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October 26, 2016

VIA US MAIL/EMAIL
(Stormer.Feiler@waterboards.ca.gov)

Stormer Feiler
North Coast Regional Water Quality Control Board
5550 Skylane Boulevard, Suite A
Santa Rosa, CA 95403

Re: October 18, 2016 Notice of Violation of Cleanup and Abatement Order No. R1-2016-0031

Dear Mr. Feiler:

My clients, Douglas and Heidi Cole (the “Coles”) are in receipt of the Notice of Violation (“Notice”) of Cleanup and Abatement Order No. R1-2016-0031 (“CAO”) that the North Coast Regional Water Quality Control Board (“Regional Water Board”) issued on October 18, 2016. After reviewing that Notice and discussing it with the Coles, several factual assumptions in regard to the Coles’ operation of their diversion require clarification. All of the concerns contained in the Notice are addressed through the Coles’ current operation of their diversion at Marble Mountain Ranch (“Ranch”) located in Siskiyou County, California. The facts addressing each of the concerns outlined in the Notice are discussed below. The Coles have also requested a meeting with State Water Resources Control Board (“State Water Board”) and Regional Water Board staff to discuss a plan for a permanent physical solution at the Ranch.

Directive No. 2 – Retain an appropriately licensed and experienced California-licensed professional to evaluate, assess, and develop a Restoration and Monitoring Plan (RMP) to restore and stabilize the head cut and slope at the outlet of the Stanshaw Creek diversion to the unnamed tributary of Irving Creek. Submit the plan by September 10, 2016 to the Executive Officers for review and approval.

The Notice alleges that RMP is required because “during the winter period [the Irving Creek outfall] ditch will again carry flows to [the Irving Creek outfall point] through interception of rainfall, snowmelt, and ground water, which may result in additional erosion of the head cut.” The Coles appreciate this concern, but the circumstances at the Ranch, in addition to the Coles management of the diversion, ensure that these concerns are not present in the ditch on the Ranch that carries water to Irving Creek or at the outfall point. The Ranch is located in an area that does not experience a large

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accumulation of snow resulting in a subsequent snow melt and drainage. As a result, the ditch transporting water to the Irving Creek outfall point and the outfall point itself do not experience an influx of water from snowmelts or rain events.

Additionally, with the recent addition of further storage on their property, the Coles completely shut down their diversion during significant storm events. When the Coles dewater their ditch, it does not collect rainwater, seepage or groundwater. Therefore, the concerns for erosion at the Irving Creek ditch and outfall point identified in the Notice do not exist at the Ranch.

Directive No. 4a – Regardless of the ultimate water delivery system, the following additional measures shall be taken by September 10, 2016, to protect water quality: assess slopes between the upper ditch and Stanshaw Creek and Irving Creek and the unnamed tributary to Irving Creek for stored sediment deposits and erosional sources associated with the past and current failures of the ditch. Identify all erosional issues and those that should be corrected, propose corrective measures and provide a schedule for implementing corrective measures.

The Regional Water Board contends that there are “preferential erosion pathways and/or areas requiring restoration in streams due to past ditch failures and/or ditch diversion points exist as active erosional sources” along the Coles’ diversion. The Coles have not experienced an overtopping event or significant erosion in the last 15 years of their operation and management of the diversion at the Ranch. Since the Coles took ownership of the Ranch in 1994, they have been deepening and improving the diversion ditch by removing sediment from the ditch bed and placing that material along the berm for reinforcement. This maintenance effort has proven successful.

As previously discussed in the Coles’ response to the CAO and the related appeal to the State Water Board, in order to properly study any of these preferential pathways and understand whether they pose any threat to waters of the state, leaf off, wet conditions are required. The inspection the CAO is based upon did not map out the impacts of the identified erosion features. Mapping the erosion features cannot be done unless conditions provide a clear view of the preferential pathways which are only available during the leaf off, wet conditions. In the opinion of the Coles’ geotechnical expert, based on Lidar mapping of the diversion, many of the erosion features along the diversion are legacy features that deliver sediment to a bench on the hillside of diversion. Consequently, those erosion features do not pose a threat to waters of the state as no discharge is occurring from that pathway. A full mapping of the erosion features with leaf off, wet conditions is required to confirm this Lidar mapping conclusion. Those conditions have not been available from the date of the CAO’s issuance to the present.

The Notice also asserts that the diversion ditch generally, “if not treated appropriately, still retains the capacity to flow by capturing rainfall and intercepting groundwater during the wet season.” As discussed above, the Coles completely shut down the

diversion ditch during significant storm events. During the recent storms on October 14-18, 2016, the Coles implemented their diversion management practice of ceasing all diversion during a significant rain event. The ditch did not collect rain water and the storm did not result in a flow within the ditch.

Directive 4b – Ensure that water used onsite, conveyed in the ditch and discharged, does not adversely impact waters of the state. Develop a sampling plan to assess the quality of water in the ditch as it passes through the ranch property for potential sources of fecal coliform, total coliform, total petroleum hydrocarbons, temperature, and nutrients. The sampling plan shall assess water quality above the diversion and ranch complex, and below the ranch complex to evaluate if there are any pollutants entering the surface water from the ditch or pond. Submit the Sampling Plan for approval by the Executive Officer by September 10, 2016. Upon approval, implement the sampling plan and provide results of the sampling by November 1, 2016. In the event that sampling identifies inputs of constituents of concern, then develop a plan to remedy the discharges and submit the plan by December 1, 2016, to the Executive Officer for review and approval.

The Coles submitted the approved sampling plan on September 9, 2016, in anticipation that they would be diverting the full amount of their pre-1914 right to divert 3 cfs of water and operating their hydroelectric power system. While the Coles reserve that they may elect to operate their hydroelectric power system during future wet seasons, they will not be diverting water for that use this winter. Therefore, the Coles will not be discharging return flow to waters of the state. It is their understanding that they are not required to comply with the sampling plan requirement unless they are discharging return flow to waters of the state. The Coles do not anticipate that they will be providing further water sampling plan documents until they return to use of their hydroelectric power system and are discharging return flow that requires permitting.

While the Coles are temporarily foregoing exercising their full pre-1914 right to divert 3 cfs of water during the forthcoming wet season, they are in no way demonstrating their intention to reduce or waive their full pre-1914 right. The Coles may elect to temporarily forego diverting their full 3 cfs right while efforts are undertaken to determine the best approach to maintain full use of the Stanshaw Creek ditch system and resolve stakeholder concerns including the Regional Water Board and State Water Board issues. Once efforts are completed, the Coles intend to continue operating their hydroelectric power system and divert their full 3 cfs pre-1914 right.

Notice Page 3 – The delayed submittal of your restoration and monitoring plan required by Directive No. 2 delays your ability to apply for any required permits and may prevent you from completing the required scope of work within the CAO-directed timeframe.

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The Coles appreciate the Regional Water Board's efforts to establish a timeline that would have provided time to secure all necessary permits for any improvements at the Ranch and discharge of return flow to Irving or Stanshaw Creeks. However, as explained in the letter responding to the CAO and the appeal of the CAO, the consultant team was unable to meet those deadlines and require physical conditions that were not available for the studies within the timeframe set forth by the Regional Water Board. To fully assess and understand any erosion and sedimentation impacts that may result from the Coles' diversion; leaf off, wet conditions must be present at the Ranch. Those conditions allow the Coles' consultants to trace and map any preferential pathways from the diversion and understand any sedimentation or erosion impacts from the diversion. Any improvements required under the CAO, requires this level of study and review to ensure that the Coles are complying with the requirements to address any impacts to waters of the state.

The main improvement requiring permitting would be the return of flow to Stanshaw Creek or Irving Creek. With the Coles' current intention to forebear operating their hydroelectric power facilities during the upcoming wet season, they will not be diverting water that they then discharge. Without the water being diverted for hydroelectric power, the Coles will not have return flow to redirect to Irving Creek or Stanshaw Creek requiring permitting. The Coles have already applied for and shown that the plan to install a pipeline within the diversion does not require any permitting.

Notice page 3 – Directive No. 5, Progress reports are due quarterly starting on October 1, 2016.

A progress report detailing the Coles' activities to comply with the CAO and Draft Order was submitted via email on September 30, 2016, hard copies followed by U.S. mail. That progress report indicated that the Coles are unable to meet the timelines provided in the CAO and Draft Order, but indicated that the Coles are continuing to seek out consultant assistance in finding a permanent physical solution at the Ranch. They have retained both a fish biologist and a hydrogeologist to study and propose solutions that comply with the requirements of the CAO and Draft Order. The Coles are in the process of engaging a new engineer for further assistance with their diversion works and energy demands. They will continue to provide progress reports on a quarterly schedule as required under the CAO and Draft Order.

Notice Page 3 – The Regional Water Board is “willing to consider reasonable extensions to Order directives and amend the Order in the event the Cole family dismisses the petition submitted to the State Water Resources Control Board.”

The Coles submitted a petition to the State Water Board to reconsider the CAO's directives based on their consultants' opinion that the studies required under the CAO could not be completed within the timeframe provided in the CAO, and the level of detail required for those studies made them cost prohibitive. As a consequence of the CAO and the State Water Board's Draft Order, some of the Coles' consultants have

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elected to leave the project rather than face any potential liability for their work under the CAO and the Draft Order. This has further delayed the Coles' improvement efforts and resulted in more costs to the Coles as they work to identify a new consultant team to assist them with diversion improvements at the Ranch, which could result in improved resource conditions.

The Coles have requested a meeting with State and Regional Water Board staff to discuss the concerns in the Coles' responses to the CAO and Draft Order, the petition for reconsideration and stay of the CAO, and this Notice. The Coles' decision regarding the petition for reconsideration and stay of the CAO depends on the outcome of the meeting once all parties agree to a date; however, the Coles anticipate being able to develop a compliance schedule that the Regional Water Board can support. The request for a meeting was made more than two weeks ago, but a date has yet to be set. We look forward to meeting with the Regional Water Board and State Water Board to discuss resolution of the CAO, Notice and Draft Order.

Please contact me with any questions you may have at barbara@churchwellwhite.com or (916) 468-0625.

Regards,

Churchwell White LLP



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