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**BEFORE THE
DEPARTMENT OF FISH AND WILDLIFE
STATE OF CALIFORNIA**

**In the Matter of the Amended Administrative Complaint and
Proposed Order Against:**

**ELVIS KY, Individually and Doing Business as, KYZEN
ENTERPRISES, INC., Respondents.**

Case No. 1708020034

OAH No. 2018080269

DECISION

Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 9 through 13, 2019, in Sacramento, CA.

Jeremy Valverde, Senior Staff Counsel, represented the California Department of Fish and Wildlife (CDFW or complainant).

Elvis Ky (respondent Ky) appeared on his own behalf and on behalf of Kyzen Enterprises, Inc.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 11, 2019.¹

FACTUAL FINDINGS

Jurisdictional Matters

1. The CDFW is authorized by Fish and Game Code section 12025 to administratively impose civil penalties for violations of specified laws in connection with the production or cultivation of cannabis. The specified laws include Fish and Game Code sections 1602, 5650, and 5652. On July 18, 2019, CDFW served respondents with the Amended Administrative Complaint alleging 44 separate violations of Fish and Game Code sections 1602, 5650, and 5652, and seeking civil penalties totaling \$680,400.

¹ By Order dated September 23, 2019, the record was reopened to allow complainant to submit jurisdictional documents including but not limited to the Amended Administrative Complaint, and for respondents to submit any objections to the jurisdictional documents and/or any argument that respondents should be permitted to introduce additional documents for jurisdictional purposes only. On September 24, 2019, complainant submitted jurisdictional documents, which were marked as Exhibit 30. Respondents did not object or file any argument that they should be permitted to introduce additional jurisdictional documents. On October 11, 2019, Exhibit 30 was admitted into evidence for jurisdictional purposes only, and the record was closed.

Alleged Violations and Complainant's Evidence

2. The alleged Violations 1 through 44, set forth below, are based substantially on two onsite inspections conducted by CDFW on August 2, 2017, and August 13, 2018, of three parcels of property owned by Kyzen Enterprises, Inc., in rural Calaveras County (Kyzen Property).² Based on these inspections, CDFW prepared an Environmental Impact Assessment dated August 31, 2017 (2017 Assessment), and a Supplemental Environmental Impact Assessment dated November 26, 2018 (2018 Assessment). The 2017 and 2018 Assessments were admitted into evidence for all purposes without objection, as Exhibits 5 and 6 respectively.³

3. Elvis Ky is the registered agent for Kyzen Enterprises, Inc., according to articles of incorporation filed with the California Secretary of State. The Kyzen Enterprises, Inc., corporate resolution for the purchase of the Kyzen Property lists Elvis Ky as president.

4. The 2017 and 2018 Assessments were the result of CDFW's participation in a joint operation with law enforcement organized by Calaveras County to address the rapidly growing number of cannabis cultivation sites suspected to be noncompliant with the Calaveras County Cannabis Cultivation Code and/or environmentally destructive. During the inspections, CDFW personnel observed numerous violations related to cannabis cultivation on the Kyzen Property. The

² The three parcels are designated as Calaveras County Assessor's Parcel Numbers 050-022-022, 050-022-023, and 052-017-087.

³ Exhibit 5 is referenced as Exhibit D, and Exhibit 6 is referenced as Exhibit K in the Amended Administrative Complaint.

cannabis cultivation activities on the Kyzen Property, included unpermitted stream alterations, pollution, and other activities negatively impacting unnamed tributaries to Salt Creek. The findings are discussed in the 2017 and 2018 Assessments, and are the basis for the alleged Violations 1 through 44, below.

VIOLATION 1 – SECTION 1602 (ROAD CROSSING AT SITE C)

5. Exhibit 5, pages 12 and 13, Figure 3, includes an August 2017 photograph and written description of a dirt road crossing built across a rock and gravel streambed by grading 24 linear feet of the channel, substantially altering the streambed, bank, and channel at a location tributary to Salt Creek.

VIOLATION 2 – SECTION 1602 (EQUIPMENT OPERATION AT SITE D)

6. Exhibit 5, pages 13 and 14, Figure 4, includes an August 2017 photograph and written description of recent use of heavy equipment directly upstream from Site C, affecting 35 feet of channel cross-section, and causing altered channel contours including cleared topsoil, ripped substrate, piled channel materials, loose soil and rutted streambank, and placement of soil where streamflow can deliver the sediment downstream.

VIOLATION 3 – SECTION 1602 (EQUIPMENT OPERATION AT SITE E)

7. Exhibit 5, pages 14 and 15, Figure 5, includes an August 2017 photograph and written description of recent use of heavy equipment within an unnamed tributary to Salt Creek, directly downstream from Site C, affecting 29 feet of channel cross-section, and causing altered substrate composition from mechanical disturbances, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 4 – SECTION 1602 (EQUIPMENT OPERATION AT SITE J)

8. Exhibit 5, pages 18 and 19, Figure 11, includes an August 2017 photograph and written description of a road crossing built over a metal culvert (drainage pipe). The culvert is undersized and improperly installed. The culvert crossing substantially altered the streambed, channel, and bank impacting 29 linear feet of stream channel, placement of soil fill materials and rock within approximately 50 feet of channel cross-section, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 5 – SECTION 1602 (GRADED PAD AT SITE N)

9. Exhibit 5, pages 21 and 22, Figures 15 and 16, includes two August 2017 photographs and a written description of a graded area of approximately 0.38 acres. The grading resulted in substantial changes to a stream by placement of earth and rock fill along 200 linear feet of the bank of an unnamed tributary to Salt Creek, placement of earth and rock fill materials within 10 feet of the center of a streambed, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 6 – SECTION 1602 (ROAD CROSSING AT SITE P)

10. Exhibit 5, pages 26 through 29, Figures 22 through 25, includes four August 2017 photographs and a written description of a polyethylene culvert installed underneath a dirt road river crossing. The culvert is undersized, improperly installed, and partially collapsed. The culvert substantially altered the stream channel and stream flow. In addition, installation of the culvert included substantial use of stream channel materials to construct the dirt road crossing, resulting in substantial diversion and obstruction of natural stream flow.

VIOLATION 7 – SECTION 1602 (HEAVY EQUIPMENT WORK AT SITE R)

11. Exhibit 5, pages 29 and 30, Figure 26, includes an August 2017 photograph and written description of a 0.3-acre area of a stream channel excavated with heavy equipment, which caused substantial changes to the stream channel and placed soil where stream flow can deliver sediment downstream.

VIOLATION 8 – SECTION 5652 (REFUSE AND WASTE IN STREAM CHANNEL AT SITE A)

12. Exhibit 5, pages 11 and 12, Figure 1, includes an August 2017 photograph and written description of household refuse and cultivation supplies littered within the bed, bank, channel and riparian corridor of approximately 1,000 linear feet of an unnamed tributary to Salt Creek. The litter included human waste and discarded toilet paper.

VIOLATION 9 – SECTION 5650(A)(6) (DUMPED PESTICIDE AT SITE B)

13. Exhibit 5, page 12, Figure 2, includes an August 2017 photograph and written description of a backpack sprayer with pesticide residue and a bottle of Roundup sitting in a stream where the pesticide could leak or spill into the stream channel.

VIOLATION 10 – SECTION 5650(A)(6) (ROAD CROSSING AT SITE C)

14. Exhibit 5, pages 12 and 13, Figure 3, includes an August 2017 photograph and written description of a dirt road crossing built across a rock and gravel streambed tributary to Salt Creek. Construction included grading 24 linear feet

of the channel, resulting in placement of soil where streamflow can deliver sediment downstream.

VIOLATION 11 – SECTION 5650(A)(6) (EQUIPMENT OPERATION AT SITE D)

15. Exhibit 5, pages 13 and 14, Figure 4, includes an August 2017 photograph and written description of recent use of heavy equipment directly upstream from Site C, resulting in substantial changes to an unnamed tributary to Creek, including substantial changes to 35 feet of the channel cross-section, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 12 – SECTION 5650(A)(6) (EQUIPMENT OPERATION AT SITE E)

16. Exhibit 5, pages 14 and 15, Figure 5, includes an August 2017 photograph and written description of recent use of heavy equipment directly downstream from Exhibit 5, Site C, affecting 29 feet of channel cross-section, altered substrate composition from mechanical disturbances, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 13 – SECTION 5650(A)(6) (CULTIVATION CLEARING AT SITE F)

17. Exhibit 5, page 8, Map 2, and page 16, Figure 7, includes an August 2017 photograph and written description of a large marijuana cultivation site developed on floodplains of an unnamed tributary to Salt Creek. Deleterious substances observed at the marijuana cultivation site included liquid and soil fertilizer, sediment, petroleum products, refuse, and miscellaneous cultivation supplies. These materials were placed where they can enter the waters of the state during high flows that inundate the floodplain.

VIOLATION 14 – SECTION 5652 (REFUSE AND PETROLEUM PRODUCTS AT SITE G)

18. Exhibit 5, pages 16 and 17, Figure 8, includes an August 2017 photograph and written description of over 20 plastic garbage bags overflowing with garbage piled on the ground, approximately 80 feet from an unnamed tributary to Salt Creek. Additional refuse was scattered throughout the camp within 75 to 100 feet from an unnamed tributary to Salt Creek. Eight gas cans and a fuel generator were also found at the camp. None of the gas cans or generator were properly stored with secondary containment to catch leaks or spills.

VIOLATION 15 – SECTION 5652(B) (ABANDONED VEHICLE AT SITE H)

19. Exhibit 5, page 17, Figure 9, includes an August 2017 photograph and written description of an abandoned truck with an open differential exposing petroleum within approximately 103 feet of the top bank of an unnamed tributary to Salt Creek.

VIOLATION 16 – SECTION 5650(A)(1) (PETROLEUM PRODUCTS AT SITE I)

20. Exhibit 5, pages 17 and 18, Figure 10, includes two August 2017 photographs and a written description of an auger attachment for heavy equipment leaking hydraulic fluid into the ground near an unnamed tributary to Salt Creek.

VIOLATION 17 – SECTION 5650(A)(6) (ROAD CROSSING AT SITE J)

21. Exhibit 5, pages 18 and 19, Figure 11, includes two August 2017 photographs and written description of a road crossing built over a metal culvert placed in an unnamed tributary to Salt Creek. The culvert is undersized and improperly

installed. The culvert crossing substantially altered the streambed, channel, and bank impacting 29 linear feet of a streambed, and resulted in placement of soil where streamflow can deliver sediment downstream.

VIOLATION 18 – SECTION 5652 (REFUSE AND WASTE AT SITE K)

22. Exhibit 5, page 19, Figure 11a, includes an August 2017 photograph and written description of human waste and discarded toilet paper within 150 feet of the high water mark of a stream.

VIOLATION 19 – SECTION 5650(A)(6) (DISCARDED FERTILIZER AT SITE L)

23. Exhibit 5, pages 19 and 20, Figures 12 and 13, includes three August 2017 photographs and written description of discarded fertilizer spread on the ground covering an area of approximately 40 by 56 feet, three to four inches deep, approximately 28 feet from the top bank of a streambed tributary to Salt Creek.

VIOLATION 20 – SECTION 5652 (REFUSE DISCARDED AT SITE M)

24. Exhibit 5, pages 20 and 21, Figure 14, includes two August 2017 photographs and written description of a dilapidated greenhouse with discarded cultivation supplies including fertilizer bags, greenhouse plastic, and plastic cups approximately 75 feet from a streambed tributary to Salt Creek.

VIOLATION 21 – SECTION 5650(A)(6) (CULTIVATION PAD AT SITE N)

25. Exhibit 5, pages 8 and 9, Maps 2 and 3, and pages 21 and 22, Figures 15 and 16, includes two aerial maps, two August 2017 photographs, and a written description of a graded area of approximately 0.38 acres. The movement of earth in the graded area resulted in placement of earth and rock fill materials along the bank

of 200 linear feet of the bank of an unnamed tributary to Salt Creek, placement of earth and rock materials within 10 feet of the center of a streambed, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 22 – SECTION 5652 (REFUSE DISCARDED AT SITE O)

26. Exhibit 5, pages 22 through 26, Figures 17 through 21, includes five August 2017 photographs and a written description of a work encampment with significant accumulations of garbage, litter, and debris, including dilapidated tents, bags of garbage, gas cans, tires, numerous generators, and approximately 1,500 pounds of granulated fertilizer in 30 pound bags. This was located alongside approximately 450 linear of a streambed tributary to Salt Creek.

VIOLATION 23 – SECTION 5650(A)(6) (ROAD CROSSING AT SITE P)

27. Exhibit 5, pages 26 and 27, Figures 22 and 23, includes two August 2017 photographs and a written description of a polyethylene culvert installed in an unnamed tributary to Salt Creek. The culvert was improperly installed and collapsed, causing substantial erosion alongside a road. The culvert installation affected 20 linear feet of stream channel, placement of rock and soil fill materials within approximately 10 feet of the channel cross-section, and placement of soil where the streamflow can deliver sediment downstream. In addition, the culvert installation resulted in substantial use of stream channel materials to construct the road crossing over the culvert, and substantial diversion of streamflow tributary to Salt Creek.

VIOLATION 24 – SECTION 5650(A)(6) (EROSION FROM DIVERTED FLOW AT SITE Q)

28. Exhibit 5, pages 28 and 29, Figures 24 and 25, includes two August 2017 photographs and a written description of erosion caused by the collapsed culvert at Site P, which obstructed and diverted the streamflow of an unnamed tributary of Salt Creek. The streamflow diversion resulted in a new stream channel for approximately 350 feet alongside a road, causing erosion and the deposit of approximately 31 cubic yards of sediment downstream.

VIOLATION 25 – SECTION 5650(A)(6) (HEAVY EQUIPMENT WORK AT SITE R)

29. Exhibit 5, pages 29 and 30, Figure 26, includes an August 2017 photograph and written description of a 0.3-acre area near a stream channel excavated with heavy equipment. This substantially altered the streambed, channel, and bank impacting 150 linear feet of a streambed tributary to Salt Creek, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 26 – SECTION 5650(A)(6) (BURIED CULVERT AT SITE T)

30. Exhibit 5, page 30, Figure 27,⁴ includes a 2017 photograph and written description of a clogged and buried culvert in a streambed hydrologically connected at both ends to a Salt Creek tributary.

⁴ The Administrative Complaint incorrectly references Figure 26 as Site T.

VIOLATION 27 – SECTION 5650(A)(6) (EROSION FROM DAM AT SITE U)

31. Exhibit 5, pages 31 and 32, Figures 28 and 29, includes two August 2017 photographs and a written description of a 93-foot long earthen dam across a stream tributary to Salt Creek. Approximately half the face of the dam was in an eroded condition. Erosion and deferred maintenance of the dam has allowed sediment to transport downstream, resulting in substantial changes to the downstream channel.

VIOLATION 28 – SECTION 5652 (REFUSE AND ABANDONED VEHICLE AT SITE V)

32. Exhibit 5, page 33, Figure 31, includes an August 2017 photograph and written description of an abandoned recreational vehicle (RV) approximately 78 feet from the top bank of a streambed tributary to Rock Creek. There was a dirt pit located directly behind the RV, with a flex hose delivering raw sewage from the RV to the pit. There was also human waste and discarded toilet paper piled on the ground surrounding the RV. In addition, there were garbage bags, cans, bottles, a car battery, and other refuse piled around the RV.

VIOLATION 29 – SECTION 5652 (REFUSE AND WASTE IN STREAM CHANNEL AT SITE A)

33. Exhibit 6, pages 14 and 15, Figures 1 and 2, includes 6 photographs and a written description of human feces, toilet paper, litter, and trash along 1,000 linear feet of a streambed tributary to Salt Creek.

VIOLATION 30 – SECTION 1602 (ROAD CROSSING AT SITE C)

34. Exhibit 5, pages 12 and 13, Figure 3, includes an August 2017 photograph and written description of a dirt road crossing built across a rock and gravel streambed tributary to Salt Creek. The construction included grading 24 linear feet of the channel, compaction of fill materials within the stream channel, and placement of soil where streamflow can deliver sediment downstream.

VIOLATION 31 – SECTION 5650(A)(6) (ROAD CROSSING AT SITE C)

35. Exhibit 6, page 15, Figure 3, includes two 2017 and 2018 photographs and a written description of the same road crossing documented in 2017 at Site C (Factual Findings 5 and 14), affecting an unnamed tributary to Salt Creek. The crossing was not designed or installed appropriately to withstand the seasonal streamflow. During the 2018 site inspection, CDFW staff observed sediment deposits from the road crossing washed downstream where it can pass into the waters of the state.

VIOLATION 32 – SECTION 5652 (REFUSE AT SITE F)

36. Exhibit 6, pages 17 through 19, Figures 7 through 9, includes seven 2017 and 2018 photographs and a written description of the same cannabis cultivation site documented in 2017 at Site F (Factual Finding 17) within a floodplain alongside an unnamed tributary to Salt Creek. During the 2018 inspection, the site was found inactive, but soil fertilizer filled holes remained in place, and cultivation-related refuse was present, including discarded plastic pots, fertilizer containers, polyurethane tubing, and miscellaneous trash all in an area within 150 of a stream tributary to Creek.

VIOLATION 33 – SECTION 5652 (REFUSE AT SITE G)

37. Exhibit 6, pages 19 and 20, Figure 10, includes four 2017 and 2018 photographs and a written description of the same site documented in 2017 as Site F (Factual Finding 18). During the 2018 inspection, CDFW staff documented similar conditions observed in 2017, though some of the infrastructure such as a container being used for housing in 2017 had been removed. During the 2018 inspection, CDFW staff observed that remaining refuse included cultivation and petroleum products without proper storage or containment, trash bags overflowing on the ground, and other miscellaneous litter, all within 115 feet of a stream tributary to Salt Creek.

VIOLATION 34 – SECTION 5652(B) (ABANDONED VEHICLE AT SITE H)

38. Exhibit 6, pages 20 and 21, Figure 11, includes four 2017 and 2018 photographs and a written description of the same site documented in 2017 as Site H. (Factual Finding 19.) During the 2018 inspection, CDFW staff documented the same abandoned truck with the differential cover removed and exposed petroleum. The truck had been moved approximately 700 feet since 2017, to a location approximately 55 feet from a stream.

VIOLATION 35 – SECTION 5650(A)(6) (ROAD CROSSING AT SITE J)

39. Exhibit 6, pages 21 and 22, Figure 12, includes four 2017 and 2018 photographs and a written description of the same site documented in 2017 as Site H. (Factual Findings 8 and 21.) During the 2018 inspection, CDFW staff observed that the culvert had begun showing signs of collapse underneath the driving surface, and that continued collapse is expected because the culvert was not designed or installed correctly. The culvert substantially altered the streambed, channel, and bank impacting 29 linear feet of the streambed tributary to Salt Creek.

VIOLATION 36 – SECTION 5652 (REFUSE AT SITE K)

40. Exhibit 6, pages 22 through 24, Figures 13 and 14, includes four 2017 and 2018 photographs and a written description of the same site documented in 2017 as Site K. (Factual Finding 22.) During the 2018 inspection, CDFW staff observed that Site K changed from a fecal waste site in 2017, to a cannabis cultivation supply refuse site in 2018. In 2018, CDFW staff observed water storage tanks and soluble fertilizer at the site, along with full garbage bags, and miscellaneous litter including irrigation line scraps, grow bag material, and black pots, all within 150 feet of a stream tributary to Salt Creek.

VIOLATION 37 – SECTION 5650(A)(6) (CULTIVATION PAD AT SITE N)

41. Exhibit 6, pages 24 and 25, Figures 15 and 16, includes three 2017 and 2018 photographs and a written description of the same 0.38-acre graded area documented in 2017 as Site N. (Factual Finding 19 and 25.) During the 2018 inspection, CDFW staff observed that the grading that impacted 200 linear feet of a streambed tributary to Salt Creek had not been remediated. Also, in the 2018 inspection, the CDFW staff observed new evidence of cannabis cultivation including two greenhouses with potting soil located within 35 feet of a stream.

VIOLATION 38 – SECTION 5652 (REFUSE AT SITE O)

42. Exhibit 6, pages 25 through 28, Figures 17 through 22, includes 11 2017 and 2018 photographs, and a written description of the same work encampment documented in 2017 as Site O. (Factual Finding 26.) During the 2018 inspection, CDFW staff observed that Site O remained similarly polluted with cultivation related waste including bags of concentrated fertilizer deposited within 30 feet of a stream where it can pass into the waters of the state.

VIOLATION 39 – SECTION 5650(A)(6) (ROAD CROSSING AT SITE P)

43. Exhibit 6, pages 29 and 30, Figures 23 and 24, includes six 2017 and 2018 photographs and a written description of the same partially crushed polyethylene culvert documented in 2017 as Site P. (Factual Findings 10 and 27.) During the 2018 inspection, CDFW staff observed that the partially crushed and incorrectly installed polyethylene culvert remained in place, resulting in a substantial diversion of the stream channel and an eroded dirt ditch approximately 400 feet in length.

VIOLATION 40 – SECTION 5650(A)(6) (EROSION FROM DIVERTED FLOW AT SITE Q)

44. Exhibit 6, pages 29 and 30, Figures 22 through 24, includes six 2017 and 2018 photographs and a written description of the continuing erosion at Site Q that CDFW first observed in 2017. (Factual Finding 28.)

VIOLATION 41 – SECTION 5650(A)(6) (HEAVY EQUIPMENT WORK AT SITE R)

45. Exhibit 6, pages 31, Figure 25⁵, includes two 2017 and 2018 photographs and a written description of continued erosion of an unremediated excavation site which substantially altered the streambed, channel, and bank impacting 150 linear feet of a streambed, documented in 2017 as Site R. (Factual Findings 11 and 29.)

⁵ The Amended Administrative Complaint incorrectly references Figure 24, rather than Figure 25, which is Site R.

VIOLATION 42 – SECTION 5650(A)(6) (BURIED CULVERT AT SITE T)

46. Exhibit 6, pages 32 and 33, Figures 26 and 27, includes three 2017 and 2018 photographs and a written description of the clogged and buried culvert, which had become completely buried since 2017, and sediment discharge as a consequence of the buried culvert, documented in 2017 as Site T. (Factual Finding 30.)

VIOLATION 43 – SECTION 5652 (REFUSE AND ABANDONED VEHICLE AT SITE V)

47. Exhibit 6, pages 33 and 34, Figure 29, includes four 2017 and 2018 photographs and a written description of an abandoned RV, a sewage pit, filled trash bags, a pile of used butane cans, and other miscellaneous garbage, all within 75 feet from a stream. Some of the garbage and refuse had been present during the 2017 CDFW inspection (Factual Finding 32), and some was deposited later and evident during the 2018 inspection.

VIOLATION 44 – SECTION 5652 (REFUSE AT SITE W)

48. Exhibit 6, pages 34 and 35, Figure 30, includes four 2018 photographs and a written description of discarded cultivation supplies including plastic planter pots, plastic bags, and other miscellaneous trash scattered in an area along 20 linear feet of streambed and bank. In addition, CDFW staff observed black pots, grow bags, fertilizer bags and a tire and vehicle wheel deposited within 40 feet of the stream.

SUMMARY OF CDFW FINDINGS IN 2017 AND 2018 ASSESSMENTS

49. The streams affected by Violations 1 through 44, are unnamed tributaries to Salt Creek, which flows downstream to Salt Spring Valley Reservoir, then to Rock

Creek, and eventually into the San Joaquin Delta. The watershed and downstream watersheds support a wide variety of fish and wildlife species that may be impacted by Violations 1 through 44. The species potentially affected include those listed in the California Natural Diversity Database, which identifies 15 special status species, 11 of which are listed or are candidates for listing under the California Endangered Species Act and/or the federal Endangered Species Act. These species include the California tiger salamander, the California red-legged frog, steelhead, vernal pool fairy shrimp, tricolored blackbird, bald eagle, and Swainson's hawk.

50. Salt Spring Valley Reservoir is located approximately three miles downstream from the Kyzen Property, and supports a large sport fishery. Additionally, the reservoir provides essential habitat and prey for raptors. Aquatic species in and downstream from Salt Springs Valley include white catfish, brown bullhead, largemouth bass, bluegill, green sunfish, mosquito fish, black crappie, white crappie, goldfish, carp, hitch, and golden shiner.

51. The cannabis cultivation activities resulted in the delivery of sediment and agricultural pollution to streams tributary to Salt Creek, resulting in conditions that are harmful to fish and wildlife. The stream channel alterations do not meet environmental standards and would have required notice to CDFW and an application for a Lake and Streambed Alteration Agreement (LSAA). There is no record of prior notice to the CDFW of the alterations, or an LSAA between respondents and the CDFW prior to the 2017 and 2018 inspections. If stream channel modifications had been permitted through CDFW's LSAA program, measures would have been required to protect fish and wildlife.

52. On August 13, 2018, CDFW staff returned to the sites documented in the 2017 Assessment, and found that substantial stream alterations, pollution, and refuse,

remained un-remediated at the majority of locations. Additionally, new cannabis cultivation related violations were present, including the introduction of additional deleterious substances at locations where they can pass into streams tributary to Salt Creek. CDFW staff also observed that pollutants present during the 2017 inspection had washed downstream, and that erosion of sediment downstream had also continued.

RESPONDENTS' NOTICE OF AND RESPONSE TO VIOLATIONS

53. On August 30, 2017, CDFW sent Kyzen Enterprises, Inc., a Notice of Violation of Fish and Game Code sections 1602, 5650 and 5652 in Conjunction with Cannabis Cultivation (Notice of Violation). On September 19, 2017, respondent Ky sent an email to Jennifer Garcia at CDFW, stating that he: was "surprised" to see the Notice of Violation; has been "mostly in another state" running a company; has been leasing his property to tenants during the past year; and that he was "working on contacting" his tenants to resolve the violations.

54. On September 20, 2017, Ms. Garcia sent an email response to respondent Ky, noting that the property had "undergone significant environmental damage and illegal cannabis cultivation" and asking respondent Ky to call her at his earliest convenience to discuss the "environmental crimes and the next steps in remediation." Responded Ky did not call Ms. Garcia. Instead, on September 28, 2017, respondent Ky sent Ms. Garcia an email stating that he was able to "pick up all the trash in the stream waterways" and was "in contact with a few people" to get help with the cleanup and restoration within "the budget since property tax is also coming around the corner."

55. On October 19, 2017, following another email exchange, Ms. Garcia sent an email to respondent Ky notifying him that he "may need to obtain a Streambed

Alteration Agreement in order to remove some of the materials from the creek." On the same date, respondent Ky sent an email to Ms. Garcia telling her that "since it is coming up on winter we may need to wait until it dries up next year to get that project done."

56. Respondent Ky was an absentee owner, spending most of his time in either Arizona or Valencia, California. Respondent Ky was aware of and helped facilitate cannabis cultivation on the Kyzen Property. On June 30, 2016, respondent Ky signed a Medical Cannabis Cultivation Landowner Consent Form (Consent Form). On April 15, 2016, respondent Ky and the tenant on the Kyzen Property, Philip Isidro, signed a Cash Lease of Farm Land.⁶

57. Respondent Ky was also aware of earth grading and installation of a culvert on the Kyzen Property. On March 20, 2018, CDFW Game Warden William Witzel interviewed respondent Ky by telephone. Respondent Ky told Warden Witzel that his tenant Philip Isidro had hired a contractor to install a road culvert, and that respondent Ky had given permission to do the work as long as it was done to code and with permits. Respondent Ky stated he did not know whether Mr. Isidro or the contractor had obtained permits for the work they performed on the property. Respondent Ky said he was in Arizona and did not visit the property during the time the work was

⁶ Respondents produced the signature pages of the Cash Lease and the Consent Form. Respondents contest the authenticity of respondent Ky's signature on documents produced by complainant, other than the Consent Form. It is not necessary to make any determination regarding the authenticity of the challenged documents, as the Consent Form established that respondent Ky consented to cannabis cultivation on the Kyzen Property as early as 2016.

being done. Respondent Ky was also aware of road construction and greenhouses constructed on the Kyzen Property, both of which were noted in the Assessments prepared by the CDFW staff.

58. Respondent Ky also told Warden Witzel during the same telephone conversation that he had been in contact with Condor Environmental about drafting plans to clean up the property, but the cost for the plans were out of his budget. Respondent Ky did not implement any meaningful remediation plan for the Kyzen Property.

RESPONDENTS' ASSETS

59. Respondents' assets are one of the factors to be considered in determining the amount of any civil penalty to be imposed.⁷ Brendan Lynch, CDFW Game Warden, conducted research into respondent Ky's assets. Warden Lynch found through the Department of Motor Vehicles that respondent Ky has a 2011 Ferrari 458 Italia, and a 2006 Bentley Continental GT registered under his name. The Kelly Bluebook estimates for the Ferrari and Bentley are \$162,000 and \$43,000, respectively. Warden Lynch found that respondent Ky is listed as the sole owner of the New Shanghai Restaurant in Citrus Heights. Warden Lynch also found electronic communications indicating that respondent Ky is the Chief Executive Officer (CEO) of a health and wellness company known as Ariix with a weekly salary of \$4,000.

Respondents' Evidence

60. Respondent Ky testified that he is very short on financial assets. He no longer owns the Bentley. He still has possession of the Ferrari, but is no longer making

⁷ Cal. Code Regs., tit. 14, § 748.5 subd. (d)

payments on it. In 2017 or 2018, he borrowed \$80,000 to purchase the New Shanghai Restaurant in Citrus Heights. The restaurant is losing money. Approximately one year later, respondent Ky borrowed another \$80,000 to purchase a restaurant known as Bubble Noodle in Arizona. That restaurant is also losing money.

61. Respondent Ky testified that he is trying to sell the Kyzen Property. He owes \$477,000 on a first mortgage, and \$192,000 on a second mortgage. He is no longer paying his mortgages, and is not paying his property tax. He hopes someone will purchase the property, and that the purchaser will remediate the problems identified in the 2017 and 2018 Assessments. Respondent Ky received a \$50,000 estimate for the remediation costs from a company known as DRM. Respondent Ky did not pursue a remediation contract with DRM.

62. Respondent Ky could not closely monitor the work on the Kyzen Property because he spent most of his time in Arizona. He approved work on the Kyzen Property on the condition that "it was legal and any necessary permits had been obtained." In addition, respondent Ky leased only one parcel of the Kyzen Property – Parcel Number 052-017-087. He contends he did not consent to any of the modifications on the other two parcels of the Kyzen Property.

Discussion

63. The allegations in Violations 1 through 44 have been established. The 2017 and 2018 Assessments clearly set forth the violations, and respondents did not meaningfully challenge those allegations. Respondent Ky's assertions that he did not know about all of the work being done on the Kyzen Property, and that he insisted all work be done legally and with required permits does not, even if true, absolve respondents of responsibility. He knew cannabis was being grown on the Kyzen

Property, and that roads, culverts, and other developments were part of the cultivation. Respondents are responsible to make reasonable efforts to monitor the use of the Kyzen Property, and to undertake some effort to ensure the land use projects are legal. Respondents did neither. Based on these facts and the other findings herein, respondents are responsible for the condition of the Kyzen Property. All of respondents' arguments to the contrary have been considered and rejected.

64. As set forth in Legal Conclusions 8 through 10, the CDFW is authorized to impose civil penalties for these violations. In determining the amount of civil penalties to be imposed, all relevant circumstances should be taken into account including "the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, any prior history of violation, any corrective action taken by the respondent, and the respondent's assets and other financial resources." It is clear based on the 2017 and 2018 Assessments that the harm caused by the violations is extensive, that the violations have persisted for more than a year resulting in additional harms, and that respondents have taken very minimal corrective action.

65. There is no clear evidence regarding respondents' net assets. Respondent Ky has significant cash flow, but also significant debt. Respondent Ky has elected to direct his cash flow in directions other than remediation of the violations set forth in the 2017 and 2018 Assessments. Thus, the only factor clearly weighing in respondents' favor is that respondents have no record of previous violations.

66. As set forth in Legal Conclusion 8, the maximum civil penalty for each violation of Fish and Game Code sections 5650 and 5652 is \$20,000, and the maximum civil penalty for each of section 1602 is \$8,000. Based on the proven Violations 1 through 44, the aggregate maximum civil penalty is \$756,000. Based on the criteria set

forth in the California Code of Regulations, the maximum civil penalty for each violation is justified. It is reasonable, however, to reduce this amount by 10 percent on the basis that respondents do not have a history of violations. This 10 percent reduction results in an aggregate civil penalty of \$680,400.

LEGAL CONCLUSIONS

Burden of Proof

1. The Department has the burden of proving the allegations by a preponderance of the evidence. (Cal. Code Regs., tit. 14, § 748.5, subd. (b). The term preponderance of the evidence means "more likely than not." (*Sandoval v. Bank of Am.* (2002) 94 Cal.App.4th 1378, 1388.)

Applicable Statutes and Regulations

2. Fish & Game Code section 1602, subdivision (a), states:

An entity shall not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, unless all of the following occur. [Specified conditions include that CDFW receive "notification regarding the activity in the manner prescribed by the Department."]

3. Fish & Game Code section 5650, subdivision (a), states in pertinent part:

[I]t is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this state by any of the following:

(1) Any petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen, or residuary product of petroleum, or carbonaceous material or substance.

[II] ... [I]

(6) Any substance or material deleterious to fish, plant life, mammals, or birdlife.

4. Fish & Game Code section 5652, subdivision (a), states:

It is unlawful to deposit, permit to pass into, or place where it can pass into the waters of the state, or to abandon, dispose of, or throw away, within 150 feet of the high watermark of the waters of the state, any cans, bottles, garbage, motor vehicle or parts thereof, rubbish, litter, refuse, waste, debris, or the viscera or carcass of any dead mammal, or the carcass of any dead bird.

Violations

5. Based on Factual Findings 5 through 11, and 30, and the evidence as a whole, complainant established by a preponderance of evidence that respondent violated Fish & Game Code section 1602, subdivision (a).

6. Based on Factual Findings 13 through 17, 20, 21, 23, 25, 27 through 31, 35, 39, 41, and 43 through 46, and the evidence as a whole, complainant established by a preponderance of evidence that respondent violated Fish & Game Code section 5650, subdivisions (a)(1) and (a)(6).

7. Based on Factual Findings 12, 18, 19, 22, 24, 26, 32, 33, 36, 37, 38, 40, 42, 47, and 48, and the evidence as a whole, complainant established by a preponderance of evidence that respondent violated Fish & Game Code section 5652, subdivision (a).

Civil Penalties

8. Fish & Game Code section 12025, subdivision (b)(1) states:

In addition to any penalties imposed by any other law, a person found to have violated the code sections described in this subdivision in connection with the production or cultivation of a controlled substance on land that the person owns, leases, or otherwise uses or occupies with the consent of the land owner shall be liable for a civil penalty as follows:

(A) A person who violates Section 1602 in connection with the production or cultivation of a controlled substance is subject to a civil penalty of not more than eight thousand dollars (\$8,000) for each violation.

(B) A person who violates Section 5650 in connection with the production or cultivation of a controlled substance

is subject to a civil penalty of not more than twenty thousand dollars (\$20,000) for each violation.

(C) A person who violates Section 5652 in connection with the production or cultivation of a controlled substance is subject to a civil penalty of not more than twenty thousand dollars (\$20,000) for each violation.

9. California Code of Regulations, title 14, section 748.5, subdivision (d), states:


In determining the amount of the proposed civil penalty, the department shall take into consideration all relevant circumstances to the extent they are known to the department, including the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, any prior history of violation, any corrective action taken by the respondent, and the respondent's assets and other financial resources.

10. Based on the violations established by the evidence, and the maximum civil penalty that may be imposed for each violation, respondent is liable for a maximum of \$756,000 in civil penalties. As discussed in Factual Findings 63 through 66, and based on the criteria for determining the amount of civil penalties, as set forth in California Code of Regulations, title 14, section 748.5, subdivision (d), the maximum should be reduced by 10 percent, for total civil penalties of \$680,400.

ORDER

1. Violations 1 through 44 alleged by complainant are SUSTAINED.
2. Respondents Elvis Ky and Kyzen Enterprises, Inc., are, jointly and individually, ordered to pay the sum of \$680,400 to the California Department of Fish and Wildlife no later than 20 days from the date this Decision and Order is served.

DATE: November 25, 2019

DocuSigned by:

26BAPCCRE5EP478

TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. (Cal. Code Regs., tit. 14, § 748.5, subd. (k).) Either party may appeal this decision to a court of competent jurisdiction within 30 days of the date of service of the final Order. (Cal. Code Regs., tit. 14, § 748.5, subd. (l).)

DECLARATION OF SERVICE

Case Name: **Ky, Elvis; Isidro, Philip**

OAH No.: **2018080269**

I, Noreen Barry, declare as follows: I am over 18 years of age and am not a party to this action. I am employed by the Office of Administrative Hearings. My business address is 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833. On November 25, 2019, I served a copy of the following document(s) in the action entitled above:

DECISION

to each of the person(s) named below at the addresses listed after each name by the following method(s):

Jeremy Valverde
Senior Staff Counsel
Department of Fish and Wildlife
Office of the General Counsel
1416 9th Street, 12th Floor
Sacramento, CA 95814
VIA US Mail
Certified No. 7017 3040 0000 4160 4012

Elvis Ky
1931 W. Pelican Drive
Chandler, AZ 85286
VIA US Mail
Certified No. 7017 3040 0000 4160 4005

Brian Naslund
FISH&WILDLIFE - Law Enforcement Div
1416 9th Street, Room 1326
Sacramento, CA 95814

United States Mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above, and placed the envelope or package for collection and mailing, in accordance with the Office of Administrative Hearings' ordinary business practices, in Sacramento, California. I am readily familiar with the Office of Administrative Hearings' practice for collecting and processing documents for mailing. Correspondences are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope or package with postage fully prepaid. [by certified mail].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed at Sacramento, California on November 25, 2019.

DocuSigned by:
Noreen Barry
7623563211564C6

Noreen Barry, Declarant