

**STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION**

STAFF REPORT FOR REGULAR MEETING OF July 7-8, 2005

Prepared on June 14, 2005

ITEM: 18

SUBJECT: Administrative Civil Liability Order No. R3-2005-0024; David Pierson

KEY INFORMATION

Discharger: David Pierson
Location: Creston, San Luis Obispo County
Discharge Type: Non-Point Source (sediment)
Existing Order: None

SUMMARY

David Pierson (hereafter Discharger), owner of land in the Creston area, is alleged to have violated a Prohibition of the California Regional Water Quality Control Board (Water Board) for which the Water Board may impose civil liability pursuant to California Water Code 13350.

The Discharger discharged or threatened to discharge soil and silt to waters of the state in violation of best management practices, and in quantities deleterious to fish, wildlife, and other beneficial uses.

On May 9, 2005, the Water Board Executive Officer issued Administrative Civil Liability (ACL) Complaint No. R3-2005-0024 in the amount of one hundred twenty-five thousand dollars (\$125,000).

Appropriate enforcement actions are important in order to ensure consequences for illegal discharges and provide incentives for others to comply with water quality regulations.

DISCUSSION

Background: The Discharger is the owner of 635 acres of land in the Creston area of San Luis Obispo County (Attachment 24). The specific

location is Section 36, Township 28 South, Range 14 East, Mount Diablo Base, and Meridian (35° 27' - Latitude, 120° 25' - Longitude).

The property, has on occasion, been referred to as Goldie Lane Properties, and Huero Huero Ranch. During the summer of 2002, the Discharger altered approximately 39 of the 635 acres by removing most of the vegetation, constructing a 1330-foot dirt road, and reestablishing an existing dirt road. The altered 39-acre area will hereafter be referred to as the Site.

The Site drains to an unnamed "blue line" stream that is tributary to Huerhuero Creek, both of which are waters of the state. Huerhuero Creek is tributary to the Salinas River. The Water Quality Control Plan, Central Coast Basin (Basin Plan) designates both recreation and aquatic life as beneficial uses of the blue line stream, among other uses. The beneficial uses of Huerhuero Creek include municipal and domestic water supply, agricultural supply, ground water recharge, water contact recreation, non-contact water recreation, wildlife habitat, warm freshwater habitat, rare, threatened, or endangered species, and commercial and sport fishing.

By removing vegetation without implementing effective Best Management Practices (BMPs) the Discharger discharged, or threatened to discharge,

eroded soil and silt from the Site to waters of the state. The Discharger failed to cease the discharge and threatened discharge by not implementing effective BMPs for a period of at least 185 days. This period of time is calculated from September 1, 2002, when removal of vegetation was completed, until at least March 4, 2003, when Water Board staff documented that the soils were partially stabilized. The precise time in which the soils became extensively stable is unknown because on March 4, 2003, soils were still eroding and being discharged to state waters. The next inspection wasn't until September 19, 2003, when the soils were considered mostly stable.

On November 8, 2002, December 20, 2002, and February 3, 2003, Water Board staff witnessed and documented discharges of eroded soil from the Site to waters of the state.

History of Water Board inspections, correspondence, and enforcement efforts, and the Discharger's failure to cease violating a prohibition

August, 2001 - In response to the Discharger's proposal to subdivide the Site, the County of San Luis Obispo issued a Mitigated Negative Declaration & Notice of Determination that included a Supplemental Report (RCD Report) prepared by the Resource Conservation District (RCD). The Negative Declaration and RCD Report (included as Attachment 1) make numerous references to the erodible nature of the Site due to the soil type and steep terrain, and also reference the need to provide erosion and sedimentation controls to protect Huerhuero Creek and unnamed "blue line" streams. The Discharger apparently did not pursue approval for the subdivision; however the documents were still relevant as a source of information and guidance for the Discharger concerning the high erosion hazard at the Site and any activity involving land disturbance.

September 20, 2002 - Water Board staff inspected the Site and found that it had been "grubbed" (i.e., cleared) of most existing vegetation, and observed that there was no form of erosion or sedimentation controls. A consultant, representing the discharger, was on site and stated that the grubbed areas would be seeded to prevent erosion. Staff informed the consultant that seeding alone would likely not be

adequate and additional erosion and sediment controls were necessary.

October 10, 2002 - A letter (included as Attachment 2) from Water Board staff was sent to the Discharger confirming the findings of the September 20, 2002 inspection and reiterating the concern about the lack of erosion and sedimentation controls and the need for more than the proposed seeding. The letter stated,

"...applying seed alone is not a sufficient erosion control measure. Established vegetation is a means of erosion control; thus seed must be nurtured into vegetation before runoff occurs to be effective erosion control."

This statement explained to the Discharger what comprised the Best Management Practice for soil stabilization using seeding; a BMP that the Discharger's consultant said they planned to implement. Water Board staff discussed potential enforcement actions and the Discharger was directed to submit a detailed erosion and sedimentation control plan by October 21, 2002.

October 17, 2002 - Water Board staff sent a letter (included as Attachment 3) to the discharger that addressed errors in the October 10th letter, and extended the deadline for submitting the erosion and sedimentation control plan to October 25, 2002.

October 22, 2002 - Water Board staff received the requested erosion and sedimentation control plan.

November 8, 2002 - Water Board staff inspected the Site and found that the Discharger had seeded but, even though it was raining, there were no erosion or sedimentation controls in place. This was contrary to the promise by representatives of the Discharger to have erosion and sediment controls in place prior to any rains. The Site was eroding extensively, and eroded sediments from the Site were being conveyed by storm water to the unnamed "blue line" stream.

November 12, 2002 - Water Board staff sent a letter (included as Attachment 5) to the Discharger telling him that the referenced erosion and sedimentation control plan was inadequate and again explained that seeding alone would not be effective in preventing erosion and that additional

erosion controls would have to be implemented. This letter reiterated that,

“...established vegetation is a means of erosion control; thus, the seed must be nurtured into vegetation before runoff occurs to be effective erosion control.”

The letter continued,

“ Additional erosion control measures must be implemented to avoid widespread erosion and sediment loss, and to reduce potential surface water impacts.”

A staff review sheet regarding the erosion and sedimentation control plan was provided with instructions to address all noted inadequacies and to have a revised erosion and sedimentation control plan on Site and available for review.

November 25, 2002 – Water Board staff sent a Notice of Violation (included as Attachment 6) to the Discharger confirming the findings of the November 8, 2002 inspection, including photographs depicting extensive erosion and threatened impacts on receiving waters. The NOV informed the Discharger that he had failed to provide effective erosion and sedimentation controls and was reminded of the possibility of the Water Board imposing monetary civil liability.

December 20, 2002 – Water Board staff inspected the Site and found the erosion and sedimentation controls to be extensively ineffective and observed evidence that eroded sediments had entered the unnamed “blue line” stream and flowed to Huerhuero Creek.

January 23, 2003 – The Water Board Executive Officer issued Cleanup and Abatement Order No. R3-2003-0021 (included as Attachment 7) to the Discharger for failing to implement effective erosion and sedimentation controls, and discharging pollutants to state waters.

February 3, 2003 –Water Board staff inspected the Site and found that, although the Discharger did install some erosion and sedimentation control improvements and others were in progress, the installation was incomplete; a violation of Order No. R3-2003-0021.

February 13, 2003 – A consultant, on behalf of the Discharger, submitted a revised erosion and sedimentation control plan in response to Order No. R3- 2003-0021.

February 21, 2003 –Water Board staff sent a Notice of Violation (included as Attachment 8) to the Discharger for not complying with Order No. R3-2003-0021 by failing to provide effective erosion and sedimentation controls and failing to submit a complete erosion and sedimentation control plan. The Discharger was reminded of the possibility of the imposition of monetary civil liability.

February 28, 2003 –Water Board staff inspected the Site and found it lacked erosion controls, had widespread erosion, and sediment controls had been overwhelmed with eroded sediments.

March 7, 2003 - Water Board staff responded to the Discharger’s consultant (Attachment 9) referencing his letters dated February 25, 2003, and March 3, 2003. The letters (included as Attachments 10 and 11), in part dispute the evidence of eroded sediments reaching receiving waters and claim effective erosion controls were in place. The Water Board staff response references existing correspondence documenting ineffective erosion and sediment controls and discharges of sediments.

March 11, 2003 – Water Board staff sent the Discharger a Notice of Violation (included as Attachment 12), with descriptive photographs, confirming the findings of the February 18, 2003 inspection. The NOV required the Discharger to submit a revised erosion and sedimentation control plan.

August 12, 2003 – The Executive Officer for the Water Board issued Cleanup and Abatement Order (CAO) No. R3-2003-0062 (included as Attachment 13) and rescinded CAO No. R-3-2003-21. The intent of both CAOs was to bring about stabilization of Site soil and eliminate discharges to state waters. The original CAO was replaced because it referenced a section of the California Water Code that did not apply to the Site. A September 19, 2004 Water Board staff inspection found the grubbed areas of the Site had become revegetated, and, for the most part, had become stable and no longer susceptible to erosion.

Therefore, it does not appear that CAO No. R-3-2003-0062 was violated.

April 1, 2004 – Water Board staff prepared an Internal Memo titled “Assessment of Sediment Conditions and Possible Impacts to Beneficial Uses from Sediment on the Kelegian and Pierson Properties” (included as Attachment 14). This assessment was taken into account in determining the amount of the assessed liability.

July 16, 2004 - The Executive Officer of the Water Board issued Administrative Civil Liability Complaint No. R3-2004-0110 (attached as Attachment 15) with a recommended civil liability of \$25,500.

October 22, 2004 – The Discharger submitted a letter (included as Attachment 16) to Water Board staff that purportedly summarized the Discharger’s expenditures of \$82,616.94 for soil stabilization efforts. There were no invoices, receipts, or any other similar documents submitted to support or substantiate the claimed expenses. The letter in part states,

“Mr. Pierson has reviewed his expenditures in trying to meet the requirements of your staff. The following information for your review is submitted in mitigation of the proposed penalties:”

“In view of the extent to which money was expended to comply with your staff’s requests, Mr. Pierson feels that the arbitrary fine is unwarranted. In behalf of our clients, we respectfully request that you review the basis for your stated fine, as I believe it is unwarranted or at least excessive.”

Water Board staff disagrees with the Discharger’s position that these expenditures invalidate his liability. The violations of the Basin Plan prohibition are based on the disturbance of 39 acres of highly erodible soils, failure to implement effective Best Management Practices to stabilize the disturbed soils and the discharge of soils to surface waters. Accepting the argument that the Discharger spent a lot of money after the initial soil disturbance might affect the Discharger’s economic savings or other factors used to determine the amount of a penalty, but it does not invalidate the fact that the Discharger violated the

prohibition. Regardless of the amount spent, the Discharger never implemented effective erosion or sedimentation controls. The eventual stabilization of Site soil in the Spring of 2003, was just as likely the result of naturally-occurring revegetation as it was the establishment of vegetation from the aerial seeding that was initiated in the Fall of 2002. In all likelihood, the lack of erosion control allowed the rains to wash away much of the seed.

Complaint R3-2004-0110 was scheduled to be heard by the Water Board on September 10, 2004, but in response to a request by the Discharger the matter was postponed until December 2, 2004. On November 29, 2004, the Discharger submitted a written waiver of the right to a hearing, and provided payment for the recommended liability of \$25,500. On December 2, 2004, the Water Board held a public meeting to determine whether to accept the settlement. The Water Board did not accept the settlement; it directed staff to withdraw Administrative Civil Liability Complaint No. R3-2004-0110 and issue a new complaint. Water Board staff notified the Discharger of the Water Board decision, and returned the \$25,500 payment.

January 19, 2005 – The Water Board received a letter from the Discharger, dated January 12, 2005 (included as Attachment 17), requesting specific Water Board documents be made available.

January 27, 2005 – Water Board staff sent a letter (included as Attachment 18) to the Discharger regarding the availability of the specified documents.

January 18, 2005 – The Discharger submitted a letter dated January 14, 2005 (included as Attachment 19), that alleged that the Water Board acted without authority on December 2, 2004, when it directed the staff to withdraw Complaint No. R3-2004-0110 and to issue a new complaint to the Discharger. The discharger maintained that the matter should be closed.

January 26, 2005 – The Discharger submitted a letter (included as Attachment 20), dated January 25, 2005 that, 1) Further disputed the authority of the Water Board to act as they did on December 2, 2004, 2) Claimed the Discharger had taken effective action to prevent erosion at the Site, 3) Stated that a hearing was needed, 4) Stated that the Water Board staff made misstatements about the

Discharger, acted in an arbitrary and capricious manner and did not afford the Discharger fair and equitable treatment, 5) Requested a delay in the hearing (none had been scheduled at the time), and 6) Advocated an evidentiary hearing be held.

February 7, 2005 – The Discharger submitted a letter (included as Attachment 21), dated February 4, 2005 that 1) Once again disputed the authority and actions of the Water Board to act as it did on December 2, 2004, and argued that the settlement became final and the matter closed when the Discharger submitted payment for the proposed liability and waived the right to a public hearing, and 2) Requested a delay in the hearing (none had been scheduled at the time).

February 23, 2005 – Water Board staff sent a response (included as Attachment 22) to the Discharger's January 14 and 25, 2005, and February 4, 2005 letters. The staff response made the following points: 1) Settlement of the previous complaint did not become final until the Water Board adopted or rejected the order. The Order was rejected by the Board, and staff was directed to withdraw the Complaint and issue a new one; 2) As of yet staff had not issued a new complaint, and therefore no public hearing had been scheduled. In addition, the letter addressed issues concerning subpoenas, depositions, Water Board procedures, and staff responsibilities and provided clarification concerning the availability of requested documents.

March 4, 2005 – The Water Board received a letter from the Discharger dated March 2, 2005 (included as Attachment 23) that responded to staff's February 23, 2005 letter. In part, it reiterated that the withdrawal of the complaint was legally inappropriate

Basin Plan Prohibition and Violation

The discharges and threatened discharges of disturbed soils occurred in violation of a Prohibition contained in the Water Quality Control Plan for the Central Coast Region (Basin Plan), Chapter 4., Implementation Plan. The Prohibition states

VIII.E.1. LAND DISTURBANCE PROHIBITIONS

The discharge or threatened discharge of soil, silt, bark, slash, sawdust, or other organic and earthen materials into any stream in the basin in violation of best management practices for timber harvesting, construction, and other soil disturbance activities and in quantities deleterious to fish, wildlife, and other beneficial uses is prohibited.

Explanation of violation

The Discharger discharged and threatened discharge of soil and silt into the blue line stream and Huerhuero Creek in violation of best management practices for soil disturbance activities, and in quantities deleterious to fish, wildlife, and other beneficial uses (municipal and domestic water supply, agricultural supply, ground water recharge, water contact recreation, non-contact water recreation, wildlife habitat, warm freshwater habitat, rare, threatened, or endangered species, and commercial and sport fishing). The Discharger violated this prohibition by removing most of the vegetation from a site that has a severe erosion hazard, without implementing effective BMPs to eliminate or minimize erosion and sediment discharges. Water Board staff, in letters and in person, repeatedly informed the Discharger of correct implementation of soil stabilization BMPs. The Discharger did not implement effective soil stabilization.

The disturbed soils are designated a severe erosion hazard by the Resource Conservation District (RCD) and the United States Department of Agriculture, Natural Resources Conservation Service (NRCS). These agencies are recognized as entities that specialize in evaluating soils and determining severe erosion hazard soils. This recognition is supported by the specific reference to both agencies in the Land Use Disturbance portion in the Basin Plan, Chapter 4. Implementation Plan.

The NRCS co-produced the "Soil Survey of San Luis Obispo County, California – Paso Robles Area" (Soil Survey). In summary, the Soil Survey describes the area of the Site as hilly with steep to very steep slopes of 30% – 75 %, and having coarse sandy loam soils of 6 – 12 inches overlying weathered granite rock. Surface runoff is very rapid, and the hazard of erosion is very high. The

Soil Survey also references the soil as being "fragile and any disturbance can cause severe erosion."

The culpability of the discharger is increased by the August 2001 RCD Report (Attachment 1) that included the Site, and was made part of a draft Mitigated Negative Declaration (Attachment 1) prepared by San Luis Obispo County. The RCD Report identified the severe soil erosion hazard at the Site and also noted that runoff of eroded soils from the Site could adversely affect water quality. Water Board staff visiting the Site also determined there was a severe erosion hazard that could adversely affect water quality, and the Discharger was made aware of these issues beginning with the first site visit on September 20, 2002.

The U.S. Environmental Protection Agency document titled "Protocol For Developing Sediment TMDLs", First Edition, on page 2-1, under the heading "IMPACTS OF SEDIMENTS ON DESIGNATED USES", and subheading "Aquatic life and fisheries", states the following:

"Excessive sediments deposited on streams and lake bottoms can choke spawning gravels (reducing survival and growth rates), impair fish food sources, fill in rearing pools (reducing cover from prey and thermal refugia), and reduce habitat complexity in stream channels. Excessive suspended sediments can make it more difficult for fish to find prey and at high levels can cause direct physical harm, such as clogged gills. In some waters, hydrologic modifications (e.g., dams) can cause sediment deficits that result in stream channel scour and destruction of habitat structure."

After having been forewarned of the severe erosion hazards and potential negative impacts on receiving waters, the Discharger proceeded with removing most vegetation at the Site without ever implementing effective BMPs. The soils remained disturbed for a minimum of 185 days (September 1, 2002 – March 4, 2003), during which time the soil eroded and sediments from the Site were discharged to waters of the state.

Although Water Board staff does not have the detailed information necessary for precise

calculations, the Discharger undoubtedly realized an economic savings by not implementing effective BMPs.

CIVIL LIABILITY

Recommended Liability

After considering factors specified in California Water Code Section 13327, the Water Board Executive Officer recommends a liability of one hundred twenty-five thousand dollars (\$125,000).

Maximum Liability

Pursuant to California Water Code Sections 13350(e)(1), the Water Board may impose civil liability up to \$5,000 per day for each day a violation occurs. The Discharger violated the Basin Plan prohibition for a minimum of 185 days. The total maximum liability that may be imposed for that period is \$925,000 (nine hundred twenty-five thousand dollars).

In determining the amount of civil liability the California Water Code requires the Water Board consider the following factors as specified in Section 13327:

- nature, circumstances, extent, and gravity of the violations
- discharge susceptibility to cleanup or abatement
- discharge toxicity
- ability to pay and the effect on ability to continue in business
- voluntary cleanup efforts undertaken
- violation history
- degree of culpability
- economic benefit or savings (if any), and
- other matters as justice may require.

Staff considered these factors when drafting the Complaint and staff's analysis is set forth in the Complaint.

Minimum Liability

California Water Code Section 13350(e)(1) has no minimum liability provision that is applicable in this matter.

RECOMMENDATION

Water Board staff recommends assessment of \$125,000 (One Hundred Twenty-five Thousand Dollars) for the Discharger's violation of a Basin Plan Prohibition from September 1, 2002 through March 3, 2003.

ATTACHMENTS

- 1.) 8/23/01 Mitigated Negative Declaration and RCD Report
- 2.) 0/11/02 Central Coast Water Board staff letter
- 3.) 10/17/02 Central Coast Water Board staff letter
- 4.) 10/22/02 Discharger E&S Control Plan
- 5.) 11/12/02 Central Coast Water Board staff letter
- 6.) 11/25/02 Central Coast Water Board staff letter
- 7.) 1/23/03 CAO No. R3-2003-0021
- 8.) 2/21/03 Central Coast Water Board staff letter
- 9.) 3/7/03 Central Coast Water Board staff letter
- 10.) 2/25/03 consultant letter
- 11.) 3/3/03 consultant letter
- 12.) 3/11/03 Central Coast Water Board staff letter
- 13.) 8/12/03 CAO No. R3-2003-0062
- 14.) 4/1/04 Central Coast Water Board staff Internal Memo
- 15.) 7/16/04 ACLC No. R3-2004-0110
- 16.) 10/22/04 Discharger letter
- 17.) 1/12/05 Discharger letter
- 18.) 1/27/05 Central Coast Water Board staff letter
- 19.) 1/14/05 Discharger letter
- 20.) 1/25/05 Discharger letter
- 21.) 2/4/05 Discharger letter
- 22.) 2/23/05 Central Coast Water Board staff letter
- 23.) 3/2/05 Discharger letter
- 24.) Map of the Site
- 25.) 5/10/05 ACLC No. R3-2005-0024 and Transmittal Letter
- 26.) ACL Order No. R3-2005-0024

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