

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0520

**CHRISTOPHER CORDES, EDDIE AXNER CONSTRUCTION, INC., AND EDDIE AXNER
ASSESSOR PARCEL 041-300-035-000
SHASTA COUNTY**

**PROSECUTION TEAM'S LEGAL AND TECHNICAL ANALYSIS
SUPPORTING ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0520**

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I. Introduction

The Central Valley Regional Water Board Prosecution Team recommends that the Central Valley Regional Water Board adopt an administrative civil liability order imposing liability on Christopher Cordes, Eddie Axner construction Inc., and Eddie Axner (Dischargers) for the unauthorized discharge of sediment laden storm water runoff and fill material to tributaries of North Fork Cottonwood Creek. The total liability being proposed is two hundred ninety seven thousand four hundred dollars (\$297,400), which consists of one hundred thirty seven thousand seven hundred dollars (\$139,700) against the Dischargers joint and severally, and an additional one hundred fifty seven thousand seven hundred dollars (\$157,700) against Mr. Christopher Cordes individually. The Prosecution Team asserts that the proposed administrative civil liability is appropriate for the reasons explained in Administrative Civil Liability Complaint (Complaint) R5-2015-0520, Attachment A to the Complaint, and for the reasons discussed herein.

II. Background

Mr. Cordes purchased property in Shasta County identified as Assessor Parcel Number (APN) 041-300-035-000 (hereafter referred to as the Site) on May 21, 2013. (See Exhibits 26-30, Real Property Transaction documents.) On October 7, 2014, the Central Valley Regional Water Board was informed by the Shasta County Department of Resource Management (County) that illegal grading, unpermitted road construction, and terracing had been performed on the site. (Exhibit 6, Inspection Warrant; Exhibit 7, Affidavit in Support of Inspection Warrant.) The Central Valley Regional Water Board Cannabis Enforcement Unit staff obtained an inspection warrant and conducted an inspection of the site on October 28, 2014. (*id.*, and Exhibit 2 C, 28 October 2014 Inspection Report.) A second inspection of the Site was conducted on November 19, 2014 with the consent of Mr. Cordes. (Exhibit 2 B, 19 November 2014 Inspection Report.)

In June of 2013, grading and road work was conducted on the Site by Eddie Axner Construction, Inc., in accordance with a verbal agreement between Mr. Eddie Axner and Mr. Christopher Cordes. (Exhibit 2 B, 19 November 2014 Inspection Report.) Mr. Eddie Axner is the Owner and Chief Executive Officer of Eddie Axner Construction, Inc. (See Exhibits 39-44, Eddie Axner Construction Inc., Corporate Information.)

Sometime in early 2014 (before 19 July 2014), an additional 1.5 miles of roads were graded through the Site west of the terraces. In addition to grading for constructing the road, two un-culverted unarmored watercourse crossings were also constructed. (Exhibit 2 B - 19 November 2014 Inspection Report.) Mr. Cordes asserts that this additional work was conducted by a third party to whom he leased the Site. Mr. Cordes however has refused to identify this individual. (See Exhibit 18 - Record of Communication.)

III. Alleged Violations

The 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 related to unauthorized road construction on the Site (Violation 2). The Complaint details these alleged violations and the facts and legal authority supporting these violations.

IV. Christopher Cordes is Liable for All the Violations Alleged.

Mr. Cordes is subject to liability in accordance with Water Code section 13350, subd. (a) (1), as a person who discharged waste or permitted waste to be deposited where it is discharged, into waters of the state in violation of a basin plan prohibition; or Water Code section 13385, as a person who violated section 301 of the federal Water Pollution Control Act (Clean Water Act)(33 U.S.C. § 1311) by discharging pollutant in a manner not otherwise authorized under that act. Liability can only be imposed under one of the aforementioned Water Code provisions and the Prosecution Team is recommending liability be imposed in accordance with section 13385. (Exhibit 2, ACL Complaint.)

As the property owner, Mr. Cordes is responsible for any discharges to water on or deriving from, the Site. This is consistent with *TWC Storage, LLC v. State Water Resources Control Boards et al.*, (2010) 110 Cal.Rptr.3d 270 (Page 276), in which the Court of Appeal for the State of California for the Sixth Appellate District upheld property owner's responsibilities by stating that: "Since, under Water Code section 13350, TWC [the property owner] was *strictly liable* for the discharge, it cannot be absolved simply because its contractors were negligent or also could be held liable for the discharge." This is consistent with the obligation that Federal Courts have imposed on property owners to comply with section 301 of the federal Water Pollution Control Act (Clean Water Act)(33 U.S.C. § 1311). (*United State v. Lambert* (S.D. W. Va. 1996) 915 F. Supp. 797 [finding that the Clean Water Act imposes liability both on party who actually performed work and on landowner as person responsible for control over performance of the work].) Accordingly, Mr. Cordes is a liable party within the meaning of the Porter-Cologne Water Quality Control Act (Porter-Cologne) (Wat. Code, § 13000 et. seq.) and the Clean Water Act because he is a property owner with knowledge of the activities that result in the discharge and had the legal ability to prevent the discharge.

Mr. Cordes had knowledge of the activities that resulted in the alleged violations and the legal ability to prevent the discharges. Mr. Cordes owns the Site and hired Eddie Axner Construction to develop the Site. (Exhibit 2 B - 19 November 2014 Inspection Report.) Specifically, Mr. Cordes hired Mr. Axner to widen the access road and grade two terraces. (ibid.) It is this grading and road widening activity that resulted in the storm water violations identified in the Complaint as Violation 1. (Exhibit 2, ACL Complaint.) The work conducted on the Site by Eddie Axner Construction would not have been conducted without Mr. Cordes' express request and approval.

Mr. Cordes is also liable for unauthorized dredge and fill violations alleged in the complaint as Violation 2 in accordance with Water Code section 13350 or section 13385. Assuming that that the additional road work that resulted in Violation 2 were conducted by a tenant as Mr. Cordes

asserts, Mr. Cordes as the property owner is still liable for the discharge because Mr. Cordes had knowledge of the activities taking place on the Site and the legal ability to prevent the discharge. (TWC, *supra*, p.276.)

At a minimum, Mr. Cordes had knowledge of the cultivation activities occurring at the Site. (Exhibit 57, Declaration of Dale Fletcher.) Furthermore, it is likely that Mr. Cordes was actively involved in and even benefited from the cultivation activities that resulted in the alleged violations. Mr. Cordes is the sole corporate officer of Pacific Biodynamics, a California corporation established to "provide a means for facilitating and coordinating transactions, between members of the corporation, in medical marijuana." (Exhibit 2 D, Attachment D to the Complaint - Secretary of State Filings for Pacific Biodynamics.) Mr. Cordes has repeatedly declined to name the party that he claims leased the Site and has held himself out to the Prosecution Team and Shasta County Department of Resource Management (County) as the person responsible for environmental compliance on the Site. (Exhibit 18, Record of Communication; and Exhibit 57, Declaration of Dale Fletcher.) Mr. Cordes and Mr. Axner were informed by Dale Fletcher at the County of the need to obtain a grading and other permits prior to additional grading being conducted on the Site. (Exhibit 57, Declaration of Dale Fletcher.) As the property owner, Mr. Cordes had the legal ability to prevent his tenant from conducting the activities that resulted in the discharges alleged in Violation 2.

V. Eddie Axner Construction, Inc, and Eddie Axner are Liable for Violation 1.

Eddie Axner Construction, Inc., is liable as the entity that conducted the work which resulted in the discharges alleged in Violation 1. (Wat. Code §§ 13350 and 13385.) As discussed above, the Clean Water Act and the Porter-Cologne are strict liability statutes that allow for joint and several liabilities. Administrative civil liability can be imposed joint and severally on Eddie Axner Construction as the corporate entity that conducted the activity on site that resulted in the discharges alleged in Violation 1. (Wat. Code §§ 13350 and 13385.)

Mr. Eddie Axner is also liable as an individual in accordance with the responsible corporate officer doctrine. Generally, liability is imposed under the responsible corporate officer doctrine when 1) the individual is in a position of responsibility that allows the person to influence the company policy or activities, 2) a nexus exists between the officer's position and the violation such that the officer could have influenced the company's unlawful actions, and 3) the officer either acted to facilitate the violation or through inaction failed to prevent the violation. (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.) 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 the owner and Chief Executive Officer of Eddie Axner Construction, Inc. and personally chooses what work is done by the company and directs how work is performed; (2) he entered

into agreement with Mr. Cordes to conduct the work at issue on the Site in his position with the company; and (3) Mr. Axner took action that facilitated the violations by conducting the work without installing the appropriate erosion control measures and failed to obtain the required permits prior to conducting the work.

VI. The Proposed Administrative Civil Liability of \$139,700 for Violation 1 is Conservative and Appropriate.

The USDA Natural Resources Conservation Service, Conservation Engineering Division Technical Release 55 method for calculating storm runoff volume (TR-55 Method) was used by Water Board staff to calculate storm water discharge volumes due to the availability of daily (24 hour) precipitation data. Precipitation data was obtained from the OGO Ranger Station weather station operated by the California Department of Water Resources Division of Flood Management that is located approximately 5 miles southwest of the Baker Ridge site and at a similar elevation. (Exhibit 14, OGO Gaging Station Data.) The TR-55 Method was first issued by the Soil Conservation Service in 1975 and was revised in 1986. The TR-55 Method uses simplified procedures to calculate storm runoff volume, peak rate of discharge, hydrographs, and storage volumes applicable in small watersheds, especially urbanizing watersheds, in the United States. (Exhibit_50, Technical Release 55, June 1986)

The TR-55 Method accounts for initial losses of storm water before runoff begins using a Runoff Curve Number determined from tables based on cover type, hydrologic condition, percent of impervious area and hydrologic soil group. (Exhibit 50, Technical Release 55, June 1986) The TR-55 Method determines cover type and hydrologic condition based on a cover description of the watershed for which discharge is being calculated. The cover description which best incorporates the cover type and hydrologic condition at the Baker Ridge site during the 2013-2014 wet weather period is *Developing urban areas, Newly graded areas (pervious areas only, no vegetation)*. This was based on the fact that the Access Road and Terraces were graded in June of 2013, and that the graded surfaces remained un-vegetated and un-protected until after the 28 October 2014 inspection. The TR-55 Method determines infiltration rates based on a soil type's hydrologic soil group. The USDA Web Soil Survey identifies the soils on the Baker Ridge site as being a Chaix coarse sandy loam, in the B Hydrologic Soil Group. (Exhibit_48, USDA Soil Description for Baker Ridge Site) A runoff curve number of 86 was determined using the site conditions described above and Table 2-2a of the USDA TR-55 Manual.

Using Table 10-1 of Chapter 10 Estimation of Direct Runoff from Storm Rainfall of the USDA National Engineering Handbook - Hydrology Chapters, Water Board staff determined that soils on the Baker Ridge site with a runoff curve number of 86 could infiltrate 0.33 inches of rainfall in 24 hours without generating runoff. (Exhibit 49, USDA NEH Hydrology Chapters: Chapter 10) In an effort to be very conservative, and due to the fact that the TR-55 Method does not take into account rainfall intensity and that the USDA TR-55 Manual states that the curve number procedure is less accurate when runoff is less than 0.5 inches, Water Board staff chose to only calculate storm water discharge volumes and count storm water discharge days for events with greater than 0.66 inches of precipitation; twice the amount of rainfall needed to generate runoff

(0.33 inches) as determined through TR-55 Method calculations and Table 10-1 of Chapter 10 of the USDA National Engineering Handbook – Hydrology Chapters. (Exhibit 49, USDA NEH Hydrology Chapters: Chapter 10) Attachment A to Administrative Civil Liability Complaint No. R5-2015-0520 describes how storm water discharge volumes were calculated using the TR-55 Method for individual events with more than 0.66 inches of precipitation during the 2013-2014 wet weather period.

Water Board staff was also very conservative by only estimating discharge volumes for storm water discharges from the Lower Terrace and Access Road. Fill slopes along both terraces are inclined at more than 50% and are composed of easily erodible granitic soils. The fill slopes are composed of side-cast from the construction of the terraces with little or no erosion protection. Erosion has locally rilled and incised the fill slopes and transported sediment and fill material to drainages below at multiple locations (28 October 2014 Baker Ridge Inspection Report), however those discharges were not alleged or quantified in the Complaint. Erosion and sediment control measures implemented by Eddie Axner Construction Inc. following the 28 October 2014 inspection were only effective on the flat surfaces of the terraces, as observed during the 19 November 2014 inspection. Meaning that sediment and fill material has continued to discharge from the unprotected fill and side slopes of the terraces to unnamed tributaries of North Fork Cottonwood Creek throughout the 2014-2015 wet weather period, and will continue to discharge if major erosion and sediment control measures are not implemented in the near future.

The liability amount proposed for violations alleged as Violation 1 complies with the State Water Resources Control Board's Water Quality Enforcement Policy (adopted November 2010)(Enforcement Policy) and Water Code section 13327 factors analysis; and is justified by the underlying factors as detailed in Attachment A to the Complaint.

VII. The Proposed Administrative Civil Liability Amount of \$157,700 for Violation 2 is Conservative and Appropriate.

Water Board staff was very conservative when collecting and recording measurements of the two un-culverted non-armored watercourse crossings to obtain volumes for fill material discharged to unnamed tributaries of North Fork Cottonwood Creek. For example, Water Board staff measured and recorded the width of the running surface of the watercourse crossings and did not take into account the volume of fill material sidecast from the edge of the running surface down to the bed and banks of the watercourse below the crossings. Had they taken into account this sidecast fill material which formed the side slopes of the watercourse crossings the volume of fill material discharged in the ACLC would be greater.

Staff conservatively estimated that it took two separate days to construct the two watercourse crossings. This is based on the simple design and construction of the two watercourses plus the half mile or more of new road that had to be constructed between the two watercourse crossings. Staff's estimate of the volume of fill discharged is also very conservative because the Complaint only alleges discharge violations for fill material intentionally discharged to

construct the watercourse crossings. The Complaint does not including storm water discharges containing sediment and fill material discharged to unnamed tributaries of North Fork Cottonwood Creek from many other locations observed along the New Road. Fill slopes along the New Road are inclined at more than 60% and are composed of easily erodible granitic soils. The fill slopes are composed of side-cast from the construction of the New Road, with little or no preparatory or compactive effort. Erosion has locally rilled and incised the fill slopes and transported sediment to drainages below at many locations. (Exhibit 17, CGI Slope Observations Report). Erosion and sediment control measures implemented by Eddie Axner Construction Inc. following the 28 October 2014 inspection were only effective on the less steep running surfaces of the New Road, as observed during the 19 November 2014 inspection. Meaning that sediment and fill material has continued to discharge from the un-compacted un-stabilized fill slopes of the New Road to unnamed tributaries of North Fork Cottonwood Creek throughout the 2014-2015 wet weather period, and will continue to discharge if major erosion and sediment control measures are not implemented in the near future.

The liability amount proposed for violations alleged as Violation 2 complies with the State Water Resources Control Board's Water Quality Enforcement Policy (adopted November 2010)(Enforcement Policy) and Water Code section 13327 factors analysis; and is justified by the underlying factors as detailed in Attachment A to the Compliant.

VIII. Conclusion

For the reasons stated above in the Prosecution Team's Legal and Technical Analysis, the Complaint, and Attachment A to the Complaint, the Central Valley Regional Water Board should assess administrative civil liability in the amount proposed.

For the Prosecution Team:



YVONNE M. WEST
Senior Staff Counsel
Office of Enforcement