

HEARING
STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

IN THE MATTER OF:)
)
TO DETERMINE WHETHER TO ISSUE)
AN ORDER CONSISTENT WITH DRAFT CEASE))
AND DESIST ORDER NO. 262.31-14 AND)
WHETHER TO IMPOSE ADMINISTRATIVE)
CIVIL LIABILITY AS PROPOSED IN)
ADMINISTRATIVE CIVIL LIABILITY)
COMPLAINT NO. 262.5-44 AGAINST)
THE VINEYARD CLUB, INC.)
_____)

JOE SERNA, JR., CAL-EPA BUILDING
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COASTAL HEARING ROOM
SACRAMENTO, CALIFORNIA

WEDNESDAY, APRIL 4, 2007

10:05 A.M.

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LICENSE NUMBER 10063

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

BOARD MEMBERS

Mr. Gary Wolf, Vice Chairperson

STAFF

Ms. Barbara Katz, Senior Staff Counsel

Ms. Jean McCue, Water Resources Control Engineer

DIVISION OF WATER RIGHTS PROSECUTION

Mr. Matt Bullock, Staff Counsel

Mr. Charles Lindsay, Senior Water Resources Control
Engineer

Mr. Mark Stretars, Senior Water Resources Control Engineer

THE VINEYARD CLUB, INC.

Mr. Daniel Kelly, Somach, Simmons & Dunn

Mr. Jonathan Schutz, Somach, Simmons & Dunn

Mr. Peter Sagues

Mr. Bert Sandell

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PROCEEDINGS

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VICE CHAIRPERSON WOLFF: Thank you for waiting.

I'm a few minutes late.

I'm going to read a few words here. This is the time and place for the hearing regarding whether to issue a cease and desist order in response to draft Cease and Desist Order No. 262.31-14 and whether to impose administrative liability as proposed in Administrative Civil Liability Complaint No. 262.5-44 issued by the Chief of the Division of Water Rights against the Vineyard Club, Inc.

This hearing is being held in accordance with the notice of a hearing dated February 7, 2007.

I'm Gary Wolff, Vice Chair of the State Water Resources Control Board. I'll be assisted by Senior Staff Counsel Barbara Katz and Water Resources Control Engineer Jean McCue.

The purpose of this hearing is to afford the Vineyard Club, Inc., and the Division of Water Rights prosecution team an opportunity to present relevant oral testimony and other evidence which address the following key issues:

1. Should the State Water Board issue a cease and desist order to the Vineyard Club in response to draft CDO No. 262.31-14? If a cease and desist order should be

1 issued, what modifications, if any, should be made to the
2 measures in the draft order and what is the basis for such
3 modifications?

4 2. Should the State Water Board order liability
5 in response to Administrative Civil Liability Complaint
6 No. 262.5-44 against The Vineyard Club, Inc.? If the
7 State Water Board orders liability, should the amount be
8 increased or decreased; and if so, on what basis?

9 This hearing will be transcribed by James Peters
10 with Peters Shorthand Reporting Corporation. This is Mr.
11 Peters here. Persons who want a copy of the transcript
12 should order one directly from her or him. The transcript
13 will also be posted on our website no sooner than 60 days
14 after receipt of the transcript by the State Water Board.

15 Our order of proceeding in this hearing will be
16 first to provide an opportunity for persons who are not
17 presenting cases in chief to present non-evidentiary oral
18 policy statements. Next we'll receive testimony from the
19 Division of Water Rights prosecution team, followed by
20 cross-examination by vineyard club, Board staff and
21 myself. Following the prosecution team's testimony and
22 cross-examination, the Vineyard Club may present its
23 testimony and have its witnesses cross-examined. I will
24 allow relevant redirect and recross examination of all
25 witnesses. Finally, closing statements will be allowed.

1 The procedural rules including the time limits
2 set forth in the attachment of the notice of hearing will
3 be strictly enforced. The oral testimony given today
4 should be limited to summarizing the important points in
5 the written testimony.

6 Both parties have multiple witnesses, so I've
7 decided to do cross-examination as a panel. As set forth
8 in the rules of the hearing, cross-examination will be
9 limited to one hour per panel of witnesses.

10 For panel cross-examination each witness will
11 give his or her direct testimony before any witness is
12 cross-examined. The parties will make all of their
13 witnesses available as a panel for cross-examination.

14 On cross-examining a panel, please identify the
15 specific witness to whom your question is directed. If
16 you are not sure to whom to direct a question, you may ask
17 the question generally of the panel. You may also direct
18 a question to more than one witness.

19 At this time I'd like to invite appearances by
20 the parties. Will those making appearances please state
21 your name, address, and whom you represent so that the
22 court reporter can enter this information into the record.

23 Who is representing the Division of Water Rights
24 prosecutorial team?

25 STAFF COUNSEL BULLOCK: I am. My name is Matthew

1 Bullock. And my address is 1001 I Street here in the in
2 the Cal EPA building.

3 VICE CHAIRPERSON WOLFF: Thank you.

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 I'm Charles Lindsay at Division of Water Rights.

6 Address is here in this building, 1001 I Street.

7 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

8 Mark Stretars, Division of Water Rights, 1001 I

9 Street.

10 VICE CHAIRPERSON WOLFF: Can everyone hear, or do

11 we need people to approach the mike when they speak?

12 Okay. You got those though?

13 All right. In the future, please approach the

14 mike.

15 Who's representing the Vineyard Club?

16 Please come forward to the mike.

17 MR. KELLY: Good morning, Dr. Wolff. Daniel

18 Kelly with the firm of Somach, Simmons & Dunn, 813 6th

19 Street here in Sacramento, Third Floor.

20 MR. SCHUTZ: John Schutz, also for the Vineyard

21 Club, also with Somach, Simmons & Dunn, 813 6th Street,

22 Sacramento.

23 VICE CHAIRPERSON WOLFF: I'm sorry. I didn't

24 catch your first name.

25 MR. SCHUTZ: John.

1 VICE CHAIRPERSON WOLFF: John.

2 I'll now administer the oath. Will all those
3 persons wishing to testify during this proceeding please
4 stand and raise your right hand.

5 Do you promise to tell the truth in this
6 proceeding?

7 PROSPECTIVE WITNESSES: I do.

8 VICE CHAIRPERSON WOLFF: Thank you. You may be
9 seated.

10 Does anyone wish to make a non-evidentiary policy
11 statement?

12 Seeing none, we'll proceed to testimony of the
13 parties.

14 The prosecution team. You have an opening
15 statement?

16 STAFF COUNSEL BULLOCK: I'm going to keep this
17 really brief.

18 The Vineyard Club has a license from the State
19 Water Board. That license states that no water shall be
20 diverted under the license unless there is a measuring
21 device in place in Oak Flat Creek.

22 In 2005, the evidence will show that Mr. Lindsay
23 went out to the site, there was no measuring device in the
24 creek, and that the Vineyard Club was diverting and that
25 that diversion lasted for at least 60 days. Under Section

1 1052 of the Water Code, this is a trespass and is subject
2 to a \$500-a-day liability.

3 Thank you.

4 VICE CHAIRPERSON WOLFF: Cross-examination.

5 MR. KELLY: Oh, I thought you were going to do
6 opening statements from -- do you want to do --

7 VICE CHAIRPERSON WOLFF: My understanding was we
8 do opening statements and then presentation of witnesses
9 and then cross-examination. Do I understand that
10 incorrectly?

11 SENIOR STAFF COUNSEL KATZ: Yeah, typically we do
12 the whole case in chief.

13 MR. KELLY: Okay. I'll do my opening statement
14 then after cross-examination of prosecution team?

15 SENIOR STAFF COUNSEL KATZ: Yes.

16 MR. KELLY: Okay. Thank you.

17 VICE CHAIRPERSON WOLFF: You have witnesses to
18 present, yes?

19 STAFF COUNSEL BULLOCK: Yes.

20 DIRECT EXAMINATION

21 BY MR. MATTHEW BULLOCK, STAFF COUNSEL, representing the
22 Division of Water Rights:

23 Good morning, Mr. Lindsay.

24 Could you please state your name and your place
25 of employment?

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 My name's Charles L. Lindsay. I'm also known as
3 Larry Lindsay. I work for the State Water Resources
4 Control Board in the Division of Water Rights. Currently
5 I'm the Chief of the Hearings Unit, but at the time of the
6 inspection I was working in the Enforcement Unit.

7 STAFF COUNSEL BULLOCK: Have you taken an oath in
8 this proceeding?

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
10 Yes, I have.

11 STAFF COUNSEL BULLOCK: And did you prepare the
12 statement of qualifications submitted as Prosecution Team
13 Exhibit WR-2?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
15 Yes, I did.

16 STAFF COUNSEL BULLOCK: And is Exhibit 2 a true
17 and accurate statement of your qualifications?

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
19 Yes, it is.

20 STAFF COUNSEL BULLOCK: Did you also prepare the
21 written statement that is submitted as Prosecution Team
22 Exhibit WR-1?

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
24 Yes, I did.

25 STAFF COUNSEL BULLOCK: And are the statements in

1 Enforcement Team Exhibit 1 true and accurate to the best
2 of your knowledge?

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

4 Yes, they are.

5 STAFF COUNSEL BULLOCK: Could you briefly
6 describe the licensed project?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 Yes. My first slide please.

9 This first slide you're going to see is an
10 extract from Water Right 8, page 7. It's the map attached
11 to the report. This is a blowup of the center of it.

12 Just to take a short trip here through the
13 project. The point of diversion that we're concerned with
14 is listed at the top of that map. It says, "Number 1
15 point of diversion to off-stream storage." And you can
16 see an arrow pointing to it. There's a pipeline that
17 begins right there, about a four-inch pipe that runs
18 down -- generally down the streambed, and then -- it's the
19 dashed line in the photograph -- I'm sorry -- in the
20 map -- and then it goes over to Vineyard Club Lake, which
21 is there in the center of the map and provides water into
22 the lake.

23 Next slide please.

24 --o0o--

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 This is the point of diversion on the date I was
2 there. This is Water Right 8, page 9, the bottom
3 photograph.

4 I'd like to note also this point of diversion is
5 a remote location. It's quite a hike in there and
6 especially a hike out up the canyon.

7 As you see here, there's no measuring device in
8 place, and the diversion pipe is there and in place and
9 diverting.

10 Next slide please.

11 --o0o--

12 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
13 Water Right 8, page 9, the top photograph. Just
14 stepping back a bit from the point of diversion, kind of
15 an overall view.

16 Next photograph.

17 --o0o--

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
19 This is Water Right 8, page 10, the top
20 photograph. Shows the section of the pipe as it comes
21 down this streambed headed towards the lake. It generally
22 meanders along with the streambed through the upper part
23 of it.

24 Next photograph please.

25 --o0o--

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 And this is Water Right 8, page 13, top
3 photograph. And this is the diversion pipe as it goes
4 into the lake. And you can see there that water is coming
5 out of the end of the pipe.

6 STAFF COUNSEL BULLOCK: Could you please
7 summarize the relevant term of the Vineyard Club's license
8 that's the subject of the hearing today.

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

10 Yes. You see on this slide, this is an extract
11 of Water Right 7, page 2. I'm going to read it.

12 It says, "No water shall be diverted under this
13 license unless licensee has installed a device in Oak Flat
14 Creek satisfactory to the State Water Resources Control
15 Board, which is capable of measuring the flows required by
16 the conditions of this license. Said measuring device
17 shall be properly maintained."

18 STAFF COUNSEL BULLOCK: Why is the measuring
19 device term in the license?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

21 Well, what got it started, the history of it,
22 when the Vineyard Club applied there was a protest lodged
23 by the Department of Fish and Game. And the resolution of
24 that protest was the inclusion of this term. It's
25 documented in State Water Resources Control Board Decision

1 1608, which is my -- which is Water Right Exhibit 20.

2 Also, in Decision 1608 it states on page 5, in
3 the last paragraph, that Oak Flat Creek provides nursery
4 habitat for immature steelhead.

5 STAFF COUNSEL BULLOCK: And when was the license
6 issued?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
8 March 26th, 1992.

9 STAFF COUNSEL BULLOCK: Was the Vineyard Club
10 informed of the inspection prior to the inspection
11 actually occurring?

12 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
13 Well, of course we made an appointment before I
14 showed up. It was probably about approximately a week in
15 advance. I don't remember for sure. So I, you know,
16 didn't show up unannounced. But even prior to that, the
17 Division mailed a letter about six weeks earlier. That
18 letter's dated March 18th, 2005. And this is Water Right
19 Exhibit 21. The letter informed of the possibility of
20 inspections, suggested ways to prepare for the inspection,
21 and mentioned things we'd be looking for, including
22 measuring devices.

23 STAFF COUNSEL BULLOCK: So language was
24 specifically used about measuring devices?

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Yes, it was, in the letter.

2 STAFF COUNSEL BULLOCK: On the day of the
3 inspection on May 4th, 2005, was anyone with you?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
5 Yes, Mr. Sagues.

6 STAFF COUNSEL BULLOCK: And did you give him any
7 paperwork when you arrived?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
9 When we first met there at the picnic area, I
10 gave him a copy of the license.

11 STAFF COUNSEL BULLOCK: Was he familiar with the
12 license?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
14 Didn't seem to be.

15 STAFF COUNSEL BULLOCK: What did you find at the
16 site?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
18 Well, we went down to the point of diversion. As
19 I showed you, there was no measuring device or evidence
20 that one existed.

21 STAFF COUNSEL BULLOCK: Did you inform Mr. Sagues
22 of this fact?

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
24 Yes.

25 STAFF COUNSEL BULLOCK: Did you inform him that

1 this was a violation of his license?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 Yes, I did.

4 STAFF COUNSEL BULLOCK: And did you ask Mr.

5 Sagues if there had ever been a measuring device while he

6 worked there?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 Yes. And in this conversation, the exchanges we
9 had, I learned he'd been the manager for two years and
10 told me he had no knowledge of the measuring device.

11 STAFF COUNSEL BULLOCK: Did you attempt to
12 determine the bypass?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 Yes, I did. I used a flume -- a Montana flume.

15 I was attempting to see if the bypass was being made at
16 that time since they -- they didn't have a device there.

17 And using the flume, I -- the Montana flume, you
18 try to get as much of the stream flow through the flume as
19 possible. I wasn't able to get all of it, as I discussed
20 in my report. I estimate that I had about .13 cfs going
21 through the flume is what I measured. And it looked to me
22 like about 50 percent of the stream flow was going through
23 the flume.

24 STAFF COUNSEL BULLOCK: Did you tell Mr. Sagues
25 that enforcement might occur?

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 Yes, I did.

3 STAFF COUNSEL BULLOCK: And did you make him any
4 promises in any way?

5 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

6 No, no, not as -- when I informed him of the
7 violation, I was very careful with what I said. It was at
8 the end of the inspection. We sat down in my vehicle. I
9 remember it was raining outside. And we talked about
10 this. And I made sure he realized the term in the license
11 we were talking about. I told him that they were in
12 violation at that time. And I told him about what an
13 Administrative Civil Liability was, that essentially it's
14 a fine, that they were potentially subject to that. But
15 I -- it was not up to me whether it was going to be issued
16 or not. And I made no promises, you know, if they were to
17 do something, you know, maybe -- I just said it was a
18 possibility and they were in violation.

19 STAFF COUNSEL BULLOCK: Did you tell Mr. Sagues
20 that he could continue diversion in violation of the
21 license?

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 No, absolutely not.

24 STAFF COUNSEL BULLOCK: Did you make any
25 suggestions about how the Vineyard Club should proceed?

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 Yes, I made it clear they should hire a civil
3 engineer and get on with getting a measuring device
4 installed.

5 STAFF COUNSEL BULLOCK: Does the Division usually
6 help to design measuring devices?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 No, we do not.

9 STAFF COUNSEL BULLOCK: And in your experience,
10 do most people hire an engineer to design one?

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

12 Yes, they do.

13 STAFF COUNSEL BULLOCK: When was the last time
14 that you feel confident that there was a measuring device
15 actually installed?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 Well, our review of the water right file shows a
18 photograph of one that went in about the time of
19 licensing. That would be about 13 years prior to the
20 inspection, in 1992.

21 STAFF COUNSEL BULLOCK: What period of time was
22 taken into consideration in setting the maximum liability?

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

24 The 60 days of the season that -- again, speaking
25 with Mr. Sagues, I understood that generally that

1 diversion was in for two months. And taking into account
2 the season that I was there and saw, at least on that one
3 day, it was 60 days, the two months.

4 STAFF COUNSEL BULLOCK: And was any additional
5 period taken into consideration as a factor when you were
6 setting the \$4100 amount?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 Well, Mr. Sagues did say that he'd been manager
9 for two years. And I could make the -- I would make the
10 assumption there that it probably -- since he didn't have
11 any knowledge of it, that it probably had been two seasons
12 that the measuring device had not been installed.

13 MR. KELLY: Your Honor, I'm going to object to
14 that response as speculative. I think that Mr. Lindsay
15 just said that he just assumed that had occurred the prior
16 year. So I would object to that as Mr. Lindsay
17 speculating now on violations that there's no evidence of.

18 VICE CHAIRPERSON WOLFF: Repeat the question and
19 repeat the answer. Attempt to avoid any speculation.

20 STAFF COUNSEL BULLOCK: The question was: Was
21 there any additional period of time considered as a factor
22 when setting the complaint amount?

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

24 Yes, the year prior. Mr. Sagues had told me that
25 he'd been the manager for two years and he had no

1 knowledge of the measuring device.

2 VICE CHAIRPERSON WOLFF: Is that satisfactory,
3 Mr. Kelly?

4 MR. KELLY: Yes, thank you. Thank you, Dr.
5 Wolff.

6 STAFF COUNSEL BULLOCK: Do you believe that \$4100
7 was a reasonable amount of liability based on those facts?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 No. It would have been higher, but we set it low
10 in an attempt to settle without a hearing. And this is
11 discussed in the ACL, Water Right 6, page 3, paragraph 8.

12 STAFF COUNSEL BULLOCK: Is there any additional
13 period of noncompliance that was not considered in the
14 \$4100 amount but that was determined after the complaint
15 was issued in recommending an increase?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 Well, yes. Looking through the file, there's --
18 when an engineer went out to -- or when staff went out to
19 do a pre-license inspection, there was no evidence of a
20 measuring device in place. The permit had this same term,
21 and the permit had been placed for about five years. And
22 there's no measuring device when we go show up to do the
23 license inspection, no knowledge of it. And so looking at
24 the history, yes, there are other factors in increasing
25 the liability above the 4100.

1 STAFF COUNSEL BULLOCK: Now, after the
2 inspection, did you continue communications with the
3 Vineyard Club?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Yes, I did. Between the time of the inspection
6 and the issuance of the ACL, there were some phone calls
7 and E-mails between us.

8 On August 16th, 2005, I had a phone conversation
9 with Mr. Sagues -- that's documented in a contact report,
10 my Water Right 9 -- which I reiterated the points I made
11 at the inspection, that they were in violation and that
12 they needed to get on with installing the measuring
13 device.

14 He also asked for a copy of the license, and I
15 faxed him one.

16 Also, I've seen in Vineyard Club Exhibit 8 that
17 apparently Mr. Sagues and I spoke and exchanged E-mail on
18 March 29th, 2006. According to that E-mail I called him.
19 I really don't remember the details of that conversation,
20 but one did occur. I've read the Vineyard Club 8. It
21 indicates to me that the Vineyard Club was proceeding to
22 obtain an engineer and certainly understood what they
23 needed to do.

24 After the ACL was issued I received an E-mail
25 from Mr. Sagues -- it's Water Right 10 -- and he was

1 looking for help in resolving the issue without paying.

2 STAFF COUNSEL BULLOCK: And did you stop
3 communications with the Vineyard Club at some point?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Yes. See, that would be an E-mail that I sent on
6 January 11th. Prior to that time, Mr. Sandell had become
7 the contact. And we'd gone back and forth on some design
8 issues. They were -- after the ACL was issued they
9 started attempting to design a measuring device and were
10 looking to us for some advice on it. And he presented
11 some equations, and I would give him, you know, my
12 thoughts on it. I made some corrections to his equation.
13 He'd give me something back. It wouldn't be completely
14 right based on what I'd told him. So we went back and
15 forth several times.

16 And then finally in this Water -- it was January
17 11th -- I think this is Water Right 18, I stated that he
18 was still failing to address some of the required design
19 elements, like how the vineyard -- how the measuring
20 device should be anchored, the shape of the orifice, an
21 operations plan, things like that. And I said he was
22 beginning to cross the line from -- or I was beginning to
23 cross the line from helping them to actually beginning to
24 design the project for them.

25 STAFF COUNSEL BULLOCK: What, beyond what the

1 Vineyard Club had presented to you and has presented to
2 this point, do you feel is necessary to get an acceptable
3 measuring device installed in Oak Flat Creek?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Well, it should be durable. It needs to be
6 approved by Fish and Game, with a streambed alteration
7 agreement. And we need a schedule of compliance.

8 STAFF COUNSEL BULLOCK: You said durable. Does
9 that mean that --

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

11 Well, the previous one there's evidence of in the
12 file that was installed about the time of licensing
13 appears to me to be wood, and it's gone. So something
14 happened to it. That design was not adequate.

15 STAFF COUNSEL BULLOCK: And they have not
16 addressed the material at this point?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

18 No.

19 STAFF COUNSEL BULLOCK: Why do you feel that a
20 schedule of compliance is necessary?

21 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

22 Well, two years has gone by and Vineyard Club
23 still, despite the fact on the day of the inspection --
24 despite the fact that it was in their permit, despite the
25 fact that it was in their license, they still have not put

1 in a measuring device and seem unable to maintain one. So
2 we need to put them on a schedule with a cease and desist
3 order.

4 STAFF COUNSEL BULLOCK: So in your opinion should
5 the Board issue a CDO, a cease and desist order?

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
7 Yes, we should.

8 STAFF COUNSEL BULLOCK: Okay. Thank you.

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
10 The Board should.

11 STAFF COUNSEL BULLOCK: I'd like to talk for a
12 few minutes with Mr. Stretars.

13 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
14 Is this mike live? Okay.

15 STAFF COUNSEL BULLOCK: Could you please state
16 your name and place of employment.

17 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
18 My name is Mark Stretars. I'm a senior water
19 resources control engineer --

20 VICE CHAIRPERSON WOLFF: Your mike is not on.

21 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
22 Oh, I'm sorry. I thought -- I must have touched something
23 to shut it off. I'm sorry.

24 My name is Mark Stretars. I'm a senior water
25 resources control engineer with the Division of Water

1 Rights of the State Water Resources Control Board.

2 STAFF COUNSEL BULLOCK: Have you taken an oath in
3 this proceeding?

4 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
5 Yes, I have.

6 STAFF COUNSEL BULLOCK: Did you prepare the
7 statement of qualifications that is submitted as
8 Prosecution Team Exhibit WR-4?

9 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
10 I did.

11 STAFF COUNSEL BULLOCK: Is Exhibit 4 a true and
12 accurate statement of your qualifications?

13 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
14 It is.

15 STAFF COUNSEL BULLOCK: Did you also prepare the
16 written statement that is submitted as Prosecution Team
17 Exhibit WR-3?

18 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
19 I did.

20 STAFF COUNSEL BULLOCK: Are the statements in
21 Enforcement Team Exhibit 3 true and accurate to the best
22 of your knowledge?

23 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
24 They are.

25 STAFF COUNSEL BULLOCK: Mr. Stretars, what is the

1 legal basis for the ACL?

2 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

3 The legal basis is Water Code Section 1052.

4 STAFF COUNSEL BULLOCK: Of the Water Code?

5 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

6 Of the Water Code, yes.

7 STAFF COUNSEL BULLOCK: And what is the factual

8 basis?

9 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

10 The factual basis is that the ACL was issued for
11 the diversion of water from Oak Flat Creek in violation of
12 the Vineyard Club's license, which specific states no
13 water shall be diverted without a measuring device.

14 At the time Mr. Lindsay was out there they did
15 not have a measuring device installed and they were
16 diverting water.

17 STAFF COUNSEL BULLOCK: How was the maximum
18 liability calculated?

19 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

20 The maximum liability was calculated based on two
21 factors: Section 1052 of the Water Code provides that the
22 Board may impose a liability of up to \$500 per day. And,
23 secondly, it was based on at least 60 days of violation
24 based on the statements of Mr. Sagues as noted by Mr.
25 Lindsay.

1 STAFF COUNSEL BULLOCK: And so those 60 days,
2 that was based on how many seasons of diversion?

3 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
4 It was the season of the inspection, 2005, 60
5 days.

6 STAFF COUNSEL BULLOCK: What was the maximum
7 liability that was calculated?

8 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
9 Based on those parameters, the maximum liability
10 was calculated at \$30,000.

11 STAFF COUNSEL BULLOCK: And what was the
12 recommendation of the Division at the time the complaint
13 was issued?

14 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
15 The recommendation was \$4100.

16 STAFF COUNSEL BULLOCK: In recommending \$4100,
17 what factors did you take into consideration?

18 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
19 We used the factors identified in Code Section --
20 Water Code Section 1055.3, which relate to the harm caused
21 by the violation, the nature and persistence of the
22 violation, the length of time of the violation, and
23 whether any corrective actions have been taken by the
24 violator.

25 STAFF COUNSEL BULLOCK: What was some of the harm

1 that you see as being caused by the violation?

2 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

3 We were looking at less water to downstream
4 users. As Mr. Lindsay indicated, there's also endangered
5 steelhead in the system. I believe that was Water Right
6 20, which is the decision that identified that parameter.

7 STAFF COUNSEL BULLOCK: And you mentioned
8 corrective actions. Were there any corrective actions
9 that were considered?

10 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

11 Yes, there was. In the season of 2006, the
12 Vineyard Club called and informed us that they were not
13 going to divert that year at that source.

14 STAFF COUNSEL BULLOCK: Okay. Now, 1055.3, as
15 you mentioned, allows for consideration of other factors.
16 Were other factors considered?

17 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

18 There was some consideration of other factors,
19 including an economic advantage, which basically goes to
20 the foregoing, the cost of building, installing and
21 maintaining a measuring device or purchasing or pumping
22 the water that was offsetting through the operation of
23 that diversion. We also looked at staff cost.

24 STAFF COUNSEL BULLOCK: Okay. And were other
25 factors used as to discount the amount of the liability?

1 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

2 Yes, we did discount the liability, basically to
3 achieve a settlement with the licensee, to try to
4 streamline the enforcement process, and to avoid the cost
5 of a hearing.

6 STAFF COUNSEL BULLOCK: And have you changed your
7 recommendation since the time of the issuance of the
8 complaints?

9 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
10 I have.

11 STAFF COUNSEL BULLOCK: And why has your
12 recommendation changed since issuing the complaint?

13 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
14 A little more deep review of the file -- of the
15 history of the file basically shows there's a history of
16 noncompliance, that at that point in time we had
17 discounted basically to achieve the settlement, and that
18 we believe at this point in time our case is stronger now
19 than when the liability was set at \$4100.

20 STAFF COUNSEL BULLOCK: Thank you, Mr. Stretars.
21 That's all I have for these witnesses.

22 VICE CHAIRPERSON WOLFF: Thank you.

23 Cross-examination, Mr. Kelly?

24 MR. KELLY: Thank you, Dr. Wolff.

25 //

1 CROSS-EXAMINATION

2 BY MR. DANIEL KELLY, ESQ., representing The Vineyard Club,
3 Inc.:

4 Good morning, Mr. Lindsay, Mr. Stretars.

5 Mr. Lindsay, I have a few questions for you.

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

7 Okay.

8 MR. KELLY: In your testimony, on page 1, you say
9 that your testimony is based upon your personal knowledge
10 of the evidence and actions. I believe you said the
11 Division's enforcement action.

12 Is that a true statement?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 You're talking about page 1 of Water Right 1?

15 MR. KELLY: That's correct.

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 Where are we talking about here?

18 MR. KELLY: Second paragraph, second sentence.

19 It says, "My testimony addresses the hearing issues and
20 identifies my personal knowledge of the evidence and
21 actions."

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 That's my testimony.

24 MR. KELLY: That's a correct statement?

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Yes.

2 MR. KELLY: I'd like you to direct your attention
3 to WR-1, page 3 of your testimony. The first full
4 sentence.

5 Can you read that sentence for me beginning with
6 "However".

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 "However, The Vineyard Club had been violating
9 the permit term and diverting illegally likely -- likely
10 since the permit was issued, a period of about four
11 years."

12 MR. KELLY: Is that based upon your personal
13 knowledge?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

15 It's based upon my review of the file.

16 MR. KELLY: Is that an assumption that you're
17 making, that they had been likely diverting illegally?

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

19 It's a conclusion.

20 MR. KELLY: Do you have personal knowledge of it
21 or are you assuming that they're diverting illegally for
22 years?

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

24 I'm concluding that from reviewing the file.

25 MR. KELLY: Is it based upon your personal

1 knowledge of the evidence?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 It's based upon my knowledge of the file.

4 MR. KELLY: Your Honor, I'd ask the witness to
5 answer the question I posed as to whether or not this is
6 based upon his personal knowledge and not upon any
7 speculation that they had been alleged to be diverting
8 illegally likely since the permit was issued.

9 VICE CHAIRPERSON WOLFF: The statement in
10 question is an opinion of the witness and I believe his
11 answer was adequate.

12 MR. KELLY: Okay.

13 All right. A little bit further down in that
14 paragraph, I believe it's the second to the -- I'm
15 sorry -- the third to the last sentence.

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 Are we talking about "sometime after the issuance
18 of the license"?

19 MR. KELLY: And then you go on to say, "the
20 reason is unknown," and then the following sentence
21 beginning with "it".

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 Referring to the measuring device. It may have
24 been damaged or simply deteriorated and was never
25 replaced.

1 MR. KELLY: Do you have any personal knowledge of
2 what happened to the measuring device?

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
4 No, I --

5 STAFF COUNSEL BULLOCK: I would object to this.
6 This is irrelevant. The point is that it wasn't there.
7 He's not making any sort of a statement about why it
8 wasn't there. The point of his testimony was it's not
9 there. It's not relevant.

10 VICE CHAIRPERSON WOLFF: Mr. Kelly, what is the
11 relevance of this line of questioning?

12 MR. KELLY: Dr. Wolff, it's the Vineyard Club's
13 position that a lot of the testimony in the file here
14 is -- in the record is based on speculation. And there
15 are a lot of allegations made in here with regard to my
16 clients that suggest that they're bad actors. And I think
17 that I should have the opportunity to ask whether or not
18 the allegations and the statements that Mr. Lindsay makes
19 in this testimony are actually based upon his knowledge,
20 as he testified to, or whether or not he's speculating
21 about all this testimony. I think it's absolutely
22 relevant because it goes to whether or not his testimony
23 is reliable, accurate, and accurately depicts what the
24 evidence is in this case.

25 STAFF COUNSEL BULLOCK: Dr. Wolff, the testimony

1 very clearly states that the reason is not known. We're
2 not making any suggestion that we do know the reason.
3 We're simply stating that it's not there.

4 VICE CHAIRPERSON WOLFF: Just a moment.

5 The sentence in question is? Refer me back to
6 it. Mr. Kelly, you were inquiring about which sentence?

7 MR. KELLY: It is the third to the last in that
8 top paragraph on page 3. It reads, "It may have been
9 damaged or simply deteriorated."

10 VICE CHAIRPERSON WOLFF: It's not on the screen
11 before me.

12 Here we go. We're scrolling to it. That's why I
13 couldn't find it.

14 Third to the last sentence, "It may have been
15 damaged or deteriorated"?

16 MR. KELLY: That's correct.

17 VICE CHAIRPERSON WOLFF: "We do not" -- or "we do
18 know" --

19 SENIOR STAFF COUNSEL KATZ: It says, "The reason
20 is unknown" before that.

21 VICE CHAIRPERSON WOLFF: Well, the statement is
22 clearly a statement of possibility. It is a speculative
23 statement. I'm not sure what your objection to it is
24 though. Your objection is that -- is it only -- the
25 statements here should only be based on the personal

1 knowledge of the witness?

2 MR. KELLY: Well, Dr. Wolff, that's what he
3 testified to on the first page. And then when I read his
4 testimony, he is testifying under oath that all this
5 evidence in his testimony is based upon his personal
6 knowledge.

7 VICE CHAIRPERSON WOLFF: And how do you define
8 personal knowledge?

9 MR. KELLY: Well, it at least has to be that you
10 are aware that that is the case. If he testifies that
11 it's based upon his personal knowledge and then says he
12 doesn't know the reason but it may be some other reason,
13 that's not based upon personal knowledge. I mean by
14 definition it's not based upon personal knowledge.

15 VICE CHAIRPERSON WOLFF: Well, you're speaking to
16 personal experience. You know, personal experience he
17 can't -- you know, can't speak to something not being
18 there unless he has some personal experience with it. But
19 his personal knowledge is a much more fuzzy concept, and
20 I'm not clear quite where you're going with this.

21 I think you're attempting to make the point that
22 there are speculative comments in Mr. Lindsay's testimony,
23 and I'm willing to accept that point.

24 MR. KELLY: Thank you, Dr. Wolff. That's fine.

25 VICE CHAIRPERSON WOLFF: That's fine.

1 MR. KELLY: Okay. Then go down to the second
2 full paragraph on that same page, the last sentence.

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
4 Oh, okay.

5 MR. KELLY: You say the last definitive proof is
6 13 years prior to the inspection that there was a
7 measuring device?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
9 Yes, I see where you're talking about.

10 MR. KELLY: Is that simply the last time that the
11 Division was able to verify that there was a device there?

12 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
13 What I base that statement on was a review of the
14 file where there was the photograph of the device that was
15 sent to the Division right about the time of licensing.
16 That's what that's based on.

17 MR. KELLY: Okay. But you don't know whether or
18 not in 2001 there was a measuring device there?

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
20 In 2001?

21 MR. KELLY: Correct.

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
23 No.

24 MR. KELLY: You don't know whether in 2002 or
25 2003 whether there was a measuring device there? You

1 can't definitively say that there was not, correct?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 I know that we have evidence of one in 1992 and
4 then I went out in 2005. Somewhere between those two
5 times it disappeared.

6 MR. KELLY: Could have been January of '05,
7 couldn't it have been?

8 STAFF COUNSEL BULLOCK: Objection. Mr. Kelly is
9 now asking for speculation from the witness.

10 VICE CHAIRPERSON WOLFF: Very well made.

11 Mr. Kelly, can we return to the sentence you're
12 asking about. I want to be clear.

13 Scroll the screen to where we were.

14 Was it the last sentence?

15 MR. KELLY: It is -- it's down -- it is the last
16 sentence in the last full paragraph on the screen there.
17 It begins "Therefore" -- now it's up -- it's the last --

18 VICE CHAIRPERSON WOLFF: "Therefore the last
19 definitive proof in Division records," dah, dah, dah, "is
20 that it's 13 years from my inspection"?

21 MR. KELLY: Right.

22 VICE CHAIRPERSON WOLFF: Well, now that sentence
23 is very clear. And I appreciate your point that there are
24 some speculative comments in the testimony from Mr.
25 Lindsay, and I've taken that under submission. I

1 understand that. But this sentence is a statement about,
2 you know, what is in the division records which Mr.
3 Lindsay does have personal experience with. So, you know,
4 I caution you as you proceed that you've made that point
5 and there's no need to continue to attempt to make that
6 point.

7 MR. KELLY: I appreciate that, Dr. Wolff, and
8 thank you. And the reason I ask that is because that is
9 apparently a consideration that went into the formulation
10 of the amount of the fine that they propose, was
11 consideration of all these factors. So I just want to be
12 clear that it's on the record that there's no evidence
13 that there was not a device in the years preceding the
14 inspection, that's all.

15 So I appreciate the admonition.

16 VICE CHAIRPERSON WOLFF: Accepted.

17 Continue.

18 MR. KELLY: I'd like to go down -- okay. Well,
19 let me -- if you'd go down a little on that same page, you
20 say, "The Vineyard Club apparently ignored the letter
21 dated March 18th." You don't know whether they ignored it
22 or just didn't get it, correct?

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

24 I asked Mr. Sagues if he was aware of the letter,
25 and he said no.

1 MR. KELLY: Okay. Mr. Lindsay, does the Vineyard
2 Club have a valid water right?

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
4 They have a water right license with the state,
5 yes.

6 MR. KELLY: Okay. Okay. Does every violation of
7 a condition in a water right license result in a trespass
8 against the state under Section -- Water Code Section
9 1052?

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
11 Well, we're going to some legal issues here.

12 STAFF COUNSEL BULLOCK: Objection. Yeah, I'm
13 going to object that he's asking for a legal conclusion.

14 VICE CHAIRPERSON WOLFF: Sustained.

15 MR. KELLY: Mr. Lindsay, who drafted the
16 Administrative Civil Liability complaint?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
18 I did.

19 MR. KELLY: And who made the determination to
20 actually draft the complaint?

21 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
22 Oh, my supervisor.

23 MR. KELLY: And when you drafted the complaint,
24 did you consider whether or not the violating a permit
25 term or condition -- or a term or condition of a license

1 was a trespass?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 Yes, I believed in this case it was.

4 MR. KELLY: Why did you believe in this case it
5 was?

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

7 Because the term says no water shall be diverted,
8 making it an illegal diversion -- an unauthorized
9 diversion

10 MR. KELLY: Okay. What makes in your opinion,
11 and in your position with the State Water Board, what
12 turns a condition in a license to something that would
13 rise to the level of a trespass against the state?

14 STAFF COUNSEL BULLOCK: I'm going to object here.
15 This is asking for a legal conclusion. If Mr. Kelly would
16 like to present legal --

17 VICE CHAIRPERSON WOLFF: Sustained.

18 Mr. Kelly, you may ask questions about this case
19 but not general questions about the law.

20 MR. KELLY: Mr. Lindsay, can you look at the
21 water right license at issue in this proceeding please.

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 Yes.

24 Let's see, I think we're looking at Water Right
25 7.

1 MR. KELLY: That's correct.

2 Where do the conditions begin in this water right
3 license?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Well, the terms and conditions really run
6 throughout the license.

7 MR. KELLY: Okay. Let's --

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 I mean they start right there, you know,
10 identifying the purpose of use, how much is diverted,
11 maximum rate of diversion, diversion points. And it goes
12 on to the second page where there's some additional terms
13 and conditions.

14 MR. KELLY: Okay. If I could just stop you there
15 for a second.

16 That first condition, the maximum rate of
17 diversion for off-stream storage should not exceed .25
18 cfs.

19 Correct.

20 MR. KELLY: If they're diverting more than that,
21 is that a trespass?

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 Yes.

24 MR. KELLY: Where's the language that would
25 solidify your opinion that that would be a trespass as

1 compared to other conditions?

2 STAFF COUNSEL BULLOCK: Objection. Again, Mr.
3 Kelly is asking for a legal analysis from a party that's
4 not an attorney.

5 VICE CHAIRPERSON WOLFF: Well, this is a bit more
6 difficult. The prosecution team has brought an action
7 which claims that a trespass occurred. I'm not sure who
8 in the prosecution team made that determination. You as
9 an attorney, Mr. Bullock?

10 STAFF COUNSEL BULLOCK: No, it was not me. But,
11 again, if we're going to discuss the legal -- you know,
12 what the statutes mean, I don't think that this is the
13 appropriate forum. We should be discussing it between the
14 attorneys.

15 VICE CHAIRPERSON WOLFF: Well, it's certainly
16 true that we should be considering evidence today. It's
17 an evidentiary record. It's not the proper forum to be
18 arguing legal matters. You know -- and I'm not certain
19 what this witness's opinion on this legal point -- you
20 know, what the relevance of that is.

21 So, Mr. Kelly, what is the relevance of Mr.
22 Lindsay's opinion? Suppose he were completely erroneous
23 with respect to the law and you were to show that through
24 cross-examination; what difference would that make?

25 MR. KELLY: If he's completely erroneous on the

1 law, then the ACL's baseless, then it has no basis in the
2 law.

3 VICE CHAIRPERSON WOLFF: That's not at all true.
4 I mean the law is the law regardless of the individual
5 people's opinions about them.

6 And we're going to have to make some
7 determinations about what we believe the law says, and I
8 as a hearing officer will have to make some recommendation
9 to the Board.

10 Mr. Lindsay's opinion is just a bit of evidence
11 in that. And I'm not clear what the relevance is of his
12 opinion about what constitutes a trespass.

13 MR. KELLY: Well, the relevance is -- permit
14 terms and conditions contain differing language, and
15 they're all worded different. And these witnesses
16 testified about the legal basis -- already on direct
17 testimony they've testified about the legal basis for this
18 administrative civil liability complaint being a trespass
19 against the State. And my client would like to know,
20 frankly, what differs -- we've already provided the
21 hearing team briefing, that we don't believe that the
22 State Water Board has jurisdiction based upon the
23 statutes, the regulations, State Water Board interpretive
24 guidance, court cases to issue an Administrative Civil
25 Liability complaint for violating a condition in a term or

1 a license. And the prosecution team has essentially said
2 that's a red herring. And I think it's a real issue and
3 its a very serious issue. And, you know --

4 VICE CHAIRPERSON WOLFF: I've taken that issue
5 under submission. But in this case, what is the relevance
6 of the witness's testimony? For example, you asked him if
7 a particular condition, the maximum rate of diversion to
8 off-stream source shall not exceed .25 cubic foot per
9 second, you asked him does violating that constitute a
10 trespass in his opinion. That's a specific question where
11 his opinion may be relevant. If you have other specific
12 questions like that, that's fine.

13 But I will sustain the objection that Mr.
14 Lindsay's legal knowledge or opinions on the general
15 legality of these issues is not relevant.

16 MR. KELLY: Okay. Thank you, Dr. Wolff.

17 VICE CHAIRPERSON WOLFF: Just a moment please.
18 Step off the record.

19 (Thereupon a discussion occurred off the record.)

20 VICE CHAIRPERSON WOLFF: Back on the record
21 please.

22 Continue.

23 MR. KELLY: Thank you, Dr. Wolff.

24 Mr. Lindsay, maybe we could just focus on the
25 condition that is at issue in this proceeding.

1 Can you identify that condition in the license
2 for me please?

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

4 Sure. It's on the second page of Water Right 7.

5 And it's the -- when you look at that page, it's
6 the last paragraph. It's kind of in the middle of it.

7 It says, "No water shall be diverted under this
8 license unless licensee has installed a device in Oak Flat
9 Creek, satisfactory to the State Water Resources Control
10 Board, which is capable of measuring the flows required by
11 the conditions of this license. Said measuring device
12 shall be properly maintained."

13 MR. KELLY: Okay. And can you tell me, because
14 you're the one that drafted the complaint, what the
15 language is in that specific condition that makes a
16 violation of that condition a trespass?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

18 Because it starts out -- I think I understood
19 your question -- no water shall be diverted under this
20 license. It starts off with that, and it's clear to me.

21 MR. KELLY: Okay. Thank you, Mr. Lindsay.

22 And when a water right license is prepared, could
23 you just very briefly perhaps tell me the process by which
24 someone files for a water right and then how it ends up
25 becoming a license, very briefly.

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 Sure, sure.

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

4 File an application. It's noticed -- goes out to
5 public notice. There may be -- there's a period of time
6 where protests may be gathered. Those have to be
7 resolved. Have to make some legal determinations, which
8 please don't -- you know, water's available, no harm to
9 the environment, those sorts of things obviously. And
10 then a permit is issued.

11 And then the permit will contain of course some
12 standard terms, which all of them have, and then any terms
13 that may have become maybe necessary, to resolve protests,
14 for example. And those will end up in the permit.

15 Then you go through a period of time where the
16 permittee demonstrates how much water they actually are
17 going to apply to beneficial use. And then we do an
18 inspection of the project. And from that, after seeing
19 how much water is used, then the license is prepared.

20 MR. KELLY: Thank you.

21 And then if a water right application is
22 protested, can the Division of Water Rights approve that
23 application or does it need to go before the Board and go
24 to a hearing?

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Well, if the protests are resolved outside --
2 they can be resolved outside of a hearing.

3 MR. KELLY: If they're not resolved, there's a
4 good -- would it go to -- and I guess -- in the context of
5 this water right, this water right actually went before
6 the Board and there was a decision that was issued with
7 regard to this water right, correct?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
9 Correct.

10 MR. KELLY: And so the conditions that end up in
11 the permit and eventually make it to the license are
12 imposed by the Board through that hearing process when
13 they issue their water right order or decision on the
14 application, correct?

15 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
16 If there was a hearing to resolve the protest.

17 MR. KELLY: Right. But in this case, with this
18 water right, there was a hearing and a decision of the
19 Board issued with regard to this water right?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
21 Yes.

22 MR. KELLY: Okay. And in your experience, can
23 staff -- well, who prepares the actual paper permit and
24 paper license? I mean physically just --

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Physically does the writing? Staff.

2 MR. KELLY: Staff does it.

3 Okay. When staff prepares the permit or license,
4 can they materially change any of the conditions or terms
5 that the Board imposes in their water right decision with
6 regard to any of the elements of the right?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 Any of the elements of the right? I --

9 STAFF COUNSEL BULLOCK: I'm starting to feel like
10 I need to object to the relevance of this. I mean the
11 license says what it says. And that's what -- regardless
12 of how it ended up that way, I --

13 VICE CHAIRPERSON WOLFF: Mr. Kelly, again where
14 are you going with this?

15 MR. KELLY: Okay. Your Honor, can you just bear
16 with me for one minute.

17 Mr. Lindsay, are you able to answer that question
18 or --

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

20 I want to give you a fair answer here.

21 MR. KELLY: Sure.

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 The license and the permit should reflect what's
24 in the decision.

25 MR. KELLY: I'll take -- thank you. That's fine.

1 Thank you, Dr. Wolff.

2 Can you go to the water right decision that was
3 issued. I believe it's WR 20.

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
5 Okay.

6 MR. KELLY: Where in the decision or in the order
7 part of the decision are the conditions imposed?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
9 Well, let's see. For the term at issue here, it
10 looks to me like Water Right 20, page 10, at the top,
11 paragraph 6. And it says -- it's continuing from the
12 previous page, which says "Order." So this is the order
13 by the Board. And that paragraph 6 is part of that.

14 MR. KELLY: Okay. Can you read on -- well, on
15 page 9 at Condition No. 5, does that condition contain the
16 language "no water shall be diverted"?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
18 Number 5?

19 MR. KELLY: Yeah.

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
21 No.

22 MR. KELLY: Had that condition appeared in the
23 water right license as expressly set forth by the Board in
24 its decision, had that appeared in there, would this
25 be -- would this proceeding have -- would this have gone

1 and an ACL issued?

2 STAFF COUNSEL BULLOCK: I need to object again.
3 This order was for the permit, and that language was not
4 in the permit. It was added when the license was issued.
5 And so this is not relevant to the language in the
6 license. This is about the language in the permit.

7 MR. KELLY: Dr. Wolff, if I could respond. I
8 disagree completely. Conditions -- the Water Board issues
9 a decision, and these conditions follow the permit into
10 the license.

11 VICE CHAIRPERSON WOLFF: Mr. Kelly, you're
12 attempting to use the cross-examination to make a series
13 of legal arguments. You're entitled to make those legal
14 arguments. But I prefer you use the cross-examination to
15 obtain the factual information you need to make the
16 arguments. Then make the arguments later.

17 I will allow you to continue your line of
18 questioning. But restrict your questions to those pieces
19 of information you need to then make your argument later.

20 SENIOR STAFF COUNSEL KATZ: May I add something
21 please?

22 VICE CHAIRPERSON WOLFF: Yes, you may.

23 SENIOR STAFF COUNSEL KATZ: Just wanted to note
24 that the time for expiring -- the time for challenging
25 what was in a permit or a license has expired.

1 MR. KELLY: I understand that, Ms. Katz, and I
2 can appreciate that. I'm just trying to establish whether
3 or not, and on a factual basis, the process by which this
4 water right went to license. And I just want to be sure
5 that the record's clear, because the operative language
6 that my clients are now being threatened with a \$30,000
7 fine over does not appear in the water right order, in the
8 original decision. And I can appreciate that --

9 VICE CHAIRPERSON WOLFF: I understand your
10 concern, Mr. Kelly.

11 Mr. Lindsay, were you involved in the issuance of
12 the license originally, 20 years ago?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 No.

15 VICE CHAIRPERSON WOLFF: Were you involved in the
16 water rights issue, the decision?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

18 The decision? No. No, Dr. Wolff.

19 VICE CHAIRPERSON WOLFF: All right. So you
20 should restrict your questions to -- Mr. Kelly, your
21 question to those matters which this witness is qualified
22 to comment upon and can provide evidence upon. I
23 understand you want to make argument, and you're welcome
24 to make that argument at the appropriate time. But this
25 witness has no direct knowledge of those matters.

1 MR. KELLY: I appreciate that, Dr. Wolff. And my
2 concern is that the prosecution team has been allowed to
3 go back into the eighties and the nineties with regard to
4 the original inspections of the permit and the license and
5 they provided testimony about missing devices in the
6 eighties and the early nineties. And this is all in that
7 same timeframe. So I was just going back in the same
8 timeframe to establish a complete record.

9 I appreciate the admonition. I do think it's
10 relevant. But I will move on if that's what the hearing
11 team would like me to do.

12 VICE CHAIRPERSON WOLFF: It may very well be
13 relevant, but that relevance may occur best in another
14 place in the process. If this witness has nothing to
15 offer with respect to evidence on that question, then you
16 should move on. If you believe this witness has evidence
17 that is specific to this question, you're entitled to
18 continue to ask.

19 MR. KELLY: Mr. Lindsay, in your testimony at the
20 bottom of page 3 --

21 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
22 Okay.

23 MR. KELLY: -- you say that there's no evidence
24 that the Vineyard Club will comply without future
25 enforcement.

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
2 Let's make sure we're looking in the right place
3 here.

4 I see where it says, "Finally, history shows no
5 evidence that the Vineyard Club will diligently comply
6 with its water right terms and conditions in the future
7 without compulsion through formal enforcement action."

8 MR. KELLY: Right. Did the Vineyard Club request
9 a copy of the inspection report?

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
11 No.

12 MR. KELLY: They never requested a copy of the
13 inspection report?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
15 Not my inspection report.

16 MR. KELLY: What did the Vineyard Club --

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
18 Oh, I'm sorry, I'm sorry. Mr. Sandell did. Mr.
19 Sandell did after the ACL was issued. He requested a copy
20 of the inspection report. And I gave him one.

21 MR. KELLY: So when you were there conducting
22 your inspection, it's your testimony that Mr. Sandell did
23 not request that you send him a copy of the report you
24 prepared pursuant to your inspection?

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Mr. Sagues at the time of the inspection --

2 MR. KELLY: Mr. --

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

4 No, actually I was telling him what we would
5 send. I said we would send him the results of the
6 inspection, the results of the inspection. I never
7 offered to send the report.

8 MR. KELLY: Did you ever send him the results of
9 the inspection?

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

11 No, we did not. Well, yes, we did. We sent him
12 the Administrative Civil Liability.

13 MR. KELLY: Is Administrative Civil Liability the
14 result of an inspection?

15 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

16 Yes, sir, it is. And that's what I told him. I
17 said the next correspondence he may get from us may be the
18 Administrative Civil Liability. And I may talk about
19 that, is at the end of the inspection --

20 MR. KELLY: Your Honor --

21 VICE CHAIRPERSON WOLFF: I'm sorry. Mr. Lindsay,
22 you're here at this moment to respond to questions.

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

24 Yes, sir.

25 VICE CHAIRPERSON WOLFF: Thank you.

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 Well, but that's what I'm doing.

3 VICE CHAIRPERSON WOLFF: You feel that you didn't
4 adequately answer the previous question?

5 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

6 Let me hear the question again please.

7 VICE CHAIRPERSON WOLFF: That would be helpful.

8 Can you simply repeat the last question?

9 MR. KELLY: Can it be read back?

10 (Thereupon the court reporter read
11 back the record.)

12 VICE CHAIRPERSON WOLFF: Is the Administrative
13 Civil Liability -- is an Administrative Civil Liability
14 the result of an inspection?

15 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

16 Yes.

17 MR. KELLY: That's the result? When you do an
18 inspection, the result of the inspection is Administrative
19 Civil Liability?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

21 That's one of them.

22 MR. KELLY: What are other results of
23 inspections?

24 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

25 A warning letter.

1 MR. KELLY: A report is not a result -- a report
2 of compliance and inspection is not a result of an
3 inspection?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
5 Dr. Wolff, it might be helpful if I --

6 VICE CHAIRPERSON WOLFF: Is that a question or a
7 statement?

8 MR. KELLY: I'm asking --

9 VICE CHAIRPERSON WOLFF: Are you asking him a
10 question? Then state it in the form of a question.

11 MR. KELLY: Thank you, Dr. Wolff.

12 Is a report of compliance and inspection the
13 result of an inspection?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

15 Me preparing the report is a result of the
16 inspection.

17 MR. KELLY: So when your contact report at
18 VC-7 --

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

20 Okay. VC.

21 Oh, I'm sorry. I don't have the Vineyard Club
22 exhibits in front of me.

23 MR. KELLY: It may actually be a --

24 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

25 I think it's in probably mine too.

1 MR. KELLY: I think it's WR-9 possibly.

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 I think you're right.

4 This is the contact report that I wrote on August
5 16th?

6 MR. KELLY: That's correct.

7 Your first sentence there, what were you
8 referring to?

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

10 Here's what I wanted to talk about. Here's what
11 I was referring to. At the end of the inspection, I sat
12 Mr. Sagues in our truck and I told him that the Division
13 would send him the results of the inspection. I told him
14 the results may be -- the next correspondence he gets from
15 the Division may be an Administrative Civil Liability. It
16 also may be an inspection letter with a warning.
17 Generally speaking, we do not send out the report. It's a
18 public document. It's in the files. They can have it if
19 they want it. But in my experience, we don't generally
20 send that out. It's available. Mr. Sandell asked for it.
21 I gave it to him.

22 MR. KELLY: After the ACL was issued you gave it
23 to him; is that correct?

24 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

25 Yes.

1 MR. KELLY: Okay. And if I can direct you, if
2 you have it, to VC-8.

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
4 Okay.

5 Oh, Vineyard Club 8. I'm sorry.

6 MR. KELLY: That's correct.

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
8 I think I may have that.

9 MR. KELLY: And actually maybe if we can start
10 with -- no, VC-8 is fine.

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
12 Okay. I have a copy of that in front of me,
13 besides on the screen.

14 MR. KELLY: And that was in -- when was that
15 E-mail sent to you?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
17 Looks to me like -- let me make sure. Looks like
18 March 29th, 2006, to me.

19 MR. KELLY: Roughly late March of '06?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
21 Yes.

22 MR. KELLY: And in that E-mail, which was -- and
23 we'll get to this in a second -- that was a follow-up
24 E-mail from them telling you that they're not diverting
25 water. And doesn't the Vineyard Club tell you there that

1 when they have plans to divert they're going to have the
2 engineered plan, in that E-mail in March of '06?

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

4 I'm not sure that was a follow-up from them
5 telling me they weren't going to divert water. I don't
6 see that there.

7 MR. KELLY: Okay.

8 STAFF COUNSEL BULLOCK: I'd like to object here
9 and ask what the relevance is here. We're talking about
10 an ACL, which is for past violations. This 2006 is well
11 past when the violation occurred.

12 VICE CHAIRPERSON WOLFF: Yes, Mr. Kelly, what is
13 the relevance?

14 MR. KELLY: Dr. Wolff, this is a hearing on a
15 cease and desist order and on an Administrative Civil
16 Liability complaint. And these witnesses have testified
17 that there is a threat of a violation of a term in a
18 license, and they have testified that history shows no
19 evidence that they're going to comply with the terms of
20 their license. And this evidence absolutely shows that
21 the Vineyard Club from the date of the inspection has
22 attempted to get information from the people at the
23 Division of Water Rights, have kept them informed, that
24 they're not ever going to have a plan. And I can't --
25 that's not relevant?

1 VICE CHAIRPERSON WOLFF: You've made your point.

2 But what was your question again then to Mr. Lindsay?

3 MR. KELLY: My point --

4 VICE CHAIRPERSON WOLFF: That's a point that can
5 be made without badgering the witness. I'm beginning to
6 be a little concerned about where you're going with this.
7 So, again, if you can restrict your questions to factual
8 matters known to the witness, that's fine.

9 MR. KELLY: Okay.

10 VICE CHAIRPERSON WOLFF: Certainly your point is
11 relevant. But making the argument during
12 cross-examination is inappropriate. This is the
13 difficulty here I'm finding.

14 MR. KELLY: You testified that there's no
15 evidence that the Vineyard Club's going to diligently
16 comply with the terms of their license without an
17 enforcement action, right?

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

19 That's not exactly what I said. Why don't I read
20 it.

21 "Finally, history shows no evidence that the
22 Vineyard Club will diligently comply with its water right
23 terms and conditions in the future without compulsion
24 through formal enforcement action." This is based on my
25 observations, looking at the file, where we showed up --

1 Division showed up for a permit -- I'm sorry -- a license
2 inspection and the file shows there was no measuring
3 device in place.

4 At sometime then, years later, I go out. There's
5 no measuring device in place. I saw that. Two years
6 pass, there's no measuring device in place.

7 Finally, history shows no evidence that the
8 Vineyard Club will diligently comply. That's what I'm
9 basing that on.

10 MR. KELLY: And my question, beginning with the
11 contact report, was whether or not --

12 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
13 On Vineyard Club 8?

14 MR. KELLY: On Vineyard Club 8 -- on 7, was
15 whether -- we already talked about this and it was up on
16 the screen. And I asked what the results of the
17 inspection meant, and that -- Dr. Wolff, goes directly as
18 to whether or not there's no evidence of the Vineyard Club
19 attempting to comply with the conditions and terms in its
20 license for the purposes of whether there's a threat of a
21 violation for the cease and desist order.

22 VICE CHAIRPERSON WOLFF: Mr. Kelly, you can make
23 that argument when you present your case in chief. You
24 don't need to ask this witness anything as far as I can
25 tell in order to make that point. So you're in

1 cross-examination. If you have something to ask of the
2 witness, that's fine. If you want to make a legal
3 argument or present evidence in support of a contrary
4 assertion to that of the prosecution, you should do that
5 during the presentation of your case in chief.

6 MR. KELLY: Mr. Lindsay, did anyone from the
7 Vineyard Club request at the inspection the results of
8 your inspection?

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
10 I told them we'd send the results.

11 MR. KELLY: I --

12 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
13 You know, you're asking me to remember exactly.

14 Let me talk here. You're asking me to remember
15 exactly what I said several years ago. What I know,
16 because as we -- as I was setting him down for this
17 conversation in the truck, I'd been thinking about it for
18 several minutes before we got there, I wanted to make it
19 very clear that they were illegally diverting right then,
20 that there was no measuring device in place, and that they
21 were potentially -- depending on management decisions,
22 potentially going to receive an Administrative Civil
23 Liability, and that that may be the next correspondence
24 that they got from us.

25 Now, I think, to my memory -- best of my memory,

1 Mr. Sagues was really on the receiving end of me talking
2 to him, more so than asking me for anything. I did tell
3 him he'd get the results of the inspection.

4 MR. KELLY: Did you get an E-mail from the
5 Vineyard Club in March of 2006 informing you that when
6 they plan to divert they would have an engineered plan?

7 STAFF COUNSEL BULLOCK: Asked and answered.

8 VICE CHAIRPERSON WOLFF: I believe it was asked
9 and answered, was it not?

10 MR. KELLY: I don't think it was answered. There
11 was objections lodged. And then I was admonished to talk
12 about facts that he knows. So I just want to establish
13 that he received the E-mail.

14 VICE CHAIRPERSON WOLFF: Please repeat the
15 question then, and let's answer it again.

16 MR. KELLY: Did you receive an E-mail in March of
17 2006 where the Vineyard Club informed you that before they
18 diverted you would get the engineered plan -- or an
19 engineered plan?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

21 We're talking about Vineyard Club 8?

22 MR. KELLY: Vineyard Club 8.

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

24 This is not one of my -- I don't remember this
25 conversation. Everything I know about this conversation

1 is right here on the piece of paper. That's all I
2 remember. And it says what it says.

3 VICE CHAIRPERSON WOLFF: The question is whether
4 you received that E-mail. Isn't that correct?

5 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
6 Yes, I did.

7 VICE CHAIRPERSON WOLFF: Thank you.

8 MR. KELLY: Vineyard Club 9.

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
10 I'm sorry. You're going to have to help me out
11 with that one.

12 Yes.

13 MR. KELLY: Did you receive that E-mail where the
14 Vineyard Club told you they didn't hook up the diversion
15 pipeline, then they just wanted to let you know that they
16 weren't diverting in '06?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
18 Yes, I did.

19 MR. KELLY: Okay. If I can, just so I
20 understand. We talked about the results of an inspection,
21 sometimes it's a warning letter, sometimes it's an
22 Administrative Civil Liability complaint.

23 Are there any results of an inspection if there's
24 no violation?

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Yes -- okay, I see -- let me clarify that for you
2 then. You're going to -- the party, you know, whether
3 it's a club or an individual, they're going to get some
4 correspondence from the Division that's appropriate for
5 the situation. If there's a violation, it may be informed
6 as we've talked about, informed of the violation through
7 the Administrative Civil Liability.

8 Otherwise, it's going to be a letter that
9 discusses problems we found -- gosh, it could be many
10 different things. Maybe something needs clarification, we
11 need something back from them. On some rare occasions it
12 will be a letter that says, "Thank you. We found nothing
13 wrong."

14 MR. KELLY: Okay. So they got -- so if they were
15 waiting for the results of the inspection, the fact that
16 it's been delayed two years is because they didn't get the
17 results, whatever they were, until just this past
18 December, right?

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
20 That what was delayed?

21 MR. KELLY: You --

22 VICE CHAIRPERSON WOLFF: Mr. Kelly, is this a
23 question?

24 MR. KELLY: Yes, at the end of that I asked if
25 that was correct.

1 VICE CHAIRPERSON WOLFF: Well, put the question
2 up front. It might help.

3 MR. KELLY: Okay. Mr. Lindsay, you're testifying
4 that there's a threat of a violation because they haven't
5 complied in the two years since the inspection; is that
6 correct?

7 STAFF COUNSEL BULLOCK: That mischaracterizes his
8 testimony.

9 VICE CHAIRPERSON WOLFF: Concur.

10 MR. KELLY: Okay. Mr. Lindsay, can you tell me
11 what your testimony is with regard to how the threat of
12 violation exists?

13 STAFF COUNSEL BULLOCK: Been asked and answered.
14 He stated because of the past history.

15 VICE CHAIRPERSON WOLFF: I'm sorry. State your
16 point again, Mr. Bullock.

17 STAFF COUNSEL BULLOCK: It's been asked and
18 answered. He answered that the continued threat is
19 because of their past history.

20 VICE CHAIRPERSON WOLFF: I concur.

21 MR. KELLY: Mr. Lindsay, did you testify that one
22 of the reasons that you believe a threat exists is because
23 of the delay between the inspection and when they've
24 attempted to come into compliance?

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 I did testify to that?

2 MR. KELLY: And is it at all possible that the
3 reason for that delay is they didn't get the results of
4 the inspection until December of 2006?

5 STAFF COUNSEL BULLOCK: Objection.

6 MR. KELLY: I asked if it was possible.

7 STAFF COUNSEL BULLOCK: He's asking for
8 speculation.

9 VICE CHAIRPERSON WOLFF: You're asking for
10 speculation. You are. If you wish to rephrase your
11 question where it does not require speculation, you're
12 welcome to. But you're asking for speculation.

13 MR. KELLY: All right, Mr. Lindsay. I'd like to
14 ask you a little bit about your testimony about the cease
15 and desist order.

16 In your testimony you suggest that this device
17 needs to be made of steel or some other durable material;
18 is that correct?

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
20 Durable material, steel, yeah, sure.

21 MR. KELLY: It doesn't necessarily have to be
22 made of steel then?

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
24 No, just durable.

25 MR. KELLY: Do people throughout California use

1 wood flashboards for diversion structures made of wood?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 Wood flashboards?

4 MR. KELLY: Flashboards or wood diversion
5 structures.

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

7 Wood flashboards and diversion structures are
8 used throughout California.

9 MR. KELLY: Okay. Is there any particular reason
10 why it would be inappropriate for the Vineyard Club to use
11 wood flashboards if it's accepted other places in
12 California?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 For a measuring device?

15 MR. KELLY: Yes.

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 It's an apple and an orange. A flashboard is not
18 a measuring device.

19 MR. KELLY: What is a flashboard?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

21 It's usually put into slots in a dam. For
22 example -- it may be used to raise a dam, fill a slot in a
23 dam. It may be used to create a dam structure, a
24 diversion structure.

25 MR. KELLY: I'm sorry.

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 As a diversion structure.

3 MR. KELLY: As a diversion structure?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Uh-hmm.

6 MR. KELLY: Okay. Can you look at WR-14.

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

8 Sure. Okay.

9 MR. KELLY: In that top picture --

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

11 Yes.

12 MR. KELLY: -- is that a wooden device diversion
13 structure that's set into slots in concrete, kind of what
14 you just described? Or how would that -- I'll strike that
15 question.

16 How does that differ from a flashboard?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

18 Okay. I'm going to make the assumption, which I
19 think both of us are, that we're looking at -- that this
20 diversion structure is some boards set parallel to each
21 other in some slots. I can't really tell from that
22 picture. You know, there's a better -- of course this a
23 scan, but I think that's probably what's going on here.

24 MR. KELLY: Maybe if we looked at WR-16.

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Okay. I mean I'm trying to help you out there.

2 I think that's what it is.

3 MR. KELLY: I appreciate it. Thank you.

4 What is that a picture of?

5 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

6 You know, it's kind of hard for me to tell.

7 Looks like plywood to me.

8 MR. KELLY: I guess maybe more basic than that.

9 What are we looking at? What is that?

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

11 The measuring device that was put in place in

12 about the time of licensing.

13 MR. KELLY: And apparently -- do you know whether

14 or not this was approved by the Board in 1991 as an

15 appropriate measuring device?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 I can't tell really.

18 MR. KELLY: You testified earlier that there was

19 an inspection when it was going to go to license and that

20 there was no measuring device in place in around early

21 1990s; is that correct?

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 At the -- when the inspector showed up to do the

24 initial license inspection there was no measuring device

25 in place.

1 MR. KELLY: And then did you testify that they
2 ended up putting in a measuring device?

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
4 Yes, that's what I get from the file. Yes, I
5 testified to that.

6 MR. KELLY: Okay. And why did you include this
7 picture in the exhibits that the prosecution team, if you
8 included it -- I don't know that you included it. But why
9 is this -- if you know, why is this picture included in
10 the exhibits?

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
12 To demonstrate that there appears to have been a
13 measuring device in place at approximately -- you know,
14 it's a memo. The photo's not dated, but the memo's dated
15 at the upper right-hand corner, January 14, '92, you know,
16 about the time of -- just before the license was issued.
17 So I'm trying to show that there was some device at that
18 time.

19 MR. KELLY: Okay. And was apparently -- well, I
20 don't want you to speculate.

21 Do you have any reason to believe that that was
22 not acceptable to the State Water Resources Control Board
23 as an appropriate measuring device?

24 STAFF COUNSEL BULLOCK: It's vague. I'd like to
25 ask Mr. Kelly to clarify whether he means whether the

1 witness believes that at that time the Water Board felt
2 that it was appropriate or now. If he could just clarify
3 the timing of his question.

4 MR. KELLY: Okay. Mr. Lindsay, do you have any
5 reason to believe in 1992, when this report was apparently
6 prepared, that the State Water Board did not feel that
7 that was an acceptable measuring device?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 I'm sorry. There's a couple negatives in your
10 question. I really want to try to answer --

11 MR. KELLY: I'm not trying -- it's not a trick
12 question. I just want to know -- I mean do you have any
13 reason to believe in 1992 that would not have been
14 acceptable to comply with the license terms?

15 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

16 Not based on what I see in the file.

17 MR. KELLY: Thank you.

18 And if when you had gone out to inspect the
19 diversion in '05 -- in May of '05, if that device was
20 still in place, would that have been an acceptable
21 measuring device when you went out and completed your
22 inspection? That's all.

23 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

24 If that very device was there and it appeared to
25 me at the time -- you know, I'd look at it, if it was

1 anchored and in place and, you know, substantially looking
2 like the one here in the photograph, yes.

3 MR. KELLY: Okay. Fair enough.

4 Is there any reason why when the Vineyard Club
5 was in contact with you and possibly other people in the
6 Division, if you know about any of those contacts, that
7 you just didn't supply the Vineyard Club with the device
8 that was previously installed, which may or may not have
9 complied with the license term, is there any reason why
10 you didn't give them that copy and say, "Here's the device
11 you guys had installed"?

12 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

13 You know, I've been thinking hard about this and
14 trying to search my memory. And I want to be careful not
15 to testify to anything I'm not sure of, because I remember
16 thinking about this photograph. I think I made an attempt
17 to fax it to them. But of course the picture didn't come
18 out very well. So that's the most I remember of that.

19 And I'm sorry, I just rambled a little bit. I
20 probably didn't answer your question, and I want to try.
21 So give me one -- hit me again if you want to with the
22 question.

23 MR. KELLY: Well, I mean I'm just, you know --
24 let me back up.

25 Is the goal of these compliance inspections to

1 bring people into compliance rather than bring
2 administrative enforcement actions against people?

3 STAFF COUNSEL BULLOCK: That's outside of the
4 range of the knowledge and the expertise of this witness.

5 VICE CHAIRPERSON WOLFF: Indeed it is.

6 MR. KELLY: Why do you do compliance inspections?

7 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
8 To make sure that environmental law is complied
9 with throughout California; specifically water rights of
10 course.

11 MR. KELLY: Have you ever been involved in
12 an enforce -- have you ever been -- as the result of an
13 inspection, have you ever attempted to help somebody come
14 into compliance with any condition or term in their
15 license?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
17 Oh, yes.

18 MR. KELLY: And my question is: As a result of
19 your inspection, is there any reason why you just didn't
20 provide them with a copy of that so they could reproduce
21 that device and install it in the creek?

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
23 I'm hesitating because I'm not sure I didn't
24 attempt to fax that to them. I just don't remember. I
25 agree, it would have been good to give it to them.

1 MR. KELLY: Okay. Thank you. That's fair
2 enough.

3 I want to talk a little bit about the harm that
4 you testified to with regard to this diversion.

5 What is the -- I understand what the prosecution
6 team alleges is the legal basis for the violation.

7 VICE CHAIRPERSON WOLFF: Excuse me. I'm going to
8 interrupt briefly.

9 Mr. Lindsay, do you need a break?

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

11 No, I'm fine.

12 VICE CHAIRPERSON WOLFF: All right. I just
13 wanted to check. Go ahead, please.

14 MR. KELLY: And I'll wrap it up quick here.

15 VICE CHAIRPERSON WOLFF: No, that's fine.

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 I think I can last that long.

18 MR. KELLY: I said I understand what you contend
19 is the legal basis, and we disagree on that and that's
20 fine.

21 The factual basis for the Administrative Civil
22 Liability complaint is not having a measuring device in
23 place; is that correct?

24 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

25 Yes.

1 MR. KELLY: And that picture there differs from
2 the pictures that you took how? With regard to the
3 diversion -- let me ask you this: With regard to the
4 diversion, what makes that structure different than the
5 one that you took a picture of?

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
7 Oh, on my inspection?

8 MR. KELLY: Yes.

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
10 That one appears to me from the photograph to
11 have some sort of a slot that measures the flow through
12 it.

13 MR. KELLY: That's consistent with -- if you page
14 up on that, if you scroll up -- that's consistent with the
15 diagram on the bottom of the page?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
17 Yes.

18 MR. KELLY: And that's the difference?

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
20 Yes.

21 MR. KELLY: So the violation is not having the
22 bypass hole in the board, correct?

23 STAFF COUNSEL BULLOCK: That mischaracterizes his
24 testimony. It's a combination. As was stated in our
25 testimony, it's not having the measuring device and

1 diverting water. That was testified to.

2 VICE CHAIRPERSON WOLFF: I think that is correct.
3 Maybe you want to rephrase the question. It's difficult,
4 I know. Take your time.

5 MR. KELLY: You did an approximate -- is it
6 correct that you did an approximate measure of the bypass
7 flows when you were there?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
9 Yes, I did.

10 MR. KELLY: And perhaps without getting into the
11 details of the way that everything was measured, did you
12 generally find that they were in compliance with their
13 bypass flow requirements?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
15 No. And I'll help you out here. I really made
16 no determination.

17 MR. KELLY: Okay. So you're not testifying and
18 you're not alleging that they were violating bypass flow
19 requirements?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
21 No, I'm not.

22 MR. KELLY: Had they had this device in place and
23 hooked up, would they still be diverting water? I'm just
24 trying to find -- and I don't -- again, this isn't a trick
25 question. I'm just trying to figure out --

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 Yes, yes. From what I understand of this device,
3 it appears they would be diverting water, yeah.

4 MR. KELLY: And perhaps if I could just maybe set
5 this question up. You went out and you measured
6 approximately .13 cfs of diversion through the pipe into
7 the lake?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 Yes.

10 MR. KELLY: Mr. Sagues helped you measure that --

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

12 Absolutely.

13 MR. KELLY: -- and he held the bucket?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

15 Yes.

16 MR. KELLY: And you measured approximately .13
17 cfs. There's a little bit of information there about
18 bypass flows.

19 My question is just simply that if that device
20 was up, could they have still diverted .13 cfs the same as
21 they were on the day you were there?

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 Yes, it's possible to divert .13 cfs and be in
24 compliance with a bypass.

25 MR. KELLY: Okay. And so I need to understand

1 what the alleged harmed is to steelhead. Because if
2 they're lawfully operating this diversion structure, is it
3 the prosecution team's position and is it your testimony
4 that the harm to the steelhead is caused by the .13 cfs
5 going into the Vineyard Lake?

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

7 You know, in my testimony the only place I
8 mentioned steelhead is when I quote the Board decision.

9 But to answer your question, if they're diverting
10 in accordance with their license, then -- based on the
11 Board decision, then there would be no harm to steelhead.
12 In other words, if they're following their license --

13 MR. KELLY: -- there would be no harm to
14 steelhead? That's generally -- right?

15 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

16 Yes.

17 MR. KELLY: Fish and Game might argue, right,
18 but, you know --

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

20 Again, you know, the decision led to the license
21 and -- it's all covered there.

22 MR. KELLY: Fair enough.

23 And no more water would be diverted either with
24 or without the measuring device? It's not a question of
25 whether they were meeting their bypass flows. It's

1 whether or not they had the hole in the board or some
2 other device that could measure the bypass flows; is that
3 correct?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 I'm really trying here, but I'm a little confused
6 here.

7 STAFF COUNSEL BULLOCK: That was a little vague.

8 MR. KELLY: Okay. Mr. Lindsay, let me maybe
9 simplify it. How would steelhead be affected differently
10 if the hole was in the board when you went there?

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

12 Oh, on the day I was there?

13 MR. KELLY: Yes.

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

15 No difference on the day I was there.

16 MR. KELLY: No difference to steelhead. So --

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

18 Well, you know, of course I'm not a biologist,

19 Mr. Kelly. But, again, I would say there's no -- let me

20 put it this way: I would say there's no -- I'm

21 uncomfortable commenting on how healthy steelhead are.

22 But I see where you're going and I'm trying to answer your

23 question.

24 MR. KELLY: And -- go ahead.

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Whether the hole was there or not the day I was
2 there, the conditions were the same.

3 MR. KELLY: I understand that, and I don't -- all
4 I'm trying to establish is when the prosecution team took
5 into consideration the harm, one of the harm was harm to
6 steelhead, and I'm just trying to understand whether or
7 not the lack of the measuring device caused the harm -- in
8 other words, if they were exceeding their diversion rate,
9 and let's just say that they were diverting the full
10 amount of the stream because there was no measuring device
11 in place, would it be appropriate to say that exceeding
12 their diversion quantity was causing harm because they
13 weren't meeting bypass flows?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
15 Now, you've just set it up so there's no bypass
16 flow and they're diverting more than their quantity?

17 MR. KELLY: Yes.

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
19 So if there's no bypass flow, then there's no
20 water left in the stream below the dam.

21 MR. KELLY: Right.

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
23 Well, that might be a problem with fish. But,
24 again, I'm no biologist.

25 MR. KELLY: I appreciate that. But here it's not

1 the case that they're not meeting bypass flow
2 requirements. The bypass -- there's no allegation that
3 they're not meeting bypass flow requirements. So I'm
4 trying to understand where the harm to steelhead comes if
5 there's no less water in the stream --

6 VICE CHAIRPERSON WOLFF: Are you asking a
7 question?

8 MR. KELLY: I'll asking a question.

9 VICE CHAIRPERSON WOLFF: Thinking out loud is not
10 asking a question. So ask a question please.

11 MR. KELLY: I'm asking where the harm to
12 steelhead is.

13 VICE CHAIRPERSON WOLFF: That's fine. There's a
14 question.

15 STAFF COUNSEL BULLOCK: It's argumentative.

16 VICE CHAIRPERSON WOLFF: The question is
17 argumentative?

18 STAFF COUNSEL BULLOCK: I think so.

19 VICE CHAIRPERSON WOLFF: I do not concur.

20 STAFF COUNSEL BULLOCK: Okay. Thank you.

21 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
22 Okay. The question is, where is the harm to
23 steelhead?

24 MR. KELLY: Correct.

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Okay.

2 STAFF COUNSEL BULLOCK: I would object on --

3 VICE CHAIRPERSON WOLFF: Perhaps let's state the
4 question a little more clearly. I think you're asking
5 something like: Does the existence of -- does the lack of
6 existence of a measuring device cause harm to steelhead?
7 Or how does the lack of existence of a measuring device
8 cause harm to steelhead? Is that what you're trying to
9 get at?

10 MR. KELLY: Thank you, Dr. Wolff. And I thought
11 that that's kind of where we went with discussing the
12 board with the hole versus not the hole.

13 But how does the lack of a measuring device
14 contribute to harm to steelhead?

15 STAFF COUNSEL BULLOCK: I would object. As Mr.
16 Lindsay has stated, he's not a biologist. He's an
17 engineer. He doesn't know about harm to fish. He just
18 knows the terms of the permit -- the license. Pardon me.

19 MR. KELLY: It's in his testimony.

20 VICE CHAIRPERSON WOLFF: Just a moment. Just a
21 moment.

22 Let's go off the record.

23 (Thereupon a discussion occurred off the record.)

24 VICE CHAIRPERSON WOLFF: The objection is not
25 sustained. It's overruled.

1 Go ahead with the question. Let's repeat it if
2 you need it repeated, Mr. Lindsay.

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
4 Okay.

5 VICE CHAIRPERSON WOLFF: Do you need it repeated?

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
7 Please.

8 VICE CHAIRPERSON WOLFF: Can you restate it or do
9 we want to scroll back?

10 MR. KELLY: I'll take a shot it.

11 VICE CHAIRPERSON WOLFF: All right.

12 MR. KELLY: Subject to objection.

13 How does the lack of a measuring device -- or how
14 does a lack of a hole in the board contribute to harming
15 steelhead?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 Without a measuring device diversions could take
18 place such that .4 cfs may not be going down the stream.
19 In the decision that led to the permit, that decision
20 documents that studies were done and .4 cfs was the number
21 decided upon at that time. Anything less than that could
22 be a harm. Above that number's apparently okay. Without
23 the measuring device, we don't know if that's taking
24 place.

25 MR. KELLY: Okay. Let me make sure that I

1 understand what you're saying then.

2 The harm to the steelhead results from not
3 bypassing the required flows?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Yes.

6 MR. KELLY: And there's no allegation here that
7 they were not meeting their bypass flows?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 No, my attempt to measure that was inconclusive.

10 MR. KELLY: Okay. So if you can answer the
11 question directly. There's no allegation here that they
12 were failing to meet bypass flows?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 No, on the day that I was there.

15 MR. KELLY: Fair enough.

16 So you still didn't tell me how you get harm to
17 steelhead then from having just not -- missing the hole if
18 they're meeting the bypass.

19 VICE CHAIRPERSON WOLFF: I think he's answered
20 your question, Mr. Kelly. Move on to another line of
21 questioning.

22 MR. KELLY: That's fine.

23 And is it your testimony that you told Mr. Sagues
24 that they needed to stop their diversion because it was
25 unlawful, when you were there?

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 I apologizing for mispronouncing his name

3 earlier.

4 MR. KELLY: That's okay.

5 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

6 But, no, I didn't tell him to stop diverting.

7 MR. KELLY: Okay. I have no further questions.

8 Thank you.

9 VICE CHAIRPERSON WOLFF: Thank you.

10 I want to say Mr. Broderick. But that's not

11 quite your name, is it?

12 STAFF COUNSEL BULLOCK: Bullock.

13 VICE CHAIRPERSON WOLFF: Mr. Bullock, do you have

14 some redirect?

15 STAFF COUNSEL BULLOCK: Yeah, I'd like to check

16 with the witness though.

17 Do you need a break now or do you want to finish

18 up?

19 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

20 Let's -- unless you want one.

21 REDIRECT EXAMINATION

22 BY MR. MATTHEW BULLOCK, STAFF COUNSEL, representing the

23 Division of Water Rights:

24 Mr. Lindsay, did you know the bypass on the day

25 that you did the inspection? Were you able to determine

1 it for certain?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 On the day I inspected I was not able to
4 determine the bypass for certain.

5 STAFF COUNSEL BULLOCK: Without a measuring
6 device, is there any way to determine for certain what the
7 bypass is?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 No.

10 STAFF COUNSEL BULLOCK: So without the device is
11 there a way to know whether the steelhead are being
12 harmed?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 No.

15 STAFF COUNSEL BULLOCK: What day were you out
16 there on the inspection?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

18 What --

19 STAFF COUNSEL BULLOCK: What day?

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

21 May 4th, 2005.

22 STAFF COUNSEL BULLOCK: If you know, is that the
23 driest part of the diversion season for the Vineyard Club?

24 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

25 Well, I would say no.

1 STAFF COUNSEL BULLOCK: There was some discussion
2 in the cross about the letter that was sent out to
3 everyone in the area. I wanted to ask, do you have any
4 definite knowledge that the Vineyard Club was aware of
5 your inspection before you went out?

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
7 Other than my phone call to set up the
8 inspection, no, I don't know if they received the letter.

9 STAFF COUNSEL BULLOCK: But you did speak with
10 Mr. Sagues before you went out there?

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
12 Yes, I did.

13 STAFF COUNSEL BULLOCK: When did the Vineyard
14 Club first request information about its license
15 requirements and coming into compliance? Was it before or
16 after the inspection?

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
18 Oh, after the inspection.

19 STAFF COUNSEL BULLOCK: Have they installed
20 anything since the inspection, to your knowledge?

21 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
22 Not to my knowledge.

23 STAFF COUNSEL BULLOCK: And the fact that they
24 have not been diverting in the 2006 season, was that taken
25 into consideration when you were setting the ACL amounts?

1 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

2 Yes.

3 STAFF COUNSEL BULLOCK: Would you concur with
4 that, Mr. Stretars?

5 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

6 I would.

7 STAFF COUNSEL BULLOCK: Have you kept the
8 Vineyard Club from installing -- by "you," I mean the
9 Division -- has the Division kept the Vineyard Club from
10 installing a device on the creek?

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

12 No.

13 MR. KELLY: Your honor, I would object to that
14 question as to whether or not Mr. Lindsay can speak on
15 behalf of the entire Division of Water Rights.

16 STAFF COUNSEL BULLOCK: I'll rephrase the
17 question.

18 Mr. Lindsay, have you done anything to keep the
19 Vineyard Club from installing a --

20 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

21 No.

22 STAFF COUNSEL BULLOCK: Okay. Mr. Stretars, the
23 same question.

24 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

25 No, I have not.

1 STAFF COUNSEL BULLOCK: Are you aware of anyone
2 else in the Division doing anything to keep them from
3 installing an appropriate device?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
5 No, I'm not.

6 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
7 No.

8 STAFF COUNSEL BULLOCK: Do you see there's being
9 a reason that the old design with the plywood is
10 unacceptable now even if it was acceptable before?

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
12 Yes, I do.

13 STAFF COUNSEL BULLOCK: And what is that reason?

14 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

15 Well, first of all, again looking at the
16 photograph of it, it looks like it's inundated in that
17 picture. And let's make it clear that the staff member
18 who was involved with that at the time was not a civil
19 engineer. There's no -- doesn't appear from that
20 photograph to be any kind of a free-fall out through that
21 slot. And that's necessary for the slot to operate
22 properly. So that's one thing.

23 I'm concerned about the material of that old one.
24 It appears to be plywood. And that's just not right to
25 put in to a streambed like that and expect it to last.

1 STAFF COUNSEL BULLOCK: Why is that not right?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 Well, it's going to deteriorate relatively
4 quickly. Plus the slots are supposed to be -- you know,
5 all the equations you use for these are based on -- a lot
6 of them are based on thin-plate weirs. And the shape of
7 that slot, the edge of the slot is important. And rough
8 cutting it out of plywood, again, there are ways to do it,
9 I mean if you were to design it larger perhaps than the
10 equation requires for. But, again, that's also why we
11 look for an actual testing of this device. There's more
12 to this than just a hole in a board.

13 STAFF COUNSEL BULLOCK: Does any of your concern
14 about the material have anything to do with the history of
15 the Vineyard Club specifically?

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 Well, knowing that there was apparently a device
18 in place about the time of licensing, knowing that there
19 was not one when I showed up, somewhere during that period
20 of time something happened to it. And as we've talked
21 about -- no, I don't know for sure what happened to it.
22 Based on looking at what it was made of, one of the
23 possibilities is that it deteriorated.

24 STAFF COUNSEL BULLOCK: And have you addressed
25 the material with the Vineyard Club at any point between

1 the inspection and today?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 Yes.

4 STAFF COUNSEL BULLOCK: And did they respond to
5 that concern?

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

7 No.

8 STAFF COUNSEL BULLOCK: Okay. Thank you.

9 RE-CROSS-EXAMINATION

10 BY MR. DANIEL KELLY, ESQ., representing The Vineyard Club,
11 Inc.:

12 I just have a couple of very brief questions.

13 Mr. Bullock just asked you whether or not the
14 Vineyard Club has anything installed in the creek now.
15 And you answered I believe no, whether they have any
16 diversion board? You don't have to look -- you can --

17 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

18 I don't believe --

19 STAFF COUNSEL BULLOCK: I believe the question
20 was, to his knowledge was there.

21 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

22 No, I don't think they have anything installed
23 right now.

24 MR. KELLY: Okay. And if the Vineyard Club's not
25 diverting water at all, is there any reason for them to

1 have a measuring device installed?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 Without diverting water, no, I don't --

4 MR. KELLY: So if they removed the device in

5 May -- if they removed that board in May of '05 and

6 haven't diverted since, there's no requirement that they

7 have a measuring device in that creek, is there?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 Oh, not in the creek when they're not diverting,

10 no.

11 MR. KELLY: Okay. And if the Vineyard Club wants

12 to be able to remove that structure after the brief

13 diversion period so they don't block passage of fish and

14 they don't cause other environmental harm to the creek and

15 they don't want debris to build up behind the flashboard,

16 is it unreasonable for them to want to remove that device

17 every year so the creek can just flow through its channel?

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

19 No.

20 MR. KELLY: So if they removed the device in

21 2005, between now and then have they violated any terms of

22 their water right permit -- or license, I mean? Have they

23 violated anything?

24 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

25 If they have not diverted without a measuring

1 device in place, then, no, they have not violated that.

2 MR. KELLY: So, if --

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

4 At Oak Flat Creek.

5 MR. KELLY: So if the Vineyard Club testifies
6 that they've not diverted since May of '05, then they've
7 not been in noncompliance since then, right?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 They have not diverted illegal -- in an
10 unauthorized manner.

11 MR. KELLY: They've not violated any conditions
12 of their water right license?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 Correct.

15 MR. KELLY: Thank you.

16 I have nothing further.

17 VICE CHAIRPERSON WOLFF: Thank you.

18 STAFF COUNSEL BULLOCK: Dr. Wolff, is it okay to
19 ask one more question?

20 VICE CHAIRPERSON WOLFF: Go ahead.

21 REDIRECT EXAMINATION

22 BY MR. MATTHEW BULLOCK, STAFF COUNSEL, representing the
23 Division of Water Rights:

24 Mr. Lindsay, on WR-5, page 2, which is the CDO,
25 the cease and desist order, under the proposed language

1 for the order, under "It is hereby ordered," Section 2,
2 would the cease and desist -- are you there?

3 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

4 Yes. "It is hereby ordered..." Okay.

5 STAFF COUNSEL BULLOCK: Under Section 2, would
6 the cease and desist order require them to put in a
7 measuring device, or would they have another option?

8 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

9 Oh, they have another option.

10 STAFF COUNSEL BULLOCK: What is that option?

11 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

12 It's in paragraph B, which would, you know,
13 remove the threat of future violations by having us amend
14 the license to remove the point of diversion on Oak Flat
15 Creek.

16 STAFF COUNSEL BULLOCK: Okay. Thank you.

17 VICE CHAIRPERSON WOLFF: Mr. Kelly, since I
18 granted Mr. Bullock an opportunity --

19 MR. KELLY: Perhaps just one question. And if I
20 could do it from --

21 VICE CHAIRPERSON WOLFF: Please, go ahead, as
22 long as you have a mike.

23 RE CROSS EXAMINATION

24 BY MR. DANIEL KELLY, ESQ., representing The Vineyard Club,
25 Inc.:

1 If the diversion structure's not in the creek and
2 the pipe's not in the creek, haven't they already complied
3 with B?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Well, B is addressing a change to the license
6 itself. It permanently removes the opportunity to divert
7 at Oak Flat Creek.

8 MR. KELLY: Well, I guess -- what I don't
9 understand is, this -- the proposed CDO says that it
10 should include -- shall include a time schedule for
11 installation of the device. And if they have no need to
12 divert and they've already offered up a proposal and were
13 in discussions with the Division of Water Rights to
14 attempt to come into compliance, and the diversion
15 structure's removed and they're not diverting, why do you
16 need a cease and desist order to force them to do what
17 they've already demonstrated they're willing to do?

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

19 The cease and desist order's based on a threat of
20 violation. And I see a threat of violation throughout the
21 history that I've researched in the file.

22 Now, yes, without the diversion in place, without
23 the diversion -- you know, without the structure in place
24 in the stream, they're not diverting illegally. I mean
25 they're not diverting.

1 MR. KELLY: And the history you talk of is the
2 pre-license inspection in 1991 or '92 and the 2005
3 inspection; that's the history of violations that you're
4 talking about?

5 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

6 And the time I showed up and the -- you know,
7 I --

8 MR. KELLY: Do you have personal -- sorry.

9 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

10 I advised the Vineyard Club when I was inspecting
11 that they needed to design a measuring device, engage a
12 civil engineering, and get going on doing this. And it
13 didn't get done.

14 So I don't see where they've exercised any
15 diligence in really doing anything. I'll grant you, they
16 have not diverted illegally -- or appear not to have
17 diverted illegally in that time period. But the threat's
18 there in my opinion.

19 VICE CHAIRPERSON WOLFF: Thank you.

20 MR. KELLY: Thank you, your Honor.

21 VICE CHAIRPERSON WOLFF: Does prosecution wish to
22 enter some exhibits at this time?

23 STAFF COUNSEL BULLOCK: Yes, I would ask that all
24 of our exhibits, Nos. WR-1 through WR-21, be entered.

25 VICE CHAIRPERSON WOLFF: So done. So ordered, I

1 guess I should say.

2 (Thereupon Exhibits WR-1 to WR-21 were
3 admitted into evidence.)

4 VICE CHAIRPERSON WOLFF: All right. We'll move
5 now to the presentation of the case in chief by the
6 Vineyard Club. Seeing that the lunch hour is not too far
7 off, I'm going to just move forward. However, if anyone
8 becomes lightheaded or feels that they cannot function
9 appropriately and needs a lunch break, please speak up at
10 that time. Otherwise, when I become lightheaded and feel
11 I cannot function, I will declare lunch.

12 Do you need a break?

13 THE REPORTER: I'm all right.

14 VICE CHAIRPERSON WOLFF: All right for now. All
15 right.

16 STAFF COUNSEL BULLOCK: Dr. Wolff I'm really
17 sorry to interrupt. I was wondering, could we have a
18 three-minute break just to run to the bathroom?

19 VICE CHAIRPERSON WOLFF: Certainly.

20 Three-minute bathroom break so ordered.

21 (Thereupon a recess was taken.)

22 VICE CHAIRPERSON WOLFF: The hearing is now
23 reconvened.

24 Would the Vineyard Club come forward to present
25 their case.

1 MR. KELLY: Good morning. And it is still
2 morning thankfully.

3 As I think it came out a little bit on cross, you
4 know, the Vineyard Club believes that this case is about
5 whether or not there was a hole in that board when the
6 inspection took place. And I think that the relevant
7 question is, you know, what did the Vineyard Club really
8 do to try to come into compliance? And the question
9 should be whether or not the Vineyard Club made an effort
10 to come into compliance and to be sure that they were
11 complying with the terms and the conditions of their water
12 right.

13 And I think that goes right to the issue of
14 whether or not there's a threat, and I think it goes --
15 and again I guess I'll reiterate that we don't believe
16 that there's jurisdiction to issue an Administrative Civil
17 Liability complaint in this circumstance. But to the
18 extent that there is, I think that the actions of the
19 Vineyard Club have demonstrated I believe diligence in
20 attempting to come into compliance. And they've not
21 diverted since they removed that device in May 2005. And
22 they will not divert again, and they're going to testify
23 that they're not going to divert again until they've got a
24 plan that's approved and the approval of the California
25 Department of Fish and Game. Those facts are not in

1 dispute.

2 The Vineyard Club is a volunteer organization.
3 They purchased a large piece of property in this area and
4 developed a lake to preserve open space for the benefit of
5 the entire community out there. They've managed a lake
6 for environmental benefit. They work under the Department
7 of Fish and Game guidelines to use environmental-friendly
8 practices in managing the lake. They've received
9 accolades from the Division of Safety of Dams with regard
10 to their maintenance of the dam and the spillway that
11 creates the lake. They do not have a history of violating
12 the law. They're not bad actors. They're certainly not
13 bad actors.

14 I think that the cooperation that they've
15 tried to show is evidenced by the communication that
16 they've maintained with the Division of Water Rights
17 staff, in requesting the materials in August of 2005 and
18 informing the Division that they weren't going to divert
19 in March of 2006. They had two communications in March
20 2006. The first time they received anything -- well, they
21 did get a copy of the license in August 2005. The next
22 communication they got from the Division of Water Rights
23 was an Administrative Civil Liability complaint. And that
24 does nothing to help them come into compliance with their
25 permit terms and conditions.

1 You're going to hear testimony that when Mr.
2 Lindsay went out there for the inspection, Peter Sagues
3 helped him, carried his stuff up to the diversion up in
4 the creek, stood in the lake and held the bucket. They
5 weren't trying to be obstructionists. They weren't trying
6 to get away with something. They simply just weren't
7 aware that there had to be a hole in the board to bypass
8 the flows. And since that day they've attempted to come
9 into compliance.

10 We think that the evidence actually shows that
11 the Division of Water Rights failed to maintain contact
12 and to give them the information that they needed to
13 actually come into compliance prior to issuing the
14 Administrative Civil Liability complaint.

15 I'll also say that they're very reluctant to
16 proceed to this hearing. And as I've stated in my motion
17 to dismiss prior to this hearing, they're here under a
18 looming threat and testimony by the prosecution team that
19 they should receive the statutory maximum because they've
20 requested this hearing. So they're here rather
21 reluctantly and are very concerned that state agency
22 personnel would actually advocate increased fines to the
23 statutory maximum simply for requesting a hearing without
24 any change in any of the other circumstances
25 surrounding -- factual circumstances surrounding the

1 inspection or the alleged violations.

2 They've attempted to come into compliance. The
3 first report of the inspection that they received, you're
4 going to hear testimony, I think you already heard
5 testimony, was the administrative Civil Liability
6 complaint. They didn't think that they needed a measuring
7 device in the creek in 2006 because they weren't
8 diverting. There's simply no reason for them to get a
9 device installed and get a permit to install it if they're
10 not going to divert. They got the Administrative Civil
11 Liability complaint. They contacted the Board. They
12 attempted to get information about acceptable design,
13 acceptable devices.

14 They eventually got the calculations right. They
15 went to a civil engineer. They had the civil engineer
16 sign off on the device. And in February they sent that
17 device to the Chief of the Division of Water Rights, to
18 Victoria Whitney, who in an E-mail to them said she never
19 got the plan. They E-mailed it to her again. And they're
20 still waiting to hear from what the prosecution team says
21 is the only person that can approve that device, is the
22 Chief of the Division of Water Rights.

23 They've submitted the plan. They've submitted an
24 engineering plan. They've submitted a compliance plan
25 where they said that they would go get Fish and Game

1 approval. They've already contacted Fish and Game.
2 They've offered to on a monthly basis get a hand-held flow
3 meter and measure the bypass flow devices and report those
4 on a monthly basis to the Division of Water Rights.

5 I don't understand where the threat is. And, in
6 fact, in my conversations in an attempt to settle this
7 matter, members of the prosecution team told me for all
8 practical purposes that the device that they submitted and
9 the calculations would satisfy that condition. And now
10 there's discussion that it needs to be made of steel. The
11 Vineyard Club thinks that that's ridiculous and that --

12 STAFF COUNSEL BULLOCK: I need to --

13 MR. KELLY: -- would prohibit them -- this is an
14 opening statement.

15 VICE CHAIRPERSON WOLFF: I'll ask what I believe
16 might be the question, which is: Do you intend to produce
17 evidence to that effect?

18 MR. KELLY: Absolutely. And there's actually
19 evidence in the record, and there are letters and
20 communications and E-mails between myself and the
21 prosecution team on this matter. That is in the
22 testimony.

23 VICE CHAIRPERSON WOLFF: We'll get there then.
24 Great. Thank you.

25 MR. KELLY: I guess in sum, the evidence is going

1 to show there's no current violation and there's
2 absolutely no threat of a violation of any condition in
3 that water right license. There absolutely is none. And
4 the evidence also is going to show, and I believe already
5 shows, that there's really -- the harm that the
6 prosecution team alleges in their testimony and in the
7 Administrative Civil Liability complaint isn't there.
8 It's not there. And I think that you've already heard
9 testimony in that regard. But because this opening
10 statement came after the cross-examination, I think that
11 the evidence doesn't show that.

12 And with that, I'd like to bring up the witnesses
13 from The Vineyard Club.

14 DIRECT EXAMINATION

15 BY MR. DANIEL KELLY, ESQ., representing The Vineyard Club,
16 Inc:

17 Mr. Sagues, can you state your name and your
18 address for the record please.

19 MR. SAGUES: My name is Peter Sagues. My address
20 is 390 Deer Path Drive, Geyserville, California.

21 MR. KELLY: Mr. Sandell, can you do the same
22 please.

23 MR. SANDELL: Yes. My name is Bert Sandell. I
24 live at 3348 Paradise Drive, Tiburon, California.

25 MR. KELLY: Did you both prepare testimony and

1 qualifications for this proceeding?

2 MR. SAGUES: Yes, we did.

3 MR. SANDELL: Yes.

4 MR. KELLY: And to your knowledge, is that
5 testimony a part of the exhibits submitted by the Vineyard
6 Club?

7 MR. SAGUES: Yes.

8 MR. SANDELL: Yes.

9 MR. KELLY: Okay. Possibly take turns. And
10 perhaps, Peter, maybe you can go first and provide the
11 hearing team with a summary of your testimony.

12 MR. SAGUES: Yes, sir.

13 Dr. Wolff.

14 My name is Peter Sagues. I'm the Facilities
15 Manager for the Vineyard Club in Geyserville. The
16 Vineyard Club is an organization of about between 80 and
17 90 families, and fluctuates slightly, who live -- most of
18 the them live within a mile or two of the Vineyard Club
19 Lake.

20 The Vineyard Club -- my job as Facilities Manager
21 is maintaining the grounds, the clubhouse, the lake. The
22 Vineyard Club operates a great deal as a volunteer
23 organization. I started out -- I've been a member for
24 about eight years. And one of the first things I was
25 asked was to be on the Board of Directors of the Vineyard

1 Club. It's a nonpaying volunteer job. I was asked, I
2 found out later on, because I have a general contractor's
3 license and they needed a lot of remodeling done at the
4 club. And I did volunteer my services for that.

5 And then when an opening came to be facilities
6 manager, I was asked to take that. It is a job that pays
7 \$750 a month. I just mention that because it's virtually
8 a volunteer job. And as such, I do not study necessarily
9 all of the documents as carefully as I might if it were a
10 full-time position.

11 I would like to cover the date of the inspection.
12 I received a call from Larry Lindsay asking me if I would
13 accompany him on an inspection. And we met at the parking
14 lot of the Vineyard Club, and Larry offered to drive me up
15 to the diversion site.

16 I do not recall him giving me a copy of the
17 permit. There's a good possibility. And if so, it was
18 left either in his car or his truck.

19 We hiked into the diversion, as Mr. Lindsay
20 mentioned. It is quite a substantial hike. And I offered
21 to carry some of his equipment in with him. He had quite
22 a bit of equipment and it was a pretty strenuous hike.

23 When we got to the site, Mr. Lindsay immediately
24 mentioned that there was no bypass device and asked me if
25 I knew about that. And I had no knowledge of it.

1 He did not ask me whether or not we had diverted
2 any water in the previous year. And, indeed, the pipeline
3 was not hooked up the previous year. 2005 was the first
4 year when I as manager -- when we had a diversion pipe
5 hooked up while I was manager.

6 Mr. Lindsay looked around, took quite a number of
7 photographs. And at one point I remember him walking to
8 the left of these photographs that you see. And on the
9 left there was a pile of debris. There was some pieces of
10 pipe and some pieces of plywood. And he said, "Oh, this
11 look likes this might be the old diversion or the old
12 bypass device part of the diversion dam." And he went
13 over with his camera and took pictures of that bypass
14 device and commented on it. And I did not go over and
15 take a look at that.

16 And he said he wanted to try and measure the flow
17 of water in the stream. And he took out what he
18 identified as a Montana flume. And I offered to help him
19 with trying to divert the water through the stream. And
20 what we did was to, by hand -- we did not have any
21 tools -- we dug out rocks and gravel from the bottom of
22 the stream and set the Montana flume in -- and it has a
23 small skirt on the outside of a small canvas or plastic
24 tarp -- and weighted the corners of that down. And it is
25 my memory, and it's very clear to me, that we did not put

1 the flume directly on top of rock, that is, it went on top
2 of pieces of boulder and rock. It did not get down to,
3 say, the base bedrock at the bottom of the stream.

4 We spent probably ten minutes or so wading in the
5 creek -- and we did not have boots and it was May, it was
6 very cold -- and diverted the water. And one thing that I
7 noticed was that a great deal of the water was bypassing
8 the flume. It's very difficult to build a dam out of
9 rocks the water was flowing. And, in fact, the
10 photographs that Mr. Lindsay showed the water to be
11 flowing.

12 After those measurements were made Mr. Lindsay
13 indicated that if the water got up to the .3 mark on his
14 Montana flume, that we were probably all right, that
15 probably there was enough flow in the creek. So I was not
16 concerned that we were not bypassing enough water to meet
17 our requirements.

18 Before we left the creek -- we were collecting
19 the gear and getting it altogether to get ready to carry
20 out. And it was very clear to me that Mr. Lindsay -- I
21 was asking him what a bypass device was and how it would
22 work. And he said, well -- and he volunteered that he had
23 some photographs and/or some drawings in his office and he
24 would send them over to me, and that what we needed to do
25 was to contact a licensed engineer or a civil engineer and

1 have a bypass device designed before we could divert more
2 water.

3 And it is also very clear to me that he said,
4 "Well, there's not going to be enough time the rest of
5 this season to build" -- "have a device engineered and
6 built before the end of May." This was the 4th of May,
7 and it going be the 31st the end of our diversion season.

8 So there was no discussion about whether or not
9 we should take out the pipeline, what we should do. It
10 was just that's where we stand, nothing can be done this
11 season. But he said, "Before you divert any water next
12 season, I want to see an engineered bypass device built
13 into that diversion dam."

14 Let me check my notes. One more.

15 Also, Mr. Lindsay did not say anything about
16 taking out the pipeline where -- it was my concern, now
17 thinking about it now, is that there was a possibility
18 that near the end of May as water levels gradually dropped
19 in that creek there would be a possibility that no more
20 water would be flowing over the top of the dam and any
21 water that was left would be going out through our
22 pipeline. So there was certainly a possibility that our
23 pipeline would have drained all of the water in the creek.
24 That was a possibility.

25 There was a small amount of leakage around the

1 dam itself. It's just a piece of plywood slipped down
2 into a slot of steel -- steel and concrete, so it tended
3 to leak around the edges. But there would have been very
4 little water bypassing that. And there was a possibility
5 that for a short time, until the water level dropped below
6 our pipeline, that no water would have been available to
7 go on downstream.

8 But it is very clear to me that I was not asked
9 to remove the pipeline because we're in violation. And
10 certainly if I had known then what I know now, that it
11 might cost as much as \$500 a day for that period, from May
12 5th to May 31st, I would taken it out to save half a day.
13 I would have taken it out by noon that day.

14 We walked back out, which is a pretty steep
15 climb, and went down to the lake where I helped Mr.
16 Lindsay to measure water coming out of the pipeline. And
17 to do that we waded out into the lake. I'm just
18 mentioning this because it was a matter of cooperating.
19 And I felt like cooperating everything -- I felt our
20 relationship was very good and got along very well with
21 Mr. Lindsay.

22 MR. KELLY: Did you ever receive any of the
23 information that Mr. Lindsay indicated he would send you
24 with regard to bypass devices?

25 MR. SAGUES: No, I did not. And, in fact, you

1 know, he did mention -- we did talk about getting a report
2 or getting some information. I don't know the exact
3 wording of that, but he was going to let me know the
4 results of the inspection. And I did call two times, one
5 in March -- and these were all calls that I instigated.
6 In my E-mail I said, "Thank you for your call, Larry." I
7 had placed a call to him and left a voice mail with him
8 and he called me back. I should have said, "Thank you for
9 calling back."

10 So I did call him at that time. And during that
11 call -- the first call was in August where I asked him for
12 a copy of the permit. And also just asked him for a copy
13 of the report.

14 The call that I remember was the one -- remember
15 best was the one in March where we were getting near our
16 diversion season and we wanted to get started and I'd not
17 heard any word from him on how to design a bypass device,
18 the information he promised me. And the thing that sticks
19 very clearly in my mind was when I asked Mr. Lindsay about
20 that information and the report, he was hesitant and he
21 apologized and he was stumbling a bit, said, "You know,
22 Peter, we're in a difficult situation right now. I can't
23 really tell you very much, because somebody up higher in
24 the Board is trying to decide whether or not there will be
25 enforcement action for the Vineyard Club on small projects

1 like yours. Frankly," he said, "the Water Resources Board
2 is in a situation" -- "a difficult financial situation.
3 We're trying to decide whether we can even fund these
4 sorts of enforcement actions."

5 I misunderstood "enforcement," of what that
6 meant. I thought it had to do with straightening out
7 situations. I didn't realize that enforcement meant
8 specifically fines or ACLs. All of that language pretty
9 much went over my head at the time.

10 MR. KELLY: And Did you know -- when you asked
11 Mr. Lindsay for the results of the inspection, did you
12 know that you should have asked specifically for the
13 official report that was prepared? I mean what did you
14 think you were going to get from Mr. Lindsay pursuant to
15 your request?

16 MR. SAGUES: I expected that I might get a report
17 similar to what I get on any other inspections where I am
18 dealing with agencies. My job as a general contractor and
19 prior to that as a factory manager for a company I was
20 with for 16 years, I was subject to many inspections.
21 There have probably been several hundred inspections where
22 I have been the representative of the organization. These
23 are anybody from OSHA to NIOSH to Workmen's Compensation
24 Boards. There could be audits by a variety of different
25 organizations.

1 And now of course as a general contractor, I'm
2 dealing with planning departments, building departments,
3 sewage -- you name it -- fire marshals. There are people
4 inspecting all the time.

5 And in almost all of these cases either there is
6 a report immediately, where there is a note with a list of
7 items, such as in a building job, at the end of the job
8 we're asking for a final, they might give me a list of ten
9 things to take care of. That would be enough of a report
10 for me. In others the report will -- in the case of a
11 building permit, will be signed off. In the case of an
12 OSHA inspection, there would be a report made within a
13 couple of weeks after that.

14 So I was expecting the facts of the inspection to
15 be revealed to me.

16 MR. KELLY: Thank you.

17 Mr. Sandell.

18 MR. SANDELL: Yes. Good afternoon. Just to
19 summarize my written testimony.

20 As Peter mentioned, the Vineyard Club is an
21 organization, really a homeowners' association of about 80
22 to 90 families. And they come together for recreational
23 purposes. One of the primary assets of the club is this
24 26-acre lake.

25 Since the early sixties when it was first

1 developed, like a lot of warm water lakes, it's had severe
2 algae and weed growth problems. The primary method of
3 treating those problems historically has been the
4 application, under the appropriate guidelines, I assume,
5 of copper sulfate and other defoliant agents.

6 As an avid fisherman, a father of two kids, I
7 decided that we could do some things a little differently
8 there. In working with Peter and a small group of
9 volunteers, we stopped applying the chemicals and we
10 instituted a program that involved a number of things.
11 The pipeline connection was an important item. For
12 example, we installed the whole lake aeration system,
13 similar to those used by fisheries. We began a manual
14 dredging of weeds in the lake and perfected some systems
15 that we use about six days a year, in effect, to mow the
16 lake. We worked with Fish and Game and introduced a
17 number of naturally occurring microbes to keep the algae
18 levels down. And we started a very detailed measurement
19 of what was going on in the lake.

20 In my qualifications, I noted that I have an
21 industrial engineering degree and operations research
22 degree from the University of California at Berkeley. My
23 kids claim I'm a nerd, and I'm proud of that.

24 But one of the things we did is on a biweekly or
25 monthly basis we now measure the lake for pH at the

1 surface and six feet down, we measure dissolved oxygen, we
2 measure turbidity, and we measure water temperature,
3 really to establish how we're doing on the lake.

4 Anyway, as I mentioned earlier, one important
5 element of lake maintenance is to keep the level of the
6 lake up. When the lake level is higher, the weeds don't
7 reach the surface, they don't interfere with fishing,
8 boating, swimming, the things that people love to do
9 there.

10 And so the diversion was not set up in 2004, as
11 Mr. Sagues testified. But with a small group I rallied
12 and we installed the diversion in 2005, with the objective
13 of getting the water level up. It was a dry year. We had
14 real concerns. I was not aware of the need for a bypass
15 device. I would have been glad to install it. Had I cut
16 a hole, none of us would be here today, and we would have
17 gladly done it.

18 The next involvement I had with the dam -- well,
19 excuse me. Peter called me after the inspection and let
20 me know that we didn't need to take the dam down this
21 season, but that in the future we needed to install a
22 bypass device. And so on May 29th I dismantled the dam
23 personally. And at that time, I would say there was good
24 flow around the diversion. The creek was far from dry.
25 If you were to look at the photographs taken during the

1 May 4th or May 5th inspection, I would say it was
2 generally in that range of overflow. Although I didn't
3 have any measuring devices, it was clearly far from dry.

4 Nevertheless, when the Vineyard Club received the
5 ACL and the CDO in December of 2006, Mr. Sagues was
6 traveling overseas, and I stepped in to try to help figure
7 out how we meet the requirements of the Water Board to get
8 a device that worked.

9 As part of my job, I'm involved with the
10 construction of commercial real estate. I work with
11 architects, engineers, consultants on a daily basis. At
12 this time I have a large structural upgrade going with a
13 warehouse. And one of the things that I like to do is to
14 provide those consultants and engineers with direction.
15 It's very important not just to give them a blank slate,
16 because then you get a bill that you didn't expect.

17 So in an effort to understand what it was exactly
18 the Board wanted, I first of all asked for a copy of the
19 report, at Peter's suggestion. We were able to talk. And
20 Mr. Lindsay provided it to me in short order. I know that
21 that was something Peter was frustrated he hadn't been
22 able to find or to get.

23 And I started a series of conversations with
24 various members of the Board staff, Mr. Lindsay, a
25 gentleman named Mr. O'Hagan. And my objective was to

1 figure out what they wanted. We were happy to provide it.

2 We just needed to know what was needed.

3 And, you know, in Mr. Lindsay's testimony I see

4 that he was trying to lead me in the right direction.

5 Well, how about just telling me what it was they wanted.

6 I would have been happy to do it. We weren't trying to

7 play any games. What we wanted to do was meet the

8 requirement and go back to enjoying our lake.

9 Nevertheless, we did make some progress. On

10 February 1st I sent a letter to Division Chief Whitney

11 that included, not only a design, but also a workplan for

12 the diversion. And that workplan specifically said that

13 we would log on a monthly basis and hand measure with a

14 hand-held device the flow -- the bypass flows to ensure

15 that we were in compliance. It did not -- the plan did

16 not specifically call out the materials. And at some

17 point hopefully I'll have a chance to comment on those

18 materials.

19 But as of the time I wrote my testimony, which

20 was on or about March 12th, we had not heard back from the

21 Board. I still have not received anything from Ms.

22 Whitney telling me what we need to do or don't need to do.

23 We are more than happy to try to get it done.

24 And so that is a summary of the testimony.

25 MR. KELLY: Is the Vineyard Club the only entity

1 that uses the lake?

2 MR. SANDELL: No. On a periodic basis it's my
3 understanding that it's used by the CDF for firefighting
4 purposes as well.

5 MR. KELLY: And how do they use the like for
6 firefighting purposes?

7 MR. SANDELL: You, know I've not seen it, but
8 I've always wanted to. It's my understanding that they'll
9 fly over with a bucket hung from a helicopter and scoop
10 it, fly to the fire site and dump it.

11 MR. SAGUES: I actually have witnessed CDF coming
12 in several times with their helicopter taking water.

13 MR. KELLY: Has it ever been either of your
14 intent or the club's intent to try to dodge the
15 requirement to install a measuring device before you
16 divert again?

17 MR. SAGUES: No, never.

18 MR. SANDELL: Quite the contrary. It would be
19 wonderful to get some formal feedback telling us what we
20 need to do to adjust the plan that was submitted on
21 February 1st.

22 MR. KELLY: And had you received that information
23 back in August of '05, Peter, I think when you contacted
24 the Board, or in March of '06, when you again informed the
25 Board -- if you'd have received information way back then,

1 would you have started the process of getting something
2 together if you knew specifically what they required?

3 MR. SAGUES: If we had had the general standards
4 of what the Board required for that, we would have hired a
5 civil engineer to design it for us, yes.

6 MR. KELLY: Okay. And, Bert, you talked a little
7 bit about the plan that the Vineyard Club submitted to Ms.
8 Whitney. Did you receive an E-mail after it was submitted
9 from Ms. Whitney with regard to that plan

10 MR. SANDELL: Yes. Subsequently I sent Ms.
11 Whitney a follow-up letter asking for feedback. She sent
12 me an E-mail saying that she'd not received the letter due
13 to some administrative reasons. Now, that was sent via
14 E-mail and via U.S. mail. So I was a little concerned
15 about the distribution process. Nevertheless, she told me
16 that she would get back to me personally. The response I
17 did get -- so that was around, oh, March 12th, 13th, 14th
18 I sent follow-up letter. On March 23rd, a gentleman, I
19 believe his name was James Castle, I received a letter --
20 I viewed a letter from him saying that -- advising Ms.
21 Whitney not to approve the plan, but again not providing
22 specifics about what they'd like to see.

23 MR. KELLY: Okay. And the plan that you
24 submitted to Ms. Whitney that's part of the record, was
25 that actually signed by a professional engineer?

1 MR. SANDELL: Yes, an engineer reviewed the
2 calculations, provided a stamp on that. He provided a
3 cover letter that explained that he reviewed the
4 calculations and the bypass methodology and was -- it met
5 with his approval. He noted in there -- he qualified it.
6 He said that the -- he was not certifying the structural
7 integrity of the dam, which wasn't something we were
8 after. After all, if the dam breaks and fails, there's no
9 bypass -- there's no diversion and there's no bypass. So
10 it didn't seem to make sense to pay him to do that.

11 MR. KELLY: And you mentioned some -- you
12 mentioned that the plan didn't include specifics about the
13 material of the diversion structure, the measuring device.
14 Can you talk a little bit more about what you've heard and
15 about that issue?

16 MR. SANDELL: Sure. I'm certain that that plan
17 is in an exhibit and its part of the materials that have
18 been provided. But subsequent to that, I believe it was
19 Mr. Castle's letter talked about the materials, the
20 orifice opening, and a plan to make sure that the bypass
21 conformed to the calculations.

22 As I just noted, the material of the weir or the
23 dam is not particularly relevant. What's relevant is the
24 bypass. As a matter of fact, were we to build this out of
25 metal, it would create a problem with inserting it and

1 removing it every year. Now, here we have a small stream
2 that, at best, is maybe a little wider than this table.
3 In the winter months this thing will get eight feet, nine
4 feet deep, as evidenced by the debris and the brush being
5 depressed on the side of the stream. So if we were to put
6 something in there and leave it there on a seasonal basis,
7 after one season it would be completely backfilled with
8 debris, rocks, gravel. And it could potentially damage
9 the concrete structure that holds the flashboards. So we
10 really need something that's light and can be installed on
11 a seasonal basis. So that addresses the material.

12 The other question had to do with the orifice
13 opening. Now, in our calculations, we used a worst-case
14 scenario, and we reduced the volume coming through that
15 orifice by 40 percent. So if we had just about the worst
16 orifice possible, I feel we would still have the bypass.
17 Nevertheless, we've agreed and we've stated in a written
18 plan that we're willing to measure this at the time of
19 installation and on a monthly basis at all times we're
20 diverting water, and log it, and present that to any Board
21 representatives that wanted to see it at any time. And
22 because of that, I'm not sure that the material or the
23 orifice are as important as the fact that we're able to
24 demonstrate and log that we've got adequate bypass, which
25 is really the objective.

1 MR. KELLY: And --

2 SENIOR STAFF COUNSEL KATZ: Could I interrupt for
3 just a second?

4 MR. KELLY: Certainly.

5 SENIOR STAFF COUNSEL KATZ: We're trying to keep
6 track of exhibits as they come up. So when he's
7 talking --

8 MR. KELLY: VC-18 I believe is the letter to Ms.
9 Whitney with the plan and the device.

10 SENIOR STAFF COUNSEL KATZ: Okay.

11 MR. KELLY: And I believe that all of the -- the
12 written testimony actually cites to the specific exhibits
13 that they're talking about.

14 SENIOR STAFF COUNSEL KATZ: Thanks. We're just
15 trying --

16 MR. KELLY: They just don't have their --

17 SENIOR STAFF COUNSEL KATZ: Yeah, we're just
18 trying to clarify this.

19 MR. KELLY: I appreciate that. And it was VC I
20 believe 18.

21 WATER RESOURCES CONTROL ENGINEER McCUE: He also
22 mentioned an exhibit -- or I mean a letter from Jim
23 Castle, that I'm not sure is an exhibit. Are you making
24 it an exhibit or --

25 MR. KELLY: I don't know -- it came from the

1 prosecution team and it went to Vicky Whitney. And Jim
2 Castle sent the letter, and it was just a day or so ago.
3 And I --

4 STAFF COUNSEL BULLOCK: Would you like me to
5 speak to that -- would that be helpful? -- in terms of
6 where it is?

7 MR. KELLY: Sure.

8 STAFF COUNSEL BULLOCK: I believe it's in the --
9 not in the hearing record, but it is a part of the record
10 for the Vineyard Club file.

11 MR. KELLY: Yeah, it was just a day or so ago,
12 which is why it wasn't submitted as part of the submittal
13 package. It was actually just sent.

14 VICE CHAIRPERSON WOLFF: Well, I may not be aware
15 of it. Is it being entered into this record? Because if
16 they've testified about it, then we need to have the
17 exhibit to support the testimony.

18 MR. KELLY: Well, it's certainly part of the
19 administrative -- it's not part of the hearing record to
20 date and it's not been submitted as an exhibited. But to
21 the extent now that they've testified about it, I would
22 include that in the documents that we want to move then
23 into evidence. And the hearing team actually I believe
24 should -- I don't know who it was distributed to actually.

25 VICE CHAIRPERSON WOLFF: Is this the letter in

1 which the hearing -- in which the prosecution team
2 recommends that the device be durable?

3 MR. KELLY: No, it's the -- it is a letter
4 wherein the prosecution team -- and I'm try to be fair --
5 expresses concern with the device and I think recommends
6 that it needs to be -- Mr. Lindsay testified that --

7 SENIOR STAFF COUNSEL KATZ: The March 23rd letter
8 to --

9 MR. KELLY: That sounds right. I think -- Mr.
10 Sandell, do you have an actual copy?

11 MR. SANDELL: Yes, I do have a copy. I can read
12 the relevant section.

13 SENIOR STAFF COUNSEL KATZ: Is it the March 23rd,
14 2007, letter from Jim Castle to Victoria Whitney?

15 MR. SANDELL: Yes. But it's stamped as opposed
16 to a written. That's right.

17 SENIOR STAFF COUNSEL KATZ: Yeah, okay. I've got
18 that.

19 WATER RESOURCES CONTROL ENGINEER McCUE: So that
20 would be Vineyard Club 43?

21 MR. KELLY: If that's the next in order, I would
22 certainly appreciate if the hearing team could mark that,
23 yes.

24 VICE CHAIRPERSON WOLFF: And let me clarify then.
25 I have seen that letter. And I have no objection to it

1 being entered as an exhibit. But the relevance of the
2 letter goes to the issue of whether the prosecution team
3 has performed in a punitive or acted in a punitive manner
4 or not. We do not have before us here the issue of
5 whether to approve or not to approve a measuring device.
6 That's not an issue before us. Only the ACL and the CDO
7 are before us.

8 MR. KELLY: Although, Dr. Wolff, I will say --
9 and perhaps somebody from the prosecution team can confirm
10 it, and I think it might be Mr. O'Hagan -- that in one of
11 the E-mail correspondence, and I can locate it, I think
12 that Mr. O'Hagan may have suggested that the device can be
13 approved by Victoria Whitney or approval of the device can
14 occur as a part of this hearing process. Is that -- Am I
15 recalling that correctly? And I can locate that --

16 VICE CHAIRPERSON WOLFF: What is the point you're
17 trying to make though?

18 MR. KELLY: You just said that it's not part of
19 this process, the approval of the device. And I think the
20 prosecution team actually had suggested that the result of
21 this can be an approval of that device.

22 STAFF COUNSEL BULLOCK: I don't think that's
23 quite accurate.

24 VICE CHAIRPERSON WOLFF: Okay. That's not a
25 matter before us. It's possible that someone said that.

1 I'm not certain. But whether they did or they didn't,
2 that's not the matter before us.

3 MR. KELLY: Okay.

4 VICE CHAIRPERSON WOLFF: We have an ACL and a CDO
5 before us.

6 So certainly this letter is relevant to the
7 question of potentially punitive behavior. I don't
8 anticipate our making a decision about the measuring
9 device as part of the resolution of -- you know, that
10 grows out of this hearing.

11 MR. KELLY: Okay. Thank you.

12 VICE CHAIRPERSON WOLFF: I see no basis for our
13 even being able to do that as a matter of law.

14 MR. KELLY: Okay. One last thing.

15 Do you have something else to add?

16 MR. SANDELL: Yes, I wanted to comment that my
17 March 19th letter to Ms. Whitney asking for a response
18 also noted that we would be more than happy to -- quote,
19 "The club can reinstall the system that was approved by
20 the Board at the time the permit was issued." So I also
21 offered. And as part of this, I attached a document, that
22 is actually one of the exhibits, showing the design and
23 the photograph. And we've seen this already. I just
24 don't have the exhibit number off the top of my head.

25 MR. KELLY: So the Vineyard Club is willing to

1 either install the proposed plan that signed by an
2 engineer or the plan that was apparently previously
3 approved by the Board?

4 MR. SANDELL: Absolutely.

5 MR. KELLY: Okay. There's some suggestion I
6 believe in the testimony and documentation that there
7 should be a requirement that a PE actually install this
8 device. Do you have any thoughts on that?

9 MR. SANDELL: I do. Engineers are consultants.
10 It would not be an appropriate use of funds to pay an
11 engineer to physically install a flashboard weir and a
12 diversion dam. That's not the industry -- that's not the
13 standard use of engineers, to physically do the manual
14 labor themselves.

15 MR. KELLY: Thank you.

16 Thank you, Dr. Wolff. And I think with that I'll
17 turn them over for cross-examination.

18 VICE CHAIRPERSON WOLFF: Before we begin that,
19 you had listed some other witnesses in your notice of --
20 whatever it is -- intent. There were some other witness
21 you were going to call, some adverse witnesses?

22 MR. KELLY: Yeah, Dr. Wolff. It was our intent
23 to call members that -- after our preliminary review of
24 the file had indicated that other people had worked on
25 this matter.

1 apologize if I get your name wrong. Feel free to correct
2 me.

3 On the day of the inspection was there a
4 measuring device installed in Oak Flat --

5 MR. SAGUES: No. No, there was not a measuring
6 device.

7 STAFF COUNSEL BULLOCK: And was there a measuring
8 device installed at any time in 2005?

9 MR. SAGUES: No, there was not any time during
10 2005.

11 STAFF COUNSEL BULLOCK: Okay. How long have you
12 been the club manager?

13 MR. SAGUES: I've been club manager since 2003.
14 And you remember, 2005 was the spring of 2005. So I
15 started in the summer of 2003.

16 STAFF COUNSEL BULLOCK: Okay. Mr. Sandell, you
17 helped to install the diversion pipeline in 2005?

18 MR. SANDELL: Yes, I did.

19 STAFF COUNSEL BULLOCK: Okay. And when did you
20 do that?

21 MR. SANDELL: You know, I don't have an exact
22 date. It was probably -- mid to late March would be my
23 guess.

24 STAFF COUNSEL BULLOCK: But you don't know more
25 specifically?

1 MR. SANDELL: I don't have an exact date.

2 STAFF COUNSEL BULLOCK: Not the last day of March
3 or first day of -- sometime middle to late?

4 MR. SANDELL: Yeah, I think I installed it and --
5 and it's about a mile and a half pipe, and it is a heck of
6 a thing to get started. So I think we installed it, it
7 stopped. We had to -- it gets air in it. And so it was
8 probably installed mid to late March. And by the time we
9 got it up and going -- I'm not sure. I had to hike that
10 trail at least five, six times. I brought my kids and
11 wife down there one time trying to bleed the line of air.
12 So continuous operation I'm unclear on. But it probably
13 was, I don't know, early, mid April through the time I
14 disconnected it on March -- excuse me -- May 29th.

15 STAFF COUNSEL BULLOCK: But your testimony --
16 your written testimony was mid to late March; is that
17 correct?

18 MR. SANDELL: For the diversion dam installation,
19 that's right. And as I said, the water -- the operation
20 of the diversion is a little different.

21 STAFF COUNSEL BULLOCK: Sure.

22 Do you know when in 2005 the Vineyard Club
23 stopped diverting water from Oak Flat Creek?

24 MR. SANDELL: Yes, I personally stopped the
25 diversion and dismantled the dam on May 29th. And the

1 reason I know that is because I wrote it in my notebook
2 for the lake measurements.

3 STAFF COUNSEL BULLOCK: Part of your job is to
4 help to put the diversion works in; is that correct?

5 MR. SANDELL: Well, it's not a job. Its a
6 volunteer effort. It's all volunteer.

7 STAFF COUNSEL BULLOCK: Your position, how about
8 that?

9 MR. SANDELL: Yeah. Well, you know, it's kind of
10 unclear. That's the way these volunteer organizations
11 work. And I recognize that it -- to preserve the lake
12 quality, as I mentioned earlier, it was one of five
13 important steps. And nobody else was going to do it, so I
14 did it.

15 STAFF COUNSEL BULLOCK: And how long have you
16 been helping with the installation?

17 MR. SANDELL: Well, that was the only time I did
18 it. And I haven't done it -- it hasn't happened since.

19 STAFF COUNSEL BULLOCK: How long have you been
20 the Chair of the Vineyard Club?

21 MR. SANDELL: I tried to get out of it a couple
22 times. But probably since 2003, about the time Peter came
23 on board.

24 STAFF COUNSEL BULLOCK: I believe in your written
25 testimony you said 2002. Does that sound --

1 MR. SANDELL: Okay. Late 2002, early 2003.

2 STAFF COUNSEL BULLOCK: Okay. To your knowledge,
3 has the Vineyard Club at any time that you were there ever
4 installed a measuring device?

5 MR. SANDELL: To my knowledge, no, because I
6 wasn't involved with it.

7 STAFF COUNSEL BULLOCK: Other than what you've
8 seen in the record from 1992, do you know of any time
9 one's been installed?

10 MR. SANDELL: Well, Jean Schettler's name shows
11 up on that document. Jean was on point for installing it
12 from that date until 2002. So an assumption would be,
13 since he was aware of it, his name was on it, that at all
14 times he was using the -- installing the bypass device.

15 STAFF COUNSEL BULLOCK: You're not personally
16 aware of it though?

17 MR. SANDELL: No.

18 STAFF COUNSEL BULLOCK: Mr. Sagues?

19 MR. SAGUES: No, I have no knowledge. I've not
20 seen it operating without the bypass or even -- I can't
21 even tell you what years it was operating.

22 STAFF COUNSEL BULLOCK: Do either of you have any
23 knowledge of what happened to the old device -- the old
24 measuring device?

25 MR. SAGUES: My only knowledge of it was that

1 there were pieces of it or possibly the entire piece was
2 to the left of the diversion dam as you're -- from
3 downstream view. And Mr. Lindsay commented on that and
4 took some photographs of that. And that was my only
5 knowledge of -- I didn't even know what a bypass device
6 looked like at the time.

7 STAFF COUNSEL BULLOCK: Mr. Sandell, did anyone
8 from the Division attempt to help you with designing the
9 measuring device in the time after the inspection?

10 MR. SANDELL: Yes, I had contact with Mr. O'Hagan
11 and Mr. Lindsay. And their help involved -- I would
12 submit some calculations and there were some corrections.
13 What I wish had happened, because it would have made it a
14 lot easier, I wish they had just given me the document
15 that was approved, because it would have saved a lot of
16 paperwork, a lot of headache and some engineering fees.

17 STAFF COUNSEL BULLOCK: But the Division did make
18 efforts to help you to design it?

19 MR. SANDELL: Yes.

20 STAFF COUNSEL BULLOCK: Yes. Thank you.

21 When did you first hire an engineer to do work
22 relating to the measuring device?

23 MR. SANDELL: You know, I'd have to look at my
24 notes here. But it was after those discussions.

25 STAFF COUNSEL BULLOCK: Sure. When was the first

1 time, if you know, that there was a response from the
2 engineer or any record of, from him, any knowledge for the
3 Division that you had hired an engineer?

4 MR. SANDELL: Sure. You know, again I'd have to
5 look through my notes, but it was after those discussions.
6 And I sent him as much progress as I'd made and asked him
7 if it was the kind of work he did and if he was willing to
8 help us out. And he responded. We had a couple
9 conversations. And then I sent him some material and he
10 stamped it and added his qualifying letter.

11 STAFF COUNSEL BULLOCK: And that letter -- that
12 first letter that at least the Division has -- if you have
13 previous letters, I'd like to speak to that -- but that
14 was on January 25th of 2007?

15 MR. SANDELL: It's the letter that was attached
16 to the letter I sent to Vicky Whitney on February 1st.
17 And we referenced it a little bit earlier. It's one of
18 the exhibits. I don't know which one.

19 STAFF COUNSEL BULLOCK: It's Water Rights 19, for
20 the hearing committee.

21 MR. SANDELL: Right. So that was -- I received
22 two communications with the engineer. One was that letter
23 and the other was a bill.

24 (Laughter.)

25 STAFF COUNSEL BULLOCK: Okay. Now, did he design

1 the device or did he just review your calculations?

2 He reviewed the calculations, which is quite --
3 you know, the objective is to meet the bypass requirement,
4 not to, you know, see who can design the system.

5 STAFF COUNSEL BULLOCK: Right. Do you have that
6 letter handy from --

7 MR. SANDELL: Maybe we could pull it up here.

8 STAFF COUNSEL BULLOCK: It's on I think it's page
9 4 of that exhibit you were just on.

10 You went by it. Back one more.

11 So if we can scroll down just a little bit.

12 MR. SANDELL: That's it.

13 STAFF COUNSEL BULLOCK: Okay. You have to give
14 me a second. I apparently need new glasses.

15 (Laughter.)

16 STAFF COUNSEL BULLOCK: Under the bullets -- that
17 paragraph under the bullets, the second sentence, can you
18 just read that for us quickly.

19 MR. SANDELL: Where it says, "The flashboard dam
20 and diversion pipe have been successfully installed" --

21 STAFF COUNSEL BULLOCK: Sorry. No, the paragraph
22 under the bullets, the second paragraph -- or second
23 sentence starting "as such".

24 Oh, "As such my review of your plan consists
25 solely of reviewing the bypass opening and corresponding

1 calculations."

2 STAFF COUNSEL BULLOCK: So he only reviewed what
3 you had done?

4 MR. SANDELL: That's right. And he stamped and
5 approved it.

6 STAFF COUNSEL BULLOCK: Sure. And you're not a
7 civil engineer; is that correct?

8 MR. SANDELL: I'm not a civil engineer.

9 STAFF COUNSEL BULLOCK: Okay. Mr. Sandell, I'd
10 like to direct your attention to the last paragraph of
11 your testimony, if you have that in front of you.

12 MR. SANDELL: Okay. I'm there.

13 STAFF COUNSEL BULLOCK: Now, there's been talk,
14 quite a bit of talk today about your concern with the
15 environment. And in your testimony you state that -- this
16 is a quote -- "The Vineyard Club is always very careful to
17 follow the requirements imposed on it by all government
18 agencies." And you also state that you have worked over
19 the years to, quote, "comply with all laws and regulatory
20 requirements."

21 Do you still agree with your written testimony?

22 MR. SANDELL: You know, I might amend that to say
23 that we're always very careful to follow the requirements
24 we're aware of. Because had we been aware of this, I
25 guarantee you we wouldn't be here today.

1 STAFF COUNSEL BULLOCK: Sure.

2 Mr. Sagues, you have similar statements in your
3 testimony. Would you want to make the same amendment to
4 your statements?

5 MR. SAGUES: I would.

6 STAFF COUNSEL BULLOCK: Okay. And, Mr. Sandell,
7 would you agree that your license is a requirement imposed
8 by a government agency?

9 MR. SANDELL: The permit and license issued in
10 1991?

11 STAFF COUNSEL BULLOCK: '92, yes.

12 MR. SANDELL: '92. Well, sure.

13 STAFF COUNSEL BULLOCK: Okay. Until Mr. Lindsay
14 conducted his inspection and alerted you that there was a
15 violation and that you were facing enforcement, were you
16 following the requirements imposed by the State Water
17 Board?

18 MR. KELLY: I'm going to object to that as -- I
19 think the testimony's not clear that Mr. Lindsay informed
20 them of that information when he was at the inspection.

21 STAFF COUNSEL BULLOCK: I could rephrase the
22 question. That's fine.

23 Until Mr. Lindsay conducted his inspection, were
24 you following the requirements imposed by the State Water
25 Board?

1 MR. SAGUES: Apparently not.

2 STAFF COUNSEL BULLOCK: So that's a no?

3 MR. SAGUES: That's correct.

4 STAFF COUNSEL BULLOCK: Up to that point had you
5 ever read your license to know what the requirements were,
6 Mr. Sandell?

7 MR. SANDELL: I had not.

8 STAFF COUNSEL BULLOCK: Mr. Sagues?

9 MR. SAGUES: No, I had not.

10 STAFF COUNSEL BULLOCK: Did you know that you had
11 a license, either of you?

12 MR. SAGUES: I was aware that there was some
13 requirements, that our major requirement was that we could
14 take water through the pipeline only until the end of May.
15 That was the only part of the requirement. I really
16 wasn't aware of who was -- who the authority was who said
17 that, but that was what my understanding was.

18 MR. SANDELL: If I may.

19 STAFF COUNSEL BULLOCK: Sure.

20 MR. SANDELL: I attempted to obtain a copy of the
21 license prior to doing the work. I got some material
22 related to it, but I wasn't able to actually obtain a copy
23 of the license itself.

24 STAFF COUNSEL BULLOCK: Could you clarify when?

25 MR. SANDELL: Yeah, this was before installing

1 the dam. And some of that literature indicated the
2 periods of diversion, but it did not include mention of
3 the bypass requirement, which is one of the requirements
4 of the license.

5 STAFF COUNSEL BULLOCK: So you did not have a
6 copy of your license?

7 MR. SANDELL: I did not have a copy of the
8 license at the time I oversaw the installation of the dam.

9 STAFF COUNSEL BULLOCK: Were you aware that it's
10 a public record and it's available here at the State Water
11 Board?

12 MR. SANDELL: Well, you know, these volunteer
13 things -- we all do volunteer things --

14 STAFF COUNSEL BULLOCK: I understand. I'm just
15 wondering if you knew or not.

16 MR. SANDELL: No, no.

17 STAFF COUNSEL BULLOCK: Do you believe --

18 MR. SANDELL: I was just pretty happy that
19 someone was getting -- you know, that it was happening.
20 But -- go ahead. Sorry.

21 STAFF COUNSEL BULLOCK: Do you believe that
22 ignorance of the terms of your license is an excuse for
23 not following those terms?

24 MR. KELLY: I'm going to object to that question.

25 STAFF COUNSEL BULLOCK: Can I ask what --

1 VICE CHAIRPERSON WOLFF: On what grounds?

2 MR. KELLY: On the fact that it's argumentative,
3 speculative, and simply unnecessary to use the word
4 "ignorance" in a question to a witness.

5 VICE CHAIRPERSON WOLFF: Well, let's take those
6 one by one.

7 Argumentative, I do not support your objection.

8 What was your second one? Speculative. It's
9 about a belief of the witness. I do not support that
10 objection.

11 And what was the third?

12 MR. KELLY: I think it's just an improper
13 question. I think that the fact that they didn't have the
14 license, claiming that that's ignorance, is inappropriate.

15 VICE CHAIRPERSON WOLFF: All right. Mr. Bullock,
16 please rephrase your question using words which are as
17 neutral as possible.

18 STAFF COUNSEL BULLOCK: Do you believe, Mr.
19 Sandell, that not knowing the terms in your license --
20 would you agree that you did not know the terms in your
21 license?

22 MR. SANDELL: I did not -- I was not aware of all
23 the terms, that's correct.

24 STAFF COUNSEL BULLOCK: Would you agree that --
25 or would you -- do you believe that not knowing the terms

1 in your license is an excuse for not following those
2 terms?

3 MR. KELLY: I'm going to object to the relevance
4 of this whole line of questioning. The Vineyard Club
5 testified that there was no measuring device in place when
6 the inspection took place. And that's not at issue.

7 VICE CHAIRPERSON WOLFF: This is overruled. You
8 have alleged that the prosecution acted in a punitive
9 manner. The prosecution is attempting -- and you've also
10 alleged that your clients acted in an exemplary manner.
11 The prosecution is asking a question about the belief of
12 the defendant with regard to what is acceptable behavior.
13 I think it's within the realm of the issues that are being
14 discussed here.

15 MR. SANDELL: Would you restate the question
16 please?

17 STAFF COUNSEL BULLOCK: Sure. Let me just start
18 over. We'll phrase it differently. Maybe it will be more
19 acceptable to Mr. Kelly.

20 Would you agree that you have a responsibility to
21 know and abide by the terms of your license?

22 MR. SANDELL: I'd say that's a fair statement.

23 STAFF COUNSEL BULLOCK: You state on -- I'm
24 sorry. This is for Mr. Sagues. And actually let me ask
25 you that same previous question. Do you feel that you

1 have a responsibility to know and abide by the terms of
2 your state license?

3 MR. SAGUES: All of my life I've heard that
4 ignorance of the law is no excuse, so I have no objection
5 to that.

6 STAFF COUNSEL BULLOCK: Okay. Mr. Sagues, on
7 page 5 of your testimony you state that you were not
8 advised to stop diverting water in 2005; is that correct?

9 MR. SAGUES: I was not advised to stop diverting
10 water for the rest of the month of May, that's correct.

11 STAFF COUNSEL BULLOCK: At the time of the
12 inspection, did Mr. Lindsay show you a copy of the
13 license?

14 MR. SAGUES: I do not remember him giving me a
15 copy of the license. And, in fact, as you can see from
16 the E-mail records, I asked him for a copy of the license
17 in August, just a few months later.

18 STAFF COUNSEL BULLOCK: And Did he show you a
19 copy of the license? Did you see the term?

20 MR. SAGUES: No, I do not remember that at all.

21 STAFF COUNSEL BULLOCK: Did he inform you that --
22 as I asked previously, did he inform you? So did you know
23 on that date that your license prohibited you from
24 diverting without a license -- or sorry -- without a
25 measuring device?

1 MR. SAGUES: Mr. Lindsay mentioned to me when we
2 got to the dam that there was not a bypass device on and
3 that we were possibly in violation by not having it.

4 Does that answer your question?

5 STAFF COUNSEL BULLOCK: Yeah. So you understood
6 on that date that you -- the law and your license
7 prohibited you from diverting water without a measuring
8 device, after the inspection with Mr. Lindsay?

9 MR. SAGUES: I understood after the inspection.

10 STAFF COUNSEL BULLOCK: Okay. On the date of the
11 inspection were you aware that you had had a license since
12 1992 that had that term?

13 Let me ask you those two separately. I'm sorry.
14 That was kind of a compound question.

15 On the date of the inspection were aware that you
16 had a license since 1992?

17 MR. SAGUES: No, I was --

18 MR. KELLY: Objection. Relevance.

19 VICE CHAIRPERSON WOLFF: I find it highly
20 relevant.

21 MR. SAGUES: No, I was not aware that we had a
22 license since 1992.

23 STAFF COUNSEL BULLOCK: But you were -- did you
24 have any knowledge of -- because you've stated that you
25 knew that there was a license; is that correct?

1 MR. SAGUES: I don't know that I stated that I
2 knew we had a license. I knew there was some terms and
3 conditions. And the only one that I had heard of prior to
4 this inspection was that we were not permitted to divert
5 water after the end of May.

6 STAFF COUNSEL BULLOCK: A few minutes ago I asked
7 you -- or Mr. Sandell I guess I asked whether he knew if
8 he had a license. And you said yes; is that correct?

9 We can check back if you'd feel more comfortable.

10 MR. SANDELL: Yeah, I was aware there was a
11 license. As I commented, I was not able to obtain a copy
12 and move forward with the installation of the dam -- the
13 diversion.

14 STAFF COUNSEL BULLOCK: Perhaps I've confused
15 myself now.

16 Mr. Sagues, can you please clarify for me,
17 because I've gotten a little confused, when you first
18 became aware that you had a license?

19 MR. SAGUES: It would have been at the time that
20 Mr. Lindsay mentioned that license.

21 STAFF COUNSEL BULLOCK: Okay. And today you're
22 aware that that license has been in place for quite some
23 time?

24 MR. SAGUES: Absolutely I am now, yeah.

25 STAFF COUNSEL BULLOCK: When did you come across

1 that knowledge?

2 MR. SAGUES: Over the past several months and
3 meeting with attorneys.

4 STAFF COUNSEL BULLOCK: And you're now aware that
5 your license says that no water shall be diverted from Oak
6 Flat Creek unless there's a measuring device installed?

7 MR. SAGUES: I have that firmly implanted, yes.

8 STAFF COUNSEL BULLOCK: Mr. Sandell?

9 MR. SANDELL: Yes, I'm clear on that.

10 STAFF COUNSEL BULLOCK: Just one last question
11 here.

12 Mr. Sagues, you state on page 5 of your testimony
13 that you, "you" being the Vineyard Club, have attempted to
14 meet the license requirements.

15 If you want to take a second to find that, we can
16 wait.

17 MR. SAGUES: Are you talking about 5, conclusion?

18 STAFF COUNSEL BULLOCK: Yes.

19 MR. SAGUES: Okay.

20 STAFF COUNSEL BULLOCK: Would you agree with
21 that, that you have attempted to comply with the license
22 requirements?

23 MR. SAGUES: We've always been very careful to
24 try and follow those when we understood them, yes.

25 STAFF COUNSEL BULLOCK: Mr. Sandell, same

1 question.

2 MR. SANDELL: Yes.

3 STAFF COUNSEL BULLOCK: Okay. And when did you
4 begin attempting to comply with the license requirements?
5 Was it before or after the inspection?

6 MR. SAGUES: It was at the end of the inspection
7 when I began asking Mr. Lindsay for information about
8 bypass devices. And he offered to send it to me. And
9 we -- I started finding out information about how we can
10 go about doing that.

11 STAFF COUNSEL BULLOCK: So it was not until after
12 the inspection that you started coming into compliance; is
13 that correct?

14 MR. SAGUES: That is correct. I did not -- for
15 example, there was a letter that was mentioned. I did not
16 receive any copy of a letter six weeks or so prior to that
17 inspection. The first I knew was Mr. Lindsay calling up
18 asking if he could inspect the diversion dam.

19 STAFF COUNSEL BULLOCK: Maybe I didn't make that
20 question clear.

21 The first time that you made efforts to come into
22 compliance with the -- the term in your license that says
23 no water shall be diverted, the first time that you began
24 working toward doing that was after the inspection?

25 MR. SAGUES: During the inspection, I would say.

1 STAFF COUNSEL BULLOCK: Not before?

2 MR. SAGUES: Not before.

3 STAFF COUNSEL BULLOCK: Okay. Thank you.

4 REDIRECT EXAMINATION

5 BY MR. DANIEL KELLY, ESQ., representing The Vineyard Club,
6 Inc:

7 A couple of brief questions. And this is to
8 either or perhaps both of you.

9 Prior to the diversion in 2005, did either of
10 you -- were either of you in charge of installing the
11 diversion system?

12 MR. SAGUES: No.

13 MR. SANDELL: No.

14 MR. KELLY: Do either of you know when prior to,
15 Bert, to you installing that system in May of -- or, I'm
16 sorry -- late March or early April of 2005 -- prior to
17 that do you know the last time that that diversion system
18 was installed?

19 MR. SAGUES: I believe it was either the season
20 of 2002 or 2003. But I have no way of finding that out
21 without contacting our previous -- the man who previously
22 installed it. And he's currently living in Arkansas.

23 MR. KELLY: And who is that?

24 MR. SAGUES: That is Jean Schettler.

25 MR. KELLY: And is that the same name that

1 appears on that 1992 document we've been looking at that
2 shows the old measuring device?

3 MR. SAGUES: That is correct. He was acting
4 as -- he was not officially the manager. His wife was the
5 manager for ten years. So he was taking care of that
6 responsibility from about 1991 to about 2001, and I took
7 over in 2002 or 2003.

8 MR. KELLY: So from the time that the license
9 inspection was done back in '92 that shows that photograph
10 up until the last time right before you installed it, that
11 same gentleman took care of installing the diversion
12 system?

13 MR. SAGUES: That is correct.

14 MR. KELLY: Okay. Do you have any knowledge --
15 personal knowledge of whether prior to the time, Bert,
16 that you installed the device whether or not there was the
17 lack of a device?

18 MR. SANDELL: No knowledge.

19 MR. KELLY: So you just don't know either way?

20 MR. SANDELL: Right.

21 MR. KELLY: And it's completely possible that --
22 is it Jean was his name?

23 MR. SAGUES: That's correct

24 MR. SANDELL: That's right.

25 MR. KELLY: It's entirely possible that Jean

1 could have?

2 STAFF COUNSEL BULLOCK: Objection. These are
3 leading questions. And this is a direct.

4 VICE CHAIRPERSON WOLFF: Well, you're asking him
5 to speculate about what Jean might or might not have done.
6 So why don't you rephrase your question.

7 MR. KELLY: Do you have any knowledge that there
8 was a lack of a device in 2000?

9 MR. SANDELL: No, I don't. But I do know Jean
10 Schettler. And he's a guy that when told to do something
11 does it. And his history -- he and I have worked on
12 several projects together. And I have no reason to
13 believe that if he was aware of the bypass, that he would
14 not have installed it.

15 MR. KELLY: When did Mr. O'Hagan and Mr. Lindsay
16 begin to assist helping you design this device -- or help
17 you in your design of the device?

18 MR. SANDELL: This was after I contacted them
19 after the delivery of the ACL and the CDO.

20 MR. KELLY: So prior to the ACL and the CDO you
21 received no assistance?

22 MR. SANDELL: I personally did not.

23 MR. KELLY: Peter, did you receive any assistance
24 in coming to an acceptable device prior to the issuance of
25 the ACL?

1 MR. SAGUES: I got no information back in spite
2 of asking Mr. Lindsay at least two times for that
3 information, information which he volunteered on the day
4 of the inspection.

5 MR. KELLY: I have no further questions.

6 VICE CHAIRPERSON WOLFF: Thank you.

7 Any recross?

8 STAFF COUNSEL BULLOCK: Just very quickly.

9 RECCROSS-EXAMINATION

10 BY MR. MATTHEW BULLOCK, STAFF COUNSEL, representing the
11 Division of Water Rights:

12 I just wanted to clarify. You said that you
13 presumed that in 2002, 2003 that the measuring device had
14 been installed. You didn't say what that presumption was
15 based on. If you could tell me what makes you -- I think
16 it was Mr. Sandell that made that statement.

17 MR. SANDELL: Right. Mr. Schettler -- so you're
18 curious -- well, as I said, I know Jean, and Jean is a
19 contractor. You know, that's his living. And Jean, if
20 he's aware of a requirement and he knows the consequences,
21 I'm assuming he's going to do that. As an example, he was
22 told by the dam inspection people to do a number of things
23 over time, clear tules, cut willows, and he always
24 complied with it immediately.

25 So based on my experience with Jean, my

1 assumption is that the entire time he was responsible for
2 installing the diversion dam he complied with the rules.
3 That's an assumption. I haven't personally seen that.

4 STAFF COUNSEL BULLOCK: And that's Based on your
5 belief that Mr. Schettler is an upstanding person who
6 complies with the law?

7 MR. SANDELL: And personal history of dealing
8 with him.

9 STAFF COUNSEL BULLOCK: Did he pass on any of
10 this knowledge about -- you're suggesting that he had an
11 awareness of the requirement in the license. That's the
12 assumption you're working on; is that correct?

13 MR. SAGUES: Perhaps I could address that.

14 STAFF COUNSEL BULLOCK: Sure.

15 MR. SAGUES: Mr. Schettler was acting with his
16 wife, as I mentioned, as manager for about ten years. And
17 they were -- they resigned kind of under pressure and the
18 conditions were not all that great. He was very, very
19 upset or very angry about the situation with the board for
20 letting him go or accepting his resignation. He was not
21 about to help me to pass on any of this information. The
22 information that I know about the pipeline was just what I
23 heard from him several years prior to that, the
24 requirement that the pipeline could only be hooked up
25 until the end of May.

1 STAFF COUNSEL BULLOCK: Okay. So you had
2 no -- very little information about the organizational
3 history of the Vineyard Club when you started your
4 positions?

5 MR. SAGUES: That is correct. And that is a
6 situation that we have been correcting for the last five
7 years. Since we have had three new managers there, we are
8 keeping very diligent paper records.

9 STAFF COUNSEL BULLOCK: I appreciate your time.
10 Thank you.

11 VICE CHAIRPERSON WOLFF: I have questions, both
12 for the defense witnesses and the prosecution witnesses.
13 However, I may have made a procedural error.

14 So I'm going to suggest -- but will only do this
15 if both counsel concur -- I'm going to suggest that we
16 allow the defense witnesses to take a break, we enter the
17 exhibits into testimony, we have a lunch break; when we
18 come back we recall the prosecution witnesses and I ask my
19 questions of them, we recall the defense witnesses and I
20 ask my questions of them. This preserves the order that
21 would have occurred in the normal process. And then we
22 move to rebuttals.

23 Would anyone object to that procedure?

24 STAFF COUNSEL BULLOCK: The prosecution team does
25 not.

1 MR. KELLY: We have no objection.

2 VICE CHAIRPERSON WOLFF: And let me be clear with
3 my counsel. Is there any chance given they do not object
4 that this change in procedure causes a basis for something
5 later?

6 SENIOR STAFF COUNSEL KATZ: No.

7 VICE CHAIRPERSON WOLFF: Thank you.

8 So with that, let's move to entering exhibits.

9 Mr. Kelly, you have exhibits to enter?

10 MR. KELLY: Yes, Dr. Wolff. I would move to
11 admit exhibits VC-1 through I think it's VC-40 -- I'm
12 trying to see what the last number -- it would be VC-43 I
13 think was added. So I would move to admit those into
14 evidence.

15 VICE CHAIRPERSON WOLFF: So ordered.

16 (Thereupon Exhibits VC-1 through VC-43 were
17 admitted into evidence.)

18 VICE CHAIRPERSON WOLFF: Do those include the
19 letters you sent to me and my responses, and are you
20 interested in entering those letters?

21 MR. KELLY: They don't, Dr. Wolff. And I don't
22 know that they necessarily need to be part of the
23 evidentiary record so long as they're part of the record
24 of the proceedings. And perhaps Ms. Katz can --

25 VICE CHAIRPERSON WOLFF: So those letters in

1 addition to the E-mail that was mentioned in footnote 1 to
2 my letter from yesterday are all part of the
3 administrative record. And you're saying you see no
4 reason to enter them into the evidentiary record?

5 MR. KELLY: I see no need to so long as they're
6 part of the record. Thank you.

7 VICE CHAIRPERSON WOLFF: They are your exhibits.

8 MR. KELLY: Thank you.

9 VICE CHAIRPERSON WOLFF: You're welcome.

10 Will there be rebuttal? Do the parties have
11 rebuttal?

12 MR. KELLY: Currently the Vineyard Club has no
13 plan to call any rebuttal witness.

14 STAFF COUNSEL BULLOCK: Nor do we.

15 VICE CHAIRPERSON WOLFF: Well, perhaps we should
16 press through with my questions and then we could be done.
17 I don't know. I'm getting a little lightheaded. Not too
18 bad.

19 MR. KELLY: I guess it would be up to the
20 witnesses, Dr. Wolff. And I think that maybe just a
21 minute or two just to close and we could wrap this up and
22 all go.

23 STAFF COUNSEL BULLOCK: I think some of our
24 witnesses would appreciate another short break.

25 VICE CHAIRPERSON WOLFF: Five minutes.

1 Well, let's take what we'll call five but turns
2 out to be ten. It always does. So no more than ten and
3 we'll be back. And we'll start with the prosecution
4 witnesses.

5 (Thereupon a recess was taken.)

6 VICE CHAIRPERSON WOLFF: We'll now reconvene.

7 Would the prosecution witnesses proceed to the
8 penalty box.

9 (Laughter.)

10 VICE CHAIRPERSON WOLFF: It's possible a few of
11 these questions were answered in testimony subsequent to
12 when I wrote them down. So if you believe you've answered
13 it before, it's fine to simply say, "I believe I've
14 answered that."

15 For both members -- for both witnesses, do I
16 understand correctly you were not aware of the full
17 history of this site when the \$4100 ACL was issued?

18 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

19 I'll go first. You know, I wasn't aware of
20 the -- you know, I'd seen that previous photograph in
21 there of the measuring device around 1992. So I knew
22 there wasn't a measuring device -- what I'm getting at
23 here is, had I really thought about the permit period?
24 No, I hadn't really studied the permit period and looked
25 at the possibility that 1992 was the first time a

1 measuring device had actually gone in.

2 So I think to answer your question, no. There
3 is -- I did go further back into the record once I knew we
4 were going to a hearing. To tell you exactly where that
5 point is that I went back from, it was approximately
6 around that 1992 period.

7 VICE CHAIRPERSON WOLFF: That's adequate.

8 Mr. Stretars.

9 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

10 Again, I would kind of limit the same type of
11 thing. I'm Larry's supervisor, so I did not look as in
12 detail initially -- his job was to do the inspection. He
13 basically looked at enough information and was aware of
14 the project when we went out there. Not necessarily do
15 any details, especially since we were looking at what was
16 there at this point in time. So he developed -- and that
17 was the basis of the original evaluation. Then as time
18 drug on and things began to happen, again because of the
19 timeframe we started looking at the history of the file,
20 and more things became somewhat apparent that there was
21 some concerns that it had existed earlier, you know. Not
22 that we could necessarily directly answer or that we could
23 then identify as totally being appropriate or
24 inappropriate as far as their actions, but that there was
25 some questions there.

1 VICE CHAIRPERSON WOLFF: Okay. And does either
2 of you have any personal or professional experience with
3 the Vineyard Club members prior to the inspection?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:
5 No, I do not.

6 VICE CHAIRPERSON WOLFF: Mr. Stretars?

7 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:
8 Yes, I do, in fact.

9 VICE CHAIRPERSON WOLFF: Please.

10 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

11 Dates way back. There was a complaint filed
12 years and years ago, in 1977, which I was a very young
13 gentleman in this Division at that point in time, and I
14 actually went out and inspected -- went out to visit the
15 project on the basis of the complaint, and assisted them
16 to some extent in getting the original application filed.
17 And that was my involvement up until very recent. In
18 fact, I didn't even recognize it until the file came up
19 that --

20 VICE CHAIRPERSON WOLFF: So that was 1977. So
21 that's prior to a permit even being issued, that's --

22 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

23 It was way back, yes. The permit was 1984,
24 thereabouts, something like that I think.

25 VICE CHAIRPERSON WOLFF: Are any of the people

1 who you met at that time involved in any way in this
2 hearing, to --

3 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

4 No, no one. No one I know at all,
5 no connection --

6 VICE CHAIRPERSON WOLFF: Mr. Jean Schettler, does
7 that ring a bell, or any of the names -- the name of the
8 person who was previously involved?

9 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

10 No, sir.

11 VICE CHAIRPERSON WOLFF: Okay. Thank you.

12 Let me ask you about the size of the ACL you
13 recommended.

14 What are the typical costs of taking an ACL to
15 hearing? Not this one in particular, but typically what
16 kind of range of costs are involved in preparing for a
17 hearing, paperwork, et cetera?

18 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

19 We haven't really done that many per se. I think
20 as the exhibit showed, there was about six of them that
21 Mr. Kelly wished to enter that are previous actions.

22 Again, from our side of the coin, we don't really
23 get involved with the hearing costs per se. The costs
24 relative to the prosecution team relates to basically the
25 time the engineer was out there, my time in reviewing his

1 work basically, to some extent a little bit of attorney's
2 time prior to the ACL being issued, and thereafter then
3 the operation relative to potential settlement,
4 discussions with the permitting -- or with the prosecution
5 team, and basically our time assembling for a hearing.

6 VICE CHAIRPERSON WOLFF: So you don't have a
7 range of costs. And the reason I'm asking -- I'm not
8 trying to lead you someplace. But the reason I'm asking
9 is you stated there was a discount -- \$4100 represented a
10 discount. Well, a discount from what? Now, maybe that's
11 just a casual way of speaking and that's the answer to the
12 question: It was a low number but there wasn't a higher
13 number that was discussed.

14 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

15 The discount we were looking at related to the
16 fact that the 60-day period of time at \$500 a day was
17 \$30,000. But we discounted that down to 4100, which was
18 looking at these other factors of harm, potential injury,
19 corrective actions they did; to some extent looked at our
20 costs for staff time, what the cost of potentially that
21 quantity of water might have been.

22 VICE CHAIRPERSON WOLFF: So you started with
23 30,000 as a maximum. But one of the exhibits talks about
24 120 days -- of potentially 120 days of violation based on
25 the inspection. And so that would be 60,000, not 30,000.

1 So where did the 30,000 come from? And, you know, why not
2 40,000, why not 20,000? Tell me a little bit more about
3 your thinking at picking that number to start from -- as a
4 place to discount down from and/or returning to that
5 number when you decided to re-up it.

6 You know, why 30? That's my question. Why not
7 40, why not 20, why not 60?

8 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

9 The 30, again, because the testimony of the --
10 information of -- the fact that we were out there, that
11 the diversion was occurring. And Mr. Sagues has indicated
12 that -- I indicated that the original structure had been
13 put in somewhere around the first of April, that it was
14 taken out the end of May, the 29th to be mere exact, more
15 recently. Amount of 60 days basically of potential
16 diversion time that would have occurred. The requirements
17 under the code say we cannot request anything more than
18 \$500 per day. So that would be the maximum based on that
19 stance.

20 VICE CHAIRPERSON WOLFF: Okay. Let's go back to
21 the question of when you reviewed the record in
22 preparation for the hearing you discovered what you
23 thought was a serious history of violation, and so that
24 was part of the basis of increasing the size of the ACL.

25 Did you consider recommending withdrawing the ACL

1 and the CDO and recommending revocation of the permit?

2 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

3 Well, it's at a license at this point.

4 VICE CHAIRPERSON WOLFF: I'm sorry, a license.

5 Revocation of the license. I've misstated my question.

6 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

7 That's all right.

8 No. Revoking the license, no, sir.

9 VICE CHAIRPERSON WOLFF: Didn't consider it?

10 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

11 No.

12 VICE CHAIRPERSON WOLFF: And why not?

13 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

14 Well, didn't see any reason to. I mean they're

15 in violation of it, but they can come in to compliance.

16 And also I mean thinking about all the things that

17 would -- there is a storage project there. They would

18 have to take out the lake if we revoked the license.

19 VICE CHAIRPERSON WOLFF: But if they're such bad

20 actors, they have such a bad history, why not consider

21 that?

22 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

23 I don't think that's one of the remedies in this

24 case.

25 VICE CHAIRPERSON WOLFF: Mr. Stretars, do you

1 have anything to add? Did you think about it -- maybe you
2 didn't think about it at the time, and that's a sufficient
3 answer.

4 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

5 No, we didn't think about it, or I didn't think
6 about it anyway.

7 VICE CHAIRPERSON WOLFF: Okay. Thank you.

8 For either of you, is approval of the measuring
9 device required by the Board -- approval of the design of
10 the measuring device required by the Board, either under
11 the original license or under the tentative CDO?

12 SENIOR WATER RESOURCES CONTROL ENGINEER STRETARS:

13 By the Board, you're referring to --

14 VICE CHAIRPERSON WOLFF: I'm sorry. No, by the
15 staff of the Board, by the Division. By the Division.

16 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

17 Yes, the measuring device -- here's where I'm a
18 little confused, and I want to make sure I'm answering
19 your question. Are you talking about the one we're trying
20 to get them to install now or --

21 VICE CHAIRPERSON WOLFF: Yes, yes. The
22 defendants are seeking to install a measuring device.

23 They've asked for Division approval of a proposal.

24 Is Division approval of the proposal required?

25 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

1 Yes, based on the term.

2 VICE CHAIRPERSON WOLFF: What is the basis of
3 that? The term of the license itself requires it?

4 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

5 Yes. You know, and I apologize. I left my
6 notebook over here. Let me go over here.

7 VICE CHAIRPERSON WOLFF: That's fine. If the
8 license says a measuring device acceptable to someone --
9 is that right?

10 SENIOR WATER RESOURCES CONTROL ENGINEER LINDSAY:

11 Yes. It says satisfactory to the State Water
12 Resources Control Board. I think that's been delegated.
13 I don't have evidence --

14 VICE CHAIRPERSON WOLFF: Thank you. No, that's
15 fine, that's fine. I wasn't clear on that point.

16 Those are my questions for the prosecution team.
17 Thank you very much.

18 I'd like now to recall the defense witnesses.

19 VICE CHAIRPERSON WOLFF: Mr. Sagues, I just want
20 to be clear that the photos that were shown by the
21 prosecution team in their case -- were those photos of the
22 property that you manage? There were three photos, I
23 believe.

24 MR. SAGUES: That is correct. There were some
25 photos taken from private property looking out on to the

1 lake. And the lake is the property of the Vineyard club.

2 VICE CHAIRPERSON WOLFF: Maybe we should put the
3 three photos up again to be sure then.

4 Here's one.

5 MR. SAGUES: No, those photos are not of the
6 Vineyard Club property. Those belong to a private owner.

7 VICE CHAIRPERSON WOLFF: I'm sorry. But those --
8 is that a photo at the location of your diversion off Oak
9 Creek Flat?

10 MR. SAGUES: That belongs to a man named Dan
11 Merritt.

12 VICE CHAIRPERSON WOLFF: I asked the question
13 wrong the first time.

14 Is this your diversion point?

15 MR. SAGUES: That is correct.

16 VICE CHAIRPERSON WOLFF: I'm just being certain.

17 And what's the board with the hole in it? The
18 one sitting to the right there that's not connected to the
19 pipe.

20 MR. SAGUES: Since Bert put that together, maybe
21 he could tell you.

22 VICE CHAIRPERSON WOLFF: Sure.

23 MR. SANDELL: That was some material that was
24 used to reinforce the dam at installation. And it was
25 installed -- it was laying about with some debris that was

1 used to strengthen the dam.

2 VICE CHAIRPERSON WOLFF: Okay. And let's just
3 flip to the next picture.

4 This is your pond -- the Vineyard Club pond?

5 MR. SAGUES: That is correct.

6 VICE CHAIRPERSON WOLFF: Okay. And the next one.
7 I thought there were three.

8 Yeah, this one. This is the old one, right? Do
9 you have any reason to believe this is not your facility?
10 Since Mr. Kelly brought this up earlier, I want to be sure
11 we're all talking about the same thing. This came out of
12 an inspection report, I believe, is that right?

13 MR. KELLY: Dr. Wolff, that actually is contained
14 in the file for this water right.

15 VICE CHAIRPERSON WOLFF: Yes. And the file
16 indicates that it came from this facility. I'm asking the
17 defense witnesses if they have any reason to believe or
18 disbelieve whether it is --

19 MR. SANDELL: Dr. Wolff, it appears to be the
20 same diversion point taken from a different angle. It's
21 upstream instead of downstream.

22 VICE CHAIRPERSON WOLFF: Okay. I mean I know you
23 can't be certain. You weren't there. But it does seem as
24 if --

25 MR. SANDELL: Yeah, it looks -- yeah, I think

1 that's it.

2 VICE CHAIRPERSON WOLFF: All right.

3 Mr. Sagues, I'm a little unclear on what took
4 place with the license at the time of the inspection. We
5 have testimony that a license was present in someone's
6 truck. Do you remember the license being present in the
7 truck?

8 MR. SAGUES: No, I don't remember that at all.
9 There's certainly a possibility that Mr. Lindsay gave me
10 that, as he mentioned, at the start of the inspection.
11 And then it was raining lightly that day, so I probably
12 did not carry that with me down into the creek and back.
13 And I think if he gave me one, I probably left it in his
14 truck at the end of that day. That would just be my
15 guess. Or left it some other place.

16 VICE CHAIRPERSON WOLFF: All right. But at the
17 end of the inspection when he left you were aware that
18 there was such a thing as a license and it had a condition
19 in it about measuring device, right?

20 MR. SAGUES: Within a short time after that I
21 reported to the Board of Directors of the Vineyard Club
22 that we had been in violation of our license.

23 VICE CHAIRPERSON WOLFF: Okay. Mr. Kelly
24 suggested earlier that maybe a measuring device was
25 present almost every year prior to the time of inspection

1 between '92 and 2005. And the only evidence that I'm
2 aware of that was presented to that effect was, Mr.
3 Sandell, your testimony that Mr. Schettler -- if I'm
4 pronouncing his name correctly -- was an upright man who
5 would have done that if he knew that he needed to do it.

6 Is there any other evidence the measuring device
7 was present in any of the years between the photos we've
8 just looked at?

9 MR. SANDELL: I don't -- I'm not aware of any
10 evidence. I've not visually seen it. I think that if we
11 were to seek out additional evidence through testimony of
12 other members and Mr. Schettler, we could probably come up
13 with some information. But we're not -- we don't have
14 that today.

15 MR. SAGUES: I think possibly I have one
16 explanation. The parts of the old diversion dam were
17 lying next to the dam, not very high up above the
18 waterline, at the time of the inspection by Mr. Lindsay.
19 It is my view that since that creek gets up very, very
20 high, that anything that was left in that position would
21 have been washed away during a heavy winter, even just a
22 moderately heavy winter. So that that material was
23 probably not left there for a very long time.

24 VICE CHAIRPERSON WOLFF: Thank you. I think
25 you've just equaled the prosecution in terms of

1 speculation.

2 (Laughter.)

3 VICE CHAIRPERSON WOLFF: Everyone's speculating
4 and that's fine. We all do.

5 Let me just be clear. How far back do the two of
6 you have personal knowledge of diversions? Just for a
7 couple of years, as I understand, maybe 2004, 2005, and
8 2006?

9 MR. SANDELL: Personally?

10 VICE CHAIRPERSON WOLFF: Yes.

11 MR. SANDELL: I do not believe there was a
12 diversion in the spring of 2003, because Mr. Schettler was
13 not involved at that point, and I didn't do it.

14 It didn't happen in 2004. It happened in 2005.
15 It did not happen in 2006. Other years -- years other
16 than those, I don't have any information on.

17 MR. SAGUES: Yes, I also was not involved in any
18 way that I had any personal knowledge of any of those
19 years.

20 VICE CHAIRPERSON WOLFF: And did Mr. Schettler's
21 role in this matter go all the way back to the beginning
22 of the work under the permit? Or was there anyone prior
23 to him that you're aware of?

24 MR. SAGUES: Yes, the manager -- from what I
25 understand, the manager -- at the time that the Vineyard

1 Club was contacted and was working through the license,
2 the manager was Stew Nimmo or Stewart Nimmo. Stewart
3 Nimmo died about six or seven years ago. And he had been
4 manager of the club for several years, but I'm not sure
5 what. And at that time of the transition of the change
6 from Stewart Nimmo as manager to the Schettlers as manager
7 was the time when the new diversion dam was designed and
8 built.

9 VICE CHAIRPERSON WOLFF: Thank you.

10 Just checking my notes to make sure I didn't miss
11 anything.

12 No, that's it for me.

13 Thank you very much.

14 MR. SANDELL: Thank you.

15 VICE CHAIRPERSON WOLFF: So I'll move to closing
16 arguments.

17 Closing arguments by the prosecution team first.

18 How long do you need, Mr. Bullock?

19 STAFF COUNSEL BULLOCK: Ten minutes at the most.

20 VICE CHAIRPERSON WOLFF: Sounds fine.

21 STAFF COUNSEL BULLOCK: I'd like to start out by
22 addressing something that came up quite a while ago, but I
23 think is really important to remember. We were discussing
24 the terms of Decision 1608 and why they were in there and
25 how those got transferred into the license.

1 And as a legal matter, it's important to remember
2 that what 1608 says is not relevant. But what's relevant
3 is what the license says about what is allowed for the
4 Vineyard Club to do with a reference to diversion of
5 water.

6 The Vineyard Club has a license that's very
7 clear. It states, "No water shall be diverted under the
8 license unless the licensee has installed a measuring
9 device in Oak Flat Creek." The wording of that license is
10 very clear that if there's not a measuring device, they do
11 not have a right to divert water. Section 1052 of the
12 Water Code says, "The diversion or use of water subject to
13 the Division other than is authorized in the Division is a
14 trespass subject to \$500 a day."

15 By the Vineyard Club's own testimony today, they
16 were diverting in 2005 for a period of at least 60 days
17 with no measuring device installed at any time during
18 those 60 days.

19 There's also been evidence presented today that
20 they were violating the same term in their permit in 1991,
21 and that it required help from the Division to install a
22 measuring device before they came into compliance with
23 that term.

24 Also has come out in the evidence today that that
25 measuring device was removed at some point.

1 The Vineyard Club claims to diligently comply
2 with the law. But it has a history dating back over 15
3 years showing noncompliance.

4 This ACL is not being issued against Mr. Sandell
5 and Mr. Sagues. The Water Board, the Division, the
6 prosecution team, we're not in any way questioning their
7 motives, saying that they're bad people. This isn't about
8 Mr. Sagues and Mr. Sandell. It's about the Vineyard Club
9 and about their history. And what their history shows is
10 that they lack organizational memory. That there is a
11 measuring device in place and somehow for some reason it's
12 gone and nobody knows why, nobody knows when,

13 This ACL and CDO are necessary to formally ensure
14 that the Vineyard Club not only comes into compliance, but
15 that they stay in compliance coming into the future and
16 that there is some sort of organizational memory making
17 sure that they comply with the law as they say they want
18 to do.

19 Thank you.

20 VICE CHAIRPERSON WOLFF: Mr. Kelly.

21 MR. KELLY: I think it's important to keep an eye
22 on the fact that it's the prosecution team that bears the
23 burden, and it is solely that that bears the burden. And
24 there's been a lot of speculation about when devices may
25 have been in place and when they've not been in place.

1 But the fact is that there's no evidence either way. And
2 in that regard, the prosecution team simply failed to
3 carry its burden to establish the lack of a device in
4 anything but May of 2005. And everything else has been
5 speculation.

6 So I think that -- I mean I know there's been a
7 lot of discussion about it. But that to me raises a
8 concern. And I want to be sure that we -- that everybody
9 keeps their eye on the fact that it's the prosecution that
10 bears the burden. They need to prove everything that
11 they've alleged. They need to prove it all.

12 The Vineyard Club does not have to prove that
13 there was a device there in 1998 or 1999. If the
14 prosecution team alleges it, they've got to prove it. And
15 there's been absolutely no proof.

16 Now, regarding the proposed -- the draft cease
17 and desist order, I really -- I think that the material
18 facts really aren't in dispute. There seems to be a
19 little bit of contradictory testimony with regard to the
20 conversations that took place when Mr. Lindsay was out at
21 the site. But I think generally the facts aren't in
22 dispute, that the Vineyard Club contacted the folks at
23 Division, contacted Mr. Lindsay -- the contact report's in
24 there -- tried to obtain information about the results of
25 the inspection. Mr. Lindsay had indicated that he would

1 send them examples of measuring devices. The testimony
2 was that they didn't receive it.

3 When they received the report, the results of the
4 inspection, and they saw that all this was going on, they
5 immediately got into gear and have attempted to comply,
6 and to date are still attempting to comply. There is
7 simply -- and I think the testimony was by Mr. Lindsay
8 that there's no current violation -- there's certainly no
9 current violation, because they're not diverting. They
10 didn't divert in 2004. The prosecution team in their
11 testimony you'll see thought that they were and reduced
12 that 120 days down to 60.

13 But the testimony was there was no diversion in
14 2004, testimony was there's no diversion in 2006. The
15 testimony and the evidence show that these folks are
16 trying to come into compliance. They're not diverting.
17 And they've said -- and they've said in writing and
18 they've said in E-mails that they will not divert until
19 they comply with that term of their license. They know
20 about it now and they are going to do whatever it takes to
21 comply with that license. There's no threat that these
22 folks are going to go out tomorrow and put up a diversion
23 dam and start diverting water without a bypass device.
24 Absolutely no threat.

25 And on that basis, there's no factual basis upon

1 which to issue a cease and desist order. It's absolutely
2 unnecessary, absolutely unnecessary.

3 Regarding the Administrative Civil Liability
4 complaint. We have provided the hearing team with
5 reasonably extensive briefing on that issue. And we still
6 believe that based upon the -- if you just -- if you just
7 look at the State Water Board's documents with regard to
8 investigating water right complaints. And that's in the
9 record, and I think it might be VC-3.

10 That document lays out the different types of
11 violations that occur. One of them is a violation of a
12 condition or a term in a permit or license. And then the
13 other is unauthorized diversion of water. And if you look
14 at that, it says unauthorized diversion of water is
15 diverting water without a valid water right. The permit
16 term -- violations of permit terms and conditions are
17 completely different.

18 And if you look in that same document toward the
19 end with regard to the remedies for violating a permit
20 term or condition and the remedies for engaging in the
21 unauthorized diversion of water, which is diverting water
22 without a water right, those potential penalties are very
23 different.

24 The State Water Resources Control Board cannot
25 issue Administrative Civil Liability for violating permit

1 terms and conditions pursuant to the statute.
2 Administrative Civil Liability can only be imposed for the
3 unauthorized diversion of water, which in that document --
4 that State Water Board document that was prepared in
5 February 2005, two to three months prior to this
6 inspection, makes an absolute distinction between the
7 unauthorized diversion of water and violating a term or
8 condition in the permit or license.

9 The allegations here are that it is a term
10 or condition -- it is a condition of the license that's
11 being violated. That is entirely different from engaging
12 in the unauthorized diversion of water. The unauthorized
13 diversion of water is diverting water without a valid
14 water right.

15 Regarding the amount. To the extent that the
16 hearing team believes that you can issue Administrative
17 Civil Liability for violating a term or condition in a
18 permit or license, I think -- and I appreciate Mr.
19 Lindsay's candor -- that the harm that was alleged -- the
20 environmental harm that was alleged in the complaint and
21 the testimony really isn't about -- isn't caused by the
22 lack of the measuring device; that that harm is caused by
23 the absence of the bypass flows. The testimony was, the
24 evidence is, that there's -- and the witnesses concurred
25 that there's no allegations that they weren't meeting

1 bypass flows.

2 So there's no support that there's any kind of
3 environmental harm. There's no evidence that there's any
4 water that's not available to downstream folks, because
5 that harm would have been caused by not meeting your
6 bypass flows. That's not at issue here.

7 It's the hole in the piece of wood. That's
8 what's at issue here. And Mr. Lindsay testified that not
9 having the hole in the wood isn't what would cause the
10 harm. It's not meeting those bypass flows. There's no
11 evidence that the bypass flows weren't being met. The
12 evidence is actually to the contrary.

13 The last thing regarding the amount of the
14 Administrative Civil Liability that's been proposed. The
15 prosecution team started out at 4100; and then as a result
16 of the request for this hearing shot up to the statutory
17 maximum. That's unsupported by the statute, because you
18 have to take into consideration everything.

19 Environmental harm, we've established, didn't
20 occur as result of the measuring device, violating that
21 term, because the bypass flows were being met. The
22 attempts to come into compliance, the persistence of the
23 violation. It's just not there. It's not there.
24 Absolutely not there.

25 The water right orders that we made part of the

1 evidence in this record, I'd invite you to go take a look
2 at those. Included in those, for example, was a cease and
3 desist order whereby Mr. Lindsay testified on behalf of
4 the prosecution team against the United States and against
5 the Department of Water Resources for violating salinity
6 standard in the Delta. No Administrative Civil Liability
7 there. Cease and desist order, but no Administrative
8 Civil Liability.

9 If you go through and you look at those where
10 Administrative Civil Liability's been imposed, there are
11 circumstances in there where people have multiple
12 reservoirs and they're diverting water into multiple
13 reservoirs without a water right. ACL in the amount of
14 \$3,000, \$3,070, \$4,000. And these are people who have
15 diverted water without a valid water right. Okay?

16 These folks have a valid water right.

17 The original amount proposed at \$4100 was based
18 upon the assumption that they were unlawfully diverting
19 water in '04. Actually the testimony's contrary to that
20 now.

21 It alleged a violation and harm to steelhead. It
22 came out in testimony this actually didn't cause any harm
23 to steelhead.

24 So the original amount proposed in the ACL was
25 completely out of line with past actions by the State

1 Water Resources Control Board with regard to imposing
2 Administrative Civil Liability.

3 And I firmly believe, and I want -- I would
4 appreciate that the hearing team, you know, seriously
5 consider whether or not this type of violation of a water
6 right whether or not the Board can actually properly issue
7 civil liability in this circumstance, because that's a big
8 jump. It is a big jump. And we think that there are
9 jurisdictional problems, you know.

10 But to the extent that you find that you can, I
11 think that the amount -- you know, the amount is just
12 outrageous to me, absolutely outrageous, given the
13 testimony, the facts of this case, and the attempts of the
14 folks at the Vineyard Club to come into compliance.

15 Thank you.

16 VICE CHAIRPERSON WOLFF: Thank you.

17 I believe that concludes the hearing.

18 Is there anything further to be said?

19 Ah, I need to read a last paragraph.

20 The Board will take this matter under submission.
21 All parties who participated in this hearing will be sent
22 notice of the Board's proposed decision on this matter in
23 any forthcoming board meeting at which this matter will be
24 considered.

25 After the Board adopts an order on this matter,

1 any person who believes the order is in error has 30 days
2 within which to submit a written petition for
3 reconsideration by the Board.

4 I'm sorry, that needs clarification to me.

5 You're saying that after the Board -- the full
6 Board makes a decision there's 30 days to ask the full
7 Board to reconsider?

8 SENIOR STAFF COUNSEL KATZ: You file a petition
9 for reconsideration.

10 All right. Thank you all for your interest,
11 cooperation and participation in the hearing.

12 The hearing is adjourned.

13 (Thereupon the State Water Resources
14 Control Board, Division of Water Rights
15 hearing adjourned at 1:38 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing California State Water Resources Control Board,
7 Division of Water Rights hearing was reported in shorthand
8 by me, James F. Peters, a Certified Shorthand Reporter of
9 the State of California, and thereafter transcribed into
10 typewriting.

11 I further certify that I am not of counsel or
12 attorney for any of the parties to said hearing nor in any
13 way interested in the outcome of said hearing.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 13th day of April, 2007.

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JAMES F. PETERS, CSR, RPR

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