

September 13, 2017

VIA U.S. MAIL/EMAIL

(kenneth.petruzzelli@waterboards.ca.gov)

Kenneth Petruzzelli
State Water Resources Control Board
801 K Street, 23rd Floor
Sacramento, CA 95814

Re: Supplemental Response to Notice of Violation Number 3

Dear Mr. Petruzzelli:

On June 30, 2017, as part of the quarterly progress report submitted on behalf of Douglas and Heidi Cole (the “Coles”), owners and operators of Marble Mountain Ranch (“Ranch”), a partial response to the North Coast Regional Water Quality Control Board (“Regional Water Board”) Notice of Violation No. 3 (“NOV”) was provided. This correspondence more fully addresses the allegations in the NOV and supplements the response previously submitted.

Order Directive No. 1 Allegations

The NOV provides the elements of the Cleanup and Abatement Order R1-2016-0031’s (“CAO”) Directive No. 1 requiring that the Coles “evaluate the operation of the Pelton wheel to determine if there are methods of diversion that would increase efficiency and reduce the required volume of the diversion”.¹ Directive No. 1 requires that a report evaluating the following elements of the Pelton wheel system be provided.

- a. Water balance – in vs. out
- b. Water quality review – in vs. out
- c. Review onsite water needs and usage, and hydropower generation
- d. Review opportunities to optimize water needs and usage for power generation
- e. Review opportunities to reduce water loss or head loss
- f. Design a delivery system that optimizes water conservation

To reiterate previous discussions, the Coles have an established pre-1914 3 cfs right to use water for hydroelectric power generation and for domestic use. The Coles have demonstrated that they put all water diverted under that pre-1914 3 cfs right to

¹ NOV, page 2.

beneficial use. Further, the State Water Board lacks the jurisdiction to claim use of a Pelton wheel is a waste of water. However, based on the NOV's insistence that the Coles complete these studies, there are several items that have either already been previously addressed or cannot be addressed based on the current diversion of water taking place at the Ranch.

The Coles still await a response to the forms they submitted demonstrating their lack of financial wherewithal to undertake these evaluations, but have received no response to those documents. In addition, the Coles have not utilized the Pelton wheel this last winter, creating an additional financial constraint by having to utilize generators for all power uses at the Ranch.

a. Water balance – in vs. out

The water balance of the Coles' diversion has already been studied and addressed. Duplication of this study is unnecessary and requires time and financial resources that could be better used implementing resource improvements at the Ranch.

b. Water quality review – in vs. out

As part of the Coles' effort to comply with the National Marine Fishery Services' ("NMFS") recommended bypass flow and the directives in the CAO, the Coles have voluntarily elected not to divert water for hydroelectric power generation during low flow periods. This in no way demonstrates the Coles' intention to waive their right to divert the full amount of their established pre-1914 3 cfs right. With the Coles' voluntary forbearance from diverting their full 3 cfs right, there is no water that leaves the Ranch. Therefore, there is no "out" portion of water to study for a water quality review until the Coles are once again able to divert water for hydroelectric power generation.

The Coles may be able to divert up to 3 cfs of water during upcoming high flow periods, provided they receive approval of their proposed improvement plan at Irving Creek. However, until that project is approved and can be implemented, the Coles are unable to complete a water quality review. Further, the Coles' water supply is subject to water quality monitoring through Siskiyou County.

- c. Review onsite water needs and usage, and hydropower generation
- d. Review opportunities to optimize water needs and usage for power generation
- e. Review opportunities to reduce water loss or head loss
- f. Design a delivery system that optimizes water conservation

Each of the requirements in elements c-f of the CAO's Directive No. 1 focuses on measures that optimize water conservation, or addresses water needs and use. These items have been previously evaluated through work with the Mid Klamath Watershed

Council (“MKWC”) and other partners. Engineers have evaluated the Pelton wheel and the diversion system at the Ranch. The recommendations based on those evaluations have all agreed that lining or piping the diversion from Stanshaw Creek to the Ranch will increase the stability of the diversion but also serves as one of the most beneficial ways to increase the efficiency of the diversion. The Coles continue to strive to implement that improvement.

Additional clarification in the discussion with regard to Directive No. 1

The NOV’s discussion of Directive No. 1 goes on to address the diversion’s impact to fishery resources along Stanshaw Creek. There are several points of clarification that need to be addressed in this discussion.

First, the NOV alleges that the diversion has the potential of “jeopardizing rearing habitat for Coho salmon and salmonid species” by transferring water away from “a documented pool providing summer refugia”.² Then, the NOV goes on to state that “the flows of Stanshaw Creek, likely can, and likely do, have a positive effect upon the rearing habitat of salmonids during the hot weather periods influencing salmonids mortality and survival in the Klamath Basin.”³ Finally, the NOV includes allegations from the Karuk Tribe regarding a reported fish kill event in 2009, alleging that the Coles’ diversion is responsible for the event, based on depleted flows to the off-channel pool discussed above.

The pool identified in the NOV is a manmade feature along the Klamath River; however, to comply with the NMFS recommended bypass flow to address the Klamath Basin, the Coles have voluntarily reduced their diversion to forego diverting water for hydroelectric power generation during low flow periods. Thus, the concern outlined in the NOV as part of the basis seeking the reports under the CAO’s Directive No. 1, has already been voluntarily addressed through the Coles’ management of their diversion.

The NOV also asserts that the Coles’ diversion has the potential to jeopardize rearing habitat for Coho salmon, and other salmonid species, by diverting water away from a single manmade pool along the Klamath River. A single pool within the larger Klamath Basin does not jeopardize the survival of Coho salmon and other salmonid species in the Klamath Basin. The State and Regional Water Boards lack the jurisdiction to enforce the federal Endangered Species Act (“ESA”). However, even if the State and Regional Water Boards had the jurisdiction to enforce the federal ESA, a single pool in the larger Klamath Basin “is not likely to jeopardize the continued existence” of Coho Salmon and other salmonid species in the Klamath Basin.⁴ Therefore, no jeopardy exists under the ESA. The State and Regional Water Boards do have the jurisdiction to

² NOV, page 3.

³ *Id.*

⁴ 16 USC § 1536.

enforce the California Endangered Species Act (“CESA”), but the CESA’s determination of jeopardy is based on the claim of a take which is defined as “hunt, pursue, catch, capture, kill or attempt to hunt, pursue, catch, capture or kill.”⁵ The Coles’ diversion of water is none of those activities. Therefore, the diversion does not present jeopardy to Coho salmon or other salmonids in the Klamath Basin.

Nevertheless, the Coles’ operation of their diversion ensures that the pool is maintained in the high flow winter periods to provide pool volume, water quality and growth opportunities for non-natal rearing habitat for Coho salmon and other salmonid species. Based on an initial third-party review of the Coles’ diversion, during low flow periods the pool may allow for some juvenile growth opportunities, but the pool, even without the Coles’ diversion, is unlikely to provide habitat for rearing of natal fish during those periods. Therefore, the pool does not require as much flow during low flow periods along Stanshaw Creek. The Coles’ diversion management provides water to the pool during low flow periods in an amount that serves the Coho salmon and other salmonid species that may be present at the pool during those periods. Thus, there is no jeopardy to the rearing habitat for Coho salmon or other salmonid species in the Klamath Basin from the Coles’ diversion

A final point of clarification of the NOV’s discussion of Directive No. 1, involves the closing paragraph of that discussion on page 4 of the NOV. It states, “the out-of basin transfer of Stanshaw Creek water to Irving Creek through the Marble Mountain Ranch for hydropower and/or domestic use purposes represents a potential and active discharge of waste and a potential threat to beneficial uses that is within our purview to regulate”.⁶ The Coles are not engaged in the transfer of Stanshaw Creek water to Irving Creek for domestic use purposes. All water they are currently diverting is used on the Ranch for domestic and consumptive use. Thus, no water is discharged to Irving Creek at this time.

Directive No. 2

The initial response provided in the June 30, 2017, progress report, addresses the Coles’ concerns with regard to this portion of the NOV. While that response encompasses the Coles’ response to these allegations, it bears repeating that Mr. Fiori’s report provides a recommendation that simple, cost effective measures to address the Irving Outfall site are all that is required as the outfall is evolving to a stable environment. The Coles have taken action to implement this recommendation by submitting a Report of Waste Discharge to authorize a project to install a culvert and rootwads at the base of the outfall for energy dissipation to address the impacts at the Irving Outfall. The Coles await the Regional Water Board’s response to that Report of Waste Discharge.

⁵ Fish and Game Code § 86.

⁶ NOV, page 4.

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Directive No. 3

There is no additional response to the NOV's discussion of Directive No. 3 other than to make clear that the Coles do have an existing operation and maintenance plan for the diversion. That operation and maintenance plan as communicated and observed by Mr. Fiori has proven effective and is recommended as the continuing operation plan for the diversion. The Coles have been and will continue to follow Mr. Fiori's recommendation.

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

Regards,

Churchwell White LLP



Barbara A. Brenner

KAF/dmg

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