

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

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Unauthorized Diversion and
Failure to File a Statement of Water Diversion and Use by

Peter A. Lang and Nancy Lang (dba Safari West)

SOURCE: 2 unnamed streams tributary to Porter Creek thence Mark West Creek thence the
Russian River

COUNTY: Sonoma

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Peter A. Lang and Nancy Lang (the Langs) are alleged to have violated California Water Code section 1052(a), which states:

The diversion or use of water subject to [division 2 of the Water Code (commencing with section 1000)] other than as authorized in [division 2] is a trespass.
2. California Water Code section 1052(b) provides that the State Water Resources Control Board (State Water Board) may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.
3. The Langs are also alleged to have violated California Water Code section 5101, which states, in part:

Each person who, after December 31, 1965, diverts water shall file with the board, prior to July 1 of the succeeding year, a statement of his or her diversion and use...
4. California Water Code section 5107(c)(1) provides that the State Water Board may administratively impose civil liability in the amount of \$1,000 for the failure to file a statement, plus \$500 per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the State Water Board has called the violation to the attention of that person.
5. California Water Code section 1055(a) provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom administrative civil liability (ACL) may be imposed. On May 17, 1999, the Executive Director delegated to the Deputy Director for Water Rights the authority to issue a complaint to impose an ACL under California Water Code section 1055(a). Pursuant to State Water Board Resolution 2007-0057, the Deputy Director for Water Rights is authorized to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. State Water Board Resolution 2007-0057 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director of Water Rights. This authority has been redelegated.

ALLEGATIONS

6. The following facts provide the basis for the alleged trespass:

- a) Records of the Sonoma County Assessor's Office show the Langs are the current owners of Sonoma County Assessor's Parcel numbers 079-020-048 and 079-020-049.
- b) The Langs operate a business on the property known as "Safari West," and according to their website, an estimated 60,000 people visit each year. The website has videos and blogs that highlight reservoirs on the property as important components of the Safari West experience.
- c) By letter dated July 5, 2005, the Division sent a letter to property owners within the Russian River watershed in Sonoma County whose properties contained reservoirs for which, according to Division records, there was no water right authorizing the storage of water. The letter included a questionnaire seeking information about the existing reservoir, source of water, current water usage, and any existing basis of water right, where applicable. Each party receiving the questionnaire was requested to complete and return the form to the Division. The letter informed recipients of the State Water Board's authority to initiate enforcement action for any unauthorized diversion and therefore, the importance of taking necessary corrective action. The letter also discussed the potential need to file a Statement of Water Diversion and Use. The Langs were among the contacted property owners. There is no record in the Division's files of the Langs responding to the July 5, 2005 letter.

On September 2, 2010, Division staff conducted an inspection of the Lang property located at 3115 Porter Creek Road in Santa Rosa. Division staff inspected the reservoir known as Catfish Pond and estimated its surface area at 1.8 acres and its capacity at 24 acre-feet. During the inspection, Division staff was informed that the reservoir is filled annually during the rainy season with water from two ephemeral drainages that form the unnamed stream and discharge to the reservoir. Mrs. Lang stated the reservoir was constructed in 1995 with county permits and approval.

Division staff obtained a copy of a reservoir plan and area capacity curve dated February 10, 1992, certified by Leonard D. Marr, a California Registered Civil Engineer. This plan was submitted by Mr. Lang to Sonoma County Planning Department for a Grading Permit. This certified document shows the designed reservoir area was 1.85 acres and the capacity was 19.5 acre-feet.

The water being diverted to storage in Catfish Pond is subject to the State Water Board's permitting authority. The Division has no record of a water right authorizing storage of water from the unnamed stream tributary to Porter Creek, and the Langs did not provide evidence supporting an existing basis of right. The Langs have diverted water to storage and used the stored water without a basis of right, which constitutes an unauthorized diversion and use of water.

The visit to the Lang property also included an inspection of the reservoir known as Watusi Lake which is covered by License 7349 (Application 18192). License 7349 is owned by the Langs and authorizes the collection of 30 acre-feet from October 1 of each year to May 31 of the succeeding year for recreational use. Division staff found that the dam creating the reservoir had been altered to allow the installation of 7 flashboards in the spillway. With all 7 flashboards installed, Division staff estimates the storage capacity of Watusi Lake to be 65 acre-feet, 35 acre-feet greater than the licensed amount. In addition, Division staff was informed that the reservoir is used for stockwatering of approximately 25 head of Watusi cattle in addition to the licensed recreational use. At the time of inspection, more than 30 acre-feet of water was being held in storage at Watusi Lake. Six of the seven flashboards were installed and the measured drawdown was 2 feet from the spillway invert (high water line with seven flashboards installed) to the existing water level.

Because License 7349 authorizes the collection of 30 acre-feet per annum, and Watusi Lake has been modified to potentially hold more than twice that amount of water, there exists the threat of unauthorized diversion and use of water at Watusi Lake. If the reservoir is ever drained for any reason, including maintenance and repairs, potentially as much as 35 acre-feet could be collected to storage without a basis of right.

The continuing unauthorized diversion and use of water at Catfish Pond, the failure to file a Statement of Water Diversion and Use, and the lack of corrective action to prevent such violations after notice supports the issuance of an ACL Complaint in conformance with California Water Code section 1052.

While it is not clear that any unauthorized diversion to storage has in fact occurred at Watusi Lake to date, the Langs are limited by the terms of License 7349 to diversion to storage of no more than 30 acre-feet per annum of water, and Watusi Lake has been modified to hold more than twice that amount. The Langs use this excess storage capacity for their benefit. The potential for unauthorized diversion and the failure to take any action to ensure that no water is diverted in excess of the amount authorized pursuant to License 7349 likewise supports the issuance of an ACL Complaint in conformance with California Water Code section 1052.

PROPOSED CIVIL LIABILITY

7. The first basis of this Complaint is the unauthorized diversion, storage, and use of water by the Langs from an unnamed stream at Catfish Pond since at least the year 1995, and the threatened unauthorized diversion and actual use of water in excess of the amounts authorized by License 7349 at Watusi Lake. This unauthorized diversion of water to storage and uses of water constitutes a trespass within the meaning of California Water Code section 1052(a).
8. The maximum civil liability that can be imposed by the State Water Board in the matter of the unauthorized diversion and use of the water at each facility is \$500 for each day in which the trespass occurred. Since 1995, the Langs have collected water from the unnamed stream at Catfish Pond and continuously held some water in storage for aesthetics and recreational enjoyment for fifteen years (5,475 days). The threatened unauthorized diversion and actual use of water at Watusi Lake also persisted with continual use of flashboards in the spillway. Therefore, a civil liability of at least \$2.79 million could be considered (\$500 per day x 5,475 days) for the trespass in this case.
9. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all 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 occurs, and any corrective action taken by the violator.
10. In this case, the Langs diverted water from an unnamed stream tributary to Porter Creek. The Langs continual use of the flashboards at Watusi Lake, provides for storage and use of water in excess of State Water Board licensed amounts. These diversions have annually reduced the amount of water available for legitimate downstream water right holders and for the Central California Coastal steelhead trout fishery and other riparian habitat. While the adverse impacts of unauthorized water diversions on prior right holders and the steelhead trout fishery have not been quantified for this case, unauthorized diversions of water have been shown to contribute to the cumulative impact of reducing water supplies and habitat for steelhead trout. The State of California lists the Central California Coastal steelhead as a species of special concern, and on August 18, 1997, the National Marine Fisheries Service listed the steelhead trout as threatened under the Federal Endangered Species Act. As of the date of this complaint, the Langs have failed to take corrective actions.

11. The Langs receive an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying the water to annually fill the reservoir, forgoing the cost of filing for a water right, and forgoing the cost of annual water right fees. The wholesale rate for water supplied from the Sonoma County Water Agency is \$809.36 per acre-foot. Even if the Langs did not fill both reservoirs in one year, they continually used the entire capacity for beneficial purposes and, at minimum, annually replaced evaporation and seepage losses in all years. Assuming either 15 years of use of 54.5 acre-feet annually or an annual replacement of evaporation and seepage losses, the Langs avoided paying an estimated \$661,652 or \$267,088, respectively for a purchased water supply. Alternatively, if they used a groundwater well, the costs for pumping could have been approximately half of these amounts. Additionally, the Division estimates that its staff cost to review the existing project and develop the enforcement documents to be \$6,000. The water right filing fee for the storage of water at the reservoirs would be \$2,400 and the annual water right fees for Catfish Pond since fiscal year 2003-04 would be \$700.
12. The Langs also failed to submit a Statement of Water Diversion and Use by July 1, 2010. This failure to file constitutes a trespass within the meaning of California Water Code section 1052(a). California Water Code section 5107(c)(1) provides that the State Water Board may administratively impose civil liability in the amount of \$1,000 for the failure to file a statement, plus \$500 per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the State Water Board has called the violation to the attention of that person.
13. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends civil liability in the amount of **\$48,763** for the unauthorized diversion and use of water for the past 3 years and for the failure to file a Statement of Water Diversion and Use. This liability amount is the minimum liability recommended by the enforcement staff at this time; although the State Water Board may consider a different liability, if this matter goes to hearing.

RIGHT TO HEARING

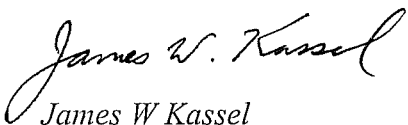
14. According to California Water Code section 1055(b), the Langs may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date this notice is received.
15. If the Langs request a hearing, they will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
16. If the Langs request a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050, et seq. of the California Water Code, and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.

If the Langs do not wish to request a hearing, a cashier's check or money order must be submitted within 20 days of the date of this Complaint for the amount of the ACL set forth in paragraph 13 above, to:

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

If the Langs do not request a hearing and they do not remit the ACL, the State Water Board may seek recovery of the ACL as authorized by California Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



James W Kassel
Assistant Deputy Director for Water Rights

Dated:

DEC 07 2010