

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

TENTATIVE CLEANUP AND ABATEMENT ORDER

MR. REZA GHOLOM VALIYEE

for the property located at:

4500 APPIAN WAY, EL SOBRANTE
CONTRA COSTA COUNTY

This Cleanup and Abatement Order (Order) is issued to Mr. Reza Gholom Valiyee (Discharger) for the discharge of fill material into waters of the United States and State, pursuant to provisions of California Water Code (Water Code) sections 13304 and 13267.

The San Francisco Bay Regional Water Quality Control Board (Regional Water Board) hereby finds the following:

1. **Purpose of Cleanup and Abatement Order:** This Order requires the Discharger to clean up and abate the effects of unauthorized fill associated with channel excavation and culvert construction in stream and riparian habitat areas of Appian Creek, a tributary to San Pablo Creek.
2. **Named Discharger:** The Discharger is a discharger under Water Code section 13304 because he permitted the discharge of culvert pipe and earthen fill into waters of the State and waters of the United States in connection with channel excavation and culvert construction in stream and riparian areas of Appian Creek.
3. **Site Location and Description:** The Discharger owns about 1 acre of land approximately one mile east of Interstate 80 at 4500 Appian Way, El Sobrante, identified as Contra Costa County Assessor's Parcel Number 425-210-037 (hereinafter referred to as the Site). The Discharger permitted activities to be conducted within a section of Appian Creek which flows through the southeast end of his property. Appian Creek drains into San Pablo Creek, which drains into San Francisco Bay, all of which are waters of the State and waters of the United States.
4. **Beneficial Uses:** The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) identifies the following beneficial uses for San Pablo Creek: freshwater replenishment, cold freshwater habitat, fish migration, preservation of rare and endangered species, fish spawning, warm freshwater habitat, wildlife habitat, water contact recreation, and noncontact water recreation. Beneficial uses of any specifically-identified water body generally apply to all its tributaries. The beneficial uses of San Pablo Creek also apply to Appian Creek.
5. **Site History and Regulatory Status:**
 - a. On June 8, 2015, Nicole Kozicki of the California Department of Fish and Wildlife (Fish and Wildlife) and Gary Faria of Contra Costa County Department of Conservation and Development met with the Discharger at the Site to discuss the unpermitted construction of a culvert in Appian Creek. Construction of the culvert reportedly consisted of approximately 100 linear feet of 48-

inch-diameter pipe and earthen fill from grading and excavation adjacent to Appian Creek. Fish and Wildlife documented field observations in an inspection report dated June 8, 2015 (Attachment A). Fish and Wildlife required the Discharger to complete remedial actions and perform creek restoration according to the following schedule:

1. By July 20, 2015, submit an engineer's plan for culvert removal to Contra Costa County and Fish and Wildlife. The plan shall include removal of the culvert and restoration of the creek to pre-culvert conditions. Banks shall be restored to no greater than 3:1 slope, seeded and protected with erosion control matting, and planted with local native trees and shrubs. Plants shall be monitored until established, usually a period of three years.
2. By October 1, 2015, remove the culvert and restore the creek, including seed and erosion, and pay \$10,000 to the Contra Costa County Fish and Wildlife Propagation Fund as mitigation for the temporal loss of habitat.
3. By December 31, 2015, replant the creek banks.

To date, none of the required actions above have been completed.

- b. On September 30, 2015, Nicole Kozicki of Fish and Wildlife notified Regional Water Board staff of the Discharger's fill and culvert in Appian Creek. Since the Discharger had not completed the actions required by Fish and Wildlife, the Regional Water Board issued a notice of violation to the Discharger on October 8, 2015, for failure to apply for and obtain a Clean Water Act section 401 water quality certification and/or waste discharge requirements prior to the placement of illegal fill into Appian Creek, a tributary to San Pablo Creek, a water of the United States, in violation of Water Code Section 13264 and the Basin Plan. The notice of violation required the Discharger to submit technical reports under Water Code section 13267 according to the following schedule:

1. By October 19, 2015, file a Report of Waste Discharge on the restoration of the impacted segment of Appian Creek, including the removal of all fill and any accumulated sediment and the mitigation of the temporal impacts to the creek that resulted from the fill activities.
2. By October 31, 2015, send documentation with photographs and detailed narratives that the above corrective actions have been implemented at the site by October 23, 2015, and that effective erosion control measures have been applied to all disturbed areas within the bed and banks of the creek, and on any adjacent land where stormwater runoff could convey sediment to the creek or other State waters.
3. By January 15, 2016, document that a Fish and Wildlife-approved planting plan has been implemented at the site, and send a copy of the plan and photographs of the restored and planted creek bank to the Regional Water Board.

To date, none of the required actions above have been completed.

- c. The Discharger has had no other regulatory oversight or history with the Regional Water Board.

6. **Basis for Cleanup and Abatement Order:** California Water Code section 13304 authorizes the Regional Water Board to issue orders requiring a discharger to cleanup and abate waste where the discharger has caused or permitted waste to be discharged in violation of any order or prohibition of

the board, or any discharger who has caused or permitted waste to be discharged or deposited where it is or probably will be discharged into waters of the United States and creates, or threatens to create, a condition of pollution or nuisance.

- a. Regional Water Board staff inspected the Site on May 11, 2016 (see Attachment B). We took observations of the size and impacts of the culvert and soil backfill. Based on our measurements during the inspection, we estimated that the culvert placed in Appian Creek was approximately 1,290 cubic feet, and the fill placed in Appian Creek surrounding the culvert was approximately 2,310 cubic feet. We also observed hydromodification of Appian Creek where the culvert was installed, including a narrowing of the channel by 64%, a narrowing of the flow area by 90%, and water flow being split and flowing both above and below the culvert. The length of the creek where fill was placed was 100 feet and the width of the creek where fill was placed was 13 feet (the total creek area filled was 1,300 square feet, or 0.0023 acres).
- b. The discharge of fill material impacted beneficial uses of Appian Creek:
 1. The culvert installation and fill loosened sediment and added it to Appian Creek, potentially impacting fish spawning by smothering the Appian Creek bed. The culvert was installed without the approval of Regional Water Board staff or a qualified professional, so it may fail and release more sediment, further impacting fish spawning.
 2. The depth of flow in the culvert was four times smaller than in the channel and the flow was 90% narrower, so fish migration may have been impaired.
 3. The addition of the culvert covered 100 linear feet of substrate, approximately 2.8 feet wide (an area of 280 square feet) that was available for fish spawning.
 4. The addition of the culvert covered 100 linear feet of substrate, approximately 2.8 feet wide (an area of 280 square feet) of cold freshwater habitat, warm freshwater habitat, and habitat for preservation of rare and endangered aquatic species.
 5. The fill of 100 linear feet of riparian vegetation, of 5 foot width on each bank (an area of 1,000 square feet) removed wildlife habitat and habitat for preservation of rare and endangered land species.
 6. Since the culvert was installed without the approval of Regional Water Board staff or a qualified professional, and the channel narrowed by 64%, the culvert may become clogged during a storm event, causing flooding and impacting San Pablo Creek freshwater replenishment.
- c. The discharge of fill material was conducted without required regulatory agency approvals, which include, but are not limited to:
 1. A Clean Water Act section 401 water quality certification from the Regional Water Board;
 2. WDRs under Water Code section 13263 from the Regional Water Board;
 3. A Clean Water Act section 404 permit from the U.S. Army Corps of Engineers (Corps);
 4. Approval from the U.S. Fish and Wildlife Service pursuant to section 7 or 10 of the federal Endangered Species Act; and

5. A Streambed Alteration Agreement from Fish and Wildlife.
- d. The Discharger has caused or permitted waste to be discharged or deposited into waters of the State and the United States, in violation of the Basin Plan, the Clean Water Act, and the Water Code.
 1. The Basin Plan prohibits the discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses.
 2. Under Clean Water Act section 301, the discharge of any pollutant except as authorized is prohibited. The discharge of dredged or fill material into waters of the United States requires a Clean Water Act section 404 permit. The Corps is responsible for issuing section 404 permits. These permits require a Clean Water Act section 401 certification from the Regional Water Board that the permitted activity complies with applicable state water quality standards and other appropriate requirements. Neither the Corps nor the Regional Water Board has issued a permit or certification, as applicable, for the Discharger's activities.
 3. Water Code sections 13376 and 13260 require any person who proposes to discharge dredged or fill material into navigable waters of the United States and any person who proposes to discharge waste that could affect waters of State to submit a report of waste discharge (ROWD). Water Code section 13376 prohibits the discharge of fill material, except as authorized by WDRs. Failure to submit a report of waste discharge and obtain waste discharge requirements constitutes a violation of the Water Code sections 13260, 13264, 13376, and 13385. The Discharger did not file a ROWD or obtain WDRs from the Regional Water Board for the activities.
 - e. This Order contains requirements for the cleanup of the discharged waste and restoration to abate impacts to Appian Creek and associated downstream waters.
4. **Basis for Requiring Reports:** The reports required under this Order are required pursuant to Water Code section 13267. The reports are necessary to ensure that the harm and future threat to water quality created by activities on the Site, which resulted in the discharges described above, are properly assessed, abated and controlled. The evidence supporting requiring the Discharger to submit the reports is available in the record for this matter, and shows that the burden imposed by preparing the reports bears a reasonable relationship to the harm to be corrected.
 5. **CEQA:** This Order is an action to enforce the laws and regulations administered by the Regional Water Board. As such, this action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to section 15321 of Title 14 of the California Code of Regulations.

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

A. PROHIBITIONS

1. Removal of vegetation within waters of the State, or within riparian areas that provide benefit to these waters, without authorization from the Regional Water Board and other applicable resource agencies, is prohibited.
2. Discharge of sediment-laden runoff to surface waters is prohibited.
3. Discharge of silt, sand, clay, or other earthen materials from any activity, in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters, or to unreasonably affect or threaten to affect beneficial uses is prohibited.
4. This Order does not allow for the take, or incidental take, of any special status species. The Discharger shall use the appropriate protocols, as approved by Fish and Wildlife, U.S. Fish and Wildlife Service, and the Corps, to ensure that activities do not impact the beneficial use of preservation of rare and endangered species or violate the California or federal Endangered Species Acts.

B. CLEANUP AND ABATEMENT TASKS

The submittals required in the tasks below shall be submitted as soon as practicable but no later than the compliance deadlines stated below. The required actions and implementation schedules shall comply with all requirements in order to be acceptable to the Executive Officer.

1. RESTORATION AND MONITORING PLAN FOR APPIAN CREEK

COMPLIANCE DATE: November 1, 2016

The Discharger shall submit to the Regional Water Board a Restoration and Monitoring Plan (Plan), acceptable to the Executive Officer, to remove the earthen fill and pipe installed along approximately 100 linear feet of Appian Creek that was culverted, and to establish a geomorphically stable channel bed and banks and a vegetated riparian zone within the 100 linear feet of Appian Creek that was culverted. The Plan shall contain, at a minimum, a basis of design report, design specifications and drawings, a planting plan using only native plants, adequate interim and final performance criteria (used to assess the success of the tributary restoration), a proposed implementation schedule, and a monitoring plan for the following:

- a. Revegetation – Planted vegetation shall be irrigated, as necessary, to ensure that the vegetation becomes self-sustaining. Monitoring shall include at least a 10-year period of documenting percent survival; height, health, and vigor of shrubs and trees; percent cover of grasses and forbs; and monitoring and control of invasive plants. At end of year 10, percent survival shall be at least 75% and percent ground cover shall be at least 70%.
- b. Channel Stability – Annual assessments of the stability of the stream channel shall include reporting of scour, rills, or slumps visible on the stream banks, head cuts or nick points along the thalweg, and accumulation of sediment in the project reach.

2. COMPLETION OF RESTORATION AND MONITORING

COMPLIANCE DATE: August 15, 2017, or October 30 of the first viable construction season if there is delay in obtaining regulatory permits. A construction season is considered viable if after obtaining all necessary permits there is sufficient time to implement all restoration and mitigation actions by October 30. Delays caused by the Discharger, such as not submitting technically sound or complete permit application documents or initiating work in a timely manner, will constitute a violation of this requirement. The Discharger is responsible for submitting timely and complete permit applications and being responsive to regulatory agencies during the application review and processing period.

The Discharger shall complete the work described in the Executive Officer-approved Restoration and Monitoring Plans required by task B.1.

3. SUBMITTAL OF TECHNICAL REPORT

COMPLIANCE DATE: November 15, 2017, or three months after the completion of Task 2, whichever is later.

The Discharger shall submit an as-built report to the Regional Water Board. The report shall document that the plans in tasks B.1 and B.2 to restore both Appian Creek and its unnamed tributary have been fully and adequately implemented. The report shall also include pre- and post-construction photographs of the Site. The photographs shall be taken from upstream of the culverted section, downstream of the culverted section, and at the creek crossing section, at a minimum.

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 monitoring is required.

The Discharger shall submit annual reports to the Regional Water Board for the work required in tasks B.1 and B.2, above by January 31 for the first five years of the initial ten year monitoring period. Thereafter, reports shall be submitted by December 31 of years seven, nine, and ten. Each report must summarize each year's monitoring results over the reporting period and include all the information specified in the monitoring plans and any corrective measures taken (e.g., re-planting or bank stabilization). The report must also include photographs taken at the same locations as specified in task B.3.

The reports shall compare data to previous years and describe progress towards meeting final performance criteria. At the end of year ten, a comprehensive final report shall be prepared that includes summaries of the monitoring data and document if the Site meets the final performance criteria in the monitoring plans. All reports shall include representative photographs and site maps, with photographs taken at the same locations as specified in task B.3.

If any interim or final performance criteria are not met, a report must identify remedial measures to be undertaken, including extension of the monitoring period, until the criteria are met. Success of the creek restoration will be determined by the Regional Water Board Executive Officer. If the project reach of Appian Creek or its tributary is not geomorphically stable at the end of year ten, the Discharger shall work with the Regional Water Board to prepare an analysis of the cause of the instability. If deemed necessary by the Regional Water

Board Executive Officer, the Discharger will be required to conduct additional remedial actions.

C. NOTIFICATIONS AND PROVISIONS

1. **Cost Recovery:** The Discharger is and shall be liable, pursuant to Water Code section 13304, to the Regional Water Board for all reasonable costs actually incurred by the Regional Water Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order. Such costs include, but are not limited to, staff time for investigation of the discharge, preparation of this Order, work to complete the directives specified in this Order, and communications between Regional Water Board staff and parties associated with the cleanup and abatement of the discharge wastes, including the Discharger, interested members of the public, and other regulatory agencies. If the Discharger is enrolled in a State Water Board-managed reimbursement program, reimbursement shall be made pursuant to this Order and according to the procedures established in that program. Any disputes raised by the Discharger over reimbursement amounts or methods used in that program shall be resolved consistent with the dispute resolution procedures for that program.
2. **Contractor/Consultant Qualifications:** The Discharger's reliance on qualified professionals promotes proper planning, implementation, and long-term cost effectiveness of investigation, and cleanup and abatement activities. Professionals shall be qualified, licensed where required, and competent and proficient in the fields pertinent to the required activities. California Business and Professions Code sections 6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgment be performed by or under the direction of licensed professionals.
3. **Report Any Changes in Ownership or Occupancy:** The Discharger shall file a written report on any changes in the Site's ownership or occupancy. At a minimum, the report shall include the name(s) and contact information for new owner(s) or occupants and changes in land use at the site. This report shall be filed with the Regional Water Board within 30 days following a change and shall reference the number of this Order.
4. **Delayed Compliance:** The Discharger shall notify the Regional Water Board Assistant Executive Officer (currently, Dyan Whyte) if it is delayed, interrupted, or prevented from meeting any of the compliance deadlines specified in this Order or a key milestone in an approved plan required by the Order (e.g., the Restoration and Monitoring Plans). The deadlines in this Order may not be modified except by amendment of this Order.
5. **Good Operation and Maintenance:** The Discharger shall maintain in good working order and operate as efficiently as possible any facility or control system, including best management practices and post-construction permanent control measures installed, to achieve compliance with the requirements of this Order.
6. **Reporting of Hazardous Substance Release:** If any reportable quantity of hazardous substances is discharged in or on any waters of the State, or discharged or deposited where it is, or probably will be, discharged in or on any waters of the State, the Discharger shall report such discharge to the Regional Water Board (in addition to reporting to the California Emergency Management Agency at (800) 852-7550), pursuant to Water Code section 13271. To report to the

Regional Water Board, call (510) 622-2369 during regular office hours and file a written report within five working days.

7. **Enforcement:** If the Discharger fails to comply with the requirements of this Order, this matter may be referred to the Attorney General for judicial enforcement. Failure to comply with this Order may result in the assessment of an administrative civil liability up to \$5,000 per violation per day, pursuant to Water Code section 13350. In addition, the Regional Water Board reserves its right to take any enforcement actions authorized by law for the underlying violations related to the unauthorized discharge of waste and fill material into waters of the United States and State.
8. **State Water Board Petition:** Any person aggrieved by this action may petition the State Water Board to review the action in accordance with Water Code section 13320 and Title 23, California Code of Regulations, section 2050 et al. The State Water Board, Office of Chief Counsel, must receive the petition by 5:00 p.m., 30 days after the date this Order becomes final (if the thirtieth day falls on a weekend or State holiday, the petition must be received by the next business day). This Order is effective August 9, 2016.
9. **Periodic Review:** The Regional Water Board may review this Order periodically and may revise it when necessary.

Ordered by,

Bruce H. Wolfe
Executive Officer

Attachment A: Fish and Wildlife Enforcement Inspection Report – 4500 Appian Way, El Sobrante Property, June 8, 2015

Attachment B: Regional Water Board May 11, 2016, Inspection Report – 4500 Appian Way, El Sobrante Property

Attachment C: 13267 Fact Sheet