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February 20, 2007

VIA ELECTRONIC MAIL
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Matthew Bullock, Staff Counsel
State Water Resources Control Board
1101 I Street
Sacramento, CA 95812

Re: Cease and Desist Order No. 262.31-14, Administrative Civil
Liability Complaint No. 262.5-44

Mr. Bullock:

The purpose of this letter is to follow-up on our February 15, 2007 telephone conversation regarding The Vineyard Club, Inc.'s (Vineyard Club) position on Cease and Desist Order No. 262.31-14 (CDO) and Administrative Civil Liability Complaint No. 262.5-44 (ACL).

As I explained, there is no legal or factual basis for the CDO. Water Code section 1831 provides the State Water Resources Control Board with the authority to issue a CDO "[w]hen the board determines that any person *is violating, or threatening to violate,*" any license term, *or* the "prohibition . . . against the unauthorized diversion or use of water . . ." (emphasis added.) There is no violation, nor is there a threatened violation, for which a CDO can, or should, be issued to the Vineyard Club.

Mr. Lindsay inspected the diversion in May 2005 on behalf of the Division of Water Rights and noted that there was no "measuring device" sufficient to ensure sufficient bypass flows, as described in his Report of Compliance and Inspection (Report). Importantly, however, the Report confirms that the minimum bypass flows were present in the Creek. Soon after the inspection, the Vineyard Club removed the diversion from the Creek and has, to date, not diverted *any* water from this point of diversion. The Report recommends that "[t]he licensee should be required to have a new device designed and its installation certified by a registered engineer . . . [t]he licensee should be advised that further diversions from Oak Flat Creek are subject to ACL and be given time to comply." (Report, p.4.) The Vineyard Club repeatedly sought a copy of the Report from the SWRCB, which was not provided until *after* the Division of Water

Rights issued the CDO and ACL, more than one and one-half years after the inspection. The Vineyard Club voluntarily contacted the SWRCB in May 2006 to inform the SWRCB that no diversions would take place during the 2006 diversion season. Thus, at the time the CDO was issued, there was no violation or "threat" of a violation that would support a cease and desist order.

Notwithstanding the absence of any basis for the CDO, the Vineyard Club has since submitted a proposal for the installation of a device to ensure the minimum bypass flows are met. The proposed plan was certified by a Registered Professional Engineer and submitted to the SWRCB. During our telephone call, the prosecution team took issue with the depiction of the bypass hole straddling two boards, and questioned whether the bypass would operate in a "submerged" condition. These are relatively minor issues that can be readily addressed. Importantly, the prosecution team indicated that the device depicted in the Vineyard Club's proposal would satisfy the condition in the license. Based upon the foregoing, it is simply untenable to maintain that a CDO is appropriate.

In addition, while I attempted to discuss the basis for the ACL with the prosecution team, you informed me that the ACL is "non-negotiable." I was somewhat surprised to learn that the prosecution team was unwilling to consider a "settlement" of the CDO absent the Vineyard Club's willingness to accept and pay the ACL as drafted. Nevertheless, as set forth below, there is no basis for imposing civil liability in this instance.

The SWRCB has the authority to impose administrative civil liability pursuant to Water Code section 1052. Specifically, Water Code section 1052(b) provides the SWRCB may impose civil liability pursuant to section 1055 for a "trespass." Water Code section 1055(a) defines trespass as "[t]he diversion or use of water subject to this division other than as authorized in this division . . ." The problem with the ACL and, for that matter, with the CDO, is that the basis for this action is an alleged violation of a term in the license, and not a "trespass." The CDO simply makes the bare allegation that the Vineyard Club has committed a "trespass." The allegation that a "trespass" forms the basis of the CDO and ACL is indefensible in light of the statutory language.

Water Code section 1831 clearly distinguishes between a "trespass," as defined in Water Code section 1052, and a "violation or threatened violation of . . . any term or condition of a . . . license." (compare Water Code, § 1831(d)(1) with § 1831(d)(2).) Through Water Code section 1831, the Legislature clearly intended to capture two distinct circumstances: a "trespass," and a violation of a condition in a license. To adopt the meaning and interpretation as set forth in the CDO and ACL would render subdivision (d)(2) of Water Code section 1831 completely superfluous. The CDO alleges a violation of a condition of a license, not a trespass. As such, there is no basis for civil liability in this instance.

That civil liability is inappropriate in this circumstance is confirmed by the SWRCB's own regulations. California Code of Regulations, title 23, section 821 provides that,

"if, after investigation, the board's staff finds that a violation of the terms and conditions of any permit or license has occurred which might be cause for enforcement action by the board, the matter may be referred to the board for hearing in accordance with the provisions of Water Code Sections 1410 et seq., 1675 et seq., or 1825 et seq."

Water Code sections 1410 et seq. and 1675 et seq. address the revocation of permits and licenses, and Water Code section 1825 et seq. addresses cease and desist orders. If, after a cease and desist order is actually adopted, a party fails to comply with a cease and desist order, the board may impose civil liability. (Water Code, § 1845(b)(3).) There is *no* basis, either in the Water Code or in the SWRCB's regulations, to impose civil liability for an alleged violation of a condition of a license without first obtaining a cease and desist order. The prosecution team's insistence on maintaining the ACL in light of the clear statutory and regulatory language is arbitrary and insupportable.

Should this matter go to hearing, the above represents some of what the Vineyard Club will present to the Hearing Officer. The Vineyard Club is not violating any condition in its water right license and is not threatening to do so. Indeed, the Vineyard Club has demonstrated compliance. There is also *no* legal or factual basis for imposing civil liability on the Vineyard Club, and the prosecution team's insistence on maintaining the ACL is both puzzling and troubling.

I would again urge you to reconsider the terms I proposed Thursday, namely to dismiss the CDO and the ACL. If you would like to discuss alternate terms to settle this matter, the Vineyard Club is, and has been, ready and willing to discuss resolving this matter without a hearing. In the event you are unwilling to reconsider your position in light of the above, the Vineyard Club will begin to prepare for the April 4 hearing. In that regard, I am entitled to review the entire file in this matter, as, once the Division determined to pursue enforcement action, any protections afforded by the deliberative process privilege were dissolved. I expect your entire file to be ready for my review no later than the morning of Thursday, February 22, 2007.

As a final matter, I request that you provide me with a list of all current matters on which you are presently assigned before the SWRCB, whether related to the instant action or not, so that I can determine whether to pursue a motion for disqualification in accordance with the reasoning set forth in *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, and the Sacramento Superior Court decision in *Morongo Band of*

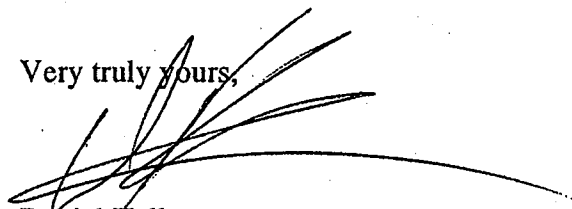
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Mission Indians v. State Water Resources Control Board, Sacramento Superior Court
Case No. 04CS00535.

Given that we must begin to prepare for hearing if settlement is not a realistic possibility, please provide your response to this letter by 4:00pm on Wednesday, February 21, 2007.

If you have any questions, or need additional information, please do not hesitate to contact me.

Very truly yours,



Daniel Kelly

DK:dlp