

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

Administrative Civil Liability Complaint No. R1-2022-0039

**In the Matter of:
Kou Xiong and Susan Yang Xiong**

**11 North Meadow Lane
Hayfork, CA 96041**

**Assessor's Parcel Number (APN) 015-420-027-00
Trinity County**

This Administrative Civil Liability Complaint (Complaint), is issued by the Assistant Executive Officer of the North Coast Regional Water Quality Control Board (Regional Water Board) to Kou Xiong and Susan Yang Xiong (hereinafter collectively referred to as the Dischargers) for: (1) failure to submit a report required under Required Action No. 1 of the Regional Water Board Cleanup and Abatement and 13267 Order No. R1-2021-0040 (Cleanup and Abatement Order or CAO) in violation of Water Code, section 13267; and (2) failure to implement and complete restoration construction and/or abatement measures required under Required Action No. 4 of the CAO in violation of Water Code, section 13304. This Complaint is issued pursuant to California Water Code (Water Code) section 13323, which authorizes the Executive Officer to issue this Complaint, and Water Code Division 7, which authorizes the delegation of the Executive Officer's issuing authority to a deputy, in this case, the Assistant Executive Officer.

The Assistant Executive Officer of the Regional Water Board hereby alleges that:

BACKGROUND

1. On June 26, 2019, the California Department of Fish and Wildlife (CDFW), Watershed Enforcement Team (WET) executed a search warrant on Trinity County APN 015-420-27-00 (the Property) that it obtained from the Trinity County Superior Court. Staff of the State Water Board Office of Enforcement and Division of Water Rights (the Division) attended this warrant-based inspection of the Property located at 11 North Meadow Lane, approximately four miles northeast of Hayfork in Trinity

County. Barker Creek, a Class I watercourse¹, is located on the east side of the Property and an unnamed Class III watercourse² tributary to Barker Creek passes through the eastern portion of the Property. Barker Creek, and its unnamed tributaries are waters of the state, as well as waters of the United States.

2. During the inspection, staff documented site conditions on the Property constituting threats to water quality and beneficial uses. The Dischargers caused or allowed the discharge and/or threatened discharge of waste to receiving waters through site development, including placement of fill material in a tributary to Barker Creek; installation of a concrete diversion structure in a tributary to Barker Creek; construction of an off-stream water storage pond, redirection of a section of the tributary, discharge of cultivation tailwater and storm water from a drainage pipe; improper containment of wastewater, discharge of solid waste and domestic greywater; and erosion of the main access road above a tributary to Barker Creek. Cannabis cultivation and associated activities at the Property were conducted without adequate best management practices to ensure water quality protection. The Dischargers' activities, resulting in discharge and threatened discharge, were conducted without authorization from applicable federal, state, and local agencies, including the Regional Water Board.
3. Information available from Trinity County Recorder's Office accessed by State Water Resource Control Board (State Water Board), Cannabis Enforcement Unit staff via Digital Map Products' LandVision™ service shows the following information relevant to this case:
 - a. On February 27, 2014, Susan Yang Xiong purchased approximately 3.7 acres of land, identified as Trinity County APN 015-420-27-00 (hereinafter referred to as the Property from Evan D. Barrow and Lisa T. Barrow.
 - b. On October 7, 2020, Susan Yang Xiong transferred ownership of the Property to Kou Xiong and recorded the transfer of the Property.
 - c. On May 4, 2022, Kou Xiong transferred ownership of his last known residence in Shasta County to Kong Meng Yang and recorded the transfer. Although Kou

¹ The California Forest Practice Rules (FPR) designate watercourse (stream) classification and lake protection zones, protective measures based on the beneficial use, and whether the watercourse is natural or manmade. (California Code of Regulations, title 14, Chapter 4, Subchapters 4, 5, and 6.) To qualify as a Perennial watercourse (Class I) there must be: (1) In the absence of diversions, water is flowing for more than nine months during a typical year (2) Fish always or seasonally present onsite or includes habitat to sustain fish migration and spawning, and/or (3) Spring, an area where there is concentrated discharge of ground water that flows at the ground surface. A spring may flow any part of the year.

² To qualify as an Ephemeral watercourse (Class III) there must be: In the absence of diversion, water is flowing less than three months during a typical year and the stream does not support riparian vegetation or aquatic life. Ephemeral watercourses typically have water flowing for a short duration after precipitation events or snowmelt and show evidence of being capable of sediment transport.

Xiong is still the owner of the Property, no known current mailing address is available for Kou Xiong.

4. Google Earth historic satellite imagery of the Site from 2004 through 2022 revealed during Ms. Susan Yang Xiong's ownership of the Property the cannabis cultivation operation expanded significantly from one outdoor cannabis cultivation plot with few cannabis plants to ultimately resemble the two outdoor cannabis cultivations plots and twice as many plants in the first plot observed during the June 26, 2019, inspection. Imagery from the Property in July 2021 and July 2022 indicate that cannabis cultivation continued on the Property after the June 26, 2019 inspection.
5. Peter Xiong (Susan Yang Xiong's ex-husband) was the operator onsite during the June 26, 2019 inspection. The State Water Board Division of Water Rights issued a Notice of Violation for unpermitted water use to Mr. Peter Xiong and signed by Mr. Peter Xiong at the conclusion of the inspection.
6. As a previous owner of this Property, and/or the person discharging waste or creating conditions that threaten to discharge waste to waters of the state, Ms. Susan Yang Xiong is identified as responsible for the condition of this Property and discharges of wastes emanating from this Property. As the current owner of the Property, Kou Xiong is responsible for the condition of the Property and discharges of waste emanating from the Property. Susan Yang Xiong and Kou Xiong are responsible for the cleanup associated with the following:
 - a. Placement of fill material and a concrete diversion structure in a tributary to Barker Creek³;
 - b. Permitted waste to be discharged or deposited where it is, or probably will be, discharged into an ephemeral watercourse, the unnamed tributary to Barker Creek; and
 - c. Created and/or threaten to create a condition of pollution by unreasonably impacting water quality and beneficial uses of the unnamed tributary to Barker Creek and subsequently to the South Fork Trinity River Hydrologic Area, which are considered waters of the state, and waters of the United States.
7. The Regional Water Board is the public agency with primary responsibility for the protection of groundwater and surface water quality for all beneficial uses within the north coast region of the State of California.
8. The *Water Quality Control Plan for the North Coast Region* (Basin Plan) identifies the following existing and potential beneficial uses for the Hayfork Valley Hydrologic

³ Barker Creek is a tributary to Hayfork Creek, which is in the Hayfork Valley Hydrologic Subarea, and tributary to the South Fork Trinity River in the South Fork Trinity River Hydrological Area of the Trinity River Hydrologic Unit. The South Fork Trinity River is a tributary to the Trinity River, a tributary to the Klamath River.

Sub Area (Basin Plan, pp. 2-7) within the South Fork Trinity River Hydrologic Area, in the Trinity River Hydrologic Unit include the following:

- a. Municipal and Domestic Supply
- b. Agricultural Supply
- c. Industrial Service Supply
- d. Industrial Process Supply
- e. Groundwater Recharge
- f. Freshwater Replenishment
- g. Water Contact Recreation
- h. Non-Contact Water Recreation
- i. Commercial or Sport Fishing
- j. Cold Freshwater Habitat
- k. Wildlife Habitat
- l. Rare, Threatened, or Endangered Species
- m. Migration of Aquatic Organisms
- n. Spawning, Reproduction, and/or Early Development

Beneficial uses of any specifically identified water body generally apply to all of its tributaries.

9. The Trinity River supports many aquatic species, including fall run Chinook Salmon, Coho Salmon, and the Steelhead Trout.

The Basin Plan contains water quality objectives that are necessary for reasonable protection of the beneficial uses. Protection of fishery-related beneficial uses (i.e., Cold Freshwater Habitat; Commercial and Sport Fishing; Spawning, Reproduction, and/or Early Development; Rare, Threatened, or Endangered Species; and Migration of Aquatic Organisms) is of particular importance, including from the following pollutants:

- Sediment (Section 3.3.11) “The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.”
- Suspended Material (Section 3.3.13) “Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.”
- Turbidity (Section 3.3.17) “Turbidity shall not be increased more than 20 percent above naturally occurring background levels.”

10. The Basin Plan (Section 4.2.1) contains the *Action Plan for Logging, Construction, And Associated Activities*, which includes the following waste discharge prohibitions:

- “The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever

nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.”

- “The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.”

11. The federal Clean Water Act section 303(d) list identifies the South Fork Trinity River Watershed as impaired due to elevated sedimentation/siltation and high-water temperature.

On November 29, 2004, the Regional Water Board adopted the *Total Maximum Daily Load Implementation Policy Statement for Sediment Impaired Receiving Waters in the North Coast Region* (also known as the Sediment TMDL Implementation Policy) through Resolution R1-2004-0087. The goals of this Policy are to control sediment waste discharges to impaired water bodies so that the TMDLs are met, sediment water quality objectives are attained, and beneficial uses are no longer adversely affected by sediment.

The Sediment TMDL Implementation Policy states that the Executive Officer is directed to “rely on the use of all available authorities, including the existing regulatory standards, and permitting and enforcement tools to more effectively and efficaciously pursue compliance with sediment-related standards by all dischargers of sediment waste.”

ENFORCEMENT ACTIONS

12. On November 12, 2019, based on the findings documented during the June 26, 2019 inspection, State Water Board staff issued a Notice of Violation (NOV) to Ms. Susan Yang Xiong that included a copy of the Cannabis Water Quality Inspection memo dated on August 23, 2019. The NOV documents the water quality concerns and violations that staff observed on the Property, including the following:

- i. Unauthorized discharge of an unpermitted concrete diversion structure in a tributary to Barker Creek;
- ii. The unauthorized discharge of spent growth media and perlite in a tributary to Barker Creek;
- iii. Unpermitted outdoor cannabis cultivation as close as 22 feet with the potential to discharge to a tributary to Barker Creek;
- iv. Evidence of domestic wastewater discharged from a mobile home onto the ground with the potential to discharge to a tributary to Barker Creek;
- v. Evidence of discharge of an unknown oily liquid from a portable generator located along the bank of Barker Creek with the potential to discharge to Barker Creek;

- vi. Evidence of discharge of domestic wastewater onto the ground under a makeshift kitchen sink with the potential to discharge to a tributary to Barker Creek;
- vii. A recently excavated off-stream water storage pond for water diversion from a tributary to Barker Creek with the potential to discharge to a tributary to Barker Creek;
- viii. An open trash container filled with an unknown bright green liquid located near a tributary to Barker Creek with the potential to discharge to a tributary to Barker Creek;
- ix. Evidence of burnt solid waste on the ground with potential to discharge to a tributary to Barker Creek; and
- x. Poor housekeeping practices associated with cannabis cultivation activities, including inadequate containment and storage of petroleum containers, cultivation-related waste, and fertilizers, allowing for potential discharges of pollutants to surface water and groundwater.

The NOV included a request for a plan to be submitted to the State Water Board by December 16, 2019, for mitigation of the discharges and threatened discharges associated with cannabis cultivation site development/operation and to comply with Water Code section 13260 by obtaining regulatory coverage under the *State Water Board Order WQ-2019-0001- DWQ, General Waste Discharge Requirements and Waiver of Waste Discharge Requirements for Discharges of Waste Associated with Cannabis Cultivation Activities* (Cannabis General Order) for the cannabis cultivation activities observed on the Property during the inspection. The NOV, which was sent via certified mail to Ms. Susan Yang Xiong, was returned to the State Water Board marked as unclaimed on December 18, 2019. On December 12, 2019, the NOV was resent via FedEx with no signature requirement. The FedEx proof-of-delivery shows the NOV was delivered on December 13, 2019. The Dischargers did not reply to staff, nor did they obtain regulatory coverage under Water Code section 13260.

13. A draft CAO was issued by the Assistant Executive Officer of the Regional Board via certified mail addressed to the Dischargers and Peter Xiong on April 27, 2021, for failing to comply with the issued NOV. As the previous owners and operator of cannabis cultivation on this Property, and/or the persons discharging waste or responsible for conditions that threaten to discharge waste to waters of the state, staff identified the Dischargers as responsible for the condition of this Property. The Assistant Executive Officer included a comment period of 30 days for the Dischargers to provide comments on the draft CAO to staff. The draft CAO, which was sent via certified mail to the Dischargers, were returned to the State Water Board marked as unclaimed.
14. On June 23, 2021, the Assistant Executive Officer of the Regional Board reissued the draft CAO via certified mail addressed to the Dischargers at the five addresses. The draft CAO was sent via FedEx and Golden State Overnight delivery service because letters issued via certified mail were unclaimed. The FedEx and Golden

State Overnight delivery service proof-of-delivery show the draft CAO was delivered to the Dischargers on June 24, 2021. State Water Board staff did not receive comments on the reissued draft CAO and was not contacted by Ms. Susan Yang Xiong and Mr. Kou Xiong within the 30 days comments period. Staff distributed the draft CAO to Mr. Peter Xiong at multiple addresses, however, staff was ultimately unsuccessful in identifying the correct address/location of the individual and removed him as a responsible party in the final CAO.

15. On August 11, 2021, the Executive Officer of the Regional Water Board issued CAO No. R1-2021-0040 and sent it via process server for personal service to the Dischargers. The CAO directed the Dischargers to (1) submit a proposed Cleanup, Restoration, and Monitoring Plan (CRMP) required under Required Action No. 1 of the CAO by September 17, 2021 for Executive Officer approval; (2) implement and complete restoration construction and/or abatement measures from an approved CRMP required under Required Action No. 4 of the CAO by October 31, 2021; and (3) submit a Completion Report required under Required Action No. 5 of the Order by December 17, 2021. ACE Attorney Services, Inc. (ACE), the process server, provided delivery notes and information regarding its multiple attempts to serve the CAO to the Dischargers. ACE made six attempts at multiple addresses to serve the final CAO to the Dischargers with no success, the CAO was ultimately posted near entrances to the addresses. According to ACE, cannabis cultivation was observed by ACE's employee while attempting to serve the CAO to Mr. Kou Xiong. ACE located a resident at the Anderson, California address who refused to accept the letter, claimed he was not associated with either of the Dischargers, and told the server not to return to that address. Per records from the Trinity County Assessor-Recorder's office, as presented in Digital Map Products' LandVision™ online service, the address located in Anderson, California was the most current location for Kou Xiong. The Dischargers did not reply to staff, nor did they take steps to comply with the required actions on the Property.
17. On January 20, 2022, Regional Water Board staff issued a Notice of Violation for Failure to Comply with Cleanup and Abatement and Water Code Section 13267 Order No. R1-2021-0040 Required Action Nos. 1, 4, and 5 to the Dischargers. The NOV of the CAO required the Dischargers to submit the CRMP for approval as soon as possible. The NOV of the CAO informed the Dischargers that they are in violation of (1) Water Code section 13267 for failure to submit a CRMP by September 17, 2021; (2) Water Code section 13304 for failure to implement and complete the CRMP by October 31, 2021; and (3) Water Code section 13267 for failure to submit a Completion Report by December 17, 2021. The letter also informed the Dischargers of the potential for administrative civil liability pursuant to Water Code sections 13268, 13350, and 13385. The NOV of the CAO was issued via FedEx with signature. The NOV of the CAO was returned to the State Water Board as unsigned.
18. On February 24, 2022, a second NOV of the CAO along with a version translated into the Hmong language were issued to the Dischargers. The second NOV of the CAO required the Dischargers to submit the CRMP for approval as soon as possible. The

second NOV of the CAO notified the Dischargers of their continuing failure to comply with the CAO. The FedEx proof-of-delivery confirmed the second NOV of the CAO were delivered to both of the Dischargers.

19. On April 7, 2022, a final NOV of the CAO along with a version translated into the Hmong language were issued to the Dischargers. The final NOV of the CAO required the Dischargers to submit the CRMP for approval as soon as possible. The final NOV of the CAO was issued via FedEx without signature requirement. The FedEx proof-of-delivery confirmed the final NOV of the CAO was delivered to Susan Yang Xiong and Kou Xiong.

ALLEGED VIOLATIONS

16. **Violation 1:** The Prosecution Team⁴ alleges that the Dischargers violated CAO Required Action No. 1 for failure to submit a CRMP by September 17, 2021, pursuant to Water Code section 13267.
17. **Violation 2:** The Prosecution Team alleges that the Dischargers violated CAO Required Action No. 4 for failure to implement and complete the CRMP by October 31, 2021, pursuant to Water Code section 13304.

LEGAL AND REGULATORY CONSIDERATIONS

18. The CAO directive to submit a CRMP was issued pursuant Water Code section 13267.
19. The CAO directives to implement corrective actions on the Property were issued pursuant Water Code section 13304, subdivision (a).

WATER CODE AUTHORITY FOR IMPOSING ADMINISTRATIVE CIVIL LIABILITY

20. Water Code section 13268 provides that the Regional Water Board may impose civil liability administratively to any person who fails to submit reports as required under Water Code section 13267 in an amount not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
21. Water Code section 13350 states, in relevant part:

(a) A person who:

⁴ To maintain impartiality of the Regional Water Board during potential enforcement hearings, as a standard practice in progressive enforcement cases, staff organizes a group of staff that works on case development (the Prosecution Team), which consists of the Assistant Executive Officer as the lead prosecutor together with staff that has inspected the site and reviewed associated enforcement documents. Another group of staff that has not been involved in the enforcement case can help advise the Regional Water Board (the Advisory Team).

(1) violates a ... cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board...

(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.

WATER QUALITY ENFORCEMENT POLICY

22. On April 4, 2017, the State Water Board adopted Resolution No. 2017-0020, which adopted the 2017 Water Quality Enforcement Policy (2017 Enforcement Policy). The Office of Administrative Law approved the 2017 Enforcement Policy and it became effective on October 5, 2017. The 2017 Enforcement Policy establishes a methodology for assessing administrative civil liability that addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code sections 13327 and 13385, subdivision (e).

23. The alleged violations are subject to liability in accordance with Water Code sections 13268 and 13350, respectively. Administrative civil liabilities under each of these sections are subject to the factors set forth in Water Code section 13327. The Prosecution Team has considered the required factors for the alleged violations using the methodology in the 2017 Enforcement Policy, as described in Attachment A to this Complaint.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

24. Issuance of this Complaint to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code §

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

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

25. The Prosecution Team proposes the assessment of an administrative civil liability in the amount of **\$506,813** for Violations 1 and 2 as detailed in Attachment A to this Complaint. The Prosecution Team calculated the proposed administrative civil liability amount from the use of the penalty methodology in the 2017 Enforcement Policy. The proposed administrative civil liability takes into account the factors described in Water Code section 13327, such as the Dischargers' culpability, history of violations, ability to pay, and other factors as justice may require.
26. Notwithstanding the issuance of this Complaint, the Regional Water Board retains the authority to assess additional administrative civil liability for violations that have not yet been assessed or for violations that may subsequently occur.

MAXIMUM STATUTORY LIABILITY

27. Violation 1: Pursuant to Water Code section 13268, subdivision (b)(1), civil liability may be imposed by a regional board administratively in accordance with Article 2.5 (commencing with Section 13323) on a daily basis in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Dischargers failed to submit the required CRMP for **357 days** from September 17, 2021 to September 9, 2022. The statutory maximum liability for Violation 1 is \$357,000 [(\$1,000/day) x 357 days].
28. Violation 2: Pursuant to Water Code section 13350, subdivision (e)(1), civil liability may be imposed by a regional board administratively in accordance with Article 2.5 (commencing with Section 13323) on a daily basis in an amount up to five thousand dollars (\$5,000) for each day the violation occurs. The Dischargers failed to implement corrective actions for **313 days** from October 31, 2021 to September 9, 2022. The statutory maximum liability for Violation 2 is \$1,565,000 [(\$5,000/day) x 313 days].
29. The proposed administrative civil liability considers the statutory maximum liability for each violation.

MINIMUM LIABILITY

30. Violation 1: There is no statutory minimum liability for this Violation.
31. Violation 2: Water Code section 13350 (e), requires that when pursuing civil liability under section 13350 (e)(1)(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." The minimum liability that may be imposed for this violation is **\$31,300**.

32. The 2017 Enforcement Policy further requires the Regional Water Board to recover, at a minimum, the economic benefit plus 10%. Attachment C includes a detailed explanation of the basis of this calculation. 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 **\$2,009**. 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 **\$2,209**. The proposed administrative civil liability is more than the minimum liability amount for either Violation. Since the statutory minimum liability is greater than the calculated economic benefit plus 10%, the statutory minimum liability in the amount of \$31,300 becomes the applicable minimum for use in this analysis.

THE DISCHARGER IS HEREBY GIVEN NOTICE THAT:

33. The Assistant Executive Officer of the Regional Water Board proposes an administrative civil liability in the amount of **\$506,813**. The amount of the proposed administrative civil liability is based upon a review of the factors cited in Water Code sections, 13350, subdivision (e), and 13327, as well as the 2017 Enforcement Policy.
34. The Regional Water Board will hold a hearing on this Complaint on a date proposed by the Regional Water Board Advisory Team, likely December 8-9, 2022. The meeting will be held in Sonoma County, California, at a location to be announced, or at a location posted on the [Regional Water Board's website](#), unless the Dischargers do one of the following by the **September 27, 2022** deadline to submit the Waiver Form (Attachment B):
- a. The Dischargers waive the right to a hearing by completing the attached Waiver Form (checking the box next to Option 1) and returning it to the Regional Water Board, along with payment for the proposed administrative civil liability amount of **\$506,813**; or
 - b. The Regional Water Board agrees to postpone any necessary hearing after the Dischargers request a delay so that they may have additional time to discuss settlement and/or prepare for the hearing by checking the box next to Option 2 on the attached Waiver Form and returning it to the Regional Water Board along with a letter describing the items to be discussed.
35. If the Dischargers have any questions about the waiver or wish to request an extension to the date, they should contact the Advisory Team.
36. If a hearing is held, it will be governed by the Notice of Public Hearing and Hearing Procedures that will be provided by the Regional Water Board Advisory Team.

37. During the hearing, the Regional Water Board will hear testimony and arguments and affirm, reject, or modify the proposed administrative civil liability, or determine whether to refer the matter to the Attorney General for recovery of judicial civil liability.
38. The Assistant Executive Officer reserves the right to amend the proposed amount of administrative civil liability to conform to the evidence presented.
39. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not administrative proceedings. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405(2), p. 510.


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Claudia E. Villacorta
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Claudia E. Villacorta, P.E.
Assistant Executive Officer

Date

Attachments:

- A. Penalty Methodology
- B. Hearing Waiver Form

Attachment A
Penalty Methodology for
Administrative Civil Liability Complaint No. R1-2022-0039:
Factors Considered in Developing Recommended Civil Liability
Kou Xiong and Susan Yang Xiong

11 North Meadow Lane
Hayfork, CA 96041

Assessor's Parcel Number (APN) 015-420-027-000

Trinity County

This technical analysis provides a summary of factual and analytical evidence that support the findings in Administrative Civil Liability Complaint No. R1-2022-0039 (Complaint) and the recommended assessment of administrative civil liability (ACL) in the amount of \$506,812.50. The Complaint alleges that Kou Xiong and Susan Yang Xiong (hereinafter collectively referred to as the Dischargers), have failed to implement the requirements of the North Coast Regional Water Quality Control Board's (Regional Water Board's) Cleanup and Abatement Order and 13267 Order No. R1-2021-0040 (Cleanup and Abatement Order or CAO).

BACKGROUND

During a June 26, 2019, inspection of Trinity County APN 015-420-027-000 (the Property), staff for the State Water Resources Control Board (State Water Board), Office of Enforcement documented conditions on the Property constituting threats to water quality and beneficial uses. The Dischargers caused or allowed the discharge and/or threatened discharge of waste to receiving waters through site development, including placement of fill material in a tributary to Barker Creek; installation of a concrete diversion structure in a tributary to Barker Creek; construction of an off-stream water storage pond, redirection of a section of the tributary, discharge of cultivation tailwater and storm water from a drainage pipe; improper containment of wastewater, discharge of solid waste and domestic greywater; and erosion of the main access road above a tributary to Barker Creek.

Staff of the State Water Board issued a Notice of Violation (NOV) to Ms. Susan Yang Xiong on November 12, 2019, that documented the water quality concerns and violations that staff observed on the Property. Subsequently, Susan Yang Xiong transferred ownership of the Property to Kou Xiong and recorded the transfer of the Property on October 7, 2020. After receiving no response from the Dischargers, the Regional Water Board transmitted a draft CAO on April 27, 2021, to the Dischargers.

On August 11, 2021, the Executive Officer of the Regional Water Board issued a final Cleanup and Abatement Order via process server for personal service to Ms. Susan Yang Xiong and Mr. Kou Xiong. The CAO directed Ms. Susan Yang Xiong and Mr. Kou Xiong to (1) submit a proposed Cleanup, Restoration, and Monitoring Plan (CRMP) under Required Action No. 1 by September 17, 2021 (Required Action No. 1); (2) implement and complete restoration construction and/or abatement measures from an approved CRMP by October 31, 2021 (Required Action No. 4); and (3) submit a Completion Report by December 17, 2021 (Required Action No. 5). State Water Board staff was not contacted by Ms. Susan Yang Xiong and/or Mr. Kou Xiong and did not receive a response to the Cleanup and Abatement Order.

On January 20, 2022, State Water Board staff issued a Notice of Violation for Failure to Comply with the Cleanup and Abatement Order (NOV of the CAO) Required Actions Nos. 1, 4, and 5 to Ms. Susan Yang Xiong and Mr. Kou Xiong. The NOV of the CAO also informed Ms. Susan Yang Xiong and Mr. Kou Xiong of potential administrative civil liability pursuant to Water Code sections 13268 and 13350. The NOV of the CAO was issued via FedEx with signature delivery, but was returned to the State Water Board as unsigned.

On February 24, 2022, State Water Board staff issued a second NOV for violations of the CAO, including a translated version in Hmong (Second NOV of the CAO) notifying the Dischargers of the continued failure to comply with the CAO's required actions to Ms. Susan Yang Xiong and Mr. Kou Xiong. The Second NOV of the CAO was issued via FedEx without signature requirement and the FedEx proof-of-delivery confirmed its delivery to both Ms. Susan Yang Xiong and Mr. Kou Xiong.

On April 7, 2022, State Water Board staff issued a third NOV for ongoing violations of the CAO along with a version in Hmong to Ms. Susan Yang Xiong and Mr. Kou Xiong. The third NOV of the CAO was issued via FedEx without signature requirement and the FedEx proof-of-delivery confirmed its delivery to both Ms. Susan Yang Xiong and Mr. Kou Xiong.

As of September 9, 2022, the Dischargers have failed to respond to the CAO and the three NOVs of the CAO subsequently issued. The Dischargers have neither submitted the required CRMP for the Property nor implemented remedial actions. Accordingly, the Prosecution Team proposes the assessment of liability on a per day basis. For this analysis, Staff has calculated 357 days of violation (from September 17, 2021, through September 9, 2022) for CAO Required Action No. 1 and 313 days (from October 31, 2021, through September 9, 2022) for CAO Required Action No. 4. The steps below provide the analysis, using the Water Boards' Enforcement Policy methodology, leading to a proposed administrative civil liability for the Dischargers' failure to comply with the CAO requirements.

SUMMARY OF VIOLATIONS

1. CAO Required Action No. 1 requires the Dischargers to submit a proposed CRMP by September 17, 2021, pursuant to Water Code section 13267. Water Code section 13268, subdivision (b), provides that the Regional Water Board may impose civil liability administratively in response to violations of section 13267 in an amount of up to one thousand dollars (\$1,000) per day of violation. The Dischargers violated Water Code section 13267 by failing to submit the CRMP by September 17, 2021. As of September 9, 2022, the CRMP is 357 days late, and the Dischargers are subject to liability of up to \$357,000 pursuant to Water Code section 13268, subdivision (b). **As described below, the Prosecution Team recommends a penalty in the amount of thirty-eight thousand six hundred and seventy-two dollars (\$38,672) for this violation.**
2. CAO Required Action No. 4 directed the Discharges to fully implement and complete all approved restoration construction and/or abatement measures pursuant to Water Code section 13304. Water Code section 13350, subdivision (a), provides that persons who violate cleanup and abatement orders are subject to civil liability of up to five thousand dollars (\$5,000) per day of violation, with a minimum of one hundred dollars (\$100) per day where a Cleanup and Abatement Order has been violated. The Dischargers violated Water Code section 13304 by failing to complete Cleanup and Abatement Order Required Action No. 4 by the October 31, 2021. As of September 9, 2022, the Dischargers have been in violation of this requirement for 313 days, and are subject to liability of up to \$1,565,000, and no less than \$31,300, pursuant to Water Code section 13350, subdivision (e). **As described below, the Prosecution Team recommends a penalty in the amount of one hundred eighty-nine thousand and sixty-two dollars (\$189,620) for this violation.**
3. The November 12, 2019, NOV identified discharges and threatened discharges as the result of cannabis cultivation in violation of the Basin Plan Section 4.2.1, Prohibition 2. The Water Boards cannot issue monetary penalties directly for these types of threatened discharges, but instead have authority pursuant to Water Code section 13304 to require actions to remediate the water quality threats. Issuance of the CAO was the Regional Water Boards' enforcement action to address these violations associated with Basin Plan Section 4.2.1, Prohibition 2. The State Water Board's Enforcement Policy includes a progressive enforcement model to ensure fair and consistent enforcement. According to the Enforcement Policy, "Progressive Enforcement contemplates an escalating series of actions beginning with notification of violations and compliance assistance, followed by enforcement orders compelling compliance, culminating in a complaint for civil liabilities." **In this case, staff issued a Notice of Violation for these threatened discharges and, after receiving no response from the Dischargers, the Executive Officer issued the CAO to require remedial action to eliminate the threat of discharges. Issuance of this proposed ACL further addresses these Basin Plan violations through enforcement of the**

CAO requirements. Therefore, the Prosecution Team, exercising its enforcement discretion, does not propose assessing liability for this violation.

PENALTY METHODOLOGY

The State Water Resources Control Board's *Water Quality Enforcement Policy*¹ ("Enforcement Policy") establishes a methodology for determining administrative civil liability by addressing the factors that must be considered under Water Code sections 13327 or 13385, subdivision (e), depending on the violations. As the violations alleged in the Complaint involve Water Code sections 13268 and 13304, the sections 13327 factors apply, requiring that the Regional Water Board consider the following when setting a penalty amount: "the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require."

Each factor of the Enforcement Policy's nine-step approach is discussed below, as is the basis for assessing the corresponding score and proposed administrative civil liability amount.

The violations alleged here involve: (1) failure to comply with the Water Code section 13267 reporting directive; and (2) failure to implement the Cleanup and Abatement Order. These are "non-discharge violations" for purposes of the Enforcement Policy penalty methodology.

Step 1 and Step 2. Discharge Violations

Enforcement Policy Steps 1 and 2, respectively, address harm and penalty assessments for discharge violations, which are not alleged in this Complaint.

Step 3. Per Day Assessment for Non-Discharge Violations

The Enforcement Policy provides that "[t]he Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. These violations include, but are not limited to, failure to conduct routine monitoring and reporting, failure to provide required information, and the failure to prepare required plans. While all non-discharge violations harm or undermine the Water Boards' regulatory programs and compromise the Water Boards' ability to perform their statutory and regulatory functions, some non-discharge

¹ The Enforcement Policy can be found at:
https://www.waterboards.ca.gov/water_issues/programs/enforcement/water_quality_enforcement.html

violations have the potential to directly or indirectly impact beneficial uses and should result in more serious consequences.”

To determine the initial liability factor for each violation, the Water Boards use the matrix set forth in Table 3 of the Enforcement Policy to determine a per-day assessment factor for each violation. The matrix considers the potential for harm resulting from the violation, and the deviation from the applicable requirement. Each of these can be “Minor,” “Moderate,” or “Major.”

The Potential for Harm categories are as follows:

- *Minor – The characteristics of the violation have little or no potential to impair the Water Boards’ ability to perform their statutory and regulatory functions, 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 have substantially impaired the Water Boards’ ability to perform their statutory and regulatory functions, present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most non-discharge violations should be considered to present a moderate potential for harm.*
- *Major – The characteristics of the violation have wholly impaired the Water Boards’ ability to perform their statutory or regulatory functions, present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm. Non-discharge violations involving failure to comply with directives in cleanup and abatement orders, cease and desist orders, and investigative orders, involving reports relating to impaired water bodies and sensitive habitats, should be considered major.*

(Enforcement Policy, page 16)

The Deviation from Requirement categories are as follows:

- *Minor – The intended effectiveness of the requirement remained generally intact (e.g., while the requirement was not met, its intended effect was not materially compromised).*
- *Moderate – The intended effectiveness of the requirement was partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement was only partially achieved).*
- *Major – The requirement was rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions).*

(Enforcement Policy, page 16)

Potential for Harm:

Violations 1 and 2: The Basin Plan designates beneficial uses and implements State Water Resources Control Board (State Water Board) Resolution No. 88-63, which establishes a policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal or domestic supply. This Property is located within the South Fork Trinity River Hydrologic Area; the existing and potential beneficial uses of South Fork Trinity River Hydrologic Area include body contact and non-body contact recreation, wild life habitat, cold freshwater habitat, rare, threatened, or endangered species, spawning, reproduction, and/or early development, migration of aquatic organisms, commercial or sport fishing, freshwater replenishment, groundwater recharge, agricultural water supply, municipal water supply, industrial water service supply, and industrial water process supply. The Clean Water Act Section 303 (d) list identifies the South Fork Trinity River watershed as impaired by sedimentation/siltation and high water temperature.

Failure to fully implement and complete all restoration construction and/or abatement measures in the unnamed tributary to Barker Creek presents an actual and a substantial potential for harm to Barker Creek and its unnamed tributaries, a water of the state and waters of the United States. This is because failure to remediate placement of fill material in a tributary to Barker Creek creates a condition in which spent growth media containing perlite can discharge into surface waters. Also, failure to abate growth media runoff from cannabis cultivation in and adjacent to a tributary to Barker Creek creates a condition in which sediment and other chemicals can discharge during rain events directly into surface waters. Such discharges of sediment including fill material and growth media pose substantial threats to existing and potential beneficial uses.

During the inspection, staff observed placement of spent growth media with perlite in a tributary to Barker Creek; installation of a concrete diversion structure in a tributary to Barker Creek; unpermitted outdoor cannabis cultivation within 22 feet of a tributary to Barker Creek; evidence of domestic wastewater discharged from a mobile home onto the ground; evidence of discharge of an unknown oily liquid from a portable generator located along the bank of Barker Creek; and evidence of discharge of domestic wastewater onto the ground under a makeshift kitchen sink. These conditions created a condition of pollution on the Property resulting in actual and potential discharges of sediment and other pollutants into a tributary of Barker Creek. These discharges pose a substantial threat to beneficial uses in Barker Creek and its tributaries.

Sediment directly threatens wildlife habitat and aquatic species (Beneficial Uses impacted: wildlife habitat, rare, threatened, or endangered species, spawning, reproduction, and/or early development, migration of aquatic organisms, cold freshwater habitat, and commercial or sport fishing). Increased sedimentation and turbidity can result in increased treatment and/or maintenance costs for downstream agricultural, industrial, and municipal users that withdraw and treat the water (Beneficial Uses impacted: agricultural water supply, municipal water supply, industrial water service supply, and industrial water process supply). Sediment-laden storm water discharges to

surface water and the resulting turbidity can also affect the recreational and aesthetic enjoyment of the surface waters (Beneficial Uses impacted: body contact and non-body contact recreation).

The CRMP was required for an accurate assessment of impacts to Barker Creek and its unnamed tributaries from unauthorized cannabis cultivation and placement of fill material, including conditions of erosion and discharges of sediment from all graded surfaces, all waters of the state and waters of the United States, drainages, and watercourse crossings, structures in the watercourse, and the functional status of these features. Failure to submit a complete and adequate CRMP as required by the CAO prevented the accurate assessment of fill materials and growth media, such as soil and other organic media, impacts to Baker Creek and its tributaries, the ability to make progress towards remediation of previous discharges of sediment, and the abatement of future discharges of sediment to waters of the state. The CAO was issued to ensure the existing condition of pollution is cleaned up, the threats of unauthorized discharges to waters of the state from the Property are prevented, background water quality conditions are restored, and any impacts to beneficial uses are mitigated for the protection of Barker Creek and its tributaries. Without the information required by the reports in the CAO, the Dischargers are out of compliance with the actions necessary to abate the ongoing and threatened pollution to Baker Creek and its tributaries because remedial action requires authorization from the Regional Water Board via its permitting and enforcement authorities. This noncompliance presents an actual and a substantial threat to beneficial uses and the characteristics of this violation have substantially impaired the State and Regional Water Boards' ability to perform their statutory and regulatory functions. Therefore, the Potential for harm for this violation is characterized as **Major**.

Deviation from Requirement:

Violation 1: The deviation from the requirement to submit a CRMP by the stated deadlines (CAO Required Action No. 1) is **Major**. The Dischargers have made no attempt to submit a CRMP, rendering the requirement for a CRMP ineffective in its essential functions. Staff applied the **Major Potential for Harm** and **Major Deviation from Requirement** determinations to Table 3 on page 16 of Enforcement Policy and selected the middle Per Day Factor value of 0.85 for Violation 1.

Violation 2: The deviation from the requirement to implement corrective actions by the stated deadlines (CAO Required Action No. 4) is **Major**. The Dischargers have made no attempt to correct the conditions of actual or threatened discharge described in the CAO, thus rendering the requirement ineffective in its essential functions. Staff applied the **Major or Potential for Harm** and **Major Deviation from Requirement** determinations to Table 3 on page 16 of the Enforcement Policy and selected the middle Per Day Factor value of 0.85 for Violation 2.

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

Violation 1: 357 (Number of Days of Violations) x 0.85 (Per Day Factor) x \$1,000 (Statutory Maximum Per Day Penalty) = **\$303,450**.

Violation 2: 313 (Number of Days of Violations) x 0.85 (Per Day Factor) x \$5,000 (Statutory Maximum Per Day Penalty) = **\$1,330,250**.

Total Initial Liability Amount: \$303,450 + \$1,330,250 = \$1,633,700

Step 4. Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history.

Culpability: 1.50

The Enforcement Policy advises that "[h]igher 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 intentional misconduct or gross negligence, a lower multiplier for more simple negligence, and a neutral assessment of 1.0 where a discharger is determined to have acted as a reasonable and prudent person would have. For this matter, Staff recommends using a culpability factor of **1.50**.

At the time of the Inspection, the Dischargers were conducting unlicensed commercial cannabis cultivation on the Property. Commercial cannabis cultivators are required to maintain the Property where cultivation is occurring consistent with the Cannabis Cultivation Policy, and with the Water Code generally. A reasonable and prudent person would have enrolled under the Cannabis Cultivation General Order (the most common way to obtain regulatory coverage under Water Code 13260 for cultivators), complied with the General Order requirements, and maintained the features at the Property consistent with the Cannabis Cultivation Policy. Compliance with the General Order requirements consistent with the Policy would be achieved by engaging qualified professionals to assess the Property for environmental issues, obtaining required permits, cleaning up the Property, and implementing designs consistent with the permits. Additionally, a reasonable and prudent person would have responded to the CAO and made efforts to comply with the required actions and communicate these efforts to the Regional Water Board. The Dischargers were notified of the requirement to submit the CRMP and to implement corrective actions by mail and by process server. The Dischargers were also provided notices translated into a different language. These actions constitute intentional misconduct; thus, a value of 1.50 is appropriate.

History of Violations: 1.0

The Enforcement Policy advises that "[a]ny prior history of violations: Where the Discharger has no prior history of violations, this factor should be neutral, or 1.0. Where

the Discharger has prior violations within the last five years, the Water Boards should use a multiplier of **1.1**.”

There are no previous orders assessing violations against the Dischargers within the last five years. Accordingly, the minimum factor of **1.0** is used.

Cleanup and Cooperation: 1.50

The cleanup and cooperation multiplier ranges from 0.75 to 1.5, with a lower multiplier where there is exceptional cleanup and cooperation compared to what can reasonably be expected, and a higher multiplier where there is not.

The Dischargers did not participate in any voluntary cleanup efforts and as of the date of this Complaint, the Dischargers have yet to submit a response. The Dischargers have shown no evidence that they have attempted to correct the violations or try to reach out to State Water Board staff to address the violations and required actions. Additionally, the Dischargers have been unresponsive to the various enforcement actions issued including responding to the three NOVs and to the CAO.

Therefore, Staff recommends assigning a score of **1.50** for this factor to reflect that the Dischargers’ lack of any cleanup and cooperation efforts in this case is unreasonable.

Multiple Day Violations

The Enforcement Policy advises that “for violations that are assessed a civil liability on a per day basis and do not constitute a single operational upset, the initial liability amount should be assessed for each day up to thirty (30) days. For violations that last more than thirty (30) days, the daily penalty 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 Water Board must make express findings that the violation:

- a. Is not causing daily detrimental impacts to the environment and is not causing daily detrimental impacts to the regulatory program;
- b. Results in no discrete economic benefit from the illegal conduct that can be measured on a daily basis; or,
- c. Occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.”

The Violations here have resulted in no discrete economic benefit from the illegal conduct that can be measured on a daily basis. Therefore, Staff recommends application of the Enforcement Policy’s suggested method for collapsing days. The Enforcement Policy provides that “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 30 days of the violation, plus an assessment for each 5-day period of violation until the

60th day, plus an assessment for each 30 days of violation thereafter. Applying this methodology, Staff recommends collapsing the number of days for which administrative civil liability shall be assessed as follows:

Violation 1: 357 days to 45 days

Violation 2: 313 days to 44 days

Adjusted Initial Liability Amount for Multiple Day Violations

The Adjusted Initial Liability amount for the non-discharge violations calculated on a per-day basis is as follows:

Violation 1: 0.85 (Per Day Factor) x 45 (Adjusted Number of Days of Violation) x \$1000 (Statutory Maximum Penalty) = **\$38,250**

Violation 2: 0.85 (Per Day Factor) x 44 (Adjusted Number of Days of Violation) x \$5000 (Statutory Maximum Penalty) = **\$187,000**

Total Adjusted Initial Liability Amount: \$38,250 + \$187,000 = \$225,250

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Potential for Harm determined in Step 2.

Total Base Liability Amount for Non-Discharge Violations:

The Total Base Liability amount for the non-discharge violations calculated on a per-day basis is as follows:

Violation 1: \$38,250 (Adjusted Initial Liability) x 1.50 (Culpability Multiplier) x 1.0 (History of Violations Multiplier) x 1.50 (Cleanup and Cooperation Multiplier) = **\$86,063**

Violation 2: \$187,000 (Adjusted Initial Liability) x 1.50 (Culpability Multiplier) x 1.0 (History of Violations Multiplier) x 1.50 (Cleanup and Cooperation Multiplier) = **\$420,750**

Total Base Liability Amount: \$86,063 + \$420,750 = \$506,813

Step 6. Ability to Pay and Continue in Business

The Enforcement Policy advises that “[i]f the Water Boards have 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. The ability of a discharger to pay an ACL is

determined by its income (revenues minus expenses) and net worth (assets minus liabilities)." The Water Code requires the Regional Water Board to consider ability to pay and continue in business when imposing liability.

Kou Xiong is the owner of the subject Property, which has an assessed value of **\$135,897**. In addition, Kou Xiong owned but recently transferred for value his residential property on May 4, 2022, in Anderson, California valued at **\$158,000**. Susan Yang Xiong is the owner of a duplex in Saint Paul, Minnesota valued at **\$252,833** according to real property tax assessor records.

Evidence obtained by review of aerial imagery of the Property subsequent to 2019 and eyewitness testimony by ACE Attorney Services, Inc. (ACE), the process server retained by the State Water Board to serve the CAO, suggest the Dischargers continue to cultivate cannabis. ACE's employee noted observing cannabis cultivation at multiple of the addresses where service was attempted. Moreover, aerial imagery from July 2021 shows outdoor cannabis cultivation on the Property, demonstrating that Kou Xiong continues to operate unauthorized cannabis cultivation. Aerial imagery from July 2022 depicts continued development of the property with the addition of two greenhouses that are consistent with cannabis cultivation operations.

Due to the Dischargers' failure to respond to the CAO or NOVs, the Prosecution Team does not have additional information about the individuals' revenues or liabilities, other than publicly available information, that would further inform the violators' ability to pay the proposed penalty. Dischargers' engagement in the enforcement process is an important factor that can help inform ability to pay, especially in the cannabis industry where cultivators do not have full access to standard banking systems. As a result, it is likely that publicly available information underestimates the Dischargers' actual income and worth, and in turn their ability to pay.

Step 7. Economic Benefit

The Enforcement Policy (pages 20-21) requires that the adjusted Total Base Liability Amount be at least 10 percent higher than any economic benefit realized by the Dischargers.

The Dischargers' economic benefit for non-compliance with the CAO is calculated from the delayed and avoided costs that would have been accrued during completion of the required actions in the CAO, including development and implementation of the required CRMP. 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.

For Violation 1, the CRMP requirements (i.e., field inspection and report preparation) are comparable to that of preparing a combined Site Management Plan and Disturbed Area Stabilization Plan as presented in the State Water Resources Control Board,

October 2017, *Direct Cost Analysis for the Proposed Cannabis Cultivation Policy* (2017 Direct Cost Analysis) which is estimated to cost between \$3,660 and \$11,720.

Using the EPA BEN model to determine the economic benefit from delayed expenditures associated with Violation 1, Staff identified the plan cost of \$9,000² as a one-time non-depreciable expenditure with a noncompliance date of the September 17, 2021 deadline. The resulting economic benefit from delaying the plan expenditures to September 9, 2022 is \$230.

For Violation 2, the instream work requires Waste Discharge Requirements and Water Quality Certification from the Regional Water Board that would require a one-time application fee of \$2,417. The least expensive scenario for the Dischargers to implement the corrective actions would be to remove the fill materials in the tributary to Barker Creek and allow native vegetation to grow. Staff estimates that the scope of work to restore flow to the unnamed tributary, improve culvert crossings, remediate access road, correct drainage pipe, and demolish water diversions structures could be accomplished for an estimated cost of \$10,620.

Using the EPA BEN model to determine the economic benefit from the avoided and delayed expenditures associated with Violation 2, Staff identified the avoided permit application cost of \$2,417, and estimated implementation cost of \$10,620 as a one-time non-depreciable expenditure with a noncompliance date of the October 31, 2021 deadline. The resulting economic benefit from delaying the plan expenditures to September 9, 2022, is \$1,778.

Staff finds that, at this time, the Dischargers have obtained an economic benefit for delayed costs of \$230 (Violation 1) + \$1,778 (Violation 2) = \$2,008 and the economic benefit plus 10 percent (\$201) = \$2,209, is significantly less than the proposed liability amount of \$506,813.

Step 8. Other Factors as Justice May Require

The Enforcement Policy advises that “[i]f the Regional 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 adjustment.” The Regional Water Board may exercise its discretion to include some of the costs of investigation and enforcement in a total administrative civil liability. No express findings have been identified to support an adjustment to the penalty amount. Although the Regional Water Board has incurred

² The estimate, based on the standard hourly-rate, included 2-days of field site visit and data gathering, 4-days of report writing with design specifications on restoration work of the fill material in the tributary, improvement in access road drainage and replace of culverts, in-stream work to restore the tributary to remove an installed concrete structure, removal of the water storage pond and diversion structure, in-stream work to restore beneficial uses to Barker Creek and its tributaries impacted by the redirection of the tributary and from unauthorized cultivation activities, and discussion on erosion control methods to correct discharges at all developed areas, 1-day of preparing maps and engineering drawings, and 4-hours of final document review.

staff costs associated with the investigation, preparation, and enforcement of the alleged violations, Staff has used its discretion to not include such costs.

Step 9. Maximum and Minimum Liability Amounts

The Enforcement Policy directs the Regional Water Board to consider maximum and minimum liability amounts set forth in the applicable statutes.

Pursuant to Water Code section 13268(b)(1), “[c]ivil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.”

Pursuant to Water Code section 13350(e)(1), “civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.”

Pursuant to Water Code section 13350, subdivision (e)(1)(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.”

Statutory Maximum Liability Amount for non-discharge violations:

The violations addressed in this matter include two non-discharge violations:

Violation 1: Failure to submit the required CRMP for **357 days** from September 17, 2021 to September 9, 2022. At \$1,000/day, the Maximum Liability would be **\$357,000**.

Violation 2: Failure to implement an approved CRMP for **313 days** from October 31, 2021 to September 9, 2022. At \$5,000/day, the Maximum Liability would be **\$1,565,000**.

Total Maximum Liability for non-discharge violations: **1** (violation) x **357** (days) x **\$1,000** (per day) + **1** (violation) x **313** (days) x **\$5,000** (per day) = **\$357,000 + \$1,565,000 = \$1,922,000**

Statutory Minimum Liability Amount for non-discharge violations:

The statutory minimum of Water Code section 13350(e)(1)(B) only applies to Violation 2.

Violation 2: The Minimum Liability for violation of Required Action No. 4: [(1 (violation) x **313** (days) x **\$100** (per day))] = **\$31,300**

The Enforcement Policy states that Regional Water Boards should strive to impose civil liabilities at least ten percent higher than the economic benefit to the violator.

As discussed above, Staff estimates the Discharger's economic benefit cited in the Complaint obtained from **Violation 2** to be **\$1,778**.

The economic benefit plus 10% would therefore be: **\$1,778** plus 10 percent (**\$178**) = **\$1,956**

The proposed liability of **\$420,750** for Violation 2 falls above the minimum liability of **\$31,300** and the total liability of **\$506,813** exceeds both **\$31,300** and **\$1,956**.

Final Liability Amount:

The final liability amount for the two violations is **Five hundred six thousand eight-hundred and thirteen dollars (\$506,813)**.

North Coast Regional Water Quality Control Board

ATTACHMENT B

WAIVER FORM FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent Kou Xiong and/or Susan Yang Xiong (hereinafter Dischargers) in connection with Administrative Civil Liability Complaint No. R1-2022-0039 (hereinafter Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, “a hearing before the regional board shall be conducted within 90 days after the party has been served with the complaint. The person(s) who have been issued a complaint may waive the right to a hearing.”

OPTION 1: Check here if the Dischargers waive the hearing requirement and will pay the liability in full.

- a. I hereby waive any right the Dischargers may have to a hearing before the North Coast Regional Water Quality Control Board (Regional Water Board).
- b. I certify that the Dischargers will remit payment for the proposed civil liability in the full amount of **Five hundred six thousand eight-hundred and thirteen dollars (\$506,813)** by submitting a check that references “ACL Complaint No. R1-2022-0039” made payable to the Accounting Office, Attn: ACL Payment Accounting Office, PO Box 1888, Sacramento, California, 95812-1888, and a copy of the check to the Regional Water Board within 15 days from the date on which this waiver is executed.
- c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after a 30-day public notice and comment period. Should the Regional Water Board receive significant new information or comments from any source (excluding the Regional Water Board’s Prosecution Team) during this comment period, the Regional Water Board’s Assistant Executive Officer may withdraw the Complaint, return payment, and issue a new Complaint. I understand that this proposed settlement is subject to approval by the Regional Water Board, and that the Regional Water Board may consider this proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.

d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Dischargers to further enforcement, including additional civil liability.

OPTION 2: Check here if the Dischargers waive the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.

a. I hereby waive any right the Dischargers may have to a hearing before the Regional Water Board within 90 days after service of the Complaint. By checking this box, the Dischargers request that the Regional Water Board delay the hearing and/or hearing deadlines so that the Dischargers may have additional time to discuss settlement and/or prepare for the hearing. It remains within the discretion of the Regional Water Board to approve the extension.

Kou Xiong and/or Susan Yang Xiong

(Print Name and Title)

(Signature)

(Date)