

**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: 19

SUBJECT: Administrative Civil Liability Order No. R3-2005-0025; 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 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 18, 2005, the Water Board Executive Officer issued Administrative Civil Liability (ACL) Complaint No. R3-2005-0025 in the amount of one hundred thousand dollars (\$100,000).

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 412 acres of land in the Creston area of San Luis Obispo County (Attachment 17). 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 of the 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 (Basin Plan) designates both recreation and aquatic life as beneficial uses of the blue line stream. 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 most of the vegetation from the Site 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 implementing effective BMPs 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 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 Water Board staff inspection was on September 19, 2003, and at that time, staff found the soils to be mostly stable.

On November 8, 2002, and December 20, 2002, 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

October 1, 2002 - Water Board staff inspected the Site and found that approximately 200 acres had been grubbed (i.e., cleared) of most existing vegetation, and there were no erosion controls and the sedimentation controls were inadequate. A consultant, representing the Discharger, was on site and stated that the grubbed areas would be seeded to prevent erosion. Water Board staff informed the consultant that seeding alone would likely not be adequate and additional erosion and sediment controls were necessary.

October 8, 2002 - A letter (included as Attachment 1) from Water 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 the Discharger that vegetation, not seed, is an erosion control practice. The Discharger's consultant said they planned to implement the described management practice.

Water Board staff discussed potential enforcement actions and directed the Discharger to submit a detailed erosion and sedimentation control plan by October 21, 2002.

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

November 12, 2002 - Water Board staff sent a letter (included as Attachment 2) 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.”

Water Board staff provided a review sheet regarding the plan 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 - Water Board staff inspected the Site and found that, although the Discharger had seeded, it was raining on the 8th and had rained shortly before the inspection on the 14th. The seed was not protected in any way. The Site was without any form of erosion controls and the limited 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 25, 2002 – Water Board staff sent a Notice of Violation (included as Attachment 3) to the Discharger confirming the findings of the November 8, and 14, 2002 inspections. The NOV included photographs depicting extensive erosion and impacts to receiving waters. The NOV informed the Discharger that he had failed to provide effective erosion and sedimentation controls, and reminded him of the possibility of further enforcement action including imposition of monetary civil liability.

December 17, and 20, 2002 - Water Board staff inspected the Site and found that erosion and sedimentation controls were extensively ineffective, and found evidence that eroded sediments had entered the unnamed "blue line" stream and Huerhuero Creek.

The Discharger's efforts to control the erosion of soil and the discharge of sediments, for the most part, consisted of the following BMPs

- 1.) The primary erosion control was loose straw that was spread on some areas of the Site. The straw was not crimped or tackified into the soil to prevent it from being mobilized by rain and wind and was largely ineffective. Without effective erosion controls, the aerial application of seeds became meaningless because most of the seed was probably washed away and blown away from the seeded areas by storm water runoff and wind.
- 2.) Fiber rolls or wattles were placed on some slopes but the distance between them was too great to be effective in reducing storm water runoff velocities and preventing erosion or trapping sediments.
- 3.) Hay bales were used in some areas in an apparent attempt to trap sediments. However, drainage areas up-gradient of the bales were so great that the resulting volumes of sediment and storm flows overwhelmed the bales, rendering them ineffective. The bales were also installed improperly, allowing water and sediment to flow beneath and around the barriers.

4.) Piles of cleared vegetation that were left at the base of some slopes to function as a sediment control or barrier. However, the loose piles were largely ineffective because the vegetation consisted mostly of lightweight brush lying on the ground surface offering little resistance to the flowing water and sediments. Also, the steep grades and large up-gradient areas resulted in volumes and velocities of sediments and storm water that were too great, regardless of the material and installation method.

5.) Rills that were present before the BMPs were initially installed compounded the ineffectiveness of all of these efforts. Water Board staff never saw any evidence of attempts to fill or eliminate the rills. As a result, the rills became more pronounced as the rainy season progressed.

February 21, 2003 – Water Board staff sent a Notice of Violation (included as Attachment 4) to the Discharger, outlining the findings noted during the December 17, and 20, 2002 inspections. Water Board staff again emphasized the need for better erosion controls and the possibility of monetary civil liability for continuing violations.

The Water Board Executive Officer issued Administrative Civil Liability Complaint No R3-2003-0020 (included as Attachment 5) with a proposed liability of \$75,000. Although the basis for the complaint was valid (failure to stabilize the soil and discharges of sediments to State waters), the complaint was withdrawn because it referenced a section of the California Water Code that did not apply to the Site.

March 4, 2003 - Water 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 – Water Board staff sent a Notice of Violation (included as Attachment 6) to the Discharger outlining the inadequacies noted during the March 4, 2003 inspection. This NOV again reminded the Discharger of the possibility of

monetary civil liability and required him to submit a revised erosion and sedimentation control plan by March 21, 2003.

March 19, 2003 - The Discharger submitted the revised erosion and sedimentation control plan (included as Attachment 7).

April 3, 2003 - Water Board staff sent a letter (included as Attachment 8), including a review sheet for 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 (included as Attachment 9).

August 22, 2003 - The Water Board Executive Officer issued Cleanup and Abatement (CAO) Order No. R3-2003-0057 (included as Attachment 10) to the Discharger.

September 19, 2003 - Water Board staff inspected the Site and found the grubbed areas had stabilized and were no longer susceptible to erosion. Therefore, the Discharger did not appear to violate CAO No. R3-2003-0057. .

April 1, 2004 - Water Board staff produced 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 11). This assessment was taken into account in determining the amount of the assessed liability.

July 16, 2004 - The Water Board Executive Officer issued Administrative Civil Liability Complaint No. R3-2004-0125 (included as Attachment 12) with a recommended civil liability of \$25,500.

October 18, 2004 - Water Board staff received a single page letter (included as Attachment 13) from the Discharger dated October 11, 2004. In the letter, the Discharger estimated expenditures of \$60,594.89 for erosion and sediment control efforts. There were no invoices, receipts, or other similar documents submitted to support or substantiate the claimed expenses.

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 200 acres of highly erodible soils, failure to implement effective Best Management Practices to stabilize the disturbed soils, and 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 liability, 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 rains to wash away much of the seed.

The Discharger, during a September 23, 2004 meeting with Water Board staff, indicated that he was led to believe by his consultant that the Water Board was satisfied with their compliance efforts despite the numerous Water Board staff letters to the contrary. Water Board staff believes that had there been a conflict in what was being communicated to the Discharger by his consultant and the Water Board, the logical and prudent action should have been to resolve the conflict. However, the Discharger never attempted to communicate directly with staff until shortly before meeting with them on September 23, 2004. By that time almost a year had passed since the Water Board began communicating concerns about activities and inactivity at the Site.

October 25, 2004 - Water Board staff received a letter (included as Attachment 14) dated October 22, 2004, from the Discharger referencing documents that reflected his claim that he did not ignore notices from the staff of the Water Board. Most of the documents (included as Attachment 15) were already part of the Water Board files. Two of the documents (included as Attachment 16) appear to be somewhat related to the Discharger's claim.

Complaint R3-2004-0125 was scheduled to be heard by the Water Board on September 10, 2004,

but was postponed until December 2, 2004 at the request of the Discharger. On November 29, 2004, the Discharger submitted a written waiver of his right to a hearing, and provided a payment of \$5,500 and a promise to pay the remaining \$20,000 of the liability by January 31, 2005. 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. R3-2004-0125 and issue a new complaint. Water Board staff notified the Discharger of the Water Board decision, and returned the \$25,500 payment.

Basin Plan Prohibitions and Violations

The discharges and threatened discharges of disturbed soils are a violation of a Prohibition contained in the Water Quality Control Plan for the Region (Basin 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 for 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. 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 BMPs.

The severity of the violation was increased by the disturbed soils being a severe erosion hazard as designated by the Resource Conservation District

(RCD) and United States Department of Agriculture, Natural Resources Conservation Service (NRCS). The RCD and NRCS 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). According to the Soil Survey, the Site includes three soil series that, as a composite can be summarized 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”.

Water Board staff visiting the Site determined there was a severe erosion hazard that could adversely affect water quality. In the fall of 2002, Water Board staff communicated with the Discharger and his representatives concerning the potential for negative impact on surface waters from the Discharger’s activities.

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 refuge), 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 removing most of the vegetation from a site with a severe erosion hazard, the Discharger violated the prohibition by discharging, and threatening to discharge soil into waters of the state, in violation of best management practices for soil disturbance activities, and in quantities deleterious to fish and wildlife. Water Board staff, in letters and in person, informed the Discharger of correct implementation of soil stabilization BMPs. The Discharger did not implement effective BMPs.

Having been forewarned of the severe erosion hazards and potential negative impacts on receiving waters, the Discharger proceeded with removing most of the 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 recommended a liability of one hundred thousand dollars (\$100,000).

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.

PROPOSED LIABILITY

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 \$100,000 (One Hundred Thousand Dollars) for the Discharger's violation of a Basin Plan Prohibition from September 1, 2002 through March 4, 2003.

ATTACHMENTS

- 1.) 10/8/02 Water Board staff letter
- 2.) 11/12/02 Water Board staff letter
- 3.) 11/25/02 Water Board staff letter
- 4.) 2/21/03 Water Board staff letter
- 5.) 2/21/03 ACLC No. R3-2003-0020
- 6.) 3/11/03 Water Board staff letter
- 7.) 3/19/03 Erosion and Sedimentation Control Plan
- 8.) 4/3/03 Water Board staff letter
- 9.) 4/4/04 Erosion and Sediment Control Plan
- 10.) 8/22/03 CAO R3-2003-0057
- 11.) 4/1/04 Water Board Staff Internal Memo
- 12.) 7/16/04 ACLC No. R3-2004-0125

- 13.) 10/11/04 Discharger letter
- 14.) 10/22/04 Discharger letter
- 15.) 10/22/04 Discharger attachments
- 16.) 10/22/04 Discharger selected attachments
- 17.) Map of the Site
- 18.) 5/18/05 ACLC No. R3-2005-0025 and Transmittal Letter

19.) ACL Order No. R3-2005-0025

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