

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R1-2022-0039

**IN THE MATTER OF:
KOU XIONG AND SUSAN YANG XIONG**

**PROSECUTION TEAM'S LEGAL AND TECHNICAL ANALYSIS
SUPPORTING ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R1-2022-0039**

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I. INTRODUCTION

The Prosecution Team for the North Coast Regional Water Quality Control Board's (North Coast Water Board) (hereafter Prosecution Team), Administrative Civil Liability Complaint No. R1-2022-0039 (Complaint) recommends the North Coast Water Board assess an administrative civil liability in the amount of five hundred and six thousand, eight hundred and thirteen dollars (\$506,813) against Kou Xiong and Susan Yang Xiong (hereinafter the Dischargers) for failing to comply with Cleanup and Abatement and 13267 Order No. R1-2021-0040 (final CAO). The Dischargers own(ed) and carried out cannabis cultivation activities on a piece of rural property in Trinity County subject to the final CAO. Notwithstanding the Prosecution Team's wide-ranging efforts to locate and notify the Dischargers of significant water quality concerns on the property due to illicit cannabis cultivation, the Dischargers failed to submit a cleanup, restoration, and monitoring report to assess the impacts and threatened impacts to water quality resulting from the property's condition of pollution. As the Dischargers failed to engage with staff regarding the need to implement and complete measures to abate water quality impacts, conditions of pollution persist on the property. The Prosecution Team asserts that the proposed administrative civil liability is appropriate for the reasons explained in the Complaint, Attachment A to the Complaint, and for the reasons discussed herein.

II. BACKGROUND

A. Susan Yang Xiong Developed the Property to Cultivate Cannabis.

Susan Yang Xiong (individually Ms. Yang Xiong) purchased Trinity County Assessor Parcel Number (APN) 015-420-27-00 (herein after the Property) located at 11 North Meadow Lane, Hayfork, California, on February 27, 2014. Barker Creek, a tributary to South Fork Trinity River¹, a tributary to the Klamath River, is located on the eastern property line. An unnamed stream tributary to Barker Creek runs parallel to Barker Creek and bisects the Property. The Property is located in the South Fork Trinity River Hydrological Unit.

During Ms. Yang Xiong's ownership of the Property, the cannabis cultivation operation significantly expanded. Aerial images from 2014 show small scale cultivation occurring on the Property, consisting of a single greenhouse in the northeast corner of the Property with some surrounding outdoor cultivation. In 2014, Ms. Yang Xiong purchased the Property and by 2015 there was a significant increase to 0.36 acres (15,776 Square Feet) in the size of cultivation with

¹ The South Fork Trinity River is a Clean Water Act section 303(d) listed waterbody as impaired due to elevated-water temperature.

the northern one-third of the Property being used for cannabis. By 2016, cannabis cultivation was occurring on more than half of the Property to 0.46 acres (20,037 square feet) and resembled the cannabis cultivation operation staff observed during the June 26, 2019 inspection.

B. During the June 26, 2019, Property Inspection, State Water Resources Control Board Staff Documented Numerous California Water Code Violations.

At the Property, staff observed two cannabis cultivation areas (Cultivation Site Nos. 1 – 2), multiple structures and tents used for fuel and fertilizer storage, and a mobile home used as a domicile for the operator. The unnamed stream, tributary to Barker Creek, runs east along the side of Cultivation Site No. 1 before turning south and passing along the side of Cultivation Site No. 2. Cultivation Site No. 1 was located forty-three feet [43 ft.] from the unnamed stream. Cultivation Site No. 2 was located twenty-two feet [22 ft.] from the unnamed stream. The unnamed stream is ephemeral and was dry during the inspection.

In the unnamed stream, the Dischargers excavated the bed and built on top of the banks a concrete water diversion structure with a head gate. This structure occupied the entire width of the water course and when the head gate was in place, diverted water into a black pipe that was part of the diversion structure and connected to an off-stream unlined pit with bare soil. The pit measured five feet [5 ft.] deep and was sixty feet [60 ft.] long by twenty-five feet [25 ft.] wide. Erosion features including rills were observed in the pit.

Numerous unauthorized discharges and threatened discharges were documented by staff near Cultivation Site No. 2. To access Cultivation Site No. 2, the Dischargers placed fill material into the unnamed stream to create a walkway. The walkway fill material contained spent growth medium with white perlite and extended from bank-to-bank² measuring thirteen feet [13 ft.] long by fifteen feet [15 ft.] wide and was six inches [6 in.] deep. Leaving Cultivation Site No. 2, staff documented a white PVC outlet pipe near the unnamed stream without erosion, sediment, or pollution controls that was used to drain commingled stormwater runoff and cannabis cultivation wastewater out of the cultivation area. On the outskirts of Cultivation Site No. 2, staff measured cannabis plants growing in raised beds framed with wooden boards twelve feet [12 ft.] from the unnamed stream. Lastly, staff also documented a 32-gallon plastic trash can without a lid filled to the top with a bright green colored liquid in addition to multiple other containers of fertilizers without secondary containment units twenty-five feet [25 ft.] from the unnamed stream.

Near the mobile home, staff continued to observe unauthorized discharges and threatened discharges. Behind the mobile home was a white PVC pipe that was likely connected to the mobile home's wastewater discharge outlet. At the outlet of the PVC pipe, staff documented wet leaves and the strong odor of sulfur. A makeshift kitchen sink was also documented near the

² Staff calculated that placement of fill material with a volume of 733 gallons (98 cubic feet) was discharged to the unnamed stream to create the walkway.

mobile home and staff observed grey water, most likely from washing dirty dishes, on the ground under the sink.

In addition to the observed unauthorized discharges and threatened discharges, staff also documented the general failure to implement best management practices throughout the Property. Evidence of soil erosion on the surface of access roads near stream crossings was observed. Burn pits with the remnants of trash and metal, as well as loose piles of native soil and cannabis trimming waste were found and documented at multiple locations throughout the Property. Staff also documented dark stains on the ground near the tents and storage structures that stored fertilizer and petroleum containers. More dark stains as well as petroleum containers were also documented off property twenty-five feet [25 ft.] from Barker Creek where the Dischargers were using a pump to illegally divert water for cannabis cultivation.

To date, the Property remains in a state of disarray. Recent photos from the Property show that most of the cannabis cultivation infrastructure remains. The covered greenhouse structures are visible, but the plastic covers are torn to shreds and hang loosely from the structures. The above ground swimming pool used for water storage remains uncovered and threatens to entrap wildlife and trash and debris can also be seen accumulating in various spots. While cannabis cultivation is no longer occurring on the Property and it appears to have been vacant for many months, conditions still prevail that present a threat to the water quality of the unnamed stream and Barker Creek.

C. North Coast Water Board Prosecution Team Pursued Progressive and Formal Enforcement Actions Based on the Discharges and Threatened Discharges Observed on the Property.

On November 12, 2019, based on the findings documented during the June 26, 2019, inspection, staff issued a Notice of Violation (NOV) to Ms. Yang Xiong. The NOV documented the water quality concerns and violations and included a copy of the Cannabis Water Quality Inspection memo. The NOV was sent to Ms. Yang Xiong's address of record via United States Postal Service (USPS) certified mail. On December 18, 2019, the NOV was returned to staff marked as unclaimed. Staff also sent the NOV via FedEx with no signature requirement and FedEx records indicate the NOV was delivered to Ms. Yang Xiong on December 13, 2019. No response was received by staff in response to the NOV.

Per records from the Trinity County Assessor-Recorder's Office, Ms. Yang Xiong transferred ownership of the Property to Kou Xiong on October 7, 2020.

With the conditions of pollution still prevailing on the Property, the North Coast Water Board issued a draft Cleanup and Abatement Order (draft CAO) to the Dischargers on April 27, 2021. Staff undertook extensive research and collaboration with California Department of Fish and Wildlife (CDFW) law enforcement to locate the Dischargers' addresses of record prior to distributing the draft CAO. The draft CAO was sent to five residences via USPS certified mail; all were returned to the North Coast Water Board marked as unclaimed. On June 23, 2021, the North Coast Water Board re-issued the draft CAO to the Dischargers via FedEx and Golden State Overnight delivery service because all correspondence sent via USPS was rejected by the

recipients. The FedEx and Golden State Overnight delivery service proof-of-delivery show the draft CAO was delivered to the Dischargers.

After no comments were received on the draft CAO, the Executive Officer for the North Coast Water Board issued CAO No. R1-2021-0040 (final CAO) to the Dischargers on August 11, 2021. Staff was ultimately unsuccessful in identifying the correct address or location of Mr. Peter Xiong and removed him as a responsible party from the final CAO. The final CAO was sent to the Dischargers via process server for personal service. ACE Attorney Services, Inc. (ACE), the process server, provided delivery notes and information regarding its multiple attempts to serve the final CAO to the Dischargers. ACE made six attempts at multiple addresses to serve the final CAO to the Dischargers with no success. Ultimately, due to the inability to personally serve the documents, ACE posted the final CAO package near entrances to the addresses. Staff never received a response from the Dischargers nor were steps taken to comply with the final CAO.

Between January 20, 2022, and April 7, 2022, staff using USPS certified mail and FedEx overnight delivery services, issued the Dischargers three Notices of Violation for the failure to comply with the required actions of the final CAO. These letters informed the Dischargers of the potential for administrative civil liability if the Dischargers continued to fail to respond to the final CAO. Staff worked with the State Water Resources Control Board's, Office of Public Participation to ensure that the Dischargers could contact the North Coast Water Board to discuss the final CAO in their native language, Hmong. Additionally, staff took the extra step of translating the April 7, 2022, NOV (all seven pages of text) into Hmong to ensure the Dischargers were properly noticed concerning the failure to comply with the final CAO's required actions.

After approximately two-years of attempting to locate and engage with the Dischargers concerning the Property, the North Coast Water Board issued Administrative Civil Liability Complaint No. R1-2022-0039 (the Complaint) on September 9, 2022, alleging the Dischargers failure to comply with the final CAO.

III. LEGAL ARGUMENT

A. The Prosecution Team Made Reasonable Efforts to Locate and Serve the Final CAO and Complaint on the Dischargers.

The Prosecution Team exhausted all available resources to locate and serve the final CAO and Complaint on the Dischargers. Beginning in 2020, staff used numerous public databases, third party individual location services, and CDFW and local law enforcement to locate the Dischargers. Due to the transitory nature of the Dischargers, the Prosecution Team identified numerous potential addresses/residences for the Dischargers. As staff continued to identify new addresses or learned addresses were incorrect, the Prosecution Team would update its distribution list. In most cases, when documents were distributed via USPS certified mail, they

were returned to the North Coast Water Board as undelivered. As such, unless required by law,³ staff relied on delivery of documents via FedEx that did not require a signatory to deliver the documents.

When the Prosecution Team was required by law to serve an order on the Dischargers, both USPS certified mail and personal service were attempted. The North Coast Water Board's USPS certified mailings for the final CAO were all unclaimed and returned. Attempts at multiple residences on multiple occasions by ACE were similarly unsuccessful. While attempting to personally serve the final CAO at two locations, the process server observed cannabis cultivation and was told never to return to one residence by an individual that claimed no association or knowledge of the Dischargers. The Prosecution Team's attempts to serve the Complaint on the Dischargers via USPS certified mail and personal service are extensively detailed in the Prosecution Team's Prehearing Motion No. 1 – Request for Permission to Serve Through Publication submitted to the Advisory Team. (PT Exhibit No. 2.)

Ultimately, the Prosecution Team served the Complaint via service by publication placing a legal notice in the Redding Record Searchlight and the Minneapolis Star Tribune. In accordance with the requirements of the Code of Civil Procedure, the notice was placed in periodicals of general circulation in the geographic location of the Dischargers' addresses of record and were posted once-a-week for four weeks. The notice published in the Redding Record Searchlight began running on November 17, 2022, and finished running on December 8, 2022. The notice published in the Minneapolis Star Tribune began running on November 12, 2002, and finished running on December 9, 2022.

B. The Proposed Administrative Civil Liability for the Failure to Comply with the Final CAO is Appropriate

The North Coast Water Board's efforts to pursue progressive enforcement against the Dischargers was frustrated by the Dischargers' seemingly willful avoidance of all attempts to engage with it concerning the Property. The Dischargers' engagement in the enforcement process is a critical factor that can help inform the Prosecution Team about potential reasons for the Dischargers' noncompliance with the final CAO or the validity of an ability to pay defense. Due to the Dischargers' failure to engage, the Prosecution Team is deprived of additional information about the Dischargers that could weigh against the proposed penalty.

The Prosecution Team used publicly available information to consider the Dischargers' ability to pay the proposed penalty. Both Dischargers own real property and Mr. Kou Xiong recently

³ The Water Code specifies that administrative civil liability complaints seeking to impose civil liability for alleged water quality violations be served in compliance with the relevant provisions of the Code of Civil Procedure. (Wat. Code, § 13323, subd. (b); see also Code Civ. Proc., § 415.10 et seq. and 416.10 et seq.) The Code of Civil Procedure lists five acceptable methods of service: 1) personal delivery; 2) substitute delivery at a respondent's residence or business address; 3) delivery by first-class mail; 4) delivery by certified mail; and 5) service via publication. (Code Civ. Proc., §§ 415.10 – 415.50.)

transferred his residence for value. The fact that cannabis cultivation continued on the Property in 2021, following the issuance of the draft CAO, was also considered. It is the Prosecution Team's position that it is likely that the Dischargers' actual income and net worth are underestimated by publicly available information.

Moreover, the Dischargers' actions to frustrate and evade the Prosecution Team support adoption of the proposed penalty. Within a year of the issuance of the NOV to Ms. Yang Xiong, informing her of the serious violations and potential liability, the Property was transferred to Mr. Kou Xiong. Within that same timeframe the cannabis cultivation operator (Ms. Yang Xiong's ex-husband), Peter Xiong vanished and could no longer be located by the Prosecution Team or CDFW law enforcement officers. Additionally, after the North Coast Water Board's issuance of the final NOV on April 7, 2022, stating enforcement was imminent for the Dischargers' failure to comply with the CAO, Mr. Kou Xiong transferred his residential property by quit claim deed on May 4, 2022. After the transfer of his residence there is no publicly listed address of record for Mr. Kou Xiong.

Lastly, but most critically, the Property remains a threat to the water quality of Barker Creek and its unnamed tributary. Discharges remain unabated on the Property and the threat of additional discharges persist. These conditions are why the Prosecution Team assessed that the failure to comply with the requirements of the final CAO represent a major potential for harm. In other words, the Dischargers' violations present a particularly egregious threat to water quality.

C. A North Coast Water Board Administrative Civil Liability Order Assessing the Proposed Penalty Would Likely be Upheld if Challenged in Civil Court

Should the North Coast Water Board adopt an Administrative Civil Liability Order (Order) assessing monetary penalties, it is likely that a court would uphold the Order if the Dischargers allege they were not served the Complaint and denied the ability to participate in the hearing. The Water Code and the Code of Civil Procedure set out requirements to serve complaints and orders on dischargers, so the dischargers are notified and have the opportunity to participate in actions against their interests (i.e., due process protections). (See Wat. Code, § 13323 and Code Civ. Proc. § 415.10 et seq.) If dischargers cannot participate in the hearing because they failed to be served a complaint in accordance with the applicable statutes, their due process rights are violated because they did not have the chance to participate. That is not the case here.

While the Dischargers failed to engage with the Prosecution Team regarding the draft CAO, final CAO, and the Complaint (and may fail to appear at the hearing to provide a defense against the Complaint), the North Coast Water Board can be assured that the Dischargers' failure to engage does not provide grounds for any subsequent Order to be overturned by subsequent challenges⁴. Code, § 13320, subd. (b).) Here, the record is extensive and consists

⁴ Water Code, § 13320 subd. (a) allows for the review of a regional board action, within 30 days of that action, by the State Water Board. The Dischargers could petition the State Water Board alleging their due process rights were

of all the documents related to the Prosecution Team's attempts to serve the Notice of Violation, Inspection Report, draft CAO, final CAO, three separate Notices of Violation for failure to comply with the CAO required actions, and the Complaint. These documents range from delivery receipts (failed and received) from two separate carriers, the notes from Ace Attorney Service process servers who attempted personal service at multiple addresses of record, and the legal notice published in two periodicals noticing the hearing on the Complaint. (PT Exhibits: 3, and 9-17.) Moreover, the Prosecution Team submitted to the North Coast Water Board, Advisory Team the supporting law and facts to demonstrate that service via publication of a legal notice was justified in this matter. (PT Exhibit 2.)

The Prosecution Team satisfied its statutory and procedural due process obligations through extensive attempts and exhaustion of service options, as required by law. Publication of the legal notices pursuant to the applicable statutes in periodicals of general circulation effects service of the Complaint and fulfills the requirements necessary to protect the Dischargers' due process.

IV. CONCLUSION

This enforcement action captures three of the five North Coast Water Board's Enforcement Priorities, including prioritizing and pursuing enforcement actions for cannabis cultivation without applicable permits, unauthorized dredge/fill activities, and timely enforcement on missed deadlines in existing enforcement orders. The Prosecution Team respectfully requests the North Coast Water Board adopt the proposed Order before you in this matter and assess the administrative civil liability amount proposed.

Sincerely,

Claudia Villacorta

Claudia E. Villacorta, P.E.
Assistant Executive Officer

violated because they were not served the Complaint. If the State Water Board denies the petition for review, pursuant to Water Code, § 13330 subd. (b), the Dischargers can file a petition for writ of mandate with a state court to challenge the Order on grounds that their due process rights were violated.