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8 STATE WATER RESOURCES CONTROL BOARD

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10 In the Matter of Administrative Civil Liability) **RESPONSE TO MOTION BY VINEYARD**
11 Complaint No. 262.5.44) **CLUB, INC. TO DISMISS ADMINISTRATIVE**
12) **CIVIL LIABILITY COMPLAINT NO. 262.5-44**
13) **OR, IN THE ALTERNATIVE, TO POSTPONE**
_____) **HEARING.**

14 **I. INTRODUCTION**

15 The State Water Resources Control Board (State Water Board), Division of Water
16 Rights (Division), Prosecution Team (Prosecution Team) submits this response to the Vineyard
17 Club's Motion to Dismiss Administrative Civil Liability Complaint No. 262.5-44 or, in the
18 Alternative, to Postpone Hearing. The Motion presents no valid legal claims. Section 1052 of the
19 Water Code authorizes the State Water Board to impose civil liability for unauthorized diversions
20 of water in an amount not to exceed \$500 per day. The Vineyard Club made unauthorized
21 diversions of water. Administrative Civil Liability (ACL) Complaint No. 262.5-44 properly imposes
22 liability against the Vineyard Club under section 1052. Dismissal would be inappropriate and the
23 hearing should proceed as scheduled.

24 **II. DISCUSSION**

25 **THE STATE WATER BOARD HAS THE AUTHORITY TO IMPOSE**
26 **ADMINISTRATIVE CIVIL LIABILITY UNDER WATER CODE SECTION 1052 AND THE PLAIN**
27 **LANGUAGE OF THE LICENSE.**
28

1 The Vineyard Club relies on section 1831 of the Water Code, concerning the
2 authority to issue cease and desist orders, to argue that the State Water Board, Division of Water
3 Rights (Division) is prohibited from issuing administrative civil liability in this matter. The Vineyard
4 Club argues that, because section 1831 lists both “unauthorized diversion or use of water” and
5 violation of a term or condition in a license as bases for issuing a cease and desist order, that a
6 particular infraction can only be one or the other, not both. This argument is logically flawed. The
7 Vineyard Club’s diversion of water without a measuring device constitutes a violation of the terms
8 of their license *and* an unauthorized diversion.

9 Subdivision (d) of section 1831 authorizes issuance of a cease and desist order for
10 violation of any of the following:

- 11 1. The prohibition set forth in Section 1052 against the unauthorized
12 diversion or use of water subject to this division.
- 13 2. Any term or condition of a permit, license, certification, or registration
14 issued under this division.
- 15 3. Any decision or order of the board issued under this part.

16 Vineyard Club’s argument hinges on the assumption that the listed requirements
17 must be mutually exclusive -- that because violation of permit and license terms is listed in
18 paragraph (2), an activity that violates permit or license terms cannot be considered an
19 unauthorized diversion or use, which is listed in paragraph (1). There is no basis for that
20 assumption. Because a cease and desist order can be issued for violation of any of the listed
21 requirements, and the scope of the State Water Board’s cease and desist order is the same for all
22 listed requirements, there was no need to draft the statute to avoid overlap between the listed
23 categories. Contrary to the Vineyard Club’s characterization of section 1831, there is no “or”
24 between paragraphs (1) and (2) of section 1831, subdivision (d), and nothing in the plain
25 language of that statute suggests that the listed requirements are mutually exclusive.

26 The absurdity of Vineyard Club’s argument is highlighted if one looks at paragraph
27 (3), which includes violation of any “order of the board issued under this part.” As used in
28 section 1831, “this part” means Part 2 of Division 2 of the Water Code, which includes the

1 authority under which the State Water Board issues permits and licenses. Accordingly, a permit
2 or license is a State Water Board “order of the board” under paragraph (3) of section 1831. Far
3 from being drafted so that the three paragraphs are mutually exclusive, the categories in
4 subdivision (d) of section 1831 overlap so much that paragraph (2) may not including anything
5 that is not also included in paragraph (3).

6 Furthermore, section 1831 deals with cease and desist orders, not administrative
7 civil liability. Water Code section 1836 clearly states that, “Nothing in this chapter [sections 1825
8 through 1851 of the Water Code, relating to cease and desist orders] shall preclude the board
9 from issuing any order or taking any other action authorized pursuant to Sections 275 and 1052.”
10 It is also worth emphasizing that the language in section 1831 upon which the Vineyard Club
11 bases its arguments was added in 2002 for the purpose of increasing, not limiting, the State
12 Water Board’s enforcement powers. (Stats. 2002, ch. 652, (AB 2267), § 6; Sen. Rules Com., Off.
13 of Sen. Floor Analysis, 3d reading analysis of Assem. Bill No 2267 (2001-2002 Reg. Sess.) as
14 amended Aug. 19, 2002.)

15 Similarly, Vineyard Club’s citation to California Code of Regulations, title 23,
16 section 821 is a red herring. That regulation relates to investigation of complaints submitted by
17 affected third parties, a situation not present in this matter. Even if it were applicable, it would not
18 preclude an action under Water Code section 1052. The regulation specifies that the matter may
19 be referred to the board for a hearing in accordance with listed Water Code sections, including
20 section 1825 et. seq. Section 1825 directs the State Water Board to take “vigorous action . . . to
21 prevent the unlawful diversion of water” and section 1836 specifies that the State Water Board’s
22 cease and desist order authority is not a limitation on the State Water Board’s authority under
23 section 1052. Nothing in the regulation specifies that the list of authorities to conduct a hearing is
24 exclusive, or that the use of other available authority not listed in the regulation is prohibited. At
25 the time the State Water Board adopted the regulation, Water Code section 1052 had not yet
26 been amended to authorize the State Water Board to impose liability administratively, so there
27 would have been no reason to include section 1052 in the list of Water Code sections under which
28 the board might conduct a hearing. The regulation’s recitation of possible administrative

1 enforcement proceedings cannot be read as a prohibition against use of later enacted
2 administrative enforcement authority.

3 In resolving what authority the State Water Board has, the State Board should look
4 to the relevant sources. These sources are section 1052 of the Water Code and the plain
5 wording of the license issued to the Vineyard Club.

6 The Division issued license 12831 to the Vineyard Club in 1992. That license
7 includes standard term 0060062, which reads:

8 *"No water shall be diverted under this license unless licensee has installed*
9 *a device in Oak Flat Creek, satisfactory to the State Water Resources Control*
10 *Board, which is capable of measuring the flows required by the conditions of this*
11 *license. Said measuring device shall be properly maintained."*

12 (italics added.)

13 This language could not be any clearer. If no measuring device is installed in
14 Oak Flat Creek, "no water shall be diverted under this license." Installation of the measuring
15 device is a condition precedent to diversion of water under the license.

16 Evidence submitted by the Vineyard Club and the Prosecution Team will show that
17 the Vineyard Club was diverting water from Oak Flat Creek for a period of at least 60 days in
18 2005, during which time there was no measuring device in Oak Flat Creek. Any water diverted
19 when a measuring device was not installed was diverted outside the right that was granted by the
20 license and was therefore an unauthorized diversion.

21 Diverting water without a measuring device is no more authorized by this license
22 than diverting in excess of the maximum rate, outside the season of diversion, at a different point
23 of diversion, or from another source. All these types of diversions are simply outside the scope of
24 diversion authorized by the license. If the State Water Board were to accept the Vineyard Club's
25 assertion that a cease and desist order must be issued before liability could be assessed, any
26 party with a license would have a get-out-of-jail free card to divert in any manner it wished. A
27 licensee could divert as much water as it pleased, when it pleased, in whatever manner it pleased,
28 and the State Water Board would be helpless to do anything until after issuing a cease and desist

1 order requiring the licensee to comply with its license. It would be impossible to “take vigorous
2 action to enforce the terms and conditions of permits [and] licenses . . . and to prevent the
3 unlawful diversion of water.” (Wat. Code, § 1825.) Vineyard Club’s interpretation of section 1831
4 would make a mockery of the water right permitting and licensing system and is in conflict with the
5 entire statutory system of which section 1831 is a part. (See *People v. Shirokow* (1980) 26 Cal.3d
6 301, 306-307 [“the goal of statutory construction is ascertainment of legislative intent so that the
7 purpose of the law may be effectuated, and that we should construe a statute in the context of the
8 entire statutory system of which it is a part, in order to achieve harmony among the parts.”].)

9 Installation of the measuring device was directly tied to the authority to divert water.
10 The Vineyard Club was not only violating a term or condition of its license. It was also diverting
11 water outside the scope of its license by doing so. Such diversion was therefore “other than as
12 authorized.” Water Code section 1052, subdivision (a) provides that, “[t]he diversion or use of
13 water subject to this division other than as authorized in this division is a trespass.” The Water
14 Board is well within its authority to subject such a trespass to administrative civil liability of up to
15 \$500 for each day of trespass. (Wat. Code § 1052, subd.(b).)

16 **RETRACTING A DISCOUNT IN LIABILITY OFFERED IN THE INTEREST OF**
17 **SETTLING, WHERE NO SETTLEMENT IS REACHED, DOES NOT VIOLATE DUE PROCESS.**

18 The Vineyard Club also moves for dismissal based on an allegation that its due
19 process rights have been violated because the Prosecution Team is no longer recommending
20 reduced liability now that this issue is going to hearing.

21 Water Code section 1055.3 states:

22 “In determining the amount of civil liability, the board shall take into
23 consideration *all relevant circumstances*, including, *but not limited to*, the extent of
24 harm caused by the violation, the nature and persistence of the violation, the
25 length of time over which the violation occurs, and the corrective action, if any,
26 taken by the violator.”

27 (italics added.)

1 Enforcement costs are a relevant circumstance that the State Water Board may
2 consider in setting liability, and it has done so in the past. (See, e.g., Order WRO 2004-0004, at
3 p. 30.) Mandatory increases in administrative liability based on prosecution costs can raise due
4 process concerns. Discretionary consideration of prosecution costs as a factor in liability does not
5 violate due process. (See *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th
6 32, 44-45. [rejecting due process challenge to administrative procedures under which
7 administrative agency had discretion to require a party who requested a hearing to pay for
8 prosecution costs, in addition to imposing other applicable remedies].)

9 Paragraph 5 of the ACL complaint alerted the Vineyard Club that the maximum
10 liability the Division would consider was \$30,000. As part of its consideration of “all relevant
11 circumstances,” the Division chose to recommend a discount in the Vineyard Club’s liability, “to
12 achieve settlement with the licensee, streamline the enforcement process, and avoid the expense
13 of a hearing before the State Water Board.” (ACL, at ¶ 8.) Now that the matter is going to
14 hearing, these discounting circumstances are no longer present. This change affects the balance
15 of all relevant circumstances, as is evident from the fact that the original recommendation of
16 \$4,100 would now not even cover staff costs of enforcing the Water Code in this matter.

17 The ACL complaint informed the Vineyard Club that \$4,100 was, “the minimum
18 liability recommended by the Division, and the State Water Board may consider the maximum
19 liability, if this matter goes to hearing.” (ACL, at ¶ 8; see also *Id.*, at ¶ 11.) Since that complaint
20 was issued, additional prosecution costs have been incurred, and the Vineyard Club’s history of
21 non-compliance has come to light. Both the State and the Regional Water Quality Control Boards
22 have, in other liability proceedings, raised liability at the hearing above the amount proposed in
23 the original ACL complaint. (See, e.g., Order WRO 2004-0004, at p. 31; Order WQ R3-2002-
24 0097.)

25 Additionally, and as stated in the ACL, the Prosecution Team did not raise the
26 liability as a penalty for going to hearing. Rather, it initially discounted the recommended liability
27 in an effort to settle. (ACL, at ¶ 8.) Such a discount is no longer appropriate.

28 The authority to set liability at the hearing lies with the State Water Board, not with

1 the Prosecution Team. The complaint, by setting forth the length of the violation and the
2 maximum liability that may be imposed, provides clear notice of what liability may be imposed.
3 Because the Board is not limited by the amount advocated by the Prosecution Team it is hard to
4 see how the Prosecution Team's advocacy for more than it recommended when it initially issued
5 the complaint, but within the maximum liability set forth in the complaint, somehow violates due
6 process. Enforcement costs are a relevant circumstance that may be considered. The Vineyard
7 Club will have ample opportunity to present its case as to the appropriate amount of liability at the
8 hearing. The Vineyard Club was not caught unaware by the recommended increase, and the
9 ultimate decision on liability does not lie with the Prosecution Team. Due Process was not
10 violated by the Prosecution Team's recommendation to increase liability.

11 **III. CONCLUSION**

12 The State Water Board has authority under Water Code section 1052 to impose
13 civil liability in this matter, and it may impose such liability in an amount up to the statutory
14 maximum identified in ACL Complaint No. 262.5-44. Dismissal would be inappropriate, and the
15 Prosecution Team respectfully requests that this matter proceed to hearing as scheduled.

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18 _____
19 Matthew Bullock
20 Staff Counsel
21 State Water Resources Control Board
22 Division of Water Rights, Prosecution Team
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PROOF OF SERVICE

I, Gabrielle M. Durio, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22nd Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within documents:

RESPONSE TO MOTION BY VINEYARD CLUB, INC.

	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
X	BY ELECTRONIC MAIL: I caused a true and correct copy of the document(s) to be transmitted by electronic mail compliant with section 1010.6 of the California Code of Civil Procedure to the person(s) as shown.
X	BY HAND DELIVERY: I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

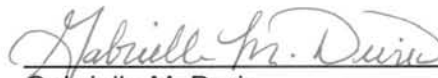
By placing a true copy thereof in separate, sealed envelopes addressed to:

Gary Wolff, P.E., Ph.D. Hearing Officer State Water Resources Control Board 1001 I Street Sacramento, CA 95814	Dan Kelly Somach, Simmons & Dunn 813 Sixth Street, Third Floor Sacramento, CA 95814-2403 dkelly@lawssd.com
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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on March 23, 2007 at Sacramento, California.



Gabrielle M. Durio
Sr. Legal Typist
State Water Resources Control Board
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