

## TESTIMONY OF MARK STRETARS

My name is Mark Stretars. I am a professional Engineer, registered in California, and a Senior Water Resource Control Engineer with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). I have over 30 years of water rights experience working for the Division in programs dealing with water right application acceptance, protest and hearing actions, complaint and compliance actions, and petitions for change and transfers of water. I am currently the Chief of the Compliance and Enforcement Unit. A copy of my resume is attached as WR-04.

My testimony, herein provided, identifies my personal knowledge of the evidence, actions, and rationale for the Division's recommendation to issue the Notice of Cease and Desist Order (CDO) and Administrative Civil Liability (ACL) Complaint against the Vineyard Club Inc. (Licensee).

### **Rationale for the Order Section of the Draft CDO and ACL Complaint**

Mr. Lindsay of my staff has provided testimony about the May 4, 2005 compliance inspection of the Licensee's operation and use of water under water right License 12831 (Application 26224) (WR-7). The inspection found that diversion was occurring from Oak Flat Creek in violation of License 12831, that the Licensee's operations constituted an unauthorized and threatened unauthorized diversion and use of water, and enforcement action was appropriate. I concur that the Vineyard Club's violation of the measuring device requirement of License 12831 constitutes a trespass against the State as defined by Water Code section 1052, subdivision (a), since the license term expressly prohibits diversions without satisfactory installation and maintenance of a measuring device. The inspection findings led to the Division's issuance of Notice of CDO No. 262.31-14 (WR-5) and ACL Complaint No.262.5-44 (WR-6) against the Licensee.

Prosecution staff developed a draft Notice of CDO and an ACL Complaint against the Licensee. The draft CDO is based on the violation and threat of violation of the terms of License 12831, and the potential future threat of unauthorized diversion of water. The ACL Complaint was issued based on the past unauthorized diversion of water.

To address the unauthorized diversion of water, the ACL Complaint (WR-6) directs the Licensee to pay an ACL in the amount of \$4,100 for the unauthorized diversion of water from Oak Flat Creek to Vineyard Lake. The maximum ACL amount authorized by statute is \$500 for each day in which the trespass occurred. According to the Vineyard Club's manager, the diversion system is typically installed in late March after the winter high flows have passed and it is safe to work in Oak Flat Creek. (WR-8, p. 5.) After installation, diversion of water into Vineyard Lake commences immediately. Diversions continue until the end of May. (WR-8, p. 5) While Prosecution staff have reason to believe the trespass occurred

over more than one season, liability was calculated based only on the season during which the inspection was conducted. Therefore, based on that two-month period (April 1 to May 31, 2005, or 60 days) Water Code section 1052 provides for civil liability of up to \$30,000 (\$500 per day x 60 days) for the trespass. In assessing the amount of civil liability, the Prosecution staff, pursuant to Water Code section 1055.3, considered the 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 occurred, and corrective action taken by the violator. In addition, staff considered economic advantage from the violation, and staff costs. In this case, Prosecution staff conservatively calculated that the Licensee diverted 16 acre-feet of water from Oak Flat Creek to Vineyard Lake during the 60-day period. It should be noted that License 12831 provides for a maximum rate of diversion to offstream storage of 0.25 cubic foot per second from Oak Flat Creek, which would be equivalent to about 30 acre-feet diverted during the same two-month period.

The Licensee's unauthorized diversion of water while in violation of the measuring device requirement reduced the amount of water available for appropriation by downstream water right holders. Additionally, while the adverse impacts of unauthorized diversions on the steelhead trout fishery is unknown without valid monitoring of the bypass requirements for the protection of the fishery, diversion of water likely contributes to the cumulative impact of reducing habitat for steelhead trout in the Russian River and its tributaries. "Field surveys on May 23, 1984 and June 14, 1985 have shown that both Oak Flat Creek and Gill Creeks provide nursery habitat for immature steelhead." (WR-20, p. 5.) On August 18, 1997, the National Marine Fisheries Service listed the steelhead trout as endangered under the Federal Endangered Species Act.

While the suggestion to have a registered engineer design the installation of the measuring device in Oak Flat Creek was made during the inspection in 2005, plans for the design of the measuring device were not discussed with Prosecution staff until after the ACL and draft CDO were mailed on December 11, 2006. The Licensee did advise that it had not diverted from Oak Flat Creek in the spring of 2006 because there was sufficient late spring rain to keep the lake topped off. This cessation of diversion in 2006 was taken into account as a positive corrective action when setting the ACL dollar amount.

Prosecution staff found that the Licensee received an economic advantage over other legal users of water by foregoing the cost of building, installing, and maintaining a measuring device, or the cost associated with purchasing water from a local water agency or pumping water from a groundwater supply.

The \$4,100 ACL amounts to approximately \$69 per day for the 60 days of violation or 8.2 days of violation at the maximum rate of \$500 per day. As stated in Paragraph 8 of the ACL, the recommended liability amount discounted the maximum liability to achieve settlement with the Licensee, streamline the enforcement

process, and avoid the expense of a hearing. Since we are now at a hearing, I recommend that the State Water Board considering increasing the liability amount.

This concludes my testimony.