

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ADMINISTRATIVE
CIVIL LIABILITY ORDER R5-2020-0568 IN THE MATTER OF KYLE TERBORG

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order or Order) is entered into by and between the California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) and Kyle Terborg (Discharger) (collectively, Parties) and remains tentative until its adoption by the Central Valley Water Board, or its delegee, as an order by settlement, pursuant to Government Code section 11415.60.

STIPULATIONS

1. On 1 November 2014, California Department of Fish and Wildlife (CDFW) law enforcement personnel informed Central Valley Water Board staff of potential grading activities being performed off Zogg Mine Road in western Shasta County. CDFW law enforcement personnel participated in a helicopter overflight of the area on 18 November 2014 and identified that significant land disturbance and grading activities were occurring on Shasta County Assessor Parcel (APN) 041-430-049-000 (Site), in close proximity to several drainages and tributary watercourses that flow into South Fork Clear Creek. Central Valley Water Board staff reviewed relevant information provided by CDFW and determined that the grading activities posed a threat to water quality, and that a Site inspection would be necessary to better evaluate on-Site conditions.

2. At all relevant times herein, Discharger has been the owner of the Site.

3. Throughout subsequent investigations performed at the Site, Central Valley Water Board staff observed discharges and threatened discharges to an unnamed Class III tributary to the South Fork of Clear Creek, as a result of grading and road construction activities, and poor road maintenance. Central Valley Water Board staff observed that the ground disturbing activities were performed to facilitate the cultivation of cannabis.

4. Notices of Violations (NOVs) were issued to Discharger on 20 February 2015, 1 February 2016, and 21 March 2016. Clean-up and Abatement Order No. R5-2016-0716 (CAO) was issued to Discharger on 2 December 2016. The CAO required, *inter alia*, Discharger to submit an Interim Erosion Control Plan (Interim Plan) to the Central Valley Water Board, perform the work described in the Interim Plan as approved by the Central Valley Water Board, submit a completion report following such work, submit a Restoration Monitoring and Mitigation Plan (RMMP), perform the work described in the RMMP as approved by the Central Valley Water Board, submit a completion report following such work, and submit annual monitoring for at least three years or until otherwise directed by the Central Valley Water Board.

5. On 9 March 2020, the Central Valley Water Board's Prosecution Team (Prosecution Team) issued Administrative Civil Liability Complaint No. R5-2020-0510 (Complaint) against Discharger, alleging that the Discharger had failed to meet any of the CAO deadlines that had passed prior to issuance of the Complaint. The Complaint alleged two violations: failure to timely submit the RMMP in violation of Water Code section 13268 (Violation 1), and failure to complete the work required by the RMMP in violation of Water Code section 13350 (Violation 2). The Complaint proposed imposing an administrative liability of \$198,352. Attachment A to the Complaint set forth a minimum liability of \$55,857.

6. Discharger confirmed receipt of the Complaint and submitted a waiver of the 90 day hearing requirement to allow the parties to engage in settlement discussions.

7. During settlement discussions between the Prosecution Team and the Discharger, Discharger did not dispute the violations alleged in the Complaint, and by signing below Discharger hereby admits to liability for engaging in the acts and omissions alleged in the Complaint. Additionally, Discharger supplied the Prosecution Team with evidence of Discharger's financial condition that was not available to the Prosecution Team prior to issuance of the Complaint. This information included the following:

\$2,200 to \$3,300 – estimated monthly income,

\$148 – greatest amount shown in a Bank of America account during January-April 2020,

\$2,800 – regular monthly bills (primarily rent of \$800, groceries of \$400, and insurance payments of \$375),

\$8,300 – various assets (a car estimated to be worth \$4,800, house furnishings and electronics estimated to be worth \$1,500, various art supplies estimated to be worth \$1,000, and a used snow machine estimated to be worth \$1,000),

\$4,147 – credit card debt,

\$6,287 – student loan debt,

\$2,625 – unpaid property tax debt,

\$15,800 – debt associated with remediation of the Site,

\$2,296 – accounts in collections,

\$33,487 – various other debts (e.g., loans from a family member to pay for a car, foreclosure assistance, and living expenses),

\$27,425 – debt owed on Site (Discharger estimated the Site had a fair market value of \$20,000, consistent with Evidence Code section 813, leaving the Discharger with \$7,425 in negative equity).

Discharger declared under penalty of perjury that the financial information provided to the Prosecution Team was true and correct, and Discharger expressly consented to use of such information to assess his ability to pay any proposed liability.

8. After issuance of the Complaint, Discharger completed remediation work at the Site (reflected above at a cost of \$15,800), and staff for the Central Valley Water Board inspected such work and determined it satisfied the CAO.

9. The minimum liability associated with Violation 1 is \$657.80, which is calculated to be the economic benefit plus 10%. The minimum liability associated with Violation 2 is \$55,200, which is calculated by multiplying the statutory minimum of \$100 per day found in Water Code section 13350, subdivision (e)(1)(B), by 552 days of violation. However, Water Code section 13350, subdivision (f), provides that a lower amount may be imposed if “the regional board makes express findings setting forth the reasons for its action based upon the specific factors required to be considered pursuant to Section 13327.” Water Code section 13327 provides that the Discharger’s ability to pay may be considered. The 2010 and 2017 Enforcement Policies provide (at step 9) that, the minimum liability amount may be reduced if a “specific provision . . . allows assessment below the minimum.” Additionally, the 2017 Enforcement Policy goes on to state (at step 9) that “In such cases, the express findings to support assigning a liability amount below this minimum must be set forth in the proposed settlement agreement” Since this language is procedural, and not substantive, it is also applied to any violations subject to the 2010 Enforcement Policy. Given the above financial information, the Central Valley Water Board finds there is no evidence that the Discharger has the ability to pay the proposed liability of \$198,352, nor the minimum liability of \$55,857. Pursuant to Water Code section 13327, this warrants reducing the proposed liability amount to \$25,000.

10. Based on the financial information supplied by the Discharger, and other relevant circumstances as set forth herein, the Prosecution Team and the Discharger agreed to resolve the violations alleged in the Complaint by payment by the Discharger to the State Water Resources Control Board of \$25,000. Of that amount, \$657.80 shall be paid by check to the “State Water Pollution Cleanup and Abatement Account” and the balance of \$24,342.20 shall be paid by check to the “State Water WDPF Account.” Such checks shall include “ACL Order R5-2020-0568” in the reference line, and shall be mailed to: State Water Resources Control Board Accounting Office, Attn: ACL Payment, PO Box 1888, Sacramento, CA 95812-1888.

11. Any notice provided pursuant to this Order shall be sent as follows:

If to Discharger:

Mr. Kyle Terborg
911 Lakeville St #172
Petaluma CA 94952
E-mail: kyleterborg@gmail.com

If to Central Valley Water Board:

Central Valley Regional Water Quality Control Board

Mr. Jason Schroeder, Supervising Senior Engineering Geologist
364 Knollcrest Drive, Suite 205
Redding, CA 96002
E-mail: Jason.Schroeder@waterboards.ca.gov

The Parties agree that any notice sent pursuant to this Order shall be deemed received three calendar days after sending, if sent by both U.S. Mail and e-mail to the most recent addresses identified by the receiving Party. Any of the Parties may provide written notice updating such information.

12. The Discharger has been informed of the rights provided by Water Code section 13323(b) and hereby waive his right to a hearing before the Central Valley Water Board.

13. The Discharger acknowledges and agrees that this Order will be posted for a 30-day public review and comment period prior to consideration by the Central Valley Water Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Order to the Central Valley Water Board, or its delegee, for adoption, the Prosecution Team may unilaterally declare this Order void and decide not to present it to the Central Valley Water Board, or its delegee. The Discharger agrees that it may not rescind or otherwise withdraw approval of this proposed Order.

14. In the event that this Order does not take effect because it is not approved by the Central Valley Water Board, or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that the Prosecution Team may proceed to a contested evidentiary hearing before the Central Valley Water Board to determine whether to assess liability for all violations observed at the Site, or may continue to pursue settlement. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in any subsequent administrative or judicial proceeding or hearing and will be fully protected by California Evidence Code sections 1152 and 1154; California Government Code section 11415.60; Rule 408, Federal Rules of Evidence; and any other applicable privilege under federal and/or state law. The Parties also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to:

a. Objections related to prejudice or bias of any of the Central Valley Water Board members or their advisors and any other objections to the extent that they are premised in whole or in part on the fact that the Central Valley Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions, and therefore may have formed impressions or conclusions, prior to conducting any contested evidentiary hearing in this matter; and

b. Laches, delay, or other equitable defenses based on the time period that the Order or decision by settlement may be subject to administrative or judicial review.

15. Each of the Parties will bear its own fees and costs associated with the Complaint.

16. Upon receipt of any notice setting forth a breach of the terms of this Order, a Party is entitled to a 14 day opportunity to cure any such alleged violation. Such Party shall promptly communicate to the other Party any efforts to cure any such violation. If the Party does not cure any such violation within 14 days after the date of the notice, the non-breaching Party may seek any relief provided for by law, including reducing the terms of this Order to a judgment issued by a Superior Court, to be enforced upon as allowed by law.

17. This Order shall apply to and be binding upon Discharger, and his agents, receivers, trustees, employees, contractors, consultants, successors-in-interest, and assignees. Except as expressly provided herein, nothing in this Order is intended or shall be construed to preclude the Attorney General, or any other government entity from exercising its authority under any law, statute, regulation, or ordinance.

18. This Order contains all of the terms and conditions agreed upon by the Parties relating to the matters covered by this Order, and supersedes any and all prior and contemporaneous agreements, negotiations, correspondence, understandings, and communications of the Parties, whether oral or written, respecting the matters covered by this Order. This Order may be amended or modified only by a writing signed by the Parties to this Order or their authorized representatives.

19. Each of the Parties to this Order acknowledges that it has been represented by legal counsel, or has had the opportunity to do so, and that each of the Parties has reviewed and has had the opportunity to consult with an attorney concerning all of the terms and conditions of this Order. The Parties further agree that this Order is a product of their negotiations, and shall not be deemed to have been drafted by one Party.

20. This Order may be signed in counterparts, and the Parties agree that electronic signatures will have the same force and effect as original signatures.

SO STIPULATED.

CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

Date: 1/19/21 _____
PATRICK PULUPA, Executive Officer

DISCHARGER
Date: 1-13-21  _____
KYLE TERBORG