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

11 **In the matter of Administrative Civil )**  
12 **Liability Complaint and Draft Cease and )**  
13 **Desist Order Issued Against Nancy K. ) Prosecution Team Pre-Hearing Brief**  
14 **Donovan and Stephen J. Peters )**

15 **I. INTRODUCTION**

16 The Prosecution Team for the State Water Resources Control Board (State Water Board),  
17 Division of Water Rights (Division) submits this pre-hearing brief in support of an administrative  
18 civil liability (ACL) complaint (Complaint) and draft cease and desist order (Draft CDO) against  
19 Nancy K. Donovan and Stephen J. Peters (collectively Diverters). The Complaint (Prosecution  
20 Team Exhibit WR-1.<sup>1</sup>) recommends an ACL of \$40,000 for the unauthorized diversion and use of  
21 water during a drought period by failing to file a Statement of Water Diversion and Use  
22 (Statement) and by storing and using water in two unauthorized reservoirs. (*Id.*) The Draft CDO  
23 includes corrective actions necessary for the Diverters to cease the unauthorized diversion or use of  
24 water. (*Id.*)

25 **II. BACKGROUND**

26 **A. The Diverters' Property**

27 The Diverters own approximately 160 acres of agriculture land located at 21451 Highway  
28 128 in Yorkville, Mendocino County (APN 049-080-55-00) (The Property). (WR-12; WR-37;  
WR-39; WR-51.) The Property includes a 3,000 square-foot residence, a 2,400 square-foot horse  
barn, a 720 square-foot hay barn, and an 8 acre vineyard. (*Id.*) The Property is contiguous to three  
streams – Maple Creek to the north, Rancheria Creek to the west, and Lost Creek to the south.

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

1 Maple Creek and Lost Creek are tributary to Rancheria Creek, thence the Navarro River. (WR-12;  
2 WR-13; WR-39.)

3 The Property includes at least two springs that form the headwaters for an unnamed  
4 ephemeral stream (Unnamed Stream) tributary to Maple Creek. (WR-10; WR-12; WR-39.) The  
5 Property also includes two reservoirs that store water using compacted earthen dams. (*Id.*) The  
6 Diverters built the reservoirs in the late 1980's. (*Id.*) They store and spill water during the wet  
7 season. (*Id.*) The unnamed stream fills the "upper reservoir" (Reservoir No. 2), which then flows  
8 back into the channel and fills the "lower reservoir" (Reservoir No. 1).<sup>2</sup> (*Id.*) Reservoir No. 1 then  
9 flows back into the channel and into Maple Creek. (*Id.*) Reservoir No. 2 is 15 acre-feet and  
10 Reservoir No. 1 is 16 acre-feet.<sup>3</sup> (*Id.*) Reservoir No. 1 is used for recreation and fire protection.  
11 Reservoir No. 2 is used for fire protection and for irrigating the vineyard. (*Id.*)

### 12 **B. The Diverters' Water Right History**

13 On July 29, 1999 the Diverters filed Application 30926 with the Division to appropriate 30  
14 acre-feet of water per annum through collection to storage in the two reservoirs for irrigation, stock  
15 watering, frost protection, and fire protection purposes. (WR-3; WR-10; WR-12.) The Diverters  
16 planned to irrigate 40 acres. The diversion season was for November 1 through May 1. (WR-3;  
17 WR-10.) Both reservoirs existed at the time the application was filed. (WR-10; WR-12.) On May  
18 23, 2006, the Diverters, the Diverters' consultants, and the Division, entered into a Memorandum  
19 of Understanding (MOU) to guide the processing of Application 30926, which included submittal  
20 of necessary environmental documents and public trust analyses. (WR-3; WR-11.) By letter dated  
21 September 25, 2008, the Diverters' consultant withdrew as the listed MOU  
22 consultant/representative for the Diverters, because they could not reach a contract agreement with  
23 the Diverters for the necessary environmental studies. (*Id.*) On October 22, 2008, the Division  
24 acknowledged the termination of the MOU and requested Applicants contact the Division and  
25 submit a new MOU by December 6, 2008. (*Id.*) The letter contained a warning that failure to  
26 submit the information requested within the time period provided could result in the cancellation of  
27 the application under Water Code section 1276. (*Id.*) The Division did not receive the required  
28 information. (*Id.*) On May 29, 2009, the Division requested a new MOU and notification of  
Applicants' intent to pursue the application, pursuant to Water Code section 1275, by June 28,

<sup>2</sup> The reservoir numbering has been inconsistent over the history of the Diverters' water right application and subsequent investigations, with Reservoir No. 1 sometimes referred to as Reservoir No. 2 and vice-versa. However, the upstream reservoir has consistently been referred to as the upper reservoirs and the downstream reservoir as the lower reservoir.

<sup>3</sup> This estimate is based on the most recent field inspection, conducted on August 9, 2016. (WR-2; WR-39.)

1 2009. (*Id.*) The letter again contained a warning that failure to submit the information requested  
2 within the time period provided would result in the cancellation of the application without further  
3 notice under Water Code section 1276. (*Id.*) Once again, the Division did not receive the required  
4 information. (*Id.*)

5 On August 5, 2010, the Division issued an Order canceling Application 30926 due to the  
6 Diverters' failure to submit the requested information in accordance with California Water Code  
7 section 1276. (WR-3; WR-11.) The Order and transmittal letter were sent to the Diverters via  
8 certified mail. (*Id.*) The Order informed the Diverters of their responsibility to remove or modify  
9 any diversion works or impoundments to ensure that water was no longer diverted, of the potential  
10 liability of \$500 per day if unauthorized diversions continued, and of the requirement to file a  
11 Statement for water diverted under claim of riparian or pre-1914 water rights. (*Id.*) Due to postal  
12 delivery problems, the Diverters did not receive the Order until September 28, 2010. (WR-19.)

13 Water Code section 768 requires that a petition be submitted within 30 days of the date of  
14 the Order and be based on one or more of the causes listed in that section. The Division has no  
15 record of receiving any petition for reconsideration of the Order, nor a statement or new application  
16 to appropriate water having been filed by the Diverters. (WR-3; WR-11.) The Diverters have no  
17 other water rights on file with the Division. (WR-3.)

### 18 **C. Inspections of the Property**

19 Division Staff (Staff) conducted an on-site compliance inspection of the Property on  
20 September 15, 2010. (WR-12.) During the inspection, Staff found both reservoirs still existed and  
21 stored water collected annually during the rainy season from the Unnamed Stream. (*Id.*) There was  
22 no inflow into the reservoirs at the time of the inspection and Mr. Peters, in addition to explaining  
23 how the reservoirs worked, confirmed that no other source of water diverted to the reservoirs. (*Id.*)  
24 Staff measured both reservoirs and estimated the capacity of each. (*Id.*) Division staff notified the  
25 Diverters of the requirement to file a Statement and of the potential penalties for failure to file a  
26 Statement. (*Id.*) Mr. Peters also stated that they no longer intended to plant the additional acreage  
27 applied for in Application 30926. (*Id.*)

28 Staff noted in the September 15, 2010 inspection report that the Diverters did not receive  
the Order due to postal delivery problems. (*Id.*) While discussing the Order, Mr. Peters indicated  
that he did not want his application cancelled. (*Id.*) Staff subsequently contacted the local Post  
Office to ensure delivery of the Order to the Diverters and emailed the Order to the Diverters.  
(WR-15; WR-16; WR-17; WR-18; WR-19.) After the inspection Staff contacted the Diverters to  
confirm receipt of the Order. (WR-19.) Mr. Peters questioned why he had to do environmental

1 studies were necessary, expressed frustration with the permitting process, and asked for a specific  
2 list of items necessary to complete his water right application. (*Id.*) Staff then explained that the  
3 Diverters could write a letter to the Division requesting reconsideration of the Order, but also  
4 explained that requesting reconsideration would not preclude potential enforcement and that filing  
an application did not translate to a water right. (*Id.*)

5 On August 9, 2016, Staff returned to the Property and met with the Diverters. (WR-2; WR-  
6 39<sup>4</sup>.) Department of Fish and Wildlife Staff accompanied Division Staff. (WR-5; WR-40.)  
7 Conditions have not substantially changed since the September 15, 2010 inspection. (WR-2; WR-  
8 39.) Both reservoirs continue to store water for recreational use and fire protection and the  
9 Diverters continue to re-divert water from storage in the upper reservoir to irrigate the vineyard  
10 without a valid basis for right. (WR-2; WR-39.) The Diverters provided no evidence they had taken  
11 any corrective actions since the ACL Complaint and Draft CDO were issued in 2012. (WR-2; WR-  
39.)

#### 12 **D. Policy for Maintaining Instream Flows in California Northern Coastal Streams**

13 The Property falls within the area regulated by the Policy for Maintaining Instream Flows  
14 in Northern California Coastal Streams (Policy).<sup>5</sup> (WR-3; WR-26.) The State Water Board adopted  
15 the Policy in 2014. (*Id.*) The Policy includes principles and guidelines for maintaining instream  
16 flows in northern California coastal streams as part of state policy for water quality control, for  
17 purposes of water right administration. (*Id.*) The State Water Board adopted the Policy as a  
18 requirement of Water Code section 1259.4, which was added by Assembly Bill 2121 (Stats. 2004,  
ch. 943, § 3). (*Id.*)

19 The geographic scope of the Policy, the “Policy Area,” extends to five counties—Marin,  
20 Sonoma, and portions of Napa, Mendocino, and Humboldt counties and encompasses (1) coastal  
21 streams from the Mattole River (originating in Humboldt County) to San Francisco, and (2) coastal  
22 streams entering northern San Pablo Bay. (*Id.*) Coastal streams within the Policy Area provide  
23 habitat for steelhead trout, Coho salmon, and Chinook salmon. (*Id.*) The National Marine Fisheries  
24 Services (NMFS) and the California Department of Fish and Wildlife (DFW) have listed steelhead

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25 <sup>4</sup> In the August 9, 2016 inspection report, staff refers to the upper reservoir as Reservoir No. 1 and the Lower Reservoir  
as Reservoir No. 2. (WR-39.)

26 <sup>5</sup> The Policy was first adopted by the State Water Board on May 4, 2010. (State Water Board Resolution No. 2010-  
0021.) On October 16, 2012, the State Water Board adopted Resolution No. 2012-0058, vacating the Board’s adoption  
27 of the Policy, as required by the Alameda County Superior Court in *Living Rivers Council v. State Water Resources  
Control Board* (Sup.Ct. Alameda County, 2012, No. RG10-54392). On October 22, 2013 the State Water Board re-  
28 adopted the Policy without any significant changes. (State Water Board Resolution No. 2013-0035.) The readopted  
Policy became effective on February 4, 2014.

1 trout and Chinook salmon as “threatened” under the federal Endangered Species Act (ESA) and the  
2 California Endangered Species Act (CESA), respectively. (*Id.*) Coho salmon are listed as  
3 “endangered” on both the ESA and the CESA lists. (*Id.*) Water diversions result in a significant  
4 loss of fish habitat in California. (*Id.*) Construction and operation of dams and diversions can create  
5 barriers to fish migration, thereby blocking fish from access to historical habitat. (*Id.*) Dams also  
6 disrupt the flow of food (i.e., aquatic insects), woody debris, and gravel needed to maintain  
7 downstream fish habitat. (WR-3; WR-5; WR-26.)

8 Illegal reservoirs are existing facilities that collect water from surface streams without the  
9 right to do so. (WR-3; WR-26.) If water flowing in a surface stream is diverted to a storage facility  
10 during a time when flow is high for use during a time when flow is low or does not exist, then the  
11 diverter is appropriating water to storage that is subject to the State Water Board’s permitting  
12 authority and a water right must be obtained. (WR-3.) Regulatory measures such as specifying a  
13 season of diversion and/or minimum bypass flow requirements limit diversions to times when  
14 water is available and help eliminate impacts to the environment and other legal users of water by  
15 keeping water instream that would otherwise have been diverted illegally. (WR-3.)

#### 14 **E. The State Water Board Issues the ACL Complaint and Draft CDO.**

15 In response to the inspections and investigation by Staff, the State Water Board issued the  
16 ACL Complaint and Draft CDO on June 14, 2012. (WR-1.) The State Water Board noticed a  
17 hearing for July 1, 2015. (WR-28.) It later rescheduled the hearing for October 12, 2016. (WR-62.)

### 18 **III. KEY ISSUES**

#### 19 **A. Key Issue 1 – Whether the State Water Board Should Impose Administrative 20 Civil Liability Upon the Diverters For Trespass and, If So, In What Amount 21 and On What Basis**

##### 22 **1. The Diverters Divert and Use Water Subject to the State Water Board’s 23 Permitting Authority Without Authorization**

24 The unauthorized diversion or use of water constitutes a trespass within the meaning of  
25 Water Code section 1052, subdivision (a), and the failure to file statements constitutes a violation  
26 within the meaning of California Water Code section 5107, subdivision (c)(1). The impoundment  
27 of water behind the dam constitutes a diversion of water. (Wat. Code, § 5100, subd. (c).) Although  
28 the Diverters’ property may have an associated riparian right to divert natural flow from the  
Unnamed Stream, water may not be seasonally stored and then diverted for consumptive use under  
a riparian right. (*City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 335.) The  
Diverters have diverted, stored, and used water subject to the State Water Board’s permitting

1 authority since at least 1999. (WR-12; WR-39.) They have failed to file statements for each  
2 reservoir and they have no appropriative right for either reservoir. (WR-12; WR-39.)

## 3 **2. Water Code section 1052 Establishes the Maximum Liability for Trespass**

4 In 2014, the Legislature amended section 1052 to increase administrative civil liabilities  
5 during drought conditions, including periods when the Governor has issued a proclamation of a  
6 state of drought emergency. Water Code section 1052 now provides that the maximum civil  
7 liability that can be imposed by the State Water Board in this matter for the unauthorized diversion  
8 and use of the water during a drought period is \$1,000 for each day of trespass plus \$2,500 for each  
9 acre-foot of water diverted or used in excess of that diverter's water rights. The Governor  
10 proclaimed a drought in 2014. (WR-2; WR-29.) The Governor renewed the drought proclamation  
11 in 2015. (*Id.*)

12 Evidence demonstrates that between 1999 and the date of the ACL Complaint the Diverters  
13 collected water from the Unnamed Stream and continuously held water in storage for irrigation,  
14 aesthetics, and recreational uses for at least 11 years (4,015 days). (WR-1; WR-2.) Therefore, the  
15 maximum administrative civil liability under Water Code section 1052 for the diversion and/or use  
16 of water at each reservoir when the Division issued the ACL Complaint would be about \$4  
17 million.<sup>6</sup> (WR-1.)

18 The Diverters have continued using the reservoirs in the more than four years since the  
19 Division issued the ACL Complaint. (WR-2; WR-29.) The Diverters have claimed they drain the  
20 reservoirs each year and conservatively estimate that water was collected or stored without  
21 authorization in the reservoirs every day between January 1 and October 1 in 2013, March 1 and  
22 October 1 in 2014, January 1 and October 1 in 2015, and January 1 and August 9 in 2016, for a  
23 total of 273 days before March 1, 2014 and 708 days since March 1, 2014. (*Id.*) The maximum  
24 civil liability the State Water Board may impose for unauthorized diversions in 2013 is \$273,000.<sup>7</sup>  
25 (*Id.*) The maximum civil liability the State Water Board can impose for unauthorized diversions in  
26 2014, 2015, and 2016 under the enhanced penalty for unauthorized diversions during a drought  
27 emergency is \$1,416,000<sup>8</sup> for each reservoir plus \$155,000 for the acre-feet of water diverted<sup>9</sup>, for  
28 a total of \$1,571,000. (*Id.*)

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<sup>6</sup> 4,015 days x \$500/day x 2 reservoirs = \$4,015,000

<sup>7</sup> 273 days x \$500/day x 2 reservoirs = \$273,000

<sup>8</sup> 708 days x \$1,000/day x 2 reservoirs = \$1,416,000

<sup>9</sup> 62 acre-feet x \$2,500/acre-foot = \$155,000

1 In addition, the Diverters failed to file a Statement for the diversions and uses that occurred  
2 at each reservoir after January 1, 2009. (WR-1; WR-2.) Water Code section 5107, subdivision  
3 (c)(1), provides that the State Water Board may administratively impose civil liability pursuant to  
4 section 1055 in an amount not to exceed \$1,000, plus \$500 per day for each additional day on  
5 which the violation continues if the person fails to file a Statement within 30 days after the State  
6 Water Board has called the violation to the attention of that person. When the ACL Complaint was  
7 issued, the maximum liability that could be considered for the Diverters' failure to file statements  
8 was \$1,000 for each of two reservoirs, or \$2,000. (WR-1; WR-2.)

### 8 **3. Recommended ACL Penalty Under Water section 1055.3 Discretion**

9 In determining the amount of civil liability, California Water Code section 1055.3 requires  
10 that the State Water Board consider all relevant circumstances, including, but not limited to, the  
11 extent of harm caused by the violation, the nature and persistence of the violation, the length of  
12 time over which the violation occurs, and any corrective action taken by the violator.

13 In this case, the Diverters collected and stored water from unnamed tributaries to Maple  
14 Creek and subsequently used that water for aesthetics and irrigating vineyards. (WR-12; WR-39.)  
15 The Diverters have failed to pursue corrective action by failing to diligently pursue their project for  
16 Application 30926. (WR-2; WR-39.) They were made aware of actions they needed to take to  
17 continue processing Application 30926, given ample time to take those actions, and failed to take  
18 any corrective action. (*Id.*) In the four years since the Division issued the ACL Complaint, the  
19 Diverters have continued using the reservoirs, in substantially the same manner, without corrective  
20 actions. (*Id.*)

21 The development of onstream storage and vineyard by Nancy Donovan and Stephen Peters  
22 was implemented without the benefit of permitting from the State Water Board and the  
23 Department. (WR-5.) As such, there are no measures in place to protect fish and wildlife resources.  
24 (*Id.*) Although adverse impacts of unauthorized water diversions on the steelhead trout fishery have  
25 not been quantified for this case, no mitigations protect listed onsite aquatic life or downstream  
26 salmonids. (*Id.*) Based on its inspection, DFW believes minimum bypass flows are necessary to the  
27 beneficial use of cold, freshwater habitat for the Maple and Rancheria creeks and the Navarro  
28 River. (WR-5; WR-40.) Since there are no minimum bypass flows, these beneficial uses have been  
29 harmed by the Diverters' unauthorized diversion and use of water.

30 The Diverters received an economic advantage over other legitimate water diverters in the  
31 area by foregoing the costs of pumping groundwater from a well, acquiring an appropriative water  
32 right, and paying annual water right fees. (WR-2.) An initial filing fee for a permit application

1 would have cost the Diverters \$2,150 based on the State Water Board's current fee structure and  
2 annual fees would have been about \$151. (WR-3.) Two registrations, one for each reservoir, would  
3 have cost the Diverters \$250 each and a recurring quinquennial fee of \$100.00 each, for a total fee  
4 of \$200.00 every five years. (*Id.*) These estimates do not include costs for consultants or for any  
5 other necessary permits or approvals. (*Id.*)

6 The Division estimates that its staff cost to review the existing project and develop the  
7 enforcement documents was \$5,511. (WR-2.) If this matter goes to hearing, it is estimated that the  
8 additional staff cost to prosecute this case would be approximately \$10,000. (*Id.*)

9 Having taken into consideration the factors described above, the ACL Complaint  
10 recommends an ACL in the amount of \$40,000. (WR-1.) However, the Diverters have previously  
11 indicated their finances are severely constrained. (WR-24; WR-35.) The Prosecution Team  
12 therefore requested financial information from the Diverters and also searched public records for  
13 information regarding the Diverters' finances. (WR-4; WR-38.)

14 Ms. Donovan currently owns the Property. (WR-4; WR-37; WR-51.) Its last assessed value,  
15 in 2016, was \$515,068. (*Id.*) However, the tax assessed value may understate the value of the  
16 Property, because it only includes structures and land and does not include the value of the  
17 vineyard or of the water rights. (WR-4.) Although the Property currently has 8 acres of planted  
18 Pinot Noir grapes, it has 25 additional plantable acres that are currently unused. (*Id.*) Based on  
19 other winery property currently listed for sale in the region, which list prices per planted acre in  
20 excess of \$80,000, the Property could be worth as much as \$2.6 million. (*Id.*) In 2012 a real estate  
21 company listed the Property for more than \$3 million. (WR-4; WR-53.) The staff search found no  
22 liens or mortgages attached to the Property. (WR-4.)

23 Mr. Peters operates a business, Lost Creek Vineyards. (*Id.*) Research indicates the 8 acres  
24 of vineyards consist of strictly Pinot Noir grapes. (*Id.*) In 2015, the California Department of  
25 Agriculture found the average price in Mendocino County to be \$3,022 per ton. (WR-4; WR-59.)  
26 Assuming the same tonnage and a yield of 5 tons per acre, which is typical for a small vineyard,  
27 the 2015 gross sales could have exceeded \$120,000. (WR-4; WR-60.) The Diverters state a lower  
28 taxable income due to net losses carried over from previous years, but this does not affect their  
base cash flow. (*Id.*)

The Diverters responded to the Prosecution Team's request with the financial data request  
form and tax returns for the years 2011 through 2013. (WR-54; WR-55; WR-56; WR-57.)  
However, they did not provide information such as bank statements from past years, tax records for  
2014 and 2015, business profit and loss accounting, cash flow statements, or a balance sheet. (WR-



1 4.) As a result, the Prosecution Team has a less than complete picture of the Diverters' finances.  
2 (*Id.*)

3 Nonetheless, based on available information it appears the Diverters can pay the ACL.  
4 (WR-4.) Whether the Diverters can also pay for corrective actions is uncertain, because exact  
5 corrective actions have not yet been determined. (*Id.*) However, they hold a significant unleveraged  
6 real estate asset (i.e. the Property) they could use as collateral for a loan and likely have sufficient  
7 cash flow. (*Id.*)

8 **B. Key Issue 2 – Whether the State Water Board Should Adopt, With or Without  
9 Revision, the Draft Cease and Desist Order Against the Diverters.**

10 The State Water Board may issue a CDO to “any person ... violating, or threatening to  
11 violate ... the prohibition set forth in Section 1052 against the unauthorized diversion or use of  
12 water subject to this division.” (Water Code § 1052, subd. (a), (d)(1).)

13 The Property falls within the area regulated by the Policy. (WR-3; WR-5; WR-26.) As a  
14 result, corrective actions must conform to the Policy's requirements, as well as legal and regulatory  
15 requirements that would apply to diversions and reservoirs generally. The corrective actions in the  
16 Draft CDO include: filing for and diligently pursuing an appropriative water right permit that  
17 would authorize the diversion and use of water at the reservoir; and submitting an interim  
18 operational plan that demonstrates how the reservoir will be operated in conformance with the  
19 requirements set forth in the Policy. (WR-1.) In addition, the Draft CDO specifies that should the  
20 State Water Board not issue a water right permit, the Diverters shall either render the reservoir  
21 inoperable or incapable of storing water subject to the permitting authority of the State Water  
22 Board. (*Id.*) The Prosecution Team recommends adoption of the Draft CDO.

23 **IV. CONCLUSION**

24 The Prosecution Team respectfully requests that the State Water Board issue an ACL Order  
25 imposing liability of \$40,000, and issue the Draft CDO.

26 Respectfully submitted,

27 

28 Kenneth Petruzzelli  
**OFFICE OF ENFORCEMENT**  
Attorney for the Prosecution Team

1 **SERVICE LIST OF PARTICIPANTS**

2 **Nancy K. Donovan and Stephen J. Peters**

3 **Administrative Civil Liability Complaint and Cease and Desist Order**

4 **(August 19, 2016, Revised 08/24/16)**

5  
6 **Participants**

7 **THE FOLLOWING PARTICIPANTS HAVE INDICATED THEIR INTENT TO**  
8 **PRESENT WITNESSES TO TESTIFY AT THE HEARING**

9  
10 THE FOLLOWING **MUST BE SERVED** WITH WRITTEN TESTIMONY, EXHIBITS AND  
11 OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the  
12 rules specified in the hearing notice.)

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