

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2015-0072
IN THE MATTER OF

CHRISTOPHER CORDES, EDDIE AXNER CONSTRUCTION, INC., AND EDDIE AXNER

ASSESSOR PARCEL 041-300-035-000
SHASTA COUNTY

This Order is issued to Christopher Cordes, Eddie Axner, and Eddie Axner Construction Inc. (hereafter collectively referred to as Dischargers) pursuant to California Water Code section 13385, which authorizes the imposition of Administrative Civil Liability (ACL). This Order is based on findings that the Dischargers violated Water Code section 13376, federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. § 1311) Section 301 and prohibitions established in *The Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (Basin Plan), and imposes administrative civil liabilities pursuant to Water Code section 13385.

The Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) hereby finds:

BACKGROUND

1. On 20 March 2015 the Assistant Executive Officer of the Central Valley Water Board issued Administrative Civil Liability Complaint R5-2015-0520 (ACL Complaint) to Dischargers.
2. Mr. Christopher Cordes purchased the property located off of Baker Ridge road, Shasta County Assessor Parcel Number (APN) 041-300-035-000 (hereafter referred to as the Site) on 21 May 2013. As owner of the Site, Mr. Cordes is ultimately responsible for the condition of the property and discharges of waste from the property. Mr. Cordes developed the Site and used and/or leased the Site out for marijuana cultivation.
3. In June of 2013 Mr. Eddie Axner in his capacity of owner and responsible corporate officer of Eddie Axner Construction, Inc. entered into verbal agreements with Mr. Cordes to conduct grading operations on the Site on a per hour basis. Persons employed by Eddie Axner Construction, Inc. conducted approximately 3.8 acres of clearing, grading, excavation, and/or other land disturbance to construct two large native soil surfaced terraces, and to widen and lengthen the native soil surfaced road accessing the Site from Baker Ridge road. No erosion control measures and/or inadequate control measures were implemented by the Dischargers on the property during or after this grading and earthmoving activities were conducted, through the winter 2013/2014, and the Site remained unprotected until after Regional Water Board staff (hereafter referred to as "Staff") conducted their first Site inspection in October 2014.
4. The natural topography of the Site is steep with 30 to 50 percent slopes. Soils on site are coarse sandy loams and coarse sandy silts, which are highly friable and erodible when disturbed, interpreted to be decomposed granite. There are numerous Class III (intermittent) watercourses and at least one Class II (aquatic life bearing) watercourse which begin on or adjacent to the Site, that discharge to Doby or Duckett Creeks, perennial tributaries to North Fork Cottonwood Creek.

5. Mr. Eddie Axner as the owner and as a responsible corporate officer of Eddie Axner Construction, Inc. had the ability to control activities at the Site. Mr. Axner has over 25 years' experience in the construction industry and is a licensed general engineering contractor and a licensed timber operator. Eddie Axner Construction, Inc. is also advertised as having expertise in erosion control measures. As the owner and responsible corporate officer of Axner Construction, Inc., Mr. Axner knew that permits and appropriate erosion control measures were required to conduct the work performed for Mr. Cordes, yet Mr. Axner choose to have employees conduct the work without evidence that the necessary permits had been obtained or that erosion controls would be implemented.
6. In 2014 Mr. Cordes asserts that he leased the Site to an individual and that it is this individual who graded approximately 1.5 miles of native soil surfaced road to access more of the Site west of the terraces, presumably to support additional cultivation. In addition to grading for constructing the road, the individual created two un-culverted unarmored watercourse crossings. Mr. Cordes has refused to divulge the identity of the individual who leased the Site and conducted this additional roadwork and grading, and has claimed that he is willing to assume responsibility for the individual's activities. As discussed in more detail below in section 8, inappropriate erosion control measures were implemented by the Dischargers on the Site during or after this grading was conducted and the Site remained unprotected until after Staff conducted their first Site inspection.
7. On 7 October 2014, Mr. John Tomasello from the Shasta County Department of Resource Management alerted the Central Valley Water Board that a large grading project had been conducted without permits off of Baker Ridge Road, east of Rainbow Lake in Ono, Shasta County. The Central Valley Water Board was advised that this illegal grading, which included unpermitted road construction and terracing, was conducted to establish a large marijuana growing operation. Staff confirmed that a Construction General Permit had not been issued for the Site.
8. On 27 October 2014, Staff obtained an inspection warrant granting access to the Site to conduct an inspection. (See ACL Complaint R5-2015-0520, Attachment C – 28 October 2014 Baker Ridge Inspection Report, Appendix C.)
9. On the morning of 28 October 2014, Eddie Axner Construction, Inc. began installing erosion control measures on the Site. Prior to this day no erosion control measures where in place and the 2014-2015 wet weather period had already begun. During the 19 November 2014 inspection Staff observed that all surfaces disturbed by grading had been straw mulched and seeded and riprap had been used to stabilize multiple areas and as energy disipators. The Dischargers will need to implement more erosion control measures during the 2015 dry season to fully stabilize the site and prevent further erosion and discharges of sediment laden storm water.
10. On 28 October 2014, Staff conducted an inspection of the Site in accordance with the warrant issued on 27 October 2014. A second Site inspection was conducted by Staff on 19 November 2014 with permission from the landowner, Mr. Cordes. (See ACL Complaint R5-2015-0520 Attachments B and C for copies of the inspection reports for both inspections.)

SITE INSPECTION OBSERVATIONS

11. **28 October 2014 Inspection.** On October 28, 2014 Staff inspected the Site in accordance with the Inspection warrant.

During the 28 October 2014 inspection Staff noted two locations where the majority of storm water runoff from surfaces graded by Eddie Axner Construction, Inc., on the Site discharged to the unnamed tributaries of North Fork Cottonwood Creek. The first storm water runoff discharge location was in the northwest corner of the Lower Terrace (See ACL Complaint R5-2015-0520, Attachment C - 28 October 2014 Baker Ridge Inspection Report, Appendix A, Way Point 100). The Lower Terrace was void of vegetation and had a surface area of approximately 30,000 square feet. Storm water runoff from the Lower Terrace surface discharges at the before mentioned location in the northwest corner.

Staff found and documented evidence of large scale rill erosion on the south and west fill/side slopes of the lower terrace. Staff found and documented evidence that sediment from the large scale rill erosion on the south and west fill/side slopes had reached the unnamed tributary of North Fork Cottonwood Creek. Staff also discovered more than 1,900 cubic feet of potting soil that had been dumped down the fill/side slope of the east northeast side of that terrace. The presence of easily identifiable perlite in the potting soil allowed Staff to find and document evidence that potting soil from the dump location had discharged to an unnamed tributary of North Fork Cottonwood Creek and had been transported off the Site. Other disturbed soils from that slope were discharge in the same manner and into the same receiving waters.

The second storm water runoff discharge location noted by Staff during the 28 October 2014 inspection was on the upstream side of the watercourse crossing located at the entrance to the Site(See ACL Complaint R5-2015-0520, Attachment C - 28 October 2014 Baker Ridge Inspection Report, Appendix A, Way Point 118). Storm water runoff from the Access Road, which is approximately 1000 feet long, 12-16 feet wide, and has a surface area of approximately 14,000 square feet, flows via an inside ditch to the before mentioned discharge location on the upstream side of the watercourse crossing, where it discharges to an unnamed tributary of North Fork Cottonwood Creek. At the time of the inspection, the crossing's 24-inch culvert was more than 50 percent plugged and staff found and documented areas along the banks of the watercourse where sediment from the road had discharged to the watercourse and a layer of sediment within the watercourse, 34 inches thick, directly below the storm water discharge point (See ACL Complaint R5-2015-0520, Attachment C – 28 October 2014 Baker Ridge Inspection Report, Appendix B, Photograph #14).

Prior to the 28 October 2014 inspection, there were no Erosion Control/Sediment Control Best Management Practices implemented to reduce erosion and storm water discharge from the Site at the two before mentioned discharge locations. The two discharge locations and the terrace surface and road surface from which storm water runoff discharges to tributaries of North Fork Cottonwood Creek through those two discharge locations, were created by Eddie Axner Construction, Inc. in June of 2013 in conjunction with all other earthwork conducted on the Site by Eddie Axner Construction, Inc.

The two storm water discharge violations associated with the lower terrace and the access road discussed above in this section are referred to collectively hereafter as Violation 1.

During the 28 October 2014 inspection Staff also found a recently or newly constructed section of road with an un-culverted, non-armored watercourse crossing that was constructed by placing more than 3,840 cubic feet of native rock and soil in the streambed and banks of an unnamed tributary of North Fork Cottonwood Creek (See ACL Complaint R5-2015-0520, Attachment C - 28 October 2014 Baker Ridge Inspection Report, Appendix A, Way Point 117). Both Mr. Axner and Mr. Cordes have asserted that this newly constructed section of road and crossing were constructed by an undisclosed third party at some date after Eddie Axner Construction, Inc., conducted earthwork on the Site. Staff found and documented evidence that fill material from this watercourse crossing had discharged to the unnamed tributary of North Fork Cottonwood Creek below the crossing. Due to time constraints Staff was unable to fully travel and inspect this recently or newly constructed section of road during the October 2014 inspection.

12. **19 November 2014 inspection.** A second follow-up inspection was conducted by Staff on 19 November 2014 with permission from Mr. Cordes obtained through Eddie Axner and his consultant Mr. Will Bond of SHN Consulting Engineers & Geologist, Inc. During the 19 November 2014 inspection Staff inspected more of the newly constructed section of road that starts above the upper terrace and loops westward. (See ACL Complaint R5-2015-0520, Attachment B - 19 November 2014 Baker Ridge Inspection Report, Appendix A.)

Satellite imagery establishes that the newly constructed road was built sometime between September 2013 and July 2014. Based on statements made by Mr. Axner during the 19 November 2014 inspection and collaborating statements from Mr. Cordes, the newly constructed section of road was constructed in April or May of 2014 by an entity other than Eddie Axner Construction, Inc. Mr. Cordes has stated that the recent road work was completed by a lessee of the Site and that he is unwilling to identify that party.

During the 19 November 2014 inspection, Staff found a second un-culverted, non-armored watercourse crossing on the newly constructed section of road. This crossing was constructed by placing more than 4,680 cubic feet of native rock and soil into a streambed and banks of an unnamed tributary of North Fork Cottonwood Creek (ACL Complaint R5-2015-0520, Attachment B – 19 November 2014 Baker Ridge Inspection Report, Appendix A, Way Point 2). Staff found and documented evidence that fill material from this watercourse crossing had discharged to the unnamed tributary of North Fork Cottonwood Creek below the crossing (ACL Complaint R5-2015-0520, Attachment B – 19 November 2014 Baker Ridge Inspection Report, Appendix B, Photograph #5).

The discharge of fill material to unnamed tributaries of North Fork Cottonwood Creek in order to create the watercourse crossing on the newly constructed section of road are referred to collectively hereafter as Violation 2.

BENEFICIAL USES OF RECEIVING WATERS

13. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Water Resources Control Board.

Surface water from unnamed tributaries on the Site discharge to Doby or Duckett Creeks, then to North Fork Cottonwood Creek, a tributary to Cottonwood Creek and the Sacramento River. North Fork Cottonwood Creek and the downstream waters are all navigable waters of the United States and are spawning habitat for anadromous fish.

Existing and potential beneficial uses for Cottonwood Creek include the following: Municipal & Domestic Supply (MUN); Agricultural Supply (AGR); Water Contact (REC-1) & Other Non-contact Recreation (REC-2); Warm (WARM) & Cold (COLD) Freshwater Habitat; Migration of Aquatic Organisms (MIGR); Spawning (SPWN); and Wildlife Habitat (WILD). Beneficial uses of any specifically identified water body generally apply to all of its tributaries. (Basin Plan, p. II-2.00)

STORM WATER DISCHARGE VOLUME ESTIMATES

14. Staff used a highly conservative method to estimate that 56,456 gallons of sediment laden storm water was discharged in association with Violation 1. The following paragraphs describe how the volume was determined.

Using the USDA Natural Resources Conservation Service - Conservation Engineering Division Technical Release 55 Method (USDA TR-55 Method) and based on characteristics of the site (Newly graded area with no vegetation, Hydrologic Soil Group B) Staff determined that precipitation events greater than 1/3 of an inch over 24 hours would generate runoff from the Site. Using precipitation data from a Dept. of Water Resources/Flood Management gauging station (OGO Ranger Station) located approximately 5 miles southwest of the Site, Staff identified seven days with more than 2/3 of an inch of precipitation over a 24 hour period, between 19 November 2013 and 29 March 2014. Staff used 2/3 of an inch, twice the amount calculated to generate runoff (1/3 of an inch), to conservatively develop storm water discharge volumes.

| Discharge Event | Dates | Total Runoff Volume from Lower Terrace (gallons) | Total Runoff Volume from Access Road (gallons) | Total Runoff (gallons) | Total Subject to Penalties (Total – 1,000 gallons*) | Days of Violation Subject to Penalties |
|-----------------|---------------|--|--|------------------------|---|--|
| #1 | 19 Nov 2013 | 1,711 | 799 | 2,510 | 1,510 | 1 |
| #2 | 8 Feb 2014 | 3,327 | 1,553 | 4,880 | 3,880 | 1 |
| #3 | 9 Feb 2014 | 2,002 | 934 | 2,936 | 1,936 | 1 |
| #4 | 26 Feb 2014 | 6,151 | 2,870 | 9,021 | 8,021 | 1 |
| #5 | 3 March 2014 | 14,199 | 6,626 | 20,825 | 19,825 | 1 |
| #6 | 5 March 2014 | 2,634 | 1,229 | 3,863 | 2,863 | 1 |
| #7 | 28 March 2014 | 8,469 | 3,952 | 12,421 | 11,421 | 1 |
| | Total | 38,493 | 17,963 | 56,456 | 49,456 | 7 |

*Per Water Code

For the purposes of calculating volume of runoff, Staff is using a discharge volume of 56,456 gallons (of this amount, 49,456 gallons subject to penalties as described below in section 26).

**VIOLATION 1 – STORM WATER DISCHARGE VIOLATIONS ASSOCIATED WITH WORK
CONDUCTED BY EDDIE AXNER CONSTRUCTION, INC.**

15. **Violation 1:** Dischargers are alleged to have violated section 301 of the Clean Water Act, Water Code section 13376, and Basin Plan prohibitions detailed below by discharging at least 56,458 gallons of sediment laden storm water without obtaining coverage under the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities Order No. 2009-0009-DWQ, NPDES No. CAS000002 (General Permit) over a period of 7 days during storm water runoff generating rain events that occurred between 9 November 2013 and 29 March 2014.
16. **Clean Water Act Violations:** The Clean Water Act prohibits certain discharges of storm water containing pollutants except in compliance with a National Pollution Discharge Elimination System (NPDES) permit. Discharges to surface waters comprised of storm water associated with construction activity, including clearing, grading, excavation, and other land disturbance activities (except operations that result in disturbance of less than one acre of total land area and which are not part of a larger common plan of development or sale), are required to obtain coverage under the General Permit. Section 301 of the CWA prohibits the discharge of pollutants except as in compliance with the applicable General Permit or CWA Section 404 permit.
17. **Water Code Violations:** Water Code section 13376 requires any person discharging, or proposing to discharge, pollutants or dredge or fill material into waters of the United States to file a report of waste discharge. The Dischargers violated Water Code section 13376 by discharging sediment from disturbed land surfaces into waters of the United States without first filing a report of waste discharge or obtaining coverage under the General Permit.
18. **Basin Plan Prohibition Violations.** The Basin Plan prohibits the discharge of sediment and settleable material into surface waters in a manner that causes nuisance or adversely affects beneficial uses. (Basin Plan, p. III-7.00.) The Basin Plan also prohibits the discharge of materials resulting in changes in turbidity that cause nuisance or adversely affect beneficial uses. (*Id.* at p. III-9.00.) The Dischargers violated these Basin Plan prohibitions by discharging sediment from disturbed land surfaces and changes in turbidity that adversely affected beneficial uses.
19. **Responsible Parties.** The Dischargers are all joint and severally liable for the storm water discharge violations. The sediment laden storm water discharged into unnamed tributaries of North Fork Cottonwood Creek were the result of grading and road building activities that Mr. Cordes hired Mr. Eddie Axner and Eddie Axner Construction, Inc. to conduct. Mr. Cordes is liable as the owner of the Site and the person who contracted for the work that resulted in the discharge. Mr. Eddie Axner and Eddie Axner Construction, Inc. are liable for conducting the work that caused the discharge of sediment laden storm water in violation of the provisions discussed above in paragraphs 15 through 17. Mr. Eddie Axner is a responsible corporate officer of Eddie Axner Construction, Inc. and can be held personally liable in accordance with the responsible corporate office doctrine because; (1) he is in a position of responsibility with Eddie Axner Construction, Inc. that allows him to influence company policies and activities; (2) there is a nexus between Mr. Axner's position and the violations in questions such that he could have influenced the company's unlawful actions; and (3) Mr. Axner took action that facilitated the violations and through inaction failed to prevent the violations. (See *People v. Roscoe* (2009) 169 Cal.App.4th 829, 831; *Tehama Market Associates, LLC* (RWQCB 2007)

ACL Order No. R5-2007-0054, p. 3; *Original Sixteen to One Mine, Inc.* (SWRCB 2003) Order No. WQO 2003-0006, pp. 6-7; *Mr. Kelly Engineer/All Star Gas* (SWRCB 2002) Order No. WQO 2002-001, p. 5; *People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1213-1216.)

VIOLATION 2 - UNAUTHORIZED DREDGE AND FILL VIOLATIONS TO UNNAMED TRIBUTARIES OF DOBY & DUCKET CREEKS

20. **Violation 2:** Mr. Cordes is alleged to have violated section 301 of the Clean Water Act, and the Basin Plan prohibitions detailed below by discharging fill materials into the unnamed tributaries of North Fork Cottonwood Creek.
21. **Clean Water Act Violations:** Clean Water Act section 404 requires any person proposing to discharge dredge or fill material into navigable waters of the United States to obtain a Section 404 permit prior to such discharge. Section 401 of the Clean Water Act requires that any person obtaining a Section 404 permit must obtain water quality certification from the State in which the discharge occurs.
22. **Basin Plan Prohibition Violations.** The Basin Plan prohibits the discharge of sediment and settleable material into surface waters in a manner that causes nuisance or adversely affects beneficial uses. (Basin Plan, p. III-7.00.) The Basin Plan also prohibits the discharge of materials resulting in changes in turbidity that cause nuisance or adversely affect beneficial uses. (*Id.* at p. III-9.00.) Mr. Cordes violated the Basin Plan prohibitions by discharging, or allowing to be discharged on his property, fill material into navigable waters of the United States to construct road crossings.
23. **Responsible Parties.** Mr. Cordes as the owner of the Site is ultimately responsible for the conditions of the Site and the fill activities that occurred on the property. While Mr. Cordes has asserted that he leased the property out for some undisclosed period of time and that it was the lessee who conducted the dredge and fill activities on the Site, Mr. Cordes has not been willing to provide the name of that party or any information concerning the terms of that lease. Mr. Cordes was aware of the activity taking place on his property that resulted in the discharge and had the legal ability to prevent the discharge. It is even likely that Mr. Cordes benefited from the marijuana cultivation activity taking place at the Site based on the fact that Mr. Cordes is the sole corporate officer of Pacific Biodynamics, a corporation established to "provide a means for facilitating and coordination transactions, between members of the corporation, in medical marijuana." (ACL Complaint R5-2015-0520, Attachment D.) Accordingly, liability for the dredge and fill violations can be imposed on Mr. Cordes.

ADMINISTRATIVE CIVIL LIABILITY PROVISIONS

24. Water Code section 13350 states, in relevant part:
 - (a) A person who (1) violates a cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of a waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state . . . shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e) . . .

(e) The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not on both. (1) The civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.

In the alternative:

25. 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) ...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.

The violations alleged herein are subject to liability in accordance with Water Code section 13350 and Water Code section 13385 and the Central Valley Water Board in its discretion could elect to impose liability under either code section. Staff is recommending the proposed liability, as discussed in greater detail below, be imposed in accordance with Water Code section 13385.

CALCULATION OF CIVIL LIABILITIES UNDER WATER CODE SECTION 13385 FOR VIOLATION 1

26. **Maximum Civil Liability for Storm Water Discharges to Surface Waters:** Per Water Code section 13385, civil liability administratively imposed by the Central Valley Water Board may not exceed \$10,000 per violation per day per violation, plus \$10 per gallon for each gallon of waste discharged but not cleaned up over 1,000 gallons. Staff conservatively estimated above in section 13 that in the period from 19 November 2013 until 29 March 2014 a total of 56,456 gallon of water and sediment discharging to surface waters over 7 days. Of the 56,456 gallons that were discharged, a total of 49,456 gallons were discharged in excess of 1,000 gallons per discharge event. Therefore, at \$10 per gallon for discharges in excess of 1,000 gallons, and at \$10,000 per day for each day of the seven days of discharge, the

maximum administrative civil liability that may be assessed pursuant to section 13385 for violation 1 is **five hundred and sixty four thousand five hundred forty dollars (\$564,540)**.

27. **Minimum Civil Liability for Storm Water Discharges to Surface Waters:** Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The discharge violations associated with the work conducted by Eddie Axner Construction, Inc. were due to a failure to obtain and comply with the State of California's NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities Order No. 2009-0009-DWQ, including the failure to implement appropriate erosion and sediment control. Delayed and avoided costs associated with obtaining and complying with the necessary authorizations are estimate at \$72,278. Using US EPA's BEN model, the economic benefit gained by non-compliance is calculated to be approximately \$8,912, which becomes the minimum civil liability which must be assessed pursuant to section 13385 for Violation 1. In addition, the Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the economic benefit ($\$8,912 + 10\% = \$9,803$) so that liabilities are not construed as the cost of doing business and provide a meaningful deterrent to future violations.

CALCULATION OF CIVIL LIABILITIES UNDER WATER CODE SECTION 13385 FOR VIOLATION 2

28. **Maximum Civil Liability for Discharge of Fill Material to Surface Waters:** Per Water Code section 13385, civil liability administratively imposed by the Central Valley Water Board may not exceed \$10,000 per violation per day per violation, plus \$10 per gallon for each gallon of waste discharged but not cleaned up over 1,000 gallons. Mr. Cordes, and/or his lessee, discharged approximately 8,520 cubic feet of fill material into waters of the United States at two locations on the Site in order to construct road crossings. Each cubic foot of fill is equal to approximately 7.48 gallons. Accordingly, Staff conservatively estimates the discharge volume of 63,730 gallons (of this amount, 61,730 gallons subject to penalties as described below). Each of the crossings, at a minimum, took a day to construct for a total of 2 days of violation. Therefore, at \$10 per gallon for discharges in excess of 1,000 gallons, and at \$10,000 per day for each day of the two days of discharge, the maximum administrative civil liability that may be assessed pursuant to section 13385 is **six hundred thirty seven thousand three hundred dollars (\$637,300)**.
29. **Minimum Civil Liability for Discharge Fill Material to Surface Waters:** Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The discharge violations associated with the work conducted by Mr. Cordes and/or his lessee were due to a failure to obtain and comply with the State of California's NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities Order No. 2009-0009-DWQ and the unauthorized placement of fill without obtaining a Clean Water Act Section 404, Dredge and Fill Permit, and 401 Water Quality Certification. Delayed and avoided costs associated with obtaining and complying with the necessary authorizations are estimated at \$38,738. Using the US EPA's BEN model, the economic benefit gained by non-compliance is calculated to be approximately \$10,102, which becomes the minimum civil liability which must be assessed pursuant to section 13385 for violation 2. In addition, the Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the economic benefit ($\$10,102 + 10\% = \$11,112$) so that

liabilities are not construed as the cost of doing business and provide a meaningful deterrent to future violations.

ADMINISTRATIVE CIVIL LIABILITY

30. Pursuant to Water Code section 13385, subdivision (e), in determining the amount of any civil liability imposed under section 13385, subdivision (c), the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
31. On 17 November 2010, 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 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code sections 13327 and 13385(e). The entire Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11179.pdf
32. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A to this Order. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
33. As described above, the maximum penalty that can be imposed against **the Dischargers for Violation 1 is \$564,540** and the minimum penalty in accordance with the Enforcement Policy that would recover the economic benefit amount, plus 10%, is likely more than **\$9,803**. Based on consideration of the above facts, after applying the penalty methodology, and considering the Discharger's ability to pay, the Assistant Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Dischargers in the amount of **\$139,700** for Violation 1. The specific factors considered in this penalty are detailed in Attachment A to this Order.
34. As described above, the maximum penalty that can be imposed against **Mr. Cordes individually for Violation 2 is \$637,300** and the minimum penalty in accordance with the Enforcement Policy that would recover the economic benefit amount, plus 10%, is likely more than **\$11,112**. Based on consideration of the above facts, after applying the penalty methodology, and considering Mr. Cordes' ability to pay, the Assistant Executive Officer of the Central Valley Water Board proposes that civil liability for Violation 2 be imposed administratively on Mr. Cordes in the amount of **\$157,700**. The specific factors considered in this penalty are detailed in Attachment A to this Order.
35. Notwithstanding the issuance of this Order, the Central Valley Water Board retains the authority to assess additional penalties for violations of the requirements of the Discharger's

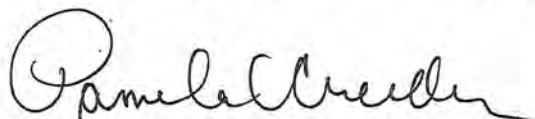
waste discharge requirements for which penalties have not yet been assessed or for violations that may subsequently occur.

36. Issuance of this Administrative Civil Liability Order to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, sections 15307, 15308, 15321(a)(2) and all applicable law.

IT IS HEREBY ORDERED that Christopher Cordes, Eddie Axner Construction, Inc., and Eddie Axner shall pay a civil liability as follows:

1. **No later than 30 days from the date on which this Order is issued**, Christopher Cordes, Eddie Axner Construction, Inc., and Eddie Axner shall pay **one hundred thirty nine thousand seven hundred dollars (\$139,700)** for storm water discharges (Violation 1). Payment shall be made to the *State Water Pollution Cleanup and Abatement Account* (in accordance with Water Code section 13385(n)(1)) and shall be remitted to the Central Valley Water Board at 11020 Sun Center Drive, Suite 200, Rancho Cordova, California.
2. **No later than 30 days from the date on which this Order is issued**, Christopher Cordes shall pay **one hundred fifty seven thousand and seven hundred dollars (\$157,700)** for violations related to the discharge of fill material (Violation 2). Payment shall be made to the *Waste Discharge Permit Fund* (in accordance with Water Code section 13385(n)(2)) and shall be remitted to the Central Valley Water Board at 11020 Sun Center Drive, Suite 200, Rancho Cordova, California.

I, Pamela C. Creedon, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on June 5, 2015.



PAMELA C. CREEDON, Executive Officer

Attachment A: Penalty Calculations for Violation 1 and 2

**Attachment A – ACL Order No. R5-2015-0520
Specific Factors Considered for Administrative Civil Liability
Storm Water Discharges from Assessor Parcel 041-300-035-000**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

VIOLATION 1 - STORM WATER DISCHARGES FROM LOWER TERRACE & ACCESS ROAD TO UNNAMED TRIBUTARIES OF DOBY CREEK

Step 1 – Potential for Harm for Discharge Violations

The "potential harm to beneficial uses" factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5).

The designated beneficial uses of Cottonwood Creek that could be impacted by the unauthorized discharge include Municipal and Domestic Supply; Agricultural Supply; Water Contact Recreation; Noncontact Water Recreation; Warm Freshwater Habitat; Cold Freshwater Habitat; Migration of Aquatic Organisms; Spawning; and Wildlife Habitat. Storm water from Assessor Parcel 041-300-035-000 (hereafter referred to as the "Site") discharged to unnamed tributaries of Doby Creek, which is a tributary of North Fork Cottonwood Creek, which is a major tributary of Cottonwood Creek. Beneficial uses of any specifically identified water body generally apply to all of its tributaries. Spawning, warm, and cold freshwater habitats were the beneficial uses most obviously affected by storm water discharges from the Site. Storm water discharges occurred on at least seven days, but likely more, during the period between 19 November 2013 and 29 October 2014. Fine sediments from discharges were observed in the unnamed tributaries on and adjacent to the Site during the 28 October 2014 inspection and the 19 November 2014 inspection.

The observed harm to beneficial uses was determined to be "Moderate" which is defined as "moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected

and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).” A score of 3 is assigned for this factor.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. “Potential receptors” are those identified considering human, environmental, and ecosystem exposure pathways.

Streams immediately downstream of the discharge points were significantly affected by increased siltation, turbidity, and fines in the stream substrate. Discharges from the Site are deleterious to aquatic life and may cause a chronic impact due to habitat degradation.

The discharged material posed a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection). A score of 2 was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger.

Less than 50% of the discharges from the Site are susceptible to cleanup or abatement, as the discharges entered unnamed tributaries of North Fork Cottonwood Creek and are no longer on Site. Therefore, a factor of 1 is assigned.

Final Score – “Potential for Harm”

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a **final score of 6** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses administrative civil liabilities for the spills based on both a per-gallon and a per-day basis.

1. Per Gallon Assessments for Discharge Violations

When there is a discharge, the Board is to determine an initial liability amount on a per gallon basis, using the Potential for Harm score and the extent of Deviation from Requirement of the violation. The Potential for Harm Score was determined above, and is 6.

The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, etc.) that was violated. For this discharge, the Deviation from Requirement is considered “**Major**” because the Discharger did not comply with the Water Code requirement to apply for a

permit before discharging pollutants to waters of the U.S.

Table 1 of the Enforcement Policy (p. 14) is used to determine a “per gallon factor” based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is **0.22**. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

For the penalty calculation, Staff used a highly conservative estimate of 56,456 gallons for the volume of discharge. The following paragraphs describe how the volume was determined.

Using the USDA Natural Resources Conservation Service - Conservation Engineering Division Technical Release 55 Method (USDA TR-55 Method) and based on characteristics of the site (Newly graded area with no vegetation, Hydrologic Soil Group B) Staff determined that precipitation events greater than 1/3 of an inch over 24 hours would generate runoff from the Site. Using precipitation data from a Dept. of Water Resources/Flood Management gauging station (OGO Ranger Station) located approximately 5 miles southwest of the Site, Staff identified seven days with more than 2/3 of an inch of precipitation over a 24 hour period, between 19 November 2013 and 29 March 2014. Staff used 2/3 of an inch, twice the amount calculated to generate runoff (1/3 of an inch), to be highly conservative in developing storm water discharge volumes.

During the 28 October 2014 inspection Staff noted two locations where the majority of storm water runoff from graded surfaces on the Site discharged to the unnamed tributaries of North Fork Cottonwood Creek. The first storm water runoff discharge location was in the northwest corner of the Lower Terrace (ACL Complaint R5-2015-0520, Attachment D - 28 October 2014 Baker Ridge Inspection Report, Appendix A, Way Point 100). The Lower Terrace was void of vegetation and had a surface area of approximately 30,000 square feet. Storm water runoff from the Lower Terrace surface discharges at the before mentioned location in the northwest corner.

The second storm water runoff discharge location noted by Staff during the 28 October 2014 inspection was on the upstream side of the watercourse crossing located at the entrance to the Site (ACL Complaint R5-2015-0520, Attachment D - 28 October 2014 Baker Ridge Inspection Report, Appendix A, Way Point 118). Storm water runoff from the Access Road, which is approximately 1,000 feet long, 12-16 feet wide, and has a surface area of an approximately 14,000 square feet, flows via an inside ditch to the before mentioned discharge location on the upstream side of the watercourse crossing, where it discharged to an unnamed tributary of North Fork Cottonwood Creek. Prior to the 28 October 2014 inspection, there were no Erosion Control / Storm Water Best Management Practices implemented to reduce erosion and storm water discharge from the Site at the two before mentioned discharge locations.

The first of the seven days where storm water runoff discharged from the Site occurred on 19 November 2013. A total of 0.76 inches of precipitation was recorded at the OGO Ranger Station on this date. Using the USDA TR-55 method Staff calculated that 1,711 gallons of storm water discharged from the Lower Terrace and 799 gallons from the Access Road.

The second of the seven days where storm water runoff discharged from the Site occurred on 8 February 2014. A total of 0.96 inches of precipitation was recorded at the OGO Ranger Station on this date. Using the USDA TR-55 method Staff calculated that 3,327 gallons of storm water discharged from the Lower Terrace and 1,553 gallons from the Access Road.

The third of the seven days where storm water runoff discharged from the Site occurred on 9 February 2014. A total of 0.8 inches of precipitation was recorded at the OGO Ranger Station on this date. Using the USDA TR-55 method Staff calculated that 2,002 gallons of storm water discharged from the Lower Terrace and 934 gallons from the Access Road.

The fourth of the seven days where storm water runoff discharged from the Site occurred on 26 February 2014. A total of 1.24 inches of precipitation was recorded at the OGO Ranger Station on this date. Using the USDA TR-55 method Staff calculated that 6,151 gallons of storm water discharged from the Lower Terrace and 2,870 gallons from the Access Road.

The fifth of the seven days where storm water runoff discharged from the Site occurred on 3 March 2014. A total of 1.88 inches of precipitation was recorded at the OGO Ranger Station on this date. Using the USDA TR-55 method Staff calculated that 14,199 gallons of storm water discharged from the Lower Terrace and 6,626 gallons from the Access Road on 3 March 2014.

The sixth of the seven days where storm water runoff discharged from the Site occurred on 5 March 2014. A total of 0.88 inches of precipitation was recorded at the OGO Ranger Station on this date. Using the USDA TR-55 method Staff calculated that 2,634 gallons of storm water discharged from the Lower Terrace and 1,229 gallons from the Access Road.

The last of the six precipitation events where storm water runoff discharged from the Site occurred on 28 March 2014. A total of 1.44 inches of precipitation was recorded at the OGO Ranger Station on this date. Using the USDA TR-55 method Staff calculated that 8,469 gallons of storm water discharged from the Lower Terrace and 3,952 gallons from the Access Road.

For the purposes of the penalty calculation, Staff is using a discharge volume of 56,456 gallons (of this amount, 49,456 gallons subject to penalties as described below). The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon

discharged. The Per Gallon Assessment is calculated as (0.22 factor from Table 1) x (49,456 gallons) x (\$10 per gallon). The value is **\$108,800**.

| Discharge Event | Dates | Total Runoff Volume from Lower Terrace (gallons) | Total Runoff Volume from Access Road (gallons) | Total Runoff (gallons) | Total Subject to Penalties (Volume – 1,000 gallons)* | Days of Violation Subject to Penalties |
|-----------------|---------------|--|--|------------------------|--|--|
| #1 | 19 Nov 2013 | 1,711 | 799 | 2,510 | 1,510 | 1 |
| #2 | 8 Feb 2014 | 3,327 | 1,553 | 4,880 | 3,880 | 1 |
| #3 | 9 Feb 2014 | 2,002 | 934 | 2,936 | 1,936 | 1 |
| #4 | 26 Feb 2014 | 6,151 | 2,870 | 9,021 | 8,021 | 1 |
| #5 | 3 March 2014 | 14,199 | 6,626 | 20,825 | 19,825 | 1 |
| #6 | 5 March 2014 | 2,634 | 1,229 | 3,863 | 2,863 | 1 |
| #7 | 28 March 2014 | 8,469 | 3,952 | 12,421 | 11,421 | 1 |
| | Total | 38,493 | 17,963 | 56,456 | 49,456 | 7 |
| Per Water Code | | | | | | |

2. Per Day Assessments for Discharge Volumes

When there is a discharge, the Water Board is to determine an initial liability amount on a per day basis using the same Potential for Harm factor score (6) and the extent of Deviation from Requirement (Major) that were used in the per-gallon analysis. The “per day” factor (determined from Table 2 of the Enforcement Policy) is **0.22**.

The discharges that are the subject of this enforcement action occurred on at least seven different days. Therefore, the Per Day Assessment is calculated as (0.22 factor from Table 2) x (7 days) x (\$10,000 per day). The value is **\$15,400**.

Initial Liability Amount: The value is determined by adding together the per gallon assessment and the per day assessment. For this case, the total is \$108,800 + \$15,400 for a total initial liability amount of **\$124,200**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violations are related to the discharge from the Site, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator’s culpability, efforts to clean up or cooperate with regulatory authority, and the violator’s compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Dischargers were given a multiplier value of **1.5** because the Dischargers did not comply with the Water Code requirement to apply for a permit before discharging pollutants to waters of the U.S. and were knowledgeable of that requirement. In addition staff believes that negligence was involved because the Discharger failed to exercise a degree of care which a reasonable person would exercise under similar circumstances.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers have cooperated with the investigation thus far and have implemented some Best Management Practices since the 28 October 2014 inspection to reduce the amount of sediment and fill material that continues to discharge from the Site. Therefore, the Dischargers were given a multiplier value of **0.75**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy indicates a minimum multiplier of 1.1 to be used. The Dischargers do not have a history of violations with the Central Valley Water Board. Therefore, the History of Violation factor is **1.0**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

Total Base Liability Amount: This value is calculated as the Initial Liability Amount (\$124,200) x Adjustment Factors (1.5) (0.75) (1) and is equal to **\$139,700**.

Step 6 - Ability to Pay and Ability to Continue in Business

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. The Dischargers have an ability to pay the total base liability amount proposed for Violation 1 based on the fact that the Dischargers own real property that collectively is worth in excess of the total base liability amount for Violation 1. Furthermore, Axner Construction, Inc., is a for profit business that generates income and owns assets. Based on this information, the total base liability amount for Violation 1 was not adjusted for the Dischargers' ability to pay.

Step 7 – Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for "other factors as justice may require," but only if express findings are made to justify this.

Step 8 – Economic Benefit

Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The Dischargers benefited economically by not enrolling and complying with the State of California's NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities Order No. 2009-0009-DWQ (NPDES No. CAS000002). To comply with this order the Dischargers would have had to pay an annual Construction Stormwater Program fee, hired a Qualified Storm Water Pollution Prevention Plan (SWPPP) Developer (QSD) to develop a SWPPP for construction and land disturbance activities on the Site, implement erosion and sediment control best management practices (BMPs) in accordance with the SWPPP, and hired a Qualified SWPPP Practitioner (QSP) to inspect those BMPs, monitor the Site and storm water discharges from the Site, take corrective actions when needed, and write and submit monitoring reports to the Central Valley Water Board.

The annual Construction Stormwater Program fee for fiscal year 2013-14 for the construction and land disturbance activities the dischargers conducted on the Site is \$715. This is considered an avoided cost because the Dischargers cannot retroactively enroll in the Construction Stormwater Program. The estimated cost to have a QSD develop a SWPPP for the Site and to have a QSP to inspect and monitor the site as needed to comply with the SWPPP and the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities during fiscal year 2013-14 is \$5,100. This is considered an avoided cost as the Dischargers cannot retroactively have a SWPPP developed, inspected, or monitored. The estimated cost to implement erosion and sediment control BMPs for the construction and land disturbance activities conducted by the Dischargers in 2013 is \$66,463. This is considered a delayed cost as the Dischargers will have to implement erosion and sediment control BMPs in compliance with Cleanup and Abatement Order R5-2015-0701.

The Dischargers economic benefit for noncompliance with the Construction Storm Water General Permit is calculated from the delayed and avoided costs listed above using the USEPA's BEN computer program, and is equal to the present value of the avoided costs plus the "interest" on delayed costs. This calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid the instance of noncompliance. The total Benefit of Noncompliance to the Dischargers in regards to this violation is calculated to be \$8,912.

The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations." Therefore, the economic benefit is estimated to be **\$9,803**, which becomes the minimum civil liability which must be assessed pursuant to section 13385.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Order, and the values are repeated here.

Maximum Liability Amount: \$564,540

Minimum Liability Amount: \$9,803

Step 10 – Final Proposed Liability Amount for Violation 1

Based on the foregoing analysis, and consistent with the Enforcement policy, *the final liability amount proposed for Violation 1 is \$139,700.*

VIOLATION 2- DISCHARGES OF FILL MATERIAL TO UNNAMED TRIBUTARIES OF DOBY & DUCKET CREEKS

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5).

The designated beneficial uses of Cottonwood Creek that could be impacted by the unauthorized discharge include Municipal and Domestic Supply; Agricultural Supply; Water Contact Recreation; Noncontact Water Recreation; Warm Freshwater Habitat; Cold Freshwater Habitat; Migration of Aquatic Organisms; Spawning; and Wildlife Habitat. The discharger(s) placed 8,520 cubic feet of fill in unnamed tributaries of Doby and Duckett Creeks, which are tributaries of North Fork Cottonwood Creek, which is a major tributary of Cottonwood Creek. Beneficial uses of any specifically identified water body generally apply to all of its tributaries. The fill material was observed in the unnamed tributaries on Assessor Parcel 041-300-035-000 (hereafter referred to as the “Site”) during the 28 October 2014 inspection and the 19 November 2014 inspection.

The observed harm to beneficial uses was determined to be “Above Moderate” which is defined as “more than moderate threat to beneficial uses (i.e., impacts are observed or likely substantial, temporary restrictions on beneficial uses (e.g., less than 5 days), human or ecological health concerns).” A score of 4 is assigned for this factor.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways.

Streams immediately downstream of where fill material was discharged were significantly affected by increased siltation, turbidity, and fines in the stream substrate. Discharges from the Site are deleterious to aquatic life and may cause a chronic impact due to habitat degradation.

The discharged material posed a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection). A score of 2 was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger.

More than 50% of the discharged fill material on the Site is susceptible to cleanup or abatement. Therefore, a factor of 0 is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a **final score of 6** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses administrative civil liabilities for the spills based on both a per-gallon and a per-day basis.

1. Per Gallon Assessments for Discharge Violations

When there is a discharge, the Board is to determine an initial liability amount on a per gallon basis, using the Potential for Harm score and the extent of Deviation from Requirement of the violation. The Potential for Harm Score was determined above, and is 6.

The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, etc.) that was violated. For this discharge, the Deviation from Requirement is considered "**Major**" because the Discharger did not comply with the Water Code requirement to apply for a permit before discharging pollutants to waters of the U.S.

Table 1 of the Enforcement Policy (p. 14) is used to determine a “per gallon factor” based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is **0.22**. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below. For the penalty calculation, Staff used a conservative estimate of 63,730 gallons for the volume of fill material discharged.

For the purposes of the penalty calculation, Staff is using a discharge volume of 63,730 gallons (of this amount, 61,730 gallons subject to penalties as described below). The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon discharged. The Per Gallon Assessment is calculated as (0.22 factor from Table 1) x (61,730 gallons) x (\$10 per gallon). The value is **\$135,800**.

Fill material was discharged to unnamed tributaries on Site at two locations. At both locations fill material was discharged to construct an unculverted non-armored watercourse crossing. At the first location (Way Point 1, 19 November 2014 Baker Ridge Inspection Report) more than 3,840 cubic feet, or 28,725 gallons, of fill material was discharged to an unnamed tributary of Doby Creek. At the second location (Way Point 2, 19 November 2014 Baker Ridge Inspection Report) more than 4,680 cubic feet, or 35,005 gallons, of fill material was discharged to an unnamed tributary of Duck Creek.

2. Per Day Assessments for Discharge Volumes

When there is a discharge, the Water Board is to determine an initial liability amount on a per day basis using the same Potential for Harm factor score (6) and the extent of Deviation from Requirement (Major) that were used in the per-gallon analysis. The “per day” factor (determined from Table 2 of the Enforcement Policy) is **0.22**.

The two watercourse crossings most likely were constructed on at least two separate days. Therefore, the discharges that are the subject of this enforcement action occurred on at least two different days. Therefore, the Per Day Assessment is calculated as (0.22 factor from Table 2) x (2 days) x (\$10,000 per day). The value is **\$4,400**.

Initial Liability Amount: The value is determined by adding together the per gallon assessment and the per day assessment. For this case, the total is \$135,800 + \$4,400 for a total initial liability amount of **\$140,200**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violations are related to the discharge from the Site, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator’s culpability, efforts to clean up or cooperate with regulatory authority, and the violator’s compliance history. After each of these factors is considered for the

violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Dischargers were given a multiplier value of **1.5** because the Dischargers did not comply with the Water Code requirement to apply for a permit before discharging pollutants to waters of the U.S. In addition staff believes that negligence was involved because the Discharger failed to exercise a degree of care which a reasonable person would exercise under similar circumstances.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers have cooperated with the investigation and have implemented some Best Management Practices since the 28 October 2014 inspection to reduce the amount of sediment and fill material that continues to discharge from the Site. Therefore, the Dischargers were given a multiplier value of **0.75**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy indicates a minimum multiplier of 1.1 to be used. The Dischargers do not have a history of violations with the Central Valley Water Board. Therefore, the History of Violation factor is **1.0**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

Total Base Liability Amount: This value is calculated as the Initial Liability Amount (\$140,200) x Adjustment Factors (1) (0.75) (1) and is equal to **\$157,700**.

Step 6 - Ability to Pay and Ability to Continue in Business

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. Mr. Cordes has an ability to pay the total base liability amount proposed for Violation 2 based on the fact that he owns real property in California and Texas with tax assessor values in excess of \$280,000. It is also unknown at this time what other sources of income and/or assets are available to Mr. Cortes and it is presumed that the other Dischargers will pay some portion of the liability imposed for Violation 1. Based on this information, the total base liability amount for Violation 2 was not adjusted for the Dischargers' ability to pay.

Step 7 – Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this.

Step 8 – Economic Benefit

Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The Dischargers benefited economically by not enrolling and complying with the State of California’s NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities Order No. 2009-0009-DWQ (NPDES No. CAS000002) and for not obtaining a Clean Water Act Section 404 Permit or 401 Water Quality Certification for dredged and fill materials.

To comply with the General Construction Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities order the Discharger would have had to pay an annual Construction Stormwater Program fee, hired a Qualified Storm Water Pollution Prevention Plan (SWPPP) Developer (QSD) to develop a SWPPP for construction and land disturbance activities on the Site, implement erosion and sediment control best management practices (BMPs) in accordance with the SWPPP, and hired a Qualified SWPPP Practitioner (QSP) to inspect those BMPs, monitor the Site and storm water discharges from the Site, take corrective actions when needed, and write and submit monitoring reports to the Central Valley Water Board. To obtain a Clean Water Act Section 401 Water Quality Certification the Discharger would have had to submit an application and application fee.

The annual Construction Stormwater Program fee for fiscal year 2014-15 for the construction and land disturbance activities the dischargers conducted on the Site is \$745. This is considered an avoided cost because the Discharger cannot retroactively enroll in the Construction Stormwater Program. The estimated cost to have a QSD develop a SWPPP for the Site and to have a QSP to inspect and monitor the site as needed to comply with the SWPPP and the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities during fiscal year 2014-15 is \$6,600. This is considered an avoided cost as the Discharger cannot retroactively have a SWPPP developed, inspected, or monitored. The estimated cost to implement erosion and sediment control BMPs for the construction and land disturbance activities conducted by the Dischargers in 2013 is \$30,296. This is considered a delayed cost as the Discharger will have to implement erosion and sediment control BMPs in compliance with Cleanup and Abatement Order R5-2015-0701. The cost to obtain a Section 401 Water Quality Certification in 2014 is \$1097.

The Dischargers economic benefit for noncompliance with the Construction Storm Water General Permit is calculated from the delayed and avoided costs listed above using the USEPA’s BEN computer program, and is equal to the present value of the avoided costs plus the “interest” on delayed costs. This calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid the instance of

noncompliance. The total Benefit of Noncompliance to the Dischargers in regards to this violation is calculated to be \$10,102.

The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations." Therefore, the economic benefit is estimated to be **\$11,112**, which becomes the minimum civil liability which must be assessed pursuant to section 13385.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Order, and the values are repeated here.

Maximum Liability Amount: \$637,300

Minimum Liability Amount: \$11,112

Step 10 – Final Liability Amount for Violation 2

Based on the foregoing analysis, and consistent with the Enforcement policy, the final liability amount proposed for Violation 2 is \$157,700.

Total Combined Liability Amount

The final liability amounts for Violation 1 and Violation 2 discussed above consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Without further investigation of the discharge, calculation of economic benefits, and additional staff time, the proposed combined Administrative Civil Liability is **\$297,400** (consisting of Christopher Cordes, Eddie Axner and Eddie Axner Construction, Inc. being joint and severally liable for **\$139,700** and Christopher Cordes being individually liable for an additional **\$157,700**).