

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

**[PROPOSED] ORDER NO. R1-2022-0033  
for Administrative Civil Liability**

**In the Matter of:  
Szagora LLC and Toshko Toshkoff  
Humboldt County  
Assessor's Parcel Number 208-054-003-000**

**Administrative Civil Liability Complaint No. R1-2022-0023**

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. R1-2022-0023, dated May 9, 2022 (Complaint) issued to Szagora LLC, and Toshko Toshkoff (Dischargers).<sup>1</sup> 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. R1-2021-0031 (Cleanup and Abatement Order) and proposes an administrative civil liability in the amount of \$209,687 pursuant to applicable laws and regulations, including California Water Code section 13350. A hearing took place on August 4, 2022, 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. Szagora LLC acquired title to Humboldt County APN 208-054-003-000 (Property) on December 9, 2019 and has owned the Property at all times relevant here. Toshko Toshkoff owns and manages the LLC. Mr. Toshkoff controls the Property and directed the activities on the Property that triggered the Cleanup and Abatement Order, including the use of a road crossing tributaries to the Mad River to access unauthorized cannabis cultivation facilities. Mr. Toshkoff was not named to the Cleanup and Abatement Order because Regional Water Board staff discovered his involvement with the activities at the site after the Cleanup and Abatement Order was issued.
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. Earthen material from undersized,

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<sup>1</sup> The Complaint also names Rudy Chacon, but the Prosecution Team has proposed to drop Mr. Chacon from this matter. See paragraph 15 below.

misaligned and failed stream crossings and hydrologically connected road segments threaten to discharge to unnamed tributaries to the Mad River in the Butler Valley Hydrologic Area. The *Water Quality Control Plan for the North Coast Region* (Basin Plan) identifies the following existing and potential beneficial uses for the Butler Valley Hydrologic Area (Basin Plan, pp. 2-11):

- a. Municipal and domestic supply
  - b. Agricultural supply
  - c. Industrial service supply
  - d. Industrial process supply
  - e. Groundwater recharge
  - f. Freshwater replenishment
  - g. Navigation
  - h. Hydropower generation
  - i. Non-contact water recreation
  - j. Commercial and sport fishing
  - k. Warm freshwater habitat
  - l. Cold freshwater habitat
  - m. Wildlife habitat
  - n. Rare, threatened, or endangered species
  - o. Migration of aquatic organisms
  - p. Spawning, reproduction, and/or early development
  - q. Aquaculture
  - r. Native American Culture
3. The Mad River supports a number of aquatic species, including the California Coast Fall Chinook Salmon and the Northern California Coast Summer 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 Mad River as impaired due to elevated sedimentation/siltation and turbidity.

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 July 20, 2020, Regional Water Board staff (Staff) participated in a joint inspection with personnel from the California Department of Fish and Wildlife and Humboldt County including law enforcement agents. Staff observed undersized, misaligned and failed stream crossings and hydrologically connected road segments on a road leading to a cannabis cultivation facility on the Property. The stream crossings and road segments threaten to discharge earthen waste to unnamed tributaries to the Mad River. Law enforcement agents eradicated the cannabis plants on the Property.
7. On October 19, 2020, Staff provided recommendations to the Dischargers for correcting the stream crossings and road segments on the Property in a Notice of Violation. The Notice of Violation also directed the Dischargers to obtain regulatory coverage under Water Code section 13260 for the activities observed on the Property during the inspection. The Dischargers did not reply to Staff, nor did they obtain regulatory coverage under Water Code section 13260.
8. On April 8, 2021, Staff provided a draft Cleanup and Abatement Order to

Dischargers Szagora LLC and Rudy Chacon and invited them to provide comments by May 8, 2021. Again, the Dischargers did not respond to Staff.

9. On June 2, 2021, the Regional Water Board Executive Officer issued the Cleanup and Abatement Order to Szagora LLC, Mr. Chacon, and Ted Nash<sup>2</sup>, 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 July 1, 2021 (Required Action 1) and to complete implementation of the CRMP by October 15, 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 July 2, 2021.
10. On October 8, 2021, Staff advised the Dischargers in a Notice of Violation Letter that they were in violation of Cleanup and Abatement Order Required Action 1 for failing to submit a CRMP by July 1, 2021, and that failure to meet the Cleanup and Abatement Order deadlines may subject them to significant daily administrative penalties.
11. On October 15, 2021, Mr. Toshkoff and Mr. Nash spoke with Staff on the phone. The Dischargers acknowledged receipt of the Notice of Violations and Cleanup and Abatement Orders but chose not to abide by the Cleanup and Abatement Order requirements.
12. On March 16, 2022, Staff advised the Dischargers in a Notice of Violation Letter that they were in violation of Cleanup and Abatement Order Required Action Nos. 1 and 4 for failing to submit a CRMP by July 1, 2021 and for failing to implement an approved CRMP by October 15, 2021.
13. On March 30, 2022, Staff spoke with Mr. Toshkoff and explained the actions that he would need to take to comply with the requirements of the Cleanup and Abatement Order. Mr. Toshkoff did not express his intention to comply with the Order.
14. 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.
15. The Complaint names Rudy Chacon along with Szagora LLC and Toshko Toshkoff. After the issuance of the Complaint, the Prosecution Team obtained new evidence indicating that Rudy Chacon was not an operator of the activities at the property. Specifically, evidence indicates that Mr. Chacon assisted the operators with the formation of Szagora, LLC, but was not involved in operations at the property. This evidence includes emails from Mr. Chacon, and telephone conversations with Mr. Chacon and Mr. Toshkoff. This conclusion is further

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<sup>2</sup> Mr. Nash is not named to this Complaint because Staff have since learned that Mr. Nash was not involved in directing the activities at the Property.

supported by the Department of Fish and Wildlife's supplemental investigation report (PT-26), which concludes that Mr. Chacon was not an operator at the site. Based on this information, this Order will be issued jointly to Szagora LLC and Toshko Toshkoff, but not to Rudy Chacon.

### **VIOLATIONS**

16. **Violation 1:** The Prosecution Team alleges that the Dischargers violated Cleanup and Abatement Order Required Action 1 by failing to submit a CRMP by July 1, 2021.
17. **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 15, 2021.

### **LEGAL AND REGULATORY CONSIDERATIONS**

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

### **WATER CODE AUTHORITY FOR IMPOSING ADMINISTRATIVE CIVIL LIABILITY**

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

22. On April 4, 2017, the State Water Board adopted Resolution No. 2017-0020, which adopted the 2017 Water Quality Enforcement Policy (2017 Enforcement Policy). The 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).<sup>3</sup>
23. 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**

24. 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**

25. The Prosecution Team proposes an administrative civil liability of **\$209,687** 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**

26. **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

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<sup>3</sup> The 2017 Enforcement Policy is available at:  
[https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2017/040417\\_9\\_final%20adopted%20policy.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf)

exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Dischargers failed to submit the required CRMP for 312 days from July 1, 2021 to May 9, 2022. The statutory maximum liability for Violation 1 is \$312,000 [(\$1,000/day) x 312 days].

27. **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 206 days from October 15, 2021 to May 9, 2022. The statutory maximum liability for Violation 2 is \$1,030,000 [(\$5,000/day) x 206 days].

### MINIMUM LIABILITY

28. **Violation 1:** There is no statutory minimum liability for this Violation.
29. **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 \$20,600.
30. 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 \$920. The administrative civil liability is more than the minimum liability amount for either Violation.

### ADMINISTRATIVE CIVIL LIABILITY

31. 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 Szagora LLC and Toshko Toshkoff in the amount of **\$209,687**, as explained in detail in Attachment A to this Order.
32. 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.
33. 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/](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. Szagora LLC and Toshko Toshkoff jointly shall be assessed an Administrative Civil Liability in the amount of two hundred nine thousand six hundred eighty-seven dollars (\$209,687).
2. Payment shall be made no later than 30 days from the date on which this Order is adopted. Szagora LLC and Toshko Toshkoff shall send the original signed check 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, Matthias St. John, 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 August 4, 2020.

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Matthias St. John  
Executive Officer

22\_0033\_SzagoraLLC\_ACLO



**Attachment A**  
**Penalty Methodology for**  
**Administrative Civil Liability Complaint No. R1-2022-0023:**  
**Factors Considered in Developing Recommended Civil Liability**  
**Szagora LLC**

This technical analysis provides a summary of factual and analytical evidence that support the findings in Administrative Civil Liability Complaint No. R1-2022-0023 (Complaint) and the recommended assessment of administrative civil liability (ACL) in the amount of \$209,687. The Complaint alleges that Szagora LLC,<sup>1</sup> Toshko Toshkoff and Rudy Chacon (collectively 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. R1-2021-0031 (CAO). Additionally, the Complaint alleges that the Dischargers failed to comply with Water Code section 13260 after having been requested to do so by the Regional Water Board.

**BACKGROUND**

During a July 20, 2020 inspection of Humboldt County APN 208-054-003-000 (the Property), Regional Water Board staff (Staff) observed a road and five poorly constructed/maintained stream crossings where earthen material threatened to discharge into receiving waters, in violation of Basin Plan Section 4.2.1, Prohibition 2.

On October 19, 2020, Staff transmitted a Notice of Violation (NOV) to Szagora LLC, title owner of the Property, Ted Nash (aka Todor Neshev), registered agent for Szagora LLC, and Rudy Chacon, manager of Szagora LLC. The NOV and attached inspection report described the observed violations, provided recommendations for correcting the road and stream crossings, and directed the Dischargers pursuant to Water Code section 13260 to obtain regulatory coverage for discharges and threatened discharges of waste from cannabis cultivation and associated site development. Although both Ted Nash and Rudy Chacon signed certified mail return receipts for the NOV, neither they nor anyone else from, or associated with, Szagora LLC responded.

On April 18, 2021, Staff transmitted a draft CAO to the Dischargers, for which Mr. Nash and Mr. Chacon each signed certified mail return receipts. The Dischargers did not respond or provide any comments on the Draft CAO.

On June 2, 2021, the Regional Water Board Executive Officer issued the final CAO to the Dischargers, for which Mr. Nash and Mr. Chacon each signed certified mail return receipts. The CAO directed the Dischargers to submit a proposed Cleanup, Restoration,

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<sup>1</sup> Szagora LLC is a domestic limited liability corporation registered in the State of Nevada

and Monitoring Plan (CRMP) by July 1, 2021 (Required Action 1) and to complete implementation of the CRMP by October 15, 2021 (Required Action 4).

On October 8, 2021, Staff transmitted a NOV for failing to comply with CAO Required Action No. 1 to the Dischargers. On October 15, 2021 Staff spoke with Mr. Toshkoff, who confirmed that he had received the NOV letters and CAO mailed to Ted Nash and Rudy Chacon. Mr. Toshkoff explained to Staff that he owned Szagora LLC, Ted Nash was the resident agent and that Rudy Chacon was the manager.

On March 16, 2022, Staff transmitted a NOV for failing to comply with CAO Required Action Nos. 1 and 4 to the Dischargers. To date, Staff has not received any CRMP submittals. Accordingly, Staff proposes the assessment of penalties on a per day basis. For this analysis, Staff has calculated 312 days of violation (from July 1, 2021 to May 9, 2022) for CAO Required Action No. 1 and 206 days (from October 15, 2021 to May 9, 2022) for CAO Required Action No. 4. The steps below provide an analysis, using the Water Boards' Enforcement Policy methodology, leading to a proposed administrative civil liability for the Dischargers' failure to comply with the CAO deliverables.

### **SUMMARY OF VIOLATIONS**

1. CAO Required Action No. 1 directed submittal of a CRMP 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 the July 1, 2021, due date. As of May 9, 2022, the CRMP is 312 days late, and the Dischargers are subject to liability of up to \$312,000 pursuant to Water Code section 13268, subdivision (b). **As described below, the Prosecution Team recommends a penalty in the amount of thirty-seven thousand eight hundred and twelve dollars (\$37,812) for this violation.**
2. CAO Required Action No. 4 directed the Discharges to implement remedial actions 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 CAO has been violated. The Dischargers violated Water Code section 13304 by failing to complete CAO Required Action No. 4 by the October 15, 2021, due date. As of May 9, 2022, the Dischargers have been in violation of this requirement for 206 days, and are subject to liability of up to \$1,030,000, and no less than \$20,600, pursuant to Water Code section 13350, subdivision (e). **As described below, the Prosecution Team recommends a penalty in the amount of one hundred seventy-one thousand eight hundred and seventy-five dollars (\$171,875) for this violation.**
3. The October 19, 2020 NOV directed the Dischargers to obtain regulatory coverage under Water Code section 13260 for the cannabis cultivation activities no later

than December 12, 2020 (30 days after the Dischargers received the NOV). Failure to obtain regulatory coverage under 13260 when so requested by the Board is subject to liability pursuant to Water Code section 13261. However, on October 15, 2021, Mr. Toshkoff communicated to staff that he did not intend to recommence commercial cannabis cultivation on the Property. Staff is not aware of any evidence indicating that the Dischargers resumed cultivation on the Property following the eradication of the cannabis cultivation by the California Department of Fish and Wildlife (CDFW).

**Therefore, Staff does not propose assessing liability under Water Code section 13261.**

4. The October 19, 2020 NOV also identified threatened discharges of earthen material from the road and stream crossings at WQ 7, WQ 8, WQ 9, WQ 10 and WQ 13 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 Resources Control 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, staff does not propose assessing liability for this violation.**

5. The Dischargers are in violation of State Water Resources Control Board Cannabis Cultivation Policy (Cannabis Policy<sup>2</sup>) Attachment A, Section 1, terms: 1, 2, 3, 12, and 14; and Section 2 terms: 15, 17, 19, 22, 23, 48, 49, 51, 69, 74, 76 and 82. When Staff observes violations on illegal cannabis cultivation sites, the Water Code authorities available allow Staff to issue directives to dischargers requiring enrollment in regulatory programs and to issue other enforcement orders, including cleanup and abatement orders. Since cultivation has not continued on the property since the inspection on July 20, 2020, Staff has elected to utilize its enforcement authority to require remedial actions to address these violations; the Regional Water Board issued the CAO to address these violations in addition to the other violations of the Basin Plan consistent with the progressive enforcement process described in Violation No. 4, above. **Issuance of this proposed ACL further addresses these violations of the**

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<sup>2</sup> The Cannabis Policy can be found at:

[https://www.waterboards.ca.gov/water\\_issues/programs/cannabis/docs/policy/final\\_cannabis\\_policy\\_with\\_attach\\_a.pdf](https://www.waterboards.ca.gov/water_issues/programs/cannabis/docs/policy/final_cannabis_policy_with_attach_a.pdf)

**Cannabis Policy through enforcement of the CAO requirements. Therefore, staff does not propose assessing liability for this violation.**

### **PENALTY METHODOLOGY**

The State Water Resources Control Board's *Water Quality Enforcement Policy*<sup>3</sup> ("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 CAO. 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 the 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."

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<sup>3</sup> The Enforcement Policy can be found at:  
[https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2017/040417\\_9\\_final%20adopted%20policy.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf)

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

The Potential for Harm categories are as follows:

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

(Enforcement Policy, page 16)

The Deviation from Requirement categories are as follows:

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

(Enforcement Policy, page 16)

Potential for Harm:

**Violations 1-2:** 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. The Property is located in the Butler Valley Hydrologic Area of the Mad River watershed. Existing and potential beneficial uses for the Butler Valley Hydrologic Area include the following: Municipal and Domestic Supply (MUN); Agricultural Supply (AGR); Industrial Service Supply (IND); Industrial Process Supply (PRO); Groundwater Recharge (GWR); Freshwater Replenishment (FRSH); Navigation (NAV); Hydropower Generation (POW); Water Contact Recreation (REC-1); Non-contact Water Recreation (REC2); Commercial and Sport Fishing (COMM); Cold Freshwater Habitat (COLD); Wildlife Habitat (WILD); Rare Threatened or Endangered Species (RARE); Migration of Aquatic Organisms (MIGR); Spawning, reproduction, and/or Early Development (SPWN); Aquaculture (AQUA); and Native American Culture (CUL).

Tributaries to the Mad River pass through the middle of the Property from the west to east. Staff observed a road on the Property, passing between unauthorized cannabis cultivation facilities in the north and south of the Property, that crosses the tributaries to the Mad River. This road has steep sections that are hydrologically connected to surface waters with undersized, misaligned, and failed stream crossings that threaten to discharge earthen waste to the unnamed tributaries to the Mad River.

Discharged sediment and other inert materials alter the hydrologic and sediment transport regimes of surface waters. Such changes may lead to adverse conditions such as flooding, increases in suspended sediment and turbidity, accelerated erosion of the watercourse bed or banks, and localized accumulation of deleterious materials. Additionally, such discharges directly threaten wildlife habitat and aquatic species (Beneficial Uses impacted: RARE, MIGR, SPWN, COLD, COMM, and WILD). Increased sedimentation and turbidity can result in increased treatment and/or maintenance costs for downstream agricultural and municipal users that withdraw and treat the water (Beneficial Uses impacted: AGR and MUN). 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: REC-1 and REC-2).

Due to the Dischargers' failure to comply with CAO Required Action No. 1 (Violation 1) and CAO Required Action No. 4 (Violation 2), the conditions on the road used to access commercial cannabis facilities on the Property continue to threaten to discharge fine sediment to the Mad River. In addition, due to failure to obtain regulatory coverage the Dischargers have not complied with regulatory requirements or implemented adequate best practicable treatment and control measures or best management practices to eliminate threatened discharges of fine sediment or other wastes to the Mad River. Moreover, the Dischargers' failure to comply with the CAO Required Actions and to obtain regulatory coverage under Water Code section 13260 has substantially impaired the Water Boards' ability to perform its statutory and regulatory functions and present a substantial threat to beneficial uses. Therefore, the Potential for Harm to Beneficial Uses for each of the two violations is **Moderate**.

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 **Moderate 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 0.55 for Violation 1.

**Violation 2:** The deviation from the requirement to implement corrective actions by the stated deadlines (CAO Required Action 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 **Moderate 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 0.55 for Violation 2.

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

**Violation 1:** Per-Day Liability (1 violation x 312 (days) x 0.55 (per day factor) x \$1,000 (per day)) = **\$171,600**

**Violation 2:** Per-Day Liability (1 violation x 206 (days) x 0.55 (per day factor) x \$5,000 (per day)) = **\$566,500**

#### **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: 1.25***

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 **1.25**.

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 Policy, and with the Water Code generally. The Dischargers failed to comply with Cannabis Policy Attachment A, Section 1, terms: 1, 2, 3, 12, and 14; and Section 2 terms: 15, 17, 19, 22, 23, 48, 49, 51, 69, 74, 76 and 82. 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 Policy. Compliance with the General Order requirements consistent with the Policy would be achieved by engaging qualified professionals to design road crossings that are sized for the 100-year flow event, obtaining required permits and by implementing the designs consistent with the permits. Additionally, a reasonable and prudent person would have responded to the CAO and made efforts to comply with the CAO requirements and communicate these efforts to the Regional Water Board. These actions constitute intentional misconduct; thus, a value of 1.25 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 requiring Dischargers take actions or assessing monetary fines against the Dischargers for previous violations within the last five years. Accordingly, the minimum factor of **1.0** is used.

***Cleanup and Cooperation: 1.25***

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.

Staff is not aware that the Discharger undertook any cleanup that would be considered exceptional in response to the violations summarized above, nor any steps that would be considered above and beyond a normally expected response. In fact, the Dischargers have shown no evidence that they have attempted to correct the violations. Additionally, the Dischargers have been unresponsive to the various enforcement actions issued including responding to the three NOVs and CAO.

Therefore, Staff recommends assigning a score of **1.25** 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:** 312 days to 44 days

**Violation 2:** 206 days to 40 days

#### **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:** \$171,600 (Initial Liability) x 44/312 (Collapsed Days) x 1.25 (Culpability Factor) x 1.0 (History of Violations Factor) x 1.25 (Cleanup and Cooperation Factor) = **\$37,812**

**Violation 2:** \$566,500 (Initial Liability) x 40/206 (Collapsed Days) x 1.25 (Culpability Factor) x 1.0 (History of Violations Factor) x 1.25 (Cleanup and Cooperation Factor) = **\$171,875**

**Total Base Liability Amount: \$37,812 + \$171,875 = \$209,687**

#### **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).”

Szagora LLC is title owner of the Property, which has an assessed value of **\$322,351**, and property transaction records indicate that the Property was purchased in 2019 for cash and, therefore, the Property likely has no mortgage or other financial encumbrances. The Water Boards do not have information about the company’s revenues or liabilities that would further inform the violator’s 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.

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 Site Erosion and Sediment Control 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 \$2,760 and \$9,920.

Using the EPA Ben model to determine the economic benefit from delayed expenditures associated with Violation 1, Staff identified the plan cost of \$9,920 as a one-time non-depreciable expenditure, \$0 in capital investment, and \$0 in annual recurring fees with a noncompliance date of the July 1, 2021 deadline. The resulting economic benefit from delaying the plan expenditures to May 9, 2022 is \$344.

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 and \$323/year in monitoring fees for 5 years. The least expensive scenario for the Dischargers to implement the corrective actions would be to decommission the road and stream crossings where they threaten to discharge to receiving waters. Staff estimates that this scope of work could be accomplished for as little as \$10,000.

Using the EPA Ben model to determine the economic benefit from delayed expenditures associated with Violation 2, Staff identified the permit application cost of \$2,417, and estimated implementation cost of \$10,000 as a one-time non-depreciable expenditure, \$0 in capital investment, and the \$323 in annual recurring fees with a noncompliance date of the October 15, 2021 deadline. The resulting economic benefit from delaying the plan expenditures to May 9, 2022 is \$493.

The dischargers also avoided \$600 in enrollment fees for not enrolling in the Cannabis General Order. This avoided cost is not included in the economic benefit calculation

because Staff is not proposing to assess liability for failure to enroll, as explained under item #3 of the Summary of Violations section above, and enrollment under the Order is not a required corrective action.

Since the Dischargers will still need to submit a Cleanup and Restoration Plan and an application fee for a Water Quality Certification and implement the remedial work, the respective costs, estimated above, are not considered to be avoided. Staff finds that, at this time, the Dischargers have obtained an economic benefit for delayed costs of \$344 (Violation 1) + \$493 (Violation 2) = \$837 and the economic benefit plus 10 percent (\$83) = \$920, is significantly less than the proposed liability amount of \$209,687.

### **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.

### **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 **312 days** from July 1, 2021 to May 9, 2022. At \$1,000/day, the Maximum Liability would be **\$312,000**.

**Violation 2:** Failure to implement an approved CRMP for **206 days** from October 15, 2021 to May 9, 2022. At \$5,000/day, the Maximum Liability would be **\$1,030,000**.

Total Maximum Liability for non-discharge violations: **1** (violation) x **312** (days) x **\$1,000** (per day) + **1** (violation) x **206** (days) x **\$5,000** (per day) = **\$312,000 + \$1,030,000 = \$1,342,000**

**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 4: ((**1** (violation) x **206** (days) x **\$100** (per day)) = **\$20,600**

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 obtained from the violations cited in the Complaint to be **\$837**.

**The economic benefit plus 10%** would therefore be: **\$837** plus 10 percent (**\$83**) = **\$920**

The proposed liability of **\$171,875** for Violation 2 falls above the minimum liability of **\$20,600** and the total liability of **\$209,687** exceeds both **\$20,600** and **\$920**.

**Final Liability Amount:**

The final liability amount for the two violations is **Two hundred and nine thousand, six-hundred and eighty-seven dollars (\$209,687)**.