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MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

May 4, 2018

VIA ELECTRONIC MAIL

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
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**SUBJECT: COMMENT LETTER – MAY 15, 2018 BOARD MEETING RE: STORNETTA
CDO & ACL HEARING**

Dear Ms. Townsend:

The Division of Water Rights Prosecution Team submits the following comments in response to the April 3, 2018, Draft Order in the Matter of Draft Cease and Desist Order and Administrative Civil Liability Complaint (Draft Order) against Stornetta Family Trust and Newton Dal Poggettoo (Trustee). For the purpose of clarity, without the intention of increasing the proposed assessed liability, the Prosecution Team requests reconsideration and further explanation on the calculation of the days of violation.

The Draft Order limits the days of violation to the period when the reservoir was not spilling. (Draft Order, pp. 16-17.) Limiting days of violation to days of active diversion, and not including impoundment as an unauthorized diversion, would have serious negative public policy implications because it will incentivize diverters to store as much water as possible in the fewest number of days in order to limit their potential liability.

Calculation of the days of violation in this manner is also inconsistent with State Water Resources Control Board Order WR 2015-0025 (Mann). Mann is an unauthorized reservoir case that was heard on the same day as the Draft Order and involves very similar facts and violations. The Mann order found that each day that the onstream reservoir was impounding water is a violation of Water Code section 1052. Accordingly, the Prosecution Team is requesting further consideration and clarification on this issue.

As the decision acknowledges, the impoundment of water behind the dam constitutes a diversion of water. (Draft Order, p. 7-9.) The Prosecution Team asserts that while storage in and of itself is not a "beneficial use," storage for a future beneficial use is an unauthorized use

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for purpose of Water Code section 1052. Each day that the reservoir exists and water remains impounded/stored for future use should be considered a violation of Water Code section 1052. The mere fact that the impounded water may not have been used for stock watering during periods where natural flow was available under Stornetta's riparian rights, does not obliterate the fact that there was a continuing unauthorized diversion occurring each day water is impounded in the onstream reservoir.

The Draft Order may merely be using the days in which the reservoir was not spilling as a minimum number of days of violations because there is insufficient information in the record to determine if at some point in time during the wet season the reservoir was regulating flow and no longer storing water. Without further clarification however, the current draft order language implies that when the reservoir is spilling there is no unauthorized diversion or use. Accordingly, the Prosecution Team suggest revising language on page 18 of the draft order as follows:

We conclude that the weight of the evidence shows that **at a minimum**, Stornetta diverted or used water without authorization every day that the reservoir was not spilling.

Thank you for your time and consideration of this issue.

Sincerely,



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YMW/SJO

05/03/2018

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