

State Water Resources Control Board

September 26, 2013

*Via E-mail Only*

Mr. Cameron Scott Kirk  
Spaulding McCullough & Tansil LLP  
90 South E. Street  
Suite 200  
Santa Rosa CA 95404  
[Kirk@smlaw.com](mailto:Kirk@smlaw.com)

**RE: ENFORCEMENT ACTION ENF00128 – ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND NOTICE OF PROPOSED CEASE AND DESIST ORDER REGARDING UNAUTHORIZED DIVERSION OF WATER WITHIN THE NAPA WATERSHED IN NAPA COUNTY**

Dear Mr. Kirk:

We have received your September 3, 2013 letter regarding the enforcement matter referenced above. Contrary to the assertions in that letter and for the reasons detailed below, the reservoir located on Napa County Assessor's Parcel Number 047-070-018 (Property) is an unauthorized diversion and use of water in violation of Water Code section 1052 and a diversion and use of water for which a Statement of Diversion and Use must be filed in accordance with Water Code section 5101.

On March 16, 2012 the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued an Administrative Civil Liability (ACL) Complaint and draft Cease and Desist Order (CDO) to "Newton Dalpogetto Successor Trust, and Newton Dalpogetto" as a trustee and individual. Subsequently, you informed the Division that the correct name of the trust that owns the Property is the Stornetta Family Trust (Stornetta) and that Mr. Newton Dal Poggetto is the Successor Trustee for Stornetta (referred to collectively hereafter as Respondents). You have also confirmed that Mr. Dal Poggetto has received notice of the ACL and CDO and you have requested a hearing on the Respondent's behalf.

We acknowledge that the ACL and CDO contain the incorrect trust name. Stornetta has received constructive notice of the ACL and CDO based on the facts that: (1) Mr. Dal Poggetto is the successor trustee for Stornetta; and (2) he has received the ACL and CDO. We are proceeding with the understanding that if this matter were to go to an administrative hearing before the State Water Board, any resulting order/s would be issued with the correct trust name.

**I. The Involvement of The Soil Conservation District does not Absolve the Respondents of the Responsibility to Comply with Water Rights Laws**

In your September 3rd letter you assert that the reservoir on the Property was constructed in or around 1964 by the Soil Conservation District in Sonoma County. You also provide a declaration from Gary Kiser, a former employee of the Soil Conservation District in Sonoma, in

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which Mr. Kiser states that the Reservoir "was the result of action taken by the Soil Conservation District, without personal involvement of the property owner." It is unclear exactly what Mr. Kiser meant by this statement and we would welcome the opportunity to talk about this issue in more detail with Mr. Kiser. To facilitate this discussion, I would appreciate it if you could provide me with Mr. Kiser's contact information.

At a minimum, the owner of the Property at the time the reservoir was constructed would have had to consent to the construction of the reservoir on the Property. Furthermore, the Soil Conservation District did not assume ownership of the Property or the reservoir constructed thereon. It is more likely, and in keeping with the historic role of soil conservation districts, that the owner of the Property applied to the local soil conservation district to receive funds and/or technical support in order to construct the reservoir. The U.S. Soil Conservation Service and local conservation districts provided financial and technical assistance services to property owners so that they could make improvements to their property and changes to their land management practices; such improvements included the construction of livestock ponds. (Helms, *Conservation Districts: Getting to the Roots* in Readings in the History of the Soil Conservation Service (Historical Notes, No. 1, 1992) pp. 26, 27.) The owner of the property on which an improvement, such as a reservoir, is constructed is responsible for having or obtaining the appropriate water rights. The fact that the Soil Conservation Service or local conservation district funded, designed, and/or constructed the dam and reservoir does not absolve the property owner of the responsibility to comply with water rights laws.

Your letter also asserts that the reservoir was constructed "for soil conservation purposes only." It is difficult to understand why a reservoir would be designed to hold and store water year round strictly for soil conservation purposes. Assuming however that your assertion is correct, the construction of the reservoir for soil conservation purposes (presumably to slow flows and prevent erosion and scouring down-stream) does not convey a right to Respondents to continue to store and then use the waters captured by the reservoir. (Meridian, Ltd. v. City and County of San Francisco, 13. Cal.2d 424, 449-450.)

## **II. Soil Conservation Project That Involve the Appropriation of Surface Water Must Comply with Water Right Permit and License Requirements.**

In the September 3rd letter you erroneously argue that Water Code section 1252.1 exempts soil conservation projects from having to obtain water right permits and licenses. Water Code section 1252.1 states:

*An appropriation of water of any stream or other source of water under this part does not confer authority upon the appropriator to prevent or interfere with soil conservation practices above the point of diversion in the watershed in which such stream or other source originates, which practices do not themselves constitute an appropriation for which a permit is required by this part.*

The plain meaning of the language of 1252.1 is not to exempt soil conservation practices from permit and license requirements. Section 1252.1 simply establishes that the granting of a water right permit or license does not convey with it the ability to interfere with upstream soil conservation practices, where those practices are of a character and nature that they themselves would not be an appropriation of water for which a permit is required under Part 2 of the Water Code. For example, many traditional soil conservation practices involve changes in land management practices, (such as plowing techniques and planting year round ground

cover), that are intended to decrease run off and erosion by increasing the amount of water that is absorbed into the ground prior to reaching surface streams. These types of practices, while not an appropriation of water that requires a permit and license under Part 2 of the Water Code, can still decrease the surface flow in a stream. Water Code section 1252.1's plain meaning and clear intent was to put appropriators on notice that securing a permit or license in accordance with Part 2 of the Water Code does not convey a right to prevent such practices. Soil conservation practices that involve the appropriation of water, such as the construction of an on stream reservoir, are subject to Water Right permit and license requirements. The Division's water rights permit and license files and past State Water Board decisions are full of examples of permits and licenses that have been issued for reservoirs that were constructed by funds from, and with the technical assistance of, the Soil Conservation Service and local conservation districts. (See e.g., State Water Board Decision Nos. 933, 936, 1394, & 1452.)

### **III. Riparian Rights Do Not Include the Right to Store Water For Off Season Use or To Unnatural Flows**

Your letter also asserts that the Respondents have a riparian right to the stream and that those rights include the use of the reservoir because the "State, essentially, had expanded the stream into a pond" and that therefore the Stornetta's were not diverting water. As discussed above in Section I, the mere involvement of the Soil Conservation District in the funding, design and/or construction of the reservoir does not release the Respondents of the obligation to obtain the required water rights and comply with the applicable reporting requirements for the construction of the reservoir and resulting diversion of water. Furthermore, a riparian right to use water in a stream that abuts the riparian property does not include the right to store flow for a later use or the right to flow that is not naturally available in the stream. (People v. Shirokow (1980) 26 Cal.3d 301; Lux v. Haggin (1886) 69 Cal. 255.)

The diversion of water for the construction of an on stream reservoir is a diversion and is explicitly included in the definition of "diversion" provided in Water Code section 5100, subdivision (c) which states:

"Diversion" means taking water by gravity or pumping from a surface stream or subterranean stream flowing through a known and definite channel, or other body of surface water, into a canal, pipeline, or other conduit, **and includes impoundment of water in a reservoir.**  
(*Emphasis Added*)

Accordingly, the Respondents as the parties that own and administer the Property are diverting and using water outside of a riparian right, and without the necessary authorization to appropriate water.

### **IV. The Statement Filing Requirement Exemption in Water Code section 5101 for Stockponds only applies to Registered Stockponds**

The Respondent's continued use of the reservoir as a livestock stockpond is NOT exempt from Water Code section 5101's Statement filing requirement. Water Code sections 5100 through 5107 require persons who divert water from a surface stream to file Statements of Diversion and use (Statements), with limited exceptions. Water Code section 5101, subdivision (b) provides one such exception for diversions that are "[c]overed by a registration for small domestic use, small irrigation use or livestock stockpond use, or a permit or license to appropriate water on file

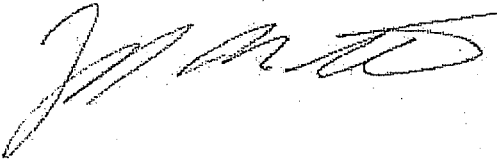
with the board." This exemption is clearly limited to those diversions that are registered with the Division for the uses provided or have obtained a permit or license from the Division.

If the reservoir on the Property were registered with the Division as a livestock stockpond in accordance with Water Code section 1226 or 1228, then the Respondent would not have had to file a Statement and would not be in violation of the Statement filing requirement. The reservoir, however, is not registered as a stockpond. The Respondents have not complied with the required application process to have the reservoir registered and therefore they are not exempt.

While we appreciate the Respondents willingness to seek to register the reservoir as a stockpond in the future, that registration would not release Respondents of liability for past violations. Furthermore, based on the estimated capacity of the reservoir in question, Division staff is not certain that the reservoir would be eligible for registration as a stockpond.

For the reasons discussed above, the ACL complaint and CDO are justified and Division enforcement staff is prepared to present the matter at a hearing before the State Water Board. We are renewing our request to access the Property in order to conduct an inspection as soon as possible. Division staff members are available on October 9th, 10th, or the 16th to conduct the inspection. Please contact me by Friday, October 4th to confirm on which one of the above dates Division staff will be granted access to the Property.

Sincerely,



Yvonne M. West  
Senior Staff Counsel  
**Office of Enforcement**

cc: (via e-mail only)

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