

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement and 13267 Order No. R1-2013-0050

For
Donald and Rogie Shutt
For
Stream Diversion and Dredge and Fill in
Gilbert Creek
On and Adjacent to Del Norte County Assessor's Parcel Number 101-160-01

Del Norte County
WDID# 1A13014CNDN

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

1. Ronald and Sylvia Lorenzetti are identified in County records as the owners of the parcel of land located at 340 Struebing Lane, near Smith River, CA (hereinafter Site). Albert and Ruth Fries and Donald and Rogie Shutt own neighboring parcels adjacent to and south of the Lorenzetti Property on Struebing Lane in the potential impact zone of an ongoing bluff failure. In accordance with State Water Resources Control Board Resolution 92-49, and as supported through the findings below, this Order names Mr. and Mrs. Shutt as Dischargers, responsible for the abatement of discharges from the Site described herein and in attachments.
2. On October 26, 2012, Mr. Ronald Lorenzetti, Mr. Albert Fries, and Mr. Donald Shutt requested that Del Norte County issue an emergency permit to divert Gilbert Creek. Following written denial of the request for emergency permitting by Del Norte County Planner Randy Hooper on October 10, 2012, Mr. and Mrs. Shutt (the Dischargers) and/or their agents conducted instream activities in Gilbert Creek, resulting in diversion, dredging, vegetation removal, filling and modifying of 572 feet of stream channel, and constructing a 130-foot long and 20-foot wide berm of native fill and woody debris in Gilbert Creek.
3. On February 27, 2013, the Regional Water Board Assistant Executive Officer transmitted a draft Cleanup and Abatement/13267 Order (CAO) naming Mr. and Mrs. Fries, Mr. and Mrs. Lorenzetti, and Mr. and Mrs. Shutt as Dischargers, providing a review and comment period prior to Executive Officer issuance of this final CAO.
4. On March 7, 2013, Regional Water Board staff received a letter from Albert and Ruth Fries in response to the draft CAO, stating that they had nothing to do with the instream work and requesting revocation of the CAO.

5. On March 15, 2013, Regional Water Board staff received a letter from Ronald and Sylvia Lorenzetti, stating that they had given Mr. Shutt permission to file for an emergency permit to reconstruct Gilbert Creek when contacted in August 2012, but had no knowledge that any work was conducted on their property following County denial of the emergency permit. Mr. and Mrs. Lorenzetti stated that they did not hire someone, nor authorize anyone to hire someone on their behalf to perform any work on the creek.
6. On April 6, 2013, the Regional Water Board staff received from the California Department of Fish and Wildlife (DFW) a supplemental narrative report documenting an interview between DFW Warden Jackie Krug, and Bob Busch of Busch Geotechnical Consultants in Arcata. The supplemental narrative report indicates that Donald Shutt hired Mr. Busch to evaluate Gilbert Creek after some recent instream work had been conducted without a DFW permit. Mr. Busch confirmed in this interview that Mr. Shutt was responsible for the recent instream work.
7. On April 19, 2013, Stormer Feiler, an Environmental Scientist with the Regional Water Board, spoke via telephone with Robert Busch of Busch Geotechnical Consultants. Mr. Busch confirmed that he participated in the interview described in finding 6, above, and that Mr. Shutt was responsible for conducting the work in Gilbert Creek. Mr. Busch further stated that Mr. Shutt would not tell him who he had hired to perform the instream work.
8. On April 22, 2013, Stormer Feiler received from County of Del Norte correspondence between Attorney at Law John Babin (representing Mr. Shutt) and DFW, which included an application for a 1600 agreement to address violations identified in the Notice of Violation issued by DFW to Mr. Shutt for unlawful activities within and adjacent to Gilbert Creek at the Site. The 1600 agreement included in this correspondence identifies Mr. Donald Shutt as the Applicant, and requests permission to conduct instream work on the Lorenzetti property.
9. This CAO identifies Donald and Rogie Shutt, the owners and residents of 300 Struebing Lane (Del Norte County APN# 101-160-03), as the responsible parties (Dischargers) in this matter based on the information described in findings 6-8, above.
10. The Dischargers and/or their agents have diverted a stream and placed earthen materials and woody debris in and adjacent to Gilbert Creek, a tributary to the Pacific Ocean. The Dischargers' activities at the Site have resulted in discharge, and threatened discharge of sediment and debris, as described herein, to waters of the State and of the United States.
11. On October 26, 2012, Regional Water Board staff (Staff) inspected the Site and observed the following:

- a) A recently constructed instream berm 130 feet long and 20 feet wide consisting of earthen materials and woody debris in the Gilbert Creek channel substantially diverting the stream to the north and de-watering 200 feet of existing stream channel;
 - b) A recently excavated new channel in the banks of Gilbert Creek resulting in the deposition and placement of earthen materials and woody debris into or where such materials can enter into Gilbert Creek;
 - c) Sediment deposits in Gilbert Creek from stream channel modification and berm construction.
12. The Water Quality Control Plan for the North Coast Region (Basin Plan) designates the following existing or potential beneficial uses for Gilbert Creek within the Winchuck River hydrologic unit:
- a. Municipal and domestic supply
 - b. Agricultural supply
 - c. Industrial service supply
 - d. Industrial process supply
 - e. Freshwater replenishment
 - f. Navigation
 - g. Power
 - h. Water contact recreation
 - i. Non-contact water recreation
 - j. Commercial and sport fishing
 - k. Cold freshwater habitat
 - l. Wildlife habitat
 - m. Rare threatened or endangered species
 - n. Marine
 - o. Migration of aquatic organisms
 - p. Spawning, reproduction, and/or early development
 - q. Aquaculture
13. The Water Quality Control Plan for the North Coast Region (Basin Plan) designates the following existing or potential beneficial uses for the Pacific Ocean:
- a. Industrial Service supply
 - b. Industrial Process Supply
 - c. Navigation
 - d. Power

- e. Water contact recreation
 - f. Non-contact water recreation
 - g. Commercial and sport fishing
 - h. Areas of Special Biologic Significance
 - i. Wildlife habitat
 - j. Rare threatened or endangered species
 - k. Marine
 - l. Migration of aquatic organisms
 - m. Spawning, reproduction, and/or early development
 - n. Shellfish
 - o. Aquaculture
14. Recently constructed features on the Site have directly impacted the beneficial uses of water because of the negative or potentially negative impacts associated with the introduction of earthen material and sediment directly into a stream that provides fish habitat for coastal cutthroat trout. Diversion and re-construction of Gilbert Creek has resulted in potential negative effects to a number of beneficial uses including those related to fish and fisheries, and aquatic habitat.
15. The Basin Plan contains specific standards and provisions for maintaining high quality waters of the State that provide protection to the beneficial uses listed above. The Basin Plan's Action Plan for Logging, Construction and Associated Activities (Action Plan) includes two prohibitions (Page 4-26 of the 2007 Basin Plan):
- Prohibition 1 - *"The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited."*
 - Prohibition 2 - *"The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited."*
16. The federal Clean Water Act (CWA) section 301 prohibits the discharge of any pollutant to waters of the United States except for when such discharge is in compliance with sections 302, 306, 307, 318, 401, 402, and 404. In this case, the activities that led to the discharges of waste described in this Order were not conducted in compliance with sections 401, 402, and 404.
17. Placement of fill in waters of the United States, including wetlands, ponds, and streams requires Clean Water Act section 401 Water Quality Certification from the

Regional Water Board and a Clean Water Act section 404 permit from the United States Army Corps of Engineers. Anyone proposing to conduct a project that requires a federal permit for placement or discharge of fill into waters of the United States and/or waters of the State, including wetlands (all types), rivers, streams (including perennial, intermittent, and ephemeral streams) lakes, estuaries, harbors, bays, and the Pacific Ocean, must file an application for 401 Water Quality Certification and/or waste discharge requirements with the Regional Water Board. We have no record of such an application being filed for the instream construction activities on the subject parcel and in the subject creek.

18. Section 3 of the Basin Plan contains water quality objectives that specify limitations on certain water quality parameters not to be exceeded as a result of waste discharges. The water quality objectives that are considered of particular importance in protecting the beneficial uses from unreasonable effects due to discharges from construction, or associated activities, include the following:
 - Color: Waters shall be free of coloration that causes nuisance or adversely affects beneficial uses.
 - Suspended Material: Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.
 - Settleable Material: Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.
 - Sediment: The suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.
 - Turbidity: Turbidity shall not be increased more than 20 percent above naturally occurring back ground levels. Allowable zones within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.
19. As described above, the Dischargers and/or their agent(s) have placed earthen materials and debris into Gilbert Creek and where it can pass into Gilbert Creek, in quantities likely deleterious to fish, wildlife and other beneficial uses. This discharge violates Prohibitions 1 and 2 in the Action Plan, as described in finding 14, and violates the federal CWA, as described in findings 15 and 16.
20. The conditions on the Site are therefore subject to cleanup and abatement under California Water Code (Water Code) section 13304. Water Code section 13304, subdivision (a) provides, in relevant part, that: "Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement 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 waters of the state and creates, 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.”

21. As stated in finding 14., above, the Basin Plan’s Action Plan contains two separate prohibitions against the discharge or placement of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited. As explained herein, the Dischargers’ activities on the Site have violated both of these prohibitions and the federal CWA; therefore, the Dischargers are subject to this Order pursuant to Water Code section 13304.
22. Pursuant to Water Code section 13304 (c)(1), the Regional Water Board is entitled to and can seek reimbursement for reasonable costs incurred to investigate the unauthorized discharge of wastes, to oversee cleanup of the wastes, supervising cleanup and abatement activities, or taking other remedial actions required by this Order.
23. Water Code section 13267, subdivision (a), authorizes the Regional Water Board to investigate the quality of any waters of the state within its region in connection with any action relating to the Basin Plan. Water Code section 13267, subdivision (b) provides that the Regional Water Board, in conducting an investigation, may require Dischargers to furnish, under penalty of perjury, technical or monitoring program reports. A technical report, and restoration and monitoring work plan required by this Order, pursuant to Water Code section 13267, is necessary to ensure that the prior harm and future threat to water quality created by the discharges described above are properly assessed, abated, and controlled. Based on the nature and possible consequences of the discharges, the burden of providing the required reports, including the costs, bears a reasonable relationship to the need for the reports, and the benefits to be obtained from the reports.
24. This is an enforcement action taken by a regulatory agency for the protection of the environment, and is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, section 21000 *et seq.*), in accordance with California Code of Regulations, title 14, sections 15308 and 15321.
25. Failure to comply with the terms of this Order may subject the Dischargers to administrative civil liability, pursuant to sections 13350 of the Water Code in an amount of up to five thousand dollars (\$5,000) per day of violation or ten dollars (\$10) per gallon of waste discharged. Failure to provide the technical reports

required by this Order may also subject Dischargers to administrative civil liability in the amount of up to \$1000 per day pursuant to section 13268 of the Water Code.

26. Any person affected by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with Water Code section 13320 and title 23, California Code of Regulations, section 2050-2068. The State Water Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. Please note, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner's legal rights. Additionally, if you choose to file a petition with the State Water Board, be advised that you must comply with the Order while your request for reconsideration and/or petition is under consideration.

THEREFORE, IT IS HEREBY ORDERED that, pursuant to Water Code sections 13304 and 13267, the Dischargers shall provide the following information and perform the following cleanup and abatement actions:

1. Immediately cease all activities that cause or threaten to cause the discharge of sediment to Gilbert Creek and any other waters of the State or United States (or tributaries thereto) located on or downstream of the Site.
2. Develop and submit a technical report that includes the following details on instream construction no later than **August 15, 2013**:
 - A list of all contractors and/or operators that worked on the instream construction;
 - A list of all parties responsible for directing, hiring, and supervising the instream work on Gilbert Creek;
 - A list of the equipment (trucks, excavators, etc.) used to divert Gilbert Creek and construct the berm;
 - Receipts for all equipment, including excavators, bulldozers, and trucks used by the Dischargers and any other contractors involved;
 - Copies of any and all plans or as builts or diagrams used to guide instream construction;
3. Retain a qualified licensed professional experienced in wetland, stream and aquatic restoration, erosion control, and design and construction of engineered fills, to develop a restoration plan to remove all illegally placed earthen material and restore the functionality of the damaged stream. The plan must include design and construction standards, and a monitoring plan for the following:
 - a. Removal and stabilization of earthen, rock, woody debris and other wastes, and restoration of the affected instream habitat. All debris must be disposed of in a proper manner and/or stabilized in a location where there is no potential for discharge.

Stream restoration must include: restoration of natural grade and drainage paths in form and functionality including re-vegetation as necessary, mitigation to control instream erosion of gravels, and treating erosion from exposed soils during construction and until vegetation is established.

- b. The restoration plan must include: a map(s) at 1:12000 or larger scale (e.g., 1:6000) 1) delineating existing and restored stream channels, 2) illustrating all restoration plan work points, spoil disposal sites, re-vegetation planting area, and any other factor that requires mapping or site construction details to complete the scope of work; design and construction standards for earthen material and rocky debris stabilization; soil compaction; restoration of the instream channel roughness; re-planting of exposed soils; and erosion control for unanticipated precipitation during remediation.
- c. A monitoring plan is required for all site remediation to determine the success of stream restoration efforts and re-vegetation. The monitoring plan must include regularly scheduled inspections conducted by experienced professionals for five years or until the Site is restored, vegetation is re-established, erosion is no longer ongoing, and monitoring is no longer necessary. Each monitoring event must include a report within 30 days that describes the inspection findings, and provides corrective actions for any failures of the Site(s); failures include but are not limited to, erosion controls, and instream work and re-vegetation success. Each year an annual monitoring report shall be submitted documenting narratively and photographically any necessary mitigation and evidence of successful restoration and Site recovery, for five years or until the Site is recovered.
- d. A description of proposed interim measures and/or practices to be used to control erosion from roads and road-related sediment sources on the property until these features can be removed. The plan for temporary erosion control must include a monitoring and reporting plan including regular inspections through the winter period, with a report due to the Regional Water Board within 30 days of each inspection. A rainfall related trigger for inspections is suggested.
- e. A monitoring plan for all site remediation activities and features, to assess and demonstrate the success of sediment remediation efforts and re-vegetation. The monitoring plan must include regularly scheduled inspections for five years or until the Site is restored, vegetation is re-established, erosion is no longer ongoing and monitoring is no longer necessary. Each monitoring event must include a report within 30 days that describes the inspection findings, and provides corrective actions for any failures of the Site(s); failures include but are not limited to erosion controls and re-vegetation success. Each year an annual monitoring report shall be submitted documenting verbally and photographically any necessary mitigation and evidence of successful restoration and Site recovery, for five years or until the Site is recovered. A rainfall related trigger for inspections is suggested for the first two years following restoration.

4. The Dischargers must submit the entire restoration and monitoring plan to the Regional Water Board by **August 15, 2013** (inclusive of wetland delineation, restoration designs, and monitoring and reporting requirements, and time schedules described herein).
5. Progress reports are due the first of each month starting **September 1, 2013**, until the completion of restoration efforts triggers the required monitoring and reporting program described above.
6. Following Executive Officer written concurrence, and consistent with the directives of and in compliance with any necessary approvals and/or permits from the CDFW, and other agencies, the Dischargers shall implement the work plan. The Dischargers must complete all work to restore the site by **October 15, 2013**.
7. If the Dischargers are unable to perform any activity or submit any documentation in compliance with the deadlines in this Order, the Dischargers may request, in writing to the Executive Officer, an extension of the time schedule as specified. In the written extension request describe why the delay is beyond the reasonable control of the Dischargers; the request must be received by the Regional Water Board no less than 15 calendar days prior to the respective deadline. The Executive Officer, for good cause, may grant an extension.
8. This Order in no way limits the authority of this Regional Water Board to institute additional enforcement actions or to require additional investigation and cleanup at the Site consistent with the Water Code.

Ordered by:

Original Signed By

Matthias St. John
Executive Officer

July 8, 2013