

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2016-0513

**JIM & VERA KURNOSOFF,
AS INDIVIDUALS AND IN THEIR REPRESENTATIVE CAPACITY AS TRUSTEES
FOR THE J & V REVOCABLE TRUST,
FRESNO COUNTY**

**PROSECUTION TEAM'S LEGAL AND TECHNICAL ANALAYIS SUPPORTING
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2016-0513**

I. Introduction

The California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) Prosecution Team requests that the Hearing Panel recommend that the Central Valley Water Board adopt Administrative Civil Liability Complaint R5-2016-0513 (ACLC) as proposed. This Legal and Technical Analysis discusses the legal basis for liability of Jim and Vera Kurnosoff, as individuals and in their representative capacity as trustees for the J & V Revocable Trust (Dischargers) and explains the inclusion of an updated economic benefit calculation and corresponding minimum liability amount.

II. The Dischargers are Required to Obtain Coverage Under the Irrigated Lands Regulatory Program

On 18 March 2015, Board staff conducted a field inspection, from public roadways, of Fresno County Assessor Parcel Number (APN) 020-100-33S and found evidence of 30 acres of commercially irrigated grapes. An additional three parcels (020-100-32S, 020-150-11S and 020-150-12S) of grapes were found using aerial imagery indicating a total of approximately 88 acres of irrigated cropland. (ACLC, Attachment B.)

On 26 March 2015, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Dischargers, sent via certified mail. The Directive stated that, *"You are receiving this letter because, based on information available to the California Regional Water Quality Control Board, you own the following parcels with irrigated cropland, which are subject to new regulations."* The Directive was sent based on information that the subject parcels contained commercially irrigated land without regulatory coverage. The Directive required Dischargers to obtain regulatory coverage for their irrigated agriculture parcels within 15 calendar days of receipt of the Directive. (ACLC, Attachment A.)

The Dischargers received the Directive on 28 March 2015. (ACLC, Attachment A.) Thus, the Dischargers were required to obtain regulatory coverage by 12 April 2015. The Dischargers neither obtained regulatory coverage by 12 April 2015 nor contacted the Board, resulting in issuance of a Notice of Violation (NOV) on 9 July 2015. (ACLC, Attachment C.)

Board staff contacted Mr. Jim Kurnosoff Sr. via telephone twice in August 2015, but communications proved unsuccessful. (Prosecution Team Exs. 5-6.)

On 28 September 2015, Board staff conducted a second field inspection, from public roadways of Fresno County APNs 020-100-32S and 020-100-33S. Staff again found a commercial irrigated land use; however, staff observed no direct evidence of surface water discharges from the parcels (e.g., discharge pipes at borders or erosion rills leading offsite). (ACLC, Attachment D.)

On 5 October 2015, the Prosecution Team sent the Dischargers a letter notifying them of the Prosecutions Team's intention to pursue an administrative civil liability in the amount of \$27,885 and inviting the Dischargers to discuss settlement prior to issuance of an ACLC. (ACLC,

Attachment E.) A settlement meeting occurred on 13 November 2015, but no settlement was reached. (Prosecution Team Ex. 8.)

On 25 January 2016, the Prosecution Team issued the ACLC for \$27,885 in administrative civil liability for failure to obtain regulatory coverage as required by the Directive.

Initially, this case was set for the April 2016 Board Meeting. However, the Dischargers submitted a waiver form and the Advisory Team agreed to take this case off calendar while the parties engaged in further settlement negotiations.

The parties held another settlement meeting on 4 April 2016. (Prosecution Team Ex. 9.) Again, the parties failed to reach a settlement.

On 22 June 2016, Ms. Kathleen P. Clack, attorney for Jim Kurnosoff, sent a letter to David Sholes to explain her client's position and offered to meet to further discuss the case. The letter states that the land was not irrigated from some time in 2013 to August 2015 due to broken water pumps, the Dischargers relied solely on rainwater, and the Dischargers lost 4,500 vines during this period. The letter also states that it was Mr. Jim Kurnosoff's (likely Jim Kurnosoff Sr.), practice to toss mail for which he has no understanding. The letter further states that Mr. Kurnosoff would enroll in the Coalition. (Prosecution Team Ex. 10.)

On 5 August 2016, David Sholes and Patrick Barnes of the Prosecution Team conducted a site visit to the Kurnosoff properties accompanied by Mr. Jim Kurnosoff and Ms. Clack. The purpose of the site visit was to gain a better understanding of the irrigation system and to verify some of the statements made in the 22 June 2016 letter, such as the loss of 4,500 vines.

The Kurnosoffs refer to Fresno County APNs 020-100-32S and 020-100-33S as Home Base. Mr. Kurnosoff told staff that the well on APN 020-100-32S (the eastern parcel) went out in early 2014 and was repaired in early 2015 and the well on APN 020-100-33S (the western parcel) went out in late 2013 and is now irrigated by the well on the eastern parcel. Mr. Kurnosoff stated that no irrigation occurred in 2014. An employee of Mr. Kurnosoff's stated that about 1,800 vines were lost at Home Base, and that no other area of the ranches had experienced losses that concentrated. (Prosecution Team Ex. 19.)

The Kurnosoffs operate and refer to Fresno County APN 020-150-18S as Three Palms. This property was not mentioned in the ACLC, and is therefore not subject to this action. (Prosecution Team Ex. 19.)

The Kurnosoffs refer to Fresno County APNs 020-150-11S and 020-150-12S as Shasta Ranch. A single well is used to irrigate both of these parcels and it went out of operation in 2013 or 2014. The current status of the well is unknown. Mr. Kurnosoff stated that he received some water from the Fresno Irrigation District at least once during 2013-2015 to irrigate these parcels. (Prosecution Team Ex. 19.)

During the site visit, David Sholes and Patrick Barnes did not see evidence of a loss of 4,500 vines as alleged in the 22 June 2016 letter. (Prosecution Team Ex. 19.)

If an APN is irrigated anytime in the past five years, it must maintain regulatory coverage under the Irrigated Lands Regulatory Program, even during fallow years or years in which irrigation does not occur. This rule is consistent with the general intent of the Irrigated Lands Regulatory Program and the annual fee schedule for waste discharge requirements and waivers of waste discharge requirements for discharges from agricultural lands, including irrigated lands.¹

Google Earth imagery date 5 April 2014 and 18 March 2015 confirmed the presence of irrigated agriculture on the four parcels subject to the ACLC. (Prosecution Team Ex. 18.)

When the ACLC was issued in January 2016, the Dischargers had not obtained regulatory coverage. The Dischargers joined the Coalition in June 2016, over one year since issuance of the Directive, over seven months after the first settlement meeting, and nearly six months after the ACLC was issued. (See Prosecution Team Ex. 11.)

A final settlement meeting was held on 1 September 2016, and again, the parties failed to reach a settlement. (See Prosecution Team Ex. 20.)

III. Jim and Vera Kurnosoff are Liable as Individuals and in their Representative Capacity as Trustees of the J & V Revocable Trust

“A trust itself cannot sue or be sued.” (*Presta v. Tepper* (2009) 179 Cal.App.4th 909, 914.) As a general rule, “...the trustee is the real party in interest with standing to sue and defend on the trust's behalf.” (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 691.) Thus, the ACLC was issued against Jim and Vera Kurnosoff in their representative capacity as trustees of the J & V Revocable Trust.

“A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault.” (Prob. Code, § 18001.) “[A] trustee is 'personally at fault' when the trustee, either intentionally or negligently, acts or fails to act.” (*Haskett v. Villas at Desert Falls* (2001) 90 Cal. App. 4th 864, 875.) As stated in Attachment F of the ACLC, the Prosecution Team alleges that the Dischargers acted intentionally or at least negligently in failing to obtain regulatory coverage as evidenced by the multiple notices sent to the Dischargers and the Dischargers continual failure to obtain regulatory coverage despite knowledge of the requirements. Therefore, the Dischargers are liable as individuals.

IV. Updated Economic Benefit Analysis and Minimum Liability Amount

The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit of noncompliance. In April 2016, after issuance of the ACLC, the BEN financial model was updated to BEN version 5.6.0. Prosecution Team Exhibit 17 is included in the Prosecution Team's Evidence Submission and is intended to

¹ “As used in this section, the acreage on which the fee is based refers to the area that has been irrigated by the farmer or discharger at any time in the previous five years.” (Cal. Code Regs., tit. 23, § 2200.6, subd. (a), fn. 1.)

supersede the calculation included in the ACLC and its corresponding attachments, including ACLC, Attachment F, page F-7. Therefore, the economic benefit of noncompliance is \$4,084.

The Enforcement Policy recommends that the minimum liability amount imposed not be below the economic benefit of noncompliance plus ten percent. The economic benefit of noncompliance is \$4,084. Therefore, the minimum liability amount is \$4,492. This updated minimum liability amount is intended to supersede the minimum liability amount listed in the ACLC and its corresponding attachments.

V. Conclusion

For the reasons stated above, the Prosecution Team requests that the Hearing Panel recommends that the Central Valley Water Board adopt Administrative Civil Liability Complaint R5-2016-0513 as proposed.

For the Prosecution Team:

A handwritten signature in blue ink that reads "Kailyn Ellison". The signature is written in a cursive style and is positioned above a solid horizontal line.

Kailyn Ellison, Attorney for the Prosecution Team
State Water Resources Control Board, Office of Enforcement