

San Diego Regional Water Quality Control Board

June 16, 2017

Certified Mail – Return Receipt Requested

Mr. Paul Warren
25777 Willow Lane
Escondido, CA 92084
email: pwpro9@gmail.com

In reply refer to: ECM Pin 833830:ebecker

Subject: Adoption of Cleanup and Abatement Order No. R9-2017-0090 Directing Paul Warren to Cleanup and Abate the Effects of Waste from Unauthorized Fill Activities

Mr. Warren:

Please find enclosed the Adopted Final Cleanup and Abatement Order, R9-2017-0090 (Final Order). I am issuing this Order pursuant to my delegated authority from the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board). Prior to issuing the Final Order, I reviewed the Tentative Cleanup and Abatement Order (Tentative Order) submitted by the Prosecution Team on June 12, 2017 as well as your comments submitted on June 7, 2017. I made minor non-substantive changes to the Tentative Order.

The Final Order, among other requirements, requires you to:

1. Immediately, cease all project activity other than that necessary to comply with the Final Order or to comply with corrective actions that may be required by any other regulatory agencies;
2. Remove discharges of fill and restore the stream channel to pre-impact conditions within 21 days from execution of the Final Order;
3. Fully stabilize disturbed soils at your property by properly installing an effective combination of erosion and sediment control Best Management Practices (BMPs) within 30 days from execution of the Final Order; and
4. Submit a technical report with photographic evidence to San Diego Water Board staff documenting that all erosion and sediment control BMPs necessary to stabilize the property have been implemented, and that the stream channel has been fully restored to its original condition within 60 days from execution of the Final Order.

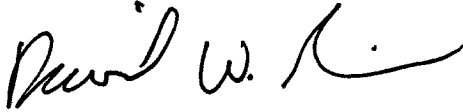
If you have questions or comments regarding this matter, please contact Deborah Jayne at (619)

Mr. Paul Warren

June 16, 2017

521-8050. In the subject line of any response, please include the reference number **833830:ebecker**.

Respectfully,



DAVID W. GIBSON
Executive Officer

Enclosures:

1. Final Cleanup and Abatement Order No. R9-2017-0090

CC via email:

Advisory Team

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**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

CLEANUP AND ABATEMENT ORDER NO. R9-2017-0090

**AN ORDER DIRECTING PAUL WARREN TO CLEANUP AND ABATE THE EFFECTS
OF WASTE FROM UNAUTHORIZED FILL ACTIVITIES**

The California Regional Water Quality Control Board, San Diego Region (hereinafter San Diego Water Board), finds that:

BACKGROUND

1. Paul Warren (Discharger) owns a 0.39 acre vacant property located near 25777 Willow Lane in an unincorporated portion of San Diego County. (Attachments A, K.) The parcel is identified as San Diego County Assessor's Parcel Number 187-133-31-00.
2. A stream channel runs through the Discharger's property. The stream channel is a stream tributary to Reidy Canyon Creek which flows into Escondido Creek. (Attachments E-F.)
3. The Discharger has informed the San Diego Water Board that he intends to gunite¹ line the stream channel for the purpose of complying with County of San Diego Environmental Health Department requirements for horizontal setbacks for the installation of an onsite septic tank/leach field system. (Attachment A.)
4. On February 9, 2016, the Discharger attended a meeting with the California Department of Fish and Wildlife (CDFW), United States Army Corps of Engineers (USACE), and the San Diego Water Board. These agencies provided the Discharger with direction on what permits would be required for the Discharger's proposed activities. (Attachments A, E, F.)
5. At the Discharger's request on March 20, 2017, CDFW, USACE, County of San Diego, and San Diego Water Board staff conducted a joint inspection of the Discharger's property. During the inspection, San Diego Water Board staff confirmed the existence of flowing water in the stream channel with a defined bed and bank. San Diego Water Board staff identified the stream channel as approximately 3-4 feet wide, with flowing water of less than one inch in depth. Existing culvert pipes downstream and upstream indicated water flowing through the property. The inspection report is included as Attachment E.

¹ Gunite is a building material consisting of a mixture of cement, sand, and water applied through a pressure hose, producing a dense hard layer of concrete.

6. The San Diego Water Board's March 20, 2017 inspection report was emailed to the Discharger on March 28, 2017.
7. Before and after the March 20, 2017 joint inspection, the Discharger repeatedly stated he would gunite line the stream channel as he believes the San Diego Water Board does not have jurisdiction over his property. (Attachments A-D, G-L.)
8. On May 22, 2017, the Discharger stated that he began the process of gunite lining the stream channel. (Attachment L.)
9. On May 24, 2017, County of San Diego Code Compliance Division staff confirmed new construction and took photographs of fill activities at the Discharger's property. (Attachment M.)
10. The San Diego Water Board has not received a report of waste discharge or application for Clean Water Act section 401 Water Quality Certification from the Discharger, nor has the San Diego Water Board issued Waste Discharge Requirements or water quality certification orders for the work described in Finding Nos. 3-9 above.

PURPOSE OF THE ORDER

11. This Order requires the Discharger to clean up and abate the effects of filling the stream channel without obtaining a section 401 Certification or Waste Discharge Requirements. Investigation and cleanup actions required under this Order shall be conducted to conform to and implement policies and requirements of the Porter-Cologne Water Quality Control Act (division 7, commencing with Water Code section 13000) including (1) sections 13267 and 13304; (2) applicable state and federal regulations; (3) all applicable provisions of statewide Water Quality Control Plans adopted by the State Water Resources Control Board (State Water Board) and the *Water Quality Control Plan for the San Diego Basin* (Basin Plan) adopted by the San Diego Water Board including beneficial uses, water quality objectives, and implementation plans; (4) State Water Board policies and regulations, including Resolution No. 88-63, *Sources of Drinking Water*; Resolution No. 92-49, *Policies and Procedures for Investigation, and Cleanup and Abatement of Discharges under Water Code Section 13304*; and (5) relevant standards, criteria, and advisories adopted by other state and federal agencies.

LEGAL AND REGULATORY AUTHORITY

12. The stream channel is a water of the state.² Waters of the state are defined under Water Code section 13050, subdivision (e) as "any surface or groundwater

² Waters of the state may also include waters of the United States. On June 8, 2017, USACE issued an approved jurisdictional determination (File name SPL-2017-00209-RJV) under Section 404 of the Clean Water Act for this stream channel.

including saline waters, within the boundaries of the state.”

13. The discharge is located within the Escondido Hydrologic Subarea (HSA 904.62) of the Carlsbad Hydrologic Unit. The Basin Plan designates the following surface water beneficial uses within HSA 904.62:
- a. Municipal and Domestic Supply (MUN)
 - b. Agricultural Supply (AGR)
 - c. Contact Water Recreation (REC-1)
 - d. Non-contact Water Recreation (REC-2)
 - e. Warm Freshwater Habitat (WARM)
 - f. Cold Freshwater Habitat (COLD)
 - g. Wildlife Habitat (WILD)
 - h. Industrial Service Supply (IND)³

14. Water Code section 13304, subdivision (a) states, in relevant part:

A person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirements or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and causes, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.... Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

- a. “Waste” is defined by Water Code section 13050, subdivision (d) as, *sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.*
- b. “Pollution” is defined by Water Code section 13050, subdivision (l) as, *an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following: (A) The waters for beneficial uses. (B) Facilities which serve these beneficial uses.*

³ Industrial Service Supply is listed as a potential Beneficial Use.

15. Water Code section 13243 provides that a Regional Board may specify certain conditions where a discharge of waste, or certain types of waste, is not permitted. The Basin Plan lists the following waste discharge prohibitions applicable to this order:
- a. *The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in Water Code section 13050, is prohibited.*
 - b. *The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the Regional Board.*
 - c. *The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.*
16. Finding Nos. 1 through 11, above, establish that the Discharger has discharged waste (i.e., fill material) to waters of the state without Waste Discharge Requirements and/or other necessary permits, and in violation of discharge prohibitions. The discharged waste creates, or threatens to create, a condition of pollution because land disturbance activities can adversely affect the use of supply water, cause anaerobic conditions and interfere with respiration of aquatic fauna. Land disturbance activities also screen out light hindering photosynthesis and normal aquatic plant development. The unmitigated use of gunite, or other hardscaping of the receiving waters, alters the hydrology and results in loss of habitat, flood attenuation, groundwater recharge, and pollutant assimilation.
17. Cleanup and abatement of the discharged waste is necessary to ensure that the existing conditions from the unauthorized discharge are cleaned up and that the threat of unauthorized discharge to waters of the state from the property is prevented. The issuance of a cleanup and abatement order pursuant to Water Code section 13304 is appropriate and consistent with the policies of the San Diego Water Board.
18. Water Code section 13267(b)(1) states, in relevant part:
- In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is*

suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

19. The burden of preparing the reports required by this Order bears a direct relationship for the need for the reports and the benefits to be obtained from the reports. The technical reports required by this Order are necessary to assure compliance with this Order and to protect the waters of the state. In accordance with Water Code section 13267, subdivision (b), the findings in this Order provide the Discharger with a written explanation with regard to the need for remedial action and reports and identify the evidence that supports the requirement to implement cleanup and abatement activities and submit the reports.
20. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), pursuant to California Code of Regulations (CCR), title 14, section 15321, subdivision (a)(2). The issuance of this Order may also be considered an action by a regulatory agency for the protection of the environment, exempt pursuant to CCR, title 14, section 15308. This action is also exempt from the provisions of CEQA in accordance with the following: CCR, title 14, section 15061, subdivision (b)(3) because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment; CCR, title 14, section 13304 for minor alterations to the condition of land, water, and/or vegetation; and CCR, title 14, section 15338 for small habitat restoration projects.
21. A formal evidentiary hearing is not required before the issuance of a cleanup and abatement order. (*Machado v. State Water Resources Control Bd.* (2001) 90 Cal.App.4th 720.) The Discharger was given one (1) week to submit comments on a draft Cleanup and Abatement Order. All comments submitted by the Discharger regarding the draft Cleanup and Abatement Order are included as Attachment N and were transmitted to the Executive Officer prior to the Executive Officer deciding whether to issue this Cleanup and Abatement Order.
22. The San Diego Water Board has provided sufficient due process to the Discharger prior to issuing this Cleanup and Abatement Order. Noting that due process is flexible and calls for such procedural protections as the situation demands, *Machado* analyzed and balanced the due process argument based on the factors identified in *Mathews v. Eldridge* (1976) 424 U.S. 319, 334-35, i.e., (1)

the private interest affected by the order; (2) the risk of erroneous deprivation of that interest through the procedures employed; and the probable value, if any, of additional or substitute procedural safeguards and (3) the government's interest (including the function involved and the fiscal/administrative burdens that additional requirements would impose). An analysis of the *Mathews* factors demonstrates the procedures used in issuing this Cleanup and Abatement Order satisfy due process. The Cleanup and Abatement Order's impact on the Discharger's private interest is minimal as it does not impose criminal or civil penalties or prevent development of the Discharger's property provided that appropriate permits have been obtained. As the *Machado* court noted, the Discharger also has the ability to petition the State Water Board for discretionary review and then to seek a writ of mandate from superior court. Further, this Order is only being issued after the Discharger was repeatedly notified about the need to obtain appropriate permits prior to conducting work related to lining the stream channel. Lastly, the San Diego Water Board has an essential interest in protecting water quality from unauthorized discharges of waste. Any additional procedures would result in an unwarranted delay to remedial action and exacerbate current conditions on the property.

THEREFORE, IT IS HEREBY ORDERED that, pursuant to Water Code sections 13304 and 13267, the Discharger shall clean up and abate the discharge and threatened discharge of wastes to waters of the state and shall comply with the provisions of this Order:

A. ORDERS

1. Immediately, cease all project activity other than that necessary to comply with Order Nos. 2-4, below, or to comply with corrective actions that may be required by any other regulatory agencies, including but not limited to CDFW, USACE, and/or the County of San Diego.
2. Within 21 days from execution of this Order, the Discharger shall remove discharges of fill and restore the stream channel to pre-impact conditions.
3. Within 30 days from execution of this Order, the Discharger shall fully stabilize disturbed soils at the property by properly installing an effective combination of erosion and sediment control Best Management Practices (BMPs).
4. Within 60 days from execution of this Order, the Discharger shall submit a technical report with photographic evidence to San Diego Water Board staff documenting that all erosion and sediment control BMPs necessary to stabilize the property have been implemented, and that the stream channel has been fully restored to its original condition.

B. REPORTING REQUIREMENTS

1. **Notice of Onsite Work.** The Discharger shall notify San Diego Water Board staff at least forty-eight (48) hours prior to any onsite work that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.
2. **Duty to Use Qualified Professionals.** The Discharger shall provide documentation that reports required under this Order are prepared under the direction of appropriately qualified professionals. As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments shall be performed by or under the direction of registered professionals competent and proficient in the fields pertinent to the required activities. The Discharger shall include a statement of qualification and registration numbers, if applicable, of the responsible lead professionals in all reports required under this Order. The lead professional shall sign and affix their registration stamp, as applicable, to the report or document.
3. **Signatory Requirement.** All reports required under this Order shall be signed and certified by the Discharger or by a duly authorized representative of the Discharger and submitted to San Diego Water Board staff. A person is a duly authorized representative of the Discharger only if: (1) the authorization is made in writing by the Discharger, and (2) the authorization specifies either an individual or a position having responsibility for the overall operation of the property or the activity. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.)
4. **Changes to Authorization.** If an authorization under paragraph (3) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the property or for any activity, a new authorization satisfying the requirements of paragraph (3) of this section shall be submitted to the San Diego Water Board prior to or together with any reports or information to be signed by an authorized representative.
5. **Reporting of Changed Owner.** The Discharger must notify the San Diego Water Board of any changes in property occupancy or ownership associated with the property described in this Order within 30 days of the change.
6. **Duty to Submit Other Information.** When the Discharger becomes aware that it failed to submit any relevant facts in any submittal required under the Order, or submitted incorrect information in any such report, the Discharger shall promptly submit in writing such facts or information to the San Diego Water Board.
7. **Penalty of Perjury Statement.** All reports shall be signed by the Discharger or its duly authorized representative(s), and shall include the following statement by the official(s), under penalty of perjury, that the report is true and correct to the best of the official(s)' knowledge:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

8. **Report Submittal.** All reports required by this Order shall be submitted to the San Diego Water Board electronically to sandiego@waterboards.ca.gov with "833830:ebecker" written in the subject line.

C. NOTIFICATIONS

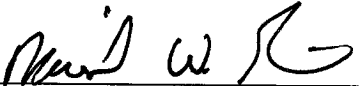
1. **Cost Recovery.** Pursuant to Water Code section 13304, subdivision (c), and consistent with other statutory and regulatory requirements, the San Diego Water Board is entitled to, and may seek reimbursement for, all reasonable costs actually incurred by the San Diego Water Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this or any subsequent order. Upon receipt of invoices, and in accordance with instruction therein, the Discharger must reimburse the San Diego Water Board for all reasonable costs incurred by the San Diego Water Board to investigate discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order and consistent with the estimation of work.
2. **Modifications.** Any modification to this Order shall be in writing and approved by the Executive Officer, including any potential extensions. Any written extension request by the Discharger shall include justification for the delay.
3. **All Applicable Permits.** This Order does not relieve the Discharger of the responsibility to obtain permits or other entitlements to perform necessary assessment activities. This includes, but is not limited to actions that are subject to local, state, and/or federal discretionary review and permitting.
4. **Enforcement Discretion.** The San Diego Water Board reserves its right to take any enforcement action authorized by law for violations of the terms and conditions of this Order.
5. **Enforcement Notification.** Failure to comply with requirements of this Order may subject the Discharger to enforcement action, including but not limited to administrative enforcement orders requiring the Discharger to cease and desist from violations, imposition of civil liability pursuant to Water Code section 13268

for failure to submit required technical or monitoring reports in an amount not to exceed \$1,000 in administrative liabilities or \$5,000 in judicial liabilities for each day in which the violation occurs, imposition of civil liability pursuant to Water Code section 13350 in an amount not to exceed \$5,000 in administrative liabilities or \$15,000 in judicial liabilities for each day of violation, referral to the state Attorney General for judicial liabilities and injunctive relief, and referral to the District Attorney for criminal prosecution.

6. **No Limitation of Water Board Authority.** This Order in no way limits the authority of the San Diego Water Board to institute additional enforcement actions or to require additional investigation and cleanup of the property consistent with the Water Code.
7. **Requesting Administrative Review by the State Water Board.** Any person affected by this action of the San Diego Water Board may petition the State Water Board to review the action in accordance with section 13320 of the Water Code, title 23, section 2050. The petition must be received by the State Water Board, Office of Chief Counsel, within **30 calendar days** of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

This Order is effective upon the date of signature.

ORDERED BY



DAVID W. GIBSON
Executive Officer

16 June 2017
Date

(Attachments on Next Page)

Attachments:

- Attachment A: February 23, 2017 Email from Paul Warren
- Attachment B: March 2, 2017 Email from Paul Warren
- Attachment C: March 21, 2017 Email from Paul Warren
- Attachment D: March 22, 2017 Email from Paul Warren
- Attachment E: Inspection Report transmitted to Paul Warren on March 28, 2017
- Attachment F: April 13, 2017 Response to Office of the Governor Inquiry
- Attachment G: April 14, 2017 Email from Paul Warren
- Attachment H: April 26, 2017 Email from Paul Warren
- Attachment I: May 1, 2017 Email from Paul Warren
- Attachment J: May 8, 2017 Email from Paul Warren
- Attachment K: May 16, 2017 Email from Paul Warren
- Attachment L: May 22, 2017 Email from Paul Warren
- Attachment M: May 24, 2017 Email from the County of San Diego with Photographs of the Warren Property
- Attachment N: Comments from Paul Warren on the Draft Cleanup and Abatement Order