

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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In the Matter of Allegations of Violations of the Following: Failure to File a Statement of Water Diversion and Use (Water Code section 5101), Cannabis Cultivation Policy Requirements Adopted Pursuant to California Water Code section 13149, Diversion or Use of Water for Cannabis Cultivation for which a License is Required (Water Code section 1847(b)(4)),

by

**Nicolas Baker**

In

**Trinity County**

On

**APN: 018-220-021-00, 018-220-022-00**

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**NICOLAS BAKER (HEREINAFTER REFERRED TO AS “THE DIVERTER”) ARE HEREBY GIVEN NOTICE THAT:**

1. The State Water Resources Control Board’s (State Water Board’s) Division of Water Rights (Division) alleges that the Diverter committed the violations described below, relating to the diversion or use of water for cannabis cultivation activities on the Diverter’s real property in Trinity County during 2021.
2. Based on these allegations, the Division seeks an Administrative Civil Liability Order against the Diverter imposing liability in the total amount of \$17,500.
3. **The Diverter has the right to request a hearing on these allegations but must do so in writing within 20 days from the date the Diverter receives this Complaint, or else that right is waived.** Please see the specific directions for submitting hearing requests in the “Right to Hearing” section at the end of this Complaint.

**SUMMARY OF ALLEGED VIOLATIONS**

4. Violation 1: The Diverter is alleged to have failed to file a statement of water diversion or use (Statement) during 2020.
5. Violations 2-8: The Diverter is alleged to have violated seven (7) requirements of the *Cannabis Cultivation Policy – Principles and Guidelines for Cannabis Cultivation* (Cannabis Cultivation Policy), established by the State Water Board pursuant to Water Code section 13149, by doing the following: diverting water for cannabis cultivation during the surface water forbearance period (Term 66); failing to plug, block, disconnect, or remove diversion intakes and otherwise bypass flows or render

diversions inoperable during the surface water forbearance period (Term 77); failing to install separate measuring devices to quantify water diversions for beneficial uses other than cannabis cultivation (Term 81); failing to install and maintain measuring devices for surface water diversions and retaining daily diversion records (Term 82); failing to use water storage tanks equipped with a float valve (Term 92); failing to ensure that all vents and other openings on water storage tanks are designed to prevent entry and/or entrapment of wildlife (Term 93); and failing to maintain daily records of all water used for irrigation of cannabis (Term 98).

6. Violation 9: The Diverter is alleged to have diverted and used water for cannabis cultivation for which a license is required, but has not been obtained, under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code during 2021.

### **BACKGROUND AND FACTUAL BASIS**

7. Property Ownership:

According to Trinity County property records, the Diverter bought Trinity County Assessor's Parcel Numbers (APN) 018-220-21-00 on September 17, 2015, and APN 018-220-22-00 on December 5, 2013 (collectively "the Property"). The Diverter has owned the Property at all times relevant to the violations alleged in this Complaint.

8. Watershed Information:

The Property is located in the Browns Canyon watershed (CalWater watershed No. 1111.220201) tributary to the Van Duzen River. Water for cannabis cultivation was diverted at four points of diversion (POD) from two unnamed streams and an unnamed spring that are tributary to the Van Duzen River. Downstream from the Property, in neighboring Humboldt County, the Van Duzen River is designated as a California Wild and Scenic River from the Dinsmore Bridge downstream to the confluence with the Eel River. As a Wild and Scenic River, the State Water Board is limited from processing or accepting new applications to appropriate water unless the diversion and use of water falls within two limited exceptions approved by the Secretary of the Resources Agency pursuant to California Code of Regulation, Title 23, section 734. In accordance with the Public Resources Code, Division 5 Chapter 1.4, California Wild and Scenic Rivers Act, section 5093.50 et seq., it is the policy of the State of California, that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of section 2 of Article X of the California Constitution.

9. Inspection Basis:

On May 7, 2021, the Division was notified by the Department of Fish and Wildlife (CDFW) of a search warrant inspection of the Property based on suspected illegal cannabis cultivation and possible surface water diversion used for cannabis cultivation.

10. Water Rights Records Review:

On May 10, 2021, prior to the inspection, and recently on May 12, 2022, Division staff examined available State Water Board water rights records in the electronic Water Rights Management System (eWRIMS) and did not find any evidence of an existing Statement, water right permit, license, or registration for diversion and use of water on the Property. On February 10, 2022, Division staff checked eWRIMS and again did not find any evidence of an existing water right permit, license, or registration for the diversion and use of water Division staff observed taking place on the Property, nor that a Statement had ever been filed regarding the observed diversions. Division staff checked again on August 17, 2022 and did not find a water right for Nicolas Baker.

11. Well Records Review:

On or around May 10, 2021, Division staff reviewed the Department of Water Resources database of Well Completion Reports and found no record of a well on the Property at the time of the inspection.

12. May 12, 2021 Inspection:

On May 12, 2021, Division staff accompanied CDFW and Trinity County Sheriff's Office in conducting an inspection of the Property. During the inspection, the Diverter's cannabis plants were eradicated by CDFW Wardens. During the inspection, Division staff observed a total of approximately 5,456 plants and (4) four Points of Diversion (POD) and related water conveyance and irrigation infrastructure throughout the Property. At the conclusion of the inspection, Division staff left a Field Notice of Violation (Field NOV) with the search warrant on the Property.

13. Points of Diversion:

Division staff observed and documented four PODs during the May 12, 2021, inspection.

- a. POD1 is point of diversion to off-stream storage located on an unnamed spring that is a tributary to the Van Duzen River. The unnamed spring was excavated out to create a hole 3 feet wide and 3 feet deep. The excavated earthen materials were piled up to make a small dam (1 foot high and 1 foot wide) to collect and hold water in a pool of water to convey by gravity to off-stream water storage tanks. The spring was flowing but the downstream channel below the spring was not. Division staff observed POD1 actively diverting all of the natural spring flow during the inspection. If water was not diverted by POD1, the natural spring flow would naturally flow down the stream channel and off the property.
- b. POD2 is a point of diversion on an unnamed stream that is a tributary to the Van Duzen River. A water pump and hose were used to divert water from a natural pool formed in the unnamed stream that was approximately 4 feet wide and 0.5 feet deep. The unnamed stream has defined bed and banks upstream and downstream from POD2 and water was flowing into and out of the natural pool at the time of the inspection, but the pump was not on. When the pump is turned on, water is conveyed to off-stream water storage tanks. The stream was flowing but POD2 was not actively diverting during the

- inspection. Division staff find that based on observations, POD2 was likely the primary POD and source of water for cannabis cultivation at the time of the inspection. Division staff based this finding on less water available at POD1 and POD4 and water from POD3 supplied water to POD2 to increase the amount of water available at POD2 when the gas pump was operating. POD2's gas pump was also connected to 30,000 gallons of off-stream water storage at Point of Storage (POS) 4 (POS4) compared to 45,000 gallons between the other seven POS on the property, six of which receive water that is first stored at POS4.
- c. POD3 is located approximately 100 feet upstream of POD2 on the same unnamed stream. The unnamed stream was flowing and POD3 was actively diverting during the inspection. POD3 consists of two unscreened irrigation pipes placed in the stream, from which water is diverted via gravity downstream to POD2. Division staff observed water flowing from POD3 to POD2 during the inspection. This configuration indicates that water diverted from POD3 is diverted to POD2 and then from POD2 water is diverted by operating a gas pump to fill off stream storage at POS4.
  - d. POD4 is located on an unnamed stream with defined bed and banks that is tributary to the Van Duzen River. The stream was flowing and POD4 was actively diverting during the inspection. POD4 consists of hand stacked rocks in the stream channel to create two small pools of water that convey water by gravity through two 1-inch black polyethylene pipes to off stream water storage tanks at POS8.
  - e. POD1, POD2, POD3, and the related POSs and POUs (except for POU3), are located on APN 018-220-22-00 and comprise the water conveyance system that irrigates cannabis at POU 1-3 and provides domestic water at POU4. POD4, POS8, and POU5, constitutes a separate water conveyance system for cannabis cultivation at POU5. POD4, POS8, POU3 and POU5, are located on APN 018-220-21-00.

#### 14. Aerial Imagery Review:

On May 17, 2021, Division staff reviewed aerial imagery of the Property and made the following observations:

- a. Google Earth Pro aerial imagery from May 28, 2014, shows greenhouses consistent with those observed at POU2 during the May 12, 2021, inspection.
- b. Google Earth Pro aerial imagery from June 2, 2016, shows greenhouses consistent with those observed at POU1, POU2, and POU4 during the May 12, 2021, inspection.
- c. Google Earth Pro aerial imagery from November 11, 2018, shows greenhouses consistent with those observed at POU1, POU2, and POU5 during the May 12, 2021, inspection.

- d. LandVision aerial imagery from April 11, 2020, shows greenhouses consistent with those observed at POU1, POU2, and POU5 during the May 12, 2021 inspection.

15. CDFA License Records Review:

On May 17, 2021, and again on February 10, 2022, Division staff reviewed CDFA<sup>1</sup> records of commercial cannabis cultivation license records current to February 2, 2022, to determine if there was an active or pending license on file that would legally authorize the commercial cannabis cultivation observed on the Property. Division staff found no CDFA license on record for the Property. Division staff checked again on August 17, 2022 and did not find a licensing record for Nicolas Baker.

16. Inspection Report and Notice of Violation:

The Division has made three attempts to deliver the Diverter a Notice of Violation (NOV) and Inspection Report (IR) via United State Postal Service (USPS) certified mail. First on July 15, 2021, then again on September 16, 2021, and finally on November 10, 2021. The NOV/IR describes the observations made by Division staff during the inspection, notifies the Diverter that the observed violations may subject them to enforcement by the State Water Board and recommends corrective actions to address each alleged violation. As of the date of this complaint, the Division has been unable to deliver the NOV/IR.

17. Landowner/Diverter Response:

As of the date of this Complaint, the Diverter has not responded to the field NOV. Division staff have no knowledge or evidence to support that any of the recommended corrective actions have been taken.

### **STATE WATER BOARD AUTHORITY**

18. Water Code section 1055, subdivision (a) provides that the Executive Director for the State Water Board may issue a Complaint to any person or entity on which administrative civil liability may be imposed pursuant to Water Code sections 1847 and 5107. The Executive Director delegated this authority to the Deputy Director for Water Rights by memorandum dated May 17, 1999. The Deputy Director redelegated this authority to the Assistant Deputy Director for the Permitting and Enforcement Branch by memorandum dated August 27, 2008.

19. Water Code 1112 provides that the Administrative Hearings Office presides over hearings on complaints issued under Water Code section 1055. Pursuant to Water Code section 1114, for matters seeking administrative liability under Water code section 1847 or 5107, the Hearing Officer adopts a final order. For all other matters,

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<sup>1</sup> Three state programs merged to form the Department of Cannabis Control (DCC). Those programs were the Bureau of Cannabis Control in the Department of Consumer Affairs, the Manufactured Cannabis Safety Branch in the Department of Public Health, and CalCannabis Cultivation Licensing in the Department of Food and Agriculture (CDFA). Effective July 12, 2021, DCC is the state program tasked with licensing, inspecting, and regulating cannabis activities in California. However, because the site inspection and records review for this matter occurred prior to July 12, 2021, this Complaint references CDFA rather than DCC when identifying the licensing agency.

the Hearing Officer adopts a proposed order to be considered by the State Water Board.

## ALLEGED VIOLATIONS

### Statement of Annual Diversion or Use

20. **Violation 1: Failure to File Statement of Annual Diversion or Use:**  
Water Code section 5101 requires that any person who diverts water shall file a Statement with the Board by April 1 of the succeeding year, with certain exceptions that are not relevant here.
21. Water Code section 5102 requires that a separate statement be filed for each Point of Diversion (POD).
22. Water Code section 5107(c)(1) provides that the State Water Board may impose liability pursuant to Water Code section 1055 for failure to file a statement in an amount not to exceed one thousand dollars (\$1,000), plus five hundred dollars (\$500) per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the State Water Board has called the violation to the attention of that person.
23. During the May 12, 2021, inspection, Division staff observed POD1-4 actively diverting or situated such that they likely had diverted water. Division staff could find no Statement on file with the State Water Board to report water diversion and use for POD1-4.
- a. POD1, POD2, POD3, and the related POSs and POU5 (except for POU3), are located on APN 018-220-22-00 and comprise the water conveyance system that irrigates cannabis at POU 1-3 and provides domestic water at POU4. POD4, POS8, and POU5, constitutes a separate water conveyance system for only cannabis cultivation at POU5. POU3, POD4, POS8, and POU5, are located on APN 018-220-21-00.
  - b. LandVision aerial imagery from April 11, 2020, shows greenhouses consistent with those observed at POU1, POU2, and POU5 during the May 12, 2021, inspection. The presence of the same cultivation infrastructure indicates the same PODs observed in May 2021 were likely used in 2020. POD 1-4 were the sole sources of water observed on the Property during the inspection, and thus the Diverter likely used at least one POD during cultivation in 2020. All water diversion and use by the Diverter in 2020 was required to have been reported to the State Water Board by April 1, 2021<sup>2</sup>. As of the date of this Complaint, the State Water

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<sup>2</sup> Prior to September 23, 2021, all statements were due July 1 of the succeeding year. Senate Bill 155 came into effect on September 23, 2021, amending Water Code section 5101 to provide that for diversions after December 31, 2020, and before October 1, 2021, statements are due before April 1 of the succeeding year. (Water Code § 5101, subd. (b)(2).) For diversions after September 30, 2021, statements are due before February 1 of the succeeding year. (Water Code § 5101, subd. (b)(3).)

Board does not have an Initial Statement of Water Diversion and Use on file for POD 1, 2, 3 or 4.

- i. Four violations are alleged for the failure to file a Statements by April 1, 2022, for the diversion and use of water from POD 1-4 in 2021 as identified above through aerial imagery.

### **Cannabis Cultivation Policy Requirements**

24. The State Water Board's Cannabis Cultivation Policy went into effect on December 18, 2017, following approval by the Office of Administrative Law. Pursuant to Water Code section 13149, the Policy contains principles, guidelines and requirements (referred to here as "requirements") for the diversion or use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flow. The State Water Board subsequently amended the Cannabis Cultivation Policy, effective April 16, 2019.

25. Cannabis Cultivation Policy, Attachment A, Section 1, Term 9, defines cannabis cultivation as:

*Any activity involving or necessary for the planting, growing, pruning, harvesting, drying, curing, or trimming of cannabis. This term includes but is not limited to: (1) water diversions for cannabis cultivation, and (2) activities that prepare or develop a cannabis cultivation site or otherwise support cannabis cultivation and which discharge or threaten to discharge waste to waters of the state.*

26. Water Code section 1847, subdivisions (a) and (b)(1) provide that any person or entity violating any Requirement adopted pursuant to Water Code section 13149 may be liable in an amount not to exceed the sum of five hundred dollars (\$500) per violation, plus two hundred fifty dollars (\$250) for each additional day on which each violation continues if the person fails to correct the violation within 30 days after the State Water Board has called the violation to the attention of that person or entity, plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in violation of the applicable Requirement.

27. **Violation 2:** Cannabis Cultivation Policy, Attachment A, Section 2, Term 66, states:

*All water diversions for cannabis cultivation from a surface stream, subterranean stream flowing through a known and definite channel (e.g. groundwater well diversions from subsurface stream flows), or other surface waterbody are subject to the surface water Numeric and Narrative Instream Flow Requirements. This includes lakes, ponds, and springs (unless the spring is deemed exempt by the Deputy Director). See Cannabis Cultivation Policy, Attachment A, Section 3, Numeric and Narrative Instream Flow Requirements No. 4, for more information.*

- a. POD1 diverts water from an unnamed spring with a known and definite channel, POD 2-3 divert water from an unnamed stream with a known and definite channel, and POD4 diverts water from an unnamed stream with a known and definite channel, all of which are subject to the Policy's

Numeric and Narrative Instream Flow Requirements. POD1, POD3, and POD4 were observed actively diverting water by gravity, while POD2 was connected to a gasoline water pump to divert water when switched on. The Diverter was cultivating approximately 5,456 cannabis plants at POU 1-3 and POU5 at the time of the inspection. The water diversions observed during the May 12, 2021, inspection occurred during the surface water dry season forbearance period (April 1 through October 31).

- i. Observations of active diversions from POD1, POD3, and POD4 are alleged violations of Term 66 of Section 2 of the Cannabis Policy.
- ii. Based on the configuration of the water diversion and conveyance system observed during the inspection, though not observed to be actively diverting on May 12, 2021, it is likely that POD2 was used to divert water for cannabis cultivation during the 2021 forbearance period.
- iii. Therefore, four violations of Term 66 of Section 2 of the Cannabis Policy are alleged for the diversion of water at POD1, POD2, POD3, and POD4 for cannabis cultivation irrigation during the forbearance period.

**28. Violation 3:** Cannabis Cultivation Policy, Attachment A, Section 2, Term 77, states:

*Cannabis cultivators shall plug, block, cap, disconnect, or remove the diversion intake or otherwise bypass flow or render the diversion intake incapable of diverting water for cannabis cultivation activities during the surface water forbearance period, unless the diversion intake is used for other beneficial uses, to ensure no water is diverted during that time.*

- a. Division staff observed that POD4 was actively diverting surface water for cannabis cultivation during the May 12, 2021 inspection, which was conducted during the surface water forbearance period (April 1 – October 31). Division staff observed that the diversion structure for POD4 was not plugged, blocked, capped, disconnected, or rendered inoperable to stop the diversion of water during the forbearance period, as required.
  - i. 1 violation of Term 77 of Section 2 of the Cannabis Cultivation Policy is alleged for the failure to follow intake requirements for POD 4 during the site inspection on May 12, 2021.

**29. Violation 4:** Cannabis Cultivation Policy, Attachment A, Section 2, Term 81, states:

*Cannabis cultivators are encouraged to install separate storage systems for water diverted for cannabis irrigation and water diverted for any other beneficial uses, or otherwise shall install separate measuring devices to quantify diversion to and from each storage facility, including the quantity of water diverted and the quantity, place,*



and purpose of use (e.g., cannabis irrigation, other crop irrigation, domestic, etc.) for the stored water.

- a. During the May 12, 2021, inspection, Division staff observed POS7 as a shared water storage facility for cannabis cultivation use at POU3 and domestic use at POU4. Water stored at POS7 is diverted from POD1, POD2, and POD3. Division staff did not observe any water measuring device installed to quantify the amount of water diverted to and from POS7 for cannabis cultivation or other beneficial uses such as domestic use. Based on the water diversion and conveyance system, a total of two (2) water measuring devices are required to measure water diverted to and from POS7 to measure the amount of water used for cannabis cultivation at POU3 and domestic use at POU4.
  - i. One violation of Term 81 of Section 2 of the Cannabis Cultivation Policy is alleged for failure to install separate storage systems or install measuring devices to quantify diversion to and from each storage facility at POS7.

**30. Violation 5:** Cannabis Cultivation Policy, Attachment A, Section 2, Term 82, states:

*The cannabis cultivator shall install and maintain a measuring device(s) for surface water or subterranean stream diversions. The measuring device shall be, at a minimum equivalent to the requirements for direct diversions greater than 10 acre-feet per year in California Code of Regulations, Title 23, Division 3, Chapter 2.7 and Chapter 2.8. The measuring device(s) shall be located as close to the point of diversion as reasonable. Cannabis cultivators shall maintain daily diversion records for water diverted for cannabis cultivation. Cannabis cultivators shall maintain separate records that document the amount of water used for cannabis cultivation separated out from the amount of water used for other irrigation purposes and other beneficial uses of water (e.g., domestic, fire protection, etc.). Cannabis cultivators shall maintain daily diversion records at the cultivation site and shall make the records available for review or by request by the Water Boards, CDFW, or any other authorized representatives of the Water Boards or CDFW. Daily diversion records shall be retained for a minimum of five years. Compliance with this term is required for any surface water diversion for cannabis cultivation, even those under 10 acre-feet per year.*

- a. During the May 12, 2021, inspection, no water measuring devices were observed on or near POD1, POD2, POD3, or POD4, nor were any records of water diversion found on the Property. Division staff determined that, based on the diversion system, there would need to be at least four water measuring devices installed for POD 1-4 to measure water diverted for cannabis cultivation.
  - i. Four violations of Term 82 of Section 2 of the Cannabis Cultivation Policy are alleged for failure to have water measuring devices installed during the inspection and for the failure to maintain daily diversion records on the Property.

**31. Violation 6:** Cannabis Cultivation Policy, Attachment A, Section 2, Term 92, states:

*To prevent rupture or overflow and runoff, cannabis cultivators shall only use water storage tanks and bladders equipped with a float valve, or equivalent device, to shut off diversion when storage systems are full. Cannabis cultivators shall install any other measures necessary to prevent overflow of storage systems to prevent runoff and the diversion of more water than can be used and/or stored.*

- a. During the May 12, 2021, inspection, Division staff observed POS1, POS3, POS4, POS7, and POS8 without float valves or similar devices installed to prevent the overflow and waste of water. POS with multiple storage tanks were connected so that at least one overflow prevention device per POS would meet the requirement. Division staff determined that, based on the diversion system, there would need to be at least one overflow prevention device for each POS, for a total of five (5).
  - i. Five violations of Term 92 of Section 2 of the Cannabis Cultivation Policy are alleged for the failure to use water storage tanks with a float valve, or equivalent device, during the inspection on May 12, 2021.

**32. Violation 7:** Cannabis Cultivation Policy, Attachment A, Section 2, Term 93, states:

*Cannabis cultivators shall ensure that all vents and other openings on water storage tanks are designed to prevent the entry and/or entrapment of wildlife.*

- a. During the May 12, 2021, inspection, Division staff documented a total of ten (10) water storage tanks in use for cannabis cultivation without tank lids or other mechanisms to prevent the entry and/or entrapment of wildlife. POS1 (4 tanks), POS3 (1 tank), POS4 (2 tanks), POS7 (2 tanks), and POS8 (1 tank).
  - i. Ten violations (one per storage tank) of Term 93 of Section 2 of the Cannabis Cultivation Policy are alleged for the failure to have a lid installed to prevent the entry and/or entrapment of wildlife during the inspection on May 12, 2021.

**33. Violation 8:** Cannabis Cultivation Policy, Attachment A, Section 2, Term 98, states:

*Cannabis cultivators shall maintain daily records of all water used for irrigation of cannabis. Daily records may be calculated by the use of a measuring device or, if known, by calculating the irrigation system rates and duration of time watered (e.g., irrigating for one hour twice per day using 50 half-gallon irrigation emitters equates to 50 gallons per day (1 hour x 2 times per day x 50 irrigation emitters x 0.5 gallons per irrigation emitter per hour) of water used for irrigation). Cannabis cultivators shall retain, for a minimum of five years, irrigation records at the cannabis cultivation site and shall make all irrigation records available for review by the Water Boards, CDFW, and any other authorized representatives of the Water Boards or CDFW.*

- a. During the site inspection on May 12, 2021, Division staff did not locate daily records of water used for cannabis irrigation on the Property. Additionally, staff did not observe any water measuring devices at any of the PODs, POSs, or POUs. After the inspection, no additional information has been received in response to required corrective actions.
  - i. One violation of Term 98 of Section 2 of the Cannabis Cultivation Policy is alleged for failing to have daily records of water used for irrigation of cannabis during the inspection on May 12, 2021.

### **Diversion or Use of Water for Cannabis Cultivation Requires CDFA License**

- 34. **Violation 9:** Water Code section 1847, subdivisions (a) and (b)(4) provide that any person or entity who diverts or uses water for cannabis cultivation for which a license is required, but which has not been obtained, under Chapter 6 (commencing with 26060) or Chapter 7 (commencing with 26070) of Division 10 of the Business and Professions Code may be liable in an amount not to exceed the sum of five hundred dollars (\$500) per violation, plus two hundred fifty dollars (\$250) for each additional day on which each violation continues if the person fails to correct the violation within 30 days after the State Water Board has called the violation to the attention of that person or entity, plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in violation of the applicable requirement.
- 35. CDFA established a commercial cannabis cultivation licensing program pursuant to Chapter 6 (commencing with section 26060) of Division 10 of the Business and Professions Code. CDFA began issuing licenses on January 1, 2018. Any person engaged in commercial cannabis activity must obtain a state license from CDFA. (Bus. & Prof. Code § 26037.5, subd. (a); 4 Cal. Code Regs. §15000.1, subd. (a).) "Commercial cannabis activity" includes cultivation. (Bus. & Prof. Code § 26001, subd. (j); 4 Cal. Code Regs. § 15000, subd. (o).) The only exceptions to the cultivation licensing requirement are for persons cultivating not more than six living cannabis plants, or certain nonprofit entities in limited circumstances not applicable here. (Bus. & Prof. Code § 26037.5, subd. (b).) CDFA's cultivation licensing requirements are set forth in Chapter 6 of Division 10 of the Business and Professions Code, commencing at section 26060.
  - a. During the May 12, 2021, inspection, Division staff observed approximately 5,456 cannabis plants on the Property, with an approximate cultivation area of 10,391 square feet, irrigated from surface water diversions at POD 1-4. Cannabis cultivation of the scale observed by Division staff on the Property required a CDFA commercial cannabis license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code. Division staff examined available records on May 17 and February 10, 2022 and did not find any evidence that CDFA issued a cultivation license for the activities observed on the Property.

- i. One violation is alleged for diverting and using water for cannabis cultivation without having obtained a CDFA commercial cannabis license as required.

### **Statutory Maximum Liability**

36. The statutory maximum liability for violation 1-9 is the sum of each Violation's statutory maximum liability (Violations 1+2+3+4+5+6+7+8+9 = Statutory Maximum Liability). Therefore, the statutory maximum liability for Violations 1-9 is \$17,500 (\$4000 + \$2,000 + \$500 + \$500 + \$2,000 + \$2,500 + \$5,000 + \$500 + \$500).

### **WATER CODE SECTION 1055.3 CONSIDERATION OF FACTORS**

37. Water Code section 1055.3 requires that the State Water Board in determining the amount of civil liability shall take into consideration all relevant circumstances, including, but not limited to, 1) the extent of harm caused by the violations, 2) the nature and persistence of the violation, 3) the length of time over which the violation occurs, and 4) the corrective action, if any taken by the violator. This requirement is applied to all penalty proposals relative to this administrative civil liability complaint.

#### **Relevant Circumstances Applicable to All Violations**

38. Although the evidence suggests that illegal cannabis cultivation activities likely predated the May 12, 2021, inspection, the Division has taken a conservative approach to calculating the proposed administrative civil liability amount. To deter illegal cannabis cultivation activities and encourage the legal market and enterprises, it is necessary to impose administrative civil liability in sufficient amounts to make the costs of noncompliance higher than the cost of compliance. The Division recommends that the State Water Board take each opportunity to deter illegal activities and demonstrate the need to comply, including by imposing significant administrative civil liabilities for cannabis cultivation violations. The Diverter engaged in illegal cannabis cultivation activities, as such the proposed penalties must be adequate to serve as both punishment for the violations and as a deterrent for future noncompliance by similarly situated parties. In addition, we must recognize the inherent difficulties with communicating with this group of diverters. The illegal side of cannabis cultivation is elusive in terms of mailing addresses misrepresented or no longer valid, returned mail is a norm, and these cases present a greater difficulty in gaining compliance or conducting enforcement.

#### **39. Violation 1: Failure to File Statements of Water Diversion or Use (Water Code 5101)**

a. Extent of Harm Caused:

The harm caused by this violation can be categorized generally as harm to the orderly and efficient administration of the state's water resources. The main purpose of the State Water Board's Statement Program is a central repository for records of diversions and uses of water. The failure to submit

statements of water diversion and use impacts the water rights regulatory program harming other water right diverters, the environment, and the public at large. Information the regulated community includes in Statements is critical for administering water rights and managing water supply. The State Water Board and the public need to understand when, where, how, and why water is used to ensure water is being put to beneficial use. The need for orderly records is particularly important after three years of critical drought conditions have led to curtailments of other legal users of water based on reported water use and projected water availability data. The failure to comply with reporting requirements adds administrative burden to state and can alter or reduce water use by legal water users when there is insufficient supply relative to demand. When legal users are curtailed the water that becomes available unfairly benefits illegal diverters or those who do not report their diversion or use of water. Therefore, by failing to file a Statement to report water diversion and use, the Diverter impaired the State Water Board's orderly and efficient administration of water resources of the state.

b. Nature and Persistence:

The nature and persistence of the Diverter's failure to file a Statement of Diversion and Use is on-going. The need to file a Statement was called to the attention of the Diverter after the inspection in the Field NOV and three unsuccessful delivery attempts were made to deliver the NOV/IR by mail. Nevertheless, to date, Division staff have received no Statement of Water Diversion and Use for POD 1-4. The violation is on-going and the effect on downstream users of water remains unknown but is a point of concern as the state experiences its second significant drought in the last 10 years. When diverters do not report their diversion and use of water it makes the fair and equitable administration of the water rights system significantly more difficult in times of severe water shortage.

c. Corrective Action:

As of the date of this Complaint, the Diverter has not come into compliance by filing a Statement for POD 1-4.

d. Length of Time:

The Diverter purchased the Trinity County APN 018-220-22-00 on December 5, 2013, and APN 018-220-21-00 on September 17, 2015. Google Earth Pro and LandVision aerial imagery from 2014, 2016, 2018, and 2020 all show cultivation or infrastructure associated with cultivation existing on the Property. The aerial imagery shows that over the time period from 2014-2020 the areas developed for greenhouses and cultivation infrastructure increased until all POUs observed during the May 12, 2021 inspection, are visible in 2018 and 2020. During the May 12, 2021 inspection, Division staff observed water diverted from POD 1-4 used for cannabis irrigation and domestic use. POD 1-4 are the sole source of water observed during the time of the inspection and no evidence has been received from the Diverter or collected that would support an alternative source of water. Water diverted and used in 2020 was required to be reported by July 1 2021, water diverted and used during 2021 was required to be reported to the State Water Board by

April 1, 2022. Division staff attempted to provide notice of the violation by leaving a copy of the Field NOV that cited the failure to file a Statement and the corrective actions necessary to correct the violation. The violation continues as a Statement has not been filed with the State Water Board for the diversion and use of water on the Property in 2021. Google Earth Pro and LandVision aerial imagery from 2014, 2016, 2018, and 2020 all show cultivation occurring on the Property. The imagery shows that each year the extent of cultivation increased until all POUs observed during the May 12, 2021 inspection are visible in the 2018 and 2020 aerial images. Therefore, the Division alleges four Water Code Section 5101 for the failure to file a Statement

- e. The Diverter has never reported the diversion and use of water by filing a Statement and the violation is on-going. Taking into consideration the factors listed in a-d, the penalty is recommended at \$ \$4000 to deter non-compliance and to encourage voluntary compliance.

### **Violations 2 through 8: Cannabis Cultivation Policy Violations**

#### **40. Violation 2: Cannabis Cultivation Policy Section 2, Term 66- Failure to Comply with the Narrative and Numeric Instream Flow Requirements**

- a. Extent of Harm Caused:

Absent restrictions on water diversion, the individual and cumulative effects of water diversions for cannabis cultivation during the dry season are likely to significantly decrease instream flow and, in some instances, reduce hydrologic connectivity or completely dewater the stream. Minimum flows that provide habitat connectivity are needed to maintain juvenile salmonid passage conditions in late spring and early summer. Instream flows are also needed to maintain habitat conditions necessary for juvenile salmonid viability throughout the dry season, including adequate dissolved oxygen concentrations, low stream temperatures, and high rates of invertebrate drift from riffles to pools. Furthermore, many species depend on spring recession flows as migratory and breeding cues. The violation represents potential harm to multiple terrestrial and aquatic species causing habitat loss by dewatering or diminished flows extirpating species listed on the California Endangered Species Act and Federally Endangered Species Act lists. The State Water Board is requiring a surface water diversion forbearance period to ensure adequate flows are maintained throughout the dry season to protect aquatic species, aquatic habitat, and water quality. Compliance with this Policy is mandatory to ensure that the diversion of water and associated with cannabis cultivation does not have a negative impact on the environment. Diverting water during the forbearance period impacts downstream priority of water right diverters' ability to use water beneficially and impacts instream and terrestrial public trust resources and habitat. The extent of harm caused by the violation is compounded by the current emergency drought conditions in addition to the diversions and use of water occurring in the Van Duzen River watershed, which is a California Wild and Scenic River from the Dinsmore Bridge downstream to the confluence with the Eel River, which is

also identified as a State designated Wild and Scenic River from 100 yards below the Van Arsdale Dam to the Pacific Ocean.

b. Nature and Persistence:

During the inspection, Division staff observed active water diversions at POD1, POD3, and POD4 during the surface water dry season forbearance period (April 1 – October 31) for cannabis cultivation. Based on the observed configuration of the water diversion and conveyance system, POD2 was almost certainly used to divert water for cannabis cultivation during the 2021 forbearance period. Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. Division staff left a Field NOV that identified the violation and the corrective actions necessary to correct the violation. Based on the consumptive water demand estimates of cannabis (up to 2.5 - 6 gallons per-plant per day during the growing season), as determined by independent studies, the amount of water necessary to irrigate 5,456 cannabis plants is 13,640 – 32,736 gallons per day at a frequency of 5.5 – 2.3 days between diversion.

c. Corrective Action:

The Diverter has not contacted Division staff or provided any evidence in response to the Field NOV.

d. Length of Time:

The Division is alleging a single day of violation for each POD observed during the inspection. Therefore, the Division alleges four violations of Term 66 of Section 2 of the Cannabis Cultivation Policy for the diversion and use of surface water from POD1, POD2, POD3, and POD4 during the forbearance period.

e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 per violation, for a total liability amount of \$2,000.

**41. Violation 3: Cannabis Cultivation Policy Section 2, Term 77- Failure to Follow Diversion Intake Requirements**

a. Extent of Harm Caused:

Compliance with this requirement is mandatory to ensure that the diversion of water associated with cannabis cultivation does not harm instream flows during the forbearance period. The inability to render the Diverter's POD intake incapable of diverting water can result in continued water diversion; thereby impacting downstream beneficial uses and depriving downstream priority of right diverters. These violations may also injure other water right holders by improperly shifting the burden of offsetting public trust impacts to senior priority of right diverters. Impacts are compounded when the violation persists throughout the forbearance period in dry and critically dry years. POD 1-4 divert water from unnamed streams tributary to a California Wild and Scenic River (Van Duzen River) and the State Water Board has established

limitation on when diversions can occur to protect public trust resources and to prevent harm.

b. Nature and Persistence:

During the May 12, 2021 inspection, Division staff observed POD1, POD3, and POD4 actively diverting for cannabis cultivation. POD1 and POD3 were also actively diverting for domestic use. Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. On May 12, 2021, at the end of the inspection, Division staff left a Field NOV that identified the violation and the corrective actions necessary to correct the observed violations. As POD4 was the only POD diverting only for cannabis irrigation only, Division staff allege one day of violation of Term 77 for a failure to plug, block, cap, or bypass POD4 water diversions.

c. Corrective Action:

The Diverter has not contacted Division staff in response to the Field NOV or provided any evidence that corrective action to plug, block or cap, disconnect, or remove the diversion intake has been taken.

d. Length of Time:

Division staff documented a violation for the failure to plug block or remove the diversion intake at POD4 during the May 12, 2021 inspection. The Division is alleging a single day of violation for the failure to render POD4 inoperable to stop the diversion of water. Therefore, liability for one violation of Cannabis Policy Section 2, Term 77 is alleged.

e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 for this violation.

**42. Violation 4: Cannabis Cultivation Policy Section 2, Term 81- Failure to Install Separate Measuring Devices for Water Diverted for Cannabis Cultivation and Other Beneficial Uses**

a. Extent of Harm:

Cannabis cultivators are required to maintain measuring device(s) and daily diversion records for surface water diversions to assist the State Water Board in obtaining accurate water diversion and use data on how much water is being diverted in watersheds. Accurate water diversion and use data is needed from all users of water in the state so that the State Water Board can plan for emergency drought response to effectively manage limited water resources in impacted watersheds. By failing to install a measuring device and maintain daily diversion records, the Diverter deprives the State Water Board of critical data. This directly harms the State Water Board's ability to plan for limited water supply, forecast water demand, assure compliance with water rights, and effectively manage the state's water resources.

b. Nature and Persistence:

Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. Division staff left a Field NOV that identified the



- violation and the corrective actions necessary to correct the violation. Based on the water diversion and conveyance system, there would need to be one water measuring device installed that measures the water use for domestic and cannabis separately.
- c. Corrective Action:  
The Diverter has not contacted Division staff in response to the Field NOV to provide evidence that a measuring device has been installed on POS7 to measure water used for domestic and cannabis use.
  - d. Length of Time:  
Division staff documented a violation of the requirement to install separate measuring devices for domestic and cannabis use during the May 16, 2021 inspection. Division staff are alleging a single day of violation. Therefore, liability for one violation of Term 82 of Section 2 of the Cannabis Cultivation Policy is alleged.
  - e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 for this violation.

**43. Violation 5: Cannabis Cultivation Policy Section 2, Term 82- Failure to Install Water Measuring Devices or Maintain Diversion Records**

- a. Extent of Harm:  
Cannabis cultivators are required to maintain measuring device(s) and daily diversion records for surface water diversions to assist the State Water Board in obtaining accurate data on how much water is being diverted in watersheds. Accurate water diversion and use data is needed from all users of water in the state so that the State Water Board can plan for emergency drought response and effectively manage limited water resources in impacted watersheds. By failing to maintain measuring devices and daily diversion records the Diverter deprives the State Water Board of critical data. This directly harms the State Water Board's ability to plan for limited water supplies, forecast water demand, assure compliance with water rights, and effectively manage of the state's water resources.
- b. Nature and Persistence:  
Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. Division staff left a Field NOV that identified the violation and the corrective actions necessary to correct the violation. Based on the structure of the irrigation system observed during the inspection, Division staff find that at least four measuring devices are required to comply with this requirement.
- c. Corrective Action:  
The Diverter has not contacted Division staff in response to the Field NOV to provide diversion records or any evidence that the Diverter has installed a device to measure the amount of water diverted from POD 1-4 for cannabis irrigation.

- d. Length of Time:  
Division staff documented a violation of the requirement to measure surface water diversions and maintain daily records during the May 12, 2021 inspection. Division staff are alleging a single day of violation for each POD. Therefore, liability for four violations of Term 82 of Section 2 of the Cannabis Cultivation Policy are alleged.
- e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 per violation, for a total liability amount of \$2,000.

**44. Violation 6: Cannabis Cultivation Policy Section 2, Term 92- Water Storage Facility Without Device to Prevent Water Overflow**

- a. Extent of Harm:  
Compliance with this requirement is necessary to prevent waste of water diversions to full water storage facilities. Water storage facilities used without a device to prevent overflow, run off, or ruptured storage containers have the potential to harm instream flows and is a waste or unreasonable use of water. This in turn impacts downstream beneficial uses and downstream priority of right diverters. The harm caused by these violations is compounded where there are multiple water storage facilities without devices installed to prevent the overflow of water.
- b. Nature and Persistence:  
During the inspection, Division staff documented a total of five (5) POSs without float valves or similar devices installed to prevent overflow or runoff at POS1, POS3, POS4, POS7, and POS8. POSs with multiple storage tanks were connected so that at least one shut of valve per POS would be required to meet the requirement. Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. Division staff left a Field NOV that identified the violation and the corrective actions necessary to correct the violation.
- c. Corrective Action:  
The Diverter has not contacted the Division in response to the Field NOV or provided any evidence that the Diverter took corrective actions to install or use water storage tanks equipped with a float valve, or equivalent device, to shut off water diversions when storage systems are full.
- d. Length of Time:  
Division staff documented five water storage facilities with multiple tanks without float valves or similar devices installed to prevent the overflow or runoff of water during the inspection. Therefore, liability for five violations of Term 92 of Section 2 of the Cannabis Cultivation Policy are alleged.

- e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 per violation, for a total liability amount of \$2,500.

**45. Violation 7: Cannabis Cultivation Policy Section 2, Term 93- Failure to Secure Tank Openings to Prevent Entry and Entrapment of Wildlife**

a. Extent of Harm:

Cannabis cultivators are required to ensure that tank openings are closed to the environment as open water storage tanks may potentially cause direct harm by entrapping wildlife. The potential harm to wildlife increases significantly when there are multiple water storage tanks with accessible openings or vents.

b. Nature and Persistence:

During the inspection, Division staff identified ten (10) storage tanks at POS1 (4 tanks), POS3 (1 tank), POS4 (2 tanks), POS7 (2 tanks), and POS8 (1 tank) without a lid. Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. Division staff left a Field NOV that identified the violation and the corrective actions necessary to correct the violation.

c. Corrective Action:

The Diverter has not contacted Division staff in response to the Field NOV or provided any evidence that the Diverter took corrective actions to achieve compliance by ensuring that all vents and other openings on water storage tanks are designed and managed to prevent the entry and/or entrapment of wildlife.

d. Length of Time:

Division staff documented ten (10) storage tanks at POS1, POS3, POS4, POS7, and POS8 without a lid to prevent wildlife from entering the tank and becoming entrapped. Therefore, liability for ten violations of Term 93 of Section 2 of the Cannabis Cultivation Policy is alleged.

- e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 per violation, for a total liability amount of \$5,000.

**46. Violation 8: Cannabis Cultivation Policy Section 2, Term 98- Failure to Maintain Daily Records of Water Use for Cannabis Irrigation**

a. Extent of Harm:

Compliance with this term is required to ensure that the diversion and use of water associated with cannabis cultivation does not have a negative impact on aquatic and riparian habitat and does not impact downstream water priority of right diverters. Accurate water use data on cannabis cultivation irrigation water demand is necessary so that the Division can determine if best irrigation management practices are in use. The application of best irrigation

management practices prevents the waste of water from overwatering and prevents runoff of cannabis cultivation wastewater. By failing to maintain daily irrigation records, the Diverter directly harms the State Water Board's ability to plan for emergency drought response, limited water supplies, forecast water demand, assure compliance with water rights, and effectively manage the state's water resources.

b. Nature and Persistence:

During the site inspection on May 12, 2021, no water measuring devices were observed on or near the POD or POS, nor were any irrigation records for cannabis water use found. Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. Division staff left a Field NOV that identified the violation and the corrective actions necessary to correct the violation.

c. Corrective Action:

The Diverter has not contacted Division staff in response to the Field NOV or provided any additional information regarding maintenance of daily irrigation records.

d. Length of Time:

During the site inspection on May 12, 2021, Division staff were unable to locate any cannabis irrigation records, nor did Division staff observe any measuring devices that would allow the Divert to calculate the amount of water used for irrigation of cannabis. Therefore, liability for one violation of Term 98 of Section 2 of the Cannabis Cultivation Policy is alleged.

e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 for this violation.

**47. Violation 9: Diversion or Use of Water for Cannabis Cultivation Without the Requisite License (Water Code 1847)**

a. Extent of Harm Caused:

Operating a commercial cannabis cultivation site without a license causes negative economic impact on the legal cannabis industry and general harm to the administration of the regulatory program. Illegal cultivation directly harms the legal market by supporting and supplying an unregulated market where illegal cultivators do not incur the compliance costs to cultivate cannabis in a manner that does not have a negative impact on water quality, aquatic habitats, riparian habitats, wetlands, springs, and health and safety of users. As such, the Diverter's cannabis cultivation activities significantly harm legal cultivators and the Cannabis Cultivation Regulatory Program.

b. Nature and Persistence:

Unlicensed cannabis cultivation is in violation of the laws and regulations enacted pursuant to the Medical and Adult-Use Cannabis Regulation and Safety Act. CDFR began accepting applications for commercial cannabis cultivation licenses on January 1, 2018. The scale of cannabis cultivation

observed on the Property during the May 12, 2021, inspection required a commercial cannabis license. Division staff attempted to notify the Diverter of the violation three times by mail but was unsuccessful. Division staff left a Field NOV that identified the violation and the corrective actions necessary to correct the violation.

c. Corrective Action:

The Diverter has not contacted Division staff in response to the Field NOV. Division staff examined CDFA records of commercial cannabis cultivation licenses on December 2, 2021, and found no record that a cultivation license has been issued for the activities observed on the Property.

d. Length of Time:

Water diversion and use for cannabis cultivation was documented on the Property during the May 12, 2021 inspection. Although it is likely that water diversion and use for cannabis cultivation, the scale of which required a license, occurred on the Property prior to the inspection, liability for a single violation under Water Code section 1847, subdivision (b)(4) is alleged.

e. Considering the factors listed in a-d above, the Division proposes an administrative civil liability in the amount of \$500 for this violation

### **PROPOSED CIVIL LIABILITY**

48. Having taken into consideration the factors described above and the need for deterrence, the Assistant Deputy Director for Water Rights recommends an ACL in the amount of \$17,500; Adding the proposed fines for Violations 1-9: \$4,000 + \$2,000 + \$500 + \$500 + \$2,000 + \$2,500 + \$5,000 + \$500 + \$500 brings the total proposed liability to \$17,500.

### **RIGHT TO HEARING**

49. The Diverter may request a hearing on this matter before the State Water Board Administrative Hearings Office. Any such request for hearing must be delivered to or received by mail by the Administrative Hearings Office within 20 days after the date the Diverter receives this Complaint as required by Water Code section 1055, subdivision (b).

50. If the Diverter does not request a hearing within 20 days, then the right to a hearing on the matter is waived. The Assistant Deputy Director for Water Rights, under authority delegated by the State Water Board, may then issue a final Administrative Civil Liability Order assessing the proposed liability.

51. If the Diverter timely requests a hearing, the Diverter will have an opportunity to contest the allegations in this Complaint and the imposition of liability before a hearing officer from the Administrative Hearings Office. The Administrative Hearings Office will issue a notice setting the specific time and place for the hearing, and describing the hearing process, not less than 10 days before the hearing date.

52. After any hearing, the Administrative Hearings Office will issue a proposed order or final order setting administrative civil liability or determining that a liability shall not be imposed. If the Administrative Hearings Office issues a proposed order, the State Water Board will consider adopting the order at a subsequent public meeting.

STATE WATER RESOURCES CONTROL BOARD

A handwritten signature in cursive script that reads "Jule Rizzardo".

*Jule Rizzardo, Assistant Deputy Director  
Division of Water Rights*

Dated: AUG 26 2022