

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-0025

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

against

**Robert Mann (Individual and Trustee) and
Robert C. Mann 1999 Trust**

SOURCE: Unnamed Stream tributary to Pepperwood Creek thence House Creek
thence Wheatfield Fork Gualala thence South Fork Gualala thence Gualala River

COUNTY: Sonoma

**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 Robert Mann, in his individual capacity and in his capacity as trustee of the Robert C. Mann 1999 Trust, and the Robert C. Mann 1999 Trust (collectively referred to herein as Mann). The Board held a public hearing concerning this matter on August 26, 2014, during which it heard testimony and received evidence. In this order, and based upon the record before it, the State Water Board requires Mann to cease and desist his 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 Mann in the amount of \$125,000.

2.0 FACTUAL BACKGROUND

The Robert C. Mann 1999 Trust owns property in Sonoma County (Sonoma County Assessor's Parcel Number (APN) 109-310-002, hereafter "Mann's property") that includes a reservoir on an unnamed stream tributary to Pepperwood Creek in the

Gualala River watershed (hereafter, Unnamed Stream). In 2011, the Board's Division of Water Rights (Division) began investigating the basis of right for 1,771 existing reservoirs in five counties, including Sonoma, within the area subject to the State Water Board's Policy for Maintaining Instream Flows in Northern California Coastal Streams (North Coast Instream Flow Policy or Policy).¹ (WR-1, pp. 1-2.)² Mann's property and reservoir were included in the investigation. (*Ibid.*) On September 9, 2011, Division staff conducted a field inspection of Mann's property and concluded the reservoir is onstream and collecting water subject to the permitting authority of the State Water Board.

(WR-6.)

On June 14, 2012, the Assistant Deputy Director for the Division issued a draft CDO and ACL complaint to Mann alleging that Mann violated the statutory prohibition against the unauthorized diversion or use of water by diverting surface water from the Unnamed Stream to storage in the reservoir for later use without a basis of right and that there exists a threat of continued violation in the future. (WR-11.) The ACL complaint also alleged that Mann failed to file a Statement of Water Diversion and Use (Statement) for his diversion and use of water from the Unnamed Stream in violation of the statutory requirement that he do so and also subsequently failed to file the required Statement within 30 days after the State Water Board called the violation to his attention. (*Id.*, pp. 5-9.) The ACL complaint proposed civil liability for trespass and failure to file a Statement in the amount of \$66,000. (*Id.*, p. 8.)

By letter dated July 2, 2012, Mann requested a hearing on the draft CDO and ACL complaint. (WR-13.)

¹ The Board's Prosecution Team provided testimony that the 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 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 Policy without any significant changes. (State Water Board Resolution No. 2013-0035.) The readopted Policy became effective on February 4, 2014.

² 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 PDF page number of the exhibit. The following abbreviations are used when citing to the parties' exhibits: "WR" is used for the Board's Prosecution Team and "MANN" is used for Mann.

Citations to the Certified Reporter's Transcript are indicated by "R.T." followed by the page number.

The State Water Board issued a Notice of Public Hearing on May 22, 2014. On August 26, 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 (hereafter, Prosecution Team) by presenting evidence for consideration by the State Water Board 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 Mann, both of whom presented testimony and other evidence at the hearing. The State Water Board received closing briefs from the Prosecution Team and Mann on October 13, 2014. The State Water Board has considered all of the evidence in the hearing record, and the findings and conclusions herein are based upon it.

3.0 LEGAL AND PROCEDURAL BACKGROUND

3.1 Cease and Desist Order Authority

The State Water Board may issue a CDO when it determines that any person is violating, or threatening to violate, the prohibition against unlawful diversions. The State Water Board may issue a CDO only after notice and an opportunity for hearing. (Wat. Code, § 1831, subd. (c).) A CDO is effective immediately upon being issued. (Wat. Code, § 1832.)

If a person fails to comply with a CDO, the State Water Board may proceed pursuant to Water Code section 1845, subdivision (a). Under section 1845, the penalties for a violation of a CDO are injunctive relief issued by a superior court and liability for a sum not to exceed \$1,000 for each day in which the violation occurs. Either the court or the State Water Board may impose civil liability against a violator of a CDO. (Wat. Code, § 1845, subd. (a) – (b).)

3.2 Authority to Assess Civil Liability

The State Water Board may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs. (Wat. Code, § 1052, subd. (b).) Fines can go up to \$10,000 for each day a trespass occurs in certain critically dry years. (See Wat.Code § 1845, subd. (b)(1)(A).) Any unauthorized diversion subject to Division 2 of the Water Code is a trespass. (Wat. Code, § 1052, subd. (a).)

Each person who diverts water after December 31, 1965, must file a Statement 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 30 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 the ACL 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.

4.0 DISCUSSION

4.1 Hearing Issues

The May 22, 2014 Notice of Public Hearing identified the following key issues for the hearing:

- 1) Whether the State Water Board should impose administrative civil liability upon Mann for trespass and, if so, in what amount and on what basis;
- 2) Whether the State Water Board should impose administrative civil liability upon Mann for failure to file a required statement of 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 June 14, 2012 draft CDO against Mann.

4.2 Unauthorized Diversion and Trespass Against the State

The record shows that Mann's property includes a reservoir on an Unnamed Stream tributary to Pepperwood Creek in the Gualala River watershed. (WR-1, pp. 4-5; WR-3, p. 1; WR-6, p. 1; WR-18.) The Prosecution Team alleges that water impounded in the reservoir is subject to the permitting authority of the State Water Board and that Mann is making unauthorized diversions of water at said reservoir which constitutes a trespass against the State as defined by Water Code section 1052, subdivision (a). (WR-1, p. 4.)

Mr. Aaron Miller and Mr. Jeff Wetzel, witnesses for the Prosecution Team, testified that in June 2011 the Division began investigating the bases of right for existing reservoirs in Marin, Mendocino, Napa, Sonoma, and portions of Humboldt counties, all within the area subject to the State Water Board's North Coast Instream Flow Policy. (WR-1, pp. 1-2; WR-3, p. 1.) Mr. Wetzel testified that during this investigation,³ the reservoir on Mann's property showed clear signs of water storage behind a single axis earthen dam with a defined downstream channel and upstream channels. (WR-3, p. 1.)

Mr. Wetzel stated in his testimony that he followed up the 2011 investigation by conducting an on-site inspection of Mann's property on September 9, 2011. (WR-3, p. 2.) During the onsite inspection, Mr. Wetzel was accompanied by a special investigator with the Division. (*Ibid.*) The purpose of the onsite inspection was to determine if the reservoir is onstream and collecting water, and is subject to the permitting authority of the State Water Board. (*Ibid.*) Ms. Lucy Mann, representing the respondent, accompanied Division staff during the inspection. (*Ibid.*; R.T., p. 30.) According to Mr. Wetzel, the majority of the inspection was spent measuring the reservoir, which he estimates has a surface area of more than 13 acres, with a volume of approximately 183 acre-feet and a dam height of approximately 65 feet. (R.T., pp. 30-32.) In his testimony, Mr. Wetzel states that during the inspection he observed a water truck that Ms. Mann stated was used to haul water from the reservoir to supply stock watering troughs for cattle on the property. (WR-3, p. 2.) Mr. Wetzel concluded, based on his observations and field measurements, that water is collected to storage in the reservoir on Mann's property on an annual basis and is used for stockwatering purposes. (*Ibid.*)

In his testimony, Mr. Wetzel stated that following the inspection, he prepared a field inspection report (Report). (R.T., pp. 32, 50; WR-6.) The Report concluded that the reservoir is onstream and collecting water, and is subject to the permitting authority of the State Water Board. (WR-3, pp. 2-3; WR-6.) Because there are no existing water rights authorizing this diversion to storage for beneficial use, the impoundment is an unauthorized diversion of water. (WR-3, pp. 2-3; WR-6.) Division staff transmitted the field inspection findings to Mr. Mann in a "Findings Letter" dated October 28, 2011.

³ Mr. Wetzel testified that the 2011 investigation included reviewing Division records to verify that there was no known basis of right for the reservoir on file with the Division of Water Rights and also included reviewing U.S. Geological Survey topographic maps and aerial imagery. (R.T., p. 29; WR-3, p. 1.)

(WR-3, p. 3; WR-7.) The Findings Letter included recommendations for Mann to come into compliance with State Water Board regulations and the California Water Code.

(WR-7.) In a letter dated November 15, 2011, the Division also notified the California Department of Water Resources, Division of Safety of Dams (DSOD) that the reservoir may be under the jurisdiction of DSOD. (WR-3, p. 3; WR-8.)

Mr. Robert Mann, witness for the respondent, testified that his grandfather constructed the reservoir roughly 60 years ago to help control soil erosion movement and conserve heavy winter runoff, with the secondary benefits of having water available for livestock and fire protection. (MANN-1, pp. 1-2; R.T., p. 62.) Mr. Mann argues that his family members have been stewards of the land for over 140 years and, therefore, the reservoir should qualify for a “grandfathering right.” (MANN-1, p. 3.) Mr. Mann testified that although he had not determined the capacity of the reservoir, he disputed the height of the dam and the method of measuring the height of the dam. (R.T., pp. 66-67, 72-73, 90-91.) Mr. Mann also testified that a water truck had been used to haul water from the reservoir to some temporary water troughs. (*Id.*, p. 63.) Mr. Mann further testified that after Ms. Mann was told by Division staff during the site inspection that use of the water truck was considered a diversion, they had ceased hauling water from the reservoir using the truck. (*Ibid.*) Mr. Mann also argues that the reservoir does not “directly water any of the cows” and water troughs on the property were filled by sources other than the reservoir. (*Ibid.*) On cross-examination and in his written testimony, however, Mr. Mann stated that he had estimated the amount of water from the reservoir used by livestock, although he did not state the amount. (R.T., pp. 70-72; MANN-1, p. 2.)

By Mr. Mann’s own admission, there is a dam on a stream flowing through Mann’s property that impounds water. (MANN-1.) This finding is further supported by the undisputed testimony of Messrs. Wetzels and Miller. Mr. Mann also did not rebut the Prosecution Team’s testimony that Mann has no basis of right to store water subject to the permitting authority of the State Water Board in the reservoir. Mr. Mann asserts that he did not understand that impounding water was a diversion and did not know that a water right was necessary for storage of water in the reservoir for beneficial use. (R.T., pp. 61-62; MANN-1.)

The impoundment of water behind the dam constitutes a diversion of water. (Wat. Code, § 5100, subd. (c) [A diversion “means taking water [...] and includes impoundment of water in a reservoir”].) While Mann’s property may have an associated riparian right to divert natural flow from the stream flowing through the property, water may not be seasonally stored under a riparian right. (*City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 335.)

Mr. Mann testified that the reservoir was constructed for the purposes of flood and erosion control, with secondary use for livestock watering and fire suppression. (MANN-1, pp. 1-2; R.T., p. 62.) Division staff estimated an annual loss of approximately 28 acre-feet of water from evaporation as a result of storage in the reservoir, and annual consumptive use of about 5 acre-feet for livestock watering based on the needs of three hundred head of cattle. (WR-1, pp. 5-6; WR-3, p. 2; but see R.T., pp. 65-67, 70-72, 74.) This diversion of water for beneficial use is subject to the permitting authority of the State Water Board.

The State Water Board finds that Mann has violated the statutory prohibition against the unauthorized diversion of water by impounding water for beneficial use, and finds that Mann has committed a trespass.

4.3 Failure to File a Statement of Water Diversion and Use

The evidence in the record establishes that Mann diverted water for a number of years, including diversions that occurred between January 1, 2009 and December 31, 2010. (MANN-1; WR-5, p. 2; WR-1, p. 5.) According to Prosecution Team testimony, Mann: 1) failed to file a Statement for his diversion and use of water from the Unnamed Stream for both 2009 and 2010 by the deadline of July 1 of each subsequent year; 2) was put on notice of the violation for failure to file a Statement and informed of the potential penalties for failure to file a Statement during a field inspection on September 9, 2011;⁴ and 3) filed a deficient⁵ Statement with the Division on October 19, 2011, which was more than 30 days after the State Water Board called the violation to Mann’s attention. (WR-1, p. 8; WR-3, pp. 2-3; WR-5.) Mann did not contest any of these assertions by the

⁴ Mr. Wetzel testified that during the September 9, 2011 on-site inspection, Ms. Mann was informed of the requirement to file a Statement for the reservoir. (WR-3, p. 2.)

⁵ Mr. Wetzel provided testimony that the Division mailed a letter to Mann on January 2, 2013, indicating the Statement was deficient and Ms. Mann (Lucy Mann, witness for the respondent) responded with a letter on February 24, 2013, correcting the deficiencies. (WR-3, p. 3; WR-14; WR-16.)

Prosecution Team. The Board therefore finds that Mann did not timely file a Statement within 30 days of the violation being brought to his attention. (See Wat. Code, § 5107, subd. (c)(1).)

4.4 Cease and Desist Order is Warranted

The State Water Board finds that issuance of a CDO is appropriate. Mann has violated the prohibition against the unauthorized diversion of water and threatens to continue doing so.

4.4.1 Requirements of the Cease and Desist Order

The State Water Board finds that Mann is violating and threatening to violate Water Code section 1052 by engaging in and threatening to engage in an unauthorized diversion of water, and that an order directing Mann to cease and desist the continued and threatened unauthorized diversion by developing and implementing a plan to discontinue the unauthorized impoundment of water behind the dam (compliance plan) is appropriate. Once implemented, the compliance plan must either: 1) result in the issuance of a water right permit that authorizes storage of water in the reservoir on Mann's property and achieve compliance with the terms and conditions of the permit, 2) cause the dam to be removed, or 3) render the dam incapable of impounding water and capable of bypassing all natural flow of the watercourse. The compliance plan must require Mann to secure all permits or approvals necessary to implement the compliance plan from any local, state, or federal agencies and shall further require Mann to consult with agencies that have jurisdiction over the dam or watercourse relevant to compliance with this order.

Pursuant to the Instream Flow Policy, the State Water Board can no longer accept applications for the diversion of water to storage on a Class I or Class II stream unless an exception to the provisions of the Instream Flow Policy is obtained from the State Water Board. Should Mann choose the option of diligently pursuing and securing an appropriate water right permit, the State Water Board will make a stream class determination for the project after the Deputy Director receives Mann's appropriate water right application. If the State Water Board denies or cancels Mann's water right application, then Mann shall revise the compliance plan and re-submit it to the Deputy Director. Once implemented, the revised compliance plan must either: 1) cause the dam to be removed or 2) render the dam incapable of impounding water and capable of

bypassing all natural flow of the watercourse. The revised compliance plan must also meet the same criteria for permits and approvals as in the above paragraph.

This order requires Mann to submit a compliance plan for approval by the State Water Board prior to implementation. Mere submittal of a plan is exempt from the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 et seq.) as the submittal will not cause a direct or indirect physical change in the environment and is an activity that cannot possibly have a significant effect on the environment. Environmental review of implementation of the plan yet to be developed is premature and speculative at this time because of insufficient information to identify possible environmental impacts. Such review, if required by CEQA, will occur after submittal of the proposed compliance plan and prior to the Deputy Director's approval.

This order does not preclude Mann from pursuing an appropriate right to offstream storage under the Division of Water Right's Livestock Stockpond Registration program.

4.5 Administrative Civil Liability is Warranted

The State Water Board finds that civil liability should be administratively imposed upon Mann for a trespass under Water Code section 1052 and for failure to file a Statement in compliance with Water Code section 5101.

4.5.1 Amount of Liability

In determining the amount of civil liability, the board has taken into consideration 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 the corrective action, if any, taken by the violator. (Wat. Code, § 1055.3.)

4.5.1.1 Extent of Harm Caused by the Violation

Although the Prosecution Team has not quantified the precise harm caused by Mann's unauthorized diversions, they allege that Mann's diversions may adversely affect the Central California Coastal steelhead trout (steelhead trout) fishery and other riparian habitat, as well as downstream water right holders. (WR-1, p. 6; WR-11, p. 8.)

Mr. Mann argues that the reservoir is an asset to the State for fire protection and he is

“confident [the diversion] causes no effect to the downstream neighbors (water use) nor the fish and wildlife but rather provides many times more value compared to the reservoir’s absence in the headwaters of this drainage.” (MANN-1, p. 3; R.T., p. 91.)

The onstream reservoir on Mann’s property is on an Unnamed Stream tributary to Pepperwood Creek thence House Creek thence Wheatfield Fork Gualala thence South Fork Gualala thence Gualala River, within the geographic area subject to the North Coast Instream Flow Policy. (WR-1, pp. 1-2; WR-3, p. 1; WR-6, p. 1.) The Policy provides for a watershed-based approach to evaluate the effects of multiple diversions on instream flows within a watershed as an alternative to evaluating water diversion projects on an individual basis. (WR-26, p. 2.) The primary objective of the North Coast Instream Flow Policy is to ensure that the administration of water rights occurs in a manner that maintains instream flows needed for the protection of fishery resources, which is in the public interest. (*Ibid.*) Under the Policy, one of the principles that the State Water Board applies in the administration of water rights is to consider and minimize the cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat. (*Id.*, pp. 2-3.)

Beginning in 1996, the National Marine Fisheries Services and the California Department of Fish and Wildlife listed steelhead trout as “threatened” under the federal Endangered Species Act and the California Endangered Species Act, respectively. (WR-26, p. 8.) Mr. Miller, witness for the Prosecution Team, testified that the Gualala River watershed contains threatened steelhead trout, and unauthorized diversions of water in the watershed have been shown to contribute to the cumulative impact of reducing water supplies and habitat for the fishery. (R.T., p. 37; WR-1, pp. 6-7.) He further testified that the reservoir has existed for many years, and water has been diverted to storage in each of those years without a basis of right. (R.T., p.37; WR-1, p. 7.)

During cross-examination, Mr. Mann testified that before the dam was constructed on the Unnamed Stream his father and grandfather used to get permission from the neighbor to fish on the Unnamed Stream just downstream of Mann’s property because fish came up to the property line. (R.T., pp. 76-77.) Mr. Miller additionally testified that based on the proximity to Pepperwood Creek, a creek that appears to have water in it most of the year and which would support a fishery, “it’s conceivable that during high

flow, during the winter months” the Unnamed Stream “could contain water sufficient for some sort of fishery habitat.” (*Id.*, p. 54.)

Mr. Miller stated in his testimony that regulating previously un-regulated facilities in the North Coast helps to mitigate against any significant impacts to public trust resources like threatened or endangered salmon and steelhead. (WR-1, p. 3.) Regulatory measures, such as specifying a season of diversion and/or minimum bypass flow requirements, limit diversions to times when water is available and help eliminate impacts to the environment and other legal users of water by keeping water instream that would otherwise have been illegally diverted. (*Ibid.*)

This evidence supports a finding that the impoundment of a significant volume of water in the reservoir on Mann’s property on an annual basis (approximately 33 acre-feet per year), has resulted in injury and harm to other water users and aquatic life.⁶

4.5.1.2 Nature and Persistence of the Violation

The State Water Board has directed Mann to take the necessary steps to cease unauthorized diversions to storage. (WR-6; WR-7, WR-11.)

Mr. Wetzel testified that he inspected Mann’s property on September 9, 2011, and in his Reservoir Investigation Report concluded that: 1) the reservoir is storing water subject to the permitting authority of the State Water Board; 2) the reservoir currently constitutes an unauthorized diversion of water since there are no existing rights authorizing this diversion to storage for beneficial use; 3) the owner should be required to file a Statement within 30 days of notification that a Statement is required; 4) it is reasonable to conclude that Robert Mann is knowledgeable of California water rights because he is the primary owner listed on Water Right License 444 in Modoc County; and 5) it appears the capacity of the reservoir is over 50 acre-feet and within the jurisdiction of the Department of Water Resources’ Division of Safety of Dams. (WR-3, pp. 2-3; WR-6, p. 2.)

⁶ 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 Mann’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>).

Mr. Wetzel also testified that the Reservoir Investigation Report, a map, and photos (WR-6) were transmitted to Mann in the Findings Letter dated October 28, 2011 (WR-3, p. 3; WR-7). These documents alerted Mann that the reservoir was diverting water subject to State Water Board jurisdiction and the impoundment of water in the reservoir for beneficial use was an unauthorized diversion of water for which he could be subject to enforcement. (WR-3, p. 3; R.T., pp. 32-34.)

The Findings Letter directed Mann to submit a response within 45 days indicating: 1) the course of action he intends to take to comply with the requirements of the Water Code and 2) an implementation plan with a schedule. (WR-7, p. 2.) The Division received a response letter from Mann on November 29, 2011. (WR-9.) Mann's response did not provide the information requested in the Findings Letter or convey any intent to pursue the necessary corrective actions as identified in the Findings Letter. (WR-3, p. 3.)

By letter dated June 14, 2012, the Assistant Deputy Director of the Division of Water Rights served Mann with the ACL Complaint proposing liability for unauthorized diversion and use of water and the draft CDO. (WR-11.) The draft CDO proposed to require Mann to either: 1) file an appropriative water right application and take the necessary steps to obtain an appropriative water right, or 2) notify the State Water Board that Mann will not pursue a water right permit and instead take the necessary steps to permanently render the reservoir incapable of storing water subject to the State Water Board's permitting authority. (*Id.*, pp. 13-14.)

The Prosecution Team also entered into evidence a letter dated March 8, 2012, to Mr. Mann, in which DSOD described the findings of its January 10, 2012 inspection to determine whether the dam is under the Department's jurisdiction. (WR-10.) The DSOD letter stated that, because of its size, the dam was under the state's jurisdiction and is currently being operated and maintained in violation of Water Code section 6077. (*Ibid.*) The letter included a May 31, 2012 deadline for Mr. Mann to inform DSOD of his choice of three paths to bring the dam into compliance and provide a schedule for the work necessary to satisfy the alternative chosen. (*Ibid.*) The three options were to file with DSOD the appropriate application, additional information, and fees for: 1) construction or enlargement of a dam and reservoir; 2) modification of the dam to less than jurisdictional size as defined in Sections 6002 and 6003 of the California Water Code; or

3) removal of the dam completely to eliminate all storage. (*Ibid.*) Mr. Mann testified that he had hired an engineer to evaluate the dam but the engineer has yet to provide Mr. Mann with an engineer's report because Mr. Mann halted the engineer's investigation pending the outcome of this hearing. (R.T., pp. 72-73, 82-83.)

The State Water Board finds the following: 1) Mann's diversions to storage in the reservoir for beneficial use are in violation of state law without an appropriate water right; 2) Mann's unauthorized diversion may cause harm to public trust resources such as threatened and endangered species, and injure downstream legal users of water, 3) Mann's lack of diligence in pursuing a remedy to the violations noted by the State Water Board and DSOD has been persistent; and 4) Mann took the minor corrective action of submitting a Statement only after facing the prospect of additional administrative civil liability.

4.5.1.3 Length of Time Over Which the Violation Occurred

By Mr. Mann's own admission, the dam and reservoir have been in place for roughly sixty years. (MANN-1, p. 1; R.T., p. 68.) The Prosecution team established that the reservoir has been in existence and continuously holding water since at least 1978. (WR-1, p. 5; R.T., pp. 30, 35-36.) Mr. Mann testified that the reservoir was constructed for the purposes of flood and erosion control, with secondary use for livestock watering and fire suppression. (MANN-1, pp. 1-2; R.T., p. 62.) There is sufficient evidence in the record to establish that Mann has owned the property since at least 1992. (WR-1, p. 5; R.T., pp. 35-36.) Division staff estimated an annual loss of approximately 28 acre-feet of water from evaporation as a result of storage in the reservoir, and annual consumptive use of about 5 acre-feet for livestock watering based on the needs of three hundred head of cattle. (WR-1, pp. 5-6; WR-3, p. 2; but see R.T., pp. 65-67, 70-72, 74.) This diversion of water for beneficial use is subject to the permitting authority of the State Water Board. Mr. Miller testified that the reservoir does not have an outlet pipe, therefore each year the reservoir collects water to storage with no flow downstream of the dam until the reservoir spills. (WR-1, p. 5.) Based on the weight of the evidence in the record, the State Water Board finds that Mann has diverted between 28 and 33 acre-feet of water to storage for beneficial use without a basis of right each year since at least 1992.

4.5.1.4 Corrective Action

In mitigation, the Board finds that Mann has taken limited corrective action by filing a Statement. (WR-3, p. 3; WR-5.) Mann also ceased diverting water from the reservoir using a water truck, though Mr. Mann admitted that using the water in that manner was not practical. (R.T., p. 63.)

The Board finds that Mann has not taken any action to correct the violation other than submitting a Statement and ceasing diversions from the reservoir by water truck, despite warning of potential enforcement action. Mann has had multiple opportunities to cease impounding water for beneficial use without a permit, or at a minimum, start the process to do so. As discussed above, Mann stated that he hired an engineer to evaluate the dam but halted the engineer's investigation pending the outcome of this hearing.

4.5.1.5 Other Relevant Circumstances

Another factor considered by the State Water Board in determining the amount of civil liability is the amount of staff costs. The State Water Board has incurred considerable costs in handling this enforcement action. Prosecution staff were required to spend a considerable amount of time investigating Mann's diversion, drafting an administrative civil liability complaint, and preparing a case for presentation at the August 26, 2014 hearing. (R.T., pp. 39-40; WR-1, p. 8.)

4.5.2 Conclusion Regarding Amount of Liability

As stated above, in determining the amount of civil liability, the board has taken into consideration 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 the corrective action, if any, taken by the violator.

The Board finds that the maximum civil liability amount for the unauthorized diversion is \$3,467,000. The evidence shows that the reservoir has existed in its present form for at least 19 years, a total of 6,935 days, and supports the conclusion that Mann has been impounding water for beneficial use during that period. Multiplying 6,935 days by \$500 per day results in a maximum civil liability of \$3,467,000 that can be considered for the trespass. (WR-1, p. 5; WR-11, p. 7.) In total, the State Water Board could consider

a maximum penalty of \$3,468,000 (\$3,467,000 plus \$1,000) for both the unauthorized diversion and the failure to file a Statement. (WR-11, pp. 7-8.)

The State Water Board finds that some of the relevant factors for determining the appropriate amount of a penalty were not fully reflected in the Prosecution Team's proposed liability amount. The Prosecution Team's estimate of economic benefit gained from the violation, on which the proposed liability amount was based, 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, and therefore, that the economic benefit was substantially greater than the Prosecution Team's estimate. The number of years over which these annual unauthorized diversions took place is also directly relevant to the likely extent of harm to other legal users and the environment as a result of the violations. Having taken into consideration all relevant circumstances, including the likelihood of injury and harm to other water users and aquatic life, the lack of diligence in pursuing a remedy to the violations, the length of time that the violation has occurred under Mr. Mann's ownership or operation at the property, the negligible amount of any substantive corrective action taken by Mr. Mann even after notification by staff, the Prosecution Team's costs incurred in taking this corrective action and the penalty for not timely filing the statement of diversion and use, the State Water Board sets the administrative civil liability in the amount of \$125,000.

4.6 Suspension of Administrative Civil Liability

The State Water Board finds that suspension of \$100,000 of the administrative civil liability it has imposed upon Mann is appropriate, pending the successful implementation of all elements of Mann's compliance plan.

5.0 CONCLUSIONS

- a. Mann is making unauthorized diversions of water into storage in the reservoir for beneficial use, which constitutes a trespass against the State as defined by Water Code section 1052, subdivision (a).
- b. Mann failed to file a Statement in compliance with Water Code section 5101 by the statutory deadline.
- c. A cease and desist order is appropriate to require Mann to take corrective actions and to establish a schedule for compliance.

- d. Mann should be required to pay administrative civil liability in the amount of \$125,000 for the unauthorized diversion of water subject to the State Water Board's permitting authority. Of this amount, \$25,000 should be due immediately. The remaining \$100,000 should be suspended pending Mann's compliance with the schedule required by the CDO.

6.0 ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT, based upon the foregoing findings:

- I. The State Water Board **ORDERS** that, pursuant to Water Code sections 1831 through 1836, Robert Mann (Individual and Trustee) and Robert C. Mann 1999 Trust (collectively referred to herein as Mann) shall cease and desist the continued and threatened unauthorized diversion by developing and implementing a plan to discontinue the unauthorized impoundment of water behind the dam located on Mann's property (compliance plan). The compliance plan shall require Mann to secure all permits or approvals necessary to implement the compliance plan from any local, state, or federal agencies and shall further require Mann to consult with agencies that have jurisdiction over the dam or watercourse. Mann shall take the following corrective actions and satisfy the following time schedules:
 - A. Not later than thirty (30) days from the date of this order, Mann shall hire a professional engineer to assist him in developing and completing a compliance plan. The professional engineer shall hold a valid and current license issued by the California Board for Professional Engineers, Land Surveyors, and Geologists, and the professional engineer shall have experience in matters involving water rights. Mann shall demonstrate his compliance with this requirement by submitting written proof that he has retained the services of such a professional engineer to the Deputy Director for Water Rights (Deputy Director) not later than thirty (30) days from the date of this order. Such written proof shall bear the signature, name, and license number of the professional engineer.
 - B. Not later than 120 days from the date of this order, Mann shall submit a written progress report to the Deputy Director. The progress report shall demonstrate that Mann has provided notice of this cease and desist order and its

requirements to all local, state, and federal agencies that have jurisdiction over the dam or watercourse on Mann's property. At a minimum, the progress report shall include information that demonstrates that Mann has provided such notice to: 1) the North Coast Regional Water Quality Control Board, 2) the Department of Water Resources' Division of Safety of Dams, 3) the California Department of Fish and Wildlife, 4) the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, 5) the United States Fish and Wildlife Service, and 6) the United States Army Corps of Engineers. The progress report shall further demonstrate, to the Deputy Director's satisfaction, that Mann has made a good faith effort to secure the aforementioned agencies' substantive input on: 1) how he should comply with this order and 2) what permits and approvals Mann must secure to comply with this order, including, but not limited to: (a) North Coast Regional Water Quality Control Board Waste Discharge Requirements (Wat. Code, § 13260 et seq.); (b) permits required by the Department of Water Resources, Division of Safety of Dams approval (Wat. Code, § 6002); (c) a lake or streambed alteration agreement from the Department of Fish and Wildlife (Fish & G. Code, § 1600 et seq.); (d) a U.S. Army Corps of Engineers Clean Water Act section 404 permit (33 U.S.C. § 1344); and (e) any local grading permits. In addition, the progress report shall also demonstrate that Mann has provided notice of this cease and desist order and its requirements to the Gualala River Watershed Council and California Department of Forestry and Fire Protection (CAL FIRE) and demonstrate, to the Deputy Director's satisfaction, that Mann has made a good faith effort to secure their substantive input on how he should comply with this order. Mann shall forward copies of any written responses that he receives to this notice, to the Deputy Director within 10 days. The Deputy Director may solicit further consultation from the aforementioned agencies after reviewing their input.

- C. Not later than 180 days from the date of this order, Mann shall submit a proposed compliance plan to the Deputy Director. The compliance plan, once implemented, shall either: 1) result in the issuance of a water right permit that authorizes storage of water in the reservoir on Mann's property and achieve compliance with the terms and conditions of the permit, 2) cause the dam to be removed, or 3) render the dam incapable of impounding water and capable of bypassing all natural flow of the watercourse. The compliance plan shall

demonstrate that its implementation is: 1) feasible, 2) in full compliance with all state and federal laws, and 3) executed in a period of time no longer than is reasonably necessary. The compliance plan shall further set forth project milestones and dates for accomplishing such milestones. Mann shall diligently pursue implementation of the compliance plan and satisfy all Division requests for information within the designated time frames, or any extension of time granted by the Division.

- D. If the compliance plan includes the option of pursuing a water right permit, Mann shall submit an appropriate water right application for storage and use of water in his reservoir as an attachment to the compliance plan and all applicable filing fees. If the State Water Board subsequently determines the project is on a Class III stream, or if the State Water Board grants an exception to the Class I or Class II stream provisions, then within 90 days of the date the Deputy Director accepts the application, Mann shall submit a reservoir operation plan (operation plan) to the Deputy Director. The operation plan must demonstrate how Mann will operate the reservoir without storing additional water subject to the State Water Board's permitting authority, or alternatively how Mann will operate the reservoir in compliance with the State Water Board's Instream Flow Policy. If Mann intends to continue to divert and store water subject to the State Water Board's permitting authority while pursuing a water right permit through the application process, then the operation plan must at a minimum detail interim operating conditions consistent with section 2.2 of the Instream Flow Policy. Specifically, the reservoir operation plan shall describe how Mann will bypass all water outside the Instream Flow Policy's diversion season of December 15th to March 31st, provide for an appropriate minimum bypass flow (MBF) during the diversion season, and keep hourly records of the diversion of water. The MBF should be based on the criteria outlined in the Instream Flow Policy. The reservoir operation plan shall include the installation of measuring devices and bypass facilities, a monitoring and reporting schedule for those facilities that complies with section 10 of the Instream Flow Policy, and a schedule detailing the completion date for the construction of those facilities. Mann shall implement the operation plan in accordance with the schedule contained therein. No additional water shall be collected to storage unless consistent with the operation plan as accepted by the Deputy Director, if and until a permit is issued pursuant

- to Mann's water right application submitted in accordance with this paragraph. Mann shall diligently pursue securing a permit by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division.
- E. The Deputy Director will review and approve the proposed compliance plan upon a showing that it complies with the requirements of this order in a feasible, legal, and expeditious manner. The Deputy Director will reject the proposed compliance plan if it does not call for its completion within two years of the Deputy Director's approval of the plan, unless Mann shows good cause for why a period longer than two years is reasonably necessary.
 - F. If the Deputy Director denies approval of the proposed compliance plan, the Deputy Director will provide written notice of the rejection to Mann. The notice will state the reasons for rejecting the proposed compliance plan and will identify an employee or employees within the Division of Water Rights with whom Mann shall immediately engage in good faith consultation to remedy the reasons for rejection. Within ninety (90) days of the date of the written rejection, Mann shall submit an amended proposed compliance plan to the Deputy Director, which the Deputy Director will approve or reject in accordance with paragraphs (I.E).
 - G. Mann shall secure the Deputy Director's approval of the proposed compliance plan. Upon securing the Deputy Director's approval, Mann shall forthwith implement the compliance plan. Within five (5) days of his failure to meet any milestone dates set forth in the compliance plan, Mann shall provide written notice of the failure to the Deputy Director. Mann shall, within 30 days of issuance of any permits, approvals, or waivers, transmit copies to the Deputy Director.
 - H. Mann shall submit to the Deputy Director documentation signed by a professional engineer certifying that the compliance plan has been fully implemented within 10 days of completion.
- II. The State Water Resources Control Board ORDERS that Mann shall pay administrative civil liability (ACL) in the amount of \$125,000.

- A. Of this amount, \$25,000 is due immediately. If this amount of the ACL is unpaid after the time for review under Water Code section 1120, et seq. has expired, the Deputy Director will seek a judgment against Mann in accordance with Water Code section 1055.4.

- B. The State Water Board suspends the remaining \$100,000 pending the successful implementation of all elements of Mann's compliance plan as follows:
 - 1. If Mann meets all requirements of section I.A through I.D of this order and the Deputy Director approves Mann's compliance plan after ordering no more than one revision, then \$50,000 of the imposed administrative civil liability is indefinitely suspended pending successful implementation of all elements of Mann's compliance plan. If Mann fails to timely meet any requirement of numbered paragraphs I.A through I.D, the Deputy Director will issue an order partially rescinding the suspension of administrative civil liability and directing Mann to make immediate payment of \$50,000. If this amount of the suspended ACL is unpaid after 30 days of the date of the Deputy Director's order, the Deputy Director will seek a judgment against Mann in accordance with Water Code section 1055.4.

 - 2. Upon a finding by the Deputy Director that Mann has timely and successfully completed implementation of the compliance plan in accordance with section I of this order, an additional \$50,000 of the imposed administrative civil liability is suspended. If Mann fails to timely complete implementation of the compliance plan, the Deputy Director will issue an order rescinding the suspension of administrative civil liability and directing Mann to make immediate payment of the full \$100,000 in suspended liability. If any amount of the suspended ACL is unpaid after 30 days of the Deputy Director's order, the Deputy Director will seek a judgment against Mann in accordance with Water Code section 1055.4.

- C. Upon a finding by the Deputy Director that Mann has complied with sections I and II.A of this order, the Deputy Director will issue a letter to Mann confirming that Mann has satisfied his payment of administrative civil liability and that Mann is not obligated to pay the suspended liability amount of \$100,000.

- III. 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.
- IV. Nothing in this order shall excuse Mann from meeting any other requirements that may be imposed hereafter by applicable legally binding legislation or regulations.
- V. The Board hereby delegates all necessary authority to the Deputy Director to enforce the requirements of this order.
- VI. The Board hereby delegates to the Deputy Director all necessary authority to act on any applications to modify, revoke, or stay the cease and desist order. The Board hereby further delegates to the Deputy Director authority to modify, revoke, or stay the 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 July 21, 2015.

- AYE: Vice Chair Frances Spivy-Weber
Board Member Doduc
Board Member D'Adamo
- NAY: None
- ABSENT: Chair Felicia Marcus
Board Member Moore
- ABSTAIN: None



for Jeanine Townsend
Clerk to the Board