

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

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

BLACK KITE CELLARS
Statement Number: S016035

SOURCE: Navarro River

COUNTY: Mendocino

YOU ARE HEREBY GIVEN NOTICE THAT:

1. California Water Code sections 5100-5107 establish a program requiring persons who divert water from a surface stream or a subterranean stream flowing through a known and definite channel (with a few limited exceptions), to file a Statement of Water Diversion and Use (Statement).
2. Black Kite Cellars (Diverter) has filed an initial Statement (Statement number S016035), as required by California Water Code section 5101, and is alleged to have violated California Water Code section 5104 subdivision (a), which states, in pertinent part:

Supplemental statements shall be filed at three-year intervals, prior to July 1 of the year next succeeding the end of each three-year interval...
3. Supplemental Statement of Diversion and Use (Supplemental Statement) is required by California Code of Regulations Sections 910 and 920, subdivision (a) to be filed electronically on a form available at the State Water Resources Control Board (State Water Board) website. The State Water Board's website provides access to the Electronic Water Rights Information Management System for filing a Supplemental Statement.
4. California Water Code section 5107, subdivision (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, subdivision (a) provides that the Executive Director for 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, subdivision (a). Pursuant to State Water Board Resolution 2012-0029, 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 2012-0029 also authorizes redelegation of this

authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

ALLEGATIONS

6. Diverter filed Initial Statement S016035 on June 1, 2007, and reported the use of 2.3 acre-feet of water in 2006 for frost protection and irrigation of 12 acres of vineyard and use at a domestic residence once a month under a riparian claim. After filing of the initial Statement, Diverter failed to file the Supplemental Statements for 2007, 2008, and 2009.
7. On January 30, 2013, the Division of Water Rights (Division) mailed Diverter, or Diverter's designated representative, a letter notifying Diverter of the requirement to electronically file a Supplemental Statement of water diversion and use for 2010, 2011 and 2012 no later than June 30, 2013.
8. On July 26, 2013, the Division mailed Diverter, or Diverter's designated representative, a second letter informing Diverter that the Division had still not received a Supplemental Statement as of July 22, 2013, and the letter informed Diverter of the potential monetary penalties.
9. On August 23, 2013, the Division mailed Diverter a final delinquent notice by certified mail (Certificate No. 7012 3460 0000 3521 3768) which indicated that the Supplemental Statement had not been received by August 19, 2013. This letter identified that Diverter is subject to a \$1,000 penalty, and if Diverter's report is not received within 30 days of the date Diverter received this letter, Diverter will be subject to an additional \$500 per day for each additional day the violation continues.
10. The Division's records show that the August 23, 2013 Certified letter was delivered by the U. S. Postal Service on August 26, 2013.
11. On October 9, 2013, the Division called the Diverter's representative Rebecca Green and left a voicemail regarding the requirement to file the Supplemental Statement.
12. On October 22, 2013, the Division contacted the Diverter's representative Rebecca Green and she stated she is not responsible for the diversion and use of water at Black Kite Cellars, and said the person responsible is Michael Green.
13. On October 22, 2013, the Division contacted Michael Green and discussed the requirement to file a Supplemental Statement and reminded Mr. Green that this matter was past due and subject to enforcement action.
14. On October 22, 2013, the Division sent Michael Green an email which included; a link for filing the Supplemental Statement on-line, a link for updating the contact information for Statement S016035, and a copy of the letter from the Division to the Diverter dated August 23, 2013.
15. Water Code section 5106, subdivision (b)(1) provides that the State Water Board may rely on the name and address included in Statements submitted under this part for the purpose of determining the names and addresses who are to receive notices with regard to proceedings before the State Water Board. The three notice letters discussed above were all sent to the name and address provided in initial Statement number S016035 filed by the Diverter.
16. Water Code section 5106, subdivision (b)(2) provides that any person may submit, in writing, a request to the Board to provide notification to a different address, and the State Water Board shall provide the notification to that address. No such notice has been provided to the State Water Board since the filing of S016035.

17. Water Code section 5104, Subdivision (b) requires that if there is a change in the name or address of the person diverting the water, a Supplemental Statement informing the State Board of that change in name or address must be filed. No notice of change in name or address of diverter has been filed with the State Board since the filing of S016035.
18. As of October 25, 2013, no Supplemental Statement has been filed for 2010 through 2012 by, or on behalf of, Diverter.

PROPOSED CIVIL LIABILITY

19. The deadline for submittal of a Supplemental Statement for the years 2010 through 2012 was June 30, 2013. California Water Code section 5107, subdivision (c)(1) provides that the State Water Board may administratively impose civil liability pursuant to section 1055 in an amount not to exceed \$1,000 for the failure to file the required 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. Such notice was received by Diverter on August 26, 2013. Diverter failed to submit the required Supplemental Statement by September 25, 2013, the 30th day after receiving notice of the violation from the State Water Board.
20. As of October 25, 2013, Diverter had not filed a Supplemental Statement and had been on notice of the violations for 60 days; therefore Diverter is subject to civil liability in the amount of \$1,000 for the initial violation plus \$500 per day for 30 additional days of violation (September 25, 2013 through October 25, 2013, inclusive), or \$15,000. The potential maximum liability that can be considered for the violations alleged up to and including October 25, 2013 is \$16,000. The alleged violation is ongoing, however, and additional potential liability continues to accrue on a daily basis.
21. In determining the appropriate amount of a civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances. In this case, no Supplemental Statement was filed despite three notices being sent and multiple phone calls. Failure to comply with the Supplemental Statement reporting requirements in a timely manner harms the Division's ability to accurately track water diversions from the water course and effectively regulate the resources it is required to protect. Despite repeated notification to Diverter of the reporting requirements and potential liability for failure to submit a Supplemental Statement, Diverter failed to comply in a timely manner.
22. Having taken into consideration all relevant circumstances, including but not limited to the Diverter's failure to submit the Supplemental Statement, the harm of the missing Statement to the Division's effectiveness in regulating water diversions, staff costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the Assistant Deputy Director of Water Rights recommends the imposition of \$10,000 in administrative civil liability (Proposed Liability).

CONDITIONAL SETTLEMENT OFFER

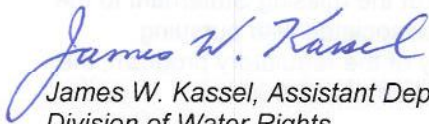
23. To promote resolution of the alleged Statement filing violations, the Assistant Deputy Director of Water Rights makes the following conditional settlement offer (Conditional Offer). Diverter can avoid further enforcement action and settle the alleged failure to file Statement of Water Diversion and Use violation by agreeing to comply with the terms of the Conditional Settlement Offer, provided below, as well as in the "Acceptance of Conditional Settlement Offer and Waiver of Right to Hearing or Reconsideration" (hereafter "Acceptance and Waiver") attached hereto as Exhibit "A."

24. The Conditional Offer requires Diverter to pay an expedited payment amount (hereinafter "Expedited Payment Amount") of \$1,000, file the necessary Statement, and waive the right to a hearing and reconsideration of the alleged violation.
25. To accept the Conditional Offer, Diverter must sign and return the Acceptance and Waiver along with the Expedited Payment Amount and electronically file the necessary Statement within 20 days of receipt of this complaint.
26. If there are extenuating circumstances that Diverter would like to discuss, such as an inability to pay the Expedited Payment Amount, then Diverter can contact the Division with that information as soon as possible but no later than the 20 days from receipt of this complaint.

RIGHT TO HEARING

27. Diverter 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 the Diverter received this complaint. (Water Code, sec. 1055, subd. (b).)
28. If Diverter requests a hearing, Diverter 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. The State Water Board may convene a settlement conference prior to noticing a hearing date.
29. If Diverter requests 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 Water Code and/or its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall be final and effective upon issuance.
30. If Diverter does not remit the Acceptance and Waiver, the Expedited Payment Amount, and electronically file the necessary Statement, or request a hearing within 20 days of the date this complaint is received, then the State Water Board will issue a final ACL Order and seek recovery of the liability imposed as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



James W. Kassel, Assistant Deputy Director
Division of Water Rights

Dated: **NOV 22 2013**

ORDER NO. 20xx-00xx-DWR

EXHIBIT A

**ACCEPTANCE OF CONDITIONAL SETTLEMENT OFFER
AND WAIVER OF RIGHT TO HEARING AND RECONSIDERATION**

Black Kite Cellars

Source: Navarro River

County: Mendocino

By signing below and returning this Acceptance of Conditional Settlement Offer and Waiver of Right to Hearing and Reconsideration (Acceptance and Waiver) to the State Water Resources Control Board (State Water Board), Black Kite Cellars (Diverter) hereby accepts the State Water Board's conditional settlement offer (Conditional Offer) and waives the right to a hearing before and reconsideration by the State Water Board at which violations alleged in the Administrative Civil Liability Complaint issued to Diverter (ACL Complaint) to which this Acceptance and Waiver is attached as Exhibit "A" could be disputed.

Diverter agrees to perform the following within 20 days of receipt of the ACL Complaint:

- **Pay administrative civil liability as authorized by California Water Code section 5107, subdivision (c) in the amount of \$1,000 (Expedited Payment Amount)** by cashier's check or by certified check made payable to the "State Water Resources Control Board" for deposit into the Water Rights Fund, which shall be deemed payment in full of any civil liability pursuant to California Water Code section 5107 (c) that otherwise might be assessed for the violations described in the ACL Complaint.
- **Electronically file the necessary Supplemental Statement of Water Diversion and Use (Supplemental Statement) for the 2010, 2011, and 2012 calendar years under Statement number S016035**, as required by Water Code sections 5104 and 5107, subdivision (b).

Diverter understands that this Acceptance and Waiver waives the Diverter's right to contest the allegations in the ACL Complaint and the civil liability amount proposed for those violations.

Diverter understands that the failure to submit payment of the Expedited Payment Amount, electronic copies of the necessary Supplemental Statement as identified and described above, along with the signed Acceptance and Waiver within 20 days of receipt of this notice shall render the State Water Board's Conditional Offer void. If the State Water Board's Conditional Offer is deemed void due to Diverter's non-performance, then the State Water Board will issue a final ACL Order and seek recovery of the full liability amount proposed in the ACL Complaint.

Diverter understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the ACL Complaint. The filing of a Statement of Diversion and Use with the State Water Board does not in any way establish or constitute evidence of a right to divert or use water. (Wat. Code, § 5106, subd. (a).)

Upon execution by Diverter, the Acceptance and Waiver and Expedited Payment Amount shall be mailed to the following:

**Conditional Settlement Offer
State Water Resources Control Board
Division of Water Rights
Enforcement Section
P. O. Box 2000
Sacramento, CA 95812-2000
Attn: John O'Hagan**

Diverter understands that this Acceptance and Waiver is not final until it is formally endorsed by the Division of Water Rights.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Diverter in the making and giving of this Acceptance and Waiver.

Black Kite Cellars*

*Please make corrections as appropriate.

By: _____
Signed Name Date

Printed or typed name

Title

IT IS SO ORDERED PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 11415.60.

Approval of the Acceptance and Waiver has been delegated to the Assistant Deputy Director for Water Rights by State Water Board Resolution 2012-0029, and approval shall not limit the authority of the Executive Director or the Deputy Director for Water Rights, as delegated, to initiate any enforcement actions for the unauthorized diversion or use of water, for any future violations of the California Water Code, or violation of the terms of the Acceptance and Waiver.

By: _____
James W. Kassel,
Assistant Deputy Director
Division of Water Rights Date