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11 Attorneys for the Prosecution Team

12 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

<p>13 <b>In the matter of Administrative Civil</b></p> <p>14 <b>Liability and Cease and Desist Order</b></p> <p>15 <b>Against Nancy K. Donovan and Stephen</b></p> <p>16 <b>J. Peters</b></p> <hr/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>17 <b>Testimony of Bryan Elder in Support of</b></p> <p>18 <b>Administrative Civil Liability and Draft</b></p> <p>19 <b>Cease and Desist Order</b></p>
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20 I, Bryan Elder, declare as follows:

- 21 1. My testimony, herein provided, identifies my personal knowledge of the evidence, actions,  
 22 and rationale for the State Water Resources Control Board (State Water Board) Division of  
 23 Water Rights (Division) recommendation to issue an Administrative Civil Liability (ACL)  
 24 Order and Cease and Desist Order (CDO) against Nancy K. Donovan and Stephen J. Peters  
 25 (collectively the “Diverters”). The ACL Complaint and Draft CDO are attached as  
 26 **Prosecution Team Exhibit WR-1.**<sup>1</sup>
- 27 2. I have been employed by the State Water Board since April 2014. My current position is  
 28 Water Resource Control Engineer. I hold a Master of Business Administration from  
 Pepperdine University and a Master of Science in Civil Engineering from University of  
 California, Los Angeles. I also hold an active Professional Civil Engineer license in the  
 state of California (C81253). My duties at the State Water Board include conducting  
 technical and financial analyses for regional water board enforcement cases. My technical  
 and financial analyses often address a discharger’s ability to pay a fine and implement  
 corrective actions. My statement of qualifications is attached **Exhibit WR-8.**

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<sup>1</sup> Further references to Prosecution Team exhibits will be “WR-[Exhibit Number].”

- 1 3. Prior to being hired at the State Water Board, I was employed as a Project Manager and  
2 Engineer at AECOM Environment. I was primarily responsible for managing a portfolio of  
3 environmental projects with duties including budgeting, project scoping and cost  
4 estimating.
- 5 4. Information relevant to a diverter's ability to pay an ACL and/or pay for corrective actions  
6 may include, but is not limited to historical tax returns, cash flow statements, profit/loss  
7 statements, bank statements, loans/debt, and business/personal assets.
- 8 5. In previous correspondence, the Diverters have stated they have financial challenges. A true  
9 and correct copy of that correspondence is offered into evidence as **Exhibit WR-24**.
- 10 6. On July 18, 2016, the Prosecution Team formally requested that the Diverters provide  
11 information regarding their ability to pay the proposed ACL and to pay for corrective  
12 actions. A true and correct copy of the letter from the Prosecution Team and attached  
13 Individual Ability to Pay Form is offered into evidence as **Exhibit WR-38**.
- 14 7. On August 16, 2016, the Diverters returned the Individual Ability to Pay Claim Form  
15 (Claim Form). They included tax returns for tax years 2011, 2012, and 2013. They did not  
16 include tax returns for tax years 2014 or 2015. A cover letter for the returned information,  
17 dated August 5, 2016, was signed by Ms. Nancy Donovan. The Claim Form was signed by  
18 Mr. Stephen Peters under penalty of perjury and dated August 1, 2016. A true and correct  
19 copy of the cover letter and attached Individual Ability to Pay Form returned by the  
20 Diverters is offered into evidence as **Exhibit WR-54**.
- 21 8. The Diverters' Claim Form indicates that the Diverters have current living expenses in  
22 excess of \$67,000 per year. Of that amount, \$46,596 is reported as annual "credit card  
23 payments". The Claim Form further indicates that the Diverters have total credit card debt  
24 of approximately \$22,000. Total cash accounts listed in the Claim Form total approximately  
25 \$5,000. Total non-real estate assets are listed with a total value of approximately \$18,796.  
26 The Diverters list one real estate property on the Claim Form, 21451 Highway 128,  
27 Yorkville, California 95494 with a self-estimated market value of \$507,000. This valuation  
28 appears to be based on the 2015 tax assessment value. No mortgages, loans, or liens are  
identified on the Claim Form. The 2015 assessor record, obtained through a public record  
search, is offered into evidence as **Exhibit WR-51**.
9. The Diverters' tax return for tax year 2011 indicates an adjusted gross income of -\$33,487.  
The Diverters reported a net operating loss carryover from previous operating years of  
-\$39,882, however, farm income was reported as \$10,033. Additional business income was

- 1 reported as \$4,596 from jewelry sales. A true and correct copy of the Diverters' tax return  
2 for tax year 2011 is offered into evidence as **Exhibit WR-55**.
- 3 10. The Diverters' tax return for tax year 2012 indicates an adjusted gross income of -\$27,903.  
4 The Diverters reported a net operating loss carryover from previous operating years of  
5 -\$36,267, however, farm income was reported as \$3,304. A true and correct copy of the  
6 Diverters' tax return for tax year 2012 is offered into evidence as **Exhibit WR-56**.
- 7 11. The Diverters' tax return for tax year 2013 indicates an adjusted gross income of -\$27,471.  
8 The Diverters reported a net operating loss carryover from previous operating years of  
9 -\$34,308, however, farm income was reported as \$12,143. A true and correct copy of the  
10 Diverters' tax return for tax year 2013 is offered into evidence as **Exhibit WR-57**.
- 11 12. Liz Kanter and Jim Barton of the State Water Board, Office of Enforcement, at my  
12 direction and under my supervision, searched public record databases for information  
13 regarding additional assets, debts, and business associations. These databases include  
14 Westlaw, Humboldt and Mendocino County Recorder databases, and the California  
15 Secretary of State business database.
- 16 13. The Diverters were married in Nevada in 1995. The Diverters' marriage record is offered  
17 into evidence as **Exhibit WR-52**.
- 18 14. The property at 21451 Highway 128 in Yorkville, Mendocino County (APN 049-080-55-  
19 00) (the Property) has been owned by Nancy K. Donovan since 1997. Previous to 1997, the  
20 Property was owned by Stephen J. Peters. Its 2016 county-assessed value is \$515,068. No  
21 mortgages or liens were found during the public records search. A true and correct copy of  
22 a ParcelQuest search for the Property performed by Jim Barton is offered into evidence as  
23 **Exhibit WR-37**.
- 24 15. Mr. Stephen Peters operates a business, Lost Creek Vineyards, as a sole proprietorship, as  
25 indicated in the Diverters' Claim Form. A true and correct copy of record of that business is  
26 offered into evidence as **Exhibit WR-58**.
- 27 16. During the initial investigation Division enforcement staff conducted an internet search for  
28 information on the property and discovered that the Diverter's property had been listed in  
2012 by V&E Properties at an asking price of \$3.2 million. V&E Properties markets itself  
as a real estate company that specializes in winery and vineyard properties in the Diverters'  
region. A true and correct copy of the real estate listing for the Property is offered into  
evidence as **Exhibit WR-53**.


- 1 17. Based on other large properties and vineyards located in the North Coast region that are  
2 currently for sale, the subject property value may be grossly underreported. Several of these  
3 properties are listed with a price per planted acre in excess of \$80,000. Assuming the  
4 Diverters' property has 33 plantable acres (8 currently planted, 25 fallowed), the property  
5 could be worth as much as \$2.6 million. True and correct copies of several regional  
6 examples of comparable property listings are offered into evidence as **Exhibit WR-61**.
- 7 18. Although project-level corrective actions have not yet been determined and, as a result, the  
8 total cost of corrective actions is speculative, the Diverters nonetheless hold unleveraged  
9 real estate that could be used as collateral for a loan. In addition, the Diverters reported the  
10 real estate value in the Claim Form based on the 2015 county tax assessment, which does  
11 not incorporate the current market value for an established wine grape vineyard and future  
12 yields.
- 13 19. In addition to real estate, the Diverters did not adequately disclose personal and business  
14 cash flows. While tax returns for 2011, 2012, and 2013 report negative adjusted gross  
15 income, actual cash flows from farm business operations appear to be positive.
- 16 20. Because the Diverters have not provided 2014 and 2015 tax returns, business income is  
17 estimated based on the active vineyard acreage (eight acres of Pinot Noir grapes).  
18 Assuming an annual yield of five tons per acre (based on UC Davis Extension report of  
19 potential crop yield), gross sales for 2015 may be as high as \$120,000 (based on California  
20 Department of Agriculture estimate of \$3,022 per ton). Based on static farm expenses  
21 reported in previous tax returns, farm profit may have been substantially higher for 2015  
22 than previous years. A true and correct copy of the UC Davis Extension Vineyard  
23 Production Report is offered into evidence as **Exhibit WR-60**. A true and correct copy of  
24 the California Department of Agriculture report estimating gross sales per ton is offered  
25 into evidence by reference, pursuant to California Code of Regulations, title 23, section  
26 648.3, as **Exhibit WR-59** and available at:  
27 [https://www.nass.usda.gov/Statistics\\_by\\_State/California/Publications/Grape\\_Crush/Final/  
28 2015/201503gcbtb00.pdf](https://www.nass.usda.gov/Statistics_by_State/California/Publications/Grape_Crush/Final/2015/201503gcbtb00.pdf)
21. Although the Diverters' Claim Form reports significant current living expenses, it does not  
appear to be representative of recurring minimum payments. Reported annual credit card  
payments exceed the debt balances listed on the Claim Form, indicating substantial payoffs  
that may not be appropriate to include as a recurring expense. Additionally, as reported,  
expenses far exceed approximate cash flows derived from the 2011, 2012, and 2013 tax

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returns. Cash assets (bank accounts) reported on the Claim Form further do not support these living expenses. Therefore, it is assumed that reported expenses are exaggerated, income is grossly underreported, or additional cash accounts have not been disclosed.

22. Based on the information provided by the Diverters, I believe that the Diverters have the ability to pay the proposed penalty.

I declare under penalty of perjury to the laws of the State of California that the foregoing is true and correct. Executed on September 13, 2016 at Sacramento, California.

  
Bryan Elder