CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

RESPONSE TO WRITTEN COMMENTS

on Tentative Cleanup and Abatement Order
and Revised Tentative Cleanup and Abatement Order

Timothy Starkweather,
Jean A. Porlier, Joan A. Boblitt,
William E. Vidalin, and Robert V. Vidalin
for Properties
Assessor Parcel Numbers 902-0008-005-05 and 902-0008-005-09
Las Colinas Road, Livermore, Alameda County

The California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) staff received five written comments from four parties on a Tentative Cleanup and Abatement Order (Tentative Order) and Revised Tentative Cleanup and Abatement Order (Revised Tentative Order) for unpermitted fill of wetlands at Assessor Parcel Numbers 902-0008-005-05 and 902-0008-005-09 (Site). All five commenters support issuance of the Revised Tentative Order.

The Tentative Order, which was distributed on January 13, 2017, for a 10-day public comment period, named Dr. Timothy Starkweather, who allegedly filled the wetlands, and Jean A. Porlier and Joan A. Boblitt, identified owners of the Site, as responsible parties. We received four comments on the Tentative Order, the most significant being the identification of additional owners of the Site. Accordingly, we added William E. and Robert V. Vidalin as responsible parties and issued the Revised Tentative Order on March 9, 2017, for another 10-day public comment period. We received an additional comment on the Revised Tentative Order.

Regional Water Board staff has summarized the comments shown below in *italics* (quoted where possible, or paraphrased for brevity), and followed each comment with staff's response. For the full content and context of the comments, please refer to the original comment letters: http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/tentative_orders.shtml.

This document contains staff-initiated revisions proposed to the Revised Tentative Order, shown with underline text for additions and strikethrough (~~text~~) for deletions.

A. Comments by Alameda County Public Works Agency & Flood Control and Water Conservation District, from Justin Lawrence, Environmental Compliance Specialist

Email on January 18, 2017

(1) "You may want to include some language into C.3 that links the restoration/maintenance to the land owner and not just the three people identified. "TRANSFER OF PROPERTY- This [Order] shall run with the land and shall be

binding upon all heirs, successors, and assigns of [the] Property Owner[s].[1] *Whenever the Property is held, sold, conveyed or otherwise transferred, it shall be subject to this [Order], which shall apply to, bind, and be obligatory to all present and subsequent owners of the Site." We do this with MRP C3 stormwater treatment facility agreements. Seems there [are] a few loop holes that might allow the owner to sell or claim bankruptcy[,] [d]eed restriction would guarantee that the environmental restoration would be completed no matter who owns it."*

Response: We appreciate concerns about circumstances that may impede timely restoration at the Site, but we have not suggested any changes to the Revised Tentative Order. If the land is sold, the Dischargers will continue to have responsibility for performing tasks of the order and restoring the property. The order may be amended to add the new property owner as an additional responsible party. The requirements of a cleanup and abatement order cannot be annulled through a bankruptcy filing.

(2) "You might want to add a financial means to assure that funds are available to do the work. I recommend requiring construction and maintenance bonds."

Response: We have not suggested changes to the Revised Tentative Order. At this time, the Dischargers have indicated a desire and ability to restore the wetlands. The dischargers will be enrolled in cost recovery to recoup oversight costs. In the event of failure to comply with the Order or failure to pay into cost recovery, the Regional Water Board has the ability to take further enforcement action, e.g., by seeking a lien, injunction, or imposing administrative civil liability. (Wat. Code §§ 13304, 13350, 13385.)

B. Comments by Peter MacDonald, Law Office of Peter MacDonald, Counsel for Dr. Starkweather

Email and letter on January 23, 2017

(1) "We believe the owners of the two parcels subject to the proposed Order are Joan Auguston Boblitt, Jean Auguston Porlier, William E. Vidalin and Robert Vernon Vidalin, as tenants in common."

Response: We acknowledge this comment and appreciate receiving a copy of the Site deeds. We have suggested the following changes to the Revised Tentative Order:

Page 1

TIMOTHY STARKWEATHER,
JEAN A. PORLIER, ~~AND~~ JOAN A.~~L.~~ BOBLITT,
WILLIAM E. VIDALIN, AND ROBERT V. VIDALIN

This Cleanup and Abatement Order (Order) is issued to Timothy Starkweather, Jean A. Porlier, ~~and~~ Joan A.~~L.~~ Boblitt, William E. Vidalin, and Robert V. Vidalin (collectively, the Dischargers)…

[1] The term "Property Owners" refers to Jean A. Porlier, Joan A. Boblitt, William E. Vidalin, and Robert V. Vidalin. As stated in the Revised Tentative Order, the Property Owners "have owned the Site at all times since unauthorized activities began."

> Ms. Porlier, ~~and~~ Ms. Boblitt, Mr. William E. Vidalin, and Mr. Robert V. Vidalin are named as dischargers because they have owned the Site at all times since unauthorized activities began, according to data from ParcelQuest provided to the Regional Water Board by Rodrigo Orduña of the Alameda County Planning Department~~.~~, and according to Site deeds provided to the Regional Water Board by Mr. MacDonald, attorney for Dr. Starkweather.
>
> Mses. Porlier and Boblitt, and Messrs. William E. and Robert V. Vidalin, all four ~~both~~ descendants of Robert Livermore, own, but do not reside at the Site. ~~Their cousin, Robert~~ Mr. Robert V. Vidalin~~,~~ has apparently been living at the Site…

(2) "We question the factual basis for naming Dr. Starkweather as a [Discharger]."

Response: Dr. Starkweather is named as a discharger because he admitted to filling the wetlands, as discussed in finding 2 of the Revised Tentative Order. No evidence was submitted to assert that Dr. Starkweather should not be named as a discharger. We did not suggest any changes to the Revised Tentative Order.

(3) "To our knowledge, only clean certified fill was ever brought to the property, under conditions which were believed to be legal agricultural activity at the time those events occurred."

Response: We did not make any changes to the Revised Tentative Order in response to this comment. Sampling and analysis of the imported fill demonstrated that it contained petroleum hydrocarbons, diesel, oil, and lead, and was not "clean" soil. Regional Water Board staff would not have approved a soil impacted by petroleum hydrocarbons, diesel, oil, and lead to be used as import material to fill wetlands. The site from which the fill was taken, four parcels of land in Milpitas addressed 569-573 Trade Zone Blvd, 595-615 Trade Zone Blvd, and 625 Trade Zone Blvd, were known to contain these pollutants and had been subject to a two-year-long toxic cleanup. As stated in the July 1, 2014, site closure letter from Santa Clara County for that site, "The County and the appropriate planning and building department shall be notified prior to any changes in land use, grading activities, excavation, and installation of water wells. This notification shall include a statement that **residual contamination exists on the property**…" (emphasis added). The Revised Tentative Order requires the removal of the imported fill from wetlands. The status of fill outside the wetlands is discussed further in the response to Comment E.5.

Lack of knowledge of permitting requirements does not excuse the failure to seek or obtain a permit. Moreover, both prior regulatory actions and Dr. Starkweather's own statements indicate that he was aware of the requirement to obtain permits for his activities. As stated in findings 6.a-d of the Revised Tentative Order, Warden Kozicki's October 20, 2016, notice of violation (NOV) put him on notice that bridge construction at Arroyo Las Positas, as well as spreading fill material over the upland area, required permits. Dr. Starkweather assured Warden Kozicki after receiving the NOV that "[n]o work [whatsoever] will be done without all proper permits and with the full permission of all [stakeholders]. [No] work of any kind will be done without express permission

[and] with all permits… in hand." These quotations indicate that Dr. Starkweather was aware of permitting requirements for his activities.

(4) "The comment period did not allow time for professional analysis of the exact calculation of wetland loss on our part, and the role of the drought in shrinking those wetlands."

Response: We did not change the Revised Tentative Order in response to this comment. The estimated loss of wetlands in the Revised Tentative Order is based on the difference between two wetland delineations, one on December 5, 2006 (2006 Delineation), and one on February 11, 2016 (2016 Delineation), by LSA Associates, Inc., a professional consulting firm. The variable nature of wetlands was part of the methodology for the delineations LSA Associates, Inc. performed. Wetland delineations look not just at living plants, but also at soil, hydrology, and hydrophytic vegetation.

(5) "We are asking that the Restoration and Monitoring Plan be used to coordinate the multiple agencies and permits required to implement this cleanup."

Response: Comment noted. This is a reasonable concern in a process involving multiple agencies. Our intention is also that the Restoration and Monitoring Plan will be used to coordinate permit approvals by multiple agencies. We will share the Restoration and Monitoring Plan with the other agencies, the Dischargers, and the consultants to help coordinate the cleanup.

C. Comments by Joan Boblitt
Email on January 23, 2017

(1) "There are four owners of… parcels 902-0008-005-05 and 902-0008-005-09. The owners are Joan Boblitt, Jean Porlier, Robert Vidalin, and William Vidalin."

Response: Thank you for the correction. We have added two property owners (William E. Vidalin and Robert Vernon Vidalin) as responsible parties to the Revised Tentative Order. See Response to Comment B.3, above, for more information.

(2) "T.W. Starkweather apparently shares the mailbox at [the Site's] address, for some reason, although he has his own adjacent mailbox and his own address."

Response: Thank you for the correction. We have added Dr. Starkweather's correct address, as well as the mailing addresses and emails of all five named Dischargers, to all correspondence.

(3) "We first heard on August 15, 2016, from Fish and Wildlife that there was a violation against us concerning the wetlands. Prior to that time[,] no agency ever contacted the owners with wetland issues. Why were we never contacted prior to August 15, 2016, if there were wetland violations as far back as June 2014? Why were agencies working solely with T.W. Starkweather?"

Response: Comment noted. We understand your concern about not being involved earlier. Regional Water Board staff can speak only to our involvement at the Site,

which started in March 2016. At that time, Dr. Starkweather represented himself as an agent of the Site's owners to the other regulatory agencies. We began including you and Ms. Porlier on all correspondence after July 2016, when we received copies of county records showing that you were Site owners. After receiving comment letters from you and Mr. MacDonald in January 2017, along with the Site deeds indicating that William E. Vidalin and Robert V. Vidalin also own the Site, we added them to all correspondence as well. Property owners will be party to Regional Water Board actions and staff communications.

D. Comments by Zone 7 Water Agency, Elke Rank, Associate Water Resource Planner
Email and letter on January 23, 2017

(1) Include a measure in the Cleanup and Abatement Order to test and remediate, as necessary, any contaminated soil that has been placed as fill in the wetland.

Response: We have not recommended any changes to the Revised Tentative Order in response to this comment. The Revised Tentative Order requires fill placed in wetlands at the Site to be removed, unless the dischargers provide technical justification for the imported soil to remain on the Site, with considerations of impacts to Wetlands and ecological toxicity. The status of fill outside the wetlands is discussed further in Response to Comment E.2, below.

(2) We understand the objective for requiring the party to install fencing so as to avoid additional encroachment into the wetland and prevent any soil erosion from entering the wetland. However, the property owner should take care to avoid impeding stormwater flow along Arroyo Seco, especially should a debris jam form along the fence.

Response: We did not suggest changes to the Revised Tentative Order in response to this comment. The Revised Tentative Order requires wetland restoration and does not include specifications for fencing. Arroyo Seco is located over 300 feet away from wetlands that will be restored by the Revised Tentative Order. We do not anticipatecorrective actions required by the Revised Tentative Order to impact Arroyo Seco, and we will review plans for restoration activities proposed in the required Restoration and Monitoring Plan, including any structures like fencing, to ensure they appropriately avoid potential impacts to Arroyo Seco and other surface waters.

E. Comments by Joan Boblitt
Email on March 18, 2017

(1) "I see nowhere in the CAO where it stipulates taking into consideration seasonal and yearly variations in weather conditions including a protracted drought as we often experience in California. Would it be possible for language to be added to the CAO so that when our site is evaluated, those weather variations are taken into consideration?"

Response: Thank you for your concern about drought and seasonal impacts on the restoration. We did not suggest changes to the Revised Tentative Order based on this comment. Future drought conditions should be taken into consideration in the

Restoration and Monitoring Plan required in the Revised Tentative Order. Drought conditions may require an extension of the monitoring period for the restoration.

(2) *"Soil has been brought onto our family land. I gather that the agencies believe that the added soil has contaminated the wetlands. Has this soil been tested? I assume you or some agency must have tested the soil and found it hazardous if there is a CAO in place ordering the soil's removal. Where are the results of the soil test? Will we owners get a copy of the soil test results? If there has been no test on the added soil, why not? It would seem to me that testing the soil would be the first order of business in order to establish that it is or is not harmful to the wetlands. I do not find anywhere in the CAO where soil test results are addressed. Or how much soil is to be removed and from where."*

Response: Thank you for your comment concerning the soil contamination and test results. The soil test results for the site where the soil originated can be found here: http://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T10000004653. As stated in the response to Comment B.3, sampling and analysis indicated the imported fill included gasoline, diesel, oil, and lead at a level below the risk-based screen level threshold for residential uses, but the fill was evaluated for a limited suite of constituents and not compared to ecological toxicity values. Regional Water Board staff would not have issued a water quality certification that allowed the fill of a wetland without further evaluation. In general, reuse of soil must consider the end use and effects at the location that receives the soil, including impacts to wetlands and potential toxicity. Any soil that remains on the Site must be sampled and shown to have no harmful impacts. We have suggested the following changes to the Revised Tentative Order:

Page 7

The Dischargers shall submit to the Regional Water Board a Restoration and Monitoring Plan (Plan), acceptable to the Executive Officer, describing actions to restore the water quality functions, ~~and~~ values, and area of the 0.6 acres of Wetlands lost, and mitigate for any temporal and permanent losses. The Plan must also include technical justification for any imported soil remaining on the Site, with considerations of impacts to Wetlands and ecological toxicity. The Plan shall contain, at a minimum, a basis of design report, design specifications and drawings, a planting plan, adequate interim and final performance criteria (used to assess the success of the wetland restoration), a proposed implementation schedule, identification of all necessary permits and approvals and a process to obtain them, and a monitoring plan for the following…

(3) *"Every year since the establishment of Hwy 50 and I580, the approximately eight acres of family land to the east is inundated with water washing from the Interstate. Some years the land has flooded to the point of standing water for days threatening to flood the family home. I believe T.W. Starkweather brought this fact up to members of one or more of the agencies inspecting the wetlands. The runoff and offending contaminants would [certainly] impact our wetlands. I saw nowhere in the [Order] where this serious concern was addressed. Will Cal[T]rans or the responsible party for highway*

runoff be asked to do its part in diverting the water, containing contaminants harmful to the wetlands, off our land?"

Response: The Revised Tentative Order addresses the unauthorized fill of the Site wetlands, so we did not suggest any changes based on this comment. We understand and share your concern about the potential for freeway runoff to impact site wetlands. The Regional Water Board staff person responsible for administering CalTrans permits, Derek Beauduy, has been informed of your concern and is looking into the highway runoff issue. If you have any questions about the freeway runoff, you can contact him at derek.beauduy@waterboards.ca.gov or at 510-622-2348.

(4) *"A resolution [of the Order] in a timely manner would bring me peace of mind. How quickly can the wetland [restoration] be completed…?"*

Response: We appreciate your interest in completing the restoration expeditiously and share your concern about the timely resolution. The Revised Tentative Order provides dates for the completion of the following required tasks:

1. Restoration and Monitoring Plan for the Wetland
Compliance Date: ~~April 10, 2017~~June 10, 2017

2. Completion of Restoration and Monitoring
Compliance Date: October 30, 2017, or October 30 of the first viable construction season

3. Submittal of Technical Report
Compliance Date: January 15, 2018, or three months after the completion of Task 2

4. Submittal of Annual Reports For First Five Years and Reports in Years Seven, Nine, and Ten
Compliance Date: No later than December 31 each year

(5) *"I am concerned about the cost of [restoration] and want to make certain there are funds available to complete [it]. With this in mind, would it be appropriate to set up an escrow account with money set aside by T.W. Starkweather and Monte Vista Memorial Investment Group to this end to make certain the necessary funds will be available for the duration of the remediation?"*

Response: We did not suggest any changes to the Revised Tentative Order based on this comment. We share your concern about ensuring that there are adequate funds to pay for the restoration. However, the Regional Water Board does not require or recommend particular payment arrangements among responsible parties. Each named discharger shares responsibility for completing cleanup and is jointly and severally liable for oversight costs. Accordingly, you must negotiate the specifics of any financing arrangement with the other named dischargers.

(6) *"I continue to ask why the owners are never invited to any meetings scheduled by agencies, [Fish and] Wildlife, [Regional] Water Board, or LSA [Associates, Inc.]. We don't even receive any notice of them. Is this usual? Since we are ultimately responsible*

(our names are on the [Order] and [we are] named as Dischargers), I would think our presence would be required."

Response: Comment noted. We understand your concern about not being involved earlier, and wish to reassure you that you will be party to ongoing correspondence with staff at the Regional Water Board, and you will be invited to future meetings between the agencies and dischargers. We began including Site owners in communications as soon as we became aware of them. We began including you and Ms. Porlier on all correspondence after July 2016, when we received copies of county records showing that you were Site owners. After receiving comment letters from you and Mr. MacDonald in January 2017, along with the Site deeds indicating that William E. Vidalin and Robert V. Vidalin also own the Site, we added them to all correspondence as well (see the response to Comment C.3, above, for more information).