMPs on all disturbed areas during the rainy season. No one was on site at the time of the inspection. The dewatering operation had been discontinued. It was not raining but it had rained the previous day. The ground was wet and there were numerous puddles of muddy water throughout the project. Although some additional sediment control BMPs were deployed and some recently dug trenches were backfilled with sand and ballast rock, erosion and sediment controls at the site remained inadequate, these are violations of General Permit Special Provisions C.2, and Section A: Storm Water Pollution Prevention Plan A.1.c, and A.6.

25 February 2004 Inspection - On 25 February 2004, Central Valley Central Valley Water Board staff again inspected the site. Precipitation in the Oroville area had been heavy prior to the inspection. (Oroville area rain gages recorded between 0.39 and 1.00 inches of rain on 24 February 2004 and between 0.80 and 1.40 inches of rain on 25 February 2004). No one was on site at the time of the inspection. The contractor had deployed silt fence and straw wattle at the northeast corner, straw had been broadcast on and around the fill slopes on the northwestern side and filter fabric and gravel had been deployed at the northwest corner of the site. Two hay bales had been deployed in the roadside drainage ditch on the south side of Highway 162 on the west and eastside of the NEXRAD road. These additional erosion and sediment control BMPs were ineffective in stabilizing the site or controlling sediment transport offsite into waters of the State. No erosion control BMPs had been deployed on the northwestern, middle or southern portions of the site.

A total of ten water samples were taken during the inspection, at locations shown in Figure 2. Three samples (Nos. 3, 6 and 7) were not affected by the Linkside Place storm water discharge and would be representative of background conditions. Two samples were taken on the north side of Highway 162 (Nos. 9 and 10) and were turbid and sediment-laden. Two samples (Nos. 1 and 2) were taken at the northeast corner of Linkside Place as it discharged onto the Golf Course and were turbid and sediment-laden. A sample of a delineated wetland area immediately east of the Linkside Place east property boundary (Sample No. 4) was turbid

and sediment-laden. A sample of an ephemeral drainage on the east side of the NEXRAD road adjacent to the Golf Course (Sample No. 5) was taken and was turbid and sediment-laden. The results of the storm water analyses (as shown below in Table 2) indicate that Linkside Place was discharging turbid and sediment-laden storm water to surface waters tributary to the Feather River. The Discharger was in violation of the Basin Plan for exceedance of the narrative water quality objective for sediment and suspended material. The Discharger was in violation of the Basin Plan for exceedance of the numerical objective for turbidity.

<b>Table 2</b> Linkside Place Water Analyses for 25 February 2004				
Sample Location	Turbidity NTU	Total Suspended Solids (TSS) mg/L	Comparison with TSS Benchmark Value (100 mg/L)	Comparison with BP Turbidity Objective
<b>Sample No. 1</b> Eastside NEXRAD road & NW corner of golf course property (discharge)	2,590	1,640	>16 times	>39 times
<b>Sample No. 2</b> Westside NEXRAD road, NE corner of Linkside Place (discharge)	1,960	1,920	>19 times	>29 times
<b>Sample No. 3</b> South of site, ephemeral drainage Westside NEXRAD facility (background)	55.6	<b>BACK</b> 10	<b>GROUND</b> <10 times	--
<b>Sample No. 4</b> Delineated wetland, Westside of NEXRAD road, east of site (discharge)	2,770	2,300	>23 times	>42 times
<b>Sample No. 5</b> Culvert discharge to ephemeral drainage 100' north of NEXRAD facility (discharge)	3,000	2,080	>20 times	>45 times
<b>Sample No. 6</b> Wet swale ephemeral drainage north side NEXRAD Facility	10.2	<b>BACK</b> 5	<b>GROUND</b> <20 times	--

(background)				
<b>Sample No. 7</b> Wetland ephemeral drainage 20' south of NEXRAD Facility (background)	20.9	<b>BACK</b> 8	<b>GROUND</b> <12 times	--
<b>Sample No. 8</b> NE corner of site between silt fence barriers (discharge on property)	2,600	1,760	>17 times	>39 times
<b>Sample No. 9</b> Northside Hwy 162 150' east of NEXRAD (discharge)	925	285	>2 times	>14 times
<b>Sample No. 10</b> Northside Hwy 162 across from NW corner of Linkside Place (discharge)	305	174	>1.7 times	>4 times

The results of samples collected on 18 and 25 February 2004 (excluding background), as shown in Tables 1 and 2 above, document that turbid and sediment-laden storm water was discharged from the site to adjacent properties and surface waters in excess of basin plan water quality objectives. These violations were caused by the Discharger's failure to properly implement and maintain effective BMPs using BAT/BCT performance standards, which led to the discharge of pollutants to waters of the United States from the construction site.

### CENTRAL VALLEY WATER BOARD STAFF ACTIONS

#### Issuance of Notice of Violation

Due to the noted violations that occurred on 18 and 25 February 2004, the Discharger was issued a Notice of Violation (NOV) on 7 April 2004 that required the Discharger to: 1) discontinue all discharges of materials other than storm water which are not otherwise authorized by an NPDES permit, 2) implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season, 3) maintain BMPs to reduce or eliminate pollutants in storm water discharges and authorized non-storm water discharges, 4) inspect the construction site regularly to ensure that appropriate and effective sediment and erosion control BMPs are installed and maintained throughout Linkside Place, 5) inspect the construction site before and after storm events and once each 24-hour period during extended storm events to identify BMP effectiveness and implement repairs or design changes as soon as feasible depending on field conditions, 6) for each inspection complete an inspection checklist as listed under Section A: Storm Water Pollution Prevention Plan, No. 11 Maintenance, Inspection and Repair, 7) ensure that the person(s) responsible for inspections

are properly trained in storm water management including the effective use of storm water management BMPs and good housekeeping practices for construction sites, and 8) submit by 27 April 2004, a revised SWPPP with map showing the location of all BMPs, photographic evidence of the corrections made and any additional BMPs installed in response to the NOV and to submit a written summary of how the Discharger will prevent future violations and potential discharges of pollutants to waters of the State.

**Discharger Response To NOV**

A letter dated 21 April 2004 was received from Hanover Environmental (Dischargers consultant) stating that the Discharger had retained them to assist in obtaining compliance with the General Permit. On 26 April 2004 Hanover Environmental requested a time extension for the SWPPP submittal from 27 April to 7 May 2004. A revised SWPPP was received in the Redding Central Valley Water Board Office on 7 May 2004. This SWPPP essentially covered proposed BMP implementation for the following (2005) winter period.

**ISSUANCE OF ORIGINAL ACL COMPLAINT BY EXECUTIVE OFFICER**

Due to the severity of the violations noted during the February 2004 inspections and the disregard for compliance with the General Storm Water Permit, the Executive Officer, on 23 November 2004 issued an Administrative Civil Liability Complaint (ACL complaint) No.R5-2004-0541 to Linkside Place LLC, in the amount of \$100,000 for violations of the General Storm Water Permit that occurred in the winter of 2004. Immediately upon issuance of the original ACL complaint, attorneys representing the Discharger and the site contractor initiated lengthy and ultimately unsuccessful settlement discussions.

**ORIGINAL ACL COMPLAINT SETTLEMENT DISCUSSIONS**

The original ACL complaint gave Linkside Place LLC until 24 December 2004 to sign a waiver for hearing and to pay the \$100,000 liability or to appear at a hearing before the Regional Central Valley Water Board in accordance with California Water Code (CWC) Section 13323. Following is a chronology of events regarding settlement discussions that ensued after issuance of the original ACL complaint:

<b>20 December 2004</b>	Letter from one of the Discharger’s attorney, Mr. Bartley S. Fleharty requesting an extension from 24 December 2004 to 10 January 2005 to determine whether or not to pay \$100,000 penalty.
<b>28 December 2004</b>	Meeting with Tim O’Laughlin, attorney representing the Discharger and E-Ticket Construction and Hanover Environmental (consulting firm hired to eliminate storm water violations).
<b>28 December 2004</b>	Central Valley Water Board letter to the Fleharty granting extension until 10 January 2005 or pay the liability.
<b>12 January 2005</b>	Letter from O’Laughlin to Central Valley Water Board requesting another extension to 24 January 2005 to pay liability and to set 19

	January 2005 as date to discuss a settlement. (O’Laughlin given lead attorney status by Discharger)
<b>12 January 2005</b>	Central Valley Water Board letter to Discharger and O’Laughlin granting payment extension to 24 January 2005 and confirming 19 January 2005 settlement meeting.
<b>19 January 2005</b>	Settlement meeting. No settlement reached. O’Laughlin stated settlement decision forthcoming.
<b>14 February 2005</b>	Central Valley Water Board letter to the Discharger requesting, by 25 February, notification of Discharger’s intent regarding settlement of ACLC. (cc to O’Laughlin and Fleharty)
<b>23 February 2005</b>	Letter from Fleharty requesting a third extension of payment to 25 March 2005.
<b>24 February 2005</b>	Central Valley Water Board staff inspection found site to be in compliance with General Permit. Central Valley Water Board staff telephoned Fleharty requesting payment of liability or request for hearing and indicated that third extension would not be granted. Fleharty stated that the owner and contractor have scheduled a meeting next week to determine whether to pay liability. Staff requested Fleharty notify Central Valley Water Board of decision.
<b>1 March 2005</b>	Central Valley Water Board staff faxed the 24 February 2005 record of communication to Fleharty denying third extension request.
<b>16 March 2005</b>	Telephone call from Fleharty stating that he had called the Discharger numerous times but had not received a response. Fleharty stated that he did not know dischargers intention but that he advised full payment
<b>12 May 2005</b>	Central Valley Water Board staff telephoned Fleharty and informed him that full liability payment must be received in the Redding office by close of business 26 May 2005 or item would be placed on the agenda for the June 2005 Board meeting.
<b>23 May 2005</b>	Letter from Executive Officer to Discharger requesting full payment by close of business on 26 May 2005 item remain on June 2005 agenda. Letter further stated that the Central Valley Central Valley Water Board would consider at the hearing whether to affirm, reject or modify (increase or decrease) the proposed \$100,000 liability, or refer matter to the Attorney General for judicial civil liability with maximum liability at \$310,400.
<b>26 May 2005</b>	Telephone call from Fleharty stating he could not reach the discharger regarding payment. <b>Item placed on June 2005 Central Valley Water Board Agenda.</b>
<b>7 June 2005</b>	Letter from O’Laughlin stating he was just retained by Discharger. Letter requested delay of hearing until at least 6 September 2005 to allow for discovery, depositions and consultation with experts.

<b>9 June 2005</b>	Central Valley Water Board staff call to O’Laughlin stated extension not likely.
<b>13 June 2005</b>	Second letter from O’Laughlin to Executive Officer requesting extension (with list of reasons) to 6 September 2005.
<b>13 June 2005</b>	Letter from Executive Officer to O’Laughlin stating request for extension denied.
<b>14 June 2005</b>	Third letter from O’Laughlin asking that the Executive Officer reconsider the extension request.
<b>14 June 2005</b>	Central Valley Water Board staff served with a subpoena order to appear for a deposition regarding the Linkside Place ACLC on 21 June 2005.
<b>17 June 2005</b>	Central Valley Water Board Staff Counsel (David Coupe) notified O’Laughlin that Linkside matter was to be removed from the June 2005 Agenda.
<b>21 June 2005</b>	Counsel receives a letter from O’Laughlin that deposition of Central Valley Water Board staff rescheduled to 12 July 2005.

The original ACL complaint was for violations that occurred in February 2004. Erosion control efforts at the Linkside Place site were substantially improved prior to the 2005 rainy season and were found to comply with the General NPDES Permit. No additional violations were noted during the period covered by the above chronology.

The chronology listed above indicates significant confusion regarding legal representation on behalf of the discharger listed on the original ACL complaint and an indication that whoever was actually representing the discharger may not have had direct contact with the proper ownership or representatives thereof.

### **July 2005 REVISED ACL COMPLAINT**

Central Valley Water Board staff in an effort to resolve the outstanding ACL decided to reissue the ACL complaint to name the individual listed as owner on the NOI and to include a corporation that staff determined was also a possible the owner of the site. On 11 July 2005 the Executive Officer re-issued ACLC No.R5-2004-0541 (Revised) to William Isaac, Linkside Place, Inc. and Linkside Place LLC, in the amount of \$100,000 for violations of the General Permit. The only revision to the ACLC was the inclusion of William Isaac and Linkside Place, Inc. as dischargers.

### **DISCOVERY OF OWNERSHIP CHANGE**

Shortly after issuing the revised ACL complaint, a prospective purchaser of the Linkside Place subdivision contacted Central Valley Water Board staff. The prospective purchaser indicated that he was considering acquiring the subdivision property from the current owner that it turned out was not one of the parties named in the original or the revised ACL complaints. Based upon this information Central Valley Water Board staff, with Butte County assistance

conducted a title search of the Linkside Place property. Following is a brief summary of the subdivision's ownership:

- 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  
**(Isaac listed as property owner on NOI submitted to Central Valley Water Board in September 2003)**
- 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 was owner during period of documented violations)**
- Tehama Market Associates, LLC granted title back to Linkside Place, LLC on 4 October 2004

In addition to the title search, State Water Board Office of Statewide Initiatives conducted research regarding the status of the limited partnerships and corporations. The Secretary of State offices in California and Nevada were contacted and it was determined that the individuals and limited partnerships listed in the title search appear to be linked as many of the officers are the same individuals. It was also determined that Linkside Place, LLC and Tehama Market Associates, LLC are corporations in good standing. The lengthy title search indicated that Linkside Place, Inc. (one of the parties named in the revised ACL complaint) was **not** a listed owner during the time storm water violations occurred. The title search identified the owner of the Linkside Place property during the noted 2004 violation period as **Tehama Market Associates, LLC.**

## **JANUARY 2006 ACL COMPLAINT**

Central Valley Water Board staff prepared another revision of the ACL complaint in September 2005. Discussions between Central Valley Water Board staff and counsel regarding the final form of the ACL complaint occurred throughout September, October and December 2005. A determination was made to include only Tehama Market Associates, LLC as the named discharger in the January 2006 version of the ACL complaint. On 25 January 2006, the Acting Executive Officer issued a new ACL complaint No.R5-2006-0501 to Tehama Market Associates, LLC, as the owner and discharger during the observed violations in February 2004. ACL complaint No. R5-2006-0501 rescinded and replaced ACLC No. R5-2004-0541 and was in the amount of \$100,000. Tehama Market Associates, LLC, nor any representative thereof, never submitted a signed waiver or implied any intent to pay the \$100,000 penalty specified in ACL complaint No. R5-2006-0501. A hearing was scheduled for 16 March 2006. Prior to the, hearing objections were raised by the adjudicatory team, and the item was removed at the request of the Central Valley Water Board chair from the March 2006 agenda.



Please note, that in response to the Notice of Public Hearing for the March 2006 hearing, Discharger did not argued that they where not covered by the General Permit.

ACL No. R5-2006-0501 was rescinded on 10 April 2006 because the Central Valley Water Board had been unable to hold a hearing within 90 days of the date the complaint was served as required by CWC section 13323.

### **OCTOBER 2006 ACL COMPLAINT**

Central Valley Water Board staff prepared another revision of the ACL complaint including Tehama Market Associates, LLC, as the owner and discharger during the observed violations in February 2004 and Albert Garland as responsible corporate officer.

Albert Garland is a responsible corporate officer of Tehama Market Associates, LLC. The responsible corporate officer doctrine states, in general, that a corporate officer or manager of a limited liability company is liable for a violation committed by the company if: (1) the individual is in a position of responsibility that allows the person to influence company policies or activities; (2) there is a nexus between the individual's position and the violation in question such that the individual could have influenced the company's unlawful actions; and (3) the individual either took actions that facilitated the violations or through inaction failed to prevent the violations. (See *In re: Original Sixteen to One Mine, Inc.* (SWRCB 2003) Order No. WQO 2003-0006, pp. 6-7; *In re: Mr. Kelly Engineer/All Star Gas* (SWRCB 2002) Order No. WQO 2002-0001, p. 5; *People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1213-1216 [managers of limited liability companies treated same as corporate officers]) see also Annot., "Responsible Corporate Officer" Doctrine or "Responsible Relationship" of Corporate Officer to Corporate Violation of Law (2004) 119 A.L.R.5th 205.)

Albert Garland is the sole officer of Professional Resources Systems International, Inc., which is the corporation designated as the "manager" of Tehama Market Associates, LLC. In this capacity, Mr. Garland had the ability to control activities at the site and Mr. Garland did, in fact, exercise control and oversight of the development activities at the Linkside Place Subdivision. He was vested with control over the Linkside Place Subdivision by the former property owner, William Isaac and exercised control over the entitlements for the site. He signed the Notice of Intent to Comply with the General Water Permit, which was received on 23 October 2003, as owner and manager of Linkside Place. He served as the contact person for Central Valley Water Board Staff and appeared to direct the contractors who performed development work on the Linkside Place property. In this role, Mr. Garland had the responsibility to ensure that the work conducted at Linkside Place adhered to applicable laws, including the General Permit. Mr. Garland could have exercised sufficient control over the contractors to prevent the violations of the General Permit, but failed to do so. Accordingly, Albert Garland is a responsible corporate officer liable for the violations committed by Tehama Market Associates, LLC.

On 26 October 2006, the Assistant Executive Officer issued a new ACL complaint No.R5-2006-0525 to Tehama Market Associates, LLC, and Albert Garland for observed storm water violations in February 2004. The complaint was issued in preparation of a hearing on 25/26 January 2007. On 27 November 2006, a tentative Administrative Civil Liability order and a Notice of Public Hearing was sent to the Discharger and publicly notice for a hearing on 25 or 26 January 2007.

It is clear that William Isaac had coverage under the General Permit due to submission of a NOI by Mr. Isaac's agent, Albert Garland. There is no evidence in the Central Valley Water Board's record, however, that Tehama Market Place, LLC obtained coverage under the General Permit following transfer of the property from Mr. Isaac. Either:

- Tehama Market Place, LLC did not have coverage under the General Permit and discharged storm water to waters of the United States and created conditions of pollution and nuisance and violated the Clean Water Act and California Water Code by discharging storm water from the construction site without an NPDES Permit, or
- Tehama Market Place, LLC did have coverage under the General Permit, by notification from the previous owner, and discharged storm water to waters of the United States and created conditions of pollution and nuisance, and violated the General Permit.

In response to a Notice of Public Hearing in March 2006, for ACLC No R5-2006-0501 the Discharger did not argued that they where not covered by the General Permit.

On 21 December 2006, in response to the hearing notice the Discharger, through their legal counsel, submitted "*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 TMA {Tehama Market Associates LLC} never submitted a NOI, vicinity map, or fee. (ACLC R5-2006-0525,p2 para.7.) TMA therefore never had a General Permit, was not covered by the General Permit, and was not subject to its terms.”*

#### **April 2007 COMPLAINT**

Based upon available information and the "points and authorities" the Discharger discharged storm water from the construction site into waters of the United States and its tributaries without an NPDES Permit in violation of CWA Section 301 and CWC Section 13376 and failed to obtain coverage under the NPDES General Permit No. CAS000002 Order No. 99-08-DWQ. This admission that they discharged with out a permit negated the basis of previous complaints that were issued on violations of the General Permit.

On 20 April 2007 the Assistant Executive Officer replaced ACL Complaint No.R5-2006-0525 with new ACL Complaint No.R5-2007-0500 to Tehama Market Associates, LLC, and Albert Garland for discharging storm water without an NPDES permit or coverage under the General Permit, in violation of the federal Clean Water Act and the California Water Code.

### **PROPOSED ADMINISTRATIVE CIVIL LIABILITY ORDER**

The legal basis for this action is based on violation of the CWA Section 301, and CWC Section 13376. The Discharger is in violation of Section 301 of the CWA and Section 13376 of the CWC, which prohibit the discharge of pollutants to surface waters except in compliance with an NPDES permit.

The Discharger violated the CWA and CWC by discharging storm water from a construction site on 18 February 2004 and 25 February 2004 as observed by Water Board staff. Water samples collected by Water Board staff document that turbid and sediment-laden storm water was discharged from the site to adjacent properties and surface waters in excess of basin plan water quality objectives. These violations were caused by the Discharger's failure to properly implement and maintain effective BMPs using BAT/BCT performance standards, which led to the discharge of pollutants to waters of the United States from the construction site.

### **CONSIDERATION OF ACL FACTORS**

The Central Valley Water Board may impose an ACL pursuant to CWC Section 13385(a) for the discharging pollutants without an NPDES permit. Pursuant to CWC Section 13385(c), the Regional Board may impose civil liability in an amount up to \$10,000 for each day in which the violation occurs, and where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed \$10 per gallon multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

Pursuant to CWC Section 13385(e), in determining the amount of civil liability imposed, the Regional Board shall take into account:

*“the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability; economic benefit or savings, if any, resulting from the violation; and other matters as justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”*

### **Nature and Circumstances**

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

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

### **Extent and Gravity**

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

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

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

### **Susceptibility of the Discharge to Cleanup and Abatement**

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

### **Degree of Toxicity of the Discharge**

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

### **Ability to Pay**

The Discharger is an established developer in good financial standing. The 65 lots are expected to sell for approximately \$150,000 or more. As such, the monetary liability associated with this administrative civil liability should pose no financial hardship for the Discharger nor reduce its ability to continue in business.

### **Prior History of Violations**

There was no prior history of violations at the site.

### **Degree of Culpability**

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

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

*“I certify under penalty of law that this document and all attachments were prepared under my direction and supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment. In addition, I certify that the provisions of the permit, including the development and implementation of a Storm Water Pollution Prevention Plan and a Monitoring Program Plan will be complied with.”*

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

On 21 December 2006, in response to the hearing notice the Discharger, through their legal counsel, submitted a letter dated 20 December 2006 containing “*points & authorities opposing administrative civil liability complaint R5-2006-0525*” in response to the complaint, tentative ACL order and staff report. The points and authorities argues that the 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 TMA {Tehama Market Associates LLC} never submitted a NOI, vicinity map, or fee. (ACLC R5-2006-0525,p2 para.7.) TMA therefore never had a General Permit, was not covered by the General Permit, and was not subject to its terms.”*

This development indicates a level of culpability not previously evident from the prior submittals in this matter. Mr. Garland, as an agent of Mr. Isaac, initially submitted an NOI to comply with the General Permit, which establishes his prior knowledge of the General Permit

and the requirement for activities at Linkside Place Subdivision to be covered under it. Yet, through his counsel, Mr. Garland now appears to assert that he chose not to re-file an NOI on behalf of Tehama Market Associates, LLC. The refusal to seek coverage under the General Permit despite evident knowledge of the requirement to do so shows enhanced culpability on the part of the Discharger.

### **Economic Benefit or Savings Resulting from the Violation**

The Discharger gained an economic benefit by conducting extensive earthwork activities during the rainy season without appropriate erosion and sediment control measures. Scheduling earthwork activities to occur during the dry season is a fundamental BMP for construction activities. The economic benefit for failure to comply with General Permit is \$41,850 by not implementing adequate erosion and sediment control BMPs. This amount is based on a cost of \$2,500 per acre, which is the average cost for erosion and sediment control BMPs that are necessary to provide erosion control for late fall grading activities and erosion control. The Discharger did install some sediment controls around the periphery of the construction site. Sediment controls were deployed in approximately 10 percent of the total area disturbed. The Discharger should have installed, at a minimum, an effective combination of erosion and sediment control on all disturbed areas during the rainy season. The construction site is approximately 18.6–acres in size.

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

### **Other Factors**

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

### **Statutory Maximums and Minimums**

As provided under CWC Section 13385, the Discharger could be held liable for each day on which pollutants were discharged from Linkside Place Subdivision to waters of the United States without coverage under the General Permit. The Discharger's violations are subject to a total maximum civil liability of \$6,450,600, which includes daily discharge violations and volume of discharge. From November 2003 through February 2004 the Discharger failed to install and maintain an effective combination of erosion and sediment control BMPs resulting in the discharge of sediment and sediment-laden storm water to surface waters. During that period staff documented surface water discharges that exceeded Basin Plan water quality objectives for turbidity and suspended solids on 18 February 2004 and 25 February 2004. The discharge of sediment-laden storm water off-site on 18 and 25 February 2004 was conservatively estimated at 641,000 gallons. Staff observed the pumped petroleum hydrocarbon-laden storm water discharges and estimated the volume at 3,060 gallons. The maximum civil liability for days of observed violations is \$20,000. The maximum civil liability for discharge of sediment-laden storm water is determined by multiplying 643,060 gallons (641,000 gallons plus 3,060 gallons pumped minus 1,000 gallons) by \$10 to obtain \$6,430,600.

Under CWC Section 13385(e), an Administrative Civil Liability must recover at least the economic benefit/cost savings derived from the acts that constitute the violations, which in this case is estimated as \$41,850.

**PROPOSED CIVIL LIABILITY**

ACL Complaint No. R5-2007-0500 proposed an ACL in the amount of \$150,000. This amount would recover economic benefit derived from the acts that constitute the violation and takes into account the other factors to be considered in CWC Section 13385.

**SUMMARY AND RECOMMENDATION**

Staff, due to the lengthy settlement discussions and frequent changes in ownership of the Linkside Place property has spent an unusually large amount of time on this matter. The total disregard by the Discharger of implementing adequate erosion control or storm water containment/treatment BMPs and the resulting violations of the Basin plan water quality objectives and to knowingly discharge sediment-laden storm water with out a NPDES permit, warrants a civil monetary penalty. Staff recommends the Central Valley Central Valley Water Board adopt the proposed ACL Order in the amount of \$150,000.