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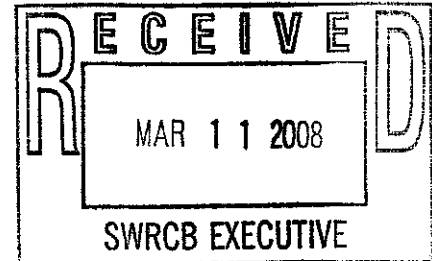
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3/18/08 Bd. Mtg. Item 8
Vineyard Club, Inc.
Deadline: 3/11/08 by 12 p.m.

March 11, 2008

Jeanine Townsend, Clerk to the Board
Executive Office
State Water Resources Control Board
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828



Re: COMMENT LETTER – 03/18/08 BOARD MEETING ITEM: VINEYARD CLUB ORDER

Dear Ms. Townsend and State Water Resources Control Board:

This firm represents the Vineyard Club, Inc. in the above-referenced matter to be heard by the State Water Resources Control Board (State Board) on March 18, 2008. Below please find the Vineyard Club's comments on the draft cease and desist order and administrative civil liability complaint dated February 19, 2008 (Draft CDO/ACL).

For the reasons detailed below, the Vineyard Club respectfully requests that the State Board reject the Draft CDO/ACL in its entirety. In the alternative, the Vineyard Club requests that the State Board reduce the proposed ACL amount to reflect the relevant facts and modify the CDO, as described in detail below.

I. Background and Summary

The Vineyard Club is a small non-profit recreational organization run by volunteer members. The Vineyard Club possesses a water right license to divert up to .25 cubic feet per second (cfs) from Oak Flat Creek in Sonoma County, from Oct. 1 to May 31. The Vineyard Club's license contains standard permit term 62, requiring the Vineyard Club to install a bypass structure to measure and ensure the minimum bypass flows in the creek. The Vineyard Club's license requires it to bypass the lesser of .4 cfs or the natural flow of the creek. On May 4, 2005, Mr. Charles ("Larry") Lindsay inspected the Vineyard Club's diversion and discovered that the Vineyard Club did not have a bypass structure in place. The Vineyard Club's diversion structure consists of a flashboard structure with a circular hole in it to allow for the required bypass. The Draft CDO/ACL resulted from the Vineyard Club not having this hole in the flashboard at the time of Mr. Lindsay's 2005 inspection. The Draft

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CDO/ACL does not allege that the Vineyard Club was not meeting its bypass flow requirements, only that it did not have a bypass structure/measuring device in place.¹

At the inspection Mr. Lindsay stated that he would provide Mr. Sagues a copy of the inspection report and a sample design of a bypass structure. (Reporter's Transcript of April 4, 2007 hearing, 105-109, 143, 59-60, 70-71, hereafter "RT".) None of this material was sent to the Vineyard Club. (VC-7, RT 70-71, 147.) Despite the lack of guidance and correspondence from the State Board staff, the Vineyard Club remained in contact with the State Board staff; it notified them that it would not divert water in 2006 and again requested the results of the inspection. (VC-7, VC-9.) In short, from the date of the inspection that resulted in the Draft CDO/ACL, the Vineyard Club has shown nothing but good faith efforts to comply with the bypass structure/measuring requirement. (8, 12.)²

Over a year and a half after Mr. Lindsay's visit, on December 11, 2006, the Vineyard Club received notice of a proposed CDO/ACL (Proposed CDO/ACL). Because the Vineyard Club had submitted an engineer-approved bypass structure and maintenance plan to the State Board staff, the Vineyard Club felt the CDO was unnecessary and on February 13, 2007, offered to pay the ACL if the prosecution team would dismiss the CDO. (VC-20, VC-22.) The prosecution team rejected this offer and when the Vineyard Club continued to seek a hearing on what it perceived to be an unjust CDO, the prosecution team advocated that the ACL be increased to \$30,000 to cover staff costs associated with the hearing. (WR-1, p. 1, 8.) However, the prosecution team had not calculated any relevant staff costs. (RT 156-57.) A hearing on the matter was held on April 4, 2007 and on February 20, 2008, the State Board sent the Vineyard Club its Draft CDO/ACL. Despite the fact that no circumstances had changed between the Proposed CDO/ACL and the Draft CDO/ACL, the ACL penalty was increased from \$4,100 to \$14,750 simply because the Vineyard Club pursued a hearing.

The CDO portion of the Draft CDO/ACL is unnecessary because there is no existing violation or threat of violation and the Vineyard Club has already performed all the conditions in the Draft CDO/ACL. The ACL should be dismissed or significantly reduced because it punishes the Vineyard Club for seeking a hearing on the CDO and because all the factors the State Board considers in determining an ACL favor a reduced ACL. For example, the number of days of violation is uncertain, there was no allegation of harm as a result of the license term violation, the State Board found no evidence of harm, the prosecution team failed to provide any meaningful evidence regarding the persistence of the violation, and the Vineyard Club has shown good faith in taking corrective actions to remedy the license term violation. In fact, the Vineyard Club's proposed bypass structure was approved on June 7, 2007. (7.) Lastly, the ACL as proposed is grossly inconsistent with past State Board actions.

¹ However, even if bypass flows were at issue, the hearing testimony shows the bypass requirement was likely being met. (RT pp. 74-75, 104-105.)

² All citations herein are to the Board's February 19, 2008 Draft CDO/ACL unless otherwise indicated.

II. The CDO Is Unnecessary to Ensure Vineyard's Club Compliance with Its Water Rights License

The CDO is unnecessary because there is no existing violation or any threat of violation from the Vineyard Club. In its Draft CDO/ACL, the SWRCB concludes that the CDO is necessary to "prevent the threatened reoccurrence" of the Vineyard Club diverting water without a bypass structure in place. (14, 8.) As acknowledged in the draft order, since the day of the inspection resulting in this Draft CDO/ACL, the Vineyard Club has demonstrated nothing but good faith efforts to come into compliance. (8, 12; RT 143.) For example, at the time of the inspection, Mr. Sagues asked for a copy of the inspection report and a sample bypass structure design, which Mr. Lindsay agreed, and possibly attempted, to send. (RT 105-109, 143, 59-60, 70-71.) In the months following Larry Lindsay's May 4, 2005 inspection, Vineyard Club representatives contacted Mr. Lindsay to learn of the findings of the inspection, which had not been sent. (VC-7.) The Vineyard Club also communicated to State Board staff that it would not be diverting water in 2006. (VC-9.) After the notice of the Proposed CDO/ACL was issued, the Vineyard Club continued attempting to coordinate with the SWRCB in designing a bypass structure that would be acceptable to State Board staff. (VC-11, VC-16, VC-18, VC-19.) In other words, from the time of the inspection until it received the ACL, the Vineyard Club was attempting to receive guidance from the SWRCB staff and was not diverting water in the interim.

Furthermore, the CDO is unnecessary because the Vineyard Club has already met all the conditions in the Draft CDO/ACL. The Vineyard Club submitted an engineer-approved bypass structure that was approved by Ms. Victoria Whitney, a Division Chief of the State Board. (7.) The Vineyard Club stated that it would perform flows tests throughout its diversion season and keep records of its dates and amounts of diversion. (VC-18.) The Vineyard Club has submitted a proposed maintenance plan for the bypass structure and applied for or already obtained all applicable local and state permits. In other words, the Vineyard Club has already performed all of the conditions proposed in the Draft CDO/ACL. Because there is no violation or threat of violation and the Vineyard Club has demonstrated good faith in coming into compliance, the CDO is unnecessary and should be rejected in its entirety.

In the alternative, the Vineyard Club respectfully requests that the State Board modify the Draft CDO/ACL to eliminate the requirement that the Vineyard Club receive approval of its bypass structure maintenance plan prior to diverting water. As presently drafted, the Draft CDO/ACL requires the Vineyard Club to receive approval of its maintenance plan from the State Board's Division Chief before it diverts water. (15.) The Vineyard Club is preparing to divert water this diversion season (now through May 31) in accordance with the State Board's final order following the March 18, 2008 hearing. However, if the Vineyard Club is required to obtain approval of its maintenance plan submitted 13 months ago or submit a new one, it may miss this diversion season. The Vineyard Club is not opposed to re-submitting a maintenance plan and schedule, and will make any necessary changes to the previously

submitted plan as directed by the State Board staff. However, the Vineyard Club should not be forced to wait for final approval of the plan submitted 13 months ago prior to diverting this season. At most, staff approval should be required prior to diversion in the 2008-2009 diversion season. Therefore, if the State Board adopts a CDO against the Vineyard Club, the Vineyard Club respectfully requests that the State Board to modify the Draft CDO/ACL to eliminate the requirement that the Vineyard Club receive approval of its bypass structure maintenance plan prior to diverting water.

III. The Increased ACL Amount Impermissibly Punishes the Vineyard Club for Seeking A Hearing on the CDO

The ACL here is imposed for entirely past events, whereas the CDO is intended to “prevent the threatened reoccurrence” of the Vineyard Club diverting water without a bypass structure in place. (14, VC-12.) In its Proposed CDO/ACL, the State Board proposed an ACL of \$4,100. (VC-10.) The Vineyard Club felt that the proposed CDO was entirely unnecessary and proposed to the prosecution team that it would pay the ACL amount if the prosecution team would agree to dismiss the CDO. (VC-20, VC-22.) The prosecution team did not agree to separate the ACL and CDO. Therefore, because its settlement offer was refused and the prosecution team refused to dismiss the CDO, the Vineyard Club decided to proceed to hearing on all issues.

As a result of the Vineyard Club requesting a hearing, the prosecution team advocated that the ACL be increased to \$30,000 when the matter proceeded to hearing. (WR-1, pp. 1, 8.) No relevant circumstances affecting the ACL had changed between the Proposed ACL of \$4,100 and the hearing on the matter. However, because the ACL was imposed for entirely past events, there was no factual basis to increase the amount of the ACL because the Vineyard Club had pursued a hearing on the matter. Even if staff costs increased between the Proposed CDO/ACL and this Draft CDO/ACL, these costs can only be attributed to the CDO because the ACL is based entirely on past events. Moreover, increased staff costs could not have been the reason for the ACL increase because the prosecution team testified that it had not calculated the staff costs associated with this hearing. (RT 155-156.) Nonetheless, the amount of the ACL was increased from \$4,100 in the Proposed CDO/ACL to \$14,750 in the Draft CDO/ACL. In other words, the alleged increased staff costs of the CDO were added to the ACL because the Vineyard Club requested a hearing. This is not permissible. The ACL should be decreased at least to the originally proposed \$4,100 based on this factor, the other factors the State Board is required to consider, and the State Board’s past actions, as discussed below.

IV. The Amount of Civil Liability Is Inappropriately High Based on a Consideration of the Relevant Factors

The ACL amount in the Draft CDO/ACL is inappropriately high because all of the relevant factors in determining the appropriate penalty amount favor a reduced penalty for the

Vineyard Club. The Draft CDO/ACL proposes an ACL of \$14,750.³ (14, 16.) The relevant factors to be determined in setting the ACL amount are the days of violation, the extent of the harm caused by the violation, the nature and persistence of the violation, and any corrective action taken. (12, Wat. Code § 1055.3.) Consideration of each of these factors favors a reduced penalty, as described below.

The Number of Days of Violation is Uncertain

Because there is no evidence establishing the specific date the diversion was installed in 2005, the number of days constituting the violation are uncertain. (11; RT 126-28.) The only testimony is that the diversion began to be installed in “mid to late March” but was not operational until “mid-April.” (RT 127.) The Draft CDO/ACL found 59 days of violation based upon a determination that the diversion was installed on April 1, 2005 and removed on May 29, 2005. (11, 14.) However, the evidence is inconclusive regarding the date the diversion was installed. Therefore, the maximum penalty, from which the penalty is reduced based on the other factors, was not firmly established at the hearing by the prosecution team.

Furthermore, Mr. Sagues testified that on Mr. Lindsay’s May 4, 2005 inspection that Mr. Lindsay instructed him that nothing could be done about the 2005 diversion season and that prior to the next diversion season a bypass device should be put in place. (RT 105-107.) Mr. Lindsay did not mention that the Vineyard Club needed to remove the diversion. (*Id.*) In fact, when Mr. Lindsay was asked “is it your testimony that you told Mr. Sagues that they needed to stop their diversion because it was unlawful, when you were there”, Mr. Lindsay admitted that “. . . no, I didn’t tell him to stop diverting.” (RT 82-83). Mr. Sagues also testified that had Mr. Lindsay instructed him to remove the diversion or told him the consequences of not removing the diversion, Mr. Sagues would have removed it that very afternoon. (RT 105-107; VC-11; *see also* RT 133.) That the Vineyard Club would have removed the diversion on May 4, 2005 is supported by their good faith efforts to come into compliance throughout this proceeding. Had the diversion been removed on May 4, 2005, and assuming an installation date of April 15th, the maximum penalty would be \$9,000 (18 days x \$500 per day). In short, the prosecution team did not provide sufficient evidence for the State Board to determine the appropriate maximum penalty. Though it is not possible to determine the appropriate maximum penalty, whatever the appropriate maximum penalty is, it should be greatly reduced by the other factors the SWRCB must consider.

There Was No Harm Alleged or Established As a Result of the Violation

At the hearing, the prosecution team did not allege any violation of the Vineyard Club’s bypass flow requirements, only that it did not have a bypass structure in place. (RT 82.) Also, even if bypass flows were at issue, the testimony demonstrates that the bypass

³ In determining the appropriate amount of the ACL, the State Board allegedly relied only on the testimony of the Vineyard Club and drew appropriate references in the Vineyard Club’s favor. (11.)

requirement was likely being met. (RT 74-75, 104-105.) There was testimony that the Vineyard Club did not divert water in 2003, 2004, or 2006 and there is no evidence regarding the Vineyard Club's diversions from 1991-2002. (12.) Therefore, the State Board concluded in its Draft CDO/ACL that "the extent of the harm caused by the violation is unknown" and that "there is no evidence of actual harm." (12.) Because there was no harm shown from the absence of the bypass structure, the ACL amount should be reduced based on consideration of this factor.

The Persistence of Any Violation And The Length of Time Over Which A Violation Occurred Are Unknown and Favor a Reduction of the ACL

There is almost no evidence in the record regarding the nature and persistence of any violation. There is testimony that the Vineyard Club did not divert water in 2003, 2004, or 2006. The prosecution provided no reliable evidence regarding the Vineyard Club's diversions from 1991-2002. (12.) However, there is testimony that from 1991-2002 there was a Vineyard Club member in charge of installing the diversion structure. (RT 143-146.) Furthermore, pieces of an old diversion device were seen on the day of the Lindsay inspection. (RT 104, 129-130.) Thus, some evidence suggests the Vineyard Club complied with its water rights license from 1991-2002. Based on this testimony, the State Board concludes in its Draft CDO/ACL that the "persistence of the violation is not clear from the evidence" and that "there is no evidence of actual harm." (12.) As stated above, it is the prosecution's burden to prove the elements of its case. (11, fn. 5.) The prosecution having failed to establish any persistence of the violation or the length of time over which the violation occurred, the ACL should be reduced based on these factors.

The State Board is concerned about the Vineyard Club's institutional memory regarding its license conditions.⁴ (12.) The Vineyard Club has taken steps to remedy any record keeping inadequacies it may have had. (RT 149.) Moreover, the record shows that the Vineyard Club is not suffering from a chronic lack of institutional memory regarding its license requirements; the lack of knowledge stemmed from the resignation in 2005 of one individual, who took his knowledge of the license requirements with him without passing them along to the other Vineyard Club members. (RT 143-148.) The license requirements are now firmly implanted in the institutional memory of the Vineyard Club. (RT 142, 140.)

The Vineyard Club Has Consistently Shown Good Faith in Taking Corrective Action

The Draft CDO/ACL correctly states that the Vineyard Club has attempted to take corrective action since the May 4, 2005 inspection. (8.) After the inspection, the Vineyard

⁴ To support this concern the Draft CDO/ACL cites to *U.S. v. Chevron U.S.A., Inc.* (N.D. Cal. 2005) 380 F.Supp.2d 1104 (*Chevron*) and *United States v. Alisal Water Corporation* (2002) 326 F.Supp.2d 1010, 1015 (*Alisal*). (13.) Neither of these cases apply to the present action.

Club contacted the State Board staff to determine the results of the investigation to ascertain any necessary corrective actions. (RT 108, 146-47; VC-7, VC-8.) The Vineyard Club also emailed State Board staff to advise them that it would not be diverting water in 2006. (RT 114; VC-9) After the Proposed CDO/ACL, the Vineyard Club corresponded with State Board Staff regarding an appropriate bypass structure and eventually submitted an engineer-approved bypass structure and a proposed maintenance plan. (VC-18, VC-16.) The bypass structure was approved by Ms. Whitney on June 7, 2007. (7.) Furthermore, in another demonstration of its good faith efforts to be fully compliant, the Vineyard Club did not divert water in its 2006-2007 diversion season and has not yet diverted in its 2007-2008 diversion season even though it may lawfully do so with the bypass structure approved by Ms. Whitney. Because the Vineyard Club has shown good faith efforts in taking corrective actions, the ACL should be reduced based on a consideration of this factor.

V. Recent ACLs Issued By the State Board Demonstrate That This ACL is Inappropriately High and Should Be Reduced or Eliminated

Previous ACLs issued by the State Board are grossly disparate from the ACL amount proposed for the Vineyard Club. While the Vineyard Club does not disagree with the State Board that each enforcement action is unique, it feels that the State Board's ACLs should show reasonable consistency. The table attached hereto as Exhibit A illustrates that this ACL is grossly disparate from previous ACLs issued by the State Board.

VI. The State Board May Not Issue an ACL for the Violation of Water Rights License Permit Terms

In addition to its belief that the ACL amount in the Draft CDO/ACL is inappropriately high, the Vineyard Club reiterates its argument that the State Board does not have the authority to issue an ACL in the situation, as here, where there is only a violation of a water right license's terms. The situation involved in this hearing does not constitute a "trespass" as contemplated in Water Code section 1052, and therefore the ACL imposed by the Draft CDO/ACL is inappropriate. The Vineyard Club relies on and incorporates all of its arguments made previously in this action in this regard, and presents only a summary of its argument here.⁵

As argued in our previous motion to this effect, Water Code section 1831 provides the SWRCB with the authority to issue a cease and desist order for, among other things,

A violation or threatened violation of . . . [t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water

⁵ The Vineyard Club's arguments in this regard were previously made to the hearing officer in a March 16, 2007 Motion to Dismiss, filed by Daniel Kelly and is part of the record here.

[or] [a]ny term or condition of a permit, license, certification, or registration . . .”

Water Code section 1052 provides, *inter alia*, that an ACL may be imposed where there is an unauthorized diversion or use of water. In short, a CDO is appropriate to address either an unauthorized diversion or a violation of a water right permit/license term or condition, whereas an ACL may only be issued against an unauthorized diversion, i.e., a diversion without a valid water right. Section 1052 does not provide the SWRCB with the authority to impose civil liability for a violation of a term or condition in a permit or license in the first instance.⁶

The State Board concedes that license “terms and conditions may remain subject to enforcement solely under the cease and desist authority of section 1831” but argues that the standard water right permit term 62 in the Vineyard Club’s license is somehow different from other license terms and conditions. (11.) The State Board does not provide any compelling reason why standard permit term 62 is subject to Water Code section 1052’s ACL provisions and other license terms and conditions are not; it provides only semantic arguments. Furthermore, when asked about the legal distinction between a trespass and violation of a permit term, Mr. Lindsay’s attorney objected stating that Mr. Lindsay was not qualified to provide a legal opinion on this issue; the hearing officer sustained the objection. (RT 36-42.) Therefore, there is no testimony from the hearing upon which the State Board could base its determination that a violation of standard permit term 62 is a trespass. Accordingly, the Vineyard Club requests that the Hearing Officer dismiss the ACL.

VII. The Prosecution Team Had Impermissible Ex Parte Contacts With the Hearing Team

Earlier in this proceeding, the Vineyard Club expressed concern about inappropriate contacts between members of the prosecution team and the hearing team and between the prosecution team and other members of the State Board staff.⁷ The Vineyard Club incorporates its previous concerns herein, and reiterates its argument that such contacts violated the State Board’s prohibitions on ex parte communications, compromising the due process of this adjudicative process.

VIII. The Vineyard Club Requests Clarifications of the Draft CDO/ACL

The Vineyard Club seeks certain clarifications of the Draft CDO/ACL. Specifically, page 14 of the Draft CDO/ACL, paragraph A.2.(3) requires the Vineyard Club to submit “a drawing showing conformance to the design proposed to the Division by Kelder

⁶ The State Board’s regulations also recognize this limitation. (Cal. Code Regs., tit. 23, § 821.)

⁷ The Vineyard Club previously expressed its concerns regarding ex parte contacts to the hearing officer in a letter dated March 29, 2007, from Daniel Kelly to Gary Wolff. This letter is part of the record in this matter.

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Engineering.” (14.) Given that the Vineyard Club has submitted and received approval of an engineer approved bypass structure, it is uncertain why it must also submit a drawing of the design. Clarification of this requirement is requested.

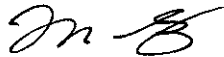
Paragraph 3, page 15, of the Draft CDO/ACL requires the Vineyard Club to hire an engineer to perform a flow test of the bypass structure and certify that it allows sufficient bypass. Once again, given that the Vineyard Club has submitted and received approval of an engineer-approved bypass structure, and submitted a maintenance plan that provides for bypass flow testing, it is redundant and unnecessary to require the Vineyard Club to hire an engineer to perform this work. (See RT. 124.)

IX. Conclusion

For the reasons set forth above, the Vineyard Club respectfully requests that the State Board reject the Draft CDO/ACL in its entirety. In the alternative, the Vineyard Club requests that the Board modify the CDO, as described above, and reduce the proposed ACL amount to reflect the relevant facts.

This matter is of great importance and consequence to the Vineyard Club. Thank you for your consideration of these comments.

Very truly yours,



Jon Schutz

JRS:mm

cc: Matthew Bullock, SWRCB

EXHIBIT A

Water Right Permittee	Order	Violation	Violation Period	Maximum ACL Penalty	ACL Imposed or Settlement Amount
North San Joaquin Water Conservation District	2008-00XX	-Diversion without installing fish screens 2003, 2004, 2005 -80 cfs; 20,000 AFA	450 days	\$225,000	\$20,000 + \$46,600 if CDO not complied with
California American Water Company	2008-00XX	-Diversion in excess of its permit for 12 years -Impacts to salmon -Violation of previous settlement of ACL	12 years	No ACL	No ACL; only CDO
Monson-Pacific, Inc.	2006-0020 2007-0001	-Two unpermitted reservoirs	About 13 years	\$1,095,000 (based on three years)	\$12,600 Settlement
Boulder Creek Golf and County Club, Inc.	2004-0032	-Failure to provide downstream flows -Failure to install measuring device -Failure to pay DFG for replacement of lost steelhead			\$5,000 Settlement
Kent Ritchie	2004-0009	-Illegal reservoir			\$3,070
Robert O. Valentine	2004-0001	-Unpermitted reservoir -Irrigation of 93 acres with water right authorizing irrigation of only 6 acres			\$3,000
Middleridge Vineyards, M/R Vineyards	2003-0018	-Operation of three reservoirs without a permit or license -Change in place of use	About six years		\$3,500 Settlement
Omnium Estates	2003-0013	-Diversion to reservoir without a permit to irrigate 76 acres of vineyards -Possible harm to fish -Failure to respond to SWRCB for a year or appear at hearing	10 Years		\$3,000
Fetzer Vineyards	2003-0005	-Diversion to reservoir without a permit			\$6,000 Settlement