

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

**ORDER NO. R1-2023-0017
for Administrative Civil Liability**

**In the Matter of:
Kou Xiong and Susan Yang Xiong
Trinity County
Assessor's Parcel Number 015-420-027-00**

Administrative Civil Liability Complaint No. R1-2022-0039

The California Regional Water Quality Control Board, North Coast Region (hereinafter Regional Water Board) finds the following:

This matter comes before the Regional Water Board from Administrative Civil Liability Complaint No. R1-2022-0039, dated September 9, 2022 (Complaint) issued to Kou Xiong and Susan Yang Xiong (Dischargers). The Complaint alleges two violations based on evidence that the Dischargers failed to comply with Regional Water Board Cleanup and Abatement and 13267 Order No. R1-2021-0040 (Cleanup and Abatement Order or CAO) and proposes an administrative civil liability in the amount of \$506,813 pursuant to applicable laws and regulations, including California Water Code section 13350. A hearing took place on February 2, 2023, in accordance with the hearing notice and procedures served on Dischargers, and applicable laws and regulations, including California Code of Regulations, title 23, sections 648-648.8, as well as applicable orders from the Governor of the State of California.

BACKGROUND

1. Susan Yang Xiong (Ms. Yang Xiong) acquired title to Trinity County APN 015-420-027-00 (Property) on February 27, 2014 and owned the Property at the time State Water Resources Control Board, Office of Enforcement staff (Staff) documented site conditions constituting threats to water quality and beneficial uses. Ms. Yang Xiong transferred ownership of the Property to Kou Xiong (Mr. Xiong) on October 7, 2020. Mr. Xiong owned the Property at the time of the violations alleged in the Complaint. The Property conditions that triggered the Cleanup and Abatement Order persist.
2. 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. The Dischargers created and threaten to create conditions of pollution by unreasonably impacting water quality and beneficial uses of the unnamed tributary to Barker Creek within the Hayfork Valley Hydrologic Sub Area and subsequently to the South Fork Trinity River Hydrologic Area. 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 Sub Area within the South Fork Trinity River Hydrologic Area (Basin Plan, pp. 2-7):

- 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 and 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
3. The South Fork Trinity River supports a number of aquatic species, including the California Coast Fall run Chinook Salmon, Coho Salmon, and the Northern California Coast Steelhead. The Basin Plan contains water quality objectives which are necessary for reasonable protection of the beneficial uses. Protection of fishery 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) are of particular importance and include the following:
- 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 3.3.12) “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.”
4. The Basin Plan (Section 4.2.1) contains the *Action Plan for Logging, Construction, And Associated Activities*, that 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.”

5. The federal Clean Water Act section 303(d) list identifies the South Fork Trinity River 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* (Sediment TMDL Implementation Policy) by Resolution R1-2004-0087. The goals of the 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.”

6. On June 26, 2019, Staff participated in a joint inspection of the Property with personnel and law enforcement from the California Department of Fish and Wildlife, Watershed Enforcement Team. Staff observed and documented discharges and threatened discharges 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 of Barker Creek; construction of an off-stream water storage pond, redirection of a section of the tributary, discharge of cannabis cultivation tailwater and storm water from 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. Peter Xiong, Ms. Yang Xiong’s ex-husband was the cannabis cultivator onsite during the inspection and signed the State Water Resources Control Board’s, Division of Water Rights Notice of Violation for unpermitted water diversion and use. Law enforcement agents eradicated the cannabis plants on the Property.
7. On November 12, 2019, Staff provided recommendations to Ms. Yang Xiong for correcting the discharges and threatened discharges on the Property in a Notice of Violation. Ms. Yang Xiong did not reply to Staff or correct the violations documented in the Notice of Violation. Subsequently, on October 7, 2020, Ms. Yang Xiong transferred ownership of the Property to Mr. Xiong.
8. On June 23, 2021, Staff provided a draft Cleanup and Abatement Order to Dischargers and invited them to provide comments within 30-days. Again, the

Dischargers did not respond to Staff.

9. On August 11, 2021, the Regional Water Board Executive Officer issued the Cleanup and Abatement Order to the Dischargers in response to violations of the Basin Plan. The Cleanup and Abatement Order directs the Dischargers to submit a proposed Cleanup, Restoration, and Monitoring Plan (CRMP) by September 17, 2021 (Required Action 1) and to complete implementation of the CRMP by October 31, 2021 (Required Action 4). The Dischargers did not respond, nor did they file a petition to challenge the Cleanup and Abatement Order. The period to challenge the Cleanup and Abatement Order expired on September 10, 2021.
10. On January 20, 2022, Staff advised the Dischargers in a Notice of Violation Letter that they were in violation of Cleanup and Abatement Order Required Actions 1, 4, and 5 for failing to submit a CRMP by September 17, 2021, failure to implement and complete the CRMP by October 31, 2022, and the failure to submit a completion report by December 17, 2022. The letter also informed the Dischargers of the potential for administrative civil liability pursuant to Water Code sections 13268, 13350, and 13385. The letter was returned to Staff unclaimed by the Dischargers.
11. A second Notice of Violation letter was sent to the Dischargers' addresses of record on February 24, 2022, notifying the Dischargers of the continued failure to implement the Cleanup and Abatement Order's required actions. The FedEx proof-of-delivery confirmed the second letter was delivered to both Dischargers. Nevertheless, the Dischargers did not respond to Staff.
12. On April 7, 2022, a Final Notice of Violation letter was sent to the Dischargers along with a complete translation of the letter into the Hmong language. The FedEx proof-of-delivery confirmed the final letter was delivered to both Dischargers. Nevertheless, the Dischargers did not respond to Staff.
13. The Penalty Methodology for the Complaint (Attachment A) provides the details of these violations and the factors considered in developing the civil liability. Attachment A to the Complaint is included as Attachment A to this Order and incorporated herein by reference.

VIOLATIONS

14. **Violation 1:** The Prosecution Team alleges that the Dischargers violated Cleanup and Abatement Order Required Action 1 by failing to submit a CRMP by September 17, 2021.
15. **Violation 2:** The Prosecution Team alleges that the Dischargers violated Cleanup and Abatement Order Required Action 4 by failing to implement an approved CRMP by October 31, 2021.

LEGAL AND REGULATORY CONSIDERATIONS

16. The Cleanup and Abatement Order directive to submit a CRMP was issued pursuant to Water Code section 13267.
17. The Cleanup and Abatement Order directives to implement corrective actions on the Property were issued pursuant to Water Code section 13304, subdivision (a).

WATER CODE AUTHORITY FOR IMPOSING ADMINISTRATIVE CIVIL LIABILITY

18. 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.
19. Water Code section 13350 states, in relevant part:

(a) A person who:

(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.

(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

20. 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 2017 Enforcement Policy was approved by the Office of Administrative Law and 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).¹

21. The violations alleged 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 Regional Water Board has considered the required factors for the alleged violations using the methodology in the 2017 Enforcement Policy, as described in Attachment A.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

22. Issuance of this Order 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

23. The Prosecution Team proposes an administrative civil liability of **\$506,813** for the violations, as detailed in Attachment A. This proposed administrative civil liability was derived 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.

MAXIMUM STATUTORY LIABILITY

24. **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].
25. **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].

¹ The 2017 Enforcement Policy is available at:
https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

MINIMUM LIABILITY

26. **Violation 1:** There is no statutory minimum liability for this Violation.
27. **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.
28. The 2017 Enforcement Policy further requires the Regional Water Board to recover, at a minimum, the economic benefit plus 10%. Attachment A includes a detailed explanation of the basis of this calculation. The Dischargers’ economic benefit obtained from the violations cited in the Complaint plus 10% equals \$2,209. The administrative civil liability is more than the minimum liability amount for either Violation.

ADMINISTRATIVE CIVIL LIABILITY

29. Based on consideration of the above facts, the evidence in this matter, material submitted by the parties, the testimony and arguments presented at hearing, the applicable law, and after applying the methodology in the Enforcement Policy, the Regional Water Board finds that civil liability shall be imposed administratively jointly against the Dischargers in the amount of **\$506,813**, as explained in detail in Attachment A to this Order.
30. Notwithstanding the issuance of this Order, the Regional Water Board retains the authority to assess additional penalties for violations for which penalties have not yet been assessed or for violations that may subsequently occur.
31. Any person aggrieved by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, section 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filling petitions will be provided upon request, and may be found on the Internet at:
http://www.waterboards.ca.gov/public_notices/petitions/water_quality/

IT IS HEREBY ORDERED, pursuant to Water Code sections 13268, 13350, and other applicable law, that:

1. The Dischargers jointly shall be assessed an Administrative Civil Liability in the amount of five hundred six thousand eight hundred thirteen dollars (\$506,813).

2. Payment shall be made no later than 30 days from the date on which this Order is adopted. The Dischargers shall send the original signed check with reference to this Order number to:

State Water Resources Control Board
Division of Administrative Services
ATTN: Accounting
1001 I Street, 18th Floor
Sacramento, CA 95814

with a copy to:

North Coast Regional Water Quality Control Board
Attn: Jeremiah Puget
5550 Skylane Boulevard, Suite A
Santa Rosa, CA 95403.

I, Valerie Quinto, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, North Coast Region, on February 2, 2023.

Valerie Quinto
Executive Officer

ATTACHMENT A

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 eighty-six thousand sixty-two dollars (\$86,062.50) 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 four hundred twenty thousand seven hundred fifty dollars (\$420,750) 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 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

¹ The Enforcement Policy can be found at:

https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

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

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.

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)**.