

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

**In the Matter of Allegations of Violations of the Following:
Failure to File a Statement of Water Diversion and Use (Water Code section 5101),
Cannabis Cultivation Policy Requirements Adopted Pursuant to California Water
Code section 13149, Diversion or Use of Water for Cannabis Cultivation for which
a License is Required (Water Code section 1847(b)(4)),**

**by
Ignacio Lupian
in
Lake County
on
APN: 002-012-390-000**

**IGNACIO LUPIAN (HEREINAFTER REFERRED TO AS “DIVERTER”) IS HEREBY
GIVEN NOTICE THAT:**

1. The State Water Resources Control Board’s (State Water Board’s) Division of Water Rights (Division) alleges that the Diverter committed the violations described below, relating to the diversion or use of water for cannabis cultivation activities on the Diverter’s real property in Lake County during 2021.
2. Based on these allegations, the Division seeks an Administrative Civil Liability Order against the Diverter imposing liability in the total amount of \$3,750.
3. **The Diverter has the right to request a hearing on these allegations but must do so in writing within 20 days from the date the Diverter receives this Complaint, or else that right is waived.** Please see the specific directions for submitting hearing requests in the “Right to Hearing” section at the end of this Complaint.

SUMMARY OF ALLEGED VIOLATIONS

4. Violation 1: The Diverter is alleged to have failed to file a statement of water diversion or use (Statement) during 2021 with the State Water Board for the diversion and use of water for cannabis irrigation during 2020, in violation of Water Code section 5101, which requires each person who diverts water to file a statement of his or her diversion or use with the State Water Board prior to July 1 of the succeeding year.
5. Violations 2-5: The Diverter is alleged to have violated Four (4) requirements of the *Cannabis Cultivation Policy – Principles and Guidelines for Cannabis Cultivation* (Cannabis Cultivation Policy), established by the State Water Board pursuant to Water Code section 13149, by doing the following: diverting water for cannabis cultivation during the surface water forbearance period (Term 66); failing to bypass

flow or render the diversion intake incapable of diverting water for cannabis cultivation during surface water forbearance period (Term 77); failing to install measuring devices or maintaining diversion records (Term 82); and failing to maintain daily irrigation records (Term 98). Four (4) separate one day violations are alleged for violations of requirements established by Water Code section 13149 and assessed liability under Water Code section 1847, subdivision (b)(1).

6. Violation 6: The Diverter is alleged to have diverted and used water for cannabis cultivation for which a license is required, but has not been obtained, under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code during 2021. One (1) day of violation is alleged pursuant to Water Code section 1847, subdivision (b)(4).

BACKGROUND AND FACTUAL BASIS

7. Property Ownership:

Lake County records indicate that the Diverter acquired Lake County Assessor's Parcel Number (APN) 002-012-390-000 (the Property) on July 15, 2015 and has owned the Property at all times relevant here.

8. Watershed Information:

The Property is located in the upper Main-stem Eel River Watershed specifically in the Hydrologic Unit Code (HUC) 12 watershed designated as Bear Creek-Rice Fork Eel River. Cannabis Cultivation activities occurred in the Little Soda Creek Watershed, which is a tributary of the HUC 12 Bear Creek Rice Fork sub watershed. Water for cannabis cultivation was diverted from an unnamed spring that is tributary to Little Soda Creek. Little Soda Creek is a tributary of the Main Stem Eel River. Downstream from the Property, in neighboring Mendocino County, the Main-stem Eel River is a state designated Wild and Scenic River from 100 yards below the Van Arsdale Dam to the Pacific Ocean. As a Wild and Scenic River, the State Water Board is limited from processing or accepting new applications to appropriate water unless the diversion and use of water fall within two limited exceptions approved by the Secretary of the Resources Agency pursuant to California Code of Regulation, Title 23, section 734. In accordance with the Public Resources Code, Division 5 Chapter 1.4, California Wild and Scenic Rivers Act, section 5093.50 et seq., it is the policy of the State of California, that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of section 2 of Article X of the California Constitution.

9. Investigation:

On June 1, 2021, the Division was notified by the California Department of Fish and Wildlife (CDFW) of a search warrant inspection of the Property based on the suspected surface water diversion used for illegal cannabis cultivation on the Property. CDFW invited Division staff to participate in the inspection, and the warrant authorized State Water Board staff participation.

10. Water Rights Records Review:

On June 2, 2021, Division staff searched for available State Water Board records in the Division of Water Rights Electronic Water Rights Management System (eWRIMS) and found no existing Statement, water right permit, license, or registration on file for the Property.

11. Well Records Review:

On June 2, 2021, Division staff searched for available Department of Water Resource records in the online Well Completion Report database and found no existing records of the existence of a groundwater well on the Property.

12. Commercial Cannabis Cultivation License Records Review:

On June 2, 2021, Division staff reviewed the California Department of Cannabis Control's (DCC's) commercial cannabis cultivation license records current to March 17, 2021, to determine if there was an active or pending license on file that would authorize the commercial cannabis cultivation observed on the Property¹. Division staff found no DCC license on record for the Property. On February 8, 2022, Division searched DCC's cultivation license records, current to February 2, 2022, and again found no such license on record.² On April 7, 2022, Division searched DCC's cultivation license records, current to April 6, 2022, and again found no license on record.

13. Inspection:

Division staff, accompanied by CDFW Game Wardens and scientific staff, and Lake County Sheriff's Office personnel, conducted an inspection of the Property on June 3, 2021, starting at 03:00 p.m. Neither the Diverter, nor a representative of the Diverter, was present during the inspection. Division staff observed approximately 220 cannabis plants, a surface water diversion, and related irrigation infrastructure on the Property.

14. Point of Diversion, Point of Storage, and Places of Use:

Division staff observed and documented one Point of Diversion (POD), accompanying Points of Storage (POSSs), and two Places of Use (POUs) on the Property during the June 3, 2021, inspection.

- a. POD1/POS2 is a developed unnamed spring with defined bed and banks downstream flowing off the Property and tributary to Little Soda Creek, which is tributary to the Main Stem Eel River. POD1/POS2 consists of an onstream excavated pit reservoir 30 feet in diameter and approximately four (4) feet deep, surrounded by wetland vegetation. The reservoir is identified as POS2. The spring and downstream channel were flowing during the inspection. A gasoline pump located on the bank of the reservoir conveys water to POS1 through a black 1-inch polyethylene

¹ The California Department of Food and Agriculture (CDFA) was the state licensing authority for commercial cannabis cultivation until those functions were legislatively merged into DCC on July 12, 2021. For ease of reference in this Complaint, all references to DCC for licenses or licensing requirements that existed at the time of the inspection shall refer to CDFA.

² The DCC records reviewed by Division staff on October 13, 2021, include CDFA and DCC licenses issued prior to October 11, 2021.

water line. Division staff did not observe any diversion control gate, dam release, or bypass structure in place at POD1/POS2 that could allow water diverted and stored to be released downstream.

- b. POS1 is a polyethylene water tank with storage capacity of approximately 3,000 gallons. The tank was approximately 25% full at the time of the inspection (~750 gallons). POS1 serves cannabis cultivation at POU1 and POU2.
- c. POU1 is a greenhouse with approximately 2,400 square feet of cannabis cultivation area. POU1 had approximately 100 cannabis plants at the time of the inspection, each approximately three to four feet in height.
- d. POU2 is a greenhouse with approximately 2,520 square feet of cannabis cultivation area. POU2 had approximately 100 cannabis plants at the time of the inspection, each approximately three to four feet in height.
- e. Water diverted at POD1 fills POS1 and POS2 and were the only water sources for cannabis cultivation at POU1 and POU2 observed during the inspection.
- f. Division staff performed a consumptive water demand analysis that provides a conservative estimate of the timing required for surface water diversions during the surface water diversion forbearance period. Based on the water demand estimate the Diverter would need to divert water every 2.3-5.5 days to refill storage that is used to irrigate 220 plants at a rate of 2.5 to 6 gallons per day at POU1 and POU2. For example, irrigating at a rate of 2.5 gallons would require water diversion every 5.5 days, irrigating at a rate of 6 gallons per plant per day would require diversion every 2.3 days. At the time of the inspection the cannabis plants observed by Division staff were approximately three to four feet tall, indicating that the cannabis plants had been established for at least one month prior to the date of inspection. As cannabis plants grow larger during the summer months, water demand increases.

15. Aerial Imagery Review:

On June 21, 2021, and again on September 20, 2021, Division staff reviewed aerial imagery of the Property and made the following observations:

- a. On June 21, 2021, Division staff reviewed Google Earth aerial imagery dated July 2, 2018, showing a similar cultivation greenhouse observed by Division staff at POU1.
- b. On June 21, 2021, Division staff reviewed LandVision aerial imagery dated June 29, 2019, showing a similar cultivation greenhouse observed by Division staff at POU1.

- c. On September 20, 2021, Division staff reviewed Google Earth aerial imagery dated August 24, 2017, which shows the initial construction of the frame of the greenhouse at POU1.
- d. On September 20, 2021, Division staff reviewed LandVision aerial imagery dated August 26, 2020, and confirmed multiple graded areas throughout the Property indicating potential commercial cannabis cultivation. The image shows cultivation greenhouse infrastructure present at both POU1 and POU2, consistent with observations during the June 3, 2021, inspection. Based on Division staff observations made during the inspection and the presence of POU1 in aerial imagery during the duration of ownership by the Diverter, Division staff find that commercial cannabis cultivation has likely been occurring within the greenhouse structures at POU1 and POU2 without the required appropriative water right or DCC license.

16. Inspection Report and Notice of Violation:

On July 29, 2021, Division staff mailed the Diverter a Notice of Violation and Inspection Report (NOV/IR) via certified mail. United States Postal Service Records indicate that the Diverter received the NOV/IR on July 31, 2021. The NOV/IR describes the observations made by Division staff and notifies the Diverter that the diversion and use of water for cannabis cultivation activities without necessary appropriative water right and not complying with all applicable requirements in the Cannabis Cultivation Policy are alleged violations subject to enforcement by the State Water Board. The NOV/IR recommends that the Diverter file a Statement for the diversion and use of water on the Property, implement corrective actions for each alleged Cannabis Cultivation Policy violation, and cease actively diverting water for cannabis cultivation until an appropriative water right has been issued by the State Water Board.

17. Landowner/Diverter Response:

- a. On August 5, 2021, the Diverter and his wife, Guadalupe Lupian, contacted Division staff by telephone. They stated that they no longer wished to pursue cannabis cultivation on the Property. Mr. and Mrs. Lupian stated they would provide pictures of the cultivation sites being removed and that they wanted to use the spring on the property for domestic uses. They requested information on filing an initial Statement and for a Small Domestic Use Registration (SDUR).
- b. On August 12, 2021, Guadalupe Lupian contacted the Division by email, submitting photos showing the removal of the cultivation areas observed during the June 3, 2021, inspection, and the removal of the pump diversion that conveyed water for cannabis cultivation. The excavated pit at POS2 remained in place and has been included as the POD for the SDUR application.

- c. On September 30, 2021, Division staff contacted the Diverter's consultant, Cindy Henriques, by email. Ms. Henriques responded on October 8, 2021, to request a copy of the NOV/IR as well as confirm that a Small Domestic Use Registration (SDUR) and a Statement need to be filed for the diversion on the Property. Division staff responded on October 12, 2021, and confirmed that both an SDUR and Statement for 2020 and 2021 are required to be filed, and the documents can be filed through the Division's online portal.
- d. On October 14, 2021, Ms. Henriques contacted Division staff by email to confirm that water diverted and used for cannabis cultivation needed to be reported, as well as the water used for domestic use. Division staff responded on October 14, 2021, and confirmed that the water for cannabis irrigation and domestic use is required to be reported.
- e. On October 14, 2021, Ms. Henriques again contacted Division staff by email, with a submission receipt for the initial Statement (S028729) reporting water diverted and used during 2020. Ms. Henriques also included a log of the quantified water use on the Property for 2021, to be filed later for the required 2021 reporting. Ms. Henriques stated in her email that the SDUR will be submitted via regular mail, and that she would alert Division staff when the SDUR is approved by the State Water Board.

18. Water Rights Record Review:

- a. On October 13, 2021, Division staff searched eWRIMS and again found no water rights records.
- b. On October 27, 2021, the Division staff reviewed available water rights records and found that the SDUR application for POD1 had been received and the registration is in the queue for review and approval.
- c. On December 17, 2021, Division staff searched available State Water Boards records in eWRIMS and found a Small Domestic Use Registration filed on behalf of the Diverter, with application ID D033248. D033248 was in a pending processing status at that time.

STATE WATER BOARD AUTHORITY

19. Water Code section 1055, subdivision (a) provides that the Executive Director for the State Water Board may issue a Complaint to any person or entity on which administrative civil liability may be imposed pursuant to Water Code sections 1847 and 5107. The Executive Director delegated this authority to the Deputy Director for Water Rights by memorandum dated May 17, 1999. The Deputy Director redelegate this authority to the Assistant Deputy Director for the Permitting and Enforcement Branch by memorandum dated August 27, 2008.

20. Water Code 1112 provides that the Administrative Hearings Office presides over hearings on complaints issued under Water Code section 1055. Pursuant to Water Code section 1114, for matters seeking administrative liability under Water code section 1847 or 5107, the Hearing Officer adopts a final order. For all other matters, the Hearing Officer adopts a proposed order to be considered by the State Water Board.

ALLEGED VIOLATIONS

21. Violation 1: Failure to file a Statement of Water Diversion or Use: Water Code section 5101 requires that any person who diverts water shall file a Statement with the State Water Board. The deadline depends on the date of the diversion; the deadline applicable here was July 1, 2021.³

22. Water Code section 5102 states that a separate statement shall be filed for each point of diversion.

23. Water Code section 5107(c)(1) provides that the Board may impose liability for failure to file a statement in an amount not to exceed one thousand dollars (\$1,000), plus five hundred dollars (\$500) per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the Board has called the violation to the attention of that person.

- a. During the June 3, 2021, inspection, Division staff observed POD1 in use and was the sole source of water observed on the property. Division staff did not find a record of any Statement on file for POD1. At the time of the inspection, POD1 was in use supplying water for cannabis cultivation at POU1 and POU2.
- b. Following the inspection, Division staff reviewed aerial imagery of the Property which indicates that POU1 and POU2 greenhouses were present during 2018 - 2020. The observed use of POD1, POS1, POS2, POU1 and POU2 at the time of the inspection was for cannabis cultivation since 2018 through 2021. A Statement for the diversion and use of water likely should have been filed as early as July 1, 2019. On July 31, 2021, the Diverter received the NOV/IR, which provided Notice of the Water Code section 5101-5107 Statement reporting requirements and recommended the Diverter file a Statement for water diverted and used during 2020 within 30 days. On October 14, 2021, the Diverter complied by submitting a Statement for 2020 water use. From August 31, 2021, until October 14, 2021, represents 45 days of non-compliance following 30 days of Notice for this requirement.

³ Prior to September 23, 2021, all statements were due July 1 of the succeeding year. Senate Bill 155 came into effect on September 23, 2021, amending Water Code section 5101 to provide that for diversions after December 31, 2020, and before October 1, 2021, statements are due before April 1 of the succeeding year. (Water Code § 5101, subd. (b)(2).) For diversions after September 30, 2021, statements are due before February 1 of the succeeding year. (Water Code § 5101, subd. (b)(3).)

- i. The diversion and use of water from POD1 for cannabis cultivation occurring in 2020, without a Statement, constitutes one (1) \$1,000 per day violation of Water Code section 5101.
- ii. The Division asserts that there are also 45 days of continuing day violations at \$500 per day for the lack of compliance between August 31, 2021, until October 14, 2021.

Cannabis Cultivation Policy Requirements

24. The Cannabis Cultivation Policy originally went into effect on December 18, 2017.⁴ The Policy contains principles, guidelines, and requirements (Requirements) adopted pursuant to Water Code section 13149, for the diversion or use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flow.

25. Cannabis Cultivation Policy, Attachment A, Section 1, Term 9, defines cannabis cultivation as:

Any activity involving or necessary for the planting, growing, pruning, harvesting, drying, curing, or trimming of cannabis. This term includes but is not limited to: (1) water diversions for cannabis cultivation, and (2) activities that prepare or develop a cannabis cultivation site or otherwise support cannabis cultivation and which discharge or threaten to discharge waste to waters of the state.

26. Water Code section 1847, subdivisions (a) and (b)(1) provide that any person or entity violating any Requirement adopted pursuant to Water Code section 13149 may be liable in an amount not to exceed the sum of five hundred dollars (\$500) per violation, plus two hundred fifty dollars (\$250) for each additional day on which each violation continues if the person fails to correct the violation within 30 days after the Board has called the violation to the attention of that person or entity, plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in violation of the applicable Requirement.

27. Violation 2: Cannabis Cultivation Policy, Attachment A, Section 2, Term 66, states:

All water diversions for cannabis cultivation from a surface stream, subterranean stream flowing through a known and definite channel (e.g., groundwater well diversions from subsurface stream flows), or other surface waterbody are subject to the surface water Numeric and Narrative Instream Flow Requirements. This includes lakes, ponds, and springs (unless the spring is deemed exempt by the Deputy Director). See Section 3, Numeric and Narrative Instream Flow Requirements of this Attachment A for more information.

- a. POD1/POS2 diverts water from an unnamed spring with a known and definite channel that flows into a small reservoir surrounded by wetland

⁴ The State Water Board subsequently amended the Cannabis Cultivation Policy, effective April 16, 2019. The violations here took place after the amendments went into effect, so any references to the Cannabis Cultivation Policy means the 2019 version.

vegetation. The unnamed spring flows into and out of the reservoir in a stream channel with defined bed and banks upstream and downstream of the reservoir. POD1/POS2 is the sole source of water observed by Division staff. POD1/POS2 is subject to the Numeric and Narrative Instream Flow Requirements. The diversion documented during the June 3, 2021, inspection, occurred during the surface water dry season forbearance period (April 1 through October 31). Water is diverted at POD1/POS2 by a Honda GX160 pump that is used to pump water to POS1 and then conveyed by gravity flow to POU 1 and 2 to cultivate about 220 cannabis plants. The pump was not on at the time of inspection. However, as stated in paragraph 14f., above the consumptive water demand analysis indicates the pump would need to be run every 2.3-5.5 days to maintain water in POS1 to irrigate POU 1 and 2. Every time the pump is turned on, water from POD1/POS2 is diverted into POS1.

- i. One day of violation of Term 66 of Section 2 of the Cannabis Policy is alleged for the diversion of water at POD1 for cannabis cultivation irrigation during the forbearance period, documented during the site inspection on June 3, 2021.

28. Violation 3: Cannabis Cultivation Policy, Attachment A, Section 2, Term 77 states:

Cannabis cultivators shall plug, block, cap, disconnect, or remove the diversion intake or otherwise bypass flow or render the diversion intake incapable of diverting water for cannabis cultivation activities during the surface water forbearance period, unless the diversion intake is used for other beneficial uses, to ensure no water is diverted during that time.

- a. Division staff observed that POD1 was actively diverting surface water when required for cannabis cultivation during the June 3, 2021, inspection, which was conducted during the surface water forbearance period (April 1 – October 31). Division staff observed that the diversion structure for POD1 was not plugged, blocked, capped, disconnected, removed, or rendered incapable of diverting water for cannabis cultivation during the forbearance period, as required.
 - i. One day of violation of Term 77 of Section 2 of the Cannabis Cultivation Policy is alleged for the failure to follow intake requirements for POD1 during the site inspection on June 3, 2021.

29. Violation 4: Cannabis Cultivation Policy, in Attachment A, Section 2, Term 82 states:

The cannabis cultivator shall install and maintain a measuring device(s) for surface water or subterranean stream diversions. The measuring device shall be, at a minimum equivalent to the requirements for direct diversions greater than 10 acre-feet per year in California Code of Regulations, Title 23, Division 3, Chapter 2.7 and

Chapter 2.8. The measuring device(s) shall be located as close to the point of diversion as reasonable. Cannabis cultivators shall maintain daily diversion records for water diverted for cannabis cultivation. Cannabis cultivators shall maintain separate records that document the amount of water used for cannabis cultivation separated out from the amount of water used for other irrigation purposes and other beneficial uses of water (e.g., domestic, fire protection, etc.). Cannabis cultivators shall maintain daily diversion records at the cultivation site and shall make the records available for review or by request by the Water Boards, CDFW, or any other authorized representatives of the Water Boards or CDFW. Daily diversion records shall be retained for a minimum of five years. Compliance with this term is required for any surface water diversion for cannabis cultivation, even those under 10 acre-feet per year.

- a. During the site inspection on June 3, 2021, no water measuring device was observed on or near POD1, nor were any records of water diversion found on the Property. Division staff determined that, based on the diversion system, there would need to be at least one water measuring device installed for POD1 to measure water diverted for cannabis cultivation.
 - i. One violation of Term 82 of Section 2 of the Cannabis Cultivation Policy is alleged for failure to have a water measuring device installed during the inspection and for the failure to maintain daily diversion records on the Property.

30. Violation 5: Cannabis Cultivation Policy, in Attachment A, Section 2, Term 98 states:

Cannabis cultivators shall maintain daily records of all water used for irrigation of cannabis. Daily records may be calculated by the use of a measuring device or, if known, by calculating the irrigation system rates and duration of time watered (e.g., irrigating for one hour twice per day using 50 half-gallon irrigation emitters equates to 50 gallons per day (1 hour x 2 times per day x 50 irrigation emitters x 0.5 gallons per irrigation emitter per hour) of water used for irrigation). Cannabis cultivators shall retain, for a minimum of five years, irrigation records at the cannabis cultivation site and shall make all irrigation records available for review by the Water Boards, CDFW, and any other authorized representatives of the Water Boards or CDFW.

- a. During the site inspection on June 3, 2021, Division staff did not locate daily records of water used for cannabis irrigation on the Property. Additionally, Division staff did not observe any water measuring devices at POD1/POS2, the POS, or at POU 1 and 2. Division staff requested daily irrigation records from the Diverter in the NOV/IR received by the Diverter on July 31, 2021. No additional information has been received in response to corrective actions required. At the time of the inspection, no responsible parties were available to provide records.
 - i. One violation of Term 98 of Section 2 of the Cannabis Cultivation Policy is alleged for failing to measure cannabis

irrigation water use and to maintain daily records of water used for irrigation of cannabis during the inspection on June 3, 2021.

Diversions or Use of Water for Cannabis Cultivation Requires CDFA License

31. Violation 6: Water Code section 1847(b)(4) provides that any person or entity who diverts or uses water for cannabis cultivation for which a license is required, but which has not been obtained, under Chapter 6 (commencing with 26060) or Chapter 7 (commencing with 26070) of Division 10 of the Business and Professions Code may be liable in an amount not to exceed the sum of five hundred dollars (\$500) per violation, plus two hundred fifty dollars (\$250) for each additional day on which each violation continues if the person fails to correct the violation within 30 days after the Board has called the violation to the attention of that person or entity, plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in violation of the applicable requirement.

DCC and its predecessors CalCannabis and CDFA established a commercial cannabis cultivation licensing program pursuant to Chapter 6 (commencing with section 26060) of Division 10 of the Business and Professions Code and began issuing licenses on January 1, 2018. While the Division is not responsible for determining the specific type of state cultivator license type that DCC would have required here, based on the review of aerial images and Division staff's observations during the site inspection, the cannabis cultivation occurring on the Property is of a scale sufficient to require a commercial cannabis cultivation license under Chapter 6 (commencing with Section 26060) of Division 10 of the California Business and Professions Code as more than six living cannabis cultivation plants were observed.

- a. During the June 3, 2021, inspection, Division staff observed the diversion and use of water for cultivation of approximately 220 cannabis plants on 4,920 sq. ft. of the Property at POU 1 and 2. This scale of cultivation requires a license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code. Division staff examined available records on June 17, 2021 (records current to March 17, 2021) and again on March 29, 2022 (records current to February 22, 2022) and have not found any record that CDFA issued a license that would have authorized the observed cultivation.
 - i. One violation is alleged for diverting and using water for cannabis cultivation without having obtained a CDFA commercial cannabis license as required.

Statutory Maximum Liability

32. The statutory maximum liability for the violations alleged in this Complaint is the sum of each violation's statutory maximum liability (Violations 1+2+3+4+5 +6 = Statutory Maximum Liability). Therefore, the statutory maximum liability for Violations 1 through 6 is \$26,000 (\$23,500 + \$500 + \$500 + \$500 + \$500 + \$500).

CONSIDERATION OF WATER CODE SECTION 1055.3 FACTORS

33. Water Code section 1055.3 requires that the Board in determining the amount of civil liability shall take into consideration all relevant circumstances, including, but not limited to, 1) the extent of harm caused by the violations, 2) the nature and persistence of the violation, 3) the length of time over which the violation occurs, and 4) the corrective action, if any taken by the violator. This requirement is applied to all penalty proposals relative to this administrative civil liability complaint.

Relevant Circumstances Applicable to All Violations

34. Although aerial imagery and the site conditions observed during the inspection suggests that illegal cannabis cultivation activities and the failure to implement the Cannabis Cultivation Policy's best management practices pre-dates June 3, 2021, perhaps by years, the Division has taken a conservative approach to calculating the proposed administrative civil liability amount, focusing on the violations observed during the inspection. The Division recommends that the State Water Board take each opportunity to deter illegal activities and demonstrate the need to comply, including by imposing administrative civil liabilities for cannabis cultivation violations as applicable based upon the Water Code. The Diverter engaged in illegal cannabis cultivation activities, as such the proposed penalties must be adequate to serve as both punishment for the violations and as a deterrent for future noncompliance by similarly situated parties.

35. Length of Time: Aerial imagery dating from 2018 through 2020 suggests that diversion and use of water for cannabis cultivation on the Property has occurred for several years in a manner similar if not identical to that observed during the June 3, 2021, inspection.

Violations 1 through 4 Cannabis Cultivation Policy Violations

36. Violation 1: Failure to Submit a Statement of Water Diversion and Use (Water Code 5101)

- a. Extent of Harm Caused: The harm caused by this violation can be categorized generally as harm to the orderly and efficient administration of the state's water resources. State Water Board's Statement program is a central repository for records of diversion and use of water reported by all water diverters that do not have or is not required to have an appropriate water right on file with the State Water Board. The failure to submit statements of water diversion and use impacts the water rights regulatory program harming other priority of right diverters, the environment, and public trust resources. The effects of cannabis-related water diversion and use that are not reported to the State Water Board remain unknown and are a concern as the state continues to experience severe drought conditions. The need for timely water diversion and use records is particularly important after three years of critical drought conditions that have led to curtailments of legal users based on reported water use and projected water availability data. Failure to comply with reporting requirements adds administrative burden to state and local

regulators that can alter or reduce water use by legal water users when there is insufficient supply relative to demand. Information the regulated community includes in Statements is critical for the administration of water rights and managing water supply in the state. The State Water Board and the public need to understand when, where, how, and why water is used to ensure water is being put to the highest beneficial use. The effect cannabis related water diversion and use not reported to the State Water Board remains unknown and is a focus of rising concern as the state continues to experience severe drought conditions. Therefore, by failing to file a Statement to report water diversion and use, the Diverter compromises the Board's orderly and efficient administration of water resources of the state. The need for timely water diversion and use records are particularly important in years of critical drought conditions that have led to curtailments of legal water users based reported water use and projected water availability data.

- b. Nature and Persistence: The nature and persistence of the Diverter's failure to file a Statement is evident over time during the Property ownership. Division staff evaluated 2017 - 2020 aerial imagery to determine when the water diversion may have started on the Property by identifying the greenhouse at POU1 in aerial imagery as a landmark visible over a period of time. Division staff also observed the greenhouse at POU1 in use in 2020 Landvison aerial imagery reviewed. Division staff believe that cannabis cultivation has likely been occurring from 2018 -2021. The need to file a statement was called to the attention of the Diverter after the inspection in the NOV/IR received on July 31, 3021. The NOV/IR provided 30 days to comply. The Diverter complied on by filing a Statement of Water Diversion and Use on October 14, 2021, with the State Water Board. From August 31, ,2021 until October 14, 2021, represents 45 days of non-compliance following 30 days of Notice for this requirement.
- c. Corrective Action: On October 14, 2021, the Diverter complied by submitting and initial Statement to the Division for POD1. On October 27, 2021, the Diverter submitted a SDUR application to the State Water Board for processing. Filing a Statement with the State Water Board started the process of correcting this violation.
- d. Having considered all relevant factors identified in a-c, including the need to impose significant liability as a deterrent to similarly situated parties, the Division proposes an administrative civil liability under Water Code section 5107 in the amount of \$1,750.

37. Violation 2: Cannabis Cultivation Policy Section 2, Term 66- Failure to Comply with the Narrative and Numeric Instream Flow Requirements.

- a. Extent of Harm Caused:
Absent restrictions on water diversion, the individual and cumulative effects of water diversions for cannabis cultivation during the dry season are likely to significantly decrease instream flow and, in some instances,

reduce hydrologic connectivity or completely dewater the stream. Minimum flows that provide habitat connectivity are needed to maintain juvenile salmonid passage conditions in late spring and early summer. Instream flows are also needed to maintain habitat conditions necessary for juvenile salmonid viability throughout the dry season, including adequate dissolved oxygen concentrations, low stream temperatures, and high rates of macroinvertebrate production and drift from riffles to pools. Furthermore, many species depend on spring recession flows as migratory and breeding cues. The State Water Board is requiring a surface water diversion forbearance period to ensure adequate flows are maintained throughout the dry season to protect aquatic species, aquatic habitat, and water quality. Compliance with this requirement is mandatory to ensure that the diversion of water and associated with cannabis cultivation does not have a negative impact on the environment. The violation represents potential harm to terrestrial and aquatic species causing habitat loss in a stream length by dewatering or diminished flows extirpating species listed on the California Endangered Species Act and Federally Endangered Species Act lists. Diverting water during the forbearance period and during California drought emergency increases the severity of potential impacts to downstream priority of water right diverter's and to public trust resources and habitat.

b. Nature and Persistence:

The nature and persistence of the Diverter's unauthorized diversion and use of water for cannabis cultivation during the forbearance period is significant. In this case, the eradication of the cannabis at the time of the search warrant inspection served to eliminate the threat of continued use but did not abrogate the past effect caused by diverting during the forbearance period at the time of and prior to the inspection date, nor did it eliminate the threat of continued diversion from the active water diversion observed. The alleged violation addresses one day of violation when we recognize there have been many days of water diversion.

c. Corrective Actions:

The Diverter has ceased the diversion of water for cannabis cultivation and intends to no longer cultivate. The Diverter has filed a Statement of Water Diversion and Use and applied for a SDU registration.

d. Proposed Penalty:

Having considered all relevant factors, including the need to impose significant liability as a deterrent to similarly situated parties, the Division proposes an administrative civil liability under Water Code section 1847(b)(1) of \$500 per one day of violation.

38. Violation 3: Cannabis Cultivation Policy Section 2, Term 77- Failure to Follow Diversion Intake Requirements.

a. Extent of Harm Caused:

Compliance with this requirement is mandatory to ensure that the diversion of water associated with cannabis cultivation does not harm instream flows during the forbearance period. The inability to render the Diverter's POD intake incapable of diverting water can result in continued water diversion thereby impacting downstream beneficial uses and depriving senior downstream diverters. These violations may also injure other water right holders by improperly shifting the burden of offsetting public trust impacts to senior priority of right diverters. Impacts are compounded when the violation persists throughout the forbearance period in dry and critically dry years. POD1/POS2 diverts water from an unnamed stream tributary to a California Wild and Scenic River (Eel River), and the State Water Board has established limitations on when diversions can occur to protect public trust resources and to prevent harm.

b. Nature and Persistence:

On July 31, 2021, the Diverter was notified by the IR/NOV that the equipment used to operate POD1 was a violation of Cannabis Policy, Section 2, Term 77, as the diversion intake remained in the unnamed stream and was not plugged, blocked, capped, disconnected, removed, or rendered incapable of diverting water during the forbearance period (April 1 – October 31). In this case, the eradication of the cannabis at the time of the search warrant inspection eliminated the threat of continued use but did not abrogate the past effect caused by diverting during the forbearance period at the time of and prior to the inspection date, nor did it eliminate the threat of continued diversion from the active water diversion observed.

c. Corrective Actions:

Photos submitted by the Diverter show the pump used to convey water to the cannabis POU on the Property was removed post inspection, but the onstream impoundment at POD1/POS2 remains. On October 14, 2021, The Diverter submitted an initial statement to the Division. On October 27, 2021 the Diverter submitted a SDU registration application to the Division for processing.

d. Proposed Penalty:

Having considered all relevant factors, including the need to impose significant liability as a deterrent to similarly situated parties, the Division proposes an administrative civil liability under Water Code section 1847(b)(1) in the amount of \$250 per one day of violation.

39. Violation 4: Cannabis Cultivation Policy Section 2, Term 82- Failure to Install Water Measuring Devices or Maintain Diversion Records.

a. Extent of Harm Caused:

Cannabis cultivators are required to install and maintain measuring devices for surface water diversions to assist the State Water Board in obtaining accurate data on how much water is being diverted in watersheds. Accurate water diversion and use data is needed from all

users of water in the state so that the State Water Board can plan for emergency drought response and effectively manage limited water resources in impacted watersheds. By failing to install a measuring device and maintain daily diversion records the Diverter deprives the State Water Board of critical data. This directly harms the State Water Board's ability to plan for limited water supply, forecast water demand, assure compliance with water rights, and effectively manage the state's water resources.

b. Nature and Persistence:

On July 31, 2021, the Diverter was notified by the IR/NOV that the failure to install and maintain monitor records of water diverted at POD1 was a violation of Cannabis Policy, Section 2, Term 82. The Diverter diverted and used water for cannabis cultivation without measuring the diversion to storage without a required measuring device installed as required.

c. Corrective Actions:

Photos submitted by the Diverter show the pump used to convey water to the cannabis POUs on the Property was removed post inspection, but the onstream impoundment at POD1/POS2 remains.

d. Proposed Penalty:

Having considered all relevant factors, including the need to impose significant liability as a deterrent to similarly situated parties, the Division proposes an administrative civil liability under Water Code section 1847(b)(1) in the amount of \$250 per one day of violation.

40. Violation 5: Cannabis Cultivation Policy Section 2, Term 98- Failure to Maintain Daily Records of Water Use for Cannabis Irrigation.

a. Extent of Harm Caused:

Compliance with this term is required to ensure that the diversion and use of water associated with cannabis cultivation does not have a negative impact on aquatic and riparian habitat and does not impact downstream water right holders. Accurate water use data on cannabis cultivation irrigation water demand is necessary so that the Division can determine if best irrigation management practices are applied. The application of best irrigation management practices prevents the waste of water from overwatering and prevents runoff of cannabis cultivation wastewater. By failing to maintain daily irrigation records, the Diverter directly harms the State Water Board's ability to plan for emergency drought response, limited water supply, forecast water demand, assure compliance with water rights, and effectively manage the state's water resources.

b. Nature and Persistence:

On July 31, 2021, the Diverter was notified in the NOV/IR of the requirement to maintain diversion and irrigation records for cannabis cultivation on the Property. During the site inspection on June 3, 2021, no water measuring device were observed on or near the POD or POS, nor

were any irrigation records for cannabis water demands found. Division staff requested daily irrigation records from the Diverter in the NOV/IR received by the Diverter on July 31, 2021. No additional information has been received in response to corrective actions required.

- c. Corrective Actions:
The Diverter has not provided any evidence that records of irrigation have been maintained as of the date of this Complaint.
- d. Proposed Penalty:
Having considered all relevant factors, including the need to impose significant liability as a deterrent to similarly situated parties, the Division proposes an administrative civil liability under Water Code section 1847(b)(1) in the full statutory maximum of \$500 per one day of violation.

41. Violation 6: Diversion or Use of Water for Cannabis Cultivation Without the Requisite License (Water Code 1847).

- a. Extent of Harm Caused:
Operating a commercial cannabis cultivation site without a license causes negative economic impact on the legal cannabis industry and general harm to the administration of the regulatory program. The Water Board's Cannabis Cultivation Regulatory Program is in its infancy and the illegal cultivation industry continues to be a focus of enforcement efforts. Illegal cultivation directly harms the legal market by supporting and supplying an unregulated market where illegal cultivators do not incur the compliance costs to cultivate cannabis in a manner that does not have a negative impact on water quality, aquatic habitats, riparian habitats, wetlands, springs, and health and safety of users. As such, the Diverter's cannabis cultivation activities significantly harm legal cultivators and the Cannabis Cultivation Regulatory Program.
- b. Nature and Persistence:
Unlicensed cannabis cultivation is in violation of the laws and regulations enacted pursuant to the Medical and Adult-Use Cannabis Regulation and Safety Act. DCC's predecessor, CDFA, began accepting applications for commercial cannabis cultivation licenses on January 1, 2018. During the site inspection, Division staff observed approximately 220 cannabis plants growing in two greenhouses irrigated by a gasoline water pump from a surface water diversion (POD1/POS2). This scale of cultivation requires a state cultivation license from DCC. It was determined the scale of cannabis cultivation occurring on the Property during the June 3, 2021, inspection required a commercial cannabis license. Division staff called to the Diverter's attention in the IR/NOV that commercial cannabis cultivation required a license pursuant to Water Code, section 1847.
- c. Corrective Actions:
On August 12, 2021, the Diverter submitted photos showing the removal of cannabis cultivation sites (POU 1 and 2) observed on the Property. In

addition, the Diverter stated that they will no longer cultivate cannabis on the property. To date, no DCC license has been acquired by the Diverter.

d. Proposed Penalty:

Having considered all relevant factors, including the need to impose significant liability as a deterrent to similarly situated parties, the Division proposes an administrative civil liability under Water Code section 1847(b)(1) in the full statutory maximum amount of \$500 per one day of violation.

PROPOSED CIVIL LIABILITY

42. The Assistant Deputy Director for Water Rights recommends administrative civil liability in the amount of Violations 1 through 6 = 1 (\$1,750) + 2 (\$500) + 3 (\$250) + 4 (\$250) + 5 (\$500) + 6 (\$500) = \$3,750.

RIGHT TO HEARING

43. The Diverter may request a hearing on this matter before the State Water Board Administrative Hearings Office. Any such request for hearing must be delivered to or received by mail by the Administrative Hearings Office within 20 days after the date the Diverter receives this Complaint as required by Water Code section 1055, subdivision (b).

44. If the Diverter does not request a hearing within 20 days, then the right to a hearing on the matter is waived. The Assistant Deputy Director for Water Rights, under authority delegated by the State Water Board, may then issue a final Administrative Civil Liability Order assessing the proposed liability.

45. If the Diverter timely requests a hearing, the Diverter will have an opportunity to contest the allegations in this Complaint and the imposition of liability before a hearing officer from the Administrative Hearings Office. The Administrative Hearings Office will issue a notice setting the specific time and place for the hearing, and describing the hearing process, not less than 10 days before the hearing date.

46. After any hearing, the Administrative Hearings Office will issue a proposed order or final order setting administrative civil liability or determining that a liability shall not be imposed. If the Administrative Hearings Office issues a proposed order, the State Water Board will consider adopting the order at a subsequent public meeting.

STATE WATER RESOURCES CONTROL BOARD



FOR

*Jule Rizzardo, Assistant Deputy Director
Division of Water Rights*

Dated: