

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ACL COMPLAINT NO. R5-2007-0500

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
IN THE MATTER OF

TEHAMA MARKET ASSOCIATES, LLC
ALBERT GARLAND
LINKSIDE PLACE SUBDIVISION
BUTTE COUNTY

This Administrative Civil Liability Complaint (hereafter Complaint) is issued to Tehama Market Associates, LLC, and Albert Garland based on a finding of violations of the Clean Water Act (CWA) Section 301, and California Water Code (CWC) Section 13376, pursuant to the provisions of Section 13385 of the CWC which authorize the imposition of administrative civil liability.

The Assistant Executive Officer of the Regional Water Quality Control Board, Central Valley Region (hereafter Central Valley Water Board) finds the following:

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 south 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) ___ F.3d ___; 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 (General Permit), 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 after the property was conveyed to Tehama Market Associates, LLC. 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, 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, Administrative Civil Liability Complaint (ACLC) No. R5-2004-0541 was issued to Linkside Place, LLC in the amount of one hundred thousand dollars (\$100,000) 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 the issuance of ACLC No. R5-2004-0541, Central Valley Water Board staff conducted research of the property ownership of Linkside Place Subdivision and found that the property had changed ownership several times since obtaining coverage under the General Permit and that the original administrative civil liability complaint may not have named the appropriate Discharger. Extensive research by staff from the State Water Resources Control Board (SWRCB) and Central Valley Water Board determined that Linkside Place, LLC was not a Discharger. The same research determined that Tehama Market Associates, LLC was the Discharger as title to the subdivision was transferred to Tehama Market Associates, LLC just prior to the period of noted violations subject to this complaint. Tehama Market Associates, LLC retained title to the property until October 2004 at which time title was transferred back to Linkside Place, LLC.
11. Based on this new ownership information, on 25 January 2006, ACLC No. R5-2004-0541 was rescinded and replaced by ACLC No. R5-2006-0501. This new ACLC named Tehama Market Associates, LLC the owner of the property at the time relevant to the alleged violations, as the Discharger. ACLC No. R5-2006-0501 was rescinded on 10 April 2006 because the Central Valley Water Board had been unable to hold a hearing within 90 days of the date the complaint was served as required by CWC section 13323.
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 Notice of Intent to Comply with the General Water Permit, which was received on 23 October 2003, as owner and manager of Linkside Place. He served as the contact person for Central Valley Water Board Staff and appeared to direct the contractors who performed development work on the Linkside Place property. In this role, Mr. Garland had the responsibility to ensure that the work conducted at Linkside Place adhered to applicable laws, including the General Permit. Mr. Garland could have, on behalf of Tehama Market

Associates, LLC, applied for coverage under the General Permit and could have exercised sufficient control over the contractors to ensure compliance with the General Permit, but failed to do so. Accordingly, Albert Garland is a responsible corporate officer liable for the violations committed by Tehama Market Associates, LLC, in discharging pollutants into waters of the United States without an NPDES permit.

14. It is clear that William Isaac had coverage under the General Permit due to submission of a NOI by Mr. Isaac's agent, Albert Garland. There is no evidence in the Central Valley Water Board's record, however, that Tehama Market Place, LLC obtained coverage under the General Permit following transfer of the property from Mr. Isaac. Either:
 - i. Tehama Market Place, LLC did not have coverage under the General Permit and discharged storm water to waters of the United States and created conditions of pollution and nuisance and violated the Clean Water Act and California Water Code by discharging stormwater from the construction site without an NPDES Permit, or
 - ii. Tehama Market Place, LLC did have coverage under the General Permit, by notification from the previous owner, and discharged stormwater to waters of the United States and created conditions of pollution and nuisance, and violated the General Permit.

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

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 General Construction storm water permit. The complaint was issued in preparation of a hearing on 25/26 January 2007. On 27 November 2006, a tentative Administrative Civil Liability order and a Notice of Public Hearing was sent to the Discharger and publicly notice for a hearing on 25 or 26 January 2007.
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 Water Board can not issue a complaint based on violations of the General Construction storm water permit when their client did not file a "Notice of Intent" or obtain coverage under the General Permit. Argument IV, D. 2, 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 collectively designated as the Discharger responsible for the violations described in this Complaint.
19. 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.
20. The Discharger is alleged to have owned and operated a construction site from December 2003 through October 2004 without coverage under an NPDES permit, specifically the General Construction storm water 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. After the inspection, Central Valley Water Board staff contacted Mr. John Montgomery of E-Ticket Construction, who acknowledged that the pump was leaking fuel and that the pump had been operating for approximately 8.5 hours.
 - ii. The pumped discharge was sediment-laden and highly turbid and caused an exceedance of the Central Valley Water Board 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 TSS in receiving water. The discharge of sediment-laden storm water was therefore causing or threatened to cause pollution, contamination, or nuisance.
21. The Discharger is alleged to have violated provisions of law for which the Central Valley Water Board may impose liability under CWC Section 13385. Section 13385 of the CWC 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 (13376 prohibits discharge except as authorized by waste discharge requirements or permit)*
- (2) *Any waste discharge requirements or dredged and fill material permit.*

- (5) *Any requirements of Section 301, 302, 306, 307, 308, 318, or 405 of the 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."*

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

days of discharge most likely occurred based on precipitation data; however, these days were not considered in the calculation. During the rainy season of 03/04 there were 13 rainfall events that exceeded 0.2 inches of precipitation. These events would have resulted in discharges from the site. Of the 13 rainfall events staff only sampled 2 events.

24. 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.
25. Two storm water discharges were observed on 18 and 25 February 2004, resulting in an additional civil liability of \$10,000 per day per violation for \$20,000. Additional days and possible additional locations of discharge most likely occurred based on precipitation data. The facility lacked erosion and sediment controls prior to the onset of rainfall in 2003/2004.
26. Pursuant to CWC Section 13385(c), the Discharger's violations are subject to a total maximum civil liability of \$6,450,600, which includes daily discharge violations and volume of discharge. From November 2003 through February 2004 the Discharger failed to install and maintain an effective combination of erosion and sediment control BMPs resulting in the discharge of sediment and sediment-laden storm water to surface waters. During that period staff documented surface water discharges that exceeded Basin Plan water quality objectives for turbidity and suspended solids on 18 February 2004 and 25 February 2004. The discharge of sediment-laden storm water off-site on 18 and 25 February 2004 was conservatively estimated at 641,000 gallons. Staff observed the pumped petroleum hydrocarbon-laden storm water discharges and estimated the volume at 3,060 gallons. The maximum civil liability for days of observed violations is \$20,000. The maximum civil liability for the volume of sediment-laden storm water unlawfully discharged is determined by multiplying 643,060 gallons (641,000 gallons plus 3,060 gallons pumped minus 1,000 gallons) by \$10 to obtain \$6,430,600.
27. Central Valley Water Board staff spent a total of 300 hours investigating this incident and preparing the Complaints. The total cost for staff time is \$24,000 based on a rate of \$80 per hour including overhead costs.
28. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000 et. seq.), in accordance with Section 15321(a)(2), Title 14 of the California Code of Regulations.

TEHAMA MARKET ASSOCIATES, LLC, AND ALBERT GARLAND ARE HEREBY GIVEN NOTICE THAT:

1. Administrative Civil Liability Complaint No. R5-2006-0525 is hereby replaced by this Complaint.
2. The Assistant Executive Officer of the Central Valley Water Board proposes the assessment of Administrative Civil Liability in the amount **of one hundred fifty thousand dollars (\$150,000)**. The amount of the liability proposed is based on a review of factors cited in CWC Section 13385, and the State Water Resources Control Board's Water Quality Enforcement Policy.
3. A hearing on this matter will be scheduled for the **21/22 June 2007** Central Valley Water Board meeting unless the Discharger agrees to waive a hearing and pay the proposed civil liability in full.
4. If a hearing in this matter is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
5. The Discharger may waive the right to a hearing. If you wish to waive the right to a hearing, you must **within 30 days of the date of this complaint**, sign and return the waiver to the Central Valley Water Board's office with a check in the amount of the civil liability made payable to the "State Water Pollution Cleanup and Abatement Account." Any waiver will not be effective until 30 days from the date of this complaint to allow interested persons to comment on this action.

Original signed
JAMES C. PEDRI, Assistant Executive Officer

20 April 2007
(Date)

**WAIVER OF HEARING FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent Tehama Market Associates, LLC, and Albert Garland (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R5-2007-0500 (hereinafter the "Complaint");
2. I am informed of the right provided by California Water Code Section 13323, subdivision (b), to a hearing within ninety (90) days of issuance of the Complaint;
3. I hereby waive the Discharger's right to a hearing before the California Regional Water Quality Control Board, Central Valley Region, within ninety (90) days of the date of issuance of the Complaint; and
4. I certify that the Discharger will remit payment for the civil liability imposed in the amount of **one hundred fifty thousand dollars (\$150,000)** by check, which contains a reference to "ACL Complaint No. R5-2007-0500" and is made payable to the "*State Water Pollution Cleanup and Abatement Account*."
5. I understand the payment of the above amount constitutes a settlement of violations alleged in the Complaint that will not become final until after a public comment period.
6. I understand that the Executive Officer has complete discretion to modify or terminate this settlement.
7. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

(Print Name and Title)

(Signature)

(Date)