CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION

In the matter of:	**Complaint No. R3-2008-0030**
Gilroy Unified School District	**Administrative Civil Liability**
7810 Arroyo Circle	**For**
Gilroy, CA	**Violations of**
WDID No. 3 43C 349 742	**Waste Discharge Requirements and the Clean Water Act**

GILROY UNIFIED SCHOOL DISTRICT IS HEREBY GIVEN NOTICE:

Gilroy Unified School District (Discharger) is alleged to have violated provisions of law and an Order of the State Water Resources Control Board (State Water Board), for which the Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board), may impose civil liability pursuant to Section 13385 of the California Water Code.

Unless the Discharger waives its right to a hearing, the Central Coast Water Board will hold a public hearing on this matter within 90 days of the Discharger's receipt of this Administrative Civil Liability Complaint (Complaint). The Discharger and/or the Discharger's representative(s) will have the opportunity to be heard, and to contest the allegations in this Complaint and the imposition of civil liability by the Central Coast Water Board. A public hearing is tentatively scheduled for September 5, 2008, in San Luis Obispo.

Staff will mail the Discharger an agenda not less than ten days before the hearing date. At the hearing, the Central Coast Water Board will consider whether to affirm, reject, decrease, or increase the proposed administrative civil liability, or whether to refer the matter to the State Attorney General for recovery of judicial civil liability, or any other action appropriate as a result of the hearing.

ALLEGATIONS

1. The Discharger is the owner of an approximately 43-acre construction project known as Christopher High School (Site), 850 Day Road, Gilroy, in Santa

Clara County. The project plans include building a high school, and the disturbance of all 43 acres. The topography of the Site is generally level.

2. State Water Board Order No. 99-08-DWQ, National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002, *Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity* (Permit), as amended, prescribes waste discharge requirements regulating storm water discharges associated with construction activity for sites disturbing one acre or more in accordance with the Clean Water Act (United States Code, Title 33, Chapter 26) and the Porter-Cologne Water Quality Control Act (California Water Code Sections 13000 et seq.).

3. On November 4, 2007, Stephen L. Brinkman, Gilroy Unified School District Assistant Superintendent, signed a Notice of Intent to comply with the Permit. The Notice of Intent states that construction began on September 21, 2007.

4. The Notice of Intent identifies Gilroy Unified School District as the site owner, and the Gilbane Company as the developer/contractor.

5. 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.

6. The Pajaro River is a water of the United States, and creeks tributary to the river are also waters of the United States.

7. 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.

8. On December 1 and 2, 2005, the Central Coast Water Board adopted the *Pajaro River Total Maximum Daily Loads (TMDLs) for Sediment (including Llagas Creek, Rider Creek, and San Benito River) and Land Disturbance Prohibition* as amendments to the Water Quality Control Plan, Central Coast Region (Basin Plan). The TMDLs became effective on November 27, 2006, and were approved by the United States Environmental Protection Agency on May 3, 2007.

   The Central Coast Water Board's goal for establishing these TMDLs is to protect cold fresh water habitat, migration of aquatic organisms, and spawning, reproduction, and/or early development beneficial uses (COLD, MIGR, AND SPWN, respectively) as defined in the Basin Plan. Among others in the TMDL, urban and rural residential development is an acknowledged

source of sediment to Llagas Creek and the Pajaro River. TMDL implementation is in progress at this time.

9. 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.

   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 4th 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 22nd 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.

   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.

   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.

10. Violations of the Permit subject the Discharger to liability under California Water Code Section 13385(a)(2).

11. *SWPPP Violation: Improper Construction and Implementation of Sediment/Siltation Basins.* 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.

Permit Special Provisions for Construction Activity C.2 states,

> All dischargers shall develop and implement a SWPPP in accordance with Section A: *Storm Water Pollution Prevention Plan*. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT (Best Available Technology Economically Achievable/Best Conventional Pollutant Control Technology) performance standard.

Permit SWPPP Requirement A.1(c) states,

> A SWPPP shall be <u>developed and implemented to address the specific circumstances</u> for each construction site covered by this General Permit. ...The SWPPP shall be <u>developed and amended or revised, when necessary, to</u> ... <u>identify, construct, implement</u> in accordance with a time schedule, and maintain Best Management Practices (BMPs) to reduce or eliminate pollutants in storm water discharges and authorized nonstorm water discharges from the construction site during construction. (<u>Emphasis added</u>)

Permit SWPPP Requirement A.8 states,

> ...<u>Effective</u> filtration devices, barriers, and settling devices shall be selected, installed and maintained properly... These are the

> most basic measures to prevent sediment from leaving the project site and moving into receiving waters.
>
> At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season.
>
> If the discharger chooses to rely on sediment basins for treatment purposes, sediment basins shall, at a minimum, be designed and maintained as follows:

The Permit then proceeds to describe four technical options for designing sediment basins, which are hereby included by reference into this Complaint. The Discharger did not design its sediment basins according to any of the options prescribed in SWPPP Requirement A.8.

The Discharger's SWPPP indicates the sediment basins would not be used because they were not applicable to the site.

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. Central Coast Water Board staff observed the basins during inspections on January 22, 2008, and January 29, 2008. 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).

Therefore, the Discharger was in violation of Permit Special Provisions for Construction Activity C.2, and Permit SWPPP Requirements A.1 and A.8 for at least 122 days during the rainy season, from November 4, 2007 (the first day of Permit regulation), through March 4, 2008 (the date the Discharger signed a newly developed SWPPP).

12. *SWPPP Violations: Failure to Develop BMP Implementation Schedules.* 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.

    Permit SWPPP Requirement A.6 states,

    > The SWPPP shall include a description of the erosion control practices, including a time schedule, to be implemented during construction to minimize erosion on disturbed areas of a construction site.

    Permit SWPPP Requirement A.8 states,

    > A proposed schedule for deployment of sediment control BMPs shall be included in the SWPPP.

    The Discharger's SWPPP indicates the intended use of scheduling as a minimum requirement regarding the implementation of erosion controls. However, the SWPPP did not include a schedule. The SWPPP stated nothing about using scheduling for sediment control deployment.

    The Discharger's SWPPP did not include the required erosion and sediment control implementation schedules. Therefore, the Discharger was in violation of Permit Special Provisions for Construction Activity C.2, and Permit SWPPP Requirements A.6 and A.8 for at least 122 days during the rainy season, from November 4, 2007 (the first day of Permit regulation), through March 4, 2008 (the date the Discharger signed a newly developed SWPPP).

13. Central Coast Water Board staff discussed violations with representatives of the Discharger and of the Discharger's contractor during inspections on January 22, 2008, January 29, 2008, and February 21, 2008.

PROPOSED CIVIL LIABILITY

In determining any liability to be imposed, California Water Code Section 13385 requires the Central Coast Water Board to consider the following factors and any other factors as justice may require:

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.

   The above allegations describe the nature, circumstances, extent, and gravity of the violations which staff considered in its recommended liability. Non-compliance with Permit requirements is a serious violation.

   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 Discharger's non-compliance described in Allegation No. 11 includes varying degrees of gravity. 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 date of staff's first inspection), the Discharger installed the first of these excavations. On January 29, 2008 (the date of staff's second inspection), and despite staff's notification at the January 22nd inspection that the excavations did not comply with Permit requirements, the Discharger increased the size of the excavations, but again without applying the Permit's required standards. Each of staff's inspections showed that the excavations were not retaining or clarifying sediment-laden stormwater 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 4th 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 22nd 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 4th storm, and the subsequent and inadequate response described in the paragraph above. During the November 4th – January 4th 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 4th flooding, creek bank failure, and sediment-laden stormwater discharges to tributaries to waters already impacted by sediment and siltation (see Allegations #5 - #8).

This consideration does not warrant less than the maximum liability.

b. **Discharge susceptibility to cleanup or abatement:** Stormwater discharges generally are not susceptible to complete cleanup because pollutants or contaminants 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.

   This consideration does not warrant less than the maximum liability because the Discharger could not clean up the sediment discharged to Llagas Creek and the Pajaro River, thereby contributing to the anthropogenic pollutant loading to receiving waters already impaired by sediment and siltation.

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). Llagas Creek and the Pajaro River flow year-round and therefore support these beneficial uses year-round. This consideration warrants less than the maximum liability because although sediment discharges can cause impacts commonly associated with toxicity, sediment is not a toxic substance.

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[1] (2005-2006), and plans to spend 122 million dollars on the first phase of this construction project[2].

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 penalties imposed upon the Discharger for violating the Permit.

This consideration does not warrant less than the maximum liability.

e. **Violation history:** The Central Coast Water Board has not taken previous enforcement actions against the Discharger for this project. This consideration is neutral with respect to liability.

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. This factor is neutral with respect to liability, because there were no voluntary cleanup activities.

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. This consideration does not warrant less than the maximum liability.

   Central Coast Water Board staff discussed noncompliance with the Discharger at each inspection; however, staff observed continued non-compliance during the second inspection. This further consideration also does not warrant less than the maximum liability.

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 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

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[1] Gilroy Unified School District, http://www.gusd.k12.ca.us/index.php?/community/index/

[2] Gilroy Unified School District, *Facilities Master Plan 2002-2027, Updated December 13, 2007*, Project Plans, page 1-29

(or sub-contracted personnel) time to implement BMPs, and savings realized by avoiding design and construction of BMPs.

During staff's February 21, 2008 inspection, 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. Staff is presuming 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.

To estimate this delayed savings, staff used an economic benefit modeling calculator (BEN) provided by U.S. EPA for this purpose. Staff first estimated the necessary capacity of the basin(s) based on the design specifications in the Permit. Based on this capacity, staff then applied the average cost per acre to install and maintain sediment basins to determine a capital cost for the BMP. Staff then entered this capital cost into the BEN calculator to determine the economic savings from November 4, 2007, through April 1, 2008 (staff's estimate of the Discharger's design and construction of appropriate sediment basins). According to this process, 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[3]. 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[4] 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.

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[3] 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.

[4] 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,

Entering this capital cost into the BEN calculator, with non-compliance spanning November 4, 2007 through April 1, 2008 (staff's estimate of when the Discharger will achieve compliance by implementing an appropriate SWPPP), and a penalty payment date of October 5, 2008 (staff's assumption that the Discharger will pay any assessed liability 30 days after the Central Coast Water Board's September 5, 2008 meeting), the Discharger's economic benefit due to delayed compliance costs was $917.

Given the above considerations, it is reasonable to conclude that staff's recommended civil liability 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 technical staff, administrative staff, supervisors, and legal counsel) are twenty thousand, three hundred and seventy-five dollars ($20,375).

$125/hour X 163 hours = $20,375

RECOMMENDATION

The following table summarizes the maximum liability for each allegation.

Allegation No.	Daily Violations	Max. Liability per Daily Violation	Max. Liability
11	122	$10,000	$1,220,000
12	122	$10,000	$1,220,000
		Total Maximum Liability	**$2,440,000**

Upon consideration of factors as required by California Water Code Section 13385, the Assistant Executive Officer recommends civil liability in the amount of **two hundred and fifty thousand dollars ($250,000)** for the Discharger's violations of the Permit.

Maximum Liability – Pursuant to California Water Code Section 13385, the Central Coast Water Board can impose civil liability for up to ten thousand dollars ($10,000) per day for each violation of waste discharge requirements. Waste discharge requirements include NPDES permits (California Water Code Section 13374). The Discharger was in violation of multiple requirements of the Permit from November 4, 2007, through March 4, 2008. Per the above allegations, 244 violations are subject to the maximum civil liability of $10,000 per day per violation. The maximum liability the Central Coast Water Board may impose on

the Discharger is therefore **two million, four hundred and forty thousand dollars ($2,440,000)**.

Minimum Liability – In accordance with California Water Code Section 13385, the minimum liability the Central Coast Water Board may impose is recovery of economic benefits (if any) derived from the violations. Staff has concluded that the Discharger's economic benefit was derived from delaying the cost of compliance, since the Discharger eventually took action towards spending resources to comply with the Permit. The amount of economic benefit was approximately $920. Therefore, the proposed liability of two hundred and fifty thousand dollars ($250,000) is greater than the economic benefit or savings realized by the Discharger during the period of violation, and therefore meets California Water Code Section 13385 specifications for assessing at least the minimum liability.

Michael J. Thomas
Assistant Executive Officer

6-25-08
Date

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