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-Via e-mail and US Mail

Petition for review of Administrative Civil Liability Order No. R3-2005-0025 filed by the Regional Water Board, Central Coast Region, July 8, 2005

1. The Board did not set liability in an amount commensurate with the violation

The Santa Lucia Chapter of the Sierra Club, an interested entity, petitions the Water Board for reconsideration in the matter of the above-referenced Central Coast Water Board enforcement action against Haig Kelegian (Discharger).

Representing the interests of 2,500 members of the Sierra Club in San Luis Obispo County in the environmental health and protection of resources of the Central Coast, petitioner is aggrieved by the failure of the Water Board to ensure consequences for an illegal discharge commensurate with the magnitude of the violation and to provide incentives for others to comply with water quality regulations.

The Water Board found the Discharger liable for $100,000 in fines pursuant to California Water Code 13350. The Discharger had failed to cease discharge and threatened discharge of eroded soil and silt, which he caused to be discharged into waters of the state for a period of at least 185 days, having failed to make required changes in practices despite the Water Board's numerous site visits, phone calls, letters of concern citing inadequate erosion control plans, and two Notices of Violation.

The administrative record, both in the hearing of July 8, 2005 and the staff report prepared on June 14, 2005 (encl.), makes clear that the amount of the ACL should have been, conservatively, $235,000.

In Appendix 1 of the ACL Complaint (R3-2003-0020) as issued on February 21, 2003, headed “Kelegian Ranch Cost Estimate for Erosion/Sediment Control,” the Discharger was found to have realized “savings by not installing adequate BMPs” in the amount of $235,600, with an additional savings in interest on money not spent in the amount of $11,780. It was further noted that “This estimate does not include cost of training crews in inspection and maintenance of BMP’s,” and that “The least expensive of erosion and sediment control methods were used for this estimate,” and that estimates of BMP cost were “based on the lowest price quotes” from vendors (attached).

The foregoing was pointed out in public comment, prior to the Board’s discussion of staff’s recommended liability of $100,000 and decision to adopt staff’s recommendation. The sum of the economic benefit, interest and staff time was $274,305. The only response to this point came from Senior Staff Counsel, who said that the ACL was not entered under Water Code Section 13385, which requires that the minimum fine recover economic benefit, and staff was not required to set the Discharger’s $235,000+ economic gain as a minimum fine because “this case is under 13350, so there are other factors to consider. The economic benefit or savings is just one factor to consider; it’s not a minimum [amount of liability].” (Okun)

Nothing in the statute bars the Board from finding the Discharger liable for the amount of the economic benefit realized from the violation. Nothing in the ACL, the Staff Report or the record of the hearing explains why he was not, and several apparent errors in the Staff Report indicate this factor was not considered at all.

In weighing the nature, circumstances, extent and gravity of the violations -- factors including discharge susceptible to cleanup or abatement, degree of toxicity, ability to pay, voluntary cleanup efforts, prior history of violations, degree of culpability, and other matters that justice may require -- each factor should have been weighed in addition to the hard dollar amount by which the Discharger realized an economic benefit or savings from the violation. Counsel appeared to imply that findings for these separate factors might have served to reduce the amount of the Discharger’s economic benefit realized by not implementing BMPs. The Board, Staff Report and record of the hearing give no indication that this was intended.

Further, State Water Quality Enforcement Policy mandates that the formula for assessing liability shall be the sum of Initial Use liability and Beneficial Use liability, plus the Economic Benefit, yielding the Base Amount for an ACL. “This

calculation gives an amount that is the minimum appropriate to the violation. It reflects the nature, circumstances, extent, and gravity of the violation, and its impact on beneficial uses including toxicity, while **taking away any economic benefit or savings to the discharger**…" [emphasis added]. – SWRCB, Water Quality Enforcement Policy, Draft Revised Policy, Oct. 19, 2000, draft, VII.A.4.

Subsequent to this calculation of the Base Amount, of the potential mitigating factors "Conduct of the Discharger" and "Ability to Pay," Staff found the Discharger's culpability justified assessment of a significant portion of the maximum liability ($925,000) and that the Discharger had not provided financial data to show an inability to pay. These findings could not have reduced the Base Amount.

If "Other Factors" were found to reduce the amount of the recommended penalty below the level that recovers the economic benefit, Staff did not cite or give a reason for the extent of that adjustment in the administrative record, as required by Enforcement Policy.

We do not believe it is the intent of the Water Quality Enforcement Policy to allow a Discharger to realize a net economic benefit from a violation after payment of an ACL.

Finally, Staff appears to have misread its ACL Worksheet, "Kelegian Ranch Cost Estimate for Erosion/Sediment Control," mis-stating, on the next page, the economic savings resulting from the violation as consisting solely of the estimated **interest** on the savings the Discharger realized by not using effective BMPs -- $11,780 -- and omitting to mention the $235,600 the Discharger saved by not installing adequate BMPs (R3-2003-0020 ACL Worksheet, encl.). This omission strongly indicates that economic benefit or savings were not correctly weighed.

In preparing the June 14, 2005, staff report, Staff appears to have overlooked its February 21, 2003, ACL worksheet altogether, now reporting that "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" (Explanation of Violations, page 6, paragraph 3). This statement strongly indicates that the economic benefit or savings were not correctly weighed, or weighed at all.

The hearing item immediately prior to the Haig Kelegian ACL (David Pierson, ACL No. R3-2005-0024) was a nearly identical violation committed by the Discharger's business partner, geographically and chronologically contiguous, on which the Board had just assessed an ACL of $125,000. It was pointed out in public testimony that for the Board to find essentially the same level of liability for Kelegian as that assessed for the Pierson ACL meant that the Board was saying the Kelegian ACL, assessed for the same violation as Pierson but affecting five

times the acreage, did one-fifth of the damage of the Pierson violation, and this was clearly not the case.

At the hearing, when the Kelegian Ranch violation came back to the board for deliberation, several Board members told the Discharger as follows:

“I can go along with the staff’s hundred thousand but it really looks like a small amount. I think you’re lucky to get off with that if that’s what it winds up.” (Shallcross)

“I would say this is even more serious than the previous one [Pierson Ranch grading violation, fined $125,000], so I was thinking $200,000 would be appropriate.” (Daniels)

“I support the fine that is before us, $100,000, but I want you to know that had staff come to us with this computation of the $235[,000] plus the interest, if I had seen that, and that was part of their position, I would be hard pressed not to find that that might have been an appropriate type penalty based on economic benefit. ” (Chairman Young)

Virtually all Board members concluded by stating that they supported Staff’s recommended liability of $100,000. The Board clearly failed to exercise its discretion concerning the amount of recommended liability, despite the admission of the Chair and several members that the recommended ACL was too low. From their comments, Board members appeared to be unaware that they possessed discretion in setting the amount of the ACL.

2. The Board improperly ruled on the matter of Supplemental Environmental Projects

Toward the end of deliberations, the Board asked “If Mr. Kelegian wanted a supplemental environmental project; all the money separate from staff costs” (Jeffres) and made a motion to accept Staff’s recommended liability, with SEPs to be discussed at a later date. Counsel advised the Board to “find out if Mr. Kelegian wants to discuss SEPs.”

In response, Mr. Kelegian said “I’m confused,” and asked, “Do I have to make that decision now?”

A board member suggested “why don’t we just defer it and bring it back next time,” to which the reply was “That was my motion...I was sure that he didn’t know which way to go...give him some time to think about it and he can work with the staff” (Jeffres).

Counsel clarified the motion, saying “The matter is tabled to allow staff and Mr. Kelegian to see if they can agree to SEPs and staff is directed to bring an order back either for a $100,000 payment to the cleanup and abatement account or with part of the money, anything above staff costs, allocated to SEPs” (Okun).

At that point, the Executive Officer abruptly intervened, saying “I don’t believe Mr. Kelegian has offered to participate in a SEP and I don’t think...speaking as a staff person, I don’t want to agendize an item if it’s pointless” (Briggs).

Jeffres replied, “If he doesn’t want to make that choice, I’ll restate my motion to exclude that [SEPs].”

Mr. Kelegian, still obviously confused, again stated that he could not make that decision at that moment, saying “I don’t even know what the SEPS are all about.”

Jeffres then restated his motion to exclude the option of SEPs.

Thus, a motion to table an order to allow staff and the Discharger to discuss SEPs, based on the Discharger’s inability to decide at the hearing whether or not he wanted to fund SEPs, somehow became, *on that same basis*, a motion to withdraw the option of SEPs entirely due to the Executive Officer’s peremptory interpretation of the wishes of the Discharger.

Based on the foregoing, we petition for reconsideration of the amount of Administrative Civil Liability Order No. R3-2005-0025 and request rehearing of this issue.

Copies of the petition have been sent to the Regional Water Board and to the Discharger.

Exhibits encl.: 6/14/05 Staff Report
ACL worksheet
DVD, CCRWQCB hearing, 7/8/05 (mislabeled June 8, 2005), 3 of 4

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