

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL COAST REGION  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401**

**ADMINISTRATIVE CIVIL LIABILITY  
ORDER NO. R3-2008-0030  
Waste Discharger Identification No. 3 43C 349 742**

**Issued To**

**Gilroy Unified School District  
7810 Arroyo Circle, Gilroy, 95020  
Santa Clara County**

The California Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board), finds that:

1. Gilroy Unified School District (Discharger) owns an approximately 43-acre construction project known as Christopher High School (Site), located at 850 Day Road, Gilroy, in Santa Clara County. This project's construction activities are subject to National Pollutant Discharge Elimination System (NPDES) Permit No. CAS000002, State Water Board Order No. 99-08-DWQ, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity (General Permit).
2. On November 4, 2007, the Discharger filed a Notice of Intent to comply with the terms of the General Permit.
3. Storm water runoff from the Site flows into Day Creek and Lions Creek, each adjacent to the site, and each tributary to Llagas Creek and the Pajaro River. The creeks flow during rain events that produce surface runoff. Pollutants such as sediment deposited to the creeks can be transported to the downstream waterbodies.
4. The Pajaro River is a water of the United States, and creeks tributary to the river are also waters of the United States.
5. Llagas Creek and the Pajaro River are on the Clean Water Act Section 303(d) list of waters impaired by sedimentation and siltation. The Discharger's disturbance of 43 acres coupled with uncontrolled stormwater discharges contributed sediment to these waters.
6. The General Permit requires dischargers to develop and implement a Storm Water Pollution Prevention Plan (SWPPP) according to the General Permit's requirements (Permit Special Provisions for Construction Activity C.2, and Permit SWPPP Requirements A.6 and A.8).
7. On June 25, 2008, the Central Coast Water Board Assistant Executive Officer issued Administrative Civil Liability Complaint No. R3-2008-0030 (Complaint), alleging that the Discharger was in violation of the General Permit SWPPP development and implementation requirements and the Clean Water Act, and recommending liability for \$250,000.

## 8. The Complaint alleged that:

- a. On January 4, 2008, Santa Clara Valley Water District staff observed stormwater discharging from the Discharger's construction site directly to Lion's Creek. The accumulation of storm water at the site caused a large breach in one of the creek's banks and the subsequent uncontrolled release of sediment-laden storm water to the creek. The silt fencing installed around most of the site's perimeter was not capable of retaining sediment on the site while allowing the controlled drainage of stormwater. No other significant erosion or sediment controls were in place. Planned storm drain inlets within the site were not functional, and therefore provided no controlled drainage. The storm water also spilled over the top of the silt fence in several locations.
- b. During Central Coast Water Board staff's first inspection of the site on January 22, 2008, staff observed two excavations at the site intended as sedimentation basins. The Discharger installed the basins after the January 4<sup>th</sup> storm event. Neither basin was designed or installed according to the sediment basin design requirements in the General Permit. Furthermore, the Discharger indicated in its Storm Water Pollution Prevention Plan (SWPPP) that sediment basins were not applicable to the site, and would not be used. After a rain event before the January 22<sup>nd</sup> inspection, the water depth in each basin was level with the basin outlet, indicating that discharges occurred. The water in each basin was muddy, indicating that the basins did not provide significant clarification. The Discharger did not revise the SWPPP in response to the ineffectiveness of erosion and sediment controls evidenced by the January 4, 2008 BMP failures and sediment discharges to receiving waters.
- c. Staff returned for another inspection on January 29, 2008. The Discharger had increased the size of the basins, but without any demonstrable basis upon the design requirements in the General Permit. The Discharger did not provide any design specifications or SWPPP revisions consistent with this work. Several berms were constructed to retain more water within natural depressions on site, but without sufficient technical basis to demonstrate their capacity to function as an effective form of sediment control. The water level in the basins was again level with the discharge spillways, indicating discharges to receiving waters.
- d. The water district's original complaint and staff's two inspections indicated the Discharger did not apply an effective combination of erosion and sediment control to the construction site during the rainy season, resulting in uncontrolled discharges of sediment in stormwater discharges to waters of the state. Instead of revising the SWPPP and applying an effective combination of erosion and sediment controls to comply with the General Permit, the Discharger excavated two basins without the technical considerations required to ensure either retention or the clarification of stormwater discharges. The Discharger did not install erosion and sediment controls in the timely or effective manner the Permit requires, resulting in erosion and sediment transport to creeks. The Discharger did not construct sediment controls (basins) according to the design specifications in the Permit, and did not develop and implement its SWPPP according to Permit requirements.

## 9. The Discharger violated the General Permit by failing to:

- a. develop and appropriately revise its SWPPP according to the Permit's SWPPP requirements;

- b. implement the Permit's SWPPP requirements;
  - c. implement controls to reduce pollutants in storm water discharges from its construction site to the BAT/BCT (Best Available Technology Economically Achievable/Best Conventional Pollutant Control Technology) performance standard established in the Permit;
  - d. select, install, and properly maintain effective filtration devices, barriers, and settling devices;
  - e. implement an effective combination of erosion and sediment controls on all disturbed areas during the rainy season;
  - f. design, install, and maintain sediment basins according to the Permit's SWPPP requirements; and
  - g. include in its SWPPP a schedule for applying erosion and sediment controls to the site.
10. Pursuant to California Water Code Section 13385, any person who violates waste discharge requirement shall be civilly liable for up to ten thousand dollars (\$10,000) for each day in which the violation occurs.
11. The Discharger violated California Water Code Section 13385(a)(2) by failing to develop and implement a SWPPP as required by the General Permit, and is subject to the civil liability as set forth in California Water Code Section 13385(c). Specifically, the Discharger violated Permit Special Provision C.2 because the Discharger did not develop and implement sediment basin Best Management Practices in its Storm Water Pollution Prevention Plan (SWPPP) according to Permit requirements. Therefore, the Discharger was in violation of Permit Special Provisions for Construction Activity C.2, and Permit SWPPP Requirements A.1 and A.8. The Discharger failed to develop and implement a SWPPP according to Permit SWPPP Requirements A.6 and A.8 as evidenced by the Discharger's failure to include Best Management Practice (BMP) implementation schedules in the SWPPP. Therefore, the Discharger was in violation of Permit Special Provisions for Construction Activity C.2, and Permit SWPPP Requirements A.6 and A.8.
12. Pursuant to California Water Code Section 13385(e), in determining the amount of any liability under Section 13385, the Central Coast Water Board 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 benefit 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".
13. The Central Coast Water Board determines with respect to the factors in Section 13385 the following:
- a. **Nature, circumstances, extent, and gravity of the violations:** The Discharger violated Permit requirements by discharging sediment to state and federal waters, failing to develop BMPs according to the Permit's SWPPP requirements, and failing to implement an effective combination of erosion and sediment controls.

A rain event on and around January 4, 2008, resulted in the Discharger's construction site causing a bank failure in Lions Creek and the uncontrolled discharge of stormwater

and sediment to the creek. Silt fencing along the site perimeter was also overwhelmed, causing further discharges to waters of the state. The Discharger subsequently elected to install sediment basins to collect and discharge stormwater from future rain events. The Discharger did not design and construct the basins according to Permit requirements shown above, nor did the Discharger revise its SWPPP to incorporate and apply those design requirements. The Discharger provided no technical basis for the basins.

Furthermore, for a 43-acre, mass-graded construction site with no stormwater drainage infrastructure, it is reasonable to anticipate the need for sediment basins (or another applicable technology or combination of technologies) to prevent sediment from leaving the project site and discharging to surface waters. The Discharger failed to develop its SWPPP to include sediment basins or other suitable technologies from the project's beginning, and therefore was in violation of the Permit since November 4, 2007 (the date the Discharger signed the Notice of Intent to Comply with the Permit, and therefore the first day of Permit regulation).

The Discharger's failure to develop and implement a SWPPP according to the Permit reasonably extends from November 4, 2007, to at least March 4, 2008 (the date the Discharger signed a newly developed SWPPP).

Used by itself, perimeter silt fencing is not an adequate form of sediment control for a mass-graded, 43-acre construction site with no means of controlling stormwater runoff. This was the only form of erosion or sediment control evident during the January 4, 2008 storm event.

The site flooding, creek bank failure, and discharges that occurred on and around January 4, 2008, resulted from the failure to apply an effective combination of erosion and sediment controls up to that time. Furthermore, in its response to this event, the Discharger failed to comply with the Permit's sediment basin design requirements, and instead relied upon excavations and natural site features intended for that purpose, but for which there was no technical basis to support their performance to the BAT/BCT standards required by and established in the Permit. Between January 4, 2008, and January 22, 2008, the Discharger installed the first of these excavations. On January 29, 2008, the Discharger increased the size of the excavations, but again without applying the Permit's required standards. The excavations did not retain or clarify sediment-laden stormwater discharged from the site. The period from January 4, 2008, through January 29, 2008, carries a higher degree of gravity because the Discharger's violations on January 4<sup>th</sup> should have heightened its awareness of the ineffective erosion and sediment controls at the site, and prompted them to revise their SWPPP and comply with the design requirements in the Permit. Staff's direction to the Discharger at the January 22<sup>nd</sup> inspection should also have prompted these responses.

The period from November 4, 2007 (the first day of Permit regulation), up to the storm event on or around January 4, 2008, also carries significant gravity, lessened only in comparison to the gravity of the creek bank failure and uncontrolled stormwater discharges from the site during the January 4<sup>th</sup> storm, and the subsequent and inadequate response described in the paragraph above. During the November 4<sup>th</sup> – January 4<sup>th</sup> period, the Discharger's SWPPP was severely deficient in its lack of site-specific application of the Permit's SWPPP requirements, most notably the lack of erosion and sediment control deployment time schedules and sediment basin design

requirements. These deficiencies directly contributed to the January 4<sup>th</sup> flooding, creek bank failure, and sediment-laden stormwater discharges to tributaries to waters already impacted by sediment and siltation.

- b. **Discharge susceptibility to cleanup or abatement:** Stormwater discharges generally are not susceptible to complete cleanup because pollutants in such discharges often move rapidly downstream to other receiving waters, and disperse over extensive areas. The pollutant discharges in this case were not susceptible to cleanup or abatement.
- c. **Discharge toxicity:** There is evidence of sediment-laden storm water runoff discharged to Day Creek, Lions Creek, Llagas Creek, and the Pajaro River, the beneficial uses of which include Wildlife Habitat [WILD], Cold & Warm Fresh Water Habitats [COLD & WARM], and Spawning, Reproduction, and/or Early Development [SPWN].

Sediment deposition to creeks and rivers can adversely affect the above beneficial uses by causing impacts commonly associated with toxicity (such as mortality or inhibiting reproduction), although sediment is not a toxic substance. Llagas Creek and the Pajaro River flow year-round and therefore support these beneficial uses year-round.

- d. **Discharger's Ability to Pay the Liability, and the Effect on the Discharger's Ability to Continue Business:** The Discharger has the apparent ability to pay because it operates a school district serving approximately 10,100 students, with an annual budget of approximately 119 million dollars<sup>1</sup> (2005-2006), and plans to spend 122 million dollars on the first phase of this construction project<sup>2</sup>.

The State of California's 2007-2008 budget crisis will likely affect the Discharger's revenue. However, the Discharger's contract with the Developer, the Gilbane Company, indicates that the Discharger is indemnified from penalties resulting from violations of the Permit. Therefore, the Discharger can seek reimbursement from the Gilbane Company for any civil liability imposed upon the Discharger for violating the Permit.

- e. **Violation history:** The Central Coast Water Board has not taken previous enforcement actions against the Discharger for this project.
- f. **Voluntary cleanup efforts:** The Discharger did not conduct voluntary cleanup efforts in receiving waters. Sediment discharges occurred during rain events, transporting sediment to downstream waterbodies.
- g. **Degree of culpability:** As the owner of the regulated facility, the Discharger is responsible for Permit compliance, and has the highest degree of culpability. The Discharger, having signed the Notice of Intent to comply with the Permit, was aware of the Permit's general construction requirements, including the requirement to develop and implement effective erosion and sediment control BMPs according to a site-specific SWPPP.
- h. **Economic benefit or savings:** During the period of violation addressed by this complaint, the Discharger realized economic benefit or savings by failing to develop and

<sup>1</sup> Gilroy Unified School District, <http://www.gusd.k12.ca.us/index.php?/community/index/>

<sup>2</sup> Gilroy Unified School District, *Facilities Master Plan 2002-2027, Updated December 13, 2007*, Project Plans, page 1-29

implement BMPs according to the Permit's SWPPP requirements, and failing to implement an effective combination of erosion and sediment controls resulting in the discharge of sediment to waters of the state and the United States. BMP-related sources of economic benefit can include the costs of BMP materials in unstabilized areas, maintenance cost savings realized from delays in BMP installations, savings in Discharger staff (or sub-contracted personnel) time to implement BMPs, and savings realized by avoiding design and construction of BMPs.

The Discharger reported that it hired an erosion and sediment control consultant to evaluate the project site, revise the SWPPP according to the Permit, and facilitate the implementation of Permit design requirements. The Discharger signed a newly developed SWPPP on March 4, 2008. The economic benefit evaluation presumes that the Discharger will complete this work in compliance with the Permit, and that the Discharger's economic benefit of violating the Permit will be reduced because the Discharger will eventually install and maintain additional BMPs after the violation period addressed by this complaint. Therefore, the Discharger is presumed to have realized economic benefit only by delaying pollution control expenditures.

Using U.S. EPA's economic benefit modeling calculator (BEN), the Discharger's economic benefit from delaying compliance costs was approximately \$920.

Detailed Economic Benefit Analysis: General Permit SWPPP Requirement A.8 includes four options for designing sediment basins to achieve the Permit's objective of preventing sediment discharges to surface waters. Option #2 requires that basins have a capacity of 3,600 cubic feet for each acre draining to the basin<sup>3</sup>. The Discharger's site is approximately 43 acres. Multiplying 3,600 cubic feet/acre by 43 acres produces a capacity of 154,800 cubic feet.

The California Stormwater BMP Handbook<sup>4</sup> indicates that for basins greater than 50,000 cubic feet, the average cost to install and maintain sediment basins is \$600 per acre draining to the basin. Multiplying \$600/acre by 43 acres produces a capital cost of \$25,800.

Entering this capital cost into the BEN calculator, with non-compliance spanning November 4, 2007 through April 1, 2008 and the liability payment date of October 5, 2008, the Discharger's economic benefit due to delayed compliance costs was \$917.

Given the above considerations, it is reasonable to conclude that civil liability assessed in this Order recovers the Discharger's economic benefit derived from the alleged violations.

- i. **Other matters as justice may require:** Central Coast Water Board staff spent time traveling to and inspecting the Site, and preparing and reviewing documents related to this enforcement action. Estimated staff costs (including Central Coast Water Board

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<sup>3</sup> For the purposes of estimating economic benefit, staff is assuming a single basin in these calculations. In practice, and as evidenced by the Discharger's installation of two inadequate basins in January 2008, specific site conditions may require multiple basins.

<sup>4</sup> California Stormwater Quality Association (CASQA), California Stormwater BMP Handbook, Construction, Sediment Basin Fact Sheet SE-2, <http://www.cabmphandbooks.com/>, January 2003 with September 2004 Errata

technical staff, administrative staff, supervisors, and legal counsel) are twenty thousand, three hundred and seventy-five dollars (\$20,375).

$$\$125/\text{hour} \times 163 \text{ hours} = \$20,375$$

14. This Order only resolves liability that the Discharger incurred through June 25, 2008 (date Complaint issued), for the violations specifically alleged in the Complaint, and does not relieve the Discharger of liability for any violations after June 25, 2008, or any violations not alleged in the Complaint.
15. This enforcement action is taken for the protection of the environment and as such is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) in accordance with sections 15307 and 15308, Title 14, California Code of Regulations.
16. A hearing on this matter was held before the Central Coast Water Board on December 4, 2008, at the Central Coast Water Board, 895 Aerovista Place, in San Luis Obispo. The Discharger, or the Discharger's representative(s), and other designated parties and interested persons had the opportunity to be heard and to contest the allegations in Complaint No. R3-2008-0030, which recommended the imposition of civil liability by the Central Coast Water Board.

IT IS HEREBY ORDERED, pursuant to Section 13385 of the California Water Code that the Discharger is assessed a total civil liability of \$250,000, to be paid as follows:

1. The sum of two hundred and fifty thousand dollars (\$250,000) to be delivered to the Central Coast Regional Water Quality Control Board, 895 Aerovista Place, Suite 101, San Luis Obispo, CA 93401, no later than January 5, 2009. The Discharger shall make the check payable to the State Water Resources Control Board Cleanup and Abatement Account, with "ACL Order No. R3-2008-0030" shown on the memo line.

I, Roger W. Briggs, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the Central Coast Regional Water Quality Control Board on December 4-5, 2008.

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Roger W. Briggs  
Executive Officer

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Date