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11 Attorneys for the Prosecution Team

12 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>13 In the matter of Administrative Civil</p> <p>14 Liability and Cease and Desist Order</p> <p>15 Against Nancy K. Donovan and Stephen</p> <p>16 J. Peters</p> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>17 Testimony of Kyle L. Wooldridge, P.E.</p> <p>18 McCarthy in Support of Administrative</p> <p>19 Civil Liability and Draft Cease and Desist</p> <p>20 Order</p> |
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21 I, Kyle L. Wooldridge, P.E., declare as follows:

- 22 1. My testimony, herein provided, identifies my personal knowledge of the evidence, actions,
 23 and rationale for the State Water Board (Board) Division of Water Rights’ (Division)
 24 recommendation to issue an Administrative Civil Liability (ACL) Order and Cease and
 25 Desist Order (CDO) against Nancy K. Donovan and Stephen J. Peters (collectively the
 26 “Diverters”). The ACL Complaint and Draft CDO are attached as **Prosecution Team**
 27 **Exhibit WR-1.**¹
- 28 2. I have been an employee of the State Water Resources Control Board (State Water Board)
 for the past 11 years. I am currently employed as a Water Resources Control Engineer. In
 that capacity I conduct water rights investigations and prepare enforcement documents. My
 statement of qualifications is attached **Exhibit WR-6.**
3. I became involved in the enforcement action involving Ms. Donovan and Mr. Peters on or
 about May 5, 2016. The lead staff in this matter during the initial investigation and at the
 time the ACL Complaint and Draft CDO were issued were Mr. Aaron Miller and Mr.
 Jeffrey Wetzel, who are no longer in the Division of Water Rights Enforcement Section.

¹ Further references to Prosecution Team exhibits will be “WR-[Exhibit Number].”

- 1 However, I have reviewed the investigation file they developed as well as the Diverter's
2 original application and have conducted my own investigation.
- 3 4. The Diverters filed Application 30926 in July of 1999. On August 5, 2010, the Division
4 issued an order cancelling Application 30926 (Cancellation Order), because the Diverters
5 failed to diligently pursue their application. A true and correct copy of the Cancellation
6 Order, is attached as **Exhibit WR-11**.
- 7 5. On September 15, 2010, Mr. Miller and Mr. Wetzel conducted an on-site inspection of the
8 Diverters' property located at 21451 Highway 128 in Yorkville, and documented their
9 findings in a Report of Inspection. During the inspection, Mr. Peters indicated that he built
10 the reservoirs in the late 1980s. Division staff found both reservoirs were still in place, and
11 were storing water collected annually during the rainy season from an ephemeral Unnamed
12 Stream and Unnamed Springs. Based on measurements taken during the inspection,
13 Reservoir #1 was estimated to have a capacity of 16.4 acre-feet and Reservoir #2 was
14 estimated to have a capacity of 15 acre-feet. The Diverters stated the uses of water at
15 Reservoir #1 are recreation and fire protection, and Reservoir #2 is used for fire protection
16 and irrigation of 8 acres of vineyard. The Diverters informed Division staff that they had
17 not received the Cancellation Order and were unaware that their Application had been
18 canceled. A true and correct copy of the inspection report for September 15, 2010, as well
19 as the maps and photos attached to that report are attached as **Exhibits WR-12, WR-13,
20 and WR-14**.
- 21 6. In response to the Diverters assertion that they have not received the Cancellation Order,
22 Mr. Wetzel called the Yorkville Post Office on September 16, 2010 to follow up on
23 delivery of the certified letter containing the Cancellation Order. Post Office staff
24 confirmed the letter had been received by the Post Office on August 11, 2010, and stated
25 that the Post Office had delivered two notices to the Diverters' address that informed them
26 they had certified mail to pick up. Post Office staff also stated they had spoken with the
27 Diverters on September 13, 2011 and notified them of the certified mail. A true and correct
28 copy of the contact report is attached as **Exhibit WR-15**.
7. On September 23, 2010, Mr. Wetzel followed up with the Diverters regarding the certified
letter. Mr. Peters stated that they had mail delivery problems from the Yorkville Post Office
because of the rural location of their home, and they had still not received the letter or any
notices to pick up a certified letter. The Diverters called the Yorkville Post Office and
discovered the certified letter been sent back to the Division on September 18, 2010. The

- 1 Diverters requested the Division to fax or e-mail a copy of the certified letter and
2 Cancellation Order. True and correct copies of the contact reports are attached as **Exhibit**
3 **WR-16, WR-17, and WR-18.**
- 4 8. On September 27, 2010, the Division received the returned certified letter from the
5 Yorkville Post Office. The returned mail indicates the letter went unclaimed, and attempts
6 to deliver were made on August 11, 2010, September 7, 2010, and September 12, 2010.
- 7 9. On September 28, 2010, Division staff emailed the Diverters copies of the Cancellation
8 Order and the certified letter describing the Diverters options. On October 29, 2010, Mr.
9 Wetzel spoke with the Diverters over the phone, and the Diverters confirmed their receipt
10 of the Division's e-mail on September 28, 2010. Mr. Wetzel also notified the Diverters that
11 they may write a letter to the Division petitioning for reconsideration of the Cancellation
12 Order and stating their causes for requesting reinstatement of Application 30926. The
13 Diverters were informed that a petition for reconsideration does not eliminate the potential
14 for enforcement action. A true and correct copy of a contact report documenting these
15 interactions is attached as **Exhibit WR-19.**
- 16 10. California Code of Regulations title 23 section 768 requires that a petition be submitted
17 within 30 days of the date of the Order and be based on one or more of the causes listed in
18 that section. As of September 14, 2016, the Division has no record of receiving any petition
19 for reconsideration of the Cancellation Order, nor a Statement of Diversion and Use or new
20 application to appropriate water having been filed by the Diverters.
- 21 11. On August 9, 2016 I conducted an inspection of the Diverters property, along with Division
22 staff Shay Richardson, an Environmental Scientist, and Chuck Arnold, a Water Resources
23 Control Engineer, and California Department of Fish and Wildlife staff Wesley Stokes, an
24 Environmental Scientist. I confirmed, through both discussion with Mr. Peters and visual
25 observation that both reservoirs are currently operational, and storing water. Mr. Peters
26 confirmed that water has been, and is currently diverted from the Unnamed Tributary and
27 Unnamed Springs during the rainy season and then stored for later use during the dry
28 summer months. A true and correct copy of the report documenting this inspection is
attached as **Exhibit WR-39.**
12. The basis of the administrative civil liability complaint is the unauthorized diversion,
storage, and use of water by the Diverters since at least the year 1999 for each reservoir,
and the failure to file a Statement for each reservoir.

- 1 13. The unauthorized diversion and use of water constitutes a trespass within the meaning of
2 California Water Code section 1052, subdivision (a), and the failure to file statements
3 constitutes a violation within the meaning of California Water Code section 5107,
4 subdivision (c)(1). Water Code section 1052 provides that the maximum civil liability that
5 can be imposed by the State Water Board in this matter for the unauthorized diversion and
6 use of the water is \$500 for each day of trespass.
- 7 14. Water Code section 5107 provides that the maximum civil liability for that can be imposed
8 by the State Water Board in this matter for the failure to file statements is \$1,000, plus \$500
9 per day for each day the violation continues if the person fails to file a statement within 30
10 days after the Board has called the violation to the attention of that person.
- 11 15. In Application 30926, Diverters indicated the reservoirs were completed in 1992 and first
12 used in 1993. In the ACL complaint, for the purposes of determining the maximum civil
13 liability that the State Water Board can impose for the unauthorized diversions, Division
14 staff calculated that at least 11 years (4015 days) of continuous violation had occurred in
15 each reservoir between 1999 and the date of the complaint (June 14, 2012), totaling
16 \$4,015,000 (4015 days X \$500/day X 2 reservoirs).
- 17 16. In the calculation for the ACL complaint of the maximum civil liability that the State Water
18 Board can impose for failure to file Statements of Diversion and Use of Water, Division
19 staff determined that Diverters had failed to file Statements for diversions occurring after
20 January 1, 2009, and that the maximum civil liability that could be considered on the date
21 of the ACL complaint (June 14, 2012) was \$1,000 for each reservoir, totaling \$2,000
22 (\$1,000 X 2 reservoirs).
- 23 17. On March 1, 2014 Water Code section 1052 amended the maximum civil liability for
24 unauthorized diversion during a period where the Governor has issued a proclamation of a
25 state of emergency based on drought conditions, to \$1,000 for each day of trespass plus
26 \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
- 27 18. Executive Order B-29-15 (Executive Order), issued by Governor Brown on April 1, 2015
28 found that the on-going severe drought conditions presented urgent challenges across the
state, including water shortages for municipal use and for agricultural production, increased
wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination,
and additional water scarcity if drought conditions persist. The Executive Order confirmed
that the orders and provisions in the Governor's previous drought proclamations and orders,
the Proclamations on January 17, 2014 and April 25, 2014, and Executive Orders B-26-14

- 1 and B-28-14, remained in full force and effect. A true and correct copy of Executive Order
2 B-29-15 is offered into evidence as **Exhibit WR-29**.
- 3 19. Evidence gathered during the August 9, 2016 site inspection indicates that Diverters have
4 continued to divert and store water in the reservoirs without authorization after the ACL
5 Complaint was issued. Mr. Peters stated that the reservoirs fill after the first heavy rains,
6 and are drained each year in the fall.
- 7 20. Based on Mr. Peter's statement and precipitation data from CDEC for water years 2012-
8 2016, I estimate that the reservoirs were storing water or filling by January 1, 2013 (WY
9 2013), March 1, 2014 (WY 2014), January 1, 2015 (WY 2015), and January 1, 2016 (WY
10 2016). I estimate that the reservoirs held water in storage until at least October 1 in 2013,
11 2014, and 2015, and observed that the reservoirs were storing water on August 9, 2016. A
12 true and correct copy of precipitation data obtained from CDEC is offered into evidence as
13 **Exhibit WR-42**.
- 14 21. Water was collected or stored without authorization in the reservoirs every day between
15 January 1 and October 1 in 2013, March 1 and October 1 in 2014, January 1 and October 1
16 in 2015, and January 1 and August 9 in 2016, for a total of 273 days before March 1, 2014
17 and 708 days after March 1, 2014.
- 18 22. The combined capacity of the reservoirs is approximately 31 acre-feet, and the reservoirs
19 were drained and filled each year between 2013 and 2016. However only diversions to
20 storage after March 1, 2014 are subject to the \$2,500 per acre-foot civil liability under
21 Water Code section 1052. I estimated that the reservoirs were full in 2014 by March 1, so
22 only diversions to fill the reservoirs after they were drained in 2014 can be subject to the
23 \$2,500 per acre-foot civil liability. The reservoirs have been filled and drained two times
24 totaling at least 62 acre-feet of water diverted to storage in excess of their water right after
25 March 1, 2014.
- 26 23. The maximum civil liability the State Water Board can impose for unauthorized diversions
27 in 2013 is \$273,000 (273 days X \$500/day X 2 reservoirs)
- 28 24. The maximum civil liability the State Water Board can impose for unauthorized diversions
in 2014, 2015, and 2016 under the enhanced penalty for unauthorized diversions during a
drought emergency is \$1,416,000 (708 days X \$1,000/day X 2 reservoirs) plus \$155,000
(62 acre-feet X \$2,500/acre-foot) totaling \$1,571,000.
- 25 25. In determining the amount of civil liability, California Water Code section 1055.3 requires
26 that the State Water Board consider all relevant circumstances, including, but not limited to,

- 1 the extent of harm caused by the violation, the nature and persistence of the violation, the
2 length of time over which the violation occurs, and any corrective action taken by the
3 violator.
- 4 26. For the ACL Complaint, Division staff considered the following factors to determine a
5 proposed civil liability of \$40,000:
- 6 a. Diverters' unauthorized diversions have reduced the amount of water available for
7 the Northern California Coastal steelhead trout fishery and other riparian habitat;
 - 8 b. Diverters received an economic advantage over other legitimate water diverters in
9 the area by foregoing the costs of acquiring an appropriative water right or securing
10 alternative sources of water. Division staff estimated a typical cost to pump
11 groundwater of \$198 per acre-foot, and calculated that Diverters avoided pumping a
12 minimum of 166 acre-feet, saving \$32,868 over 10 years prior to the ACL
13 complaint;
 - 14 c. Diverters failed to diligently pursue Application 30926 even after they were made
15 aware of the actions needed to continue processing of the application and given
16 ample time to take those actions;
 - 17 d. Diverters failed to file a statement of Diversion and Use even after they were made
18 aware of the need to do so in the Order Canceling Application 30926, and given
19 ample time to take those actions; and
 - 20 e. Division staff estimated the staff cost to review the project and develop enforcement
21 documents to be \$5,511 and estimated additional staff costs of approximately
22 \$10,000 to prosecute the case should it go to hearing.
- 23 27. The Diverters have not taken corrective action in the four years since the ACL Complaint
24 was issued, and have confirmed that the reservoirs are operated in same manner they were
25 operated when the ACL Complaint was issued;
- 26 28. Diverters' unauthorized diversions since the ACL Complaint was issued continue to reduce
27 the amount of water available for the Northern California Coastal steelhead trout fishery
28 and other riparian habitat;
- 29 29. The Diverters continued to gain an economic advantage over other legitimate water
30 diverters by foregoing the costs of acquiring an appropriative water right or securing
alternative sources of water.
- 31 30. Diverters' unauthorized diversions since the ACL Complaint was issued would have a
maximum civil liability of \$1,844,000.

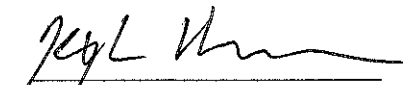
- 1 31. Staff cost to prepare for a hearing and prosecute this case are estimated to be \$10,000.
2 These costs are in addition to the staff cost of \$5,511 estimated for the initial review of the
3 project and development of enforcement documents.
- 4 32. Authentication of Exhibits from the Enforcement File: I have reviewed the enforcement and
5 permit file for this matter. The Prosecution Team Exhibits contain true and correct copies of
6 the following from the Enforcement file:
- 7 1. WR-20. 2012.06.20 ACL-CDO Affidavits for Service
 - 8 2. WR-21. 2012.06.27 Request for Service of process DON
 - 9 3. WR-22. 2012.06.28 email Yvonne West to Stephen Peters re water right resources
 - 10 4. WR-23. 2012.06.29 email Stephen Petrucci to Yvonne West
 - 11 5. WR-24. 2012.07.06 Request for Hearing submitted by Stephen J. Peters
 - 12 6. WR-25. 2012.07.18 Request for Hearing submitted by Nancy K. Donovan
 - 13 7. WR-27. 2015.02.23 Advance Courtesy Notice of Tentatively Scheduled Public Hearing
 - 14 8. WR-28. 2015.03.13 Notice of Public Hearing
 - 15 9. WR-30. 2015.04.10 Notice of Postponement of Public Hearing Donovan & Peters
 - 16 10. WR-31. 2015.11.13 H. Team email to Ms. Donovan re availability to attend hearing
 - 17 11. WR-32. 2016.05.03 H. Team email to Ms. Donovan re availability to attend hearing
 - 18 12. WR-33. 2016.05.12 email Ms. Donovan to Kenneth Petruzzelli re inspection
 - 19 13. WR-34. 2016.05.13 H. Team email to Prosecution Team and Ms. Donovan regarding
20 status of tentatively rescheduled hearing
 - 21 14. WR-35. 2016.05.15 email Nancy Donovan to Kenneth Petruzzelli re enforcement action
 - 22 15. WR-36. 2016.07.11 email Hearing Team to Donovan re availability for hearing date
 - 23 16. WR-41. 2016.08.23 Donovan-Peters Stream Class Memo
 - 24 17. WR-43. Water Code section 1055.3 factors
 - 25 18. WR-44. Annual Water Use Calculation
 - 26 19. WR-45. Navarro Base Flow 2003-2005
 - 27 20. WR-46. Navarro Base Flow 2006-2010
 - 28 21. WR-47. Navarro River flow gage and precipitation data
 22. WR-48. Reservoir annual water use calculations
 23. WR-49. Sample Costs to Establish a Vineyard and Produce Winegrapes, 2009, p.5
 24. WR-50. Sample Costs to Establish a Vineyard and Produce Winegrapes, 2010, p. 7
 25. WR-62. 2016.07.21 Notice of Rescheduled Public Hearing

23 I declare under penalty of perjury to the laws of the State of California that the foregoing is true
24 and correct. Executed on September 14, 2016 at Sacramento, California.

26 _____
27 Kyle Wooldridge

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Kyle Wooldridge