

WR-8
TESTIMONY OF BRIAN COATS

My name is Brian Coats. 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 15 years of water rights experience working in both the Petition 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. Two. A copy of my resume is attached as WR-9.

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 Flocchini Estate, LLC and Andrew Flocchini (referred to collectively hereafter as Flocchini).

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) (WR-27)¹. 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-28). 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 Sonoma County 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

¹ The Policy was first adopted by the State Water Board on May 4, 2010. (State Water Board Resolution No. 2010-0021.) On October 16, 2012, the State Water Board adopted Resolution No. 2012-0058, vacating the Board's adoption of the Policy, as required by the Alameda County Superior Court in *Living Rivers Council v. State Water 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.

reservoir cases because the reservoirs are covered by existing water rights, or not subject to the State Water Board's permitting authority. In certain instances information was available to directly contact property owners by phone and inquire about the alleged illegal reservoirs. This was the case for Flocchini. Division staff from our satellite office in Santa Rosa contacted Flocchini and setup an inspection of the storage facility on February 7, 2011. WR-12 is the Inspection Report from that inspection.

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 unregulated facilities. Regulatory measures such as specifying a season of diversion and/or minimum bypass flow requirements limit diversions to times when water is available and helps eliminate impacts to the environment and other legal users of water by keeping water instream that would otherwise have been diverted illegally.

In 2012, the Division issued 11 Administrative Civil Liability complaints and proposed Cease and Desist orders to owners of property where an unauthorized reservoir had been identified. Nine of these enforcement cases were issued to property owners where no response to the Divisions notice letters was received. The other 2012 enforcement cases were issued due to the lack of an adequate response to findings letters issued by the Division.

In 2013, the Division issued 6 Administrative Civil Liability complaints and proposed Cease and Desist orders to owners of property where an unauthorized reservoir had been identified.

Issuance of the ACL Complaint and Draft CDO

Mr. Arnold has provided testimony (WR-10) about the initial investigation conducted by Division staff Cheri Gehrt and Bridget Supple on February 7, 2011, the reservoir inspection that led to issuance of the ACL Complaint and Draft CDO (WR-1 and WR-2). I reviewed the inspection report and I concur that the reservoir that was inspected is subject to the permitting authority of the State Water Board and that Flocchini 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). The 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 investigation and subsequent follow up and lack of adequate response from Flocchini led to the Division's issuance of Notice of CDO and ACL Complaint against Flocchini (WR-1 and WR-2).

Enforcement Staff developed a Draft CDO and an ACL Complaint against Flocchini. The Draft CDO is based on past violations of the prohibition in Water Code section 1052 against the diversion or use of water subject to State Water Board jurisdiction, and the threat of future unauthorized diversion and use of water. The ACL Complaint was issued based on the past unauthorized diversion of water from an Unnamed Stream tributary to the Petaluma River watershed and the failure to file a Statement of Water Diversion and Use (Statement S022317) reporting water diversion from the reservoir. Flocchini filed a Statement of Water Diversion and Use in September 2011 (WR-14), but Flocchini has not filed an application to store water as he indicated on the signed Statement. In June, 2014, Flocchini filed Supplemental Statements for

the years 2011, 2012 and 2013 (WR-15, WR-17 and WR-18, respectively). Along with the 2011 Supplemental Statement, Flocchini submitted an engineer drawing of the reservoir (WR-16).

To address the unauthorized diversion of water, the ACL Complaint directs Flocchini to pay an ACL in the amount of \$42,000 for the unauthorized diversion of water from the Unnamed Stream tributary to the Petaluma River (WR-1). The maximum ACL amount authorized by statute for an unauthorized diversion is \$500 for each day in which the trespass occurred. Public records indicate Flocchini has owned the property since 2002. Annual water use reports submitted by Flocchini under Statement S022317 for 2011, 2012 and 2013 suggest collection to storage during the November through February months and withdrawal during the June through September period. Flocchini has indicated the basis of right for the diversion and use of water under the Statement as a pending appropriative action which has not been filed with the Division to date; thus documenting an unauthorized diversion of water in 2011, 2012 and 2013. Division staff verified the existence of the reservoir, vineyard, and reservoir status in a March 23, 2015 drive-by inspection on public roads where the reservoir appeared full (WR-23).

While Enforcement staff have reason to believe the trespass has been occurring since prior to 2011 since Flocchini has owned the parcel since at least 2002, the maximum liability calculated by Division staff was only based on three years of violation documented in the Supplemental Statements for 2011, 2012 and 2013 (WR-15, WR-17 and WR-18). The maximum liability that could be considered for 3 years of unauthorized diversion is \$547,500 (\$500 per day x 1,095 days). The proposed administrative civil liability, however, was based on the avoided cost of water.

Proposed Civil Liability Amount

In assessing the amount of civil liability, Enforcement staff, pursuant to Water Code section 1055.3 and Appendix H of the State Water Board's Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy) (WR-27) considered the relevant circumstances, including, but not limited to, the following:

Economic Benefit Gained from the Violation

In this case, Enforcement staff only considered economic benefits during the last three years of violation. Staff began to quantify 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 3.4 acres and an annual estimate of evaporative loss of three feet of water,² an estimate of annual evaporative losses was calculated at 10.2 acre-feet. Since the reservoir surface area recedes as the water evaporates, a 0.7 sloping factor was used to reduce the annual evaporative losses to 7.14 acre-feet. According to the 2011, 2012 and 2013 statement use reports submitted by Flocchini, an average of 11 acre-feet of water was used to irrigate the 26 acres of vineyards. In the initial ACL complaint, the Division used a 0.5 acre-feet per acre water duty resulting in an estimated annual water consumption of 13 acre-feet.

Studies produced by the University of California Cooperative Extension for the North Coast region for production of wine grapes from 2010 and 2012 (WR-21, pp. 7-8, WR-22, pp. 5-6) 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 the total estimated loss of 20.14 acre-feet (7.14 acre-feet of evaporation and 13 acre-feet for irrigation) of water, the avoided cost of water

² Determined using data from Department of Water Resources Bulletin 73-79.

is approximately \$3,987 annually or \$11,963 over three years. Additionally, the avoided cost of annual water right fees for the last three years is \$352. Flocchini 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 obtaining water through an alternative source such as buying the water or pumping groundwater from a well. Accordingly, Flocchini's unauthorized reservoir has provided an estimated economic advantage conservatively estimated at \$12,315 in the last three years. This economic benefit estimate does not include other economic benefits such as increased property values associated with having the reservoir.

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

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 reservoir has existed for many years and water has been diverted to storage in each of those years without a basis of right. After providing Flocchini with the inspection report (WR-12) requiring that a water right be secured, he filed a Statement of Water Diversion and Use (WR-14) documenting his diversion where the basis of right was listed as a pending appropriative application which was never filed. Accordingly, Flocchini was aware at the time of filing his Statement that an application would need to be filed but nothing was submitted.
2. The Division provided Flocchini with a September 20, 2011 Findings Letter (WR-13), which identified the reservoir as subject to the State Water Board's permitting authority and required Flocchini to proceed with corrective action. While Flocchini responded to the Findings Letter by submitting a Statement of Water Diversion and Use (WR-14), the requirement to file an application was not fulfilled. The Findings Letter warned that the unauthorized diversion of water that was occurring would be subject to enforcement action. (WR-13).
3. Flocchini had over 17 months after the initial Statement of Water Diversion and Use was submitted to file an application prior to issuance of the enforcement actions.

I determined that using a factor of 3 times the estimated economic benefit as 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 3 based on the additional circumstances discussed above, I calculated an adjusted liability amount of approximately \$36,945 before considering associated staff costs.

Enforcement Costs

Staff costs incurred in conducting the initial investigation, reviewing the existing project, and developing the enforcement documents was estimated to be \$5,186. Additional staff costs have been incurred subsequently in pursuing compliance and enforcement, but those costs were not considered as basis for the liability amount proposed in the ACL Complaint.

Ability to Pay

The Division examined Flocchini's ability to pay by reviewing real property ownership records for Flocchini Estates, LLC, and for Andrew J Flocchini (WR-20). The combined assessed value the real property owned by Flocchini is \$764,207.00. (WR-20).

In addition, the Division has estimated the value of the annual grape crop produced on the 26 acre vineyard irrigated from the reservoir. According to the Flocchini website³ and the Landmark Wine website⁴, the Flocchini vineyard grows chardonnay, pinot noir and syrah varieties. The Division assumed that Flocchini grows equal amounts of each, and obtained the average production and value data from the 2013 Sonoma County Crop Report (WR-24 [available at http://www.sonoma-county.org/agcomm/pdf/crop_reports/2013_Crop_Report.pdf].) Page 5 of the 2013 report shows that average wine grape production was 4.53 tons/acre in Sonoma County in 2013. Page 6 shows that pinot noir was valued at \$3,079.99/ton and syrah was \$2,246.05/ton in 2013. Page 7 shows that chardonnay was valued at \$1,930.28/ton. Average value for the three varieties is \$2,418.77/ton. $\$2,418.77/\text{ton} \times 4.53\text{tons}/\text{acre} \times 26\text{ acres} = \$284,882.73$ estimated value of the Flocchini vineyard crop in 2013. This estimate doesn't include the value of any processed wine.

Proposed Liability Amount Conclusion

Having taken into consideration the circumstances described above, the Division Enforcement Staff recommended an ACL in the amount of \$42,000. As Stated in Paragraph 22 of the ACL the estimated additional staff cost to prosecute this case is \$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 Flocchini.

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 Flocchini 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 Flocchini to obtain an appropriate right for the diversion of water from the Unnamed Stream and comply with the Policy, or remove the reservoir and cease the unauthorized diversion of water. For many of the same reasons discussed above in support of issuing an ACL Order, I recommend the Draft CDO be issued as written to put Flocchini under Order to take the steps necessary to correct these continued violations.

Authentication of Exhibits from the Enforcement File

Throughout this enforcement action, my staff and I have prepared and maintained the file for this matter. The Prosecution Team Exhibits contain true and correct copies of the following from the Enforcement file:

WR-1 is the ACL Complaint.

WR-2 is the Draft CDO.

WR-3 is the cover letter for ENF000179.

WR-4 is a copy of the certified mail return receipt for ENF000179.

WR-5 is a letter submitted by Andrew Flocchini to the Division on March 28, 2013.

WR-6 is Mr. Flocchini's request for hearing dated April 4, 2013.

WR-7 is the Division's acceptance of the hearing request.

WR-12 is the Divisions February 7, 2011, Inspection Report.

WR-13 is the Division's Findings Letter dated September 20, 2011.

WR-14 is Flocchini's Statement of Diversion and Use (S022317) dated September 30, 2011.

³ <http://flocchiniwines.net> Flocchini apparently makes and retails wine.

⁴ <http://landmarkwine.com/vineyards/flocchini-vineyard/> It appears that Flocchini sells winegrapes to Landmark Wines.

WR-15 is Flocchini's 2011 Supplemental Statement submitted June 2, 2014.
WR-16 is an engineered pond schematic submitted by Flocchini along with the 2011 Supplemental Statement.
WR-17 is Flocchini's 2012 Supplemental Statement submitted June 2, 2014
WR-18 is Flocchini's 2013 Supplemental Statement submitted June 2, 2014
WR-19 is the Parcel Quest report for APN 068-110-007-000
WR-20 is a property value summary table of real property owned by Andrew J Flocchini and Flocchini Estate, LLC and Tax Assessor Property Value Information for the identified parcels
WR-21 is the UC Davis Cooperative Extension 2010 Sample Costs to Establish a Vineyard and Produce Winegrapes – North Coast Region, Sonoma County
WR-22 is the UC Davis Cooperative Extension 2012 Sample Costs to Establish a Vineyard and Produce Winegrape – North Coast Region, Napa County
WR-23 is the Division Inspection Report dated March 23, 2015
WR-24 is the 2013 Sonoma County Assessor's Crop Report
WR-25 is Governor Brown's Executive Order B-29-15