STAFF REPORT

AUTHORIZING A RESOLUTION REFERRING WATER CODE VIOLATIONS BY SHADOW LIGHT RANCH, LLC, JOSHUA SWEET, AND THE HILLS, LLC TO THE OFFICE OF THE ATTORNEY GENERAL FOR JUDICIAL CIVIL ENFORCEMENT

INTRODUCTION:

In Item No. XXX, the California Regional Water Quality Control Board, North Coast Region (Regional Water Board) staff presents Resolution No. R1-2020-0013 (Resolution), for the Regional Water Board's consideration, referring Shadow Light Ranch, LLC, Joshua Sweet, and The Hills, LLC (collectively, Responsible Parties) to the Office of the Attorney General (Attorney General) for enforcement of violations of the Water Code related to the Responsible Parties' development of property for cannabis cultivation. Specifically, the Responsible Parties illegally filled in a wetland, constructed watercourse crossings, and destabilized slopes creating actual and threatened discharges.

The Resolution requests that the Regional Water Board authorize the Attorney General to seek injunctive relief, bring other applicable causes of action, and/or seek judicially imposed civil liabilities under California Water Code sections 13350 and/or 13385, as appropriate, against the Responsible Parties. Due to the significance of the issues explained in detail below, Regional Water Board staff contends that these matters warrant referral to the Attorney General.

BACKGROUND:

A. Site Information

The property at issue consists of several Humboldt County Assessor's Parcel Numbers: 223-073-004-000, 223-073-005-000, 223-061-003-000, 223-061-038-000, 223-061-039-000, 223-061-043-000, and 223-061-046-000 (collectively, the Site). Responsible Party Joshua Sweet acquired the Site in 2006 and transferred ownership to Responsible Party Shadow Light Ranch, LLC (of which he is CEO) in 2016. On June 11, 2016, Responsible Party Joshua Sweet enrolled the Site in Order No. R1-2015-0023 (Regional Cannabis Order[1]). On May 8, 2019,

[1] Waiver of Waste Discharge Requirements and General Water Quality Certification for Discharges of Waste Resulting from Cannabis Cultivation and Associated Activities or Operations with Similar Environmental Effects in the North Coast Region

Timberland Resource Consultants applied, on behalf of Responsible Parties Shadow Light Ranch, LLC and Joshua Sweet, to transfer the Site enrollment from the Regional Cannabis Order to State Water Resources Control Board (State Water Board) Order No. WQ 2019-0001-DWQ and its predecessor, Order No. WQ 2017-0023-DWQ (collectively, Statewide Cannabis Order[2]). The Site has recently been used for commercial cannabis cultivation, with Responsible Party The Hills, LLC identified as the cultivator on the enrollment documents.

The Regional Cannabis Order requires disclosure of Site information regarding the size of the cultivation area, which was initially enrolled for a cultivation area of ">5,000" square feet as submitted in June 2016. On March 31, 2017, in the 2016 Annual Report, the cultivation area was reported to be 10,000 square feet. The Responsible Parties have subsequently provided additional documentation updating their declared cultivation area and those declarations have been inconsistent with staff observations during Site inspections on multiple occasions. During a November 2, 2017, inspection of the Site as documented in staff's report of inspection (2017 Inspection Report), Regional Water Board staff observed approximately 80,000 square feet of cultivation. On April 13, 2018, the Responsible Parties submitted the 2017 Annual Monitoring Report for the Site and reported 57,300 square feet of cultivation. During the May 10, 2018, inspection, Regional Water Board staff observed an additional 4,000 square feet of cultivation, for a total of 84,000 square feet of cultivation as described in the report for such inspection (2018 Inspection Report). On March 29, 2019, the Responsible Parties submitted the 2018 Annual Monitoring Report for the Site and reported 57,300 square feet of cultivation.

There are two ponds of interest at the Site: one pond (Lower Pond) that appears to exist in satellite photos dating back to at least 2006 and another pond (Upper Pond) that was constructed starting in approximately June 2016 and completed in approximately September 2016.

An outflow pipe from the Upper Pond allows water to flow down to the Lower Pond. Any excess water in the Lower Pond flows to a Class II watercourse below the Lower Pond, hydrologically connecting the Upper Pond to the Class II watercourse. The Class II watercourse is a tributary to the South Fork Eel River, which is listed under Section 303(d) of the Clean Water Act as an impaired water body for sediment and temperature. Sediment delivery also has the potential to impact the migration, spawning, reproduction, and early development of threatened cold water fish such as spring and fall run Chinook salmon, coho salmon, and steelhead trout.

Construction of the Upper Pond occurred without required permits or approval from the Regional Water Board. The Upper Pond was constructed in a wetland, which

[2] General Waste Discharge Requirements and Waiver of Waste Discharge Requirements for Discharges of Waste Associated with Cannabis Cultivation Activities

required issuance of a Clean Water Act section 401 certification or analogous waste discharge requirements, depending on whether the wetland was a water of the United States or water of the state prior to starting construction activities. The Responsible Parties did not obtain such approval, and the Upper Pond filled approximately 6,828 square feet of wetland. The continued presence of the Upper Pond is a continued discharge to the inundated wetland and a threatened discharge to the Lower Pond and Class II watercourse below.

Construction of the Upper Pond also reactivated approximately 15,000 square feet of a historic landslide amphitheater complex above the Upper Pond. The landslide discharged significant amounts of sediment into the wetland that was inundated by the Upper Pond and decreased the capacity of the pond. During the November 2, 2017, and May 10, 2018, inspections of the Site, staff observed that the landslide area had begun to revegetate with grasses. Until the near vertical head scarps in the landslide area have been stabilized, however, there is a continued potential of slope failure and discharge of sediment to the Upper Pond. On December 31, 2018, the California Department of Fish and Wildlife (CDFW) received a Lake and Streambed Alteration (LSA) notification for the Site that contained an Engineering Geologic Assessment of the existing ponds. The Engineering Geologic Assessment describes the instability of the over steepened Upper Pond shoreline and recommended development of a repair plan that would likely include reconstruction and stabilization of the failed portion of the slope. The presence of the landslide materials within and adjacent to the Upper Pond continues to be a discharge to the impacted wetland and a threatened discharge to the Lower Pond and Class II watercourse below.

Construction of the Lower Pond, located on a Class III watercourse, also occurred without permits or approval from the Regional Water Board prior to the Responsible Parties owning the Site. Maintenance of the Lower Pond by the Responsible Parties has been inadequate to maintain a stable pond berm; the berm has begun to fail, presenting a threat to the Class II watercourse below. Failure of this pond has the potential to deliver significant amounts of sediment to the Class II watercourse below and potentially impact the migration, spawning, reproduction, and early development of threatened cold water fish (spring and fall run Chinook salmon, coho salmon, and steelhead trout).

Additionally, in approximately June 2016, the Responsible Parties constructed stream crossings (identified as C2 through C8 in the 2017 Inspection Report and 2018 Inspection Report). Such stream crossings were not properly built, including placement of culverts high in the road fill and culverts misaligned with the natural stream channel, which often result in erosion and sediment transport to the watercourses. An LSA notification, submitted by the Responsible Parties to CDFW on December 31, 2018, documents 22 stream crossings at the site, including 15 additional stream crossings beyond those documented in the 2017 Inspection Report and 2018 Inspection Report. Any recent instream work associated with or

proposed for any of the 22 stream crossings on Site would require submission of an application for Clean Water Act section 401 water quality certification or analogous waste discharge requirements. To date, Regional Water Board staff has not received an application for instream work at the Site even though staff has documented that work in streams and wetlands occurred without the required authorization.

B. Settlement Efforts

In early 2019, staff of the Regional Water Board (represented by the Office of Enforcement) invited the Responsible Parties to discuss potential settlement of the violations. Other state agencies – the Division of Water Rights and the California Department of Fish and Wildlife – joined the settlement discussions as they also had claims arising from their observations at the Site.

The Responsible Parties accepted the offer to discuss potential settlement. The Responsible Parties were represented by attorneys and consultants, and the various state agencies were represented by legal and technical staff. In spite of extensive discussions, no settlement was reached.

C. Subsequent Developments

The Statewide Cannabis Order Application Procedure B.2.c and Provision C.1.a require that a Site Management Plan be submitted within 90 days of submission of the application and issuance of the Notice of Receipt. Provision C.1.d requires that all Tier 2 Dischargers with a cannabis cultivation area, or aggregate of cultivation areas, greater than one acre submit a Nitrogen Management Plan. The application for coverage under the Statewide Cannabis Order was submitted, and the Notice of Receipt was issued on May 8, 2019, for the Site. The Notice of Receipt acknowledged the application for a Tier 2 site and stated that both the Site Management Plan and Nitrogen Management Plan were due within 90 days (i.e., by August 6, 2019). At this time, Regional Water Board staff has not received either of the required technical reports.

OPTIONS:

All other enforcement options have been considered. The Regional Water Board could pursue administrative enforcement via issuance of an Administrative Civil Liability (ACL) complaint assessing monetary liability. However, there are multiple factors that support referring enforcement to the Attorney General: (1) the ability to seek injunctive relief, which could lead to more immediate relief as compared to administrative enforcement; (2) the severity of the violations, which warrant referral to the Attorney General for civil enforcement; (3) coordination of the Regional Water Board's enforcement with the anticipated enforcement by the Division of Water Rights, avoiding the possibility of conflicting rulings if separate administrative actions were brought; (4) efficiency for the Water Boards, as there

would be one civil action to prosecute rather than two administrative actions, which could require the same witnesses to appear at and testify in two separate proceedings; and (5) it would allow the Regional Water Board to tap into the Attorney General's resources, which may be needed if the Responsible Parties put substantial resources into defense of the action (as anticipated). In short, administrative enforcement, including ACL orders assessing only monetary penalties, may not be the best and most direct remedy to remediate the Site. For these reasons, referral to the Attorney General is the most prudent option.

Given the multiple significant issues involved in this case, referral to the Attorney General will allow the Regional Water Board to better focus on, and ensure remediation of, the Site than would otherwise be allowed if the Regional Water Board pursued another administrative enforcement action.