

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION

In the Matter of:)	
)	Complaint No. R1-2016-0033
Olive Franklin, Trustee)	
of the Charles A. Franklin &)	
Julia F. Franklin Trust, and Daniel Franklin)	
WDID No. 1B13159CNME)	Unauthorized Discharges in Violation of
)	the Clean Water Act and Water Code

This Administrative Civil Liability Complaint (Complaint) is issued to Mr. Daniel Franklin and Ms. Olive Franklin, Trustee of the Charles A. Franklin & Julia F. Franklin Trust (Dischargers) pursuant to California Water Code (Water Code) section 13323. This Complaint alleges that the Dischargers released approximately 50,000 gallons of sediment-laden water to an unnamed tributary to the Eel River that scoured and displaced approximately 104,727 gallons of sediment and debris from the bed and banks of the stream for a distance of approximately 2,000 lineal feet before reaching the Mainstem Eel River. This Complaint is based on evidence that the Dischargers violated Water Code section 13376 and Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. section 1311) section 301. The Prosecution Team seeks to impose administrative civil liability pursuant to Water Code section 13385.

The Assistant Executive Officer of the North Coast Regional Water Quality Control Board (Regional Water Board) hereby finds the following:

BACKGROUND

1. In 2002, the Charles A. Franklin & Julia F. Franklin Revocable Trust (Franklin Trust) purchased the property located on 17777 Eel River Road, in Mendocino County, California (Site). The Mendocino County assessor parcel number (APN) for the Site is APN 171-260-16. The Site is 260 acres and the designated land use is Timber Production Zone. Ms. Olive Franklin, as trustee of the Franklin Trust, is properly named as a Discharger in this Complaint where legal title to property owned by a trust is held by the trustee¹. As owner of the Site, Ms. Olive Franklin, on behalf of the Franklin Trust, is responsible for the condition of the property and discharges of waste from the property.
2. Mr. Daniel Franklin is a beneficiary of the Franklin Trust, and son of Olive Franklin. Mr. Franklin purchased and installed a fuel bladder on the Site to divert and store stream water for purposes of providing water for irrigation on the Site and for fire prevention. Regional Board staff's inspection revealed Mr. Franklin was cultivating marijuana on the Site.
3. **May 3, 2013 Inspection.** During the week of May 1, 2013, Regional Water Board staff received the initial complaint of a bladder failure and significant instream resource damage from California Department of Fish and Wildlife staff and Pacific Gas and Electric staff. On May 3, 2013, Regional Water Board staff performed an initial investigation by accessing the Forest Service Road M8 (M8 road). The intersection of the M8 road and the affected unnamed stream was clearly visible due to the muddy debris and wet soils on the road surface. Sediment and debris had plugged the culvert at the M8 road stream crossing and continued to overtop the road, re-entering the stream channel, and flowing down the inside ditch to the west into an adjacent stream

¹ See *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1349.

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channel, before entering the Mainstem Eel River. Mud and debris, including large boulders 2-3 feet in diameter, were deposited in the inside ditch of the M8 road. Regional Water Board staff walked up the unnamed tributary within the stream channel and observed that the stream channel and stream bank vegetation was scoured out and obliterated. Bankside vegetation appeared to have been completely torn out except for some intact root masses. Large cobbles and boulders were displaced. Regional Water Board staff observed depositional areas of mud covered surfaces leading down to the Mainstem Eel River. Attachment B to this Complaint includes aerial images on pages 16 and 17 showing features of interest on and near the location of the discharge.

4. **May 24, 2013 Inspection.** On May 24, 2013, Regional Water Board staff and representatives of the California Geologic Survey and Department of Fish and Wildlife inspected the Site. During the inspection, Mr. Franklin informed Regional Water Board staff that a discharge occurred when a 25' x 60' bladder failed, discharging water that had been collected therein. The bladder reportedly failed because the outlet line on the bladder had been left in a closed position while the intake line was open, causing the bladder to overflow and burst. The bladder was filled with water diverted from two points of diversion, from a spring (POD #1) and from a stream (POD #2). The label on the bladder indicated a maximum capacity of 50,000 gallons and was designed for use with fuels, not recommended for long term use. At the time of the failure, Mr. Franklin estimated the bladder might have contained as much as 80,000 gallons of water.
5. **Discharge Event.** On or about April 24, 2013 or April 25, 2013 a fuel bladder containing an estimated volume of at least 50,000 gallons of water ruptured. Evidence at the Site of the bladder indicated that after the bladder had burst along a seam, the entire contents of the bladder emptied immediately onto the native soil below, eroding sections of an approximate two-foot berm surrounding the bladder which then conveyed the discharged water and sediments, soils and rocks from the berm into an unnamed tributary to the Upper Main Eel River. Once reaching the unnamed tributary, the volume and velocity of the sediment-laden water scoured and vacated instream sediment and debris for a distance of approximately 2,000 lineal feet before reaching the Mainstem Eel River.
6. The unnamed tributary is a confined channel located on steep slopes ranging from 50-80+%. As the 50,000 gallons or more of water discharged into the unnamed tributary, it became concentrated in the confined channel and scoured the bed and banks carrying materials from the stream bank, boulders, cobbles, and rooted vegetation resulting in an effect similar to a debris flow that behaves as a liquid. Evidence of stream bank scouring was observed to depths of 7-8 feet along the unnamed tributary. Scouring down to bedrock was observed in some portions of the stream. (Id. at Images 3, 9, 11, 12). A metal culvert was observed to be washed downstream and wrapped around a tree. One- to four-ton boulders were likely picked up and forced downstream where Regional Water Board staff observed these boulders deposited on intersecting roads, where the stream gradient was affected (flattened) by the road intersection. Most of the vegetation within the streambed, bank, and channel was uprooted. (Id. at Images 3, 9, 11). Splashed sediment was observed on branches approximately four feet above the bottom of the stream channel. At the stream crossing on the M8 road, sediment and debris had plugged the culvert, causing the discharge to overtop the road, re-enter the stream channel at the opposite road edge, and divert down the road and inside road

ditch to the west approximately 150 feet before discharging to another Class II stream. (Id. at Images 1, 2).

7. On September 23, 2014, the Regional Water Board Assistant Executive Officer transmitted the inspection report for the 2013 inspection to the Dischargers. The Assistant Executive Officer's letter also notified the Dischargers that the bladder discharge was subject to civil penalties.

BENEFICIAL USES OF RECEIVING WATERS

8. The unnamed stream is tributary to the Eel River in the Lake Pillsbury Hydrologic Sub Area of the Upper Main Eel River Hydrologic Area and is a water of the United States. The *Water Quality Control Plan for the North Coast Region*, also known as the Basin Plan, identifies the following existing and potential beneficial uses for the Upper Main Eel River watershed (Basin Plan, p. 2-9.00-10.00):
 - a. Municipal and domestic supply
 - b. Agricultural supply
 - c. Industrial service supply
 - d. Industrial process supply
 - e. Groundwater recharge
 - f. Freshwater replenishment
 - g. Navigation
 - h. Hydropower generation
 - i. Water contact recreation
 - j. Non-contact water recreation
 - k. Commercial and sport fishing
 - l. Warm freshwater habitat
 - m. Cold freshwater habitat
 - n. Wildlife habitat
 - o. Rare, threatened, or endangered species
 - p. Migration of aquatic organisms
 - q. Spawning, reproduction, and/or early development
 - r. Aquaculture

The Upper Main Eel River and its tributaries are waters of the United States and waters of the state, and are federal Clean Water Act section 303(d)-listed as impaired due to both sediment and temperature.

In December of 2004, a Total Maximum Daily Load (TMDL) for sediment and temperature in the Upper Main Eel River Watershed was established by the U.S. EPA. The TMDL identified the primary aquatic resources of concern as the Chinook Salmon and Steelhead Trout fishery; as such, this watershed's beneficial uses of Cold Freshwater Habitat; Commercial and Sport Fishing; Spawning, Reproduction, and/or Early Development; Rare, Threatened, or Endangered Species; and Migration of Aquatic Organisms, are of particular importance. The TMDL presumes that protection and restoration of the fishery will inherently provide an umbrella effect of protection and recovery of beneficial uses subject to impairment by sediments and temperature. The

discharge caused by the failure of the fuel storage bladder had a disastrous effect on the instream habitat of the unnamed tributary and a temporary effect on the Eel River.

Water quality objectives sufficient to support these uses include the following, as identified in Basin Plan 3-3.00:

- “Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.”
- “The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.”
- “Turbidity shall not be increased more than 20 percent above naturally occurring background levels.”

DISCHARGE VOLUME ESTIMATE

1. The Dischargers’ bladder had a stated capacity of 50,000 gallons. Even though the bladder contained water beyond its capacity, this Complaint conservatively estimates the discharge volume at 50,000 gallons. The volume of sediment-laden water discharged to waters of the United States could have been greater than 50,000 gallons.
2. Staff estimates that a total volume of approximately 518 cubic yards or 104,723.5 gallons² of eroded sediment and debris was forced down the confined channel of the unnamed tributary, and a portion of that volume discharged into the Mainstem Eel River. However, this additional volume was not considered in the penalty calculation proposed in this Complaint

ALLEGED VIOLATION

3. Mr. Daniel Franklin and Ms. Olive Franklin are alleged to have violated section 301 of the Clean Water Act and Water Code section 13376, described below, by discharging at least 50,000 gallons of sediment-laden water without obtaining coverage under an NPDES permit.
4. **Clean Water Act Violations:** Section 301(a) of the Clean Water Act provides that subject to certain exceptions, “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). One of the exceptions allowed for under the Clean Water Act is the discharge from a point source as authorized by a permit granted pursuant to the National Pollutant Discharge Elimination System (NPDES) under § 402 of the Clean Water Act. 33 U.S.C. § 1342. The Clean Water Act prohibits the discharge of any pollutant from a point source into waters of the United States without an NPDES permit. Regional Water Board staff estimate based on statements by the Dischargers and observations during site inspections that approximately 50,000 to 80,000 gallons of water from the bladder was rapidly released and flowed through a dirt berm and into

² Using an average V shaped scour channel of 3.5 feet of depth and 4 feet of width, it is estimated that approximately 518.5 cubic yards of sediment and debris was picked up from within the unnamed stream and discharged to the Upper Main Eel River. $((3.5 \text{ feet} \times 4 \text{ feet}) / 2) \times 2000 \text{ feet} = 14,000 \text{ cubic feet} / 27 \text{ cubic feet/cubic yard} = 518.5 \text{ cubic yards or } 104,723.5 \text{ gallons.}$

both an unnamed tributary to the Mainstem Eel River and the Mainstem Eel River. The discharge occurred on or about April 24, 2013 and/or April 25, 2013. The discharge displaced most of the contents, including fine soils, vegetation, and rocks and boulders, in the stream of the unnamed tributary for a distance of approximately 2,000 feet. The release of water from a bladder to a tributary of a navigable water of the United States required an NPDES permit.

5. **Water Code Violations:** Water Code section 13376 requires any person discharging or proposing to discharge pollutants to waters of the United States to file a report of the discharge. The Dischargers violated Water Code section 13376 by discharging sediment-laden water into waters of the United States without first filing a report of discharge.
6. Pursuant to Water Code section 13385(c), the Dischargers are subject to a statutory maximum of \$10,000 for the day of violation, and \$10 per gallon for every gallon discharged but not cleaned up over 1,000 gallons. The proposed Total Base Liability of \$375,000, as calculated in Steps 1 through 5 of Attachment A is incorporated herein by reference.

ADMINISTRATIVE CIVIL LIABILITY LEGAL AUTHORITY

7. Water Code section 13385 states, in relevant part:
 - (a) A person who violates any of the following shall be liable civilly in accordance with this section:
 - (1) Section 13375 or 13376. ...
 - (4) An order or prohibition issued pursuant to Section 13243 or Article 1 (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under this chapter.
 - (5) A requirement of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the federal Clean Water Act (33 U.S.C. Sec. 1311, 1312, 1316, 1317, 1318, 1341, or 1345), as amended. ...
 - (c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:
 - (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
 - (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.
 - (e) In determining the amount of any liability imposed under this section, the regional water board shall take into account the nature, circumstances, extent, and gravity of the

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- 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 ability to continue 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 as 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.
8. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability that addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code sections 13327 and 13385(e).
 9. The violations alleged herein are subject to liability in accordance with Water Code section 13385. The Regional Water Board Prosecution Team has considered the required factors for the alleged violation using the methodology in the Enforcement Policy, as explained in detail in Attachment A attached hereto and incorporated herein by this reference.

MAXIMUM AND MINIMUM CIVIL LIABILITY

10. Water Code section 13385 provides that civil liability may not exceed \$10,000 per violation per day, plus \$10 per gallon for each gallon of waste discharged but not cleaned up over 1,000 gallons. Regional Water Board staff conservatively estimate a discharge volume of 50,000 gallons and discharge event that occurred on one day. The maximum administrative civil liability that may be assessed pursuant to section 13385 is five hundred thousand dollars (\$500,000).
11. Pursuant to Water Code section 13385(e), civil liability, at a minimum must be assessed at a level that recovers the economic benefit of noncompliance, if any, derived from the acts that constitute the violation. As detailed in Step 8 of Attachment A, using U.S. EPA's BEN model, the economic benefit gained from noncompliance is calculated at approximately \$74,017. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the economic benefit so that liabilities are not construed as the cost of doing business and provide a meaningful deterrent to future violations. Economic benefit plus 10% is \$81,419.

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

12. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as detailed in Attachment A to this Complaint. Based on consideration of the above facts and the applicable law, and considering the Dischargers' ability to pay the Total Base Liability, the Assistant Executive Officer of the North Coast Regional Water Quality Control Board proposes that civil liability be imposed administratively on the Dischargers in the amount of **\$381,947**.

13. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed civil liability up to the maximum penalty provided for by law, or to refer the matter to the Attorney General to have a Superior Court consider enforcement. The Dischargers may waive their right to a hearing to contest the allegations contained in this Complaint by submitting a signed waiver and paying the civil liability in full, or by taking other actions as described in the waiver form. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this Complaint through hearing. The enforcement costs can be considered as an additional factor as justice may require.
14. Notwithstanding the issuance of this Complaint, the Regional Water Board retains the authority to assess additional administrative civil liability for violations of the requirements of any applicable Water Code section and/or portion of the Clean Water Act (33 U.S.C.A. § 1251 et seq.) for which liability has not yet been assessed or for violations that may subsequently occur.
15. Issuance of this Complaint is to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.), in accordance with title 14, California Code of Regulations sections 15307, 15308 and 15321(a)(2) and all applicable law.

DANIEL FRANKLIN AND OLIVE FRANKLIN ARE HEREBY GIVEN NOTICE THAT:

1. The Assistant Executive Officer of the North Coast Regional Water Board proposes that the Dischargers be assessed an Administrative Civil Liability in the amount of **\$381,947**. The amount of the proposed liabilities is based upon a review of the factors cited in Water Code sections 13327 and 13385, as well as the State Water Resources Control Board's 2010 Water Quality Enforcement Policy, and includes consideration of a number of factors including the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be held at a regularly scheduled North Coast Regional Water Board meeting on October 20, 2016, unless one of the following occurs by August 22, 2016:
 - a) The Dischargers waive the hearing by completing the attached form (checking the box next to Option #1 and returning it to the North Coast Regional Water Board, along with payment for the combined total proposed civil liability of **\$381,947**; or
 - b) The North Coast Regional Water Board agrees to postpone any necessary hearing after the Dischargers' request a delay by checking the box next to Option #2 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed.
3. If a hearing is held, the North Coast Regional Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

4. If this matter proceeds to hearing, the Assistant Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this Complaint through completion of the hearing.

July 22, 2016

Date

Shin-Roei Lee, P.E.

Lead Prosecutor

Regional Water Board Prosecution Team

Attachment A: Penalty Calculations

Attachment B: Inspection Report

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