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7  
8 BEFORE THE  
9 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10 In the Matter of the Administrative Civil Liability  
11 Complaint No. 262.5-44

SWRCB/OCC File \_\_\_\_\_

12 **MOTION TO DISMISS**  
13 **ADMINISTRATIVE CIVIL**  
14 **LIABILITY COMPLAINT NO. 262.5-**  
15 **44 OR, IN THE ALTERNATIVE, TO**  
16 **POSTPONE HEARING**

17 The Vineyard Club, Inc., (Vineyard Club) brings this Pre-Hearing Motion to Dismiss  
18 Administrative Civil Liability Complaint No. 262.5-44 (Complaint), or, in the Alternative, To  
19 Postpone Hearing in order to resolve significant legal and constitutional issues prior to proceeding to  
20 a hearing on the Complaint. This Motion raises only issues of law, and requires no factual  
21 determinations. It is therefore appropriate to rule on this motion prior to a hearing on this matter.  
22 This Motion is based upon the record before the State Water Resources Control Board in this matter,  
23 and on the statutes, regulations, and guidance governing and applicable to water rights enforcement in  
24 California.

25 **INTRODUCTION**

26 The Division of Water Rights issued the Complaint alleging the Vineyard Club is violating a  
27 Term 62, which requires a measuring device to be installed and maintained in order to ensure  
28 bypass flows are being met. (Complaint, pp.1-2, ¶4(c).) The Division of Water Rights (Division)  
alleges that the violation of this term constitutes an "unauthorized diversion," for which civil

MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. 262.5-44 OR, IN THE  
ALTERNATIVE, TO POSTPONE HEARING

1 liability may be issued pursuant to Water Code section 1052. The Division is wrong as a matter  
2 of law and the Hearing Officer should dismiss the Complaint. In addition, the Complaint, as  
3 drafted, proposes civil liability in the amount of \$4,100, and recognizes that the Licensee is entitled,  
4 as a matter of law, to a hearing on the Complaint. The Vineyard Club has, in accordance with its  
5 statutory and constitutional rights, requested a hearing on this matter. As a result, the  
6 "Prosecution Team," employees of the SWRCB, have requested that the Hearing Officer increase  
7 the fine to the statutory maximum. This request raises very serious constitutional issues. The  
8 Prosecution Team's methods appear to be for the purpose of forcing the Vineyard Club to waive  
9 its right to due process and the Prosecution Team's tactics are punitive in nature. For this  
10 additional reason, the Complaint should be dismissed in its entirety. In the event the Hearing  
11 Officer requires additional time or supplemental briefing to consider this matter, the Hearing  
12 Officer should postpone the hearing to rule on these important legal and constitutional issues prior  
13 to proceeding to the evidentiary hearing.

#### 14 DISCUSSION

15 A. THE SWRCB LACKS THE AUTHORITY TO IMPOSE ADMINISTRATIVE CIVIL  
16 LIABILITY IN THE FIRST INSTANCE FOR AN ALLEGED VIOLATION OF A  
LICENSE TERM

17 The SWRCB's authority for imposing Cease and Desist Orders and Administrative liability  
18 is found at Water Code sections 1052, 1055, and 1831.

19 Water Code section 1831 provides the SWRCB with the authority to issue a cease and  
20 desist order for, among other things,

21 A violation or threatened violation of . . . (1) [t]he prohibition set  
22 forth in Section 1052 against the unauthorized diversion or use of  
23 water [or] [a]ny term or condition of a permit, license, certification, or  
24 registration . . ."

24 Thus, the Legislature has made a clear and unambiguous distinction between the  
25 "unauthorized diversion or use of water," and a violation of a term or condition in a license.

26 Water Code section 1052 provides, *inter alia*, that the "unauthorized diversion or use of  
27 water " constitutes a trespass, for which "[c]ivil liability may be imposed by the board . . ."

1 Section 1052 *does not* provide the SWRCB with the authority to impose civil liability for a  
2 violation of a term or condition in a permit or license. It is clear, therefore, that the SWRCB lacks  
3 authority to impose civil liability in the first instance for the violation of a term in a license. (See  
4 *People v. Shirokow* (1980) 26 Cal.3d 301, 306-307 [in determining the meaning of a statute, an  
5 adjudicator “should construe a statute in the context of the entire statutory system of which it is a  
6 part, in order to achieve harmony among the parts.”]; accord *Department of Alcoholic Beverage  
7 Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 11 [“we do not  
8 construe statutory language in isolation, but rather as a thread in the fabric of the entire statutory  
9 scheme of which it is a part.”].) If the SWRCB were to read section 1052 as authorizing the  
10 imposition of civil liability for violating a term or condition of a license or permit, the SWRCB  
11 would render subdivision (d)(2) of Water Code section 1831 meaningless.

12 Moreover, the SWRCB’s own regulations recognize the distinction, providing for three  
13 distinct remedies in response to a violation of a term or condition of a permit or license:

14 “if, after investigation, the board’s staff finds that a violation of the  
15 terms and conditions of any permit or license has occurred which  
16 might be cause for enforcement action by the board, the matter may  
17 be referred to the board for hearing in accordance with the provisions  
18 of Water Code Sections 1410 et seq., 1675 et seq., or 1825 et seq.”  
19 (Cal. Code Regs., tit. 23, § 821.)

20 Water Code sections 1410 et seq. and 1675 et seq. address the revocation of permits and  
21 licenses, not civil liability. Water Code section 1825 et seq. provides the SWRCB with the  
22 authority to issue cease and desist orders. There is *no* reference in section 821 of the regulations  
23 to Water Code section 1052 or 1055, with regard to civil liability.

24 This precise reading and interpretation of the relevant statutes is confirmed by the California  
25 Court of Appeal, First Appellate District, which explained

26 “[i]f the permit holder or license holder violates any of the terms or  
27 conditions or fails to apply the water to a beneficial purpose, the  
28 Board may revoke the permit or license. (§§ 1410, 1611.) In 1980,  
the Board was given increased powers to enforce terms and  
conditions of an appropriation permit. (§ 1825 et seq. [authorizing  
cease and desist orders and actions for injunctive relief].) (*United  
States v. State Water Resources Control Board* (1986) 182  
Cal.App.3d 82, 102.)

1           Nowhere in the Water Code, or in the SWRCB's own regulations, is there *any* authority for  
2 imposing civil liability for an alleged violation of a term or condition in a permit or license. One  
3 cannot give meaning to the entire statutory scheme and come to any other conclusion. To adopt  
4 the meaning apparently put forth by the Division, one must impermissibly "read out" an entire  
5 provision of Water Code section 1831. It is axiomatic that an administrative agency cannot adopt  
6 a meaning of a statute that would render statutory language surplusage. (*Department of Alcoholic*  
7 *Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 14.)

8           In addition to the foregoing, the SWRCB's own publication, styled "Information  
9 Pertaining to Investigating Water Right Complaints in California, February 2005," explains the  
10 difference between violations of a term or condition in a permit or license, and the "unauthorized  
11 diversion" of water. That document provides as follows:

12           **Authority of the SWRCB**

13           The SWRCB has the authority to investigate the following types of complaints:

- 14           • Violation of Permit/License Terms – A complaint may be filed if the  
15 holder of a water right permit or license issued by the SWRCB is not  
16 complying with the terms and conditions of the permit or license. The  
17 Division will investigate the allegations to ensure that the water user  
18 complies with all terms and conditions of the water right.
- 19           • Unauthorized Diversion – A complaint may be filed if a water user does  
20 not appear to have a valid water right. The Division will investigate to  
21 determine whether the SWRCB has issued a permit or license, or  
22 whether the water user may have riparian, pre-1914, or other type of  
23 water right. If Division staff determines that the water user does not  
24 have a valid water right, action will be taken to insure that a valid right is  
25 acquired or that the person stops diverting the water.

26           The distinction between a violation of a term or condition of a permit or license contained in  
27 this document is in consonance with the First Appellate District's Opinion, the SWRCB's own  
28 regulations, and Water Code section 1052, 1055, and 1831. The Division's insistence on trying  
to expand its authority, on the other hand, through this enforcement proceeding, is an abuse of  
discretion and beyond the SWRCB's jurisdiction.

          This is not to say that the SWRCB lacks an enforcement mechanism to correct violations of  
terms and conditions of permits or licenses. Water Code section 1831 provides the SWRCB

1 with the authority to issue a cease and desist order for a violation, or threatened violation, or a term  
2 or condition in a permit or license. If, after a cease and desist order is adopted, a party fails to  
3 comply with a cease and desist order, the board may impose civil liability. (Water Code, §  
4 1845(b)(3).) However, the Division cannot put the cart before the horse. If there is a violation, or  
5 threatened violation of a term or condition in a permit or licenses, the Division must first obtain a  
6 cease and desist order for that violation. It cannot impose civil liability in the first instance.

7 The SWRCB is without the authority to impose civil liability in the first instance for a  
8 violation of a term or condition in a permit or license. To do so is in excess of the SWRCB's  
9 jurisdiction, contrary to the SWRCB's own regulations and publications, and an abuse of  
10 discretion. Accordingly, the Vineyard Club requests that the Hearing Officer dismiss the  
11 Complaint.

12 B. THE PROSECUTION TEAM CONDUCT IS IMPROPER AND VIOLATES  
13 THE VINEYARD CLUB'S CONSTITUTIONAL RIGHT TO A HEARING

14 The Legislature has specified the factors to be taken into account in establishing the  
15 amount of Administrative Civil Liability for a particular violation. Water Code section  
16 1055.2 states:

17 In determining the amount of civil liability, the board shall take into  
18 consideration all relevant circumstances, including, but not limited to,  
19 the extent of harm caused by the violation, the nature and persistence  
of the violation, the length of time over which the violation occurs,  
and the corrective action, if any, taken by the violator.

20 Based upon consideration of these factors, the Prosecution Team and the Division  
21 of Water Rights Chief recommended an ACL against the Vineyard Club for \$4,100.  
22 (VC-10, ACL at p. 3.) This amount purportedly reflected the level of liability deemed by  
23 the Prosecution Team to be commensurate with the alleged violation. After reviewing the  
24 allegations in the ACL, the Vineyard Club elected to exercise its constitutional and  
25 statutory rights to request a hearing on the complaint before the State Water Board. (Wat.  
26 Code, § 1055(b).) Now, after the complaint has been issued, the hearing set, and the  
27 testimony submitted, the Prosecution Team is recommending that the penalty be increased  
28

1 more than seven times the amount sought in the complaint to what it views as the statutory  
2 maximum of \$30,000. (WR-1, 18.) Specifically, Charles Lindsay, State Board Hearings  
3 Chief, states:

4 Since the matter has proceeded to a hearing, I recommend the State Water  
5 Board increase the amount of liability up to the statutory maximum.

6 . . . .

7 Also, although the Vineyard Club is certainly entitled to bring these issues  
8 before the State Water Board, it is done at a significantly increased staff cost

9 . . . .

10 The current amount, \$4,100, is now too low, due to the increased costs of a  
11 hearing and lack of settlement.

12 WR-1, 1, 8 (emphasis added).

13 Aside from issue of whether the Prosecution Team may advocate for a higher amount than  
14 proposed in the ACL, the Prosecution Team does not advocate for an increased penalty based on  
15 new information relating to the statutory factors to be considered in determining an appropriate  
16 ACL amount, nor even to any newly discovered "relevant circumstances" relating to the alleged  
17 violation. To the contrary, the Prosecution Team recommends an increased penalty *only* because  
18 the Vineyard Club has requested a hearing and because a hearing will increase staff costs.  
19 Increasing the ACL amount to the highest amount allowed under the statute because the Vineyard  
20 Club has exercised its statutory right to a hearing is clearly punitive.

21 Parties subject to administrative adjudicative proceedings have a constitutional right of  
22 access to petition that administrative tribunal. (*California Teachers Association v. State of*  
23 *California* (1999) 20 Cal.4th 327, 335-336.) The Prosecution Team's insistence that the amount  
24 of Civil Liability be increased to the statutory maximum solely because the Vineyard Club  
25 requested a hearing has "no other purpose or effect than to chill the assertion of constitutional  
26 rights by penalizing those who chose to exercise them." (*California Teachers Association v.*  
27 *State of California* (1999) 20 Cal.4th 327, 338, citing the United States Supreme Court's decision  
28 in *Fuller v. Oregon* (1974) 417 U.S. 40, 54.) Free access to administrative tribunals is critical

1 and to discourage the exercise of the constitutional right to a hearing through the threat of a  
2 greater punishment for attempting to exercise that right "is to discourage the exercise of that right  
3 in every case." (*California Teachers Association v. State of California* (1999) 20 Cal.4th 327,  
4 344.) The Prosecution Team's attempt to penalize the Vineyard Club for exercising its  
5 constitutional right to a hearing raises significant concerns and potentially implicates malicious  
6 prosecution by SWRCB staff. This type of conduct should have no place within the SWRCB  
7 and the Hearing Officer must dismiss the Complaint.

8 **CONCLUSION**

9 For the foregoing reasons, the Vineyard Club requests that the Hearing Officer dismiss the  
10 Complaint. In the alternative, if additional time is required to consider the legal issues raised on  
11 this motion, the hearing Officer should postpone the hearing.

12  
13 SOMACH, SIMMONS & DUNN

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15 Dated: March 16, 2007

16  
17 By 

18 Daniel Kelly

19 Attorneys for The Vineyard Club, Inc.

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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 813 Sixth Street, Third Floor, Sacramento, California 95814; I am over the age of 18 years and not a party to the foregoing action.

On March 16, 2007, 2007, I served the following document:

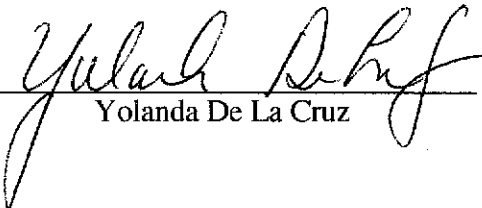
**MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. 262.5-44 OR, IN THE ALTERNATIVE, TO POSTPONE HEARING**

X Via hand delivery on all parties in said action listed below:

Matthew Bullock, Staff Counsel  
State Water Resources Control Board  
1101 I Street  
Sacramento, CA 95814

Gary Wolff, P.E., Ph.D.  
Hearing Officer  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on March 16, 2007, at Sacramento, California.

  
Yolanda De La Cruz