

**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 Robert C. Mann 1999 Trust and Robert Mann (Individual and Trustee) (referred to collectively hereafter as Mann).

**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)<sup>1</sup>. 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-25.) 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 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 Mann. Since Mann has other water rights in the Division's records contact information was available and an inquiry about the alleged unauthorized reservoir could be made. To further the unauthorized reservoir investigation, Division Enforcement Staff also sent out over 350 unauthorized reservoir notice letters, substantially similar to the inspection findings letter sent to Mann on October 28, 2011 (Findings Letter) (WR-7.) These 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

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<sup>1</sup> 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.

covered by applications to appropriate water filed 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. 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 two enforcement cases, including Mann, were issued due to the lack of an adequate response to findings letters issued by the Division.

A summary of the 11 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. Wetzel has provided testimony about the initial investigation and September 9, 2011 reservoir inspection that led to issuance of the ACL Complaint and Draft CDO (WR-3.) 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 Mann 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 Mann led to the Division's issuance of Notice of CDO and ACL Complaint against Mann (WR-11.)

Enforcement Staff developed a Draft CDO and an ACL Complaint against Mann. 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

Pepperwood Creek in the Gualala River watershed 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 when considering whether or not enforcement action was warranted and when developing the enforcement documents. (WR-26, Appendix H.)

To address the unauthorized diversion of water, the ACL Complaint directs Mann to pay an ACL in the amount of \$66,000 for the unauthorized diversion of water from the Unnamed Stream tributary to Pepperwood Creek (WR-11.) 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 1978. (WR- 6, Inspection Report Map.) Information provided by Mann asserts that the Dam was constructed in the 1950's. (WR- 5, WR-9.) 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 Enforcement staff have reason to believe the trespass has been occurring since prior to 1978, Mann appears to have owned the property since at least 1992 and the maximum liability can be calculated based on the last 19 years of estimated use. The maximum liability that could be considered for 19 years of unauthorized diversion is \$3,467,000 (\$500 per day x 6,935 days). The proposed administrative civil liability, however, was determined based on the last three years of violations.

### **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, 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 13.4 acres and an annual

estimate of evaporative loss of three feet of water, an estimate of annual evaporative losses was calculated at 28 acre-feet. Additionally based on the 300 head of cattle benefiting from water in the reservoir, it was estimated that there was five acre-feet of water used for stockwatering purposes on an annual basis. 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-21a-c) 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 the total estimated loss of 33 acre-feet (28 acre-feet of evaporation and 5 acre-feet for stockwatering) of water, the avoided cost of water is approximately \$6,534 annually or \$19,685 over three years. Additionally, the avoided cost of annual water right fees for the last three years is \$369. Mann 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, Mann's unauthorized reservoir has provided an estimated economic advantage conservatively estimated at \$20,054 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

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 Gualala 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. While the adverse impacts of the unauthorized diversion of water on the Steelhead trout fishery have not been quantified for this case, it appears that Pepperwood Creek could be a fish bearing class I stream due to the fact the USGS quadrangle map designates Pepperwood Creek as a perennial stream by use of a solid blue line. While the Unnamed Stream the reservoir sits on is designated on the USGS quadrangle map as intermittent

stream by use of a dashed blue line, it's conceivable that the Unnamed Stream could be a class I stream during parts of the year due to its proximity to Pepperwood Creek. A stream classification survey would be needed to verify the stream designations and the true effects of unauthorized diversion on the fishery for this case.

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. Mann is the holder of water rights License 444 which authorizes the diversion and use of water from the Pitt River for irrigation purposes on 45 acres of land in Modoc County. Accordingly, Mann is aware of the water rights system and the need for the diversion of water in the State of California to be authorized by a water right.
3. The Division provided Mann with the Findings Letter, which identified the reservoir as subject to the State Water Board's permitting authority and required Mann to proceed with corrective action. While Mann responded to the Findings Letter, the response was not adequate and did not provide the Division with any of the requested information or indicate any intent to pursue corrective action. The Findings Letter warned that the unauthorized diversion of water that was occurring would be subject to enforcement action. (WR-7)
4. Mann was initially cooperative by allowing staff to inspect the property and did take some initial steps by filing a Statement and responding to the findings letter, though both were deemed inadequate.
5. Mann had over 7 months prior to issuance of the enforcement actions to provide an adequate response and diligently follow up on the matter, however none was provided.

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 \$60,000 before considering additional violations and associated staff costs.

### Additional Violations

In addition, Mann 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 during the inspection and Mann did file a Statement on October 19, 2011. Therefore the maximum civil liability that could be considered for this violation is \$1,000 for this violation.

### Enforcement Costs

Staff costs incurred in conducting the initial investigation, reviewing the existing project, and developing the enforcement documents was estimated to be \$5,136. 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.

### Proposed Liability Amount Conclusion

Having taken into consideration the circumstances described above, the Division Enforcement Staff recommended an ACL in the amount of \$66,000. 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 Mann.

### **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 Mann 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 Mann to obtain an appropriative 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 Mann under Order to take the steps necessary to correct these continued violations.