

**Note: This document has been prepared by the  
Central Valley Water Board's Prosecution Team**

ITEM: 21

SUBJECT: Christopher Cordes, Eddie Axner Construction Inc., and Eddie Axner

BOARD ACTION: *Consideration of an Administrative Civil Liability (ACL) Order*

FACILITY  
BACKGROUND: Administrative Civil Liability Complaint R5-2015-0520 (ACL Complaint) was issued to Christopher Cordes, Eddie Axner Construction Inc., and Eddie Axner (referred to collectively as Dischargers) alleging storm water violations (Violation 1) and unauthorized dredge and fill violations (Violation 2) associated with the development of Shasta County Assessor Parcel Number (APN) 041-300-035-000 (Site) for the purposes of cultivating marijuana. The total liability proposed in the ACL Complaint is \$297,400, of which \$139,700 is for storm water discharge violations (Violation 1) against the Dischargers joint and severally and \$157,700 is for unauthorized discharges of fill material against Mr. Cordes alone (Violation 2).

Mr. Christopher Cordes purchased the Site located off of Baker Ridge road on 21 May 2013. The Site is located in steep terrain, comprised of highly erosive soils (decomposed granite) and is drained by 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 Ducket Creeks. Both creeks are perennial tributaries to North Fork of Cottonwood Creek, an anadromous fishery.

Mr. Cordes developed the Site through two separate grading and road development events. The first unpermitted event occurred in June of 2013 when Mr. Eddie Axner, in his capacity as owner and responsible corporate officer of Eddie Axner Construction, Inc., entered into verbal agreements with Mr. Cordes to conduct grading operations at the Site on a per hour basis. Persons employed by Eddie Axner Construction, Inc. conducted approximately 3.8 acres of unpermitted clearing, grading, excavation, and/or other land disturbance activities 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. Despite the fact that Mr. Axner is an experienced licensed contractor with expertise in erosion control, no erosion control measures were implemented on the Site during or after these grading activities were completed, and the Site remained unprotected through winter 2013/2014 until Central Valley Water Board staff (hereafter referred to as "Staff") conducted their first Site inspection in October 2014. Highly conservative estimates suggest these grading activities caused the discharge of at least 56,456 gallons of sediment laden storm water to surface water drainages (Violation 1).

The second unpermitted grading event occurred in April or May of 2014. Mr. Cordes asserts that this work was conducted and/or contracted for by a lessee of the Site. Mr. Cordes, however, is unwilling to identify that individual. These grading activities led to the construction of an approximate 1.3 mile native surface road that created two unculverted watercourse crossings; one of which resulted in the discharge of more

than 3,840 cubic feet of earthen materials to a watercourse and one that resulted in discharge of more than 4,680 cubic feet of earthen materials to a watercourse. (Violation 2.)

ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT:

On 20 March 2015, the Assistant Executive Officer issued Cleanup and Abatement Order R5-2015-0701 (CAO) and Administrative Civil Liability Complaint R5-2015-0520 (ACL Complaint). The CAO in part, requires the Dischargers to submit or comply with; 1) an Interim Erosion and Sediment Control Plan, 2) a Restoration, Mitigation, and Monitoring Plan, 3) Implementation and Completion deadlines, and 4) Long Term Monitoring.

The ACL Complaint is based on the Dischargers actions that resulted in unpermitted discharge of waste to waters of the state and waters of the United States. The total liability proposed in the ACL Complaint is \$297,400, of which \$139,700 is for storm water discharge violations (Violation 1) against the Dischargers joint and severally and \$157,700 is for unauthorized discharges of fill material against Mr. Cordes alone for dredge and fill violations (Violation 2). Proposed penalties were established using highly conservative estimates of discharge volume and the Penalty Calculation Methodology outlined in State Water Board's Enforcement Policy.

The maximum penalty under the Water Code for the violations alleged under Violation 1 is \$564,540. A conservative estimate of the minimum penalty of the economic benefit plus 10% for the violations alleged as Violation 1 is \$9,803.

The maximum penalty under the Water Code for the violations alleged under Violation 2 is \$637,300. A conservative estimate of the minimum penalty of the economic benefit plus 10% for the violations alleged as Violation 2 is \$11,112.

ACL ISSUES:

Staff has met several times with Axner and once with Axner and Cordes collectively to discuss the CAO and Complaint. Neither party appears to object to the requirements of the CAO. However, both parties object to the ACL Complaint asserting, for different reasons, that civil liability should be eliminated altogether, or reduced significantly.

Cordes' Response

Cordes argues that while he is willing to accept responsibility for his actions (Violations 1 and 2), he does not have the financial resources to address both the requirements of the CAO and the proposed penalties associated with the ACL Complaint. Cordes further argues that the proposed penalties be held in abeyance and only apply in the event he doesn't follow through with his commitments as outlined in the CAO. Cordes has submitted financial statements to bolster this argument; however the Prosecution Team believes Cordes' claim of an inability to pay lacks appropriate and sufficient supporting evidence, is incomplete, and is misleading.

Axner's Response

Axner has submitted policy statements and raised multiple arguments in opposition to the ACL Complaint including, but not limited to; (1) that as a matter of Policy the Central Valley Board should be focused on education of contractors not enforcement; (2) that Cordes, not Axner, is the legally responsible party; (3) that Joint and Several liability isn't appropriate; (4) that Axner did install some erosion control measures; and (5) that the proposed liability amount for Violation 1 is unsupported by the factual record and should be reduced.

Axner points to the Marijuana Pilot Program's Strategic Plan (*The Strategy for Regulation and Enforcement of Unauthorized Diversions; Discharge of Waste to Surface and Groundwater Caused by Marijuana Cultivation*), as establishing that the Water Board and California Department of Fish and Wildlife should focus on educating construction groups about potential liabilities and how to avoid them, and not using enforcement to "make an example of anyone in the construction industry." The Prosecution Team asserts that the Strategic Plan is only a blueprint for the joint agency Pilot Program and that nothing in the Strategic Plan limits the Board's discretion to pursue enforcement where otherwise authorized. Furthermore, the Prosecution Team points to specific language in the Strategic Plan that recognizes that where appropriate, earthwork contractors will be named as responsible parties and that "this approach has been identified as a critical step in the deterrence of irresponsible site preparation and operations." (Axner Exhibit 1, Strategic Plan, Sec. 7.3.1., p.15.)

Axner argues that it is Mr. Codes, not Axner, who should be held liable for Violation 1 and that joint and several liability is not legally available or appropriate. Axner's argument is that as owner of the Site, Cordes bears responsibility for permits, erosion control, the work conducted at the Site, and the resulting damage that occurs, as Axner worked at the direction and control of Cordes.

The Prosecution Team asserts that the legal basis for holder Axner joint and severally liable is derived from the plain-language reading of the Water Code and the underlying Federal Water Pollution Control Act. Specifically Water Code section 13385 provides that a person who violates any of the following...shall be liable civilly in accordance with this section, then goes on to list section 301 of the Clean Water Act among many other applicable sections. Axner is liable because he is a person who violated section 301 of the Clean Water Act by discharging pollutants into waters of the United States.

Axner also argues that he could not obtain a permit on his own without authorization from Cordes to do so. The Prosecution Team asserts that this argument is irrelevant. Axner's inability to independently obtain coverage under the General Permit does not absolve Axner of responsibility to comply with the Clean Water Act and the Water Code. Axner could have avoided liability for the violations alleged as Violation 1 by choosing not to conduct the work and/or insuring that the appropriate permit was in place prior to beginning the work.

With regard to Axners contention that he did install some erosion control – Axner argues that despite being instructed not to do anything about erosion control Axner installed basic erosion control measures by applying brush and timber to the graded areas to help prevent erosion. Again the Prosecution Team asserts that this argument is irrelevant; mainly because 1) the erosion control measure described by Axner are not and would be considered appropriate erosion control/best management practices given the highly erosive soils and steep slopes at the Site and 2) the proposed penalties do not account for runoff from the slopes Axner identifies in his argument as having the alleged erosion control measures applied.

Axner also argues that several factors the Prosecution Team used to calculate the proposed penalty are unsupported by the factual record. Mainly Axner argues that the Prosecution Team’s selection of “moderate” for *Step 1, Potential for Harm and Characteristics of the Discharge* should instead be “minor” because “the material that was observed in the tributaries surrounds the creek tributaries and was present in them long before any of the property work that led to this matter” and that “the Prosecution Team has not provided sufficient evidence to support the assertion that any discharge caused by Axner and Cordes would cause significant amount of additional harm over and above that caused by the discharge of the very same material which occurs every time that there is meaningful precipitation”

Prosecution Team asserts that there is substantial evidence in the record to support assigning a score of 3 or “Moderate” as defined in the Enforcement Policy for the potential harm to beneficial use factor. That it is reasonable to expect (even an already sediment impacted area) that turbid and sediment laden storm water runoff from disturbed areas of the Site had moderate impacted on beneficial uses.

Similarly, Axner argues that the Prosecution Team’s selection of “major” for *Step 2, Deviation from Requirement* was inappropriate and instead should be reduced to “minor” because it contends 1) Axner used brush to cover the area in which he had performed grading work and that the brush protected that area and reduced erosion and run-off, 2) that Axner was not able to obtain the permits himself, 3) that the responsibility to obtain the permits was Cordes’, and 4) Cordes assured Axner that the appropriate permits were in place and instructed him that he did not need to complete erosion control measures because another party would be handling that portion of the work.

Axner also disputes the Prosecution Team’s use of the highest *Culpability* multiplier of 1.5. Again Axner asserts that he was not able to obtain the necessary permits and that it was Cordes’ responsibility to do so and that Cordes assured Axner that the proper permits were in place that another party would complete the necessary erosion work. Axner further attempted to prevent erosion by placing brush over the area in which he had worked, which slowed the erosion in that particular area; an area the Prosecution Team contends is not subject to the penalties outlined in the proposed ACL.

The Prosecution Team stands by its finding of a major deviation from requirements and *Culpability* multiplier of 1.5 for both Axner and Cordes. Axner is an experienced licensed contractor in both municipal and private construction. Axner knew or should have known that permits would be required for work conducted at the Site, further that those permits would contain design and erosion control standards specific to grading activities which he conducted. Nevertheless, he chose to conduct the earth work without those permits and standards. Axner was also aware or should have been aware that placement of brush was not an appropriate or effective erosion control method.

SUMMARY:

The ACL Complaint alleges two categories of violations: (1) storm water discharge violations associated with the work conducted by Eddie Axner Construction, Inc. on the Site (Violation 1); and (2) unauthorized dredge and fill violations to unnamed tributaries of Doby and Duckett Creeks associated with the unauthorized road construction on the Site (Violation 2).

Both Mr. Axner and Mr. Cordes have asserted that the newly constructed section of road and crossings associated with Violation 2 were constructed by a third party at some date after Eddie Axner Construction, Inc. conducted earthwork on the Site. Mr. Cordes has refused to divulge the identity of the individual who allegedly leased the Site and conducted and/or contracted for this additional roadwork and grading, and has claimed that he is willing to assume responsibility for the individual's activities.

Accordingly, the ACL Complaint alleges that the Dischargers (Mr. Cordes, Mr. Axner, and Axner Construction, Inc.) are all joint and severally liable for Violation 1 storm water discharge violations associated with the work conducted by Eddie Axner Construction, Inc. on the Site and that Mr. Cordes, as the property owner and only known party involved in the additional road construction and grading, is liable for Violation 2, unauthorized dredge and fill violations to unnamed tributaries of Doby and Duckett Creeks associated with the unauthorized road construction on the Site (Violation 2).

RECOMMENDATION:

The Prosecution Team recommends that the Board adopt an Administrative Civil Liability Order that imposes liability on the Dischargers in the amount of **\$139,700** for storm water discharge violations (Violation 1) and that Mr. Cordes be separately assessed an additional Administrative Civil Liability in the amount of **\$157,700** for discharges of fill material (Violation 2), as proposed.

Mgmt. Review\_\_CES  
Legal Review\_\_YW\_

**4/5 June 2015**

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