

WR-1

TESTIMONY OF AARON MILLER

My name is Aaron Miller. I am a professional Engineer, registered in California, and a Senior Water Resource Control Engineer with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). I have over 13 years of water rights experience working in both the Permitting and Enforcement Sections within the Division. Experience includes water availability assessment, processing of water right applications, issuance of Permits, protest resolution, investigation of complaints and compliance/enforcement issues, and participation in enforcement hearings. I am currently the Supervisor of the Division's Enforcement Unit No. Four. A copy of my resume is attached as WR-2.

My testimony, herein provided, identifies my personal knowledge of the evidence, actions, and rationale for the Division's recommendation to issue an Administrative Civil Liability (ACL) Order and Cease and Desist Order (CDO) against the Stornetta Family Trust and Newton Dal Poggetto (Trustee) (referred to collectively hereafter as Dal Poggetto).

North Coast Unauthorized Reservoir Investigation

Illegal reservoirs are existing facilities that collect water from surface streams without the right to do so. If water flowing in a surface stream is diverted to a storage facility during a time when flow is high for use during a time when flow is low or does not exist, then the diverter is appropriating water to storage that is subject to the State Water Board's permitting authority and a water right must be obtained. The reservoir may be constructed for a variety of reasons. The most common reasons are for some sort of beneficial use to the land owner. These uses include irrigation of crops or pasture, stockwatering, domestic use at a residence, fire protection, and recreational uses such as fishing, swimming or boating. Water Districts may build reservoirs for municipal or industrial use.

The Division began investigating the basis of right for existing reservoirs in Marin, Mendocino, Napa, Sonoma, and portions of Humboldt counties in 2011. These Counties

are within the area subject to the State Water Board's Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy), adopted May 4, 2010. In December 2007 the State Water Board produced a draft Substitute Environmental Document (SED) as part of its development of the Policy. Appendix E of the SED contains the report Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams produced by Stetson Engineers in December 2007 (WR-27). In order to complete this report, Stetson Engineers produced a Geographic Information System (GIS) layer which identified the locations of the existing potential unauthorized dams. In June and July of 2011, a review of the GIS layer, aerial photographs, and United States Geological Survey (USGS) topographic maps of the Napa River watershed was undertaken by the State Water Board, Division of Water Rights (Division).

The Policy identified 1,771 potentially illegal reservoirs in Napa, Marin, Sonoma, Mendocino and Humboldt counties. Division Enforcement Staff undertook investigation of these potentially illegal reservoirs beginning in 2011 and have since closed over 1200 of the alleged illegal reservoir cases because the reservoirs are covered by existing water rights, or not subject to the State Water Board's permitting authority. To further the unauthorized reservoir investigation, Division Enforcement Staff sent out over 350 unauthorized reservoir notice letters, substantially similar to the notice letter sent to Dal Poggetto on August 18, 2011. (WR-5) The notice letters provided information about the need for a water right, the State Water Board's authority to impose civil liability for unauthorized diversions, Statement of Diversion and Use filing requirements, and gave property owners an opportunity to provide information concerning the basis of right for the reservoir or to submit a corrective action plan. Of the remaining alleged illegal reservoirs being investigated, 15% have since been covered by applications to appropriate water filed with the State Water Board by the property owner with 48 such applications being filed in 2012.

The investigation of the reservoirs identified by the Policy is a significant accomplishment because it brings unauthorized diverters into the water rights system. It further identifies users of waters of the state and brings them into the reporting process so that there is a better understanding of where and how much of the State's water is being used. Additionally bringing unauthorized diverters into the water rights system in

the North Coast helps to mitigate against any significant impacts to public trust resources like threatened or endangered salmon and steelhead by regulating previously un-regulated facilities.

In 2012, the Division issued nine Administrative Civil Liability complaints and proposed Cease and Desist orders to owners of property where an unauthorized reservoir had been identified and no response to the Divisions notice letters was received. The reservoir in question in this proceeding is one of the many potentially illegal reservoirs that were investigated by Division staff and one of the nine property owners who were issued an ACL and proposed CDO when there was no response to the unauthorized reservoir notice letter.

A summary of the nine unauthorized reservoir ACL complaints and proposed CDO issued by the Division in 2012 is provided below:

Project Owner	Enforcement Action Issue Date	Estimated Reservoir size acre-feet Initial/final	Proposed ACL Amount	Final ACL Liability Due
GRR Vineyard LLC	3/8/2012	12.6	\$15,700	\$9,000
Donovan & Peters	6/14/2012	31 (combined capacity of 2 reservoirs)	\$40,000	
Giese and Coulingh	3/16/2012	1.6/2.5	\$6,300	\$5,300
Dawood	3/16/2012	8.4/2.8	\$12,100	\$10,000
Dalpoggetto	3/16/2012	21/24.2	\$22,800	
Ivey	3/23/2012	0.34	\$8,000	\$8,000
Chandler and Amendola	3/15/2012	9.5	\$13,000	
Temple	3/22/2012	1.6	\$6,300	\$6,300
Gwaltney	4/2/2012	5.3	\$7,400	\$5,000
Coleman	3/23/2012	5.8/1	\$9,900	\$6,000
Mann	6/14/2012	183	\$66,000	

Issuance of the ACL Complaint and Draft CDO

Mr. Porzio of my staff has provided testimony about the initial investigation that led to issuance of the ACL Complaint and Draft CDO. Mr. Porzio has also provided testimony regarding the October 16, 2013 inspection of the Reservoir that is the subject of these enforcement actions. (WR-3). I attended and participated in the October 2013 inspection of the Dal Poggetto property and agree with the inspection findings. I concur that the reservoir that was inspected is subject to the permitting authority of the State Water Board and that Dal Poggetto is making unauthorized diversions of water at said reservoir which constitutes a trespass against the State as defined by Water Code section 1052, subdivision (a). This reservoir at issue is clearly within the permitting authority of the State Water Board due to the fact the reservoir's dam sits on a stream channel with well-defined bed and banks and collect's water to storage on an annual basis. The initial investigation led to the Division's issuance of Notice of CDO and ACL Complaint (WR-11) against Dal Poggetto. The subsequent site inspection confirms the Division's initial findings were correct.

Enforcement Staff developed a draft Notice of CDO and an ACL Complaint against Dal Poggetto. The draft CDO is based on the violation and threat of unauthorized diversion, and the potential future threat of unauthorized diversion of water. The ACL Complaint was issued based on the past unauthorized diversion of water from an Unnamed Stream tributary to the Napa River and the failure to file a Statement of Water Diversion and Use (Statement) reporting water diversion from the reservoir. Enforcement Staff referred to the North Coast Policy Appendix H (WR-28) when considering whether or not enforcement action was warranted and when developing the enforcement documents.

To address the unauthorized diversion of water, the ACL Complaint (WR-11) directs Dal Poggetto to pay an ACL in the amount of \$22,800 for the unauthorized diversion of water from the Unnamed Stream tributary to the Napa River. The maximum ACL amount authorized by statute for an unauthorized diversion is \$500 for each day in which the trespass occurred. Division evidence suggests the reservoir has been in place since at least 1980. (ACL Exhibit B,– WR-11). The reservoir does not have an outlet pipe, therefore each year the reservoir collects water to storage with no flow downstream of the dam until the reservoir spills. While Prosecution staff have reason to believe the

trespass has been occurring since prior to 1980, liability was calculated based on the last three years of estimated use. The maximum liability that could be considered for three years of unauthorized diversion is \$547,500 (\$500 per day x 1095 days).

Proposed Civil Liability Amount

In assessing the amount of civil liability, Enforcement staff, pursuant to Water Code section 1055.3 considered the relevant circumstances, including, but not limited to, the following:

Economic Benefit Gained from the Violation

In this case, Prosecution staff began by quantifying the economic benefit of having the unauthorized reservoir by evaluating reservoir losses that would be replaced on an annual basis. Using the surface area of the reservoir of two acres and an annual estimate of evaporative loss of three feet of water, an estimate of annual evaporative losses was calculated at 6 acre-feet. Studies produced by the University of California Cooperative Extension for the North Coast region for production of wine grapes and olive oil from 2009 through 2011 (WR-26) all indicate the typical cost of pumping ground water from 120 foot deep well with a 10 horsepower motor is approximately \$198 per acre-foot. Using just the estimated loss of 6 acre-feet of water due to evaporation the avoided annual cost of water is approximately \$1,188 or \$3,564 over three years. Additionally, the avoided cost of annual water right fees for the last three years is \$351. Dal Poggetto has received an economic advantage over other legitimate water diverters by avoiding the cost of getting a water right, annual water right fees, and foregoing the costs of buying the water or pumping groundwater from a well. Accordingly, Dal Poggetto's unauthorized reservoir has provided an estimated economic advantage of \$3,915.

Extent of Harm, Nature and Persistence of Violation, Length of Time Over Which the Violation Occurs, and Corrective Action, If Any, Taken

To quantify the other relevant circumstances in this matter, I applied a disincentive factor to the estimated avoided costs for this case. Taking into consideration the following

facts, 1) the Napa River watershed contains the threatened Central California Coastal Steelhead trout fishery and it is known that unauthorized diversions of water have been shown to contribute to the cumulative impact of reducing water supplies and habitat for the fishery, 2) the reservoir has existed for many years and water has been diverted to storage in each of those years without a basis of right, 3) the Division provided prior notice that Division records indicated an appropriate water right authorizing storage in the reservoir did not exist and warned of the potential for unauthorized diversion of water to be occurring (WR-5), and 4) Dal Poggetto had approximately 6 months prior to issuance of the enforcement actions to provide a response to the Division's notice and provided none. I determined that using a factor of 5 times the avoided cost was appropriate when considering the above factors and the Division's goal of deterrence. Using the estimated economic advantage as a base liability and a factor of 5 based on the additional circumstances, I recommended a liability in the amount of approximately \$19,600.

Additional Violations

In addition, Dalpoggetto failed to file a Statement for their diversion and use of water from the unnamed stream for either 2009 or 2010 by the deadline of July 1 of either year. The California Water Code section 5107(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, 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 provided by the Notice Letter on August 18, 2011 (WR-5). By February 24, 2012, Dalpoggetto had been on notice of the requirements for filing a Statement for 190 days, therefore the maximum civil liability that could have been considered around the time of issuance of the ACL complaint was \$1,000 plus 160 days (\$500), or \$81,000. A total of \$1,000 was included in the proposed liability amount for failure to file a Statement.

Enforcement Costs

Staff costs incurred in conducting the initial investigation, reviewing the existing project, and developing the enforcement documents was estimated to be \$2,200. Additional

staff costs have been incurred in pursuing compliance and enforcement, but those costs were not considered as basis for the liability amount proposed in the ACL Complaint.

Proposed Liability Amount Conclusion

Having taken into consideration the factors described above, the Division Enforcement Staff recommended an ACL in the amount of \$22,800. As Stated in Paragraph 17 of the ACL the estimated additional staff cost to prosecute this case is about \$10,000. I recommend that the State Water Board take this additional cost of prosecution and costs incurred by the Hearing Team into consideration when determining the final liability to be imposed to Dal Poggetto.

Need for Cease and Desist Order

The reservoir at issue sits on a stream channel with well-defined bed and banks and collect's water to storage on an annual basis. The Draft CDO was issued to bring Dal Poggetto into compliance and to eliminate the continued unauthorized diversion. The Order section of the Draft CDO outlines the various steps that need to be taken by Dal Poggetto to obtain an appropriative right for the diversion of water from the Unnamed Stream or remove the reservoir and cease the unauthorized diversion of water. For many of the same reasons discussed above, I recommend the Draft CDO be issued as written to put Dal Poggetto under Order to take the steps necessary to correct these continued violations.