

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
MARCH 18, 2008**

ITEM 8

SUBJECT

CONSIDERATION OF A PROPOSED ACTION FOLLOWING A HEARING ON DRAFT CEASE AND DESIST ORDER NO. 262.31-14 AND ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. 262.5-44 AGAINST THE VINEYARD CLUB, INC.

DISCUSSION

On April 4, 2007, the State Water Board conducted a hearing on draft Cease and Desist Order (CDO) No. 262.31-14 and Administrative Civil Liability (ACL) Complaint No. 262.5-44, issued by the Chief of the Division of Water Rights to the Vineyard Club, Inc. on December 11, 2006. The hearing was an adjudicative hearing governed by certain provisions regarding administrative adjudication in the Administrative Procedure Act (Gov. Code, §§ 11400, et seq.), and other statutory provisions, as specified in the State Water Board's regulations at title 23, California Code of Regulations, section 648. The State Water Board issued a Notice of Public Hearing for this proceeding on February 7, 2007.

The issues for hearing were: (1) whether, and if so with what modifications, the State Water Board should issue a CDO against Vineyard Club; and (2) whether the State Water Board should order liability in response to the ACL against Vineyard Club and, if so, the amount of the liability.

In this hearing, a staff Prosecution Team presented the case for adopting the draft CDO and for imposing administrative civil liability as requested in the ACL complaint. The parties to the proceeding are Vineyard Club and the Prosecution Team.

Based on the evidence in the hearing record, the proposed water right order concludes that Vineyard Club failed to comply with the terms of its license by diverting water without a bypass measuring device in place. In the proposed order, the State Water Board adopts a CDO requiring Vineyard Club to take the following corrective actions and satisfy the following time schedules:

1. Requires Vineyard Club to install the measuring/bypass structure approved by the Chief of the Division of Water Rights in June 2007, prior to diverting any water from Oak Flat Creek. A professional engineer must perform a flow test to confirm the measuring/bypass structure is operating correctly.
2. Requires annual reports for (5) five years, documenting the dates the diversion began and stopped, and monthly inspections of the bypass opening. Vineyard Club must maintain these records for ten (10) years.
3. Requires a proposed measuring device/bypass structure maintenance plan and schedule.

4. Requires Vineyard Club to obtain all necessary state and local agency permits required by other agencies prior to construction activities and diversion of water.

In this order, the State Water Board also assesses an administrative civil liability against Vineyard Club in the amount of \$14,750.

POLICY ISSUES:

Should the State Water Board adopt the proposed order?

FISCAL IMPACT:

This activity is budgeted within existing resources and no additional fiscal demands will occur as a result of approving this item.

REGIONAL BOARD IMPACT:

None

STAFF RECOMMENDATION:

Staff recommends that the SWRCB adopt the proposed order.

D R A F T

February 19, 2008

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-00XX

In the Matter of Draft Cease and Desist Order No. 262.31-14
and Administrative Civil Liability Complaint No. 262.5-44

against

The Vineyard Club, Inc.

Under Water Right License 12831 (Application 26224)

SOURCE: Unnamed Streams tributary to Gill Creek thence Russian River

COUNTY: Sonoma

**ORDER ADOPTING CEASE AND DESIST ORDER AND
ASSESSING CIVIL LIABILITY**

BY THE BOARD:

1.0 INTRODUCTION

In this order, the State Water Resources Control Board (State Water Board or Board) issues a Cease and Desist Order that requires The Vineyard Club, Inc. (Vineyard Club) to take certain actions under a time schedule in response to threatened violations of its license. The Board also assesses an administrative civil liability against Vineyard Club in the amount of \$14,750.

On February 7, 2007, the State Water Board issued a Notice of Public Hearing on draft Cease and Desist Order (CDO) No. 262.31-14 and Administrative Civil Liability (ACL) Complaint No. 262.5-44. The Chief of the State Water Board's Division of Water Rights (Division) had issued the draft CDO and ACL complaint on December 11, 2006. Vice Chair Gary Wolff (Dr. Wolff) presided over the hearing, which occurred on April 4, 2007. The hearing was an adjudicative proceeding governed by certain provisions regarding administrative adjudication in the

Administrative Procedure Act (Gov. Code, §§ 11400—11470.50 & 11513), as specified in the State Water Board's regulations commencing at California Code of Regulations, title 23, section 648.

The parties to the proceeding are Vineyard Club and a staff Prosecution Team (Prosecution). The Prosecution presented the case for adopting the draft CDO and for imposing civil liability as requested in the ACL complaint. The Board has considered all of the evidence and arguments in the hearing record, and the findings and conclusions herein are based on the evidence in the hearing record.

2.0 FACTUAL BACKGROUND

Vineyard Club holds License 12831 (Application 26224) which authorizes diversion of 245 acre-feet per annum of water by (1) onstream storage at Vineyard Lake, and (2) diversion to offstream storage at Vineyard Lake from an unnamed stream (aka Oak Flat Creek), at a rate not to exceed 0.25 cubic feet per second. The diversion season is from October 1 to May 31 of the following year. The water may be used for recreation and fire protection purposes. (VC-4.)¹

The draft CDO and ACL complaint allege that Vineyard Club diverted water in violation of License 12831, constituting a trespass. The basis of the complaint and draft CDO is Vineyard Club's alleged unauthorized diversion and use of water from Oak Flat Creek, tributary to Gill Creek, to offstream storage in Vineyard Lake without compliance with the terms of License 12831. Specifically, the draft CDO and ACL complaint allege that while diverting water, there was no bypass device in place to measure and ensure the minimum bypass flows to protect fish and wildlife. License 12831 establishes a required minimum bypass flow of the lesser of 0.4 cubic feet per second or natural flow. The Division Chief issued the draft CDO and the ACL complaint after the Division staff conducted an on-site inspection of Vineyard Club's licensed project to determine Vineyard Club's compliance with terms and conditions of the license. (VC-10, p. 1.)

¹ "VC" refers to the exhibits presented by Vineyard Club at the hearing. "WR" refers to the exhibits presented by the Prosecution.

3.0 LEGAL AND PROCEDURAL BACKGROUND

3.1 Authority to Issue a CDO

The State Water Board is authorized to issue a CDO when it determines that any person² is violating or threatening to violate any requirement described in Water Code section 1831, subdivision (d). Under subdivision (d), the Board may issue a CDO in response to a violation or threatened violation of any of the following:

- (1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to [Division 2 of the Water Code].
- (2) Any term or condition of a permit, license, certification, or registration issued under [Division 2 of the Water Code].
- (3) Any decision or order of the board issued under [Part 2 (commencing with section 1200) of Division 2 of the Water Code], Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order. (Wat. Code § 1831, subd. (d).)

The State Water Board may issue a CDO only after notice and an opportunity for hearing. Such notice shall be by personal notice or certified mail, and shall inform the person allegedly engaged in the violation (respondent) that he or she may request a hearing within twenty (20) days after the date of receiving the notice. The notice shall contain a statement of facts and information showing the violation. On December 11, 2006, in accordance with Water Code section 1834, subdivision (a), the Division Chief issued Draft CDO No. 262.31-14 to Vineyard Club, alleging unauthorized diversion and use of water. (VC-10.) By letter dated December 23, 2006, Vineyard Club requested a hearing. (VC-14.) As explained above, the State Water Board conducted the requested hearing on April 4, 2007.

If Vineyard Club violates a CDO, the State Water Board may proceed pursuant to Water Code section 1845, subdivision (a). Under section 1845, the penalties for a violation of a CDO are injunctive relief issued by a superior court and liability for a sum not to exceed \$1,000 for each

² A "person" includes any city, county, district, the state or any department or agency thereof, and the United States to the extent authorized by law. (Wat. Code, § 1835.)

day in which the violation occurs. Either the court or the Board may impose civil liability against a violator of a CDO.

3.2 Authority to Assess Civil Liability

The diversion or use of water subject to Division 2 of the Water Code, other than as authorized in Division 2, is a trespass. (Wat. Code, § 1052, subd. (a).) Under Water Code section 1052, subdivision (b), the State Water Board may assess an ACL against any person who, without authorization, diverts or uses water that is subject to appropriation in accordance with Division 2 of the Water Code. Subdivision (b) of section 1052 authorizes the State Water Board to impose an ACL in an amount not to exceed five hundred dollars (\$500) for each day in which the trespass occurs. If a person fails to pay an ACL, the Board may seek recovery of the ACL as provided in Water Code section 1055.4.

4.0 LEGAL AND PROCEDURAL BACKGROUND

4.1 Hearing Issues

The Notice of Public Hearing identified two issues for the hearing. First, should the State Water Board issue a Cease and Desist Order to Vineyard Club in response to draft CDO No. 262.31-14? If a cease and desist order should be issued, what modifications if any, should be made to the measures in the draft order, and what is the basis for such modifications?

Second, should the State Water Board order liability in response to Administrative Civil Liability Complaint No. 262.5-44 against Vineyard Club? If the Board orders liability, should the amount be increased or decreased, and if so, on what basis?

4.2 Positions of Hearing Participants

The parties in this proceeding are the Prosecution and Vineyard Club. The Prosecution asserts that the CDO should be issued without modifications and the ACL should be issued and the amount increased. The Prosecution argues that Vineyard Club violated its license by diverting water from the Oak Flat Creek to Vineyard Lake in 2005 without having the required measuring device in the vicinity of the diversion point. Because of Vineyard Club's prior history of noncompliance with the license requirements, the Prosecution argues that both a CDO and ACL should be issued by the State Water Board.

The Vineyard Club opposes issuance of the CDO and the ACL. Vineyard Club argues (VC-22) that the State Water Board does not have jurisdiction to issue a CDO or ACL in this matter because both are based upon a violation of the license terms and not a “trespass” as defined in Water Code section 1052, subdivision (a), as alleged by the Prosecution. Further, Vineyard Club argues that it has tried to comply with the license terms since it was notified about the violation and therefore the CDO is not necessary or appropriate. In Vineyard Club’s view, the ACL is the wrong remedy and the proposed fine is “out of line.” (Reporter’s Transcript of April 4, 2007 hearing, p. 174, hereafter “RT”.)

5.0 MOTIONS TO DISMISS AND DISQUALIFY

In a motion filed on or about March 16, 2007, Vineyard Club moved to dismiss the enforcement action based on allegedly punitive behavior in that the Prosecution argued for a substantially increased civil liability in excess of the ACL complaint (i.e., \$30,000 versus \$4,100), after the Vineyard Club requested a hearing before the Board. Vineyard Club supplemented its motion on March 29, 2007 with a request to disqualify both the Prosecution and the Board’s hearing team. In a letter ruling dated April 3, 2007 from Dr. Wolff to Mr. Daniel Kelly, Dr. Wolff stated that he would take the motion to dismiss for allegedly punitive behavior under submission until the hearing, when facts were presented about the conduct of the Prosecution. Dr. Wolff’s April 3 letter ruling denied the request to disqualify the hearing team. His letter ruling explains the ethical wall in place between the Prosecution and hearing team staff.³ This approach is entirely appropriate and proper under California’s Administrative Procedure Act. (See, Gov. Code, §§ 11425.10, subd. (a)(4) & 11425.30.)

In this order, we deny Vineyard Club’s motion to dismiss and disqualify the Prosecution. Mr. Larry Lindsay, a witness for the Prosecution, testified that the length of time of non-compliance entered into his calculation of the proposed fine, subsequent to the issuance of the ACL complaint. (RT pp. 15-17.) The recommended fine was about half the maximum he could have recommended based on his understanding of the length of time of non-compliance. Mr. Mark Stretars, a witness for the Prosecution, testified that he reviewed the file after the issuance

³ The hearing team consists of staff advising the hearing officer and ultimately the Board during this adjudicative proceeding. Dr. Wolff’s letter ruling explains the separation of functions for this proceeding and reiterates that the Prosecution and Vineyard Club are subject to the same prohibition on ex parte communications with the hearing team.

of the ACL complaint and found there were other reasons to recommend a higher fine, including a history of noncompliance by Vineyard Club and that the fine as initially proposed had been reduced in order to settle the matter. (RT pp. 23-26.)

The amount of the fine is ultimately set by the State Water Board. Staff costs to enforce licenses and permits are one of several considerations that the Board uses to determine the fines. As set forth in section 8.2.2 below, the fine set by the Board must consider “all of the relevant circumstances” as set forth in Water Code section 1055.2. We are under no obligation to accept any of the recommendations by the Prosecution and can in fact set the civil liability higher or lower depending upon our review of the relevant circumstances.

In analyzing the issues below and reaching our ultimate conclusions, we are sensitive to the issues raised in Vineyard Club’s motion to dismiss and disqualify the Prosecution.

Consequently, we note that the entire evidentiary basis for issuing this order, including the justification for the administrative civil liability assessment, comes from uncontested evidence. It is not necessary to rely on Prosecution evidence or opinion to reach our ultimate conclusions. Therefore, regardless of the Prosecution’s motivation, the conclusions of this order would be unchanged.

6.0 FACTS

We find the following facts from the evidentiary record to be significant:

Vineyard Club was issued Permit 20035 for diversion and use of water on or about March 6, 1987. (WR-12.) Documents contained in the Division’s file regarding Vineyard Club’s license show that Vineyard Club was found to be in violation of the permit condition regarding the installation of the measuring device in May 1991. (WR-14; WR-15.) The measuring device was installed in 1992, and License 12831 was issued to Vineyard Club. (VC-4.) There was no testimony about when or how the device was removed and whether it was re-installed in subsequent years as none of the witnesses had any knowledge about those facts.

On May 4, 2005, Mr. Lindsay inspected the Vineyard Lake, accompanied by Mr. Peter Sagues, manager of Vineyard Club. (VC-2, p. 2.) Mr. Sagues testified that during the inspection

Mr. Lindsay discovered that although water was being diverted, there was no measuring device in place. (RT pp. 103-104.) Mr. Sagues stated that he had been manager for about two years and was unaware of the requirement that a measuring device be in place during diversions. (VC-2.)

Mr. Sagues testified that in late March or early April 2005, Vineyard Club installed a pipeline from Oak Flat Creek to Vineyard Lake. (VC-2, p. 2.) Mr. Bert Sandell of Vineyard Club testified that in mid- to late March 2005, Vineyard Club “re-installed” the pipeline. He stopped the diversion on May 29, 2005. (VC-1, p. 2; RT, pp. 126-127.)

Both Mr. Sagues and Mr. Sandell testified that Vineyard Club did not divert any water in 2006. (VC-1, VC-2, VC-9.) Mr. Sagues and Mr. Sandell also testified that Vineyard Club did not divert any water in 2004. (RT pp. 103,165.) Mr. Sandell’s testimony indicated he did not believe there was a diversion in 2003. (RT p. 165.)

Vineyard Club has made attempts to get approval of the measuring device from the Board staff. (VC-1, VC-2, VC-15, VC-18, VC-19.) As of the hearing date, final approval of the device had not been given. In a June 7, 2007 letter to Vineyard Club, Victoria Whitney, Division Chief, approved the design of the measuring/bypass device. She also requested that Vineyard Club submit a proposed maintenance plan and schedule for approval. We take official notice of the Division Chief’s approval letter as authorized by section 648.2 of our regulations. (Cal. Code Regs., tit. 23, § 648.2.)

7.0 CEASE AND DESIST ORDER

The draft CDO alleges that Vineyard Club has violated the prohibition against unauthorized diversion and use of water by diverting water without a bypass measuring device in place. The Prosecution alleges that there is a threat that Vineyard Club will violate the license again since it violated the license in the past and thus the CDO should be issued by the State Water Board.

The draft CDO includes a time schedule for compliance and corrective actions. The proposed time schedule would require that within 90 days of the executed Order, the Vineyard Club

submit documentation of a contract with a registered engineer to design and install a measuring device in Oak Flat Creek that will meet the Board's approval.

7.1 Vineyard Club's Arguments

Vineyard Club presented testimony that it has been diligently attempting to comply with the license by asking State Water Board staff to give information about what an appropriate measuring device would be. Through testimony, Vineyard Club representatives stated that they would not divert water until and unless the approved measuring device was in place. Therefore, Vineyard Club asserts there is no threat of future violation and the CDO is not necessary.

7.2 Discussion

The evidence shows that Vineyard Club was in violation of the measuring device term under its permit in 1991 and again under its license in 2005. (WR-14, WR-15, VC-6.) Vineyard Club does not dispute these facts.

Although we believe that Vineyard Club has been making good faith efforts to design the measuring device and subsequent to the hearing achieved approval for such a device, we are not assured that there will be no future violations. The testimony pointed out a lack of "institutional memory" or records at Vineyard Club that ostensibly led to the violation of the license and the unauthorized diversion of water. Therefore, we believe it is prudent and necessary to issue a modified CDO with the following conditions.

The final CDO will require that Vineyard Club submit an annual report each year for five (5) years. Thereafter, reports shall be submitted upon the forms provided by the State Water Board from time to time, as required by the license. The first annual report shall be due thirty (30) days after May 31, which is the last day seasonal diversion is permitted. The report shall contain the dates the diversion at Oak Flat Creek began and stopped, and a log showing completion of monthly inspections of the bypass opening to ensure that the opening remains clear of debris and is fully operational. At the time of installation of the measuring device, a physical flow test will be performed by a registered engineer retained by Vineyard Club, using a hand-held flow meter to demonstrate that the bypass opening is allowing a minimum flow of

0.4 cubic feet per second, or natural flow, whichever is less. The results of this flow test, as verified by the engineer's stamp on the results, shall be included in the annual report.

8.0 ADMINISTRATIVE CIVIL LIABILITY

The ACL complaint alleged that Vineyard Club violated Water Code section 1052 because, *inter alia*, Vineyard Club was diverting water without having a measuring device. The ACL complaint proposed a fine of \$4,100.

8.1 Vineyard Club's Arguments

Vineyard Club argues that the State Water Board does not have jurisdiction to issue an ACL based upon the allegation that Vineyard Club has committed a trespass because the correct allegation should have been that Vineyard Club violated a term or condition of the license. Vineyard Club argues that the only possibly correct allegation was that it was violating a term or condition of the permit or license, as set forth in Water Code section 1831, subdivision (d)(2). In essence, Vineyard Club's argument is that a cease and desist order issued pursuant to section 1831, subdivision (d)(2) is the exclusive means for administratively enforcing a violation of a term or condition of a water right permit or license and that an administrative civil liability pursuant to section 1052 is only available for trespasses, which in Vineyard Club's view excludes violations of terms or conditions. This is an important distinction because if the draft CDO and ACL complaint assert the wrong circumstance, there is no basis for civil liability. (VC-22, RT pp. 171-172.)

Vineyard Club thereafter addresses the amount of the fine. It argues that there was no environmental damage done due to the diversion because the flow in the stream was adequate and arguably met the license condition. Also, because Vineyard Club has attempted to come into compliance and there is no persistent violation, Vineyard Club maintains that the fine should be reduced because "it is completely out of line" with prior Board actions. (RT pp. 172-175.)

8.2 Discussion

8.2.1 Jurisdiction and Authority to Issue ACL

Vineyard Club's water right license includes the following term, sometimes referred to as Standard Term 62:

No water shall be diverted under this license unless licensee has installed a device in Oak Flat Creek, satisfactory to the State Water Resources Control Board, which is capable of measuring the flows required by the conditions of this license. Said measuring device shall be properly maintained. (VC-4.)

Vineyard Club admits that the bypass measuring device required by its water right license was not in place while it diverted water during the 2005 diversion season. (VC-2, p. 2; RT p. 126.)

We do not need to address the sweeping issue of the Board's authority to issue an administrative civil liability, as presented by Vineyard Club, because violation of the license term in this case may properly be characterized as both a trespass and a violation of the license. The words "No water shall be diverted under this license. . ." are clear. No diversion of water is authorized. However, if the licensee "has installed a device . . . which is capable of measuring the flows . . ." water may be lawfully diverted. Those words modify the prohibition against the taking of water. A diversion is unauthorized under Standard Term 62 unless an approved measuring device is installed. Absent the approved device, there is no authorization to divert. This is the very nature of a trespass described in Water Code section 1052 ("[t]he diversion of use of water subject to this division other than as authorized in this division is a trespass").

Vineyard Club argues that construing Water Code section 1052 to authorize administrative civil liability for violations of a license term or condition renders superfluous certain subdivisions of section 1831. We are not persuaded. Section 1831 authorizes a cease and desist order under two relevant provisions: (d)(1) violation of the prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to division 2, or (d)(2) violation of a term or condition of a water right license issued under division 2. Vineyard Club contends if a violation of a term or condition is a trespass within the meaning of section 1052, then subdivision (d)(2) is unnecessary. From this, Vineyard Club concludes that a violation of a term or condition may not be the basis of an ACL.

We believe, in this case, that the violation of the above license term is both a trespass and a violation of the license conditions. Unlike other license terms or conditions, Term 62 specifies that “[n]o water shall be diverted unless” the bypass device condition is met. As discussed above, violation is therefore plainly an unauthorized diversion constituting a trespass within the meaning of section 1052. Separately, construing section 1052 to authorize administrative civil liability for violation of certain terms or conditions does not render superfluous section 1831, subdivision (d)(2). Other terms or conditions may remain subject to enforcement solely under the cease and desist authority of section 1831.⁴ For example, a reporting requirement that occurs after the diversion season would not necessarily be tantamount to a trespass authorizing an administrative civil liability because at the time of the diversion the person may have been in full compliance with all terms and conditions of the license. In this case, however, initiation of the CDO and the ACL under the allegation of an unauthorized diversion of water is appropriate.

Violation of Standard Term 62 constitutes a trespass violation within the meaning of section 1052. The remaining issues are to assess the duration of violations and appropriate liability, if any.

8.2.2 Amount of Civil Liability

For purposes of evaluating the duration of the violation, we will rely solely on the testimony of the Vineyard Club and draw appropriate inferences in favor of Vineyard Club.⁵ Mr. Sagues testified that Vineyard Club installed the pipeline in late March or early April. Mr. Sandell testified that it was installed in mid- to late March. Because the actual installation date is unknown, we find that the pipeline was installed on April 1, 2005. Mr. Sandell testified that he removed the pipeline on May 29, 2007. Based solely upon the testimony of Vineyard Club, it violated the license for fifty-nine (59) days and therefore the maximum penalty based solely on the Vineyard Club’s own testimony is \$29,500 (59 days of violations at \$500 per day pursuant to Water Code section 1052, subdivision (b)).

⁴ In this order, we do not address the broader issue of whether violation of any term or condition could be the basis for an administrative civil liability pursuant to section 1052. We do note, however, that Vineyard Club’s contention that violation of a term or condition of a water right license is not a trespass would lead to the dubious conclusion that violating a water right license term or condition is somehow authorized within the meaning of section 1052.

⁵ Vineyard Club appropriately contended that the burden of proof lies with the Prosecution. With respect to the duration of violations, however, we are relying solely on the Vineyard Club’s testimony because we find it unnecessary to weigh or evaluate the Prosecution’s evidence.

Water Code section 1055.3 states:

In determining the amount of civil liability, the board shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator.

The extent of the harm caused by the violation is unknown. Although Vineyard Club stated that it did not divert any water during 2004 or 2006, there is no evidence regarding other possible violations from 1991 through 2002. In 2003, there is only evidence of Mr. Sandell's "belief" that there was no diversion. The potential penalty could have been much higher if records were available. The license states that minimum flows are necessary "for the protection of fish and wildlife." We take note of our prior decision 1608, "Decision Approving Application 26224 in part" which approved the initial appropriation of water. (WR-20.) That decision stated that the State Water Board concurred with the Department of Fish and Game that the primary environmental concern was the impact of water diversion on steelhead rainbow trout, riparian vegetation and wildlife. Field surveys determined that Oak Flat Creek provided nursery habitat for juvenile steelhead.

The persistence of the violation is not clear from the evidence. It is undisputed that there were at least two occasions when Vineyard Club did not have the measuring device in place. The nature of the violation is of concern since it resulted from Vineyard Club's lack of adequate record keeping and review of its license conditions. While the unauthorized diversion of water could have had a serious effect on fish and wildlife since the bypass requirement was designed to protect fish and wildlife, there is no evidence of actual harm.

While the evidence about the length of time of the 2005 violation shows approximately fifty-nine (59) days, it is unclear whether Vineyard Club has been in compliance with the license every year since 1992. There is no evidence to establish whether there has been a measuring device in place since 1992.

With respect to corrective action, the record is clear that Vineyard Club has attempted to comply with the license since it discovered it was not in compliance as a result of the Division of Water Right's field inspection. However, one troubling aspect about this situation is that Vineyard Club did not have records about its license or its compliance with the license's bypass measuring

requirements. A cornerstone of the State Water Board's oversight of appropriative water rights is self-monitoring and self-reporting. The State relies on permitted water users to self-monitor their actions to ensure compliance with all permits and licenses as well as with all statutes and regulations. Lack of self-monitoring and self-reporting is thus a serious matter.

Indeed, there are many examples in law of regulators requiring self-monitoring and self-reporting in order to ensure compliance with laws. In *U.S. v. Chevron U.S.A., Inc.* (N.D.Cal.,2005) 380 F.Supp.2d 1104, the Court stated:

It is commonplace for environmental regulators to rely on self-reporting and self-monitoring by regulated entities to enforce environmental laws. See, e.g., 42 U.S.C. § 7414 (imposing monitoring and record keeping requirements on sources of air pollution); 33 U.S.C. § 1318 (imposing similar requirements on sources of water pollution).

Further, courts looking at violations associated with a failure to conduct appropriate monitoring and reporting have characterized such failures as serious violations because they undermine the regulatory scheme and deprive an agency of an opportunity to assess and rectify the situation. (See *United States v. Alisal Water Corporation* (2002) 326 F.Supp.2d 1010, 1015 [characterizing violations of reporting and monitoring requirements as serious under the Safe Drinking Water Act].) While we do not equate the failure to install and maintain a bypass measuring device with the seriousness of failing to identify drinking water contamination, the failure to maintain a measuring device and records associated with a diversion similarly undermines the integrity of the water right regulatory scheme and puts at risk the health of fish and wildlife dependent upon these bypass flows.

Vineyard Club argues that the proposed civil liability is out of line with other entities that have violated terms of permits and licenses. We are aware of the past enforcement actions and believe that each case is determined on its own merits and circumstances.

Another factor considered by the State Water Board is the amount of staff costs. It goes without saying that staff costs increase as enforcement actions proceed. The staff costs are maximized when matters proceed to hearings. The Board has considered this factor in past cases as well (see *In the Matter of Lake Arrowhead Community Services District*, Order WR 2006-0001).

Based on our consideration of the above factors, the civil liability is set at \$14,750, which is two hundred fifty dollars (\$250) per day for fifty-nine (59) days of violations.

9.0 CONCLUSIONS

1. The State Water Board concludes that Vineyard Club violated water right License 12831 by diverting water at least fifty-nine (59) days when it was not authorized to do so.
2. Violation of a license condition that provides that “no water shall be diverted under this license” unless a suitable bypass measuring device is installed and maintained to ensure a minimum flow of 0.4 cubic feet per second or the natural flow, whichever is less, is a trespass as that term is used Water Code section 1052, subdivision (a).
3. A limited cease and desist order is appropriate under Water Code section 1831 to prevent the threatened recurrence of the violation.
4. The State Water Board concludes that the Vineyard Club should pay administrative civil liability in the amount of \$14,750.

ORDER

IT IS HEREBY ORDERED,

- A. The State Water Board ORDERS that, pursuant to Water Code sections 1831 through 1836, the Vineyard Club, Inc., shall take the following corrective actions and satisfy the following time schedules:
 1. Prior to diverting any water from Oak Flat Creek, Vineyard Club shall install the measuring/bypass structure approved by the Chief of the State Water Board’s Division of Water Rights (Division) on June 7, 2007. The construction of the device shall not deviate from the approved design without the written consent of the Division Chief.
 2. Prior to diverting water from Oak Flat Creek, Vineyard Club shall provide the Division with a signed affidavit showing the as-built diversion and bypass structure. The affidavit shall include: (1) photographs of the as-built structure, (2) a description of the construction methods and materials, and (3) a drawing showing conformance to the design proposed to the Division by Kelder Engineering.

3. Vineyard Club shall submit an annual report for five (5) years. The first report shall be due thirty (30) days after May 31, which is the last day seasonal diversion is permitted. The report shall contain the dates the diversion began and stopped and a log showing completion of monthly inspections of the bypass opening to ensure that the opening remains clear of debris and is fully operational. Recordation shall include photographic evidence of the date of installation and removal. At the time of installation of the measuring device, a physical flow test will be performed by a registered engineer retained by Vineyard Club using a hand held flow meter to demonstrate that the bypass opening is allowing a minimum of 0.4 cubic feet per second or natural flow, whichever is less. The results of this flow test, as verified by the engineer's stamp on the results, shall be included in the first annual report prepared for and submitted by Vineyard Club after the issuance of this order.

4. Each subsequent report shall include the required information for the period of time covered by the report. Failure to report this information to the State Water Board will be deemed failure to install and bypass the required flows. Vineyard Club shall maintain these records for ten (10) years.

5. Vineyard Club previously obtained approval from the Division Chief for a measuring device/bypass structure. Within thirty (30) days of the date of this order, Vineyard Club shall submit for approval by the Division Chief a maintenance plan and schedule for the device/bypass structure or indicate that it intends to rely on plans previously submitted to the Division Chief. The plan shall identify how Vineyard Club will ensure that its measuring device and bypass structure are to be maintained, including how often the structure will be inspected, what criteria will be used to determine when maintenance is required, and what type of maintenance will occur and when. Diversion of water after the date of this order is conditioned upon an approved maintenance plan. Upon approval of the maintenance plan by the Division Chief, Vineyard Club must comply with the terms of the maintenance plan.

6. Vineyard Club shall obtain all necessary state and local agency permits required by other agencies prior to construction activities and diversion of water. Copies of such permits and approvals shall be forwarded to the Division within 90 days of the date of approval or 90 days of the date of this Order, whichever is later.

Upon the failure of any person or entity to comply with a CDO issued by the State Water Board pursuant to chapter 12 of Part 2 of Division 2 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code sec.1845, subd. (b).) Civil liability may be imposed by the superior court or administratively by the State Water Board pursuant to Water Code section 1055.

- B. The State Water Resources Control Board ORDERS that Vineyard Club shall pay administrative civil liability in the amount of \$14,750. This amount is due immediately. If the administrative civil liability is unpaid after the time for review under Chapter 4 (commencing with section 1120) has expired, the Board may seek a judgment against Vineyard Club in accordance with Water Code section 1055.4.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 18, 2008.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board