

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement and 13267 Order No. R1-2015-0016

For
Mr. Allen Henderson
5510 Hall Road, Santa Rosa

Sonoma County

WDID No. 1B14027CNSO

This Cleanup and Abatement Order (CAO or Order) is issued to Mr. Allen Henderson (Discharger) for the discharge of fill material into waters of the United States and state, pursuant to provisions of section 13304 and 13267 of the California Water Code (Water Code).

The Regional Water Quality Control Board, North Coast Region (Regional Water Board) finds that:

1. Mr. Allen Henderson (hereinafter Discharger) owns approximately 71 acres located at 5510 Hall Road in Santa Rosa and identified as Sonoma County Assessor's parcel number 130-240-034 (hereinafter Site).
2. The Discharger dredged and filled waters of the United States and the state commencing approximately in or around 2006 to 2007 without authorization from applicable federal, state, and local agencies, including the Regional Water Board. The Discharger's dredge and fill activities at the Site have resulted in sediment discharges to, and continued threatened discharges of sediment to wetlands on Site, which are tributary to Irwin Creek, the Laguna de Santa Rosa, and the Russian River.
3. On October 17, 2013, Regional Water Board staff was alerted by a neighbor regarding the Discharger's activities of grading and stockpiling of construction debris at the Site. In response to the complaint, Regional Water Board staff met with the neighbor on November 12, 2013, to view the Site from the neighboring parcels.
4. **Unauthorized activities:** On December 4, 2013, staff from the Regional Water Board met with County personnel, United States Army Corps of Engineers (Army Corps of Engineers) personnel and the Discharger to inspect the Site. Staff observed depressional wetlands on a neighboring parcel extending onto the Site just south of the fill. Staff observed various wetland features throughout the property while walking along the road with the Discharger. Regional Water Board staff observed an area of freshwater wetlands that showed evidence of disturbance. Specifically, it appeared that topsoil and plants had been scraped out of wetlands and a combination of soil, asphalt, and concrete material had been placed to create an approximately two-acre earthen pad. According to the Discharger, the fill activities for the pad commenced sometime between July 2, 2010, and July 2, 2011. During the inspection, staff also observed potential wetland impacts from the creation and use of an agricultural access road and from conversion of grazing fields to hay production. Shortly after the inspection, Regional Water Board staff

confirmed additional potential wetland impacts through aerial photography from the construction of the driveway at the northern extent of the Site; construction of a road that runs from the fill area to the southern and western extents of the Site; and the cultivation of fields for hay production. According to aerial photography, the driveway construction occurred sometime between February and August 2008; the road construction occurred sometime between August 2006 and November 2007; and, according to the Discharger, 2013 was the first year that he cultivated the fields for hay production. The Discharger dredged and filled onsite wetlands and altered the local hydrology when performing the earth moving activities, which threatens ongoing sediment discharge to adjacent wetlands. The unvegetated portions of the graded areas including the road, earthen pad and stockpiled wetland dredged material remain susceptible to erosion and threaten discharge to nearby surface waters. The activities will continue to impact the wetlands and reaches of the connected surface waters if cleanup or corrective action is not taken to protect beneficial uses against sediment discharge.

5. On December 10, 2013, staff from the Regional Water Board met with staff of the United States Fish and Wildlife Service and the Discharger to inspect the site for potential impacts to endangered species including California tiger salamander (*Ambystoma californiense*, aka CTS) and Sebastopol meadowfoam (*Limnanthes vinculans*). During the inspection, the Discharger acknowledged that Sebastopol meadowfoam has been identified at portions of the Site, southwest of the fill activities. According to the Department of Fish and Wildlife, an occurrence of Sebastopol meadowfoam is identified on the California Natural Diversity Database map as EO#52 within the area of dredge and fill for the earthen pad.
6. Regional Water Board staff determined that jurisdictional wetlands are within the areas that the Discharger filled at the Site. Regional Water Board staff reviewed the Discharger's Draft Bank Enabling Instrument (BEI) and associated Army Corps of Engineers Jurisdictional Determination map of wetlands in the area, which were submitted by the Discharger. The Jurisdictional Determination map indicates navigable waters that require permits from the Army Corps of Engineers and the Regional Water Board for any work, including construction and dredging in navigable waters pursuant to Sections 404 and 401, respectively, of the Clean Water Act. The Jurisdictional Determination and Draft BEI identified 10.2 acres of jurisdictional wetlands at the Site, including approximately 2.2 acres supporting four colonies of Sebastopol meadowfoam.
7. On October 24, 2014, Enterra Associates, Inc. submitted a plan to the Regional Water Board on behalf of the Discharger entitled *Winterization Inspection and Interim Best Management Practices (BMPs)*. That plan proposes implementation and maintenance of BMPs including the completion of pre- and post-rain event inspections of the Site with associated inspection reports to assess the adequacy of erosion and sediment control BMPs.

Legal and Regulatory Authority

This Order conforms to, and implements policies and requirements of, the Porter-Cologne Water Quality Control Act (Division 7, commencing with Water Code section 13000) including: (1) Water Code sections 13267 and 13304; (2) applicable state and federal regulations; (3) all applicable provisions of statewide Water Quality Control Plans adopted by the State Water Resources Control Board (State Board) and the Water Quality Control Plan for the North Coast Region, (hereafter "Basin Plan") adopted by the Regional Water Board including beneficial uses, water quality objectives, and implementation plans; (4) State Board policies

and regulations, including State Board Resolution No. 68-16 (Statement of Policy with Respect to Maintaining High Quality of Waters in California) (Resolution 68-18), and Resolution No. 92-49 (Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code section 13304) (Resolution 92-49); and (5) relevant standards, criteria, and advisories adopted by other state and federal agencies.

8. Resolution 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California," applies to this discharge and mandates that existing high quality waters be maintained unless the State finds that any change in quality is "consistent with [the] maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies." (Resolution No. 68-16 at p 1.) Second, if an activity results in the discharge of waste into existing high quality waters, the activity must meet requirements that "will result in the best practicable treatment or control of the discharge." (Resolution No. 68-16 at p 2.)
9. Resolution 92-49 and the Basin Plan establish the cleanup levels to be achieved. Resolution 92-49 requires the waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with California Code of Regulations, title 23, section 2550.4 . Any cleanup level alternative to background must (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Board.
10. **Basin Plan.** The Water Quality Control Plan for the North Coast region (Basin Plan) is the Regional Water Board's master water quality control planning document. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. The Basin Plan was duly adopted by the Regional Water Board and approved by the State Water Board, U.S. EPA, and the Office of Administrative Law where required. Until wetland beneficial uses are determined on a site-specific basis in accordance with the Basin Plan, the existing and potential beneficial uses can be taken from Table 2-1 of the Basin Plan. According to that table, Wetland Habitat (WET) is an existing use and the potential beneficial uses of wetlands include:
 - a. Municipal and domestic supply (MUN)
 - b. Agriculture (AGR)
 - c. Industrial (IND)
 - d. Groundwater recharge(GWR)
 - e. Freshwater replenishment (FRSH)
 - f. Navigation (NAV)
 - g. Water contact recreation (REC1)
 - h. Non-contact water recreation (REC2)

- i. Commercial and sport fishing (COMM)
- j. Cold freshwater habitat (COLD)
- k. Warm freshwater habitat (WARM)
- l. Wildlife habitat (WILD)
- m. Rare and endangered species (RARE)
- n. Migration of aquatic organisms (MIGR)
- o. Spawning, reproduction, and/or early development (SPWN)
- p. Shellfish Harvesting (SHELL)
- q. Estuarine Habitat (EST)
- r. Aquaculture (AQUA)
- s. Native American Culture (CUL)
- t. Water Quality Enhancement (WQE)
- u. Flood Peak Attenuation / Flood Water Storage (FLD)

Beneficial uses of any specifically identified water body generally apply to all tributaries and hydrologically connected wetlands, which are critical habitat and important filtering systems for removing pollutants in stormwater runoff.

11. Section 3 of the Basin Plan contains water quality objectives that specify limitations on certain water quality parameters not to be exceeded as a result of waste discharges. The water quality objectives (pages 3-2.00 and 3-3.00) that are considered of particular importance in protecting the beneficial uses from unreasonable effects due to discharges from logging, construction, or associated activities, such as the Discharger's activities, include the following:

- Color: Waters shall be free of coloration that causes nuisance or adversely affects beneficial uses.
- Suspended Material: Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.
- Settleable Material: Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.
- Sediment: The suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.
- Turbidity: Turbidity shall not be increased more than 20 percent above naturally occurring background levels. Allowable zones within which higher

percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waivers thereof.

12. Section 13304(a) of the Water Code states, in relevant part:

“Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatened to cause or permit, any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Board clean up such waste or abate the effects thereof, or in the case of threatened pollution or nuisance, take other necessary or remedial action.”

13. As described above in Finding 4, the Discharger placed soil/sediments into wetlands, caused soil/sediments to discharge into wetlands, and placed soil/sediments where they could enter wetlands and the Laguna de Santa Rosa in quantities deleterious to fish, wildlife and other beneficial uses, unreasonably impacting the beneficial uses of state waters, which have been identified as “Potential for Presence of CTS and Listed Plants” by the Department of Fish and Wildlife¹, and on a property with confirmed presence of Sebastopol meadowfoam, an endangered plant. The unauthorized fill activities at the Site are, therefore, subject to cleanup and abatement under California Water Code section 13304.

14. Section 13050 of the Water Code defines “pollution” as “an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following: (A) The waters for beneficial uses, or (B) Facilities which serve these beneficial uses.”

15. Section 13050 of the Water Code defines “waste” to include “sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.”

16. Regional Water Board staff’s inspections, described above, confirm that the Discharger has caused or permitted soil, concrete and asphalt to be discharged or deposited where it is discharged to wetlands, a water of the state. “Waste” is defined broadly enough to include deposit of soil, concrete and asphalt and the siltation and resulting turbidity from the construction of an earthen pad, roads, and the modification of wetlands for agricultural hay production². In addition, the Discharger created, or threatened to create, a condition of pollution or nuisance. Filling in freshwater wetlands eliminates the beneficial uses of the water entirely. The wetlands area within the filled area has been destroyed. Wetlands adjacent to the filled area may have been damaged as a result of the alteration of the local hydrology and it is likely that detrimental hydromodification occurred within the wetland complex due to alternations in the quantity and velocity of surface water

¹ Figure 3 Revised - Santa Rosa Plain Conservation Strategy Map. (2007, April 17). Retrieved August 28, 2014, from http://www.fws.gov/sacramento/es/Recovery-Planning/Santa-Rosa/Documents/figure-3_REVISIED_4-18-07.pdf

² The California Court of Appeal ruled that silt or sediment released from a dam was “waste” associated with human habitation because the dam was built by humans. (Lake Madrone Water District v. State Water Resources Control Board (1989) 209 Cal.App. 3d, 163, 256, fn. 1.)

flows. Therefore, the Discharger's activities have created a condition of pollution. Accordingly, the Discharger is subject to the Order pursuant to section 13304.

17. Water Code section 13304(c)(1) states, in relevant part:

"The person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions."

18. Water Code section 13267(a) provides that the Regional Water Board may investigate the quality of waters of the state within its region in connection with any action relating to the issuance of a cleanup and abatement orders issued pursuant to Water Code section 13304. Water Code section 13267(b) provides that the Regional Water Board, in conducting an investigation, may require a discharger to furnish, under penalty of perjury, technical or monitoring reports. Section 13267(b) further requires that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

19. A restoration workplan required by this Order, pursuant to Water Code section 13267, is necessary to ensure that the prior harm and future threat to water quality created by activities on the Site, which resulted in the discharges described above, are properly assessed, abated and controlled. Due to the importance of protecting water resources as explained herein, the costs associated with developing a restoration work plan bear a reasonable relationship to the benefits that will be realized once the work plan is implemented.

20. This action is an order to enforce the laws and regulations administered by the Regional Water Board. This is also a cleanup action taken to prevent, minimize, stabilize, mitigate or eliminate the threat of a release of substances that would be detrimental to beneficial uses. The Regional Water Board is taking action to assure the restoration of a natural resource and protection of the environment, specifically habitat for fish, plants, and wildlife. As such this action is categorically exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, section 21000 et seq.) pursuant to sections 15321 and 15333 of the Resources Agency Guidelines in Title 14 of the California Code of Regulations.

THEREFORE, IT IS HEREBY ORDERED that, pursuant to Water Code section 13304 and 13267, the Discharger, or its agents, successors, or assigns, shall provide the following information and perform the following cleanup and abatement actions. The Discharger shall obtain all necessary permits for the activities required in this Order.

1. Prohibitions

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

- b. Discharge of sediment-laden runoff to wetlands and other surface waters is prohibited.
- c. Discharge of settleable material that causes waters of the State to contain substances in concentrations that result in the deposition of material that causes nuisance or adversely affects beneficial uses is prohibited.

2. Cleanup and Abatement Tasks

a. **Baseline Information**

Compliance Date: April 1, 2015

Submit to the Regional Water Board a technical report assessing the impacts to the wetlands from the unauthorized activities, including but not limited to the activities outlined in paragraph 4 of this Order. This assessment shall include the following:

- i. A description of the Discharger's activities at the Site, including the purpose of the dredge and fill; a chronology of actions taken; manifests and any other information related to the source and quality of imported fill materials; photographs, aerial photographs, reports, topographic maps or drawings, etc., of Site conditions prior to conducting the unpermitted activities; future plans for the property; and how all waters of the state will be protected in perpetuity.
- ii. An analysis of the affected area, and the entire property, including a determination of the extent of wetland and riparian impacts. The analysis of impacts should include the locations and volumes of dredge removed and fill added; the types of vegetation and wildlife in the area; and the extent of impacts to those species.
- iii. A list, description, and plan/map showing all erosion and sediment transport control best management practices that are being implemented on the Site to prevent further discharge to/from wetlands and streams.

b. **Restoration, Mitigation, and Monitoring Plan**

Compliance Date: April 15, 2015

A Restoration, Mitigation, and Monitoring Plan shall be submitted to the Regional Water Board, acceptable to the Executive Officer, which includes the following:

- i. A description of the proposed cleanup activities and plans for Site restoration and proposed mitigation to restore beneficial uses by restoring the wetlands and the local hydrology to pre-discharge conditions and to compensate for and minimize any further impacts to wetlands and associated tributaries. This Plan shall be completed by a professional wetland specialist with experience in wetland

restoration/creation and erosion/sediment control and shall contain, at a minimum, a complete delineation of waters of the State on the entire property and adjacent areas that may be impacted; engineering and biological design specifications and drawings, interim and final performance criteria (used to assess the success of the wetland restoration project), a proposed implementation schedule, and a monitoring plan for the following:

- a. Evaluation of restoration efficacy;
- b. A mitigation plan for any wetlands that cannot be restored including compensatory mitigation for temporal wetland losses with appropriate mitigation ratios.
- c. A process for sampling and screening of any fill materials that are disturbed, moved, or exported offsite for potentially hazardous materials and designated wastes.

c. Completion of Restoration and Mitigation and Submittal of Technical Report

Compliance Date: 180 days after the Executive Officer concurs with the Restoration, Mitigation, and Monitoring Plan

Following the Executive Officer's written concurrence, and consistent with the directives of and in compliance with any necessary approvals and/or permits from the California Department of Fish and Wildlife, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, and other agencies, the Discharger shall complete work described in the Restoration, Mitigation and Monitoring Plan. Upon completion of the work and no later than 180 days after Executive Officer concurrence with the Restoration, Mitigation, and Monitoring Plan, the Discharger shall submit a technical report to the Regional Water Board documenting full implementation and compliance, in accordance with Task b above.

d. Monthly Progress Reports

Compliance Date: The first of each month starting April 1, 2015

Submit monthly monitoring reports to the Regional Water Board documenting implementation of the *Winterization Inspection and Interim Best Management Practices* plan identified in Finding 7. Upon implementation of the Restoration, Mitigation, and Monitoring Plan, monthly monitoring reports shall be submitted to the Regional Water Board documenting implementation efforts and compliance with the above prohibitions and the Basin Plan. Monitoring shall continue until a report, acceptable to the Executive Officer, is submitted showing final performance criteria have been achieved.

e. **Annual Monitoring Reports**

Compliance Date: March 1st each year

Submit an annual monitoring report to the Regional Water Board as required as part of the Restoration, Mitigation and Monitoring Plan. Monitoring shall continue until at least five years after successful completion of the work described in the Restoration, Mitigation, and Monitoring Plan. Alternatively, monitoring shall continue until a report, acceptable to the Executive Officer, is submitted showing final performance criteria have been achieved.

3. **Compliance Dates Extension Request:** If the Discharger is delayed, interrupted, or prevented from meeting any compliance dates specified in this Order or as specified in an approved plan required by this Order, the Discharger may request in writing an extension for compliance dates to the Executive Officer. The written extension request shall explain the basis for its request and what new compliance dates it is requesting. The extension request must be received by the Regional Water Board no less than **15 calendar days** prior to the respective deadline.
4. **Contractor/Consultant Qualifications:** The Discharger's reliance on qualified professionals promotes proper planning, implementation, and long-term cost effectiveness of investigation, and cleanup and abatement activities. Professionals shall be qualified, licensed where applicable, and competent and proficient in the fields pertinent to the required activities. California Business and Professions Code sections 6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgment be performed by or under the direction of licensed professionals.
5. **Report Any Changes in Ownership or Occupancy:** The Discharger shall file a written report on any changes in the Site's ownership or occupancy. This report shall be filed with the Regional Water Board no later than 30 days prior to a planned change and shall reference the number of this Order.
6. **Cost Recovery:** The Discharger is and shall be liable, pursuant to Water Code section 13304, to the Regional Water Board for all reasonable costs actually incurred by the Regional Water Board and associated agencies to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order. Such costs include, but are not limited to, staff time for investigation of the discharge, preparation of this Order, work to complete the directives specified in this Order, and communications between Regional Water Board staff and parties associated with the cleanup and abatement of the discharged waste, including the Discharger, interested members of the public, and other regulatory agencies. If the Discharger is enrolled in a State Water Board-managed reimbursement program, reimbursement shall be made pursuant to this Order and according to the procedures established in that program. Any disputes raised by the Discharger over reimbursement amounts or methods used in that program shall be resolved consistent with the dispute resolution procedures for that program.
7. Failure to comply with the requirements of this Order may subject the Discharger to administrative civil liability up to \$10,000 per violation per day in addition to ten dollars (\$10) per gallon of waste discharged, pursuant to Water Code section 13385. Failure to provide the technical reports required by this Order may also subject

Discharger to administrative civil liability in an amount of up to \$1,000 per day pursuant to section 13268 of the Water Code. The Regional Water Board reserves its right to take any enforcement actions authorized by law.

8. Any person affected by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with Water Code section 13320 and title 23, California Code of Regulations, section 2050-2068. The State Water Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.
9. The Regional Water Board may review this Order and may revise when necessary.

Ordered by:

Original Signed By David Leland For

Matthias St. John
Executive Officer

February 24, 2015