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11 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of:)
13)
14 **Draft Cease and Desist Order and**) **Prosecution Team’s Prehearing Brief**
15 **Administrative Civil Liability against**)
16 **Flocchini Estate, LLC, and Andrew J.**)
17 **Flocchini**)
18 _____)

19 **I. INTRODUCTION**

20 The Division of Water Rights Prosecution Team submits this brief in support of
21 Enforcement Action ENF000179, an administrative civil liability (ACL) complaint and a proposed
22 cease and desist order (CDO) against Flocchini Estate, LLC, and Andrew J. Flocchini (collectively
23 Flocchini). The complaint (Prosecution Team Exhibit WR-1¹) recommends an ACL of \$42,000 for
24 three years of unauthorized diversion of water into an unpermitted. The proposed CDO (WR-2)
25 would require Flocchini to cease the unauthorized diversions and take corrective action to bring
26 the reservoir into compliance or render the reservoir incapable of collecting water.

27 **II. BACKGROUND**

28 Flocchini owns and operates an approximately 63.84-acre parcel at 7078 Lakeville
Highway, Petaluma, Sonoma County APN 068-110-007. (WR-14 [Flocchini Statement of Diversion
and Use S022317], WR-19 [Parcel Quest report].) The parcel contains a 26-acre vineyard (WR-
14) in which Flocchini apparently grows chardonnay, syrah and pinot noir wine grapes (WR-8, p. 4

¹ Further references to Prosecution Team exhibits will be “WR-[Exhibit Number].”

1 [Brian Coats witness statement]). Flocchini irrigates the vineyard from an approximately 13.76
2 acre-feet reservoir on the parcel. (WR-14, WR-16 [Flocchini schematic of reservoir], WR-23, pp. 1-
3 2 [Division Inspection Report March 23, 2015].)

4 The reservoir is on an unnamed stream flowing through the parcel, tributary to the
5 Petaluma River. (WR-12, p. 1 [2011 Division inspection report], WR-14, WR-23, p. 1.) Flocchini
6 collects and stores water in the reservoir during the winter for use during the irrigation season.
7 (WR-14, pp. 1-2, WR-10, p. 1.) Flocchini indicates that the local groundwater is high in boron and
8 unsuitable for vineyard irrigation without dilution from the reservoir. (WR-5 [Flocchini letter to
9 Division], WR-12, p. 2.)

10 Following a Division inspection and findings letter (WR-12, WR-13 [findings letter]),
11 Flocchini filed a Statement of Diversion and Use (S022317) for the reservoir in 2011. (WR-14.)
12 The 2011 Statement indicates that Flocchini would file an application for an appropriative water
13 right, but Flocchini has not yet filed an application. (WR-14, WR-8, p. 2, WR-10, p. 3.) According
14 to Flocchini's Supplemental Statements of Water Diversion and Use for 2011, 2012 and 2013,
15 Flocchini continues to divert approximately 13.76 acre-feet per year. (WR-15 [2011], WR-17
16 [2012], WR-18 [2013].) Flocchini's Statement and Supplemental Statements indicate that the
17 reservoir is filled only with stream flow, and not groundwater. (WR-14 through WR-18.)

18 **III. FLOCCHINI'S DIVERSION AND STORAGE OF WATER IN THE RESERVOIR IS** 19 **UNAUTHORIZED**

20 The unnamed stream has a natural channel (WR-8, p. 2, WR-10, p. 3, WR-12, WR-23),
21 thus the water in the stream is subject to State Water Board jurisdiction under Division 2 of the
22 Water Code unless diverted pursuant to riparian rights or pre-1914 appropriative rights. (Water
23 Code § 1201; State Water Board Order 2001-22, at pp. 25-26.) Flocchini appears to have riparian
24 rights to the stream, but cannot rely on riparian rights to store flow for later use. (*People v.*
25 *Shirokow* (1980) 26 Cal.3d 301; *Lux v. Haggin* (1886) 69 Cal. 255.) Flocchini does not assert, nor
26 is there any evidence to suggest, a pre-1914 right. Therefore, Flocchini must obtain an
27 appropriative right under Division 2 of the Water Code in order to collect and store stream flow in
28 the reservoir for later use. Flocchini does not have an appropriative right under Division 2, and has
not filed an application for such a right. (WR-8, p. 2.)

1 **IV. FLOCCHINI’S UNAUTHORIZED DIVERSION AND STORAGE OF WATER IS A**
2 **TRESPASS UNDER SECTION 1052**

3 The collection of water in a reservoir is a “diversion” under Water Code section 5100,
4 subdivision (c) [“Diversion’ ... includes impoundment of water in a reservoir.”]. Water Code
5 section 1052, subdivision (a), provides that “the diversion or use of water subject to [Division 2]
6 other than as authorized in [Division 2] is a trespass.”

7 **V. THE STATE WATER BOARD MAY IMPOSE AN ADMINISTRATIVE CIVIL**
8 **LIABILITY UNDER SECTION 1052**

9 The State Water Board may administratively impose civil liability for unauthorized
10 diversions. (Water Code § 1052, subd. (d)(2).) At the time the ACL complaint was issued, section
11 1052 authorized administrative civil liability of up to \$500 per day for each day in which the
12 trespass occurs. In 2014, the Legislature amended section 1052 to increase administrative civil
13 liabilities during drought conditions, including periods when the Governor has issued a
14 proclamation of a state of drought emergency. Section 1052, subdivision (c), now authorizes
15 administrative civil liability of the sum of \$1,000 per day of trespass plus \$2,500 for each acre-foot
16 of water diverted in excess of the diverter’s water rights during periods of drought, or \$500 per day
17 of trespass during other periods.

18 The Prosecution Team here seeks to impose administrative civil liability for the 2011, 2012
19 and 2013 diversions covered under Flocchini’s Supplemental Statements. Those diversions
20 occurred before the 2014 drought proclamation, and the proposed liability is based on \$500 per
21 day of trespass. But the Governor’s January 17, 2014, Drought Emergency Proclamation remains
22 in effect (WR-25, p. 2 [Executive Order B-29-15]), and Flocchini’s unauthorized diversions
23 beginning in 2014 could be subject to the higher civil liabilities.

24 **VI. THE STATE WATER BOARD MAY ISSUE A CEASE AND DESIST ORDER TO**
25 **PREVENT CONTINUING OR THREATENED UNAUTHORIZED DIVERSIONS**

26 The State Water Board may issue a cease and desist order to “any person ... violating, or
27 threatening to violate ... the prohibition set forth in Section 1052 against the unauthorized
28 diversion or use of water subject to this division.” (Water Code § 1052, subd. (a), (d)(1).)

1 **VII. THE PROPOSED ACL AMOUNT IS CONSISTENT WITH PRIOR ACTIONS AND**
2 **JUSTIFIED BY THE RELEVANT CIRCUMSTANCES**

3 The ACL Complaint and Draft CDO were a result of a broad education and enforcement
4 effort undertaken by the Division to bring into compliance a large number of unauthorized
5 reservoirs in Napa, Marin, Sonoma, Mendocino and Humboldt counties identified during the
6 development of the State Water Board's Policy for Maintaining Instream Flows in Northern
7 California Coastal Streams (Policy).² (WR-8, pp. 1-2.) The Division has successfully reached out
8 to and obtained compliance from a significant number of property owners with previously
9 unauthorized reservoirs similar to Flocchini's. (WR-8, pp. 1-2.)

10 When necessary, more formal enforcement for unauthorized reservoir has been issued
11 with comparable proposed liabilities and CDO terms as those proposed here. (WR-8, p. 2.) Many
12 such cases result in default orders or settlement (ORDER WR 2012-0004-DWR [CDO]; WR 2012-
13 0020-DWR [CDO]; WR 2013-0015-EXEC [ACL Settlement]; WR 2013-0020-EXEC [ACL
14 Settlement]; WR 2013-0021-EXEC [ACL Settlement]; WR 2013-0062-EXEC [ACL Settlement].)
15 Others have been or are scheduled to be heard by the Board.

16 The Prosecution Team requests that the Board adopt an ACL Order imposing \$42,000 in
17 liability against Flocchini. Water Code section 1055.3 requires that when determining the amount
18 of liability, the Board shall consider "all relevant circumstances, including, but not limited to, the
19 extent of harm caused by the violation, the nature and persistence of the violation, the length of
20 time over which the violation occurs, and the corrective action, if any, taken by the violator." The
21 Prosecution Team has considered the relevant circumstances when determining the proposed
22 liability amount, as discussed in Mr. Brian Coats's testimony. (WR-8, pp. 3-5.)

23 The Policy directs the Board to also consider, among other things, avoided costs,
24 economic benefit, deterrence, culpability, extent of harm, staff costs, and the diverter's ability to

25 ² The Policy was first adopted by the State Water Board on May 4, 2010. (State Water Board Resolution No. 2010-
26 0021.) On October 16, 2012, the State Water Board adopted Resolution No. 2012-0058, vacating the Board's adoption
27 of the Policy in accordance with the Alameda County Superior Court decision in *Living Rivers v. State Water*
28 *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.

1 pay. (WR-26, Policy Appendix H, pp. H-1 – H-3.) The Prosecution Team has considered and
2 followed the Policy's guidance. (WR-8, pp. 3-5.) In particular, the Prosecution Team has
3 established the ability to pay the proposed liability based on Flocchini's real property assets (WR-
4 20), and on the estimated \$284,882 value (in 2013 dollars) of the annual wine grape crop from the
5 vineyard. (WR-8, pp. 4-5, WR-24, pp. 5-7.)

6 **VIII. THE CEASE AND DESIST ORDER IS NECESSARY TO ENSURE FLOCCHINI'S**
7 **FUTURE COMPLIANCE**

8 Flocchini has been given notice and ample opportunity to come into compliance, and has
9 failed to take any actions toward compliance aside from filing a Statement of Diversion and Use
10 and promising, without action, to submit an application for an appropriative right. (WR-8, p. 2,
11 WR-14.) Flocchini's own Supplemental Statements document unauthorized diversions in 2011,
12 2012 and 2013 (WR-15, WR-17, WR-18). The presence of the vineyard without a suitable
13 replacement water supply indicates threatened continuing unauthorized diversions. (WR-10, WR-
14 12, WR-14.)

15 The proposed CDO provides three options from which Flocchini may choose to come into
16 compliance and directly Flocchini to inform the State Water Board of the chosen option: (1)
17 complete and submit the appropriate Registration form, if the reservoir qualifies for a Small
18 Domestic Use, Livestock Stockpond, or Small Irrigation Use Registration; (2) file an appropriative
19 water right application with the Division for storage and use of water, and diligently pursue
20 securing a water right permit; or (3) render the reservoir permanently incapable of storing water
21 subject to the Board's jurisdiction. (WR-2, pp. 3-4.)

22 **IX. CONCLUSION**

23 The Prosecution Team respectfully requests that the Board issue an ACL Order imposing
24 liability of \$42,000, and issue a CDO as proposed.

25 Respectfully submitted,

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Date: April 20, 2015