

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

STAFF REPORT FOR REGULAR MEETING OF December 2, 2004

Prepared on November 10, 2004

ITEM: 5

SUBJECT: Administrative Civil Liability Order No. R3-2004-0125; Haig Kelegian

KEY INFORMATION

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

SUMMARY

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

The Discharger disturbed severe erosion hazard soils resulting in the discharge of eroded sediments to waters of the state.

On July 16, 2004, the Regional Board Executive Officer issued Administrative Civil Liability (ACL) Complaint No. R3-2004-0125 in the amount of twenty-five thousand five hundred dollars (\$25,500).

DISCUSSION

Background

The Discharger is the owner of 412 acres of land in the Creston area of San Luis Obispo County. The specific location is Section 31, 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 Kelegian Ranch, and Kelegian Creston Ranch.

During the summer of 2002, the Discharger cleared and grubbed most vegetation from approximately 200 of the 412 acres. The 200-acre area will hereafter be referred to as the Site.

The Site drains directly to Huerhuero Creek and 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-Region 3 (Basin Plan) designates both recreation and aquatic life (among other uses) as beneficial uses of the blue "line stream". The beneficial uses of Huerhuero Creek to 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.

The Discharger disturbed soils on the Site by removing vegetation without completing soil-disturbing activities by implementing any recognizable Best Management Practices (BMPs) to prevent soil erosion and the discharge of sediments to waters of the state. The Discharger failed to stabilize soils for a period of at least 185 days, from September 1, 2002, when removal of

vegetation was completed, until at least March 4, 2003, when Regional Board staff documented that the soils were partially stabilized. It is unknown at what precise time the soils became extensively stable because after March 4, 2003, when soils were still eroding and being discharged to state waters, the next inspection wasn't until September 19, 2003, and at that time the soils were considered extensively stable.

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

History of Regional Board inspections, correspondence, and enforcement actions and Discharger's failure to stabilize soils, which caused discharges to surface water

October 1, 2002 - Regional Board staff inspected the Site and found that approximately 200 acres had been grubbed of all vegetation, and was without any form of erosion and sedimentation controls. A consultant, representing the discharger, stated that the grubbed areas would be seeded to prevent erosion. The consultant was told that seeding alone would likely not be adequate and additional erosion and sediment controls were necessary.

October 8, 2002 - a letter (included in Attachment A) from Regional Board staff was sent to the Discharger confirming the findings of the October 1, 2002 inspection and reiterating the concern for the lack of erosion and sediment 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 Discharger what comprised the Best Management Practice for soil stabilization using seeding, a BMP that Discharger's consultant said they planned to implement. Potential Regional Board enforcement actions were discussed, and the Discharger was told to submit a detailed erosion and sedimentation control plan by October 21, 2002.

October 22, 2002 - staff of the Regional Board received the erosion and sedimentation control plan.

November 12, 2002 - Regional Board staff sent a letter (included in Attachment A) to the Discharger telling him that the referenced erosion and sedimentation control plan was inadequate and again expressed the belief that seeding alone would not be effective in preventing erosion, and that additional erosion controls would have to be implemented. This letter stated, "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 plan was provided with instructions to address all noted inadequacies and to have a revised erosion and sedimentation control plan at the Site for review.

November 8 and 14, 2002 - Regional Board staff inspected the Site and found that even though it was raining on the 8th, and had rained prior to the inspection on the 14th, the Site was without any form of erosion controls and the minimal sediment controls were ineffective. This was contrary to the promise by representatives of the Discharger to have erosion and sediment controls in place prior to any rains. Extensive erosion had occurred and was taking place, and eroded sediments from the Site had and were being conveyed by storm water to the unnamed "blue line" stream and Huerhuero Creek.

November 21, 2002 - The Regional Board Executive Officer issued Administrative Civil Liability Complaint No R3-2003-0020 with a proposed liability of \$75,000. Although the basis for the complaint, failure to stabilize the soil and discharges of sediments to State waters, were valid, the complaint had to be withdrawn because the referenced California Water Code statutes were not applicable.

November 25, 2002 - A Notice of Violation (included in Attachment A) from Regional Board staff was sent to the Discharger confirming the findings of the November 8, and 14, 2002 inspections, and included photographs depicting

extensive erosion and impacts to receiving waters. The Discharger was told that he had failed to provide effective erosion and sedimentation controls, and was reminded of the possibility of the Regional Board imposing monetary civil liability.

December 17, and 20, 2002 - Regional Board staff inspected the Site and found that it lacked effective erosion and sedimentation controls, and the lack of controls resulted in discharges of sediments to the unnamed "blue line" stream and Huerhuero Creek.

February 21, 2003 – A Notice of Violation, with descriptive photographs, (included in Attachment A) from Regional Board staff was sent to Mr. Kelegian, outlining the shortcomings noted during the December 17, and 20, 2002 inspections. The need for better erosion controls was again emphasized, as was the possibility of the imposition of monetary civil liability for continuing violations.

March 4, 2003 - Regional Board staff inspected the Site and found that it was lacking effective erosion and sedimentation controls, and eroded sediments had impacted the unnamed "blue line" stream and Huerhuero Creek.

March 11, 2003 – A Notice of Violation, with descriptive photographs (included in Attachment B), from Regional Board staff was sent to the Discharger outlining the inadequacies noted during the March 4, 2003 inspection. The Discharger was also reminded of the possibility of the imposition of monetary civil liability, and was told to submit by March 21, 2003, a revised erosion and sedimentation control plan.

March 19, 2003 - the revised erosion and sedimentation control plan was submitted and Regional Board staff found it to be inadequate.

April 3, 2003 - Regional Board staff sent a letter (included in Attachment A) including a review sheet regarding the erosion and sedimentation control plan to the Discharger, and required the Discharger to correct all of the noted inadequacies in the plan.

April 4, 2003 – A consultant for the Discharger submitted a revised erosion and sedimentation control plan to reflect findings of a March 30, 2003 Site inspection.

August 22, 2003 – The Regional Board Executive Officer issued Cleanup and Abatement Order No. R3-2003-0057 to the Discharger. A September 19, 2003 inspection by Regional Board staff found the grubbed areas of the Site had revegetated. Soils were, for the most part, stable and no longer susceptible to significant erosion. Therefore, Order No. R3-2003-0057 was not violated.

April 1, 2004 – Regional Board staff Internal Memo titled "Assessment of Sediment Conditions and Possible Impacts to Beneficial Uses from Sediment on the Kelegian and Pierson Properties" (included in Attachment A). This memo was taken into account in determining the amount of the assessed liability.

Basin Plan Prohibitions and Violations

The referenced disturbed soils and related discharges were in violation of Prohibitions contained in the Water Quality Control Plan for the Central Coast Region (Basin Plan), Chapter 4., Implementation Plan. The violated Prohibitions are as follows:

First Prohibition Violated

VIIIE.1. LAND DISTURBANCE PROHIBITIONS

Soil disturbance activities not exempted pursuant to Regional Board Management Principles contained in Chapter Five are prohibited:

3. On soils rated a severe erosion hazard by soil specialists (as recognized by the Executive Officer) where water quality may be adversely impacted;

Unless,

- a. In the case of agriculture, operations comply with a Farm Conservation or Farm Management Plan approved by a Resource Conservation District or the USDA Soil Conservation Service;

- b. In the case of construction and land development, an erosion and sediment control plan or its equivalent (e.g., EIR, local ordinance) prescribes best management practices to minimize erosion during the activity, and the plan is certified or approved, and will be enforced by a local unit of government through persons trained in erosion control techniques; or,
- c. There is no threat to downstream beneficial uses of water, as certified by the Executive Officer of the Regional Board.

Explanation for Violation of First Prohibition

Discharger violated this Prohibition because he disturbed soils rated a severe erosion hazard by soil specialists recognized by the Executive Officer where water quality may be adversely impacted and failed to complete soil disturbing activities by implementing BMPs. The Executive Officer recognizes the Resource Conservation District (RCD) and the United States Department of Agriculture, Soil Conservation Service, presently known as United States Department of Agriculture, Natural Resources Conservation Service (NRCS) as being entities that specialize in evaluating soils and determining if soils are a severe erosion hazard. 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. that is shown in allegation 6.

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 moderate to very steep slopes of 15 – 75 %, and having shallow sandy loam soils of 6 – 40 inches overlying weathered granite rock. Surface runoff is rapid to very rapid, and the hazard of erosion is high to very high. The Soil Survey also references the soil in some areas of the site as being "fragile and any disturbance can cause severe erosion". Regional Board staff visiting the Site

determined there was a severe erosion hazard that could adversely affect water quality. The Executive Officer recognizes staff as having expertise, by virtue of their engineering and geology training and work experience, to rate soil as a severe erosion hazard. Sediment discharges adversely affect water quality and unreasonably affect beneficial uses by causing excess turbidity, burying riparian vegetation, impairing flow and by covering creek bottoms. Increased turbidity, vegetation destruction and sedimentation can deplete food and habitat availability to zooplankton, insects, freshwater mollusks, and fish.

The three exemption criteria (a., b., and c. in allegation 6.) associated with the prohibition are not applicable because (a.) the Discharger never filed a farm plan with or received approval from the RCD or the NRCS, (b.) the land disturbance was not related to construction or land development, and was not subject to an erosion control plan that was enforced by a local government, and (c.) no certification regarding threat to beneficial uses was applied for or issued by the Executive Officer.

Regional Board Management Principles in Chapter Five of the Basin Plan contain exemptions that are referenced in the Land Disturbance Prohibitions. The exemptions are as follows:

- Emergency projects undertaken or approved by a public agency and necessary to prevent or mitigate loss of, or damage to, life, health, property, or essential public services from an unexpected occurrence involving a clear and imminent danger are exempt from this chapter providing such exemption is in the public interest.
- Regulation of sediment discharges from routine annual agricultural operations, such as tilling, grazing, and land grading and from construction of agricultural buildings is waived except where such activity is causing severe

erosion and causing, or threatening to cause, a pollution or nuisance.

- Regulation of discharges from State and federal lands managed by agencies operating in accordance with approved management agency agreements is waived except where such activity is causing, or threatening to cause, a pollution or nuisance.

The Discharger's soil disturbance activities were not an emergency project, do not qualify as a part of a routine annual agricultural activity, and did not involve State or Federal lands. Therefore the referenced exemptions are not applicable.

The Discharger disturbed severe erosion hazard soils in violation of a Regional Board issued prohibition. The soils remained disturbed for at least 185 days (September 1, 2002 – March 4, 2003) during which time there were occasions when eroded soil sediments from the Site were discharged to waters of the state.

Second Prohibition Violated

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.

The Discharger discharged and threatened discharge of soil, silt, and other organic and earthen materials 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. The Discharger violated this prohibition by removing most all vegetation from the Site, which has a severe erosion hazard without implementing effective BMPs to eliminate or minimize erosion and sediment discharges.

Regional Board staff in letters and in person had instructed Discharger as to correct implementation of soil stabilization BMPs and Discharger did not follow that instruction.

CIVIL LIABILITY

Recommended Liability

After considering factors specified in California Water Code Section 13327, the Regional Board Executive Officer recommended a liability of twenty-five thousand five hundred dollars (\$25,500).

Maximum Liability

Pursuant to California Water Code Sections 13350(e)(1), the Regional Board may impose civil liability up to \$5,000 per day for each day each violation occurs. The Discharger violated two Basin Plan prohibitions for a total of at least 185 days each. The maximum liability that may be imposed is \$925,000 (nine hundred twenty-five thousand dollars) per violated prohibition. The total Maximum Liability that can be imposed for violating both prohibitions is \$1,850,000 (one million eight hundred fifty thousand dollars).

In determining the amount of civil liability the California Water Code requires the Regional 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. It is also set forth in the draft Order recommended for the Board's adoption with one change in the analysis. That change is under the category of other matters as justice may require. It regards the correspondence submitted on behalf of Discharger regarding amounts the Discharger allegedly spent for erosion controls at the site.

PROPOSED LIABILITY

Minimum Liability

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

ACTIVITIES FOLLOWING ISSUANCE OF COMPLAINT NO. R3-2004-0125

On August 16, 2004, legal counsel for the discharger waived the right to a hearing within ninety days of issuance of the Complaint, and asked that the matter be continued until December 3, 2004. The Regional Board Executive Officer granted the continuance.

On October 18, 2004, the staff of the Regional Board received a single page letter (included in Attachment B) from Mr. Kelegian that was dated October 11, 2004. In the letter he estimates that, based on his review, he expended \$60,594.89 "...trying to meet the requirements ...". Nothing, such as related invoices, was included to support or substantiate his claim. Regardless of the amount spent, it never resulted in effective erosion and sedimentation controls. The eventual stabilization of Site soil in the Spring of 2003, was probably as much 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, since due to a lack of erosion control, rains would have washed away much of the seed.

On October 25, 2004, Regional Board staff received a letter (included in Attachment B) dated October 22, 2004, from the Discharger in which he

made reference to enclosed documents that reflect his claim that he didn't ignore notices from the staff of the Regional Board. The letter also implies that communications with a Regional Board staff person prompted the submittal. Of the approximate 108 pages (included in Attachment B) submitted, 96 were already part of the Regional board files, and of the 12 pages not on file only 2 (included as Attachment C) appear to be somewhat related to the Discharger's claim.

Based upon the high volume of staff correspondence to Discharger explaining non-compliance at the Site, it would have been reasonable for Discharger to recognize a conflict existed with Regional Board as opposed to what he was being told by his consultant. The Discharger never initiated contact with staff of the Regional Board for the purpose of resolving any apparent conflicts until after Complaint No. R3-2004-0125 was issued. In any event Discharger's Contractor acted as his agent for purposes of complying with Regional Board requirements at the Site. Discharger is therefore responsible for Contractor's actions or inactions and is deemed to share Contractor's knowledge.

In the letters dated October 11, 2004, and October 22, 2004, the Discharger states "... I did not ignore the notices from your offices and that we tried to be diligent and respectful to the claims made by your office." ... "In review of the monies expended to comply with your staff's request, I feel that the arbitrary fine is unwarranted." "I respectfully request that you review the basis for your stated fine, as I believe it is unwarranted or at least excessive." ... "I submit all these documents in the hopes that you will review this matter and that we can come to some reasonable solution as not to waste your time, my time and not to burden me with a great deal of more expense."

Assuming for analysis that the Discharger did spend \$60, 594 in an effort to comply with Regional Board requests. The fundamental violations comprise disturbance of 200 acres of highly erosive soil, causing discharges to surface water, violating best management practices and failing to stabilize the disturbed soil. The alleged expenditures do not change the basic violations. They also do not justify reduced liability based on the factors in section 13327 of the Water Code.

RECOMMENDATION

Regional Board staff recommends assessment of \$25,500 (Twenty-Five Thousand Five Hundred Dollars) for the Discharger's violations of two Basin Plan Prohibitions from September 1, 2002 through March 3, 2003.

ATTACHMENTS

- A. 10/8/02 Regional Board staff letter
- 11/12/02 Regional Board staff letter
- 11/25/02 Regional Board staff letter
- 2/21/03 Regional Board staff letter
- 3/11/03 Regional Board staff letter
- 4/3/03 Regional Board staff letter

4/1/04 Regional Board staff Internal Memo

- B. 10/11/02 letter from the Discharger
 - 10/22/04 letter and related documents from the Discharger
 - C. Possibly relevant documents included in The Dischargers 10/22/04 submittal
- 1. Administrative Civil Liability Complaint No. R3-2004-0125
 - 2. Administrative Civil Liability Order No. R3-2004-0125