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9 Attorneys for the Prosecution Team

10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

11 **In the matter of Administrative Civil) Declaration of Matthew McCarthy in**
 12 **Liability and Cease and Desist Order) Support of Administrative Civil Liability**
 13 **Against Nancy K. Donovan and Stephen) and Draft Cease and Desist Order**
 14 **J. Peters)**

15 I, Matthew McCarthy, declare as follows:

- 16 1. My testimony, herein provided, identifies my personal knowledge of the evidence, actions, and
 17 rationale for the State Water Resources Control Board (State Water Board) Division of Water
 18 Rights' (Division) recommendation to issue an Administrative Civil Liability (ACL) Order and
 19 Cease and Desist Order (CDO) against Nancy K. Donovan and Stephen J. Peters (collectively
 20 the "Diverters").
- 21 2. I have been an employee of the State Water Board for the past 9 years. I am currently employed
 22 as a Senior Environmental Scientist (Supervisory) in the Division of Water Rights, Permitting
 23 and Licensing Section. My statement of qualifications is offered into evidence as **Prosecution**
 24 **Team Exhibit WR-7.**¹
- 25 3. My role in this enforcement action is to provide testimony regarding the Diverters' water
 26 rights, the Instream Flow Policy for Maintaining Instream Flows in Northern California Coastal
 27 Streams² (Instream Flow Policy), and the Instream Flow Policy's impacts on water rights.

28 ¹ Further references to Prosecution Team exhibits will be "WR-[Exhibit Number]."

² The Instream Flow Policy was first adopted by the State Water Board on May 4, 2010. (State Water Board Resolution No. 2010-0021.) On October 16, 2012, the State Water Board adopted Resolution No. 2012-0058, vacating the Board's adoption of the Instream Flow Policy, as required by the Alameda County Superior Court in *Living Rivers Council v. State Water Resources Control Board* (Sup.Ct. Alameda County, 2012, No. RG10-54392). On October 22, 2013 the State Water Board re-adopted the Instream Flow Policy without any significant changes. (State Water Board Resolution No. 2013-0035.)

- 1 4. I have reviewed records of the State Water Board and found no record of the Diverters holding
2 any right for the diversion or use of water. While the Diverters did apply for a permit in 1999
3 (Application 30926) the application process was never fully completed. The Division issued an
4 order cancelling Application 30926 in 2010 and much of the file has since been purged.
5 Application 30926 and the order cancelling Application 30926 were not purged and remain in
6 the file. A true and correct copy of Application 30926 is offered into evidence as **Exhibit WR-**
7 **10**. The State Water Board order cancelling Application 30926 summarizes the application's
8 history. A true and correct copy of the order cancelling Application 30926 is offered into
9 evidence as **Exhibit WR-11**.
- 10 5. I have reviewed the file for Application 30926. The Diverters filed Application 30926 on May
11 13, 1999 to appropriate 30 acre-feet of water per annum by permit through appropriation to
12 storage in two reservoirs for irrigation, stock watering, frost protection, and fire protection
13 purposes. The Diverters planned to irrigate 40 acres. The proposed diversion season was
14 November 1 through May 1. Both reservoirs include onstream dams and existed at the time the
15 application was filed.
- 16 6. On May 23, 2006, the Diverters, the Diverters' consultants, and the Division, entered into a
17 Memorandum of Understanding (MOU) to guide the processing of Application 30926, which
18 included submittal of necessary environmental documents and public trust analyses.
- 19 7. By letter dated September 25, 2008, the Diverters' consultant withdrew as the listed MOU
20 consultant/representative for the Diverters, because they could not reach a contract agreement
21 with the Diverters for the necessary environmental studies.
- 22 8. On October 22, 2008, the Division acknowledged the termination of the MOU and requested
23 Applicants contact the Division and submit a new MOU by December 6, 2008. The letter
24 contained a warning that failure to submit the information requested within the time period
25 provided could result in the cancellation of the application under Water Code section 1276. The
26 Division did not receive the required information.
- 27 9. On May 29, 2009, the Division requested a new MOU and notification of Applicants' intent to
28 pursue the application, pursuant to Water Code section 1275, by June 28, 2009. The letter again
contained a warning that failure to submit the information requested within the time period
provided would result in the cancellation of the application without further notice under Water
Code section 1276. The Division did not receive the required information.

- 1 10. On August 5, 2010, the Division issued an Order canceling Application 30926 due to the
2 failure of the Diverters to submit the requested information in accordance with Water Code
3 section 1276. The Order was sent to the Diverters via certified mail. The Order informed the
4 Diverters of their responsibility to remove or modify any diversion works or impoundments to
5 ensure that water is no longer diverted, the potential liability of \$500 per day if unauthorized
6 diversions continued, and the requirement to file a Statement of Water Diversion and Use
7 (Statement) for water diverted under claim of riparian or pre-1914 water rights.
- 8 11. California Code of Regulations, title 23, section 768 requires that a petition be submitted within
9 30 days of the date of the Order and be based on one or more of the causes listed in that section.
10 As of the date of this declaration, the State Water Board has no record of receiving any petition
11 for reconsideration of the Order. The State Water Board has no record of receiving a new
12 application to appropriate water. The State Water Board has no record of the Diverters filing a
13 Statement of Diversion and Use.
- 14 12. In 2014, the State Water Board re-adopted the Instream Flow Policy, which included principles
15 and guidelines for maintaining instream flows in northern California coastal streams as part of
16 state policy for water quality control, for purposes of water right administration. The State
17 Water Board adopted the Instream Flow Policy as a requirement of Water Code section 1259.4,
18 which was added by Assembly Bill 2121 (Stats. 2004, ch. 943, § 3). I am familiar with the
19 Instream Flow Policy in general and more specifically with its impact on permitting and
20 registering water rights and reservoirs in the northern California coastal streams covered by the
21 Instream Flow Policy. A true and correct copy of the Instream Flow Policy is offered into
22 evidence by reference, pursuant to California Code of Regulations, title 23, section 648.3, as
23 **Exhibit WR-26** and available at: [http://www.waterboards.ca.gov/waterrights/water_issues](http://www.waterboards.ca.gov/waterrights/water_issues/programs/instream_flows/docs/adopted_policy.pdf)
24 [/programs/instream_flows/docs/adopted_policy.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/instream_flows/docs/adopted_policy.pdf).
- 25 13. The geographic scope of the Instream Flow Policy extends to five counties—Marin, Sonoma,
26 and portions of Napa, Mendocino, and Humboldt counties—and encompasses (1) all coastal
27 streams discharging to the Pacific Ocean from the mouth of the Mattole River south to San
28 Francisco, and (2) all coastal streams discharging to northern San Pablo Bay.
14. Coastal streams covered by the Instream Flow Policy provide habitat for steelhead trout, coho
salmon, and Chinook salmon. According to the Instream Flow Policy, the National Marine
Fisheries Services (NMFS) and the California Department of Fish and Wildlife (CDFW) have
listed steelhead trout and Chinook salmon as “threatened” under the federal Endangered

1 Species Act (ESA) and the California Endangered Species Act (CESA), respectively. Coho
2 salmon are listed as “endangered” on both the ESA and the CESA lists. Water diversions result
3 in a significant loss of fish habitat in California.

- 4 15. The Instream Flow Policy establishes principles and guidelines for maintaining instream flows
5 for the protection of fishery resources. It does not specify the terms and conditions that will be
6 incorporated into water right permits, licenses, and registrations, but instead prescribes
7 protective measures regarding the season of diversion, minimum bypass flow, and maximum
8 cumulative diversion. The Instream Flow Policy also limits construction of new onstream dams
9 and contains measures to ensure that approval of new onstream dams does not adversely affect
10 instream flows needed for fishery resources.
- 11 16. According to the Instream Flow Policy, construction and operation of onstream dams and
12 diversions can create barriers to fish migration, thereby blocking fish from access to historical
13 habitat. Onstream dams also disrupt the flow of food (i.e., aquatic insects), woody debris, and
14 gravel needed to maintain downstream fish habitat.
- 15 17. The Instream Flow Policy includes requirements designed to minimize the impacts of onstream
16 dams. The requirements avoid (1) causing individual or additive impacts to flows, (2)
17 interrupting fish migratory patterns, (3) interrupting downstream movement of gravel, woody
18 debris, or aquatic benthic macroinvertebrates, (4) causing loss of riparian habitat or wetlands,
19 or (5) creating habitat for non-native species.
- 20 18. Reservoirs that are involved in the regulation or storage of surface water, including water in
21 subterranean streams flowing through known and definite channels, are subject to the
22 permitting authority of the State Water Board.
- 23 19. Illegal reservoirs are existing facilities that collect water subject to the permitting authority of
24 the State Water Board without a valid basis of the right to do so. If water subject to the
25 permitting authority of the State Water Board is diverted to a reservoir during a time when flow
26 is high for use during a time when flow is low or does not exist, then the diverter is
27 appropriating water to storage that is subject to the State Water Board’s permitting authority
28 and an appropriative water right is needed. If the diversion and use of water was first initiated
after the enactment of the Water Commission Act of 1914, then a post-1914 appropriative
water right is needed. A post-1914 appropriative water right may currently be established
through an application for a permit or a registration. The reservoir may be constructed for a
variety of reasons. The most common reasons are to ensure that a land owner has sufficient

1 water to support some sort of beneficial use. These uses include irrigation of crops or pasture,
2 stockwatering, domestic use at a residence, fire protection, and recreational uses such as
3 fishing, swimming or boating. Water Districts may build reservoirs for municipal or industrial
4 use.

- 5 20. Permitting requirements for applications that include onstream dams and are located within the
6 geographic scope of the Instream Flow Policy depend on a stream classification at the point of
7 diversion, and the Instream Flow Policy includes definitions for each of three stream
8 classifications. Class I streams may be indicated by the presence or seasonal presence of habitat
9 to sustain fish, either currently or historically, or by the presence of habitat to sustain fish. Class
10 II streams may be indicated by the current or historical presence of aquatic non-fish vertebrates
11 or aquatic benthic macroinvertebrates or combinations of other indicators, such as free water,
12 aquatic plants, or hydric soils. Class III streams may be indicated by both of the following: (1)
13 the presence of defined channels with defined banks that show evidence that sediment transport
14 processes occur, such as periodic scour and deposition of sediment; and, (2) the absence of any
15 indicator that would indicate a Class I or Class II stream. In addition to these permitting
16 requirements, all water right applications must demonstrate that water is available for diversion
17 and that issuance of a permit is in the public interest.
- 18 21. Under the Instream Flow Policy, the State Water Board can no longer accept applications
19 within the geographic scope of the Instream Flow Policy that include an onstream dam for the
20 diversion or storage of water on a Class I or Class II stream unless the State Water Board grants
21 an exception to the pertinent provision of the Instream Flow Policy. Should the Diverters
22 choose the option of submitting and diligently pursuing an application for an appropriate
23 water right permit for one or both of their existing reservoirs that include onstream dams, the
24 State Water Board must make a determination of the classification of the streams where the
25 onstream dams are located before the application could be accepted.
- 26 22. Water right registrations for small irrigation use became available on January 1, 2012 as a
27 result of AB 964 (Stats. 2011, ch. 579, § 1.) that, among other changes to the Water Code,
28 amended sections 1228.1 and 1228.2. Other types of water right registrations are also available,
but cannot be used by the Diverters provided the water in the reservoirs continues to be used
for non-incident irrigation. A small irrigation use registration is available for a registrant if
the diversion or storage facilities subject to registration do not exceed the ratio of one facility
per 20 irrigated acres and if the water use on all acreage covered by the registrations, including

1 any water use based on their rights, does not exceed 100 acre-feet per year. To date, the State
2 Water Board has established general conditions only for storage of water under certain
3 conditions, so a small irrigation use registration is only available for diversion, storage, and use
4 by means of certain types of facilities.

5 23. Under the Instream Flow Policy, the State Water Board can no longer accept registrations
6 within the geographic scope of the Instream Flow Policy that include an onstream dam for the
7 diversion or storage of water on a Class I or Class II stream unless either: (1) the onstream dam
8 was constructed on or before July 19, 2006; or, (2) the State Water Board grants an exception
9 to the pertinent provisions of the Instream Flow Policy. Because the Diverters' two onstream
10 dams were built prior to July 19, 2006, a small irrigation use registration is an available vehicle
11 for a process to establish a valid basis of right for the diversion and storage of water within the
12 State Water Board's permitting authority.

13 24. In general, the difference between establishing an appropriate water right by means of an
14 application versus a registration can be summarized as follows: (1) a registration is not subject
15 to potential protest by other parties; (2) a registration does not normally require a determination
16 of the availability of water; (3) a registration is considered by the State Water Board to be
17 exempt from the requirements of CEQA; (4) a registration is subject to current and future
18 general non-negotiable conditions from the State Water Board and project-specific negotiable
19 conditions from the DFW; and, (5) initial and recurring fees for registrations are smaller than
20 any fees required for an application, permit, or license.

21 25. The following is a discussion of fees that the Diverters may incur under different permitting
22 scenarios, and is relevant for purposes of establishing evidence for costs avoided by not
23 diligently pursuing Application A030926 or filing and diligently pursuing another application
24 subsequent to the cancellation of Application A030926.

- 25 a. After collaborating with Mr. Kyle Woolridge, and based upon his conclusions, I
26 have determined the capacities of the reservoirs to be as follows: Reservoir No. 1 is
27 16 acre-feet; and, Reservoir No. 2 is 15 acre-feet.
- 28 b. Based on the State Water Board's current water rights fee structure, and the
assumption that the Diverters would be submitting an application identical to
Application A030926 wherein up to 30 acre-feet of water per year would be
diverted and stored by means of both existing reservoirs, it would cost the Diverters
an initial filing fee of \$2,150.00. This fee is comprised of \$1,300.00 payable to the

1 State Water Board (Cal. Code Regs., tit. 23, § 1062.) and \$850.00 payable to the
2 DFW (Pub. Resources Code, § 10005.). The pending application, and any permit or
3 license issued thereafter, will also be subject to a recurring annual fee of \$151.26.
4 This does not include costs for consultants or for any other necessary permits or
5 approvals.

6 c. Based on the State Water Board's current water rights fee structure, and the
7 assumption that the Diverters would be submitting an application to appropriate
8 water by permit that includes the diversion and storage of up to 16 acre-feet of water
9 per year by means of only Reservoir No. 1, it would cost the Diverters an initial
10 filing fee of \$1,940.00. This fee is comprised of \$1,090.00 payable to the State
11 Water Board (Cal. Code Regs., tit. 23, § 1063.) and \$850.00 payable to the DFW
12 (Pub. Resources Code, § 10005.). The pending application, and any permit or
13 license issued thereafter, will also be subject to a recurring annual fee of \$150.38.
14 This does not include costs for consultants or for any other necessary permits or
15 approvals.

16 d. Based on the State Water Board's current water rights fee structure, and the
17 assumption that the Diverters would be submitting and application to appropriate
18 water by permit that includes the diversion and storage of up to 15 acre-feet of water
19 per year by means of only Reservoir No. 2, it would cost the Diverters an initial
20 filing fee of \$1,925.00. This fee is comprised of \$1,075.00 payable to the State
21 Water Board (Cal. Code Regs., tit. 23, § 1063.) and \$850.00 payable to the DFW
22 (Pub. Resources Code, § 10005.). The pending application, and any permit or
23 license issued thereafter, will also be subject to a recurring annual fee of \$150.32.
24 This does not include costs for consultants or for any other necessary permits or
25 approvals.

26 e. Based on the State Water Board's current water rights fee structure, and the
27 assumption that the Diverters would be submitting two separate registrations of
28 small irrigation use appropriation that includes the diversion and storage of up to 30
acre-feet of water per year by means of both existing reservoirs, it would cost the
Diverters an initial filing fee of \$500.00. This fee is comprised of two separate fees
of \$250.00 for each registration payable to the State Water Board (Cal. Code Regs.,
tit. 23, § 1063.). If two certificates are issued for the two registrations, the

certificates will also be subject to a recurring quinquennial fee of \$100.00 each, for a total fee of \$200.00 every five years. This does not include costs for consultants or for any other necessary permits or approvals.

I declare under penalty of perjury to the laws of the State of California that the foregoing is true and correct. Executed September 12, 2016, at Sacramento, California.


MATTHEW MCCARTHY

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