

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

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

Stacio Kopiej
Mendocino County
APN: 052-070-03-00 and 052-120-03-00

STACIO KOPIEJ (HEREINAFTER REFERRED TO AS "DIVERTER") IS 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 Mendocino 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 \$13,000.
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. Violations 1: The Diverter is alleged to have failed to submit a Statement of Water Diversion or Use (Statement) to the State Water Board for the diversion and use of water to irrigate the cannabis plants observed during the California Department of Fish and Wildlife's (CDFW's) July 21, 2020 inspection, in violation of Water Code section 5101, which requires each person who diverts water to file a statement of his or her diversion or use with the Board prior to July 1 of the succeeding year.
5. Violations 2-9: The Diverter is alleged to have violated eight (8) requirements of the *Cannabis Cultivation Policy – Principles and Guidelines for Cannabis Cultivation* (Cannabis Cultivation Policy)¹, established by the State Water Board pursuant to

¹ The State Water Board on October 17, 2017, adopted the Cannabis Policy (Order No. WQ-2017-0023-DWQ). This Order became effective December 18, 2017 upon the approval of the Office of Administrative law. On February 5, 2019, the State Water Board adopted Order No. WQ-2019-001-DWQ, amending the Cannabis Policy effective April 16, 2019.

Water Code section 13149, by doing the following: diverting water for cannabis cultivation during the surface water forbearance period (Section 2, 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 (Section 2, Term 77); failing to install and maintain measuring devices for surface water diversions and retaining daily diversion records (Section 2, Term 82); failing to prevent overflow from off-stream water storage facilities (Section 2, Term 89); failing to install a float valve or equivalent device to shut off the diversion when storage is full (Section 2, 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 (Section 2, Term 93); failing to inspect for and repair leaks in the diversion system (Section 2, Term 95); and failing to maintain daily records of all water used for irrigation of cannabis (Section 2, Term 98).

6. Violation 10: 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 Mendocino County property records, the Diverter acquired ownership interest in Mendocino County Assessor's Parcel Numbers 052-070-03-00 and 052-120-03-00 (the Property) on or around March 20, 2019. At that time, the Property was also jointly owned by Tzetzto Mishev, David M. Verno Sr., and David M. Verno Jr. David M. Verno Jr. subsequently sold his ownership interest in the Property to Richard Etherton.

8. Watershed Information:

The Property is located in the Indian Creek and Coulborn Creek watersheds (HUC 12 Indian Creek, 180101060303). Water for cannabis cultivation was diverted from an unnamed stream that is tributary to Indian Creek, which is a tributary to the South Fork Eel River. The South Fork Eel River is a state designated Wild and Scenic River from its confluence with the main stem to the Section Four Creek confluence. As a Wild and Scenic River, the State Water Board is precluded from accepting any application to appropriate water from the South Fork Eel River itself from January 1 through December 31 of any year.

9. July 21, 2020, Search Warrant Inspection by CDFW:

On September 8, 2020, Division staff received a copy of a Notice of Violation that was sent to the Diverter from CDFW following the execution of a July 21, 2020 search warrant inspection of the Property. The Notice of Violation from CDFW documented multiple cannabis cultivation areas on the Property. The Diverter was not present for the inspection; however, several other individuals were on the Property at the time of the inspection, including Tzetzto Mishev. A CDFW Warden interviewed Mishev, who explained the division of the Property between the co-owners. Based on statements from Mishev, the cultivation activities occurring in the

middle portion of the Property were associated with the Diverter, while the southern portion was managed by Mishev.

10. September 2020 Water Rights Records Review:

Between September 8, 2020, and September 24, 2020, Division staff examined available State Water Board water rights records in the electronic Water Rights Information Management System (eWRIMS) and found no evidence of an existing Statement, water right permit, license, or registration on file.

11. September 24, 2020 Notice Letter:

On September 24, 2020, Division staff mailed a "Notice of Potential Unauthorized Diversion and Failure to File a Statement of Water Diversion and Use" letter to the Diverter via certified mail in response to the water diversions documented by CDFW. The letter was returned to Division staff as "unclaimed" on October 20, 2020.

12. January 26, 2021 Notice Letter:

On January 26, 2021, Division staff mailed a second copy of the same "Notice of Potential Unauthorized Diversion and Failure to File a Statement of Water Diversion and Use" letter via certified mail to Mishev in Las Vegas, Nevada. The certified delivery to Mishev was signed for on January 29, 2021.

13. CDFW Communication Regarding Subsequent Inspection:

On or around May 20, 2021, the Division was notified by CDFW of another search warrant inspection of the Property that was going to be conducted based on illegal cannabis cultivation and possible surface water diversion used for cannabis cultivation.

14. Aerial Imagery Review:

On or around May 20, 2021, State Water Board, Division of Water Rights (Division) staff reviewed aerial imagery of the Property and made the following observations:

- a. Google Earth Pro aerial imagery dated April 21, 2019, shows graded areas and greenhouse structures consistent with cannabis cultivation activity.
- b. LandVision aerial imagery dated May 6, 2020, shows graded areas and greenhouse structures consistent with cannabis cultivation activity.

15. Water Rights Records Review:

On or around May 20, 2021, prior to the inspection, Division staff examined available State Water Board water rights records in the electronic Water Rights Information Management System (eWRIMS) and found no evidence of an existing Statement, water right permit, license, or registration on file.

16. CalCannabis License Records Review:

On or around May 20, 2021, Division staff reviewed CalCannabis records of commercial cannabis cultivation licenses to determine if there was a license on file

that would legally authorize the commercial cannabis cultivation on the Property. Division staff found no CalCannabis license on record for the Property.

17. May 27, 2021 Inspection:

On May 27, 2021, staff from the Division and North Coast Regional Water Quality Control Board accompanied CDFW and the Trinity County Sheriff's Office in the execution of a search warrant inspection of the Property based on illegal cannabis cultivation and possible environmental crimes caused by cannabis cultivation. Neither the Diverter, nor a representative of the Diverter, was present during the inspection; however, Mishev was again present on the Property during the May 27, 2021 inspection and was interviewed by a CDFW Warden. Mishev stated that the cultivation that was observed during the inspection, including the cannabis greenhouse structures in the middle portion of the Property, was associated with the Diverter. Mishev stated he had removed his cannabis greenhouse structures and was cleaning up the portion of the Property where he had been cultivating cannabis in 2020. During the Property inspection, Division staff observed approximately 1,870 cannabis plants growing in six cannabis greenhouse structures. The Diverter's cannabis plants were eradicated by CDFW Wardens and the Trinity County Sheriff Office.

18. Points of Diversion:

Division staff observed and documented two points of diversion (POD) during the May 27, 2021 inspection.

- a. POD1 is an impoundment, created by excavating a hole approximately 5 feet in diameter and 6 inches in depth, located on an unnamed stream that is tributary to Indian Creek. The unnamed stream has defined bed and banks upstream and downstream of POD1. POD1 was actively diverting water during the inspection for cannabis cultivation. Division staff observed water flowing upstream of POD1, with little to no water flowing downstream of POD1.
- b. POD2 is a natural pool in the stream, created by a broken redwood tree stump and stream shape, located on an unnamed stream that is tributary to Indian Creek. The unnamed stream has defined bed and banks upstream and downstream of POD2. POD2 was actively diverting water during the inspection for cannabis cultivation. Division staff observed water flowing upstream of POD2, but no water was flowing downstream of POD2.

19. Inspection Report and Notice of Violation:

Division staff sent the Diverter an Inspection Report and Notice of Violation (IR/NOV) via certified mail to two addresses associated with the Diverter on July 29, 2021. The IR/NOV sent to the Diverter's Redway address was returned to Division staff on August 7, 2021, based on "insufficient address." The IR/NOV sent to the Diverter's Eureka address was returned to Division staff on August 9, 2021, based on "addressee unknown." On October 27, 2021, Division staff resent the IR/NOV via certified mail to the Diverter at his Redway address, which was again returned to Division staff on December 9, 2021, based on the delivery being "unclaimed/being

returned to sender". The IR/NOV described the observations made by Division staff during the inspection, notified the Diverter that the observed violations may subject him to enforcement by the State Water Board, and recommended corrective actions to address the violations. A copy of the IR/NOV is included herein as Attachment 1 to the Complaint.

20. Landowner/Diverter Response:

To date, Division staff have been unable to deliver a copy of the IR/NOV to the Diverter. As a result, there has been no contact between Division staff and the Diverter regarding the violations or corrective actions required.

STATE WATER BOARD AUTHORITY

21. 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.
22. 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, the Hearing Officer adopts a proposed order to be considered by the State Water Board.

ALLEGED VIOLATIONS

Statement of Annual Diversion or Use

23. **Violation 1:** Failure to file a Statement of Water Diversion or Use:
Water Code section 5101 requires that any person who diverts water shall file a Statement with the Board by July 1 of the succeeding year, with certain exceptions that are not relevant here.
24. Water Code section 5102 states that a separate statement shall be filed for each point of diversion.
25. Water Code section 5107(c)(1) provides that the 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 Board has called the violation to the attention of that person.

- a. Division staff documented POD1 and POD2 diverting from an unnamed stream with a defined bed and banks during the May 27, 2021 inspection for irrigation of cannabis. During the July 21, 2020 inspection performed by CDFW, cannabis cultivation was also observed in the greenhouses associated with the Diverter. CDFW was unable to identify the specific POD(s) used to irrigate cannabis cultivation;² however, no other water sources were documented during the inspection. The Diverter would have needed to divert surface water from at least one POD to irrigate the cannabis observed during the July 21, 2020 inspection. Therefore, the Diverter was required to file a statement with the Board by July 1, 2021 for the diversion and use of surface water in 2020 to cultivate his cannabis that was observed growing during the July 21, 2020 inspection.
- b. As of the date of this Complaint, the State Water Board does not have an Initial Statement of Water Diversion and Use (Initial Statement) on file for the Diverter's diversion and use of water in 2020.
 - i. One violation is alleged for the Diverter's failure to file a Statement by July 1, 2021 for the diversion and use of water in 2020.

Cannabis Cultivation Policy Requirements

26. 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.

27. 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.

28. 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 Board has called the violation to the attention of that person or entity, plus two

² CDFW documented three PODs in use during the July 21, 2020 inspection; however, these PODs appeared to be used for the southern cultivation areas not associated with Kopiej. The location of these PODs do not correspond to the two PODs documented during the May 27, 2020 inspection.

thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in violation of the applicable Requirement.

29. 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 Section 3, No. 4. Numeric and Narrative Instream Flow Requirements of the Cannabis Cultivation Policy Attachment A for more information³.

- a. POD1 and POD2, documented by Division staff during the May 27, 2021 inspection, divert water from a surface stream with a known and definite channel, subject to the Numeric and Narrative Instream Flow Requirements. Division staff observed POD1 and POD2 actively diverting water for cannabis cultivation during the inspection. POD1 and POD2 both conveyed water by gravity to POS1. Water was then pumped from POS1 to POS 2-9, conveyed from POS 2-9 by gravity to POS 10-12 for cannabis irrigation at point of use (POU) 1, and conveyed by gravity to POS 13-15 for cannabis irrigation at POU2. The Diverter was cultivating approximately 1,870 plants (across six separate greenhouses in POU1 and POU2) at the time of the inspection. The diversions documented on May 27, 2021 occurred during the surface water dry season forbearance period (April 1 through October 31).
 - i. The diversion of water at POD1 and POD2 for cannabis cultivation irrigation during the forbearance period constitutes two one-day violations (one day for each POD used for cannabis cultivation) of Term 66, of Section 2 of the Cannabis Cultivation Policy.

30. 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. POD1 and POD2 were observed to be actively diverting surface water for cannabis cultivation at the time of the May 27, 2021 inspection, which was conducted during the surface water forbearance period (April 1 – October 31). Division staff observed that the diversion structures for POD1 and

³ The Numeric and Narrative Instream Flow Requirements No. 4. Surface Water Dry Season Forbearance Period requirement stipulates the following: "Cannabis cultivators shall not divert surface water for cannabis cultivation activities at any time from April 1 through October 31 of each calendar year unless the water diverted is delivered from storage in compliance with Narrative Instream Flow Requirement 4."

POD2 were not rendered incapable of diverting water and were not plugged, blocked, capped or disconnected to stop the diversion of water during the forbearance period, as required.

- i. Two one-day violations (one day for each POD used for cannabis cultivation) of Term 77 of Section 2 of the Cannabis Cultivation Policy are alleged for the failure to follow intake requirements observed during the inspection on May 27, 2021.

31. Violation 4: 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 Property inspection on May 27, 2021, no water measuring device was observed on or near POD1 or POD2, 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 one water measuring device installed per POD to measure water diverted for cannabis cultivation.

- i. Two one-day violations (one day for each POD used for cannabis cultivation) 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.

32. Violation 5: Cannabis Cultivation Policy, Attachment A, Section 2, Term 89, states:

Cannabis cultivators shall not cause or allow any overflow from off-stream water storage facilities that are closed to the environment (e.g., tanks and bladders) if the off-stream facilities are served by a diversion from surface water or groundwater. Cannabis cultivators shall on a monthly basis, at a minimum, inspect for and repair all leaks of the diversion and storage system. Written records describing the date, time, and nature of such inspections and repairs shall be kept on-site for a period of at least two years.

- a. During the May 27, 2021 Property inspection, Division staff observed a 50-gallon tank at POS1 with water overflowing through a 1-inch gray plastic pipe. Additionally, no written records of inspections or repairs were found on Property during the inspection. Based on staff's observations, the overflow of water at POS1 was a violation of this requirement.
 - i. One day of violation of Term 89 of Section 2 of the Cannabis Cultivation Policy is alleged for the overflowing tank at POS1 that was observed on May 27, 2021.

33. 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 Property inspection on May 27, 2021, Division staff documented that two tanks at POS1, one tank at POS 2 -9, one tank at POS12, one tank at POS13, and one tank at POS14 did not have float valves or similar devices installed to prevent the overflow and waste of water. Each of these water conveyance termination points have the potential to overflow and require a device to automatically shut off the water supply once the tank has reached storage capacity. Based on staff's observations of the diversion, water conveyance and storage systems in place during the May 27, 2021 inspection, at least six overflow prevention devices would be needed to prevent the overflow of water from these storage tanks. The use of water storage tanks without an overflow prevention device is a violation of this requirement.
 - i. Six one-day violations (one day for each tank without a device) of Term 92 of Section 2 of the Cannabis Cultivation Policy are alleged for the failure to have overflow prevention devices installed during the inspection.

34. 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 Property inspection on May 27, 2021, Division staff documented that one tank at POS1, one 5,000-gallon tank at POS 2-9, one tank at POS12, one tank at POS13, and two tanks at POS 14-15 were being used to store water for cannabis cultivation without tank lids. Failure to secure all tank openings with lids presents an entrapment hazard to wildlife and is a violation of this requirement.
 - i. Six one-day violations of Term 93 of Section 2 of the Cannabis Cultivation Policy are alleged for the failure to ensure six water

storage tanks used for cannabis cultivation were covered or designed to prevent the entry and/or entrapment of wildlife during the inspection on May 27, 2021.

35. Violation 8: Cannabis Cultivation Policy, Attachment A, Section 2, Term 95, states:

Cannabis cultivators shall on a monthly basis, at a minimum, inspect their entire water delivery system for leaks and immediately repair any leaky faucets, pipes, connectors, or other leaks.

- a. During the inspection on May 27, 2021, Division staff observed three leaks in the polyethylene pipe running from POD1 to POS1. The soil in the area surrounding the leaks was wet and small pools of water had collected. Based on these observations, Division staff concluded that the leaks may have been occurring for several days. The failure to inspect for and immediately repair leaks in the system is a violation of this requirement.
 - i. Three one-day violations of Term 95 of Section 2 of the Cannabis Cultivation Policy are alleged for failing to inspect for and immediately repair the 3 separate leaks that were documented during the May 27, 2021 inspection.

36. Violation 9: 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 inspection on May 27, 2021, Division staff did not locate daily records of water used for irrigation of cannabis on the Property. Additionally, Division staff did not observe any water measuring devices at any of the PODs, POSs, or cannabis cultivation areas.
 - 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 May 27, 2021 inspection.

Diversion or Use of Water for Cannabis Cultivation Requires CDFA License

- 37. Violation 10:** 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 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.

38. CalCannabis⁴ 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 Property inspection, Division staff observed approximately 1,870 cannabis plants growing in six greenhouses, with an approximate total cultivation area of 5,200 sq. ft., irrigated from surface water diverted at POD1 and POD2. 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 CalCannabis records of commercial cannabis cultivation licenses on or around May 20, 2021 and again on January 3, 2022 and did not find any record 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

39. The statutory maximum liability for Violations 1-10 is the sum of each Violation's statutory maximum liability (Violations 1+2+3+4+5+6+7+8+9+10 = Statutory Maximum Liability). Therefore, the statutory maximum liability for Violations 1-10 is \$13,000 (\$1,000 + \$1,000 + \$1,000 + \$1,000 + \$500 + \$3,000 + \$3,000 + \$1,500 + \$500 + \$500).

WATER CODE SECTION 1055.3 CONSIDERATION OF FACTORS

⁴ Effective July 1, 2021, the CalCannabis regulatory and enforcement functions have been moved from the Department of Food and Agriculture to the Department of Cannabis Control. References herein will be to CalCannabis as it was organized during the relevant periods

40. Water Code section 1055.3 requires that the 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.

41. Violation 1: Failure to Submit Statements of Water Diversion and Use (Water Code Section 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 to create 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. Therefore, by failing to file a Statement to report water diversion and use, the Diverter impaired the 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 a problem. Division staff attempted to call to the Diverter's attention the need to file a statement of water diversion and use for surface water used to irrigate the cannabis observed by CDFW during their July 21, 2020 search warrant inspection in the "Notice of Potential Unauthorized Diversion and Failure to File a Statement of Water Diversion and Use" letter mailed by Division staff on September 24, 2020; however, this letter was returned as unclaimed. Nevertheless, the Diverter should be aware of the requirement to file a Statement of Diversion and Use. To date, Division staff have not received a Statement from the Diverter.

c. Corrective Action:

As of the date of this Complaint, the Diverter has not come into compliance by filing a Statement for diversion and use of water in 2020.

d. Length of Time:

Water diversion and use reporting for 2020 was required to be filed with the State Water Board by July 1, 2021. CDFW staff observed cannabis cultivation on the Property during their July 21, 2020 inspection, with no water sources observed other than the surface water streams on the Property. As

such, the Diverter was required to file a Statement by July 1, 2021, for the water diversion and use that occurred in 2020.

The violation continues as a Statement has yet to be filed. Although the Division attempted to call the violation to the Diverter's attention, the certified delivery of the "Notice of Potential Unauthorized Diversion and Failure to File a Statement of Water Diversion and Use" letter was unsuccessful. Therefore, the Division is not seeking additional liability for continuing days of violation. Liability for one day of violation of Water Code section 5101 is alleged.

- e. The Division proposes an administrative civil liability in the amount of \$1,000 for one day of violation.

Violations 2 through 8: Cannabis Cultivation Policy Violations

42. 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. The violation represents potential harm to multiple species through diversion of water from a stream causing habitat loss in a stream length by dewatering or diminished flows extirpating multiple species as compared to a threat of individual harm to an individual in a species. 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 production and drift from riffles to pools. Further, many species depend on spring recession flows as migratory or breeding cues. 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 requirement is mandatory to ensure that the diversion of water associated with cannabis cultivation does not have a negative impact on water quality, aquatic habitat, riparian habitat, wetlands, or springs. 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.

b. Nature and Persistence:

During the inspection, Division staff observed active water diversions at POD1 and POD2 during the surface water dry season forbearance period (April 1 – October 31) for cannabis cultivation. Based on the consumptive water demand estimates of cannabis (up to 6 gallons per-plant per day during

the growing season), as determined by independent studies, the amount of water necessary to irrigate 1,870 cannabis plants is appreciable. This violation did not continue past May 27, 2021, since the cannabis plants were eradicated by law enforcement during the inspection.

c. Corrective Action:

Division staff are not aware of any actions that have been taken by the Diverter to correct this violation.

d. Length of Time:

The Division is alleging a single day of violation for the surface water diversions observed during the inspection. Therefore, the Division alleges two violations (one day of violation for each POD) of Term 66 of Section 2 of the Cannabis Cultivation Policy for the diversion and use of surface water from POD1 and POD2 on May 27, 2021.

e. The Division proposes an administrative civil liability in the amount of \$500 for each one-day violation, for a total of \$1,000.

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

a. Extent of Harm:

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. Inability to render the Diverter's POD intakes incapable of diverting water can result in continued water diversion; thus, 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 rights. Impacts are compounded when the violation persists throughout the forbearance period in dry and critically dry years.

b. Nature and Persistence:

During the May 27, 2021 inspection, Division staff observed POD1 and POD2 actively diverting for cannabis cultivation in violation of the requirement to plug, block, cap, or otherwise render the PODs incapable of diverting water during the forbearance period.

c. Corrective Action:

Division staff are not aware of any actions taken by the Diverter to correct this violation.

d. Length of Time:

Division staff documented a violation of the requirement to plug block or remove the diversion intake at POD1 and POD2 during the inspection. The Division is alleging a single day of violation for the failure to render each POD inoperable to stop the diversion of water on May 27, 2021. Therefore, liability

for two violations (one day of violation for each POD) of Term 77 of Section 2 of the Cannabis Cultivation Policy is alleged.

- e. The Division proposes an administrative civil liability in the amount of \$500 for each one-day violation, for a total liability amount of \$1,000.

44. Violation 4: Cannabis Cultivation Policy, Section 2, Term 82 – Failure to Install Diversion Measuring Device

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 data on water diversion is needed for all users of water in the state so that the Division can plan for drought and effectively manage limited water resources in impacted watersheds. Moreover, this is vital information for water use planning made even more critical by drought conditions. By failing to maintain measuring devices and daily diversion records the Diverter deprives the Division of this critical data. This directly harms the Division's ability to plan for limited supplies, forecast water demand, assure compliance with water rights, and provide efficient management of the state's water resources.

b. Nature and Persistence:

During the Property inspection, Division staff documented that the equipment used to operate POD1 and POD2 was in violation of Cannabis Cultivation Policy, Section 2, Term 82, as no devices were observed measuring diversions from POD1 and POD2, nor were any records of water diversion found. Based on the structure of the irrigation system as observed during the inspection, two measuring devices were required to comply with the requirement.

c. Corrective Action:

Division staff are not aware of any actions taken by the Diverter to correct this violation.

d. Length of Time:

Division staff documented a violation of the requirement to measure surface water diversions and maintain daily records during the May 27, 2021 inspection. Division staff are alleging a single day of violation for each POD that was not set up to measure water diversion. Therefore, liability for two violations (one day of violation for each POD) of Term 82 of Section 2 of the Cannabis Cultivation Policy is alleged.

- e. The Division proposes an administrative civil liability in the amount of \$500 for each one-day violation, for a total liability amount of \$1,000.

45. Violation 5: Cannabis Cultivation Policy, Section 2, Term 89 – Failure to Prevent Storage Tank Overflow

- a. Extent of Harm:
Compliance with this requirement is necessary to prevent waste from water diversions to full storage facilities. Storage facilities that are not maintained to prevent overflow, run off, or ruptured storage containers have the potential to harm instream flows. This in turn impacts downstream beneficial uses and downstream priority of right diverters.
- b. Nature and Persistence:
During the May 27, 2021 inspection, Division staff documented a 50-gallon tank at POS1 to be actively overflowing in violation of this requirement.
- c. Corrective Action:
Division staff are not aware of any action taken by the Diverter to correct this violation.
- d. Length of Time:
This violation was documented during the May 27, 2021 inspection. The Division seeks liability for one day of violation of Cannabis Policy, Section 2, Term 89.
- e. The Division proposes an administrative civil liability in the amount of \$500 for one day of violation.

46. 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 from water diversions to full storage facilities. Storage facilities without devices to prevent overflow, run off, or ruptured storage containers has the potential to harm instream flows. 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 storage facilities without devices to prevent overflow.
- b. Nature and Persistence:
During that inspection, Division staff documented that two tanks at POS1, one tank at POS 2 -9, one tank at POS12, one tank at POS13, and one tank at POS14 did not have float valves or similar devices installed to prevent the overflow and waste of water. Based on the system as observed during the inspection, six devices were required to comply with this requirement.
- c. Corrective Action:
Division staff are not aware of any actions taken by the Diverter to correct this violation.

- d. Length of Time:
Division staff documented six storage tanks in use without a float valve or equivalent device installed to prevent overflow during the May 27, 2021 inspection. Therefore, liability for one day of violation for each of the six observed violations of Term 92 of Section 2 of the Cannabis Cultivation Policy are alleged.
- e. The Division proposes an administrative civil liability in the amount of \$500 for each one-day violation observed, for a total liability amount of \$3,000.

47. 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 as open 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 determined that one tank at POS1, one tank at POS 2-9, one tank at POS12, one tank at POS13, and two tanks at POS 14-15 were being used to store water for cannabis cultivation without tank lids to prevent wildlife entrapment.
- c. Corrective Action:
Division staff are not aware of any actions taken by the Diverter to correct this violation.
- d. Length of Time:
Division staff documented six storage tanks without a secured lid to prevent wildlife from entering the tank and becoming entrapped. Therefore, liability for one day of violation for each of the six observed violations of Term 93 of Section 2 of the Cannabis Cultivation Policy is alleged.
- e. The Division proposes an administrative civil liability in the amount of \$500 for each one-day violation observed, for a total liability amount of \$3,000.

48. Violation 8: Cannabis Cultivation Policy, Section 2, Term 95 - Failure to Inspect for and Repair Leaks in the Diversion System

- a. Extent of Harm:
Failure to perform the required inspections of the water delivery system and immediately repair any leaky faucets, pipes, connectors, or other leaks may result in waste of water. The multiple leaks in the Diverter's system, in the cumulative, may have the potential to harm instream flows. This in turn may impact downstream water right holders and designated beneficial uses. The requirement to perform monthly inspections/repairs on the system is to

encourage implementation of standard practices. Here, the Diverter has failed to implement these standard practices.

b. Nature and Persistence:

During the Property inspection on May 27, 2021, Division staff documented three leaks in the water supply line originating from POD1. The soil in the area surrounding the leaks was wet and small pools of water had collected. Based on these observations, Division staff to conclude that the leaks may have been occurring for several days.

c. Corrective Action:

Division staff are not aware of any actions taken by the Diverter to correct this violation.

d. Length of Time:

Division staff documented three leaks during the inspection, in violation of the requirement to inspect for and immediately repair any leaky faucets, pipes, connectors, or other leaks. Therefore, liability for one day of violation for each of the three observed violations of Term 95 of Section 2 of the Cannabis Cultivation Policy is alleged.

e. The Division proposes an administrative civil liability in the amount of \$500 for each one-day violation observed, for a total liability amount of \$1,500

49. Violation 9: Cannabis Cultivation Policy, Section 2, Term 98 - Failure to Maintain Daily Irrigation Records

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 habitat, riparian habitat, and does not indirectly impact downstream water right holders. Accurate data on cannabis cultivation irrigation water demand is necessary so that the Division can determine if standard irrigation practices are applied. This in turn prevents waste from overwatering and prevents runoff of cannabis cultivation wastewater. By failing to maintain daily irrigation records, the Diverter directly harms the Division's ability to plan for limited supplies, forecast water demand, assure compliance with water rights, and provide efficient management of the state's water resources. The State Water Board has stated the importance of real time accurate data on water demand, especially in dry and critically dry years. As such, the harm caused by the Diverter's failure to maintain irrigation records is notable.

b. Nature and Persistence:

During the Property inspection on May 27, 2021, no water metering devices were observed on or near any of the POD or POS, nor were any irrigation records for cannabis water demands found.

- c. Corrective Action:
Division staff are not aware of any actions taken by the Diverter to correct this violation.
- d. Length of Time:
During the Property inspection on May 27, 2021, Division staff were unable to locate any cannabis irrigation records, nor did Division staff observe any measuring devices that could calculate the 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. The Division proposes an administrative civil liability in the amount of \$500 for one day of violation.

50. Violation 10: Diversion or Use of Water for Cannabis Cultivation Without the Requisite License (Water Code 1847)

- a. Extent of Harm:
Operating a commercial cannabis cultivation operation without a license causes negative economic impact on the legal cannabis industry and general harm to 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, and springs. As such, the Diverter's cannabis cultivation activities may 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. CDFW began accepting applications for commercial cannabis cultivation licenses on January 1, 2018. It was determined the scale of cannabis cultivation occurring on the Property during the May 27, 2021 inspection required a commercial cannabis license.
- c. Corrective Action:
Division staff are not aware of any action taken by the Diverter to correct this violation.
- d. Length of Time:
Water diversion and use for cannabis cultivation was documented on the Property during the May 27, 2021 inspection. Although aerial imagery and information provided after CDFW's July 21, 2020 inspection indicate that water diversion and use for cannabis cultivation, the scale of which required a license, likely occurred on the Property prior to the inspection, liability for a single violation of Water Code section 1847, subdivision (b)(4) is alleged.

- e. The Division proposes an administrative civil liability in the amount of \$500 for one day of violation.

Violation 1-10: All Other Relevant Circumstances

51. Aerial imagery reviewed by Division staff from April 2019 and May 2020, show conditions consistent with cannabis cultivation activities on the Property. The warrant inspection performed by CDFW on July 21, 2020 confirmed illegal cannabis cultivation activities were occurring on the Property and indicated surface water was likely being diverted to irrigate cannabis. As such, it is likely that surface water diversions had been occurring on the Property to support the Diverter's cultivation activities since 2019. Additionally, evidence at the Property suggests that the failure to implement best management practices occurred throughout the time period the Property was used for cultivation. The potential cumulative impact of these water diversions and multiple Cannabis Cultivation Policy violations across a period of two years is considerable in this case.
52. The Cannabis Cultivation Regulatory Program is in its infancy. It is necessary to impose administrative civil liability in sufficient amounts to make the costs of noncompliance higher than the cost of compliance to ensure that illegal cannabis cultivation activities are deterred, and the legal market is encouraged. Each opportunity to deter illegal activities and demonstrate the need to comply must be taken. The Diverter engaged in illegal cannabis cultivation activities, as such the proposed penalties must be adequate to serve as a deterrent for future noncompliance.

PROPOSED CIVIL LIABILITY

53. Having taken into consideration the factors described above and the need for deterrence the Assistant Deputy Director for Water Rights recommends administrative civil liability for Violations 1 – 10 in the amounts of \$1,000 + \$1,000 + \$1,000 + \$1,000 + \$500 + \$3,000 + \$3,000 + \$1,500 + \$500 + \$500, for a total proposed liability amount of \$13,000.

RIGHT TO HEARING

54. 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).
55. 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.

56. 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.

57. 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

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Rizzardo
Date: 2022.03.18 12:01:12
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Water Board

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

Dated: **MAR 22 2022**