

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2009-0076
REVISING FINDINGS 10 AND 28 OF, AND READOPTING,
ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2007-0054

IN THE MATTER OF
TEHAMA MARKET ASSOCIATES, LLC
AND
ALBERT GARLAND

LINKSIDE PLACE SUBDIVISION
BUTTE COUNTY

This Administrative Civil Liability Order is issued pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of administrative civil liability, to Tehama Market Associates, LLC, and Albert Garland based on findings that describe violations of the Clean Water Act (CWA) section 301 and California Water Code (CWC) section 13376,.

In this Order, the Central Valley Regional Water Quality Control Board (Central Valley Water Board) amends Findings 10 and 28 of Administrative Civil Liability Order R5-2007-0054 in accordance with the Ruling on Petition for Writ of Mandate, Writ of Mandate and Judgment in *Tehama Market Associates LLC v. Central Valley Water Board*, Butte County Superior Court Case No. 141395. This proceeding was reopened solely for reconsideration of Findings 10 and 28. In accordance with revised Findings 10 and 28, our original findings and the proceedings in *Tehama Market Associates LLC v. Central Valley Water Board*, Butte County Superior Court Case No. 141395, the Central Valley Water Board hereby affirms the \$250,000 civil liability previously assessed in this matter.

Having considered the administrative record of this matter, the Central Valley Water Board finds:

1. Tehama Market Associates, LLC was the owner and developer of an 18.6-acre residential development known as Linkside Place Subdivision from December 2003 through October 2004. The site was being developed into approximately 65 single-family residences with utilities, roads and open space located on the south side of Highway 162, four miles west-southwest of Oroville, in Butte County. (Assessor Parcel Number 030-260-021). The contractor for the project was E-Ticket Construction.
2. Runoff from the site discharges to the north to unnamed ephemeral drainages and wetlands that are tributary to Thermalito Afterbay, which is tributary to the Feather River and to the east southeast to unnamed ephemeral drainages and wetlands that are tributary to the Feather River. Central Valley Water Board staff have followed and surveyed the drainages courses from the construction site to Thermalito Afterbay and the Feather River and confirmed that ephemeral drainages and wetlands into which the site drains are hydraulically connected to waters of the United States. Because they are tributary to navigable waters of the United States, the ephemeral drainages and wetlands

into which runoff from the site discharges are themselves waters of the United States. (*Headwaters v. Talent Irrig. Dist.* (9th Cir. 2001) 243 F.3d 526; see also *San Francisco Baykeeper v. Cargill Salt Division* (9th Cir., March 8, 2007) 481 F.3d 700 (9th Cir 2007) WL 686352 [affirming *Headwaters* as controlling law on Clean Water Act coverage of tributaries].) Therefore, an NPDES permit is required by the CWA for discharge of storm water from the construction site into the ephemeral drainages and wetlands. The existing beneficial uses of the Feather River designated in the Regional Board Water Quality Control Plan for the Sacramento and San Joaquin Rivers-4th Edition 1998 (Basin Plan) are municipal and domestic supply, agricultural irrigation; contact recreation, canoeing and rafting; non-contact recreation; warm and cold freshwater habitat; warm and cold water migration; warm and cold water spawning and wildlife habitat.

3. 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 an 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.
4. On 19 August 1999, the State Water Resources Control Board (State Water Board) adopted Order No.99-08-DWQ, NPDES General Permit No. CAS00002 (NPDES), implementing the Waste Discharge Requirements for discharges of storm water runoff associated with construction activity. The General Permit requires that dischargers of storm water to surface waters associated with construction activity, including clearing, grading, and excavation activities, file a Notice of Intent (NOI) to obtain coverage under the General Permit, and requires dischargers to implement best management practices (BMPs) to implement Best Available Technology and Best Conventional Pollutant Control Technology (BAT/BCT) to prevent storm water pollution.
5. A. Notice of Intent (NOI) to comply with terms of the NPDES General Permit to discharge storm water associated with construction activities at the Linkside Place Subdivision was submitted on 14 October 2003, by Albert Garland, on behalf of the property owner at that time, William Isaac. They received confirmation and WDID No. 5R04C324269 on 23 October 2003. 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.
6. 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.

7. On 18 February 2004 and 25 February 2004, Central Valley Water Board staff inspected Linkside Place Subdivision and observed a lack of erosion and sediment controls and the discharge of turbid water leaving the site.
8. On 23 November 2004, an Administrative Civil Liability Complaint (ACLC) No. R5-2004-0541 was issued to Linkside Place, LLC in the amount of one hundred thousand dollars (\$100,0000) for violations of the CWA Section 301, and the NPDES General Permit No. CAS000002 (Order No. 99-08-DWQ).
9. While the necessary paperwork was not done to transfer coverage under the General Permit from Mr. Isaac to Tehama Market Associates, LLC, the SWPPP was received the month the property was conveyed to Tehama Market Associates, LLC. Albert Garland, who filed the NOI on behalf of Mr. Isaac, continued in a managing role over the subdivision after it was transferred to Tehama Market Associates, LLC. The contractor for the site apparently undertook to comply with the General Permit—albeit with insufficient effort.
10. Subsequent to issuance of ACLC R5-2004-0541, Central Valley Water Board staff discovered that the property had changed ownership in December 2003 from Isaac to Tehama Market Associates, LLC, after coverage under the General Permit was obtained for Isaac. Staff further discovered that the property had changed ownership again in October 2004 from Tehama Market Associates, LLC, to Linkside Place, LLC, after the violations took place, but before ACLC R5-2004-0541 was issued. ACLC R5-2004-0541 named the owner at the time of its issuance, Linkside Place, LLC, as the discharger. Staff realized that Linkside Place, LLC was not the discharger because Linkside Place, LLC did not own or operate the property when the February 2004 violations occurred. Staff was alerted to past changes in ownership in December 2004 when Staff received a call from a prospective buyer unrelated to the named parties in the ACL Complaints. Staff also determined that Tehama Market Associates, LLC was a discharger because it owned the property during the period of violations described in this Order.
11. Based on this new ownership information, on 25 January 2006, ACLC R5-2004-0541 was rescinded and replaced by ACLC 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 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.
12. 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)

13. 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 NOI, with the NPDES, 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 the compliance with the General Permit, but failed to do so. Accordingly, Albert Garland is a responsible corporate officer liable for violations committed by Tehama Market Associates, LLC, in discharging pollutants into waters of the United States without an NPDES permit.
14. It is clear that William Isaac had coverage under the NPDES 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. Tehama Market Place, LLC did not have coverage under the NPDES 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 stormwater from the construction site without an NPDES permit.

In response to a Notice of Public Hearing in March 2006, for ACLC No. R5-2006-0501 the Discharger failed to assert that it was not covered by the NPDES General Permit.

15. 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 NPDES General 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 noticed for a hearing on 25 or 26 January 2007.
16. 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

Central Valley Water Board can not issue a complaint based on violations of the NPDES al Permit when their client did not file a NOI or obtain coverage under the NPDES General Permit. Argument IV, D. 2, at 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.”

17. 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.
18. Based on, but not limited to Finding Nos. 1-17, Tehama Market Associates, LLC and Albert Garland are hereby designated as the Discharger.
19. On 20 April 2007, an ACLC No. R5-2007-0500 was issued to Tehama Market Associates, LLC and Albert Garland in the amount of one hundred fifty thousand dollars (\$150,0000) for violations of the CWA Section 301, and CWC Section 13776.
20. Section 301 of the CWA and Section 13376 of the CWC prohibit the discharge of pollutants to surface waters except in compliance with an NPDES permit.
21. The Discharger owned and operated a construction site from December 2003 through October 2004 without coverage under an NPDES permit, specifically the General Permit. Pursuant to CWC Section 13385 (a), civil liability may be imposed based on the following facts concerning conditions at Linkside Place:
 - (a) **Pumped Storm Water.** On 18 February 2004, Central Valley Water Board staff observed a gasoline-powered pump in use to discharge ponded storm water into ephemeral drainages and wetlands adjacent to the site.
 - i. The dewatering pump was leaking fuel into the nearby waterway. The surface of the water in the vicinity of the pump exhibited a visible petroleum hydrocarbon sheen. The pump was discharging the petroleum hydrocarbon-polluted storm water off-site into ephemeral drainages and wetlands adjacent to the site.
 - ii. The pumped discharge was sediment-laden and highly turbid and caused an exceedance of the Basin Plan turbidity water quality objective.
 - (b) **Other Storm Water Discharges.** On 18 and 25 February 2004, Central Valley Water Board staff observed sediment-laden storm water runoff discharging from the site into ephemeral drainages and wetlands adjacent to the site.

- i. On 18 and 25 February 2004, Central Valley Water Board staff collected water samples documenting an exceedance of Basin Plan objectives for turbidity and total suspended solids in receiving water. The discharge of sediment-laden storm water was therefore causing or threatened to cause pollution, contamination, or nuisance.

22. In response to these violations Central Valley Water Board staff issued the following:

On 7 April 2004, Central Valley Water Board staff issued a Notice of Violation based on violations observed during the 18 February and 25 February 2004 inspections.

On 23 November 2004, the Executive Officer issued an ACLC No. R5-2004-0541 to Linkside Place, LLC for violations observed during the 18 February and 25 February 2004 inspections.

On 11 July 2005, the Executive Officer reissued a revised ACLC No. R5-2004-0541, including William Isaac, Linkside Place, Inc. and Linkside Place, LLC as dischargers.

On 25 January 2006, the Acting Executive Officer rescinded and replaced ACLC No. R5-2004-0541, with ACLC No. R5-2006-0501 naming Tehama Market Associates, LLC 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.

On 26 October 2006, the Assistant Executive Officer replaced ACLC No. R5-2006-0501 with ACLC No. R5-2006-0525 naming Tehama Market Associates, LLC and Albert Garland as the discharger for violations observed during the 18 February and 25 February 2004 inspections.

On 20 April 2007, the Assistant Executive Officer replaced ACLC No. R5-2006-0525 with ACLC No. R5-2007-0500 for discharging storm water on 18 February and 25 February 2004 without a NPDES permit.

23. Issuance of this Administrative Civil Liability (Order) to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000 et seq.), in accordance with Title 14 California Code of Regulations, Section 15321(a)(2).

24. On 20 April 2007, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R5-2007-0500 to the Discharger, proposing a \$150,000 Administrative Civil Liability pursuant to CWC section 13385. The amount of the liability was established based upon a review of the factors cited in CWC section 13385 and the State Water Board's Water Quality Enforcement Policy. The Staff Report contains a detailed discussion of the evidence and factors, and is hereby incorporated by reference as findings in this Order.

Liability under Water Code section 13385

25. CWC section 13385 states, in part:

(a) Any person who violates any of the following shall be liable civilly in accordance with this section:

(1) Section 13375 or 13376.

(5) Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of Clean Water Act, as amended."

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is 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 ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

(e) In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, 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 benefits or savings, if any, resulting from the violation, and other matters that 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.

25A. A violation of Clean Water Act section 402 consists of several elements. A violator must have (1) discharged (2) a pollutant (3) to navigable waters of the United States (4) from a point source. (*Committee to Save Mokelumne River v. East Bay Municipal Utility District* (9th Cir. 1993) 13 F.3d 305, 308.) The Discharger contends that the Prosecution Team has not established (1) discharge and (2) to a water of the United States. For completeness, however, the rationale supporting each of the elements is presented below:

(1) Discharge. The "discharge of a pollutant" means any "addition of any pollutant to navigable waters from any point source." (33 U.S.C. § 1362(12)(A).) Observations by field inspectors (including photographs) documenting the transport of pollutants from a construction site to navigable waters is sufficient evidence of a "discharge" in violation of the Clean Water Act. (*North Carolina Shellfish Growers Association v. Holly Ridge Associates, LLC* (E.D.N.C. 2003) 278 F.Supp.2d 654, 675-676; see also *California Sportfishing Protection Alliance v. Diablo Grande, Inc.* (E.D. Cal. 2002) 209 F.Supp.2d

1059, 1077-1078.) The Staff Report provides detailed evidence demonstrating that pollutants “discharged” to waters of the United States. Photographs document the transport of turbid storm water off the site. Water samples show elevated concentrations of total suspended solids and turbidity (far in excess of water quality standards) that reached receiving waters.

An alternative rationale is also available to demonstrate that a discharge occurred even if the pollutants do not directly enter waters of the United States. Were the receiving waters abutting the site not waters of the United States (although they are as discussed below), a violation can still occur if the pollutants indirectly discharge to waters of the United States. (*Rapanos, supra*, 126 S.Ct. at p. 2227 [plurality opn].) In such a case, the government is not required to show that the pollutants actually reached the downstream navigable waters. A discharge to a tributary to a navigable water is sufficient. (*United States v. Ashland Oil and Transportation Co.* (5th Cir. 1974) 504 F.2d 1317, 1329.)

As discussed above, the Staff Report provides detailed evidence showing that the pollutants from the site discharged into ephemeral drainages and wetlands. The follow-up field study performed by Central Valley Water Board staff in March 2006 demonstrates that these waterbodies are tributary to the Feather River, which is a navigable water of the United States.

(2) Pollutant. Sediment of the type discharged from the site in storm water is clearly a pollutant under the Act. (*North Carolina Shellfish Growers Association, supra*, 278 F.Supp.2d at pp. 676-677 [sand and dirt, the main components of sediment, are named specifically within the definition of “pollutant.”].)

(3) Water of the United States.

Intermittent tributaries. The U.S. Court of Appeals for the Ninth Circuit recently clarified that *Rapanos v. United States* (2006) 126 S.Ct. 2208 interpreted the extent of the ability of the U.S. Army Corps of Engineers to regulate adjacent wetlands, not other hydrologic features. (*San Francisco Baykeeper v. Cargill Salt Division* (9th Cir. 2007) 481 F.3d 700, 707.) The court noted that questions concerning Clean Water Act coverage over intermittent tributaries, even post--*Rapanos*—are still answered using *Headwaters v. Talent Irrig. Dist.* (9th Cir. 2001) 243 F.3d 526. (*Id.* at 708.) The *Headwaters* case held that tributaries of navigable waters, regardless of whether they flow intermittently, are still waters of the United States. (*Id.* at p. 533.) The court explained the basis for that finding in the words of the Eleventh Circuit:

Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... [I]t makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a “water of the United States” under the Act.

(*Ibid.*, quoting *U.S. v. Eidson* (11th Cir. 1997) 108 F.3d 1336, 1342.)

The ephemeral drainages and wetlands into which storm water from the site was discharged are tributaries to downstream navigable waters.

The Linkside Place subdivision is in western Oroville on the south side of State Highway 162. Adjacent to the east of the subdivision is the Table Mountain Golf Course and immediately east of the golf course is the Oroville Municipal Airport. Both the golf course and airport are owned by the City of Oroville. In 1992 the City of Oroville began the process of expanding the airport runways to the south. The City hired Jones & Stokes Associates, Inc to prepare a "Wetland Delineation for the Oroville Municipal Airport Expansion Area". The wetland delineation found a total of 9.4 acres of jurisdictional waters including wetlands. On 4 December 1992 the US Army Corps of Engineers (Corps) issued a verification letter of the 9.4 acres of wetlands. The Jones & Stokes report detailed a channelized tributary that flows from west to east across the study area (future airport expansion). The channel carries irrigation runoff from the adjacent golf course (Table Mountain Golf Course), flows across the airport through culverted crossings under two runways and Larkin Road, and eventually flows into the large recreational area east of the airport. Because the channelized tributary is perennial, it supports a dense cover of cattail and tule for the entire length of the airport property. Although the channel is obviously human-made, it intercepts water from natural drainages and swales and appears to be part of the natural surface tributary system." In May 2006, Central Valley Water Board staff walked this drainage from the Linkside Subdivision and confirmed that it enters the recreational area and the Feather River.

In 1998 the City of Oroville conducted a drainage analysis for Table Mountain Golf Course, because of flooding fairways and poor water transfer and storage. The study found that off-site flows from the west (of approximately 42 cfs) contribute more than 50% of water discharged downstream to the southeast of the golf course. This caused water to backup throughout the golf course, flooding the lower fairways. In addition, the soils substratum of the site, that consisted of unrelated cementitious materials, prevented percolation of storm water. This study was prepared before Linkside Place subdivision was proposed or constructed.

In a letter dated 29 November 2004, the Corps verified that the site contained 6.7 acres of waters of the United States including wetlands and was tributary to the Feather River, a water of the United States. However after additional review the Corps in a letter dated 3 August 2005 disagreed with the information submitted by the consultant and denied the verification, because it did not meet the minimum standards for Corps acceptance and the estimate of jurisdictional wetlands from the previous assessment was low. Nevertheless, the Corps reiterated in a letter dated 11 January 2007 that its "determination that these waters were subject to [r]egulation under Section 404 of the Clean Water Act did not change." And, again, in a 29 March 2007 email from its counsel to counsel for the Discharger, the Corps stated "The Corps has determined that we have 404 jurisdiction on the Linkside site. We confirmed this determination in a letter to Mr. Garland dated 11 January 2007."

Accordingly, the regulatory actions by the Corps bolsters the conclusion that the drainages and wetlands adjoining the site are tributary to the Feather River, a navigable water of the United States. These tributaries, regardless of frequency/duration of their flow, are themselves waters of the United States. (*Headwaters, supra*, 243 F.3d at p. 533; see also *Idaho Rural Council v. Bosma* (D. Idaho 2001) 143 F.Supp. 1169, 1178-1179 (pond discharging through fractured bedrock to a spring and then to a stream tributary to a navigable water is a water of the United States).

Effects on Interstate Commerce. In addition to tributaries, the Clean Water Act extends to "non-navigable waterbodies whose use or misuse could affect interstate commerce." (40 C.F.R. § 122.2 ("waters (c)"); *San Francisco Baykeeper, supra*, 481 F.3d at p. 704.) The reason is that they provide habitat for endangered species, which are regulated by the United States because of their cumulative effects on interstate commerce. (*GDF Realty Investments, Ltd., v. Norton* (5th Cir. 2003) 326 F.3d 622, 627-647 (effect on interstate commerce determined by aggregating the effects on one endangered species with effects on all others); see also *Palila v. Hawaii Department of Land & Natural Resources* (D. Haw. 1979) 471 F.Supp. 985, affd. (9th Cir. 1981) 639 F.2d 495 [discussing Endangered Species Act's effects on interstate commerce.]

The wetland delineation report determined the airport expansion area contained vernal pools and swales that were habitat for vernal pool fairy shrimp, Conservancy fairy shrimp, California linderiella, and vernal pool tadpole shrimp. These invertebrates are known to occur in Butte County and each species has been documented to inhabit the types of vernal pools observed in the project area.

In 1995 the United States Air Force installed the Next Generation Weather Radar System (NEXRAD) west of the golf course. Prior to installation the USAF requested Formal Section 7 (ESA) Consultation from U.S. Department of Interior, Fish and Wildlife Service (Fish and Wildlife Service) because of the vernal pools and swales on-site that contained Conservancy fairy shrimp, longhorn fairy shrimp, vernal pool tadpole shrimp and the vernal pool fairy shrimp. The Fish and Wildlife Service issued a ESA Section 7 with the following terms: "...All vernal pools, swales and associated upland habitat adjacent to the proposed project site will not be damaged, trespassed on, or otherwise impacted during and following project implementation."

In 2002, Mr. Isaac/Linkside Place LLC applied for a tentative subdivision map for Linkside Place. The tentative subdivision map required the normal California Environmental Quality Act (CEQA) process. The City of Oroville proposed a mitigated negative declaration for the project and received comments from numerous agencies including the Central Valley Water Board. Central Valley Water Board staff required compliance with CWA Section 401 water quality certification for wetlands impacts and permitting under CWA Section 402 for construction storm water activities. The City of Oroville required the developers to conduct wetlands surveys because of their previous experience with projects in the area. The City

required Mr. Isaac/Linkside Place LLC to obtain an ESA Section 7 or Section 10 consultation from the Fish and Wildlife Service and a CWA Section 404 permit from the Corps because of vernal pool wetlands and endangered species.

In May 2002, a wetland delineation was performed by Albert Beck, Eco-Analysis and he stated in his report "It was my assessment that vernal pools on this property had a high probability of supporting listed fairy shrimp." Mr. Beck recommended additional assessment of vernal pool species. Additional assessment was performed by ECORP Consulting, Inc and identified vernal pool fairy shrimp (*Branchinecta lynchi*) (federally listed threatened) in a few pools. They provided that information to the Fish and Wildlife Service as required by their federal collecting permit. Accordingly, because the ephemeral drainages and wetlands on and abutting the site are occupied by species covered by the ESA, those hydrologic features are covered by the Clean Water Act on the grounds that harm to the endangered species inhabiting them would have a substantial effect, in the aggregate, on interstate commerce.

(4) Point Source. A construction site of more than five acres in size is a "point source" as defined by the Clean Water Act. (40 C.F.R. § 122.26(b)(14)(x); *California Sportfishing Protection Alliance*, 209 F.Supp.2d at p. 1077.) The Linkside Place property encompasses over 18 acres and therefore is a point source.

26. The following factors were used to establish the amount of the liability:

Enforcement Considerations

The Central Valley Water Board may impose an ACL pursuant to CWC Section 13385(a) for violations of the General Permit or for discharges of pollutants to waters of the United States without permit coverage. Pursuant to CWC Section 13385(c), the Central Valley Water 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.

Nature and Circumstances

The initial investigation was to a site that had storm water permit coverage and a SWPPP. Central Valley 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, Central Valley 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) Wastewater 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 Discharger has not submitted evidence of inability to pay the penalty or 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 NOI to comply with terms of the 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 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 NOI with the General 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 NOI 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 Central Valley Water Board can not issue a complaint based on violations of the General Permit when their client did not file a NOI 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."

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 addition, 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

Central Valley 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 Administrative Civil Liability 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 \$6,420,000, which includes daily discharge violations and volume of discharge. From November 2003 through February 2004 the Discharger discharged from a point source to waters of the United States without a NPDES permit. During that period Central Valley Water Board 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; this amount is included within the 641,00 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 640,000 gallons (641,000 gallons minus 1,000 gallons) by \$10 to obtain \$6,400,000.

27. 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.
28. The Discharger has asserted that this administrative proceeding is barred by the doctrine of laches. The violations occurred in February 2004, and ACLC No. R5-2007-0500 was issued in April 2007, three years and 61 days after the first noted violation. For the following reasons, the doctrine of laches does not preclude this administrative action.
- 28A. The time period of three years and sixty one days did not constitute an unreasonable delay. Even if Code of Civil Procedure §338(i) is deemed to be sufficiently analogous and borrowed for purposes of a laches analysis, creating a presumption of unreasonableness to be rebutted by the Prosecution Team, the Board finds that

evidence in the record, including but not limited to evidence identified in 28.A.1 through 28.A.5, defeats any such presumption of unreasonableness.

A.1. First, delay in prosecuting the action, while the parties diligently pursued settlement discussions, should not be counted toward the laches period. Evidence in the record shows that Board staff participated in settlement discussions from December 2004 to June 2005 which accounts for a six month delay in the prosecution of the violations. While Linkside Place LLC was not ultimately the party against whom Order 2007-0054 was issued, the discussions, involving Linkside Place LLC, William Isaac, E-Ticket Construction and Board staff, were carried out in good faith. Further, the record shows that Garland, as Isaac's representative at the time and as the sole officer of Linkside Place LLC, was informed of the settlement negotiations, and Discharger's attorney of record in this proceeding was involved in the settlement discussions as counsel for E-Ticket Construction during this time period.

A.2. Second, staff's delayed discovery of the identity of the Discharger was reasonable. Code of Civil Procedure section 338.1(i) states that "the cause of action in [an action commenced under Porter-Cologne] shall not be deemed to have accrued until the discovery by . . . a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction." To the extent this statute of limitations is borrowed, the discovery rule of 338(i) should be applied also. At no point in the communications between Board staff and Linkside Place LLC that are documented in the record, did Linkside Place LLC represent itself to be anything other than a responsible party. Further, the General Permit requires a permittee to notify the State Water Board when covered property is transferred, and requires purchasers subject to the General Permit to submit a new Notice of intent and no such notification or new NOI is shown on the record. The record also indicates that Garland conducted himself as if permit coverage remained in place for Isaac, and served as the site contact person throughout the ownership changes. The Board inferred from this evidence in the record that it was reasonable for Board staff to assume that they did not need to investigate further to identify the responsible party until they were alerted to the ownership transfer in December of 2004.

A.3. Third, the Board finds that the alleged delay in bringing the action was not due to inaction or indifference in pursuing the Board's rights, but to Board staff diligently seeking prosecution of the violations albeit against a party that was later discovered not to be responsible for the violations under the law. The record shows that the violations occurred on 18/25 February 2004, an NOV was issued on 7 April 2004, staff met with the consultant to the site and Garland to discuss compliance efforts on 20 April 2004 and the first complaint issued on 23 November 2004. Staff proceeded with reasonable and good faith conduct to bring the ACL Complaint against the party it believed to be the responsible party, and as further described in Finding 28.B below, the Discharger had notice of these related proceedings and thus was not prejudiced.

A.4. Finally, delay was reasonable due to the unusual complexity of this case. The record shows that Tehama Market Associates, LLC asserted as late as March 8, 2006, in comments opposing the Second ACL Complaint that it was covered by the permit, and then asserted for the first time in response to the third ACL Complaint that

Discharger did not have coverage under the General Permit. The Board infers from this fact and others in the record that it was reasonable for Board staff to take additional time to reconsider and determine the legal and factual foundation of Discharger's liability.

A.5. In summary, given the factors in 28.A.1 through 28.A.4 that excused the delay, the elapsed time between the discovery of the first violation and the issuance of ACL Complaint R5-2007-0500 was not unreasonable. To the extent a three year statute of limitations is borrowed and a presumption of unreasonableness is thereby created, the factors above defeat any presumption of unreasonableness.

28B. Even if Code of Civil Procedure §338(i) is deemed to be sufficiently analogous and borrowed for purposes of a laches determination, evidence in the record, including but not limited to evidence identified in 28.B.1 through 28.B.3, defeats any presumption that the Discharger suffered prejudice due to the delay.

B.1. There was no prejudice to the Discharger due to loss of evidence or faded memories. The Discharger had the opportunity to take depositions in order to preserve evidence. The attorney of record in this case did in fact depose Scott Zaitz on 21 June 2005, although he was representing Linkside Place LLC at the time. The Discharger has pointed to the hearing transcript from 2007 to argue that Scott Zaitz had difficulty recalling what type of map he had consulted when drafting the first ACL Complaint and further that the Prosecution Team could not recall the origin of one photograph. The Board finds that these isolated recollection issues do not rise to the level of a prejudice to the Discharger in loss of evidence, particularly when the Discharger had an opportunity to preserve such evidence in its deposition of Scott Zaitz.

B.2. The Discharger was not prejudiced due to costs incurred or economic investments made on an assumption that Board staff's failure to prosecute meant acquiescence in the violations. Discharger has not come forward with any evidence of prejudice. Even if the burden is on the Prosecution Team to produce such evidence, the Board finds that it has met that burden. As a preliminary matter, in bringing forward affirmative evidence regarding prejudice, the Prosecution Team is being asked to prove a negative inference. Based on the evidence before the Board, the Board finds nothing contrary to a finding that Discharger was not prejudiced. Further, the Prosecution Team has offered affirmative evidence that there was no economic detriment to the Discharger. The record indicates that the Discharger corrected all violations by 24 February 2005. The Board infers from this evidentiary fact that Discharger did not rely economically on any perceived acquiescence by Board staff in the violations, incurring the costs for correcting the violations without regard to the delay in prosecution.

B.3. Finally, there is extensive evidence in the record that the Discharger was on notice well before the issuance of the final ACL Complaint that the Board would be pursuing prosecution. Most clearly, the record shows that Tehama Market Associates, LLC, was named as Discharger in the ACL Complaint issued 25 January 2006. Albert Garland and Tehama Market Associates, LLC were named as Discharger in the ACL Complaint issued 26 October 2006. Additionally, the record shows that Albert Garland, although he was not named yet as Discharger, participated in the 20 April 2004 meeting following

the issuance of the NOV and was informed of the settlement negotiations, and served continuously as the site contact person even as the property changed ownership. The Board infers from this evidence that there was no element of surprise to the Discharger in this case and that any perceived acquiescence the Discharger may argue cannot be justified on the facts. Accordingly, any detrimental reliance on the Discharger's part cannot be grounds for prejudice.

29. The Discharger has disputed several key portions of evidence and the conclusions proffered by Central Valley Water Board staff and contained in the above findings, including most notably the Central Valley Water Board staff's calculations of the number of gallons of sediment-laden runoff from the Discharger's site and the status of the immediately down-gradient tributaries. Even viewing the disputed evidence in a light favorable to the Discharger, it is clear from the record that the Discharger discharged pollutants from its site as a result of its construction activities, and that a sufficient number of gallons of those pollutants either directly or indirectly reached waters of the United States to sustain an administrative civil liability of \$250,000.00. In issuing this Order, the Central Valley Water Board notes that the amount of the administrative civil liability is based on the totality of the circumstances, and that the dominant factor in determining the amount of administrative civil liability was the Discharger's knowing disregard for the requirements of the storm water permit, rather than any of the specific evidence disputed by the Discharger.

IT IS HEREBY ORDERED that Tehama Market Associates, LLC and Albert Garland shall pay \$250,000 in administrative civil liability as follows:

Within 30 days of adoption of this order, the Discharger shall pay \$250,000 by check, which contains a reference to "ACL Order R5-2009-0076" and is made payable to the *State Water Pollution Cleanup and Abatement Account*.

Certification:

I, PAMELA C. CREEDON, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 13 August 2009.



PAMELA C. CREEDON, Executive Officer