D R A F T

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2018-

In the Matter of Draft Cease and Desist Order and Administrative Civil Liability Complaint

against

Stornetta Family Trust and Newton Dal Poggetto (Trustee)

SOURCE: Unnamed Stream tributary to Huichica Creek thence Napa Slough thence Napa River thence San Pablo Bay

COUNTY: Napa

ORDER ADOPTING CEASE AND DESIST ORDER AND IMPOSING ADMINISTRATIVE CIVIL LIABILITY

BY THE BOARD:

1.0 INTRODUCTION

This matter comes before the State Water Resources Control Board (State Water Board or Board) pursuant to a 2012 draft Cease and Desist Order (CDO) and Administrative Civil Liability (ACL) complaint issued to Stornetta Family Trust and Newton Dal Poggetto (trustee) (collectively, Stornetta). The Board held a public hearing concerning this matter on September 2, 2014, during which it heard testimony and received evidence. In this Order and based upon the record before it, the State Water Board requires Stornetta to cease and desist the unauthorized diversion and use of water and take certain corrective actions within a specified time schedule. The State Water Board also imposes administrative civil liability against Stornetta in the amount of $75,000.

2.0 LEGAL AND PROCEDURAL BACKGROUND

2.1 Procedural Background

Stornetta Family Trust owns property in Napa County (Napa County Assessor's Parcel Number (APN) 047-070-018) (hereafter, Stornetta's property) on which is located a reservoir on an unnamed stream tributary to Huichica Creek thence Napa Slough thence Napa River thence San Pablo Bay (hereafter, Unnamed Stream). (WR-3; WR-14, p. 1;

WR-7; WR-9; WR-10; DalPoggetto-Exhibit B.)[1] On March 16, 2012, the Assistant Deputy Director for the State Water Board's Division of Water Rights (Division) issued a draft CDO and ACL complaint to "Newton Dalpoggetto [Dal Poggetto] Successor Trust, and Newton Dalpoggetto [Dal Poggetto]." (WR-11.) The Acting Assistant Deputy Director for the Division issued an amended draft CDO and ACL complaint on May 1, 2014, to "Stornetta Family Trust and Newton Dal Poggetto (trustee)," correcting the identification of the trust that owns the property and clarifying that Mr. Dal Poggetto is named in his capacity as the trustee for the Stornetta Family Trust and not as an individual. (WR-3, p. 4; WR-15.)

The draft CDO and ACL complaint allege that Stornetta violated the statutory prohibition against the unauthorized diversion or use of water by diverting surface water from the Unnamed Stream to storage in an on-stream reservoir and beneficially using the stored water without a basis of right, and that there exists a threat of continued violation in the future. (WR-15.) The ACL complaint also alleges that Stornetta failed to file a statement of water diversion and use for the diversion and use of water from the Unnamed Stream in violation of the statutory requirement, and did not correct its failure to file the required statement within thirty days after the State Water Board called the violation to Stornetta's attention. (*Id.*, p. 5.) The ACL complaint proposed civil liability for trespass and failure to file a statement in the amount of $22,800. (*Id.*, p. 6.)

On April 9, 2012, the Board received a letter from Stornetta's representative requesting a hearing on the draft CDO and ACL complaint. (WR-13.) The State Water Board issued a Notice of Public Hearing on May 22, 2014. The hearing notice identified the key hearing issues as:

1) Whether the State Water Board should impose administrative civil liability upon Stornetta for trespass and, if so, in what amount and on what basis;

[1] Citations to the evidentiary record identify primary support for a particular fact or proposition, but are not intended to identify every piece of supporting evidence in the record. Exhibits are identified by the name or abbreviation for the party submitting the exhibit, the exhibit number, and the page number or other location of the referenced material within the exhibit. Page numbers refer to the Adobe Portable Document Format (PDF) page number of the exhibit. The following abbreviations are used when citing to the parties' exhibits: "WR" represents the Prosecution Team and "DalPoggetto" represents Stornetta. Citations to the Certified Reporter's Transcript are indicated by "R.T." followed by the page number.

2) Whether the State Water Board should impose administrative civil liability upon Stornetta for failure to file a statement of water diversion and use and, if so, in what amount and on what basis; and
3) Whether the State Water Board should adopt, with or without revision, the March 16, 2012 draft CDO against Stornetta.

On September 2, 2014, the State Water Board held an adjudicative hearing pursuant to Government Code section 11400, et seq., and the Board's regulations. The functions of Board staff who acted in a prosecutorial role by presenting evidence for consideration by the State Water Board (Prosecution Team) were separated from the Board staff who advised the State Water Board. All parties observed a prohibition on ex parte communications.

The parties to the proceeding are the Prosecution Team and Stornetta, both of whom presented testimony and other evidence at the hearing, as well as prehearing and closing briefs.[2] The State Water Board has considered all of the evidence in the hearing record, and bases the findings and conclusions herein upon that evidence.

2.2 Cease and Desist Order Authority

The State Water Board may issue a cease and desist order when it determines that any person is violating, or threatening to violate, the prohibition against unauthorized diversions of water. (Wat. Code, § 1831.) The State Water Board may issue such an order only after notice and an opportunity for hearing. (*Id.*, § 1831, subd. (c).) A cease and desist order is effective immediately upon being issued (*Id.*, § 1832), and civil liability may be imposed by the Board or a court against a person or entity who fails to comply with the order (*Id.*, § 1845).

2.3 Authority to Assess Civil Liability

The unauthorized diversion or use of water that is subject to the permitting authority of the State Water Board is a trespass. (Wat. Code, § 1052, subd. (a).) The Board may administratively impose civil liability in an amount not to exceed $500 for each day in which the trespass occurs. (Wat. Code, § 1052, subd. (c).)

[2] Both parties submitted prehearing briefs and amended prehearing briefs. All citations to the prehearing briefs of either party in this order refer to the amended prehearing briefs.

Each person who diverts water after December 31, 1965, must file a statement of water diversion and use with the State Water Board prior to July 1 of the succeeding year. (Wat. Code, § 5101.) The Board may impose administrative civil liability upon a person who fails to timely file a required statement for a diversion or use that occurs after January 1, 2009, in an amount not to exceed $1,000, plus $500 per day for each additional day on which the violation continues if the person fails to file a statement within thirty days after the State Water Board has called the violation to the attention of that person. (Wat. Code, § 5107, subds. (b), (c)(1).)

The State Water Board must provide notice of an administrative civil liability complaint and an opportunity for a hearing. (Wat. Code, § 1055, subd. (b).) An order setting administrative civil liability is effective and final upon being issued. (*Id*., subd. (d).) If the administrative civil liability is not paid, the State Water Board may seek recovery of the civil liability as provided in Water Code section 1055.4.

3.0 DISCUSSION

3.1 Staff Investigation

This enforcement action arises out of the Board's development of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). In developing the Policy, Board staff identified existing and potentially unauthorized dams in Marin, Mendocino, Napa, Sonoma, and portions of Humboldt counties. (WR-27, pp. iii-iv.) In June 2011, the Division began using this information along with United States Geological Survey (USGS) topographic maps and aerial photographs to investigate the basis of right for 1,771 existing reservoirs and assess whether the reservoirs were collecting surface flow subject to the permitting authority of the Board. (WR-1, pp. 1-2; WR-15 p. 4.)

Mr. Kevin Porzio, Water Resource Control Engineer in the Division's Enforcement Section, conducted the initial assessment of the reservoir located on Stornetta's property. Mr. Porzio's assessment yielded the following information: 1) aerial photographs showed clear signs of water storage behind a single axis earthen dam with defined downstream and upstream channels; 2) the USGS quadrangle map showed a

blue line stream above and below the reservoir;[3] and 3) the reservoir was shown as a pinkish color, indicating a new feature as of the 1980 photo revision date on the USGS quadrangle map. (WR-3, p. 1; WR-7; R.T., pp. 31-35, 69.)

The Division had no record of an appropriative water right authorizing the water diversion facility or any statement of water diversion and use for Stornetta's property. (WR-1 p. 2; WR-5 pp. 1-2; WR-3 pp. 1-2.) The online service ParcelQuest identified "Dalpoggetto Newton Suc" as the owner of the parcel fully surrounding the reservoir. On August 18, 2011, the Division mailed a letter with the subject "Notice of Potential Unauthorized Diversion and Use of Water, and Failure to File a Statement of Water Diversion and Use for Diversion of Water in Napa County" (Notice Letter) to "NEWTON DALPOGGETTO." (WR-3, pp. 1-2; WR-5; WR-6, p.3.) The Division did not receive a response to the Notice Letter. (WR-1, p. 3; WR-3, p. 2.) Division staff attempted but was unable to find contact information online for Mr. Dal Poggetto. (*Ibid*.)

Because the Division was unable to contact Mr. Dal Poggetto and conduct a field inspection of the property, the Division instead conducted an "initial investigation" of the reservoir based on aerial imagery, the USGS Napa quadrangle map, and measurements made in ArcGIS. (WR-3, pp. 1-2; WR-15, p.4.) Mr. Porzio documented the 2011 initial investigation in a February 16, 2012 initial reservoir investigation report. (WR-3, p. 2; WR-8.) Mr. Porzio concluded that the reservoir on Stornetta's property was storing water subject to the permitting authority of the State Water Board and recommended that the Division consider enforcement action for the unauthorized diversion of water and failure to file a statement of water diversion and use. (WR-3, p. 2; WR-8, pp. 1-2.)

On March 16, 2012, the Assistant Deputy Director issued a draft CDO and ACL complaint to "Newton Dalpoggetto Successor Trust & Newton Dalpoggetto (trustee & individual)" which was sent by certified mail to the same mailing address to which the Notice Letter was sent. Mr. Dal Poggetto received the letter on March 26, 2012. (WR-3, p. 2; WR-6; WR-11; WR-12; WR-13.) On April 9, 2012, the Division received a letter on behalf of Mr. Dal Poggetto and the Stornetta Family Trust, requesting a hearing on the draft CDO and ACL complaint. (WR-3, pp. 2-3; WR-13.)

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[3] Mr. Aaron Miller, Senior Water Resource Control Engineer in the Division's Enforcement Section, clarified during the hearing that the stream was actually depicted by a dashed line, indicating that the dam was constructed on a stream channel that is intermittent or ephemeral and does not flow year round.

On October 16, 2013, Mr. Dal Poggetto granted access to the Stornetta property to Mr. Aaron Miller, Senior Water Resource Control Engineer in the Division's Enforcement Section, and Mr. Porzio, to conduct an inspection of the reservoir and determine if the reservoir was onstream and collecting water subject to the water right permitting authority of the State Water Board. (R.T., p. 38; WR-3, p. 3; WR-1, p. 4.)

During the inspection, Mr. Porzio and Mr. Miller observed two large cattle feeding barns, many livestock watering troughs, and cow dung on the property, as well as cattle hoof prints and dung around the reservoir and along the hills to the east and west of the reservoir. (WR-3, p. 3.) Mr. Porzio observed a defined channel that was the Unnamed Stream running from the eastern hillsides in a southerly direction towards the reservoir. (*Ibid*.) There was no flow in the Unnamed Stream at the time of the inspection. (WR-14, p. 1.) There was cow dung along the banks and in the channel of Unnamed Stream and cow prints and dung at the inlet below the high waterline at the reservoir. (WR-3, p. 3; WR-14, p. 2.) Mr. Porzio and Mr. Miller followed the Unnamed Stream downstream of the reservoir to what appeared to be the property line, where they observed more cattle tracks and dung in the downstream channel. (WR-3, p. 3.) Mr. Porzio and Mr. Miller also observed a well and trough located on Stornetta's property, though the well and trough did not appear to be in use.

Mr. Porzio and Mr. Miller measured the reservoir and estimated that the reservoir had a surface area of about two acres and a volume of approximately 24.2 acre-feet. (WR-1, pp. 3 & 5; WR-14, p. 2.) Because the reservoir did not have an outlet pipe, when the Unnamed Stream was flowing the dam collected water to storage and prevented any downstream flow unless the reservoir was spilling. (WR-1, p. 4.) Based on his observations and field measurements, Mr. Porzio concluded that: 1) a defined channel exists upstream of the reservoir and below the dam; and 2) water is collected to storage in the reservoir on an annual basis during the winter months to replenish losses due to stockwatering use, seepage, and evaporation. (WR-3, pp. 3-4; WR-14, p. 3.)

Stornetta does not dispute the presence of an on-stream dam that impounds water on Stornetta's property or deny that the reservoir has been continuously used for livestock watering. (DalPoggetto-Closing Brief, p. 1; DalPoggetto-Exhibit D.) Mr. Dal Poggetto testified that at the time he became trustee of Stornetta's property, the property had been used "for years" for dry cattle grazing. (R.T., p. 81.) In his written testimony, Mr. Dal Poggetto states that "the water has been used consistently only as a stockpond."

(DalPoggetto-Exhibit D.) When asked how the water in the reservoir is currently used, Mr. Dal Poggetto testified that he did not think it is used "unless [the Lessee's] cows go down and drink a little, if they can get through the weeds." (R.T., p. 82.)
Mr. Dal Poggetto could not, however, identify any source of water for livestock on the property other than the reservoir. (R.T., pp. 96-97.) Although Mr. Miller and Mr. Porzio observed a well and trough on the property, Mr. Dal Poggetto did not know whether or how recently the property owner or lessee may have used the well. (WR-14, p. 3; R.T., p. 81.) Under cross-examination, Mr. Dal Poggetto explained that he received notice from Pacific Gas and Electric Company about eight months before the hearing that electrical service to the property was to be discontinued. (R.T., pp. 96-97.)

Stornetta asserts as a defense to the allegations in the draft CDO and ACL complaint, that the dam was constructed by the soil conservation district in 1964 to control erosion on and downstream of Stornetta's property.[4] (Stornetta-Closing Brief, p. 1.) Stornetta submitted a written declaration by Mr. Gary Kiser stating that he worked for the "Soil Conservation District" in Sonoma County, California, and as part of his employment with the district he was personally involved in the construction of the reservoir. (DalPoggetto-Exhibit C.) Mr. Kiser described the construction of the reservoir as an act of the district, without personal involvement of the property owner. (*Ibid*.) Mr. Kiser was unavailable to testify at the hearing due to illness and therefore was unavailable for cross-examination.[5] (R.T. p. 80.)

3.2 Unauthorized Diversion

Based on the evidence, we conclude that Stornetta diverted water to storage in the reservoir and beneficially used the stored water without a valid basis of right. The diversion and subsequent use for livestock watering without a water right is a trespass against the state under Water Code section 1052, which states, "[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass." (Wat. Code, § 1052.)

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[4] Mr. Dal Poggetto uses the terms "Soil Conservation District" and "Soil Conservation Service" in his testimony.

[5] The Prosecution Team objected to admission of Mr. Kiser's declaration and Mr. Dal Poggetto's testimony regarding Mr. Kiser's assertions on hearsay grounds. (R.T., pp. 76-77.) Hearing Officer Moore ruled that he would allow the testimony and declaration into the record. (R.T., pp. 76-77, 83-86.) The State Water Board has not relied on any disputed exhibit or testimony as the sole or primary support for any of the findings in this order.

Stornetta asserts that the storage and use of water stored in the reservoir is not a trespass because: 1) the water was not diverted from the reservoir; 2) the reservoir was constructed for the purpose of soil conservation; 3) the state acted of its own accord in constructing the reservoir; and 4) the water has been used in the same manner since the dam was constructed. (Stornetta-Prehearing Brief, pp. 2-3.)

The impoundment of water flowing in the Unnamed Stream behind the dam on Stornetta's property constitutes a diversion of water. A diversion "means taking water […] and includes impoundment of water in a reservoir." (Wat. Code, § 5100, subd. (c); see, e.g., *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 953 [discussing application to divert water to on-stream storage]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 99 [describing purpose of Friant dam as "to divert water from the San Joaquin River"]; State Water Board Decision 539 (1946), p. 1 [discussing application for direct diversion and for diversion to on-stream storage]; State Water Board Decision 645 (1950), p. 1 [discussing diversion to on-stream storage]; State Water Board Revised Decision 1642 (2001), p. 1 [discussing application, permit and license to divert water to on-stream storage]; State Water Board Revised Decision 1644 (2003), p. 7 [discussing diversion to on-stream storage].) The Board's permitting authority is invoked by the impoundment and beneficial use of the water regardless of whether the water is subsequently diverted from storage or is beneficially used in situ.

Stornetta asserts in its defense that the reservoir was constructed by the resource conservation district without active participation of the property owner, though Stornetta concedes that the district would have been required to obtain the consent of the property owner to construct the dam. (R.T. p. 106.) Even if the property owner did not take an active role in construction of the reservoir, as the owner of the property on which the dam is located, the Stornetta Family Trust is liable for the ongoing annual diversion and storage of water. Stornetta does not allege that the district established an easement or other claim of ownership that deprived Stornetta of authority to remove the dam or render it incapable of impounding water. Because Stornetta has sufficient control to cease the impoundment, it is liable for the unauthorized diversion.

Stornetta is correct that in certain circumstances, the impoundment of water for soil conservation may be exempt from the Board's permitting authority.[6] (Stornetta-Prehearing Brief) The impoundment of water solely to prevent injury from soil erosion by decreasing the volume and rate of surface flow is not a beneficial use of water for purposes of establishing an appropriative right. (See State Water Board Decision 1651 (2012), p. 37-38 ["We have concluded, however, that flood control is not a beneficial use of water."]; State Water Board Decision 130 (1926), p. 6 [storage of water for flood control purposes is not application of water to beneficial use "but rather the placing of restraint upon floods in order to prevent damage"]; State Water Board Decision 100 (1926), p. 61; State Water Board Decision 858 (1956), p. 49.) Stornetta's subsequent use of stored water for livestock watering is, however, a beneficial use that must be authorized by the Board. Even if the reservoir was constructed solely for the purpose of soil conservation, Stornetta is obliged to obtain a permit to divert or use the water for any other purpose constituting a beneficial use.

Finally, Stornetta asserts that use of water for livestock watering is within the scope of the riparian right associated with the property. A riparian right allows the diversion and use of natural flows, including reasonable use for livestock. But the seasonal storage of water for later beneficial use is not a valid exercise of a riparian right. (*Moore v. California Oregon Power Co.* (1943) 22 Cal.2d 725, 731; *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 335; *Seneca Consol. Gold Mines Co. v. Great Western Power Co.* (1930) 209 Cal. 206, 215-17.) Although Stornetta may claim a riparian right for watering livestock during periods of natural flow in the Unnamed Stream, that right is insufficient to allow diversion to storage and use of the stored water during dry periods when natural flow is unavailable. The evidence indicates that Stornetta diverted water to storage that was used for livestock watering at times of the year when natural flow was unavailable. Such diversion and use is beyond the scope of any riparian water right that Stornetta may hold.

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[6] Though excepted from the Board's permitting authority, impoundment of water for the sole purpose of soil conservation is subject to the State Water Board's authority to protect public trust resources and ensure the reasonable use of water. (See, e.g., State Water Board Decision 1460 (1976) [ordering elimination of waste and unreasonable method of diversion at single-purpose flood control project].)

3.3 Notice

Stornetta's closing brief raises two arguments concerning the adequacy of notice in these proceedings. First, Stornetta argues that because the soil conservation district constructed the reservoir, Stornetta lacked fair notice that storage and use of water impounded in the reservoir for livestock watering required a permit from the Board. Second, Stornetta alleges that it did not receive the letter from the Prosecution Team dated August 18, 2011, and first received notice of this proceeding in March 2012. For the reasons stated below, the State Water Board concludes that Stornetta received adequate notice regarding both the requirements of the Water Code and the pendency of this proceeding.

The Water Code provides fair notice of the requirement to obtain a permit prior to initiating the diversion or use of unappropriated water. Water Code section 1052 states, "the diversion or use of water subject to this division other than as authorized in this division is a trespass." The Water Code provides the exclusive procedure by which a right to appropriate or beneficially use water subject to appropriation may be initiated and acquired. (Wat. Code, § 1225.) Livestock watering is specifically identified by the California Code of Regulations as a beneficial use of water subject to permitting requirements. (See Cal. Code Regs., tit. 23, §§ 669, 697; see also Wat. Code, § 1228.1, subd. (b)(3).) Although Stornetta cites *Pacific Bell Wireless, LLC v. Public Utilities Com'n* for the proposition that "fair notice is an essential requirement of any statutory scheme," (2006) 140 Cal.App.4th 718, 740, Stornetta does not point to any text of the Water Code or State Water Board regulations that it alleges to be unconstitutionally vague. We conclude that Stornetta had ample opportunity to apprise itself of and comply with the state's water rights permitting requirements.

Stornetta claims that it is entitled to rely on the state's failure to alert Stornetta or its predecessor in interest to the obligation to obtain a permit, such that it cannot now be held liable for the unauthorized diversion. In support of this argument, Stornetta provided testimony that use of the reservoir for livestock has remained unchanged since the reservoir was constructed. (DalPoggetto-Exhibit D.) The testimony does not assist Stornetta in its defense. Though the unauthorized use may have commenced immediately upon construction of the reservoir, the use was and remains unauthorized and "the mere failure to enforce the law, without more, will not estop the government from subsequently enforcing it." (*Siskiyou County Farm Bureau v. Dept. of Fish and*

Wildlife (2015) 237 Cal.App.4th 411, 443 [citing *Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1369]). Stornetta also offers no evidence that the State Water Board or any other state agency was aware of the unauthorized diversion prior to the investigation leading to this proceeding – though the Board's knowledge of the unauthorized diversion is not determinative of Stornetta's liability.

Respecting notice of this proceeding, Stornetta alleges that Mr. Dal Poggetto did not receive the August 18, 2011 letter that described the State Water Board's assessment of the reservoir located on Stornetta's property. We find that a determination of whether Mr. Dal Poggetto did or did not receive the August 18, 2011 letter is unnecessary. We will assume for purposes of this Order and without making a factual finding, that the letter was not received, and that Stornetta's first notice of the subject proceedings was pursuant to the March 16, 2012 letter from the Prosecution Team transmitting copies of the ACL complaint and draft CDO. (WR-11.) Stornetta does not dispute that service of the March letter provided actual notice of the enforcement proceedings against Stornetta. (Stornetta-Closing Brief, p. 2.) Mr. Dal Poggetto testified that he received service of the ACL complaint and draft CDO on March 26, 2012. (R.T., pp. 78-79; DalPoggetto-Exhibit B.) Even assuming that this letter was Stornetta's first notice of the pending enforcement action, notice of the action was provided more than two years in advance of the hearing held on September 2, 2014.[7]

3.4 Failure to File a Statement of Water Diversion and Use

The evidence in the record establishes that Stornetta diverted water to storage for many years, including diversions that occurred between January 1, 2009, and December 31, 2010. (See WR-14 pp. 6-7; DalPoggetto-Exhibit D; WR-3, pp. 3-4; WR-14, p. 3.) Stornetta failed to timely file a statement for diversion and use of water from the Unnamed Stream for the 2009 and 2010 water years. Division staff notified Stornetta of the violation in the ACL complaint that Stornetta received on March 27, 2012. (WR-12.) Stornetta had not filed a statement for either water year as of the date of the hearing on September 2, 2014. (R.T., p. 50; WR-11.)

[7] On May 1, 2014, the Acting Assistant Deputy Director for the Division of Water Rights issued an amended draft CDO and ACL complaint that named the Stornetta Family Trust and Newton Dal Poggetto in his capacity as trustee, to reflect correct property owner information. (WR-3, p. 4; WR-15.) Mr. Dal Poggetto received service of the amended draft CDO and ACL complaint including correct property owner information on May 5, 2014, well before the hearing on September 2, 2014.

Stornetta does not contest these facts. Instead, Stornetta points in its defense to Water Code section 5101, subdivisions (b) and (f). (Stornetta-Prehearing Brief p. 3; R.T. p. 115.) These subdivisions exempt those diversions covered by a registration for livestock stockpond use from the requirement to file an annual statement.

Appropriation of water for a livestock stockpond may be made by way of a streamlined registration procedure. (Wat. Code, §§ 1228-1229.1.) After registering for a livestock stockpond use, registrants must renew their registration every five years, prior to expiration, and pay the renewal fee specified in Water Code section 1525. (Wat. Code, § 1228.5.) Failure to comply results in the revocation by operation of law of any right acquired pursuant to the article. (*Ibid.*)

The exception to the filing requirement for livestock stockponds provided by Water Code section 5101, subdivisions (b) and (f) are limited to registered stockponds. Stornetta submitted a livestock stockpond registration (registration) for the reservoir shortly before the hearing in this matter. (R.T., p. 74.) The act of submitting a registration of water use does not excuse Stornetta from the legal obligation to file a statement for diversions that occurred prior to submittal and acceptance of the registration.

Because Stornetta did not timely file a statement of water diversion and use, Stornetta is subject to penalties as provided by Water Code section 5107, subdivision (c)(1).

3.5 Cease and Desist Order

The issuance of a CDO in this case is appropriate because Stornetta is violating and threatening to violate Water Code section 1052 by engaging in and threatening to engage in an unauthorized diversion and use of water. This Order directs Stornetta to take action so as to cease and desist the continued and threatened unauthorized diversion and use of water.

Stornetta may satisfy the requirements of this Order by obtaining a livestock stockpond registration for the reservoir. A “livestock stockpond” under the registration program is defined as a water impoundment structure constructed for livestock watering use not to exceed direct diversion of 4,500 gallons per day, or diversion to storage of 10 acre-feet per year. (Wat. Code, § 1228.1, subd. (b)(1).) When an impoundment exceeds 10 acre-feet in total volume, the registrant must demonstrate that the amount of diversion to storage based on beneficial use, evaporation, and seepage does not exceed 10 acre-feet under foreseeable conditions that would result in the greatest volume of annual

diversion. Stornetta attempted to obtain a livestock stockpond registration shortly before the hearing in this matter, however, the Division refused to accept the registration after completing a review of the submittal. The Division stated by letter dated January 24, 2017, that the registration was not accepted because of the estimated capacity of the reservoir at 24 acre-feet.[8] Given the total volume of the reservoir, the lack of an outlet pipe, and the lack of data demonstrating that the maximum diversion would be less than 10 acre-feet per year, the Division reasonably concluded that the criteria for a livestock stockpond registration had not been met.

Stornetta may satisfy the requirements of this Order by obtaining a livestock stockpond registration for the reservoir; however, Stornetta must modify the reservoir to have an outlet pipe and a capacity of no greater than 10 acre-feet to ensure compliance with the registration program. Stornetta may not satisfy the requirements of this Order by filing and pursuing an application to appropriate water. Such an application is unlikely to be approved because the reservoir is located within the Policy area, and the Policy prohibits, with limited exceptions, the acceptance of new applications for onstream dams. Therefore, this Order requires Stornetta to either submit a plan for approval by the Deputy Director to modify the reservoir to comply with the criteria of the registration program or render the dam incapable of impounding water. Once approved, Stornetta must implement the plan to either reduce the size of the reservoir to 10 acre-feet or less, install an outlet pipe as near as practicable to the bottom of the natural stream channel in order that water entering the reservoir which is not authorized for appropriation may be released or bypassed through or around the reservoir, and register the reservoir as a livestock stockpond or render the dam incapable of impounding water so as to prevent an unauthorized diversion.

3.6 Administrative Civil Liability

The State Water Board finds that civil liability should be imposed against Stornetta for trespass under Water Code section 1052 and for failure to file a statement of water diversion and use as required by Water Code section 5101. In determining the amount of civil liability, the State Water Board has taken into consideration all relevant circumstances, including but not limited to, the extent of harm caused by the violation,

[8] The State Water Board takes official notice of the January 24, 2017 letter. The letter is available in the State Water Board's correspondence file L032301 and also here: https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/dalpoggetto/docs/stornetta_rejectltr_012417.pdf

the nature and persistence of the violation, the length of time over which the violation occurred, and corrective action taken by Stornetta. (Wat. Code, § 1055.3.)

3.6.1 Extent of Harm Caused by the Violation

Stornetta's unauthorized diversion contributed to the risk of injury or harm to aquatic life and habitat, particularly the Central California Coastal steelhead trout fishery and reduced the amount of water available to downstream legal users. (WR-1, pp. 5-6; WR-15, p. 5; R.T., pp. 48, 62-64.)

Collectively, unregulated diversions in North Coast watersheds impact public trust resources such as threatened or endangered salmon and steelhead. (WR-1, pp. 2-3; R.T., pp. 29-30; see also WR-28, pp. 8-9.) Degradation and loss of freshwater habitat is one of the leading causes for the decline of salmonids in California. (WR-28, p. 1.) Water diversion results in a significant loss of fish habitat and water withdrawals that change the natural hydrologic patterns of streams can cause loss or reduction of the physical habitat that fish occupy. (*Ibid.*) Flow reduction can also exacerbate many of the problems associated with land use practices by reducing the capacity of streams to assimilate pollutants. (*Ibid.*) Construction and operation of dams and diversions create barriers to fish migration, thereby blocking fish from access to historical habitat. (*Id.,* pp.1-2.) Dams also disrupt the flow of food (i.e., aquatic insects), woody debris, and gravel needed to maintain downstream fish habitat. (*Id.,* p. 2.) Regulatory measures such as limitations on the season of diversion or requirements for minimum bypass flows can limit diversions during critical times when water is unavailable and minimize impacts to the environment and other legal users of water. (R.T., p. 30; WR-28 pp. 9-10.)

The onstream reservoir on Stornetta's property is on an unnamed stream tributary to the Napa River. (WR-8, pp. 1-3.) Mr. Miller testified that the Napa River watershed contains steelhead trout, and unauthorized diversions of water in the watershed contribute to the cumulative impact by reducing water supplies and habitat for the fishery.[9] (R.T., pp. 48, 62-64.) Steelhead trout have been listed as "threatened" under the federal Endangered Species Act and the California Endangered Species Act since 1996. (WR-28, p. 8.)

[9] Under cross-examination, Mr. Miller explained that his testimony indicating that the Napa River watershed contains threatened Central California Coastal steelhead is based on general knowledge of information published by the National Marine Fishery Service (part of the National Oceanic and Atmospheric Administration). (R.T., pp. 63-64.)

Based on the size of the watershed and erosion of the channel below the spillway, the reservoir collects water on an annual basis during the winter months to replenish losses due to stockwatering, seepage, and evaporation. (WR-3, p. 3.) The Prosecution Team calculated the reservoir's annual loss of water from evaporation by multiplying the estimated reservoir surface area of two acres by an estimated evaporative loss of three feet of water per year for a total of approximately six acre-feet of water per year. (WR-1, p. 5; R.T., p. 47.) The draft ACL complaint did not estimate the annual amount of water beneficially used for livestock watering or lost due to seepage. (WR-15, p. 6.) Stornetta offered no evidence in rebuttal. Therefore, we conclude that at least six acre-feet of water per year was lost by evaporation.

Stornetta does not dispute that the reservoir has existed for many years and water has been diverted to storage in each of those years. (R.T., p. 48; DalPoggetto-Exhibit D.) Although the Prosecution Team did not attempt to quantify the extent of harm caused by Stornetta's diversion, the evidence supports a finding that impoundment of water in the reservoir contributed to the risk of injury or harm to aquatic life and habitat, and reduced the amount of water available to downstream legal users.[10] (R.T., p. 48; WR-1, p. 6.)

3.6.2 Nature and Persistence of the Violation

Mr. Dal Poggetto testified that the reservoir has been in place since 1964, and that the water has been used consistently as a stockpond. (DalPoggetto-Exhibit D.) The Stornetta Family Trust has owned the property since at least 2005 and leased the property during that time for livestock grazing. (WR-10.) Stornetta has diverted water to storage for beneficial use and used the stored water for livestock watering without a basis of right since at least 2005. Based on the calculation described above, we conclude that in excess of 48 acre-feet of water have been diverted to storage since Stornetta acquired the property until the date of the hearing in this matter.

In recommending a penalty amount, the Prosecution Team considered that the Division provided notice that an unauthorized diversion of water may be occurring approximately six months before issuance of the enforcement action, and Stornetta did not respond to

[10] In support of this conclusion, the State Water Board takes notice of records in its files including licenses, permits, and statements of diversion and use, that document legal water users located downstream of Stornetta's property. These records are publicly available on the State Water Board's Electronic Water Rights Information Management System (accessible at https://ciwqs.waterboards.ca.gov/ciwqs/ewrims/EWPublicTerms.jsp)

the Division's notice or take corrective action. (WR-1, pp. 5-6.) Because we assume for purposes of this Order that Mr. Dal Poggetto did not receive the Division's August 18, 2011 Notice Letter, we have discounted this element in setting the amount of liability. However, the March 16, 2012 draft CDO that Mr. Dal Poggetto did receive described the bases for the Prosecution Team's conclusion that the diversions were unauthorized, and the actions that Stornetta might take in correction. (WR-11, p. 12.) Yet, Stornetta did not take any corrective action until filing a livestock stockpond registration more than two years later. Stornetta's lack of diligence in pursuing a remedy to the violations has been persistent and Stornetta took the corrective action of submitting a registration only after facing the prospect of impending liability.

3.6.3 Length of Time Over Which the Violation Occurred

As addressed above, Stornetta has diverted water to storage for beneficial use and used the stored water for livestock watering without a basis of right since at least 2005.

3.6.4 Corrective Action

Stornetta took limited corrective action for the unauthorized diversion by filing a livestock stockpond registration in 2014, shortly before the hearing in this matter.
Mr. Dal Poggetto also expressed his intent to reduce the size of the reservoir if necessary to meet statutory requirements to register it as a stockpond.[11] (R.T., p. 82.) Stornetta did not file for the registration, however, until shortly before the hearing in this matter. Stornetta had ample opportunity after notification of the alleged violation in March 2012 to begin the necessary steps to cease the unauthorized diversion or prevent the unauthorized use of water. Stornetta's initial action in remediation occurred more than two years after being notified.

3.6.5 Other Relevant Circumstances

Stornetta has obtained an economic benefit from diversion and use of water in the reservoir. The evidence indicates that Stornetta or its lessee used stored water for livestock watering when natural flow was unavailable. Mr. Dal Poggetto testified that Stornetta repeatedly leased the property on annual terms for year-round cattle grazing. (R.T., pp. 93-94.) Mr. Dal Poggetto testified that the Stornetta Family Trust received

[11] During the hearing both the Prosecution Team and Stornetta stated that a registration for Livestock Stockpond Use Appropriation form was filed by Stornetta with the State Water Board, however, neither party offered the form as an exhibit in the hearing record. (R.T. pp. 17 & 82.)

$3,000 each year until 2014 for leasing the property. (*Ibid*.) In 2014, Mr. Dal Poggetto increased the rent to $6,000 per year. (*Ibid*.)

The reservoir allows Stornetta to lease the property for profit for year-round cattle grazing without incurring costs for pumping groundwater or otherwise providing water for livestock. Stornetta also avoided the water right fees associated with obtaining a water right to divert, store, and use the water. (WR-15, p. 6.) Stornetta, therefore, gained an economic benefit each year by the diversion and use of the water by its lessee, though the precise amount of that economic benefit cannot be determined based on the evidence before us.

In addition to considering any economic benefit, civil liability for an unauthorized diversion should be set at a level that will deter future noncompliance by the violator or others in the same regulated community. Here, the evidence indicates that Stornetta either did not find the risk of noncompliance sufficiently compelling, or considered the risk of enforcement to be a lesser cost than the cost of compliance. In either case, we find that the civil liability should be set at a level that would incentivize other diverters in a similar situation to engage with Water Board staff and develop a plan for compliance rather than delay compliance until an enforcement action is brought by the Board. A system of water rights administration cannot properly function where the advantages of illegal diversion outweigh the risks and costs of the penalty for trespass.

3.6.6 Conclusion Regarding Amount of Liability

Pursuant to Water Code section 1052, a maximum liability of $500 may be imposed for each day that water was diverted or used without authorization. The reservoir has likely impounded water every year since its construction in approximately 1964, and the Stornetta Family Trust has owned the property since at least 2005. During that time, Stornetta leased the property for cattle grazing and the reservoir was used for stockwatering, more likely than not, on a daily basis. At times of the year when water was flowing in the Unnamed Stream and there was available storage capacity in the reservoir, Stornetta diverted the flow into storage at the reservoir. When the Unnamed Stream was dry and no water was otherwise available for cattle on the property, Stornetta used the stored water for livestock watering. We conclude that the weight of the evidence shows that Stornetta diverted or used water without authorization every day that the reservoir was not spilling.

The Prosecution Team considered only the last three years of unauthorized diversion and use when calculating the maximum authorized penalty for unauthorized diversion and use in the amount of $547,500 (365 days per year x 3 years x $500 per day). Although we find that Stornetta may not have engaged in an unauthorized diversion or use of water on every single day of those three years, the unauthorized diversion or use occurred any time the reservoir was not spilling – which would be true during dry seasons of the year. Considering that the unauthorized diversion and use commenced upon Stornetta's acquisition of the property in 2005 and continued through issuance of the ACL complaint in 2012, and that, conservatively, at least four months of each year was lacking in precipitation that would cause the reservoir to spill, a maximum penalty of at least $360,000 (30 days per month x 4 months per year x 6 years) is supported by the evidence.

A maximum liability of $1,000 may also be imposed for failure to timely file a statement of water diversion and use that occurs after January 1, 2009, plus $500 per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the State Water Board has called the violation to the attention of that person. (Wat. Code, § 5107, subds. (b) & (c)(1).) Because we assume for purposes of this Order that Stornetta was first notified of the violation on March 26, 2012, we will not impose an additional daily penalty for failure to file a statement.

We find that some of the relevant factors for determining the appropriate penalty were not fully reflected in the Prosecution Team's proposed liability amount of $22,800. The Prosecution Team's estimate of economic benefit gained from the violation, on which the proposed liability amount was based in part, considered only three years of unauthorized diversions. The weight of the evidence in the record indicates that these diversions have been occurring for a much longer period of time. We also conclude that economic benefit should not be the primary factor in this case for determining an appropriate penalty amount. Rather, it is the risk of injury to other legal users, likelihood of harm to fisheries and other public trust resources, and the importance of a consistent administration of water rights in this state that drives our penalty calculation in this instance. A lack of substantial economic benefit weighs in favor of not imposing the maximum penalty – but the many years over which these unauthorized diversions took place affects the likely extent of harm caused by the diversions and the opportunity for Stornetta to have apprised itself of the laws of this state and take corrective action.

Having taken into consideration all relevant circumstances, including the likelihood of injury and harm to other water users, aquatic life, and endangered species; the many years over which the violations occurred; the reluctance to take corrective action after being notified of the potential violation; and the goal of deterring other unauthorized diversions, the State Water Board sets the administrative civil liability in the amount of $75,000.

3.7 Suspension of Administrative Civil Liability

The State Water Board finds that suspension of $45,000 of the administrative civil liability is appropriate upon the successful implementation of all elements of Stornetta's compliance plan.

4.0 CONCLUSIONS

Stornetta is making an unauthorized diversion and use of water, which constitutes a trespass against the state as defined by Water Code section 1052, subdivision (a). Stornetta failed to file a statement of water diversion and use in compliance with Water Code section 5101. A cease and desist order is appropriate to require Stornetta to take corrective actions and establish a schedule for compliance. Stornetta is required to pay administrative civil liability in the amount of $75,000 for the unauthorized diversion and use of water subject to the State Water Board's permitting authority. Of this amount, $30,000 is due immediately. The remaining $45,000 is suspended upon Stornetta's compliance with the schedule required by this Order.

ORDER

IT IS HEREBY ORDERED**,**

A. The State Water Board ORDERS that, pursuant to Water Code sections 1831 through 1836, Stornetta Family Trust and Newton Dal Poggetto (trustee) (collectively, Stornetta) shall cease and desist the continued and threatened unauthorized diversion of water from the Unnamed Stream tributary to Napa River by complying with the following:

1. Stornetta shall develop and implement a plan (hereafter, compliance plan) to either: 1) obtain a livestock stockpond registration (registration) for the diversion of water to storage behind the dam located on Napa County Assessor's Parcel Number 047-070-018 (hereafter, Stornetta's property) (Napa County Assessor's Parcel Number (APN) 047-070-018) by modifying the reservoir's capacity to store no more than 10 acre-feet, installing an outlet pipe as near as practicable to the bottom of the natural stream channel in order that water entering the reservoir that is not authorized for appropriation may be released or bypassed through or around the reservoir, refiling an application for registration, and paying the registration fee; or 2) render the dam located on Stornetta's property incapable of impounding water.

2. Stornetta shall take the following corrective actions and satisfying the following time schedules:

    a. Within 45 days, Stornetta shall hire a professional engineer to assist in developing a compliance plan and shall submit written proof of satisfaction of this provision to the Deputy Director of the Division of Water Rights (Deputy Director). The professional engineer must hold a valid and current license issued by the California Board for Professional Engineers, Land Surveyors, and Geologists, and must have experience in matters involving water rights. The written proof submitted to the Deputy Director must bear the signature, name, and license number of the professional engineer.

    b. Within 150 days, Stornetta shall submit a proposed compliance plan to the Deputy Director. The compliance plan, once implemented, must either modify the reservoir's capacity to store no more than 10 acre-feet of water and include a proper outlet pipe capable of bypassing water through or around the reservoir, or render the dam incapable of impounding water. The compliance plan must demonstrate that its implementation is feasible, complies with all state and federal laws, and can be executed in a period of time no longer than reasonably necessary. The compliance plan must establish project milestones and dates for accomplishing the milestones. The compliance plan must require Stornetta to secure all permits or approvals necessary to implement the plan from any local, state, or federal agencies.

c. The Deputy Director will approve the plan upon finding that it complies with the requirements of this Order and can be implemented in a feasible, legal, and expeditious manner. The Deputy Director will reject the proposed compliance plan if it would not: 1) reduce the capacity of the reservoir to store 10 acre-feet or less and include an outlet pipe; or 2) render the dam incapable of impounding water, within two years of the Deputy Director's approval of the plan, unless the Deputy Director finds that Stornetta has demonstrated good cause as to why a period longer than two years is reasonably necessary.

d. If the Deputy Director rejects the proposed compliance plan, the Deputy Director will provide written notice of the rejection to Stornetta. The notice will state the reasons for rejection and will identify an employee or employees within the Division of Water Rights (Division) with whom Stornetta shall immediately engage in good faith consultation to remedy the reasons for rejection. Within 60 days of the date of the written rejection, Stornetta shall submit an amended compliance plan to the Deputy Director, which the Deputy Director will approve or reject in accordance with paragraph 2.c.

e. Upon approval by the Deputy Director, Stornetta shall implement the compliance plan and satisfy all Division requests for information within the designated time frames allowed in the plan, or any extension of time granted by the Deputy Director, until implementation of the compliance plan is determined by the Deputy Director to be complete. Stornetta shall, within 30 days of issuance of any permits, approvals, or waivers for the project, transmit copies to the Deputy Director. Within five (5) days of Stornetta's failure to meet any milestone dates set forth in the compliance plan, Stornetta shall provide written notice of the failure to the Deputy Director.

f. Within 10 days of completing implementation of the compliance plan, Stornetta shall submit to the Deputy Director documentation signed by a professional engineer certifying that the compliance plan has been fully implemented and either: 1) the reservoir's capacity is no greater than 10 acre-feet, includes a functioning outlet pipe as near as practicable to the bottom of the natural stream channel to allow water to be released or

bypassed through or around the reservoir, and a registration that meets all Division requirements, including the fee, has been submitted; or 2) the dam is incapable of impounding water. The Deputy Director shall provide a written determination of whether implementation of the compliance plan is complete. Implementation of the compliance plan shall not be deemed complete until the Division has issued a registration certificate or the dam has been rendered incapable of impounding water.

B. The State Water Resources Control Board ORDERS that Stornetta pay administrative civil liability (ACL) in the amount of $75,000, which is due in three installments as follows:

1. $30,000 is due immediately (First Installment). If any portion of the First Installment is unpaid after the time for review under Chapter 4 of the Water Code (commencing with section 1120) has expired, the Deputy Director will seek a judgment against Stornetta in accordance with Water Code section 1055.4.

2. If Stornetta meets all requirements of paragraphs A.2.a through A.2.b; the First Installment is fully paid; and the Deputy Director approves Stornetta's compliance plan after ordering no more than one revision, then $15,000 of the ACL (Second Installment) will be indefinitely suspended upon successful implementation of all elements of Stornetta's compliance plan. If Stornetta fails to timely meet any requirement of paragraphs A.2.a through A.2.b, or fails to pay the First Installment in full within thirty days, the Deputy Director will issue a written finding directing Stornetta to make immediate payment of the Second Installment. If any portion of the Second Installment is unpaid after 30 days of the Deputy Director's written finding, the Deputy Director will seek a judgment against Stornetta in accordance with Water Code section 1055.4.

3. Upon a finding by the Deputy Director that Stornetta has timely and successfully completed implementation of the compliance plan in accordance with section A of this Order, an additional $30,000 of the imposed administrative civil liability (Third Installment) will be suspended. If Stornetta fails to timely complete implementation of the compliance plan in accordance with section A of this Order, the Deputy Director will issue a written finding and order Stornetta to

make immediate payment of the Second and Third Installment. If any portion of the Second and Third Installment is unpaid after 30 days of the date of the Deputy Director's written finding, the Deputy Director will seek a judgment against Stornetta in accordance with Water Code section 1055.4.

4. Upon a finding by the Deputy Director that Stornetta has complied with sections A and B of this Order, the Deputy Director will issue a letter to Stornetta confirming that Stornetta has satisfied this Order and that Stornetta is not obligated to pay the amount of any suspended ACL.

Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law.

Nothing in this Order shall excuse Stornetta from meeting any other requirements that may be imposed hereafter by applicable legally binding legislation or regulations.

The Board hereby delegates all necessary authority to the Deputy Director to enforce the requirements of this Order.

The Board hereby delegates to the Deputy Director all necessary authority to act on any applications to modify, revoke, or stay this Cease and Desist Order. The Board hereby further delegates to the Deputy Director authority to modify, revoke, or stay this Cease and Desist Order, consistent with Water Code section 1832.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 15, 2018.

_____

Jeanine Townsend
Clerk to the Board