

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2019-0004
IN THE MATTER OF

KONGKEO KHAMVONGSA and ALEXANDRA KENSAVATH

ASSESSOR PARCEL NUMBER 043-060-018-000
SHASTA COUNTY

This Administrative Civil Liability Order (Order) is issued to Kongkeo Khamvongsa and Alexandra Kensavath (hereafter referred to as Dischargers) pursuant to California Water Code section 13350, which authorizes the imposition of administrative civil liability. This Order is based on evidence and findings that the Dischargers violated Cleanup and Abatement Order R5-2016-0712.

The Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) hereby finds the following:

BACKGROUND

1. Per records from the Shasta County Assessor-Recorder's Office, Seng Bounnavath purchased the 40.1 acre parcel, identified as Assessor Parcel Number 043-060-018-000 (hereafter referred to as the Site), in July 2010, and sold the Site in August 2015. The Site is located near the intersection of Ishi Road and Yolla Bolly Road in the Trinity Alps Preserve, south-western Shasta County, Section 24, Township 33N, Range 4W, MDB&M; in the vicinity of latitude 40.379198° N and longitude 122.733176° W. During Seng Bounnavath's ownership of the Site, the Site was developed to support cannabis cultivation.
2. Per records from the Shasta County Assessor-Recorder's Office, Kongkeo Khamvongsa, and Alexandra Kensavath purchased the Site from Seng Bounnavath in August 2015. As the current owners of the Site, Kongkeo Khamvongsa and Alexandra Kensavath are responsible for the condition of the property and discharges of waste emanating from the property.
3. For purposes of this Order, the Central Valley Water Board is only imposing administrative civil liability against Kongkeo Khamvongsa and Alexandra Kensavath (Dischargers). As further detailed below, actions taken by the Dischargers, after purchasing the property from Mr. Bounnavath, indicated that they were aware of the condition of the property and the need for cleanup and remedial action to address the threats to water quality and that they would undertake the corrective actions required; however, the Dischargers failed to complete any of the required restoration or remediation work and, in fact, expanded the cultivation area beyond the area originally developed by Mr. Bounnavath. Although this Order is only issued against Kongkeo Khamvongsa and Alexandra Kensavath, the Central Valley Water Board reserves its right to take any enforcement actions authorized by law for violations of Cleanup and Abatement Order R5-2016-0712 (CAO).
4. Google Earth and National Agriculture Imagery Program (NAIP) historic satellite imagery of the Site from 2009 through 2011 revealed an existing earthen embankment dam on a tributary to Fidler Creek. Subsequent hilltop and hillslope grading is visible in 2012 Google

Earth imagery, and additional grading upstream of the original dam as well as the addition of material on the original dam is visible in 2014 Google Earth and NAIP imagery, indicating that additional grading and dam enlargement was conducted between 2012 and 2014, during Mr. Bounnavath's ownership of the Site.

5. On 20 February 2015, Warden Steven Crowl with the California Department of Fish and Wildlife (CDFW) was conducting a Uniform Vehicle patrol along Yolla Bolly Road in the Trinity Alps Preserve area and noticed a large-scale grading operation and what appeared to be construction of a dam. Warden Crowl captured photographs and a GPS waypoint at the Site, and provided a declaration summarizing the grading operation and activities he observed at the Site. Based on his training and experience, Warden Crowl concluded that the conditions of the Site were consistent with activities commonly associated with cannabis cultivation. Photographs of these conditions, along with a lack of visible erosion control on the Site, were given as cause for recommendation of a joint on-site inspection with Central Valley Water Board and CDFW staff.
6. On 19 March 2015, Central Valley Water Board staff (staff) contacted Mr. Bounnavath to discuss the Site. During the discussion, staff requested consent to perform an on-Site inspection to document the grading activities and dam construction. Mr. Bounnavath gave consent to perform the inspection. Staff inspected the Site on 20 March 2015 and observed several graded areas, constructed terraces, and recent grading and construction on an earthen dam. There was no evidence of erosion control practices being implemented at the Site. Staff determined that the Site presented a threat of discharge of sediment to waters of the State due to the amount of grading and exposed soils, apparent dam construction activities, and terrace construction in close proximity to tributaries to Fidler Creek.

ENFORCEMENT ACTIONS AND SUBSEQUENT INSPECTIONS

7. **6 July 2015 Notice of Violation.** Based on the findings documented during the 20 March 2015 Site inspection, staff issued a Notice of Violation (NOV) to Mr. Bounnavath that included a copy of the 20 March 2015 inspection report. The NOV requested a plan be submitted to staff by 15 August 2015, for mitigation of the discharges associated with Site development. The NOV was sent via certified mail and was signed for by Mr. Bounnavath on 13 July 2015. On 13 August 2015, Mr. Bounnavath sold the property to Alexandra Kensavath and Kongkeo Khamvongsa. On 14 August 2015, VESTRA Resources, Inc. (VESTRA) submitted a work plan on behalf of Kendra Anderson, mother of Ms. Kensavath; however, staff met with VESTRA on 18 August 2015 and identified several deficiencies in the plan that prevented staff from approving the plan. On 7 October 2015, VESTRA submitted a second work plan to address the previously identified deficiencies, which staff reviewed and deemed sufficient. Under the revised plan, the remediation work was to be completed by 31 December 2015.
8. **1 December 2015 Visual Inspection:** On 1 December 2015, staff accompanied Warden Crowl on a visual inspection of the Site. Staff viewed the dam and portions of the Site from Yolla Bolly Road, which is a public road. As of 1 December 2015, no work had been completed at the Site.

9. **12 May 2016 Draft Cleanup and Abatement Order.** Staff contacted VESTRA numerous times in November 2015 and December 2015 to check on the progress of implementation of the work plan. VESTRA indicated to staff that money was an issue with the landowner and that work had not been started. As of 31 December 2015, remediation work had not been initiated or completed and staff had not been contacted regarding the remediation work. Due to non-compliance with the 8 July 2015 NOV and the approved remediation plan, the Assistant Executive Officer of the Central Valley Water Board issued a draft Cleanup and Abatement Order (draft CAO) to Kongkeo Khamvongsa, Alexandra Kensavath, and Seng Bounnavath on 12 May 2016, sent via certified mail. The draft CAO sent to Mr. Khamvongsa and Ms. Kensavath was received and signed for by Linda Rasbanoith, and the certified mail receipt was received by staff on 20 May 2016. The draft CAO sent to Mr. Bounnavath was received and signed for by Seng Bounnavath, and the certified mail receipt was received by staff on 16 June 2016. The transmittal letter provided Mr. Bounnavath, Mr. Khamvongsa, and Ms. Kensavath an opportunity to comment on the draft CAO until 31 May 2016. No comments were received by staff, and none of the individuals contacted staff during the comment period.
10. **27 June 2016 Cleanup and Abatement Order.** On 27 June 2016, after receiving no comments on the draft CAO, the Assistant Executive Officer of the Central Valley Water Board issued Cleanup and Abatement Order R5-2016-0712 (CAO) to Kongkeo Khamvongsa, Alexandra Kensavath, and Seng Bounnavath, sent via certified mail. The CAO sent to Mr. Bounnavath was signed for by "Seng" on 18 July 2016, and the certified mail receipt was received by staff on 21 July 2016. The CAO sent to Mr. Khamvongsa and Ms. Kensavath was signed for, and the certified mail receipt was received by staff on 1 July 2016; however staff cannot decipher the name of signature on the receipt. Per requirements of the CAO, a Restoration Monitoring and Mitigation Plan (RMMP) was to be submitted by 1 August 2016 and, by 31 October 2016, all approved restoration and mitigation measures described in the proposed RMMP were to be completed. By 1 December 2016, a Completion Report for the RMMP was to be submitted. To date, staff have not received the required documentation.
11. **11 August 2016 Notice of Violation:** On 11 August 2016, staff sent Kongkeo Khamvongsa, Alexandra Kensavath, and Seng Bounnavath a Notice of Violation for non-compliance with the CAO. The NOV was sent via certified mail, and the copy sent to Mr. Khamvongsa and Ms. Kensavath was signed for by Khemphet (last name not legible) and the certified mail receipt was received by staff on 22 August 2016. The copy sent to Mr. Bounnavath was received and signed for by Seng Bounnavath, and the certified mail receipt was received by staff on 22 August 2016. The NOV requested that Mr. Bounnavath, Mr. Khamvongsa, and Ms. Kensavath respond by submitting all documentation required in the CAO, by no later than 1 September 2016. On 19 August 2016, Mr. Khamvongsa called the Central Valley Water Board to discuss the CAO. Staff explained the CAO process to Mr. Khamvongsa. Mr. Khamvongsa then stated that he had cleaned up the trash on the property. Again, staff informed Mr. Khamvongsa of the CAO process and explained that the CAO was issued to ensure the cleanup of wastes resulting from the grading and dam construction. Staff encouraged Mr. Khamvongsa to read and fully understand the CAO and to retain a consultant to assist with compliance with the terms of the CAO. The Central Valley Water Board received no further response from Mr. Khamvongsa following the 19 August 2016 phone call.

12. **13 February 2017 Notice of Violation:** On 13 February 2017, staff sent Kongkeo Khamvongsa, Alexandra Kensavath, and Seng Bounnavath a second Notice of Violation for non-compliance with the CAO. The NOV was sent via certified mail, and the copy sent to Mr. Khamvongsa and Ms. Kensavath was signed for by Linda Rasbanoith, and the certified mail receipt was received by staff on 22 February 2017. The copy sent to Mr. Bounnavath was received and signed for by "Seng" on 17 February 2017, and the certified mail receipt was received by staff on 22 February 2017. The NOV requested that Mr. Bounnavath, Mr. Khamvongsa, and Ms. Kensavath respond by submitting all documentation required in the final CAO, by no later than 6 March 2017. To date, staff have not received a response or the required documentation.
13. **18 August 2017 Inspection:** On 18 August 2017, staff conducted a follow-up Site inspection. The Site conditions were similar to those observed in the initial 20 March 2015 inspection. No restoration or remediation work had been completed at the Site and the conditions of the CAO had not been met. As a result, the Site continued to pose a risk of sediment erosion and discharge to tributaries of Fidler Creek. In addition, the Dischargers had expanded their cultivation area to three additional areas beyond what was originally documented in 2015 and steps to install proper best management practices had not been conducted.
14. **25 April 2018 Notice of Violation:** On 25 April 2018, staff sent Kongkeo Khamvongsa, Alexandra Kensavath, and Seng Bounnavath a third NOV for non-compliance with the final CAO. The NOV was sent via certified mail. The NOV requested that Mr. Bounnavath, Mr. Khamvongsa, and Ms. Kensavath respond by submitting all documentation required in the final CAO, by no later than 25 May 2018. The document was returned to the Central Valley Water Board as undeliverable to Ms. Kensavath's and Mr. Bounnavath's addresses. On 16 June 2018, the document was delivered via certified mail and picked up by Mr. Khamvongsa. After several failed certified mailing attempts to Ms. Kensavath, the Central Valley Water Board called Mr. Khamvongsa on 26 July 2018 to inquire if he received mailings addressed to him, and if he had any contact information for Ms. Kensavath. Mr. Khamvongsa stated that he did receive the mailings but did not have any current contact or mailing information for Ms. Kensavath. On 17 August 2018, Central Valley Water Board staff received a return mailing, addressed to Alexandra Kensavath, with a forwarding address of 594 Iris Drive, Redding, California, 96002 affixed to the package. On 19 September 2018, staff mailed the 25 April 2018 NOV via certified mail and first-class mail to the forwarding address. The document was returned to the Central Valley Water Board as undeliverable to Ms. Kensavath on 10 October 2018. On 15 October 2018, staff sent the NOV package to a fourth address associated to Ms. Kensavath, located at 1024 E. Commerce Ave, Fresno, California, 93706 where staff successfully located her. On 18 October 2018, Ms. Kensavath received and signed for the mailings. Staff have not received a response from Alexandra Kensavath.
15. **13 November 2018 Administrative Civil Liability Complaint No. R5-2018-0529 (Complaint):** On 13 November 2018, the Assistant Executive Officer of the Central Valley Water Board issued the Complaint to Mr. Khamvongsa and Ms. Kensavath.
16. On 23 November 2018, the Complaint was delivered via USPS certified mail and picked up by Mr. Khamvongsa.

17. Staff attempted to provide service of the Complaint to Ms. Kensavath via USPS certified mail to the two addresses where Ms. Kensavath had previously received mail, one in Fresno and one in Banning. Staff also mailed the Complaint via first-class mail to Ms. Kensavath's Fresno and Banning addresses with two copies of a Notice of Acknowledgement and self-addressed, postage-prepaid envelopes for Ms. Kensavath to mail the Acknowledgment to Central Valley Water Board staff. After several attempts at delivery, both Complaint packages sent via certified mail were returned to staff at the Central Valley Water Board. The first-class mail has not been returned to staff and is presumed to have been delivered. Staff did not receive a completed Notice of Acknowledgment from Ms. Kensavath.
18. Additionally, staff from the Central Valley Water Board sent the Complaint to Ms. Kensavath by process server for personal service at her Fresno address. Between 28 November 2018 and 3 December 2018, the process server attempted personal service of the Complaint on four separate occasions, including one attempt on 30 November 2018, during which the process server made contact with a minor at the residence who indicated Ms. Kensavath was not available. On 29 November 2018, 1 December 2018, and 3 December 2018, the process server received no answer at the residence. On 3 December 2018, the process server posted the Complaint to the front door of the property.
19. Subsequently, Central Valley Water Board staff published notice of the Complaint and hearing dates in the Fresno Bee newspaper once a week for four consecutive weeks. The notice was published on 27 December 2018, 3 January 2019, 10 January 2019, and 17 January 2019. The publication provided Ms. Kensavath until 31 January 2019 to contact Central Valley Water Board staff. Ms. Kensavath contacted staff on 28 January 2019 and indicated that she received notice of the Complaint.

NON- COMPLIANCE WITH CLEANUP AND ABATEMENT ORDER R5-2016-0712

20. To date, the Dischargers have yet to complete any of the requirements outlined in the CAO. Table 1 outlines all of the potential violations associated with the CAO.

Table 1. Potential violations associated with non-compliance with Cleanup and Abatement Order R5-2016-0712

Potential Violations – Non-Compliance with Cleanup and Abatement Order R5-2016-0712			
Requirement	Due Date	Water Code Violation	Maximum Per Day Penalty
RMMP* Submission	1 October 2016	13268	\$ 1,000
RMMP Completion	31 October 2016	13350	\$ 5,000
RMMP Completion Report	1 December 2016	13268	\$ 1,000

*Restoration Monitoring and Mitigation Plan

21. As outlined in Table 1 (above), the Dischargers are potentially in violation of three requirements of the final CAO. Water Code sections 13350 and 13268 authorize the Central Valley Water Board to impose civil liabilities in the amounts listed in Table 1 on a per day basis for each of the violations.
22. The Dischargers were given opportunity to comment on the requirements of the draft CAO. Comments were not received by the Dischargers on the requirements of the draft CAO, therefore CAO R5-2016-0712 was issued on 27 June 2016.
23. To date, Central Valley Water Board staff have not received the materials requested in the Notice of Violation letters that were sent to the Dischargers on 11 August 2016, 13 February 2017, and 25 April 2018, notifying the Dischargers that they were in violation of the CAO, and to the knowledge of Central Valley Water Board staff, the Dischargers have not completed any of the required actions in the CAO.
24. Based on the above information, the Central Valley Water Board imposes administrative civil liability based on one violation of the CAO as authorized by Water Code section 13350 for failure to complete a Restoration, Monitoring, and Mitigation Plan, beginning from 31 October 2016, the required date of completion.

VIOLATION

25. **Violation:** The Dischargers failed to comply with CAO R5-2016-0712, issued on 27 June 2016. The Dischargers failed to comply with any of the requirements outlined in the CAO, which included the requirement to implement and complete a Restoration Monitoring and Mitigation Plan by 31 October 2016.
26. **Responsible Parties:** Kongkeo Khamvongsa and Alexandra Kensavath, as the property owners, operators, and responsible parties named in the CAO, are liable for the conditions of the Site and are responsible for complying with the CAO. As previously mentioned, the Central Valley Water Board is only imposing administrative civil liability against Kongkeo Khamvongsa and Alexandra Kensavath in this Order.¹ Kongkeo Khamvongsa and Alexandra Kensavath had the legal ability and legal responsibility to comply with the CAO to clean up and abate any discharges or threatened discharge of waste into the waters of the state from the Site, failed to do so, and expanded the cultivation area without performing any of the restoration and remediation required to stabilize the Site.

ADMINISTRATIVE CIVIL LIABILITY PROVISIONS

27. Water Code section 13350 states, in relevant part:
 - (a) A person who (1) violates a cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in

¹ The Central Valley Water Board reserves its right to take any enforcement actions authorized by law for violations of Cleanup and Abatement Order R5-2016-0712.

violation of a waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state . . . shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e). . . .

(e) The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not on both. (1) The civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs. (A) When there is a discharge, and a cleanup and abatement order is issued, except as provided in subdivision (f), the civil liability shall not be less than five hundred dollars (\$500) for each day in which the discharge occurs and for each day the cleanup and abatement order is violated. (B) When there is no discharge, but an order issued by the regional board is violated, except as provided in subdivision (f), the civil liability shall not be less than one hundred dollars (\$100) for each day in which the violation occurs. . . .

(f) A regional board shall not administratively impose civil liability in accordance with paragraph (1) of subdivision (e) in an amount less than the minimum amount specified, unless the regional board makes express findings setting forth the reasons for its action based upon the specific factors required to be considered pursuant to Section 13327.

The Violation alleged herein is subject to liability in accordance with Water Code section 13350.

CALCULATION OF CIVIL LIABILITIES UNDER WATER CODE SECTION 13350 FOR THE VIOLATION

Maximum Civil Liability for Violation of a CAO:

28. Per Water Code section 13350, civil liability administratively imposed by the Central Valley Water Board shall not exceed \$5,000 per day per violation. Staff utilized the required RMMP completion date of 31 October 2016 as a start date and used 13 November 2018, the date the Complaint was issued, as an end date for purposes of calculating the Dischargers' administrative civil liability. Therefore, the maximum statutory liability that may be assessed pursuant to section 13350 is \$3,720,000.
29. The Complaint, using the alternate approach in the 2010 Enforcement Policy, based the maximum civil liability on a reduced number of days of violation. The 2010 Enforcement Policy includes the ability for staff to use an alternative approach to calculate the penalty. Under the alternative approach, for violations that last more than thirty (30) days the liability shall not be less than an amount that is calculated based on an assessment of the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment of one day for each thirty (30) days of violation thereafter, provided that this amount is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the

illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. Staff has determined the Dischargers' failure to submit and complete a RMMP did not result in an economic benefit that can be measured on a daily basis. Therefore, staff utilized the alternate approach to penalty calculation for multiple day violations provided in the 2010 Enforcement Policy, resulting in 30 days of violation. As a result, the Complaint put the Dischargers on notice that the maximum administrative civil liability that may be assessed pursuant to section 13350 is \$150,000.

30. The 2010 Enforcement Policy states that the applicable statute sets the maximum liability, and the 2017 Enforcement Policy clarifies that the maximum liability does not include any reduction in the number of days for multiple day violations. However, because the Dischargers were put on notice that the maximum amount that the Board could impose was \$150,000, the maximum administrative civil liability that may be assessed by the Board at the February hearing is **one hundred fifty thousand dollars (\$150,000)**

Minimum Civil Liability for Violation of a CAO:

31. As provided above in paragraph 22, Water Code section 13350 requires a minimum daily penalty of \$500 per day for each day there is a CAO violation and a discharge occurs, and \$100 per day for each day there is a CAO violation without a discharge. Due to the Dischargers' failure to implement the requirements of the final CAO, it is reasonable to conclude that discharges of wastes to waters of the State occurred and that the beneficial uses of receiving waters were impacted. Central Valley Water Board staff, however, do not have sufficient information to determine how many days during the violation period that discharges occurred, nor can staff estimate volume of sediment-laden water discharged from the Site. Accordingly, staff used the daily statutory minimum of \$100 per day utilizing the alternative approach to penalty calculation for multiple day violations per the 2010 Enforcement Policy, resulting in 30 days of violation. Therefore, the statutory minimum under Water Code section 13350 is **three thousand dollars (\$3,000)**.
32. Additionally, the Enforcement Policy provides that civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. Using the US EPA's BEN model and highly conservative calculations for total delayed and avoided costs, the economic benefit gained by non-compliance is calculated to be approximately **\$3,037** which becomes the minimum civil liability which must be assessed pursuant to section 13350 and the Enforcement Policy. In addition, the Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the economic benefit so that liabilities are not construed as the cost of doing business and provide a meaningful deterrent to future violations, which is calculated to be approximately **\$3,341**.
33. Accordingly, the minimum liability that the Central Valley Water Board should impose for the Violation, in accordance with Enforcement Policy, is **three thousand three-hundred and forty-one dollars (\$3,341)**.

ADMINISTRATIVE CIVIL LIABILITY

34. Pursuant to Water Code section 13327, in determining the amount of any civil liability imposed, the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
35. The State Water Board, the Regional Water Quality Control Boards (Regional Water Boards), and the Office of Enforcement (OE) rely on the Enforcement Policy as a regulatory document to bring enforcement actions for violations of California's water quality laws. The "2010 Enforcement Policy" version, adopted in 2009 and approved in 2010, directs the State Water Board to "review and revise" the Enforcement Policy every five years. (State Water Board, Water Quality Enforcement Policy (2010), p. 31, §8.) Pursuant to that directive, the State Water Board approved the 2017 amendments ("2017 Enforcement Policy") on 4 April 2017, and on 5 October 2017 the 2017 Enforcement Policy became effective.
36. The State and Regional Water Boards and OE should rely on the version of the Enforcement Policy's substantive requirements in effect at the time of the violation to prosecute any violations. The Violation occurred on 31 October 2016, prior to the effective date of the 2017 Enforcement Policy. Therefore, substantive changes from the 2017 Enforcement Policy will not be applied and the 2010 Enforcement policy will be utilized. However, several non-substantive changes contained in the 2017 Enforcement Policy can be utilized when bringing enforcement actions that are related to conduct prior to the 2017 Enforcement Policy's effective date. Changes that are clarifications or procedural changes can be applied immediately and will be applied to the Violation accordingly.
37. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A to this Order. The civil liability takes into account such factors as the Dischargers' culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
38. As described above, the maximum penalty that can be imposed against the Dischargers for the Violation is **\$150,000**, and the minimum penalty, in accordance with the Enforcement Policy and Water Code section 13350 is **\$3,341**. Based on consideration of the above facts, after applying the penalty methodology, and considering the Dischargers' ability to pay, the Central Valley Water Board finds that civil liability shall be imposed administratively against the Dischargers in the amount of **\$150,000**. The specific factors considered in this penalty are detailed in Attachment A of this Order.
39. Notwithstanding the issuance of this Order, the Central Valley Water Board retains the authority to assess additional penalties for violations of the final CAO for which penalties have not yet been assessed or for violations that may subsequently occur.
40. Issuance of this Administrative Civil Liability Order to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources

Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, sections 15307, 15308, 15321(a)(2) and all applicable law.

IT IS HEREBY ORDERED, pursuant to Water Code sections 13323 and 13350 that:

1. **No later than 30 days from the date on which this Order is issued**, Kongkeo Khamvongsa and Alexandra Kensavath shall pay **one hundred fifty thousand dollars (\$150,000)**. The liability imposed is based upon a review of the factors cited in Water Code section 13327 and the State Water Resources Control Board's 2010 Water Quality Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violations.
2. Payment shall be made to the Waste Discharge Permit Fund (in accordance with Water Code section 13350 (k)) and shall be remitted to the Central Valley Water Board at 11020 Sun Center Drive, Suite 200, Rancho Cordova, California, 95670-6114.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulation, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at:

http://www.waterboards.ca.gov/public_notices/petitions/water_quality

or will be provided upon request.

I, Patrick Pulupa, , Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 7 February 2018.

PATRICK PULUPA, Executive Officer

Attachment A: Penalty Calculations

Attachment A – ACL Order No. R5-2019-0004
Specific Factors Considered for Administrative Civil Liability
Kongkeo Khamvongsa and Alexandra Kensavath Parcel Number 043-060-018-000,
Shasta County

The State Water Resource Control Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13350, subdivision (e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score.

The 2010 Enforcement Policy was adopted in 2009, approved in 2010 and still remains in effect for violations that occurred prior to the effective date of the 2017 Enforcement Policy¹. The terms of the 2010 Enforcement Policy direct the State Water Board to “review and revise” the Enforcement Policy every five years. (State Water Board, *Water Quality Enforcement Policy* (2010), p. 31, §8.) Pursuant to that directive, the board approved the 2017 amendments (“2017 Enforcement Policy”) on 4 April 2017, and the 2017 Enforcement Policy became effective on October 5, 2017².

The Water Boards and Office of Enforcement (OE) should rely on the version of the Enforcement Policy’s substantive requirements in effect at the time of the violation to prosecute any violations. Several aspects of the 2017 Enforcement Policy can be utilized when bringing enforcement actions that are related to conduct prior to the 2017 Enforcement Policy’s effective date. Changes that are clarifications or procedural changes can be applied immediately. Substantive changes, in contrast, can only be applied to violations that occur after the effective date of the 2017 Enforcement Policy.

The Violation occurred on 31 October 2016, prior to the effective date of the 2017 Enforcement Policy. Therefore, substantive changes from the 2017 Enforcement Policy will not be applied and the 2010 Enforcement policy will be utilized. However, clarifications or procedural changes from the 2017 Enforcement Policy have been incorporated herein.

VIOLATION – NON-COMPLIANCE WITH CLEANUP AND ABATEMENT ORDER R5-2016-0712

Step 1 – Actual or Potential for Harm for Discharge Violations

The Enforcement Policy states that calculating the actual harm or potential for harm of discharge violations is the initial step for discharge violations. In this case, this factor does not

¹ Guidance on the application of the 2017 Enforcement Policy, as compared to the 2010 Enforcement Policy can be found at:
https://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/2017/final_enforcement_policy_memo.pdf

² The 2017 Enforcement Policy can be found at:
https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

apply because the violation is for non-compliance with the issued Cleanup and Abatement Order (final CAO), a non-discharge violation.

Step 2 – Assessments for Discharge Violations

This step addresses per gallon and per day assessments for discharge violations. In this case, this factor does not apply because the violation is for non-compliance with the issued final CAO, a non-discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Central Valley Water Board shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. Using the matrix set forth in Table 3, a Per Day Factor multiplier is determined. The per day assessment for non-discharge violation is determined by multiplying the Per Day Factor by the maximum per day amount allowed under the California Water Code.

Potential for Harm

The definitions for Minor, Moderate, and Major Potential for Harm were considered substantive changes in the 2017 enforcement policy, therefore the potential for harm categories from the 2010 enforcement policy were used and are as follows:

Minor – The characteristics of the violation present only a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm.

Moderate – The characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.

Major – The characteristics of the violation present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm.- Additionally, non-discharge violations involving particularly sensitive habitats, should be considered major.

The Dischargers failed to implement requirements of the final CAO, including implementation of a Restoration, Monitoring, and Mitigation Plan (RMMP) to mitigate the potential for discharges to waters of the State. By not implementing the requirements of the final CAO, the Site continues to discharge or threatens to discharge earthen materials, soil, and sediment to surface waters of the State, impacting water quality and the Beneficial Uses of receiving waters. As documented during the Site inspections (Appendix 2 of Attachment B, and Appendix 3 of Attachment E), the discharges or threat of discharges to Class III tributaries of Fidler Creek, a tributary of the Middle Fork Cottonwood Creek, are a result of grading activities performed at the site for cannabis cultivation operations. Due to the extent and nature of the grading activities, erosion leading to sediment discharge has occurred, or threatens to occur, to waters of the State. Therefore, staff have determined that this violation presents a **Moderate Potential for Harm**.

Deviation from Requirement

The Enforcement Policy provides the following categories for Deviation from Requirement:

Minor – The intended effectiveness of the requirement remains generally intact (e.g., while the requirement was not met, there is general intent by the discharger to follow the requirement).

Moderate – The intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved).

Major – The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

The Dischargers failed to complete the required RMMP outlined in the CAO. By not completing the RMMP, a requirement of the CAO, the CAO has been rendered ineffective in its essential function. Therefore, the Deviation from Requirement for this Violation is determined to be **Major**.

Per Day Factor

The Per Day Factor, utilizing a Moderate Potential for Harm and Major Deviation from Requirement is **0.6**. The per day factor utilized is on the higher range of Moderate Potential for Harm and Major Deviation from Requirement due to the amount of clearing and grading activities conducted at the site, which have resulted in unauthorized discharges or threatened discharges of wastes to surface waters and surface water drainage courses. Materials added on to the dam crest and downstream dam face have been subject to tension cracks and rill and gully erosion and have discharged or threaten to discharge to Fidler Creek. In addition, due to the lack of a spillway or other outlet works, the entire dam structure is at risk of overtopping and failing. These site conditions continue to discharge or present a threat of discharge to waters of the State as a result of the Dischargers' failure to perform the actions required under the final CAO.

Days of Violation

On 27 June 2016, the Assistant Executive Officer of the Central Valley Water Board issued Cleanup and Abatement Order R5-2016-0712 to the Dischargers, which required the Dischargers to submit an RMMP and complete the restoration and mitigation measures described in the approved RMMP by 31 October 2016. To date, the Dischargers have not completed implementation of the RMMP. The Dischargers have been in violation for 744 days (using 13 November 2018, the date of Administrative Civil Liability Complaint R5-2018-0529 issuance as the end date).

Violations under Water Code section 13350 are assessed on a per day basis. However, the violations at issue qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 18). Under that approach, for violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2)

results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Dischargers' failure to submit and complete a RMMP results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with costs of delayed and avoided costs that would have been accrued during completion of the required actions in the final CAO, including development and completion of an approved RMMP.

The above finding justifies use of the alternate approach to penalty calculation for multiple day violations. The minimum number of days of violation to be assessed in this case under the alternate approach is 30.

Initial Liability Amount:

The initial liability amount for the violation calculated on a per-day basis is as follows:

$$(\text{Maximum per day liability}) \times (\text{Assessed number of days}) \times (\text{Per day factor})$$

Initial Liability: \$5,000/day X 30 days X .60 = **\$90,000**.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Culpability

The changes to this factor under the 2017 Enforcement Policy were substantive in nature. Therefore, because the violation occurred prior to the effective date of the 2017 Enforcement Policy, the 2010 Enforcement Policy was used to determine the Dischargers' Culpability.

The Central Valley Water Board should consider a discharger's degree of culpability regarding the violation. Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Dischargers hired a consultant and submitted an initial work plan in response to the 8 July 2015 Notice of Violation; however, they did not complete the corrective actions outlined in that work plan. The dischargers were aware of the requirements to remediate the Site based on their initial response, however they did not act upon that knowledge and have not completed any remediation actions. As a result, the Central Valley Water Board had to issue the final CAO to require the Dischargers to clean up and abate the discharges and threatened discharges of sediment and earthen material into tributaries of Fidler Creek. To date, the Dischargers have not complied with the requirements of the CAO. The Dischargers were given a multiplier value of **1.4**, accordingly.

Cleanup and Cooperation

Changes to this factor under the 2017 Enforcement Policy were non-substantive. Therefore, Staff incorporated the clarifications in the 2017 Enforcement Policy while assessing the Dischargers' Cleanup and Cooperation.

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers failed to respond to three Notices of Violation that were sent after issuance of the final CAO. The Dischargers have not completed the work required under the final CAO and have actively expanded the cannabis cultivation operations since issuance of the order. Therefore, the Dischargers were given a multiplier value of **1.5**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy indicates a minimum multiplier of 1.1 to be used. The Dischargers were given a multiplier of **1.0** because there is no evidence that they have a history of violations with the Water Boards.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

Total Base Liability Amount: This value is calculated as the Initial Liability Amount (\$150,000) x Adjustment Factors (1.4) (1.5) (1.0) and is equal to **\$189,000**. However, because the Maximum Penalty set forth within the Complaint is \$150,000, the Total Base Liability becomes **\$150,000**.

The following factors apply to the Total Base Liability Amount for the violation discussed above.

Step 6 - Ability to Pay and Ability to Continue in Business

Clarification, non-substantive, changes have been made in the 2017 Enforcement Policy, therefore the 2017 Enforcement Policy was used for Ability to Pay and Ability to Continue Business.

If the Central Valley Water Board has sufficient financial information necessary to assess the violator's ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in business. Staff do not have any evidence to suggest that the Dischargers may be able to pay the total base liability amount of \$150,000. The Dischargers do have the ability to pay some of the total base liability amount based on the fact that the Dischargers own at least one real property (see Table 1 for list of properties and assessed values). The tax assessor value of the property is \$67,624. Some or all of the property may be encumbered by loans and/or mortgages but the exact amount of those encumbrances is unknown.

In addition, utilizing a basic internet search, it appears that discharger Kongkeo Khamvongsa is possibly currently employed as an engineering technician at Critcare Systems, Inc, with a reported income of \$60,000 to \$70,000, and a net worth value of \$10,000 to \$25,000. Staff were unable to identify sufficient evidence regarding additional ability to pay for Alexandra Kensavath, other than joint ownership of one real property listed in Table 1.

Table 1

Property APN	County	Listed Owner	Assessment Year	Assessed Value
043-060-018-000	Shasta	Kongkeo Khamvongsa and Alexandra Kensavath	2018	\$ 67,624
Total Assessed Value for all Properties				\$ 67,626

Step 7 – Economic Benefit

Pursuant to the Enforcement Policy, the Economic Benefit Amount shall be estimated for every violation. The Economic Benefit is defined as any savings or monetary gain derived from the act or omission that constitutes the violation.

The Dischargers’ economic benefit for non-compliance with the final CAO is calculated from the delayed and avoided costs that would have been accrued during completion of the required actions in the final CAO, including development, completion and final completion report for implementation of the required Restoration, Monitoring, and Mitigation Plan (RMMP). The calculation was completed using the US EPA’s BEN computer program and is equal to the present value of the avoided costs plus the “interest” on delayed costs. This calculation reflects the fact that a discharger has had the use of the money that should have been used to avoid the instance of non-compliance. The total Benefit of Noncompliance to the Dischargers in regards to this violation is calculated to be **\$3,037**.

The Enforcement Policy states (p. 21) that the Total Base Liability Amount should be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. Therefore, the economic benefit plus 10% is estimated to be **\$3,341**.

While calculating the economic benefit, due to recent changes in Federal tax law, the BEN computer program produced results that could not be considered accurate when including tax deductibility. Due to this, and that the Discharger was operating the cannabis cultivation site illegally and outside of traditional business practices, the tax deductibility component was removed from the analysis.

Additionally, Water Code section 13350 requires a minimum daily penalty of \$500 per day for each day there is a CAO violation and a discharge occurs, and \$100 per day for each day there is a CAO violation without a discharge. Since the Dischargers have been in violation of the CAO requirement to complete a RMMP since 31 October 2016, the statutory minimum under 13350, utilizing \$100 per day, is **\$3,000**.

To avoid undermining the purposes of the Water Code and the Enforcement Policy, the higher of the two minimums (i.e., \$3,341) is used in this analysis.

Step 8 – Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being imposed. These values are calculated in the ACL Order, and the values are repeated here.

Maximum Liability Amount: \$150,000³

Minimum Liability Amount: \$3,000

Step 10 – Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement policy, the final liability amount for the violation is **\$150,000**.

³ This amount represents the maximum liability amount as set forth in the Complaint. This amount does not represent the maximum civil liability provided under section 13350 of the Water Code for this violation.