

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

DIVISION OF WATER RIGHTS

ORDER WR 2016-0025-DWR

ADMINISTRATIVE CIVIL LIABILITY AND CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion by the

by

Nancy K. Donovan and Stephen J. Peters

SOURCE: Unnamed Stream tributary to Maple Creek thence Rancheria Creek thence Navarro River

COUNTY: Mendocino County

The Assistant Deputy Director, Division of Water Rights, through authority delegated by the State Water Resources Control Board (State Water Board), hereby issues an Order for Administrative Civil Liability (ACL) and to Cease and Desist against Nancy K. Donovan and Stephen J. Peters (collectively the "Diverters").

I. FINDINGS BY THE STATE WATER BOARD, OR ITS DELEGEE:

1. On June 14, 2012, the Assistant Deputy Director of the Division of Water Rights issued an ACL Complaint and Draft Cease and Desist Order (CDO) against the Diverters (Exhibit A attached). The ACL Complaint was issued pursuant to Water Code section 1055. The Draft CDO was issued in accordance with the provisions of section 1834 of the California Water Code. The Assistant Deputy Director of the Division of Water Rights issued the ACL Complaint and Draft CDO pursuant to authority delegated by the Executive Director and redelegated by the Deputy Director of the State Water Board. The ACL Complaint and Draft CDO is attached as Exhibit A hereto, and incorporated by reference herein.
2. The ACL Complaint alleges that the Diverters own and operate two on-stream reservoirs that divert and store water subject to the permitting authority of the State Water Board without basis of right, in violation of Water Code section 1052. The ACL Complaint further alleges that the Diverters failed to file statements of diversion and use for each of the two reservoirs, in violation of Water Code section 5101. The ACL Complaint proposes administrative civil liability totaling \$40,000 for the alleged violations pursuant to Water Code sections 1052 and 5107.
3. The Draft CDO alleges that Diverters have violated or are threatening to violate the prohibition of unauthorized diversion, storage, and use of water set forth in Water Code section 1052, for which Water Code section 1831(d) authorizes the Board to issue a cease and desist order.
4. Ms. Donovan requested a hearing on July 18, 2012. The Division of Water Rights received her hearing request on July 24, 2012.
5. Mr. Peters requested a hearing on July 6, 2012. The Division of Water Rights received his hearing request on July 9, 2012.
6. On March 13, 2013, the State Water Board issued a Notice of Public Hearing.

The hearing procedures state:

As stated in that enclosure, anyone wishing to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be **received** by the State Water Board no later than the deadline listed below. **If Nancy K. Donovan and Stephen J. Peters fail to submit a Notice of Intent to Appear by the deadline specified in this notice, the State Water Board will deem the request for a hearing regarding the issuance of a cease and desist order and imposition of administrative civil liability to be withdrawn, and the Board may adopt the draft CDO and impose administrative civil liability in the amount of \$40,000 without further notice. If Nancy K. Donovan and Stephen J. Peters withdraw their hearing request, the Board may also adopt the draft CDO and impose administrative civil liability without further notice.**

7. On July 21, 2016, the State Water Board issued a Revised Notice of Public Hearing rescheduling the hearing to October 12, 2016 at 9 a.m. in the Byron Sher Auditorium in the CalEPA Building at 1001 I St., Sacramento, CA.
8. Ms. Donovan filed a Notice of Intent to Appear (NOI) on August 23, 2016. Ms. Donovan's NOI indicates that she planned to call herself as a witness and provide up to 30 minutes of testimony regarding facts specific to the ACL Complaint and draft CDO. Ms. Donovan did not indicate in her NOI that she would call Mr. Peters as a witness.
9. Mr. Peters did not file a Notice of Intent to Appear. Per the hearing procedures, this constituted a withdrawal of Mr. Peters' hearing request.
10. Neither Ms. Donovan nor Mr. Peters submitted a case in chief for the hearing.
11. Ms. Donovan did not appear for the hearing on October 12, 2016. Mr. Peters appeared. However, Mr. Peters had no documentation or evidence indicating that Ms. Donovan authorized him to speak on her behalf. The Prosecution Team for the Division of Water Rights was present at the hearing. A transcript of the proceeding attached hereto as Exhibit B is fully incorporated herein and made part of this Order.
12. As a party, Ms. Donovan would have been afforded the opportunity to present at a minimum an opening statement and to cross-examine the prosecution team witnesses.
13. The consequences for failing to meet procedural appearance requirements were clearly communicated through noticing and communications to the Diverters.
14. The State Water Board Hearing Officers deemed Ms. Donovan's failure to appear as a withdrawal of her hearing request and therefore directed the ACL Complaint and Draft CDO matters back to the Assistant Deputy Director for the Division of Water Rights, Enforcement Program, and directed that the Assistant Deputy Director for the Division of Water Rights, Enforcement Program, represented by the Office of Enforcement, may proceed under delegated authority to issue the enforcement actions as appropriate without further notice.
15. Water Code section 1055, subdivision (b), authorizes the Board to adopt an order setting administrative civil liability based on the allegations set forth in the ACL Complaint without a hearing if the Diverters do not request a hearing. State Water Board Resolution 2012-0029 delegates this authority to the Deputy Director for Water Rights. The Deputy Director has redelagated this authority to the Assistant Deputy Director for Water Rights.
16. Water Code section 1834, subdivision (b), authorizes the Board to adopt a cease and desist order based on the statement of facts and information set forth in the Draft CDO without a hearing if the Diverters do not request a hearing. State Water Board Resolution 2012-0029 delegates this authority to the Deputy Director for Water Rights. The Deputy Director has redelagated this authority to the Assistant Deputy Director for Water Rights.

II. IT IS HEREBY ORDERED THAT:

1. The ACL Complaint and Draft CDO is attached hereto as Exhibit A is fully incorporated herein and made part of this Order.
2. In adopting this Order, the State Water Board, or its delegee, has considered all relevant circumstances described in the ACL Complaint, as required by Water Code sections 1055.3 and 5107, subdivision (e), in determining that the **Diverters shall be assessed the civil liability of \$40,000.**
3. The Diverters shall remit, within 20 days of the date of this Order, a cashier's check or money order payment of the full penalty of \$40,000 to:

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

4. Fulfillment of the Diverters' ACL obligation under this Order, either jointly or separately totals \$40,000 and only full payment will constitute a final satisfaction of any and all liability for each of the alleged violations specifically identified in this Order. The State Water Board reserves the right to take further future enforcement for any future violations.
5. The Assistant Deputy Director is authorized to seek recovery of the liability imposed as authorized by California Water Code section 1055.4, or refer this matter to the Office of Attorney General for further enforcement action if the Diverters fail to comply with remitting payment of the full penalty within 20 days of the date of this Order.
6. Pursuant to sections 1831 through 1836 of the California Water Code, that Diverters shall cease the unauthorized diversion of water from the unnamed stream tributary to Maple Creek, file a Statement of Water Diversion and Use for the diversion of water at each of the reservoirs, and pursue one the following corrective action options and satisfy the appropriate time schedules outlined herein:

a. Option 1:

- i. Within 30 days of the date of this Order, Diverters shall file an appropriate water right application with the Division for storage and use of water in their reservoirs, and 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. It is noted that pursuant to the Instream Flow Policy applications for the diversion of water to storage on a Class I or Class II stream can no longer be accepted unless an exception to the provisions of the Instream Flow Policy is obtained from the State Water Board; and
- ii. After the appropriate water right application is received, the State Water Board will make a stream class determination for the project. If it is determined 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 of the application being accepted, Diverters shall submit a reservoir operation plan (Operation Plan) for acceptance by the Assistant Deputy Director for Water Rights.

The Operation Plan must demonstrate how the reservoir will be operated without storing additional water subject to the State Water Board's permitting authority, or alternatively how it will be operated in compliance with the State Water Board's Instream Flow Policy. If the Diverters intend to continue to divert and store water subject to the State Water Board's permitting authority while pursuing a water rights 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 Diverters 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 Instream Flow Policy. If it is determined that the point of diversion for the project is on a class I stream, Instream Flow Policy Table 2.1 should be used to determine the appropriate MBF. If it is determined that the point of diversion is on a class II or class III stream, then the interim MBF should be based on the February median flow. 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. The Diverters 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 Assistant Deputy Director for Water Rights, if and until a permit is issued pursuant to the Diverters' water right application submitted in accordance with paragraph 1 of this option.

- iii. If the State Water Board denies or cancels the Diverters' water right application, then within 150 day of the State Board issuing that decision the Diverters shall submit a plan to the Assistant Deputy Director for Water Rights for permanently rendering the reservoir incapable of storing water subject to the permitting authority of the State Water Board. The plan must satisfy the same requirements and is subject to the same acceptance criteria that are detailed below in option 2.

b. Or, in the alternative, **Option 2:**

- i. Within 30 days of the date of this Order, the Diverters shall inform the State Water Board that they will not pursue a water right permit to authorize the collection of water to storage from the unnamed stream. Thereafter, within 150 days of the date of this Order, the Diverters shall submit a plan to the Assistant Deputy Director for Water Rights to permanently render the reservoir incapable of storing water subject to the State Water Board's permitting authority. The plan shall include a time schedule not to exceed 2 years for completion of the proposed alteration and the identification of any permits or agreements necessary from other federal, state and local agencies to complete the work. Upon acceptance of the plan by the Assistant Deputy Director as sufficient to render the reservoir incapable of being an unauthorized diversion or threat of future diversion in violation of Water Code section 1052, the Diverters shall diligently comply with all provisions and time schedules of the plan. If the Diverters are unable to comply fully with the plan due to other federal, state, or local agencies with authority over the work required, the Diverters shall immediately alert the Assistant Deputy Director for Water Rights of the reason for delay and any problems with fully complying with the provisions of the plan and diligently work to overcome such obstacles.

7. In the event the Diverters fail to comply with the requirements, they shall be in violation of this CDO and subject to administrative civil liability and further enforcement actions as described in California Water Code section 1845(a):

Failure of any person to comply with a CDO issued by the State Water Board pursuant to this chapter may subject that person to further enforcement action, including assessment of civil liability of up to one thousand dollars a day and referral to the Attorney General for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

8. 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, including but not limited to, the authority to bring enforcement against Diverters for unauthorized diversion or use in violation of Water Code section 1052.
9. Nothing in this Order shall excuse the Diverters from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations or water right permit requirements.

STATE WATER RESOURCES CONTROL BOARD



John O'Hagan,
Assistant Deputy Director for Water Rights

Dated: **NOV 09 2016**