

1 YVONNE M. WEST,
2 Senior Staff Counsel (SBN 221414)
3 Office of Enforcement
4 State Water Resources Control Board
5 1001 I Street, 16th Floor
6 Sacramento, California 95814
7 Telephone: 916-322-3626
8 Fax: 916-341-5869
9 E-mail: Yvonne.West@waterboards.ca.gov

10 Attorney for the Division of Water Rights Prosecution Team

11 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of:)
13)
14 **Draft Cease and Desist Order and**) **Prosecution Team's**
15 **Administrative Civil Liability against**) **Prehearing Brief**
16 **Robert Mann (individual and Trustee)**)
17 **and Robert C. Mann 1999 Trust**)
18 _____)

19 I. INTRODUCTION

20 The State Water Resources Control Board (State Water Board), Division of Water Rights
21 (Division), Prosecution Team (Prosecution Team) submits this prehearing brief in support of
22 Enforcement Action ENF00158, administrative civil liability (ACL) complaint and proposed cease
23 and desist order (CDO) issued to Robert Mann (Individual and Trustee) and The Robert C. Mann
24 1999 Trust (referred to hereafter as Mann).

25 II. DISCUSSION

26 **MANN'S RESERVIOR IS AN UNAUTHORIZED DIVERSION AND USE OF WATER FOR**
27 **WHICH THE STATE WATER BOARD HAS THE AUTHORITY TO IMPOSE AN**
28 **ADMINISTRATIVE CIVIL LIABILITY AND ISSUE A CEASE AND DESIST ORDER**

29 The onstream reservoir located on Sonoma County Assessor's Parcel Number (APN) 109-
30 310-002 (Property) collects water during the winter and stores it into the summer. (WR-3,
31 Testimony of Jeff Wetzel, p. 2.) The reservoir provides water during times and in quantities when
32 water would not otherwise be available to Mann and that water has/is used for beneficial uses,

1 such as stock watering. (WR-3, Testimony of Jeff Wetzel.) Mann does not have an appropriate
2 water right for the reservoir. (WR-11, ACL Complaint, section 7, p. 6; WR-7, Findings Letter.)
3 While Mann has a riparian right to surface streams that run through the Property, a riparian right
4 to use water in a stream that abuts the riparian property does not include the right to store flow for
5 later use or the right to flow that is not naturally available in the stream. (People v. Shirokow
6 (1980) 26 Cal.3d 301; Lux v. Haggin (1886) 69 Cal. 255.)

7 Furthermore, the collection of water in a reservoir is a diversion explicitly included in the
8 definition of "diversion" provided in Water Code section 5100, subdivision (c), which states:

9 *"Diversion" means taking water by gravity or pumping from a surface*
10 *stream or subterranean stream flowing through a known and definite*
11 *channel, or other body of surface water, into a canal, pipeline, or other*
12 *conduit, and includes impoundment of water in a reservoir. (Emphasis*
13 *Added)*

14 Mann, as trustee of the Robert C. Mann 1999 Trust, and as the individual who controls and
15 operates the Property, is diverting and using water outside of a riparian right, and without the
16 necessary authorization to appropriate water.

17 The State Water Board has authority to impose administrative liability for the unauthorized
18 diversion or use of water and can issue a cease and desist order to prevent future unauthorized
19 diversion or use. Water Code section 1052, subdivision (a), provides:

20 *The diversion or use of water subject to [division 2 of the Water Code*
21 *(commencing with section 100)] other than as authorized in [division 2] is*
22 *a trespass.*

23 Water Code section 1052, subdivision (b), authorizes the State Water Board to administratively
24 impose civil liability in an amount not to exceed \$500 for each day that such a trespass occurs.

25 Furthermore, Water Code section 1831, subdivision (d), authorizes the State Water Board to
26 issue a Cease and Desist Order when "any person is violating or threatening to violate"
27 prohibitions against the unauthorized diversion or use provided in Water Code section 1052.
28

1 **MANN'S FAILURE TO FILE A STATEMENT OF WATER DIVERSION AND USE IS**
2 **ALSO A VIOLATION FOR WHICH THE STATE WATER BOARD HAS THE AUTHORITY**
3 **TO IMPOSE AN ADMINISTRATIVE CIVIL LIABILITY**

4 Mann's impoundment and storage of water in the onstream reservoir is a diversion for
5 which a Statement of Diversion and Use (Statement) is required. Water Code section 5101
6 requires with limited exceptions that:

7 *Each person who, after December 31, 1965, diverts water shall file with*
8 *the board, prior to July 1 of the succeeding year, a statement of his or her*
9 *diversion and use. . .*

10 The failure to file a Statement as required by Water Code section 5101 for a diversion that occurs
11 after January 1, 2009 is subject to enforcement through the imposition of an administrative civil
12 liability of up to \$1,000, plus \$500 per day for each additional day on which the failure to file
13 continues past 30 days after the State Water Board has called the violation to the attention of that
14 person. (Wat. Code § 5107, Subds. (b), (c)(1).)

15 The reservoir on Mann's property diverts and stores water seasonally each year and Mann
16 does not qualify for any of the limited exceptions to Water Code section 5101's Statement filing
17 requirements. Accordingly, an initial Statement reporting diversions made during 2009 was
18 required to be filed by Mann prior to July 1, 2010. Alternatively, Mann could have filed a
19 Statement reporting diversions made during 2010 prior to July 1, 2011. Mann did not timely file
20 an initial Statement for diversions made in either 2009 or 2010.

21 Mrs. Mann was informed of the need to file a Statement at the September 9, 2011
22 inspection. (WR-3, Testimony of Jeff Wetzel, p.2; WR-11, ACL Complaint, Section 2.) An
23 inadequate initial Statement for the diversion and use of water at the reservoir in 2010 was filed
24 on October 19, 2011. (WR-5.) A corrected statement was then filed on February 24, 2013. (WR-
25 16.) Accordingly, the State Water Board can impose liability on Mann for failure to file a
26 Statement at \$1,000 for the initial violation plus \$500 per day for each additional day on which the
27 failure to file continues past 30 days. Here, the ACL Complaint only seeks penalties for the initial
28

1 failure to file a Statement violation and recommends imposing \$1,000 in liability for Mann's failure
2 to file a Statement.

3
4 **THE LIABILITY AMOUNT PROPOSED IN THE ACL COMPLAINT IS CONSISTENT**
5 **WITH PRIOR UNAUTHORIZED RESERVIOR ENFORCEMENT ACTIONS AND**
6 **JUSTIFIED BY THE RELEVANT CIRCUMSTANCES**

7 The ACL Complaint and Draft CDO issued to Mann were a result of a broader education
8 and enforcement effort undertaken by the Division to bring into compliance a large number of
9 unauthorized reservoirs in Napa, Marin, Sonoma, Mendocino and Humboldt counties identified
10 during the development of the State Water Board's Policy for Maintaining Instream Flows in
11 Northern California Coastal Streams (Policy)¹. (WR-1, pp. 1-3.) The Division has successfully
12 reached out to and obtained compliance from a significant number of property owners with
13 previously unauthorized reservoirs similar to Mann's reservoir. (WR-1, pp. 1-3.) When
14 necessary, more formal enforcement for unauthorized reservoirs has been issued with
15 comparable proposed liabilities and CDO terms as those being proposed here. (WR-1, p. 4; WR
16 2012-004-DWR; WR 2012-0020-DWR; WR 2013-0015-EXEC; WR 2013-0020-EXEC; WR 2013-
17 0021-EXEC; WR 2013-0022-EXEC.)

18 The Division's Enforcement Staff is proposing that the State Water Board adopt an ACL
19 Order imposing \$66,000 in liability against Mann. Water Code section 1055.3 requires that when
20 determining the amount of liability, the State Water Board shall consider;

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24 ¹ The Policy was first adopted by the State Water Board on May 4, 2010. (State Water Board Resolution No. 2010-
25 0021.) On October 16, 2012, the State Water Board adopted Resolution No. 2012-0058, vacating the Board's adoption
26 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-
adopted the Policy without any significant changes. (State Water Board Resolution No. 2013-0035.) The readopted
Policy became effective on February 4, 2014.

1 *all relevant circumstances, including, but not limited to, the extent of harm*
2 *caused by the violation, the nature and persistence of the violation, the*
3 *length of time over which the violation occurs, and the corrective action, if*
4 *any, taken by the violator.*

5 The Prosecution Team has considered the above circumstances when determining the liability
6 amount being proposed. The Prosecution Team's consideration of the above circumstances is
7 discussed in detail in Mr. Aaron Miller's testimony. (WR-1, pp 5-8.) The Policy also provides
8 guidance on how relevant circumstances are considered when bringing these types of
9 enforcement actions. (WR-26, Policy Appendix H, pp. H-1 – H-3.) The Policy's guidance on
10 establishing a liability amount was also considered and followed by the Prosecution Team. (WR-
11 1, p.5.) A presumption that Mann has an ability to pay the proposed liability is established by
12 considering the real property assets owned by Mann. (WR-23a through WR-23d.) Accordingly,
13 the liability amount of \$66,000 as proposed by the Prosecution Team should be imposed.


14
15 **A CEASE AND DESIST ORDER IS NECESSARY TO ENSURE DIVERTERS FUTURE**
16 **COMPLIANCE**

17 Mann has been given notice and ample opportunity to come into compliance and has
18 failed to take any actions toward compliance aside from filing a Statement. (WR-1, p.7, WR-3, pp
19 2-5.) The proposed CDO provides two options by which Mann can come into compliance and a
20 time certain by which Mann must make and inform the State Water Board of which option will be
21 pursued. (WR-11, proposed CDO, p.3, 4.) Mann can either pursue compliance by filing and
22 diligently pursuing an appropriate water right application while operating the reservoir in
23 compliance with the Policy, or decide to permanently render the reservoir incapable of storing
24 water subject to the State Water Board's permitting authority. (WR-11, proposed CDO, pp.3, 4.)
25 The proposed CDO is necessary to provide firm and enforceable deadlines for compliance and
26 discourage future unauthorized diversion and use of water.

1 **III. CONCLUSION**

2 The State Water Board has authority under Water Code sections 1052 and 1831 to
3 impose civil liability for Mann's past unauthorized diversion and use of water and failure to timely
4 file a statement of diversion and water use. The proposed liability of \$66,000 is appropriate
5 considering the relevant circumstances and the issuance of a cease and desist order as proposed
6 is necessary to bring Mann into compliance in a timely fashion and prevent future unauthorized
7 diversion and use.

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9 Respectfully submitted,

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13 Yvonne M. West
14 Attorney for the Division of Water Rights
15 Prosecution Team

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