

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION

ORDER NO. R1-2008-0047
ID. No. 1B08003WNSO

WASTE DISCHARGE REQUIREMENTS

FOR

SHILOH GROUP LLC POND

Sonoma County

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

1. The Shiloh Group LLC (hereinafter Applicant) submitted a Report of Waste Discharge/Application for 401 Water Quality Certification and/or Waste Discharge Requirements (Dredge/Fill), (hereinafter Application) dated January 10, 2008, for the Shiloh Business Center Fire Pond Fill Project. A fee of \$500 was received with the application. The application proposes to discharge earthen fill material to an existing wetland/pond area. No other construction activity is proposed for the parcel at this time.
2. The Applicant owns a vacant parcel located west of Caletti Avenue, south of Shiloh Road, within the Town of Windsor, Sonoma County, latitude 38° 31' 27.35" N, longitude -122° 47' 36.87" W, as shown in Attachment A, incorporated herein and made part of this Order. The parcel contains a manmade pond that was created over thirty years ago to provide an emergency water supply in the event of a fire (hereafter referred to as the Shiloh Pond). The Shiloh Pond is unlined and filled by ground water during portions of the year and receives precipitation, and in the past had its flows augmented by water from nearby wells until municipal water was made available to the area and the Shiloh Pond was no longer necessary for fire suppression.
3. Information provided by the Applicant indicates that the Shiloh Pond contains wetlands that meet the federal criteria established by the US Army Corps of Engineers (ACOE). Wetlands, riparian areas, isolated pools and headwaters are shallow waters of the state, which are by their nature affected most often and severely by filling and excavation. Regulatory attention to wetlands is necessitated by the State's "No Net Loss" Policy, which is set forth in Executive Order No. W-59-93, and recognition of the high habitat value of these waters; the watershed-wide value of these waters for pollutant removal, floodwater retention, ground water recharge, channel stability, and habitat connectivity; the high number of special-status species associated with these waters and their associated habitats; the high percentage of historic losses of these waters in California; the vulnerability

of these waters to future impacts from projected population growth and land development; and the high level of public interest in these waters. The Shiloh Pond site is in an area where stream and wetland systems were prevalent. Due to historic development patterns, many of the streams were culverted or otherwise modified and wetlands were filled. The cumulative impact from these activities have affected beneficial uses. New applications for filling these areas are subject to a strategy for avoidance, minimization and mitigation in order to prevent future impacts to beneficial uses.

4. Although the Shiloh Pond contains wetland habitat, this wetland may not be subject to permitting by the ACOE because it is an isolated wetland. After the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (531 U.S. 159 (2001)), the ACOE no longer can claim jurisdiction over isolated wetlands. Prior to the Supreme Court's ruling in 2001, California largely relied upon its authority under section 401 of the federal Clean Water Act (CWA) (33 U.S.C. § 1341) to regulate discharges of dredged or fill material to waters of the State. That section requires an applicant to obtain "water quality certification" from California that the project will comply with State water quality standards before certain federal licenses or permits may be issued. The permits subject to section 401 include permits for the discharge of dredged or fill materials (CWA section 404 permits) issued by the ACOE. The certification process under section 401 only applies to those waters that are subject to the jurisdiction of the CWA, which no longer includes isolated wetlands. Nonetheless, under the Porter-Cologne Water Quality Act, California has the authority to protect all waters of the state, including isolated wetlands, such as the Shiloh Pond.
5. "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state (Water Code Section 13050(e)). The Shiloh Pond is considered waters of the state, for the following reasons:
 - The Shiloh Pond was excavated into the ground and is in direct connection with ground water;
 - Ground water and precipitation are contained in the pond for an extended period of time and are suitable for all beneficial uses consistent with the Basin Plan;
 - Over time, the Shiloh Pond has developed wetland vegetation, hydrology and soil conditions that have been determined to meet the federal criteria for wetlands;
 - The Shiloh Pond has been determined to be suitable for the following beneficial uses. Groundwater Recharge (GWR), Water Contact Recreation (Rec-1), Non-Contact Water Recreation (Rec-2), Warm Freshwater Habitat (WARM) and/or Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Wetland Habitat (WET), Municipal and Domestic Supply (MUN);
 - The Shiloh Pond provides habitat for fish, invertebrates, amphibians, birds and other terrestrial creatures, including blue gill fish and frogs;

- It has maintained inundation without any filling from wells that were on site. The Shiloh Pond has filled back up since it was pumped down to a muddy bottom in 2005. This indicates that it receives input from other natural sources, such as rain and groundwater, as do other waters of the state with the same configuration (ponds/pools).
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6. The fact that the Shiloh Pond is manmade does not alter the determination that it, and the wetlands that it supports, are waters of the State. The State of California considers many manmade water features to be waters of the State. For example, water in manmade irrigation channels is considered waters of the State. (48 Ops. Cal. Atty. Gen 30 (1966) (interpreting the Dickey Act, the predecessor of the Porter-Cologne Act). Similarly, the Ninth Circuit recently concluded that a pond that was formed from a rock quarry pit that had filled with water from the surrounding aquifer and the wetland area around it were waters of the U.S., despite the fact that the pond was a manmade feature. (*Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 2007).
 7. The Santa Rosa plains area is identified as habitat for the California Tiger Salamander (CTS) which is listed as a federal endangered species. Staff has no information regarding surveys for the presence of CTS or other endangered species (including plants) at this site.
 8. Water Code section 13264 requires that before any person initiate any new discharge of waste, they must first file a report of waste discharge and cannot discharge before they are issued waste discharge requirements (WDRs) pursuant to Water Code section 13263; a waiver pursuant to 13269; or 140 days pass, and the discharge will not create or threaten to create a condition of pollution or nuisance. Under the Porter-Cologne Act, the discharge of sediment is considered a “waste,” and would also create a condition of pollution, as that term is defined under Water Code section 13050.
 9. Water Code section 13263 requires that WDRs be prescribed as to the nature of any proposed discharge with relation to the conditions in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The WDRs must implement the North Coast Regional Water Quality Control Plan (Basin Plan), taking into consideration beneficial uses to be protected, the water quality objectives reasonably required for those purposes, other waste discharges, the need to prevent nuisance, and the provisions of section 13241 of the Water Code.
 10. The Basin Plan contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Water Board. Pursuant to Water Code section 13263(a), waste discharge requirements must implement the Basin Plan.

11. The Basin Plan lists the existing and potential beneficial uses of freshwater wetlands as including:
 - a. municipal and domestic supply (MUN)
 - b. agricultural supply (AGR)
 - c. industrial service supply (IND)
 - d. process water supply (PRO)
 - e. groundwater recharge (GWR)
 - f. freshwater replenishment (FRSH)
 - g. navigation (NAV)
 - h. hydropower generation (POW)
 - i. water contact recreation (REC-1)
 - j. non-contact water recreation (REC-2)
 - k. commercial and sport fishing (COMM)
 - l. warm freshwater habitat (WARM)
 - m. cold freshwater habitat (COLD)
 - n. wildlife habitat (WILD)
 - o. rare, threatened, or endangered species (RARE)
 - p. migration of aquatic organisms (MIGR)
 - q. spawning, reproduction, and/or development (SPWN)
 - r. shellfish harvesting (SHELL)
 - s. aquaculture (AQUA)
 - t. wetland habitat (WET)
 - u. water quality enhancement (WQE).

12. The Basin Plan lists the beneficial uses of areal groundwaters as including:
 - a. municipal and domestic water supply (MUN)
 - b. agricultural water supply (AGR)
 - c. industrial water supply (IND)
 - d. process water supply (PRO)

13. In general, projects that fill wetlands permanently convert these waters into other land uses and therefore, eliminate all of their existing and potential beneficial uses. These discharges may be permitted, provided that proper compensatory mitigation is provided, to comply with the State's "No Net Loss" policy for wetlands. Compensatory mitigation provides for replacement of beneficial uses, and function and value of the impacted waters. In this case, the Applicant has refused to provide compensatory mitigation for impacts from the discharge. If such a discharge were allowed, it would not comply with the Basin Plan nor with the State's "No Net Loss" policy. This Order, therefore, does not allow the requested discharge.

14. The Applicant has met with Regional Board staff, management, and legal counsel, on several occasions. At the meetings, and by other correspondence, the Applicant has explained that they want to fill the wetland/pond with soil so that the

area may be used for other purposes such as construction, parking, staging areas, etc. Regional Board staff explained that the wetland/pond is considered waters of the state, and therefore any impact, such as filling it, would require compensatory mitigation. Applicant explained that they do not think that this feature is a water of the state, and, even if it is deemed to be a water of the state, that no mitigation is necessary. The Applicant requested their Application be heard by the Regional Board. Regional Board staff and legal counsel explained that the swiftest way to bring the issues identified above to the Regional Board for consideration was to issue WDRs that do not allow any discharge into the wetland/pond.

15. The purpose of these WDRs are to NOT allow Applicant to discharge to the Shiloh Pond, and allow Applicant the opportunity to bring this issue before the Regional Board.
16. If the Applicant determines that it needs a WDR that permits discharge of fill to the Shiloh Pond, the Applicant would be required to submit a new application that includes a mitigation plan. The description of the project that is authorized by these WDRs does not include any discharge to waters of the state at the Shiloh Pond site.
17. Applicant has a past history of violations related to the Shiloh Pond. On September 21, 2005, Regional Board staff responded to an anonymous complaint about foul odors emanating from a project at the Shiloh Pond. Regional Board staff observed that the majority of the riparian canopy surrounding the Shiloh Pond had been removed, the entire biomass of wetland vegetation was removed and piled on the bank, and the few remaining oak and willow trees were currently in the process of being cut down and chipped. The water from the Shiloh Pond was pumped through a series of conveyances to the nearby creek. A full description of the event is described the Regional Water Board 13267(b) Order issued to Applicant on November 29, 2005, included as Attachment B, incorporated herein and made part of this Order.
18. The discharge was required to be sampled and tested for hexavalent chromium, diesel and gasoline. Not all of the requested laboratory analytical results were submitted to the Regional Water Board, but there was diesel found in one of the water samples (100 µg/L). There is known contamination at Cleanup Sites within the vicinity, including hexavalent chromium, pentachlorophenol and other chemicals, therefore, any additional work in or around the Shiloh Pond will need to have soil and groundwater properly tested and characterized for proper disposal beforehand. A workplan for any such work shall be submitted to the Regional Water Board for approval/concurrence before commencement of any activities that may involve soil/sediment or groundwater at the Shiloh Pond site.
19. As required by Water Code section 13263, these WDRs are crafted to implement the Basin Plan, and in so doing, the Regional Water Board has taken into consideration the beneficial uses to be protected, the water quality objectives

reasonably required for that purpose, other (including previous) waste discharges, the need to prevent nuisance, and considerations of the provisions of Water Code section 13241.

20. Pursuant to CEQA Guidelines section 15061(b)(3), this project is exempt 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."
21. State Water Resources Control Board (State Water Board) Resolution No. 68-16 (hereafter Resolution 68-16 or the "Antidegradation Policy") requires the Regional Board, in regulating the discharge of waste, to maintain high quality waters of the state until it is demonstrated that any change in quality will be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies (e.g., quality that exceeds water quality objectives). The permitted discharge is consistent with Resolution 68-16, because no discharge is being permitted.
22. The Regional Board has notified the Applicant and interested agencies and persons of its intent to prescribe waste discharge requirements for this discharge and has provided them with an opportunity for a public hearing and an opportunity to submit their written views and recommendations.
23. The Regional Board, in a public meeting, heard and considered all comments pertaining to the discharge.

THEREFORE, IT IS HEREBY ORDERED that the Applicant, in order to meet the provisions contained in Division 7 of the Water Code and regulations adopted thereunder, shall comply with the following:

1. DISCHARGE PROHIBITIONS

1. The discharge or threatened discharge of any waste to the Shiloh Pond or any other waters of the state on this parcel, without a subsequent permit from the Regional Board, is prohibited.

Certification

I, Catherine E. Kuhlman, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, North Coast Region, on June 11 or 12, 2008.

**Catherine Kuhlman
Executive Officer**

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ATTACHMENT A



ATTACHMENT B



Alan C. Lloyd, Ph.D.
Agency Secretary

California Regional Water Quality Control Board
North Coast Region
Beverly Wasson, Chairperson

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Arnold
Schwarzenegger
Governor

November 29, 2005

Mr. TJ Nelson
The Shiloh Group, LLC.
930 Shiloh Road
Windsor, CA 95492

Dear Mr. Nelson:

Subject: California Water Code Section 13267 Order Regarding Unauthorized Dewatering and Dredging of a Fire Protection Storage Pond and Subsequent Unauthorized Discharge to Pruitt Creek

File: The Shiloh Group, Fire Protection Storage Pond, Shiloh Business Industrial Center, Windsor, Sonoma County

Background

On September 21, 2005, staff of the North Coast Regional Water Quality Control Board (Regional Water Board) received an anonymous complaint call regarding foul odors emanating from a project that began sometime the previous week at the Shiloh Group Fire Protection Pond (Fire Pond), Shiloh Business Industrial Center, Windsor. In response, Regional Water Board staff Mr. Charles Reed and Ms. Michelle Jensen (Staff) immediately conducted a site visit. Upon arrival, Staff observed that the majority of the riparian canopy surrounding the Fire Pond had been removed, the entire biomass of wetland vegetation removed and piled on the eastern bank, and the few remaining oak and willow trees were currently in the process of being cut down and chipped. The Fire Pond was completely dewatered leaving the muddy banks and bottom exposed.

As Staff was conducting the inspection, Mr. TJ Nelson from The Shiloh Group, LLC, drove by and stopped to question their presence. According to Mr. Nelson the Fire Pond was drained slowly to a concrete-lined storm channel on the western border of the business park property. Mr. Nelson escorted Staff to the concrete-lined drainage channel, which runs along the northwestern border of the business park property for approximately 2,000 feet before crossing under Shiloh Road and connecting with Pruitt Creek.

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Mr. TJ Nelson

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November 29, 2005

Mr. Nelson stated that dewatering began approximately ten days prior to our visit and was approved by Mr. Matt Parlato of the California Department Fish and Game (DFG) who had visited the site earlier in the project. Staff questioned Mr. Nelson regarding the Fire Pond's features to which he stated that the Fire Pond was not a storm water treatment feature for the nearby Standard Structures facility and was only supplied by groundwater and rainwater with the historical feature of serving pumps for the fire system no longer in use. According to Mr. Nelson, the purpose for dewatering the Fire Pond was to prepare the site for filling, grading and future development and he informed Staff that he had hired Brelje and Race Consulting Civil Engineers (Brelje and Race) to conduct the geological studies which are currently in progress. At the conclusion of this meeting, Mr. Reed requested that Mr. Nelson remove the existing dirt and vegetation from the channelized storm drain and that we would notify him of our standing on the jurisdiction of the Fire Pond and any regulatory actions we may take. Mr. Reed contacted Mr. Nelson later that afternoon to request he stop working on the vegetation removal at the Fire Pond.

On September 23, 2005, a second site visit was conducted with Regional Water Board staff Mr. Andrew Jensen, Ms. Terri Cia, and Ms. Michelle Jensen (Staff), Ms. Sue Nelson of Brelje and Race, and Mr. TJ Nelson of The Shiloh Group, LLC. During this site visit Staff observed that there was apparent dredging which occurred on the southern bank of the Fire Pond with numerous deceased blue gill fish and bullfrog pollywogs lying on the top of the bank. When Staff peered over the bank, they observed a shallow pool of standing water with hundreds of oxygen-deprived pollywogs and fish struggling to survive. The bottom of the Fire Pond was still muddy and wet. Staff suggested filling the pond with water in the meantime until a biologist could be called out to assess the situation.

Staff also observed that the bed of Pruitt Creek, at the end of the concrete lined channel and at the outfall location, was still moist with no apparent surface waters lying directly up or downstream from the discharge point, indicating that the pond water reached Pruitt Creek and resulted in a direct discharge.

Mr. Nelson further clarified: 1) the pond was excavated 20-30 years ago, 2) only rainwater and groundwater fills the pond, 3) he previously underwent county procedures to abandon the well, 4) he is in the process of filing for a grading permit from the Town of Windsor, and 5) the dewatering began on October 7, 2005.

At this time, Regional Water Board staff requested that Mr. Nelson: 1) sample the remaining pond water for potential contaminants associated with known contamination from the previous property owner, Ecodyne, including hexavalent chromium, diesel and gasoline as directed by Ms. Beth Lamb from the Regional Water Board, 2) hire a biologist to assess the situation regarding the fish and pollywogs in the remaining standing water, 3) conduct a test to identify the precise location of outfall by pumping clean water through the same overflow pipe previously used to dewater the pond, and 4) contact the U.S. Army Corps of Engineers (USACE) to obtain input on whether or not they would be taking jurisdiction over the Fire Pond.

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Mr. TJ Nelson

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November 29, 2005

On October 27, 2005, the Regional Water Board received a letter from Ms. Sue Nelson in regards to the specific outfall location and the pond water analyses. On September 27, 2005, Ms. Nelson verified that water from the pond discharges directly to the concrete lined ditch, which flows to Pruitt Creek. Water samples were taken from both the outfall location and the Fire Pond on September 29, 2005 and October 3, 2005. The results submitted to the Regional Water Board indicate that Gasoline levels were non-detectable and Diesel levels were 100 ug/L. According to Ms. Nelson, the USACE will not be taking jurisdiction over the Fire Pond. However, it appears that this pond is a water of the state and permits are required for any activities that may affect the quality of those waters. To the best of our knowledge, the Fire Pond dredging, dewatering and discharging to Pruitt Creek had occurred without required authorization from the Regional Water Board.

Order

This Order requires you to submit a Technical Report for the above described Fire Pond dewatering, dredging, and discharge to Pruitt Creek. In order to "investigate the quality of any waters of the state in its region," the Regional Water Board may, pursuant to Water Code Section 13267(b), require "any person who has discharged, discharges, or is suspected of discharging, or proposes to discharge waste" to furnish "technical or monitoring program reports" to the Regional Water Board.

As described above, the dewatering and dredging which occurred at the site has resulted in discharges of waste to the Fire Pond and Pruitt Creek, affecting waters of the state.

Pursuant to CWC Section 13267(b), I require that you submit, under penalty of perjury, a technical report no later than December 31, 2005. The report shall contain the following:

- (1) A summary of all activities involved in the dewatering of the Fire Pond, including permitting, construction, and riparian vegetation removal;
- (2) A summary of the duration, quantity, and quality of discharge;
- (3) A mitigation and monitoring plan prepared by a qualified environmental consultant, or similarly qualified individual, who specializes in pond and stream habitat restoration.

Mitigation may include the replacement of all removed riparian vegetation to restore the Fire Pond at the current location, or may consist of off-site mitigation to replace all values and beneficial uses lost.

The foregoing technical report is needed to address the impacts to water quality by the dewatering and dredging of the Fire Pond. The report required by this Order will develop information concerning the character of discharges of waste to Pruitt Creek and resulting impairment of beneficial uses. The report will also assist the Regional Water Board to develop measures to ensure the protection of beneficial uses from potential discharges of waste from the overflow drain in the Fire Pond.

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Mr. TJ Nelson

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November 29, 2005

Any person failing to provide the report by the required date or falsifying any information in the report is, pursuant to CWC Section 13268, guilty of a misdemeanor and may be subject to administrative civil liabilities of up to one thousand dollars (\$1,000.00) for each day in which the violation occurs.

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 CWC Section 13320 and Title 23, California Code of Regulations, Section 2050. The petition must be received by the State Water Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Water Board, any person affected by this Order may request the Regional Water Board to reconsider this Order. To be timely, such request must be made within 30 days of the date of this Order. Note that even if reconsideration by the Regional Water Board is sought, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner's legal rights. If you choose to request reconsideration of this Order or 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 being considered.

Conclusion

Following the submittal of the above-described technical report, the Regional Water Board will consider further regulatory action(s) in this matter. If you have questions please contact Andrew Jensen of our staff at (707) 576-2683.

Sincerely,



Catherine E. Kuhlman
Executive Officer

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cc: Ms. Sue Nelson, Brelje and Race Consulting Civil Engineers, 5570 Skylane Boulevard,
Santa Rosa, CA 95403

Mr. Oscar Balaguer, SWRCB, Chief Water Quality Certification Unit, Division of Water
Quality

Ms. Jane Hicks, U.S. Army Corps of Engineers, 333 Market Street, San Francisco, CA
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