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

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

15 I, Jane Arnold, declare as follows:

- 16 1. My name is Jane Arnold. My testimony, herein provided, identifies my personal knowledge of
17 the evidence, actions, and rationale for the State Water Resources Control Board (State Water
18 Board) Division of Water Rights' (Division) recommendation to issue an Administrative Civil
19 Liability (ACL) Order and Cease and Desist Order (CDO) against Nancy K. Donovan and
20 Stephen J. Peters (collectively the "Diverters").
- 21 2. I am a Senior Environmental Scientist Specialist assigned to Coastal Conservation Planning
22 Section, Northern Region, Department of Fish and Wildlife (Department). I have a Bachelor of
23 Science degree in Zoology and a Master of Science degree in Fisheries Biology. I have been
24 employed with the Department for over 24 years initially as a Biologist and currently as an
25 Environmental Scientist. A true and correct copy of my résumé is attached as **Prosecution**
26 **Team Exhibit WR-9.**¹
- 27 3. My section is responsible for environmental review of projects in the coastal portion of
28 Northern California. I review water right applications, petitions for change and for time
extension, permits, licenses, and review notifications submitted pursuant to Fish and Game
Code Section 1600 *et seq.* and draft their corresponding lake or streambed alteration
agreements for water diversions. I write fish and wildlife protective lawful conditions for

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

1 Small Domestic, Livestock Stockpond, and Small Irrigation registrations appropriations. I
2 conduct violation inspections with and without law enforcement and write natural resource
3 damage assessments of the sites.

- 4 4. The Department is responsible for managing California's diverse fish, wildlife, and plant
5 resources and the habitats upon which they depend, for their ecological values and for their use
6 and enjoyment by the public. Specifically, under Fish and Game Code sections 711.7 and
7 1802, the Department is trustee for the State's fish and wildlife resources and has jurisdiction
8 over the conservation, protection, and management of fish, wildlife, native plants and the
9 habitat necessary for biologically sustainable populations of those species. Additionally, Fish
10 and Game Code Section 1600 *et seq.* grants the Department jurisdiction over projects that result
11 in substantial water diversion from lakes, rivers, or streams.
- 12 5. The Department is also responsible for oversight and assurance of the diversified uses of fish
13 and wildlife including recreational, commercial, scientific, and educational uses. Consistent
14 with these responsibilities, the Department seeks to maintain native fish, wildlife, plant species,
15 and natural communities for their intrinsic and ecological value and for their benefits to all
16 citizens in the State. This includes habitat protection and maintenance of habitat in sufficient
17 amounts and quality to ensure the survival of all native species and natural communities. In
18 regard to the State's fishery resources, the Department has a material interest in assuring that
19 water flows within streams are maintained at levels that are adequate for long-term protection,
20 maintenance, and proper stewardship of aquatic resources.
- 21 6. The Department is particularly concerned about the water diversions that are the subject of this
22 hearing because flows in the Unnamed Stream, Maple Creek, Rancheria Creek, and the
23 Navarro River support Chinook, coho salmon, steelhead trout, and other aquatic species. Coho
24 salmon are listed as endangered pursuant to the federal and State endangered species acts.
25 Chinook salmon and steelhead trout are listed as threatened pursuant to the federal Endangered
26 Species Act. Other fish species of concern in the Navarro River include Pacific lamprey, roach,
27 prickly and coast range sculpins, and three-spine stickleback.
- 28 7. Water diversions in the Navarro River and its tributaries have the potential to cause site-
specific and cumulative adverse impacts by degrading established instream habitat for fish. The
Department firmly supports the State Water Board actions imposing bypass terms on the
projects of water right applicants. Such bypass flow terms are important to provide interim
protection and maintain fish in good condition, pursuant to Fish and Game Code section 5937,
while a water right applicant pursues a water right permit.


- 1 8. Rancheria Creek and the Navarro River are extremely important nursery habitats for fish. As
2 part of the outcome of this Hearing, the Department supports the State Water Board imposing a
3 bypass flow as necessary to: protect instream flows during critical life stages of coho salmon
4 and steelhead trout; maintain seasonal water temperatures; provide for sufficient holding and
5 rearing habitat; and ensure adequate attraction flows for migration. The Department also
6 supports the State Water Board in requiring removal of unauthorized onstream storage.
7 Preserving the existing flows in the Maple Creek and downstream will protect instream habitat,
8 thereby protecting coho salmon, steelhead trout, and other native aquatic life in those waters.
9 Thus, the Department firmly supports the actions proposed in the draft Cease and Desist Order
10 and Administrative Civil Liability complaint before the State Water Board. Such action is
11 consistent with the Legislature's intent to protect the State's fish and wildlife resources on the
12 public's behalf and, of course, the State Water Board's responsibility to administer and enforce
13 the various provisions in the Water Code that govern the diversion and use of water in the
14 State. The Department also supports the State Water Board to impose mitigations to protect fish
15 and wildlife during the application process.
- 16 9. In its protests of water right applications and petitions for change, the Department has
17 consistently requested bypass flow requirements for diversions from the Navarro River and its
18 tributaries. The bypass flows are deemed necessary to maintain fishlife and to fulfill the intent
19 of Water Code Section 1243, which states in part: "In determining the amount of water
20 available for appropriation for other beneficial uses, the board shall take into account,
21 whenever it is in the public interest, the amounts of water required for recreation and the
22 preservation and enhancement of fish and wildlife resources." This section also provides that
23 "The Department of Fish and Wildlife shall recommend the amounts of water, if any, required
24 for the preservation and enhancement of fish and wildlife resources and shall report its findings
25 to the board." The Department continued to express its concerns over direct and cumulative
26 impacts of diversions on aquatic resources in the Navarro River watershed and for these
27 diversions.
- 28 10. On August 9, 2016, Mr. Wesley Stokes, at my direction, participated in an inspection of the
Diverters' property at 21451 Highway 128 in Yorkville, Mendocino County (APN 049-080-55-
00) (the Property) with Division Staff. A true and correct copy of Mr. Stokes' field notes is
offered into evidence as **Exhibit WR-40**.
11. The diversions are in the area covered by the State Water Board's Policy for Maintaining
Instream Flows in Northern California Coastal Streams (Instream Flow Policy). The Instream

1 Flow Policy establishes principles and guidelines for maintaining instream flows for the
2 protection of beneficial uses of water related to fishery resources while allowing for water use.
3 The development of onstream storage and vineyard by Nancy Donovan and Stephen Peters was
4 implemented without the benefit of permitting from the State Water Board and the Department.
5 As such, there are no measures in place to protect fish and wildlife resources. Department staff
6 determined the Unnamed Stream is a Class II stream according to the Instream Flow Policy and
7 is capable of supporting non-fish aquatic life on the property during a recent site visit. The
8 classification was based on field indicators such as vegetation, persistent water, gradient, and
9 other factors. However, no mitigations to protect onsite aquatic life or downstream listed
10 salmonids are in place. Indeed, the current onstream reservoirs lack protective bypass flows
11 and other mitigation. A true and correct copy of the Instream Flow Policy is offered into
12 evidence by reference, pursuant to California Code of Regulations, title 23, section 648.3, as
13 **Exhibit WR-26** and available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/instream_flows/docs/adopted_policy.pdf.²

- 13 12. Based on Mr. Stokes's fieldwork, the Department believes the Diverters' violations of Water
14 Code and Fish and Game justify enforcement action by the State Water Board.
- 15 13. The Department believes minimum bypass flows are necessary to support the beneficial use of
16 cold, freshwater habitat for the Maple and Rancheria creeks and the Navarro River. I believe
17 that the State Water Board has the authority and the responsibility under the Public Trust
18 Doctrine to impose an immediate interim bypass flow consistent with the requirements set forth
19 in the Instream Flow Policy. In summary, the Department supports the State Water Board
20 taking action for Administrative Civil Liability and the Cease and Desist Order. The
21 Department also believes that the State Water Board should impose an interim bypass flow
22 requirement to protect fish and wildlife while the Diverters pursue an appropriate water right.

23 _____
24 ² The Instream Flow Policy was first adopted by the State Water Board on May 4, 2010. (State
25 Water Board Resolution No. 2010-0021.) On October 16, 2012, the State Water Board adopted
26 Resolution No. 2012-0058, vacating the Board's adoption of the Policy, as required by the
27 Alameda County Superior Court in *Living Rivers Council v. State Water Resources Control Board*
28 (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.) The readopted Instream Flow Policy became effective on February 4,
2014.

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

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4 Jane Arnold

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