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

DIVISION OF WATER RIGHTS

ORDER WR 2013-00XX-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion by

Flocchini Estate, LLC and Andrew J. Flocchini

SOURCE: Unnamed Stream tributary to the Petaluma River

COUNTY: Sonoma

The State Water Resources Control Board (State Water Board or board) is authorized under California Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Flocchini Estate, LLC and Andrew J. Flocchini (collectively Flocchini) to cease and/or abate a threatened, unauthorized diversion, storage, and use of water in violation of California Water Code section 1052.

Flocchini is alleged to have violated or is threatening to violate California Water Code section 1052, for which section 1831 (d) provides, in part:

The State Water Board is authorized to issue a Cease and Desist Order when it determines that any person is violating or threatening to violate any of the following:

- (1) *The prohibition set forth in section 1052 against the diversion or use of water subject to division 2 (commencing with section 1000) of the California Water Code other than as authorized by division 2.*

On {DATE}, and in accordance with the provisions of section 1834 of the California Water Code, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against Flocchini for the unauthorized diversion or use of water. Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a CDO in accordance with California Water Code section 1831 et seq. State Water Board Resolution 2012-0029 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

The State Water Board or its delegee, the Assistant Deputy Director for Water Rights, finds that:

1. Flocchini owns property that includes a reservoir on an Unnamed Stream tributary to Petaluma River. Any water diverted to storage in the reservoir from the Unnamed Stream is subject to the State Water Board's permitting and licensing authority as detailed in division 2 (commencing with section 1000) of the California Water Code.
2. Flocchini does not have a water right permit or license to store surface water in said reservoir.

3. Flocchini has violated California Water Code section 1052 in the past by diverting surface water from the Unnamed Stream to storage in the reservoir for later use without a basis of right.
4. The reservoir also presents a threat of future unauthorized diversion and use of water in violation of California Water Code section 1052.

FACTUAL BASIS FOR ISSUING A CDO

The facts and information upon which this CDO is based are as follows:

1. In December 2007 the State Water Board produced a draft Substitute Environmental Document (SED) as part of its development of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). Appendix E of the SED contains the report Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams, produced by Stetson Engineers in December 2007. In order to complete this report, Stetson Engineers produced a Geographic Information System (GIS) layer which identified the locations of the existing potential unauthorized dams. In July of 2011 a review of the GIS layer, aerial photographs, and USGS topographic maps of Sonoma County was undertaken by State Water Board's Division of Water Rights (Division) staff. The review provided evidence that Sonoma County Assessor's Parcel Number 068-110-007 contained a reservoir that appears to collect surface flow from an Unnamed Stream and is subject to the permitting authority of the State Water Board. A review of Division records showed that a water right authorizing the diversion of water to storage at the identified reservoir did not exist. According to Sonoma County Assessor's Office, "Flocchini Estate, LLC" is the current owner of parcel 068-110-007.
2. On February 7, 2011, Division staff conducted an on-site inspection of the Flocchini property, accompanied by Andrew and Nicholas Flocchini, located at 7078 Lakeville Highway in Petaluma. During the inspection, Division staff found the reservoir storing water with both an upstream and downstream channel present. The owners disclosed that they do have a nearby groundwater well but that water is used for pasture irrigation and stockwatering. The owners then stated the well water is not used to irrigate the vineyard due to high levels of undesirable minerals such as boron and manganese. No other sources of water were available for irrigating the 26 acres of vineyard. Based on measurements taken during the inspection, aerial photographs, and the owner's statement; the reservoir surface area is approximately 3.4 acres. Using an owner-supplied maximum depth of 12 feet, the reservoir is estimated to have a capacity of 29 acre-feet using a 0.7 sloping factor. Division staff also notified Flocchini of the requirement to file a Statement and of the potential penalties for failure to file a Statement.
3. By letter dated September 20, 2011, the Division notified Flocchini that storage of water in a reservoir without an existing water right is considered an unauthorized diversion of water. Based on staff findings, Flocchini was required to either: (1) provide evidence satisfactory to the State Water Board that demonstrates the reservoir does not store water or can be operated without storing water subject to the State Water Board's permitting authority; or (2) remove the reservoir or render it incapable of storing water; or (3) file an application with the State Water Board seeking permission to appropriate water. Flocchini was given 45 days to submit a response indicating the intended course of action and an implementation plan with a schedule. As of the date of this CDO, Flocchini has submitted an initial Statement of Water Diversion and Use (Statement) but has not complied with one of the three directives noted above.
4. The water being collected to storage in the reservoir is subject to appropriation under the State Water Board's permitting authority. The Division has no record of a water right authorizing the storage of water in the reservoir, and Flocchini has not provided evidence supporting an existing basis of right. Flocchini has collected water to storage and used stored water without a basis of right since at least 2002; the year Sonoma County Assessor's records indicate Flocchini obtained the property.

As of the date of this complaint, Division records show that Flocchini has not filed an application to appropriate water.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the California Water Code, that Flocchini shall cease the unauthorized diversion of water from the Unnamed Stream tributary to Petaluma River, and shall pursue one the following corrective action options and satisfy the appropriate time schedules outlined herein:

Corrective Action Options

Option 1:

1. If the reservoir in question qualifies for a Small Domestic Use, Livestock Stockpond, or Small Irrigation Use Registration (Registration) in accordance with California Water Code sections 1228 and forward, then within 30 days of the date of this Order, Flocchini shall complete and submit the appropriate Registration form and comply with all instructions on said form. If a Registration is issued, Flocchini will comply with all conditions of the Registration, including those provided by the California Department of Fish and Wildlife;
2. If the reservoir in question does not qualify for a Registration, or if Flocchini's Registration is rejected by the State Water Board, then within 30 days of the date of this Order or within 30 days of being notified of the rejection, if applicable, Flocchini shall: (1) file an appropriate water right application with the Division and comply with Option 2 below; or (2) inform the State Water Board that he/she will not pursue a water right permit and will comply with Option 3 below.

Option 2:

1. Within 30 days of the date of this Order or notification of denial of a Registration, Flocchini shall file an appropriate water right application with the Division for storage and use of water, and diligently pursue securing a permit by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division; and
2. Flocchini may continue to divert water to storage while the appropriate water right application for permit is pending, if within 90 days of the date of this Order Flocchini submits a Diversion Analysis Study (Study) that is completed by a qualified person or entity for review and acceptance by the Assistant Deputy Director for Water Rights. This Study shall include: 1) a stream classification determination for the point of diversion and any downstream tributaries, 2) a determination of the upstream limit of anadromy in relation to the point of diversion, and 3) a cumulative diversion analysis to evaluate the effects of the unauthorized diversion in combination with all senior diverters of record, on instream flows needed for fishery resources protection. The Study shall be conducted consistent with the guidelines established in the former or current State Water Board Policy for Maintaining Instream Flows in Northern California Coastal Streams; and
3. Within 90 days of receiving notice of the Assistant Deputy Director's acceptance of the Study, Flocchini shall file an Interim Reservoir Operation Plan ("Operation Plan"). The Operation Plan shall demonstrate how Flocchini will operate the reservoir to comply with any conclusions reached in the Study regarding the season of diversion and a minimum bypass flow and how Flocchini will measure and monitor project operations for compliance. If the Assistant Deputy Director determines, based on the studies, that the project cannot continue to divert and provide instream flows needed for fishery resources protection, then the Operation Plan shall demonstrate how Flocchini will cease the diversion of water to storage until either: (1) further studies are performed and a permit is issued for the project; or (2) a permit is denied. The Operation Plan must include an implementation schedule. Once the Operation Plan has been approved by the Assistant Deputy Director for Water Rights, Flocchini must implement and comply with the Operation Plan in accordance with the implementation schedule.

4. If the State Water Board denies or cancels Flocchini's water right application, then within 150 days of the State Water Board issuing that decision, Flocchini shall submit a plan to the Assistant Deputy Director for Water Rights for permanently rendering the reservoir incapable of storing water subject to the permitting authority of the State Water Board. The plan must satisfy the same requirements and is subject to the same acceptance criteria that are detailed below in Option 3.

Or,

Option 3:

Within 30 days of the date of this Order, Flocchini shall inform the State Water Board that they will not pursue a water right permit to authorize the collection of water to storage from the Unnamed Stream. Thereafter, within 150 days of the date of this Order, Flocchini shall submit a plan to the Assistant Deputy Director for Water Rights to permanently render the reservoir incapable of storing water subject to the State Water Board's permitting authority. The plan shall include a time schedule not to exceed two years for completion of the proposed alteration and the identification of any permits or agreements necessary from other federal, state, and local agencies to complete the work. Upon acceptance of the plan by the Assistant Deputy Director as sufficient to render the reservoir incapable of being an unauthorized diversion or threat of future diversion in violation of California Water Code section 1052, Flocchini shall diligently comply with all provisions and time schedules of the plan. If Flocchini is unable to comply fully with the plan due to other federal, state, or local agencies with authority over the work required, Flocchini shall immediately alert the Assistant Deputy Director for Water Rights of the reason for delay and any problems with fully complying with the provisions of the plan and diligently work to overcome such obstacles.

Compliance with Future Directives of Division

Whichever corrective action option is taken, Flocchini shall comply with any written directive of the Assistant Deputy Director for Water Rights regarding that corrective action option until such time as the State Water Board issues a water right permit or the reservoir is rendered incapable of storing water subject to State Water Board's permitting authority.

Consequences of Non-Compliance

In the event Flocchini fails to comply with the requirements of this Order, they shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability, pursuant to California Water Code section 1845 (b)(1), of up to \$1,000 for each day in which the violation occurs or referral to the Attorney General to take further enforcement action as described in California Water Code section 1845(a):

Failure of any person to comply with a CDO issued by the State Water Board pursuant to this chapter may subject that person to further enforcement action, including assessment of civil liability of up to one thousand dollars a day and referral to the Attorney General for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

Reservation of Enforcement Authority and Discretion

Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including, but not limited to, the authority to bring enforcement against Flocchini for unauthorized diversion or use in violation of California Water Code section 1052 regardless of their compliance with a corrective action plan accepted in accordance with a corrective action option described above.

Regulatory Changes

Nothing in this Order shall excuse Flocchini from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel,
Assistant Deputy Director for Water Rights

Dated: **MAR 08 2013**

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