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August 18, 2009

Kenneth Landau
Assistant Executive Officer
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Re: Draft Cleanup and Abatement Order – Central, Cherry Hill, Empire,
Manzanita, and West End Mines, Colusa County –
Rebuttal to Submittal dated June 19, 2009 on behalf of Dr. Richard Miller

Dear Mr. Landau:

I represent American Land Conservancy (“ALC”) in connection with the subject Draft Cleanup and Abatement Order (the “**Draft Order**”). On behalf of ALC I provide this rebuttal to the letter submitted by David W. Alden, dated June 19, 2009, on behalf of Dr. Richard Miller (the “**Miller Letter**”). ALC’s rebuttal is submitted in accordance with the schedule set forth in the Revised Hearing Procedures issued in this matter on August 4, 2009.

The Miller Letter mischaracterizes the transactions by which Dr. Miller acquired fee title to property embracing the subject mine sites and the nature of the encumbrance created by Dr. Miller’s voluntary conveyance of a conservation easement interest in that property to ALC.¹ Dr. Miller’s reserved ownership rights and obligations with respect to the property under the Conservation Easement are ignored, and ALC’s limited rights with respect to the property are distorted. ALC is surprised and disappointed that a conservation partner would engage in such an unjustifiable effort to transfer the burdens of fee ownership to ALC.²

ALC respectfully submits that: (i) Dr. Miller voluntarily conveyed the Conservation Easement to ALC; (ii) the Conservation Easement does not restrict Dr. Miller’s reserved interests as fee owner in any way that interferes with his status as a “discharger” under the Draft Order; and (iii) the Conservation Easement provides no legal basis for naming ALC as a “discharger” under Cal. Water Code section 13304(a). In the remainder of this letter, ALC sets forth the details of its rebuttal to the Miller Letter.

¹ Grant of Easement for Conservation Purposes dated October 27, 1999, and recorded in the Official Records of Colusa County, California on December 3, 1999, with Recorder’s Serial No. 99-005189 (the “**Conservation Easement**”). A copy of the recorded form of the Conservation Easement is provided as Attachment 1 to this letter.

² Dr. Miller was represented by legal counsel in the transactions resulting in the conveyance of the Conservation Easement to ALC.

1. Miller voluntarily granted the Conservation Easement to ALC.

The Miller Letter suggests that the Conservation Easement was conveyed “prior to Dr. Miller’s taking title.” This is not the case. As is shown on the face of the Conservation Easement, the grant was made by Dr. Miller as the fee owner of the encumbered property. Dr. Miller voluntarily agreed to convey the Conservation Easement to ALC in connection with his purchase of the encumbered property, in back-to-back transactions. The restrictions on his property that Dr. Miller voluntarily imposed did not come without economic benefit to him, contrary to the suggestion in the Miller Letter. The Conservation Easement is a continuing “enforceable restriction” for the purposes of determining the value of the encumbered property for property tax assessments.³

2. The Conservation Easement does not preclude Miller from complying with the Draft Order.

The assertion in the Miller Letter that “the scope of the Conservation Easement does in fact preclude Dr. Miller from undertaking activities as requested in the Draft Order” is squarely at odds with the plain language of the Conservation Easement.

Section 3 of the Conservation Easement expresses that “Grantor [Miller] understands and acknowledges that nothing contained in this Grant relieves Grantor [Miller] of any obligation or restriction on the use of the Property imposed by law.”

Section 4 of the Conservation Easement expressly reserves to Grantor [Miller] “all rights accruing from its ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited [in the Conservation Easement] and do not materially impair or interfere with the conservation purpose of [the Conservation Easement].”

Section 13 of the Conservation Easement provides that “Grantor [Miller] retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the Property” and that “Grantee [ALC] shall have no obligation for the upkeep or maintenance of the Property, the monitoring of hazardous conditions thereon, or the protection of Grantor, the public or any third parties from risks relating to conditions on the Property.” Section 13 further provides that:

(b) Notwithstanding any other provision of this Grant to the contrary, the parties do not intend and this Agreement shall not be construed such that (i) it creates in Grantee the obligations or liabilities of an “owner” or “operator”, as

³ See Cal. Civ. Code § 815.10.

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those words are defined and used in any federal, state, local or administrative agency statute, regulation, rule, ordinance, order or requirement relating to environmental conditions or hazardous materials, including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Sections 9601 et seq.) (collectively, "Environmental Laws"), or (ii) it creates in Grantee the obligations or liabilities of a person described in 42 U.S.C. Section 9607(a)(3), or (iii) Grantee has the obligation to investigate or remediate any Hazardous Materials (as defined below) associated with the Property, or (iv) Grantee has any control over Grantor's ability to investigate and remediate any Hazardous Materials associated with the Property. Grantor represents, warrants and covenants to Grantee that Grantor's use of the Property shall comply with all Environmental Laws. For purposes of this Grant, the term "Hazardous Materials" shall mean any flammable explosives, radioactive materials, hazardous materials, hazardous wastes, hazardous or toxic substances or related materials defined in any Environmental Law.⁴

Moreover, there is no provision in the "Prohibited Uses and Practices" set forth in Exhibit B to the Conservation Easement that precludes Dr. Miller from complying with the obligations of a "discharger" under the Draft Order. His taking or authorizing actions to remediate existing conditions of contamination on the property cannot credibly be asserted to be inconsistent with the Conservation Easement purpose "to protect and preserve the conservation values of the Property, including without limitation, the integrity of the riparian corridor located on the Property, and to prevent any uses of the Property that would materially impair or interfere with those conservation values." (Conservation Easement, Section 1.)

The smokescreen spewed by the Miller Letter should be ignored. No provision of the Conservation Easement restricts the legal ability of Miller to undertake remedial action as a "discharger" under the Draft Order.

⁴ These provisions are comparable to provisions included in Section 14(i) of the Conservation Easement Deed template currently utilized by the California Department of Fish and Game in connection with the creation of conservation and mitigation banks in California (published at the following link: <http://www.dfg.ca.gov/habcon/conplan/mitbank/>). An interpretation that ignores such a provision would clearly be contrary state policy and potentially would expose the State of California to unintended liabilities under the conservation easements that it holds.

3. The Conservation Easement provides no legal basis for naming ALC as a “discharger” under Cal. Water Code section 13304(a).

The provisions of the Draft Order do not indicate that ALC’s identification as a “discharger” is based on the Conservation Easement.⁵ The effort in the Miller Letter to transpose the obligations of landowner and easement holder under the Conservation Easement should be rejected.

ALC’s affirmative rights to enforce the restrictions set forth in the Conservation Easement to protect the identified conservation values do not change the balance of responsibilities between Miller and ALC; nor do ALC’s limited rights to conduct certain restoration activities, which rights must be considered in the light of the provisions of Section 13(b) of the Conservation Easement, quoted above. Those limited restoration rights allow, but do not obligate, ALC to undertake, at its own expense, certain actions to promote the purpose of the Conservation Easement. ALC has in fact previously invoked those rights in support of the purpose of the Conservation Easement.⁶ ALC, however, is in no way obligated to invoke those rights to assume liability for conditions on the encumbered property contrary to the plain terms of Section 13(b) of the Conservation Easement.

A re-mixing by the Regional Board of the obligations of landowner and easement holder, such as the Miller Letter unjustifiably requests, would amount to adoption of an enforcement policy that would subject scores of non-profit land trusts,⁷ as well as the State of California,⁸ to potential liability never intended under the conservation easement instruments they hold. This would, in turn, severely frustrate the land conservation

⁵ ALC will demonstrate in its forthcoming Evidence and Policy Statement that its mere 4-month fee ownership of property encompassing the “West End Mine” -- in the context of structuring a conservation transaction -- does not justify “discharger” status under applicable decision precedent of the State Water Resources Control Board.

⁶ ALC’s only exercise of these rights to date has been to undertake a riparian habitat restoration project along Sulphur Creek, supported by grant funding from the Wildlife Conservation Board (Grant Agreement No. WC-2016BT), involving the removal of tamarisk and restoration of selected native grasses and forbs. A copy of Grant Agreement No. WC-2016BT is provided as Attachment 2 to this letter.

⁷ The California Council of Land Trusts, the pre-eminent organization for land trusts in California, claims more than 150 members. <http://www.calandtrusts.org/>.

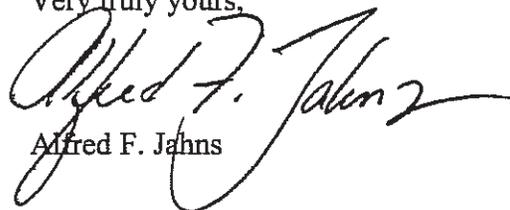
⁸ A perusal of the Conservation Easements Registry maintained by the Natural Resources Agency (<https://easements.resources.ca.gov/search.php>) will quickly reveal the magnitude of the State’s exposure to potential liability under such an enforcement policy.

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policies and goals promoted by the Conservation Easements Act and similar legislation that authorize and encourage the granting of easements in gross to protect conservation values.⁹

The grossly distorted characterization of the Conservation Easement presented in the Miller Letter should be rejected.

Very truly yours,



Alfred F. Jahns

cc: Lori Okun, Senior Staff Counsel
State Water Resources Control Board, Office of Chief Counsel

⁹ Cal. Civ. Code § 815 *et seq.*; Open-Space Easement Act of 1974, Cal. Gov. Code sections 51070 – 51097; California Farmland Conservancy Program Act, Cal. Pub. Res. Code §§ 10200 - 10277.