

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2015-0520

**CHRISTOPHER CORDES, EDDIE AXNER CONSTRUCTION, INC., AND EDDIE
AXNER
ASSESSOR PARCEL 041-300-035
SHASTA COUNTY**

**EDDIE AXNER CONSTRUCTION, INC. AND EDDIE AXNER'S LEGAL AND
TECHICAL ANALYSIS AND COMMENTS IN RESPONSE TO ADMINSTRATIVE
LIABILITY COMPLAINT NO. R5-2015-0520**

I. INTRODUCTION

Alleged Dischargers Eddie Axner Construction, Inc. and Eddie Axner (collectively “Axner”) hereby submit the following legal and technical analysis and comments in response to the Administrative Civil Liability Complaint Number R5-2015-0520 (“ACL Complaint”). The subject property is Shasta County Assessor Parcel No. 041-300-035 (the “Site”), which is owned by alleged Discharger Christopher Cordes (“Cordes”). The civil liability proposed against Axner in the ACL Complaint should be eliminated altogether, or reduced significantly for the following reasons:

First, civil liability should be eliminated altogether. Axner worked at the direction and control of Cordes. Cordes was legally responsible for obtaining necessary permits, as well as installing erosion control measure. Axner has no independent authority or ability to do either. What’s more, Cordes advised Axner he would obtain the necessary permits and instructed Axner not to install any erosion control measures despite Axner’s advise otherwise.

Second, assuming *arguendo* Axner maintains civil liability, it should be imposed severally and reduced significantly. California law does not support imposing joint and several liability in this case, and doing so would create an unjust and inequitable outcome. Similarly, if Cordes’ defense of inability to pay reduces his civil liability, the same reduction should apply to Axner. Requiring Axner shoulder the burden of Cordes’ conduct will also result in an unjust and inequitable outcome. Moreover, there are absent parties including a tenant at the Site and possibly a heavy equipment rental yard. Without these parties involved, imposing civil liability only on Axner and/or Cordes would be unjust and inequitable.

Third, despite instruction not to install erosion control measures at the Site, Axner did anyway which helped mitigate erosion. When Axner was hired back to install compliant erosion control measures, the measures were remarkably successful. This militates heavily in favor of elimination of any civil liability against Axner.

Lastly, several specific factors in the Prosecution Team’s nine-step approach to determine the proposed final liability amount for alleged Violation 1 are unsupported by the factual record and should be reduced.

II. POLICY STATEMENT

a. STRATEGIC PLAN’S PRIMARY FOCUS IS ON MARIJUANA CULTIVATION

The focus of the “Strategy – Regulation and Enforcement of Unauthorized Diversions; Discharge of Waste to Surface and Groundwater Caused by Marijuana Cultivation” is regulation of marijuana cultivation, the harmful environment issues associated with marijuana cultivation, and regulation and enforcement of marijuana cultivators. (Exhibit 1, Section 1 “Background” of Strategy – Regulation and Enforcement of Unauthorized Diversions; Discharge of Waste to Surface and Groundwater Caused by Marijuana Cultivation) To that end, a multi-faceted, multi-agency

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approach has been identified to address the problems arising from marijuana trade. As it relates to persons in the Construction Industry Groups however, such as Axner, the stated goal of the Water Board and California Department of Fish and Wildlife is to work to educate construction groups about potential liabilities and how to avoid them. (See Exhibit 1, Section 7.4.2 “Construction Industry Groups” of Strategy – Regulation and Enforcement of Unauthorized Diversions; Discharge of Waste to Surface and Groundwater Caused by Marijuana Cultivation) The goal of the program is not to make an example of anyone in the construction industry, but rather focus on education opportunities for the groups.

b. COMPETING AGENCIES PREVENT EFFECTIVE ENFORCEMENT OF POLICIES

While the three governmental agencies involved with the regulation of the Site, i.e., the County of Shasta, the Central Valley Regional Water Quality Control Board, and the California Department of Fish and Wildlife, will say they are working jointly and in unison, it is simply not the case.

Axner (and Cordes) has been forced to respond to different allegations and complaints from the different agencies, often times with overlapping or inconsistent edicts. For example, Shasta County instructed Cordes to install erosion control measures at the Site so Cordes hired Axner to conduct the work. However, while on the Site, the Department of Fish and Wildlife arrived and ordered Axner to cease all work. Whose orders should Axner have followed? Shasta County or Department of Fish and Wildlife?

By all accounts, and more often than not, the circumstance exists where the right hand doesn't know what the left hand is doing. It's understandable that each agency is simply trying to do their job but this reality ultimately creates inconsistent demands and makes it extremely difficult, if not impossible, for anyone to conduct any meaningful work or follow orders that would otherwise help mitigate the alleged problems or bring the Site into compliance.

III. BACKGROUND

a. EDDIE AXNER CONSTRUCTION INC. AND EDDIE AXNER

Eddie Axner Construction, Inc. is a family owned and operated business located in Redding, California. Eddie Axner is the President of the Company. Axner is a general engineering contractor that does both residential and commercial site work. Make no mistake though, Eddie Axner Construction, Inc. and Eddie Axner personally have *never* been or are now involved with marijuana cultivation or worked in the marijuana industry.

The Axner family has long ties locally and takes pride in being a significant contributor to the Redding and Shasta County communities. Over the past twenty-five (25) years, Eddie Axner and his family have worked on significant construction projects and made substantial financial and in-kind contributions to many local organizations including the Shasta District Fair, schools and colleges, and charities. Axner is not a fly-by-night operation or an operation that takes short-cuts.

Rather, Axner's work, both professionally and in the community, is widely recognized and well-respected for its quality.

b. BAKER RIDGE PROJECT

i. PROJECT SITE

At the outset, it bears mention that the Site had all kinds of existing problems prior to Cordes purchasing the Site. In fact, the Site was used as a dumping ground by previous owners. There were many abandoned vehicles, tires, appliances and other refuse littered throughout the Site at the time of purchase. In fact, many of the Exhibits submitted by the Prosecution Team demonstrate the condition of the Site and the surrounding properties. For example, Prosecution Team Exhibit 52 images 108, 106, 118, 029, 030, 031, 037, Exhibit 55 image 4662, and Exhibit 56 images 8572, 8573, 8576, 8577 and 8597 all show old used tires and other refuse on the Site and in the surrounding properties. This refuse was not deposited as the result of anything Axner or Cordes did – it existed prior to Cordes purchasing the Site.

Furthermore, an access road and terrace (or pad) already existed at the Site prior to Axner conducting any work. The terrace was not carved into the mountain side, it already existed. Likewise, a fire break nearly fifty (50) feet wide already existed on the Site that cut directly through the Site terraces (or pads) that still extends up Baker Ridge. It is noteworthy that it does not appear any erosion control measures were installed following the construction of the firebreak. See Prosecution Team Exhibit 54-1 through 54-12. The ACL Complaint does not appear to take into account any erosion or discharge that may have occurred as a result of previous work on the Site or the fire break.

More importantly, the composition of the dirt at the Site, and the entire region for that matter, is almost exclusively decomposed granite. This material is highly erosive, whether disturbed or not. In fact, the Prosecution Team submitted historic photographs of the stream located near the Site *filled with decomposed granite*. These photographs were purported to have been taken prior to Cordes purchasing the Site. See Prosecution Team Exhibits 54-2 and 54-11 – both pictures showing a substantial amount of decomposed granite existing in the stream bed.

While Axner is not disregarding the severity or seriousness of discharge to surface and groundwater, it should be noted that the problems alleged in the ALC Complaint existed long before Cordes purchased the Site, and well before Axner ever conducted any work there.

ii. PROJECT WORK

Cordes hired Axner to perform two grading jobs at the Site on an hourly basis. First, Cordes hired Axner to level the existing terrace (or pad) and create a second terrace for the construction of a home. This request was not unusual; there are many homes existing in the area and on the surrounding properties. Second, in order to properly access the Site, Cordes hired Axner to make repairs to the access road in order to provide the appropriate grade for access to build the home. Only after work was completed that Axner learned the Site would be used for marijuana cultivation.

Furthermore, Cordes advised Axner that Cordes would take care of obtaining the necessary permits for the project. Axner cannot independently obtain the permits on his own without authority to do so. The property owner is ultimately responsible. Any culpability for failure to obtain permits falls squarely on Cordes.

Similar to permits, Cordes also advised Axner that he would take care of erosion controls measure. While completing the work at the Site, Axner told Cordes repeatedly that erosion control measures were needed to be in place. Again, Cordes told Axner he would take care of it and Axner was not to do any work in that regard. Nevertheless, Axner still installed basic erosion control measures by applying brush and timber to the graded areas to help prevent erosion. See Exhibit 2.

iii. WORK ON SITE AFTER AXNER WORK

The ACL Complaint identifies additional road building and grading at the Site separate from the work conducted by Axner, which is addressed mostly in the alleged Violation 2. This work appears to have caused substantial damage to the Site, but was done *after* Axner's work on the Site was complete. What is missing in the ACL Complaint is that the secondary grading work was also conducted on top of Axner's work in the area of the alleged Violation 1, likely creating damage where none existed before. This work, while acknowledged, was not considered or factored by the Prosecution Team when determining the civil liability. But for this work, the alleged Violation 1 might not have been as severe, or existed at all.

IV. COMMENTS REGARDING ACL COMPLAINT AND SUPPORTING MATERIALS

a. JOINT AND SEVERAL LIABILITY IS NOT APPLICABLE IN THIS CASE

Throughout the ACL Complaint, without citation to any legal authority whatsoever, the Prosecution Team alleges in conclusory fashion that Axner is jointly and severally liable for the civil liabilities in this proceeding. This is unsupported by California law.

California law provides for three types of legal obligations: joint, several, and joint and several. Cal. Civ. Code § 1430. California law imposes a general presumption against joint and several obligations unless there are express words to the contrary. Cal. Civ. Code § 1431. The interpretation of a several obligation, rather than a joint and several one, is consistent with the policy adopted by the People of California, as codified at Civil Code § 1431.1, viewing the imposition of joint and several liability as frequently inequitable and unjust.

The creation of a several obligation is further evidenced by the conspicuous lack of text in both Sections 13350 and 13385 of the California Water Code making reference to or intention to impose a joint and several obligation. In fact, both section 13350 and 13385 are devoid of any mention of

a joint and several obligation which would be an obvious and necessary requirement for the imposition of such liability.

Here in particular, imposition of joint and several liability would result in an inequitable and unjust outcome. Cordes is the owner of the Site. As such, he bears responsibility for permits, erosion control, the work conducted on the Site, and the resulting damage that occurs. Axner worked on the Site at the direction and control of Cordes. Axner also relied on Cordes to obtain the permits and install erosion control measures. Axner has no independent ability to take those steps, especially without the owner's consent. As such, imposition of joint and several liability where Axner could be forced to absorb the entire amount of civil liability because of Cordes inability to pay would clearly be unjust and inequitable.

b. INABILITY TO PAY DEFENSE SHOULD LOWER LIABILITY TO ALL PARTIES

Whether or not joint and several liabilities is imposed, one party's inability to pay should lower the civil liability of all parties. More specifically, such as here, Cordes clearly bears the majority, if any at all, of the responsibility for the damage. At the same time, Cordes does not hide the fact he does not have the ability to satisfy any of the civil liabilities. Consequently, the situation exists where Axner may have very little, if any, responsibility for the damage, yet is responsible for all the civil liabilities. This amounts to an unjust result.

If one party get the benefit of an inability to pay, the remaining party should not be required to shoulder the financial burden resulting from the insolvent party's improper conduct. Rather, the proper and fair outcome would be to apply the inability to pay reduction across the board to all parties.

c. ABSENT PARTIES SHOULD LESSEN ANY LIABILITY TO PRESENT PARTIES

There are at least two parties that are not present in the pending action. First, Cordes readily admits he leased the Site to another individual who conducted grading work, but refuses to identify that person. Consequently, that person shares responsibility for any civil liability. Yet he is absent. Mr. Cordes also admits that heavy equipment was used at the Site for additional grading work. Axner believes the heavy equipment was rented from I-5 Rentals in Redding, California. If true, I-5 Rentals would also bear responsibility in this proceedings and share any civil liability. However, I-5 Rentals was also not included as a party.

d. AXNER WORKED AT THE DIRECTION AND CONTROL OF CORDES

i. PERMITS ARE OBTAINED BY AND RESPONSIBILITY OF PROPERTY OWNER

The owner of the parcel of real property where grading occurs is the legally responsible party, and consequently is responsible for obtaining the proper permits for the work. See Exhibit 4. Here,

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Cordes informed Axner on multiple occasions that Cordes would obtain the necessary permits for the work on the Site. Apparently, that did not happen. Axner cannot, on his own accord, apply and pay for permits without the property owners consent. As such, any responsibility and subsequent civil liability for the failure to obtain permits falls squarely on Cordes, not Axner.

ii. EROSION CONTROL MEASURES ARE RESPONSIBILITY OF PROPERTY OWNER

Similar to permitting, erosion control measures are first and foremost the responsibility of the property owner where grading work is conducted. There is no independent obligation for the contractor to put in place erosion control measures, particularly where the property owner advises the contractor that he or she will be responsible for the work. This is especially relevant when the owner will not pay the contractor to do the work, or directs the contractor not to do the work. Furthermore, in situations such as exist here, a Qualified SWPPP Practitioner (QSP) is necessary to oversee the implementation of erosion control measures. While Axner has the ability to do erosion control work and does so regularly, Axner is not a QSP and not qualified to supervise the work and ensure it's done so that it's in compliance with permits or plans. As such, responsibility for the failure to install erosion control measures also falls squarely on Cordes, not Axner. See Exhibit 4.

iii. AXNER CONDUCTED EROSION CONTROL MEASURES

Despite being instructed not to do anything about erosion control, Axner still installed basic erosion control measures by applying brush and timber to the graded areas to help prevent erosion. See Exhibit 2. This type of erosion control, while rudimentary in nature, is largely effective and was used extensively in logging operations historically. These measures, installed at Axner's expense, helped mitigate erosion at the Site. Once Cordes asked Axner to install erosion control measures, Axner did so with resounding success. See Exhibit 3.

V. CALCULATIONS OF ADMINISTRATIVE LIABILITY ARE IMPROPER AND SHOULD BE ELIMINATED OR REDUCED SIGNIFICANTLY

a. FACTORS

The Prosecution Team assessed several specific factors in a nine-step approach to determine the proposed final liability amount for alleged Violation 1. Several of the conclusions reached are unobjectionable, and will not be addressed. Others, however, are unsupported by the factual record; those are addressed below:

i. STEP 1 – POTENTIAL FOR HARM FOR DISCHARGE VIOLATIONS

Step 1 requires the consideration of three factors related to the harm that may result from exposure to pollutants in the alleged discharge, as well as the circumstances surrounding the alleged violations.

1. Factor 1 – Harm or Potential Harm to Beneficial Uses

This factor evaluates direct or indirect harm from the alleged violation. On a scale of 0-5 the Prosecution Team assigned a score of 3. To justify this score, the Prosecution Team listed several designated beneficial uses of Cottonwood Creek that could be impacted. It did not, however, identify the manner in which those beneficial uses would be harmed. The only fact alleged in the discussion of this factor is that “fine sediments” were discharged and later observed in the unnamed tributaries on and adjacent to the Site during inspections in late 2014. But, it is undisputed that the soil on the Site, and the surrounding parcels, is composed almost entirely of decomposed granite silts and loams. 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. Indeed, the silt material allegedly discharged as a result of Axner and Cordes’ actions is visible in photographs of the creeks taken before any work was done and submitted by the Prosecution Team to demonstrate the original condition of the Site. See Prosecution Team Exhibits 54-2 and 54-11. The Prosecution Team has not provided sufficient evidence to support the assertion that any discharge caused by Axner and Cordes would cause a 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.

Because it is impossible to determine what portion, if any, of the sediment observed in the tributaries was there as a result of the actions of Axner and Cordes, or what specific harm the alleged increase would cause, the score of 3 assigned for this factor is not supported, and should be reduced to 1.

2. Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the discharge

The score assigned for factor 2 is based upon the threat created by the discharged material. For the same reasons noted in the discussion of factor 1 above, this score should be reduced. The silt material is prevalent in the area and was already present in large quantities in the creek tributaries. The Prosecution Team states that the streams were “significantly affected” by the discharge. But, it is difficult to accurately assess what portion of the material in the streams, and therefore what portion of any harm, was caused by Axner and Cordes’ actions.

Because it is unclear what effect, if any, the discharged material had on the waterways over and above the materials naturally discharged during every period of precipitation, this factor should be assigned a score of 1.

ii. FINAL SCORE FOR STEP 1

After the reduction in the scores assigned to factors 1 and 2, the Final Score for Step 1 should be reduced from 6 to 3, with the associated penalty calculations adjusted accordingly.

b. STEP 2 – ASSESSMENT FOR DISCHARGE VIOLATIONS

Step 2 requires an assessment of the “Deviation from Requirement” of the accused dischargers. According to States Water Quality Enforcement Policy, the determination should be based upon whether or not the intended effectiveness of the requirement was met. Here, the Prosecution Team considers Axner and Cordes’ deviation “Major” simply because no permit was obtained before the work was completed on the Site. They did not consider or discuss the requirements intended effectiveness. The requirement would have required measures to prevent erosion. Here, Axner used brush to cover the area in which he had performed grading work. The brush protected that area and reduced erosion and run-off. See Axner Exhibit 2.

Axner, as a general contractor was not able to obtain the appropriate permit himself. That was the responsibility of the property owner, Cordes. Axner also specifically instructed Cordes that he needed to do additional erosion control work on the property. 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 could not obtain a permit, or conduct all of the necessary erosion control measures. In addition, he attempted to ensure that some erosion work was completed, and successfully prevented additional harm by completing basic erosion control measures. As to Axner, the Deviation from Requirement should be considered “Minor.” Accordingly, the Per Gallon and Per Day factors should be .009.

c. STEP 4 – ADJUSTMENT FACTORS

The Prosecution team assessed the culpability of Axner and Cordes and assigned the highest multiplier of 1.5 because no permit was obtained. As is explained above in the discussion of Step 2, Axner was not able to unilaterally obtain a permit. That was the responsibility of Cordes. Cordes assured Axner that the proper permits were in place and that another party would complete the necessary erosion control work. Axner also attempted to prevent erosion by placing brush over the area in which he had worked, which succeeded in slowing the erosion in that particular area. See Axner Exhibit 2. Cordes completed a significant amount of work after Axner had completed his portion of the project. Axner had no control over Cordes’ decision not to have the additional erosion control work completed, nor his decision to forego obtaining the appropriate permits. As

discussed above, because of the dramatic difference in the culpability of the accused Dischargers in this matter, joint assessment is inequitable and inaccurate.

For Axner, the Culpability multiplier should be 0.5.

d. STEP 7 – OTHER FACTORS AS JUSTICE MAY REQUIRE

For all of the reasons discussed above, the amount determined using the adjusted factor scores and multipliers is appropriate for Axner. He did a specific job for what he believed to be a plot for the construction of a home. He was assured that permits were obtained and a different contractor would complete that erosion control work. Axner was not in control of the Site and could not have obtained the permits even if he had sought to do so.

e. STEP 8 – ECONOMIC BENEFIT

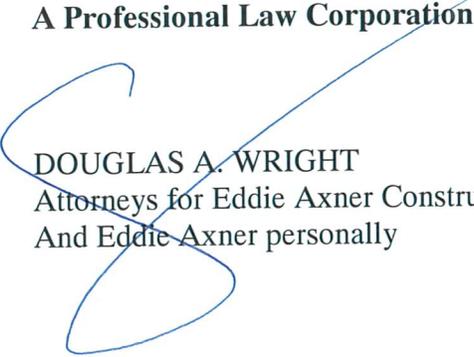
The economic benefit that is used to determine the minimum liability amount is calculated by assessing the costs delayed and avoided by the discharger in any given case. See Water Quality Enforcement Policy, p. 20. These costs would all be borne by the property owner. Here, that is Cordes, not Axner. Axner would not have been responsible for any of the additional fees that would have been associated with obtaining a permit, engaging a QSD to prepare a SWPPP, or implementing that plan. Accordingly, there was no economic benefit to Axner from the alleged wrongful activities.

VI. CONCLUSION

Based on the foregoing, Eddie Axner Construction, Inc. and Eddie Axner respectfully request that the civil liabilities proposed in the ACL Complaint be eliminated altogether, or reduced significantly pursuant to the reasons herein.

Respectfully Submitted,

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