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STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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In the Matter of Unauthorized Diversion by

**Flocchini Estate, LLC and Andrew J. Flocchini**

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SOURCE: Unnamed Stream tributary to the Petaluma River

COUNTY: Sonoma

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**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Flocchini Estate, LLC and Andrew J. Flocchini (collectively Flocchini) are alleged to have violated California Water Code section 1052(a), which states:

*The diversion or use of water subject to [division 2 of the California Water Code (commencing with section 1000)] other than as authorized in [division 2] is a trespass.*

2. California Water Code section 1052(b) provides that the State Water Resources Control Board (State Water Board) may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.
3. California Water Code section 1055, subdivision (a) provides that the Executive Director for the State Water Board may issue a complaint to any person or entity to whom administrative civil liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. State Water Board Resolution 2012-0029 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

**ALLEGATIONS**

4. In December 2007 the State Water Board produced a draft Substitute Environmental Document (SED) as part of its development of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). Appendix E of the SED contains the report Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams produced by Stetson Engineers in December 2007. In order to complete this report, Stetson Engineers produced a Geographic Information System (GIS) layer which identified the locations of the existing potential unauthorized dams. In July of 2011, a review of the GIS layer, aerial photographs, and USGS topographic maps of Sonoma County was undertaken by State Water Board's Division of Water Rights (Division) staff. The review provided evidence that Sonoma County Assessor's Parcel Number 068-110-007 contained a reservoir that appears to collect

surface flow from an Unnamed Stream and is subject to the permitting authority of the State Water Board. A review of Division records showed that a water right authorizing the diversion of water to storage at the identified reservoir did not exist. According to Sonoma County Assessor's Office, "Flocchini Estate, LLC" is the current owner of parcel 068-110-007.

5. On February 7, 2011, Division staff conducted an on-site inspection of the Flocchini property, accompanied by Andrew and Nicholas Flocchini, located at 7078 Lakeville Highway in Petaluma. During the inspection, Division staff found the reservoir storing water with both an upstream and downstream channel present. The owners disclosed that they do have a nearby groundwater well but that water is used for pasture irrigation and stockwatering. The owners then stated the well water is not used to irrigate the vineyard due to high levels of undesirable minerals such as Boron and Manganese. No other sources of water were available for irrigating the 26 acres of vineyard. Based on measurements taken during the inspection, aerial photographs and the owner's statement; the reservoir surface area is approximately 3.4 acres. Using an owner-supplied maximum depth of 12 feet, the reservoir is estimated to have a capacity of 29 acre-feet using a 0.7 sloping factor. Division staff also notified Flocchini of the requirement to file a Statement of Water Diversion and Use (Statement) and of the potential penalties for failure to file a Statement.
6. By letter dated September 20, 2011, the Division notified Flocchini that storage of water in a reservoir without an existing water right is considered an unauthorized diversion of water. Based on staff findings, Flocchini was required to either: (1) Provide evidence satisfactory to the State Water Board that demonstrates the reservoir does not store water, or can be operated without storing water subject to the State Water Board's permitting authority; or (2) remove the reservoir or render it incapable of storing water; or (3) file an application with the State Water Board seeking permission to appropriate water. Flocchini was given 45 days to submit a response indicating the intended course of action and an implementation plan with a schedule. As of the date of this complaint, Flocchini has not complied with any of the three directives noted above.
7. The water being collected to storage in the reservoir is subject to appropriation under the State Water Board's permitting authority. Andrew J. Flocchini signed and submitted an Initial Statement regarding the reservoir on behalf of Flocchini Estate, LLC, dated September 29, 2011. The Division accepted the Initial Statement on November 13, 2012. However, the Division has no record of a water right authorizing the storage of water in the reservoir, and Flocchini has not provided evidence supporting an existing basis of right. Flocchini has collected water to storage and used stored water without a basis of right since at least 2002, the year Sonoma County Assessor's records indicate Flocchini obtained the property.
8. As of the date of this complaint, Division records show that Flocchini has not filed an application to appropriate water.

#### **PROPOSED CIVIL LIABILITY**

9. The basis of this complaint is the unauthorized diversion, storage, and use of water by Flocchini since at least 2002. The unauthorized diversion and use of water constitutes a trespass subject to liability under California Water Code section 1052.
10. The maximum civil liability that can be imposed by the State Water Board in the matter of the unauthorized diversion and use of the water is \$500 for each day in which the trespass occurred. Flocchini has owned the property for the past three years and has collected water from the Unnamed Stream and continuously held some water in storage for three years. Therefore, a maximum civil liability of \$547,500 could be considered (\$500 per day for 1,095 days) for the trespass in this case.

11. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
12. In this case, Flocchini has collected and stored water from the Unnamed Stream. These diversions have annually reduced the amount of water available for legitimate downstream water right holders and for the Northern California Coastal steelhead trout fishery and other riparian habitat. While the adverse impacts of unauthorized water diversions on prior right holders and the steelhead trout fishery have not been quantified for this case, unauthorized diversions of water have been shown to contribute to the cumulative impact of reducing water supplies for legitimate water right holders and the reduction of useable habitat for steelhead trout. The State of California lists the Northern California Coastal steelhead as a species of special concern, and on February 6, 2006, the National Marine Fisheries Service listed the steelhead trout as threatened under the Federal Endangered Species Act. As of this date, Flocchini has filed an initial Statement documenting a diversion but failed to prevent storage of surface water prior to an appropriative permit, license or registration being issued. To date, the Division has not received an application from Flocchini.
13. Flocchini received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying the water or pumping groundwater from a well, forgoing the cost of acquiring an appropriative water right, and forgoing the cost of annual water right fees. Flocchini's property contains a reservoir with an estimated capacity of 29 acre-feet. The University of California Cooperative Extension has produced cost studies for various crops and commodities for different regions of California. Studies produced for the North Coast region indicate the typical cost of pumping groundwater from a 120 foot deep well with a 10 horsepower motor is approximately \$198 per acre-foot. Flocchini has owned the property for the past three years. Evaporation losses for the North Coast are estimated at 3 feet per acre per year. For the 3.4 acres of surface area on the reservoir, evaporation losses are estimated at 7 acre-feet per year (taking into account reduced surface area exposure while drawing down the reservoir during irrigation).
14. Irrigated water use for 26 acres of vineyard is estimated to be 13 acre-feet annually or 39 acre-feet for the past three years. Evaporation losses for three years at 7 acre-feet per year resulted in Flocchini saving 21 acre-feet of pumping costs. For the last three years Flocchini has avoided pumping 60 acre-feet, which amounts to an estimated \$11,963.

Additionally, the Division estimates that its staff cost to review the existing project and develop the enforcement documents to be \$ 5,186. If this matter goes to hearing, it is estimated that the additional staff cost to prosecute this case would be \$10,000. The water right filing fee for 29 acre-feet of water would be \$1,190, and the annual water right fees since fiscal year 2009-10 would be \$452.85.

15. Having taken into consideration the factors described above and the enforcement goal of deterrence, the Assistant Deputy Director for Water Rights recommends an ACL for the past three years of violation in the amount of \$42,000. This liability amount is the minimum liability recommended by the Division Prosecution Team in order to recover staff costs incurred and to impose a disincentive for continued unauthorized diversions. Should the matter go to hearing, the State Water Board may consider a different liability, including additional staff costs incurred, up to the maximum amount provided by law.

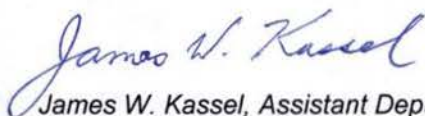
**RIGHT TO HEARING**

16. Flocchini may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code sec. 1055, subd. (b).)
17. If Flocchini requests a hearing, Flocchini will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, a separate notice setting the time and place for the hearing will be mailed no later than ten days before the hearing date.
18. If Flocchini requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall be final and effective upon issuance.
19. If Flocchini does not wish to request a hearing within 20 days of the date of this complaint, Flocchini shall waive his rights to a hearing and reconsideration of this matter, and remit a cashier's check or money order for the amount of the ACL set forth in paragraph 22 above to:

State Water Resources Control Board  
Division of Water Rights  
Enforcement Section  
P.O. Box 2000  
Sacramento, CA 95812-2000

20. If Flocchini does not request a hearing and does not remit the ACL, the State Water Board will issue a final ACL Order and seek recovery of the full amount of the ACL as authorized by California Water Code section 1055.4

STATE WATER RESOURCES CONTROL BOARD



James W. Kassel, Assistant Deputy Director  
Division of Water Rights

Dated: **MAR 08 2013**