

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2022-0124-EXEC

In the Matter of the Petition for Reconsideration of

BRENT OWEN

Regarding Order WR 2020-0106-DWR
Imposing Administrative Civil Liability Upon Brent Owen Due to Failure to File a Report
of Licensee for License 10004

SOURCE: UNNAMED DRAINS

COUNTY: BUTTE

ORDER DENYING PETITION FOR RECONSIDERATION

BY THE EXECUTIVE DIRECTOR

1.0 INTRODUCTION

Brent Owen (Petitioner) petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of State Water Board Order WR 2020-0106-DWR (Order WR 2020-0106-DWR), issued September 15, 2020. The order concluded that Petitioner failed to file a 2018 report of licensee for water right License 10004 (Application A016078) as required by title 23, section 929 of the California Code of Regulations.¹ The order assessed administrative civil liability in the amount of \$2,000.

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a water rights decision or order within 30 days on any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

¹ Unless otherwise indicated, all future citations are to title 23 of the California Code of Regulations.

- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(§ 768.)

A petition must specify the specific board action for which the petitioner requests reconsideration, “the reason the action was inappropriate or improper,” “the specific action which petitioner requests,” and must contain “a statement that copies of the petition and accompanying materials have been sent to all interested parties.” (§ 769, subd. (a)(2), (4)–(6).) Additionally, “a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.” (*Id.*, subd. (c).)

A petition for reconsideration must be timely filed within 30 days of the decision or order at issue. (§ 768.) The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)–(C).) The State Water Board may elect to hold a hearing on the petition for reconsideration.

The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

3.0 BACKGROUND

Petitioner was the owner of record for water right License 10004 during calendar year 2018. License 10004 authorizes the diversion of 3 cubic feet for second from April 1 to June 15 and from September 1 to October 31, not to exceed 292 acre-feet per year, from two unnamed drains tributary to Butte Creek in Butte County for irrigation and stockwatering. The total face value of License 10004 is 292 acre-feet. The priority date for License 10004 is October 5, 1954. This information was obtained from the State Water Board’s Electronic Water Rights Information Management System (eWRIMS).

Section 929 requires that a licensee file an annual water use report for each water right license. (See also § 847.) For a water right license, annual water use reports are commonly referred to as “reports of licensee.” Reports of licensee for a given calendar year are due by April 1 of the following calendar year. (§ 929.)

Water Code section 1846, subdivision (a)(2) provides that the State Water Board may administratively impose civil liability against any person or entity who violates a regulation or order adopted by the State Water Board. The amount of civil liability shall not exceed \$500 per violation per day.

Petitioner did not submit the 2018 report of licensee for License 10004 online by April 1, 2019.

On June 12, 2019, Division of Water Rights (Division) enforcement staff (Prosecution Team) issued a Notice of Deficiency requesting that the 2018 report of licensee for License 10004 be submitted within 30 days. The Notice of Deficiency, served via certified mail to Petitioner's address of record, warned of the potential for an enforcement action with a monetary penalty should the violation persist.

On July 1, 2019, the Prosecution Team issued an administrative civil liability complaint (ACL Complaint) against Petitioner by certified mail. The ACL Complaint mailing, which included a cover letter and other enclosures, informed Petitioner of the Prosecution Team's conclusion that Petitioner had not filed the required report of licensee for 2018 by the deadline specified under section 929 or in response to the Notice of Deficiency. The ACL Complaint recommended administrative civil liability in the amount of \$2,000 for these violations. Petitioner received the ACL Complaint via certified mail on July 8, 2019.

Enclosed with and referenced in the ACL Complaint and cover letter was a conditional settlement offer. The offer allowed for a reduced administrative civil liability amount of \$500 if Petitioner submitted within 20 days of receipt of the ACL Complaint: 1) a signed acceptance of the conditional settlement offer and waiver of the right to hearing and reconsideration (Acceptance and Waiver) and 2) the 2018 report of licensee for License 10004. Under the terms of the Acceptance and Waiver, the Petitioner would be required to pay the reduced administrative civil liability within 30 days of the State Water Board's issuance of a stipulated administrative civil liability order accepting the parties' settlement. The ACL Complaint mailing also included information and instructions for requesting a hearing and for filing online reports of licensee.

According to eWRIMS, the State Water Board received a 2018 report of licensee for License 10004 on July 10, 2019. The report, electronically signed by Petitioner, states no diversion or use of water under License 10004 during calendar year 2018. Users must enter a unique username and password to file reports of licensee for a given water right license in eWRIMS.

Petitioner requested a hearing on the ACL Complaint by letter dated July 23, 2019. The State Water Board received Petitioner's hearing request on July 25, 2019, within the time specified by section 1055, subdivision (b) of the Water Code.

On April 9, 2020, the State Water Board's Administrative Hearings Office (AHO) issued a Notice of Public Hearing for June 19, 2020, and establishing a deadline of May 21, 2020, for any party intending to participate in the hearing to file a Notice of Intent (NOI). The Notice of Public Hearing stated explicitly:

If the AHO does not receive an NOI from Respondent indicating Respondent's intent to participate in the hearing as a Party before the deadline specified below, then the AHO may deem Respondent's request for a hearing regarding the administrative civil liability complaint to be withdrawn and the AHO may issue an order imposing administrative civil liability without further notice or opportunity for hearing. Respondent must file an NOI to preserve Respondent's right to a hearing.

(Underlining in original.) A copy of the Notice of Public Hearing was served upon Petitioner and the Prosecution Team via certified mail. For the certified mailing to Petitioner's address of record, a return receipt stamped April 16, 2020, was signed by K.D. Hawkins, whom Petitioner indicates is his secretary and the only other person working in his office.

The Prosecution Team filed an NOI on May 20, 2020. Petitioner did not file an NOI.

On July 10, 2020, the AHO's Presiding Hearing Officer sent a memorandum to the Division's Assistant Deputy Director overseeing the Prosecution Team. The memorandum stated that the AHO did not receive an NOI or any other correspondence from Petitioner or K.D. Hawkins after the July 23, 2019 request for hearing. The memorandum conveyed that the AHO deemed Petitioner's request for hearing withdrawn and that the AHO referred the ACL Complaint matter back to the Division for further proceedings. A copy of the memorandum was served by first-class mail and electronic mail upon Petitioner and the Prosecution Team.

On July 23, 2020, the Assistant Deputy Director wrote a letter to the AHO's Presiding Hearing Officer requesting clarification regarding the AHO's memorandum, including whether the Division or the AHO had authority to take further action regarding the ACL Complaint and recommended administrative civil liability penalty against Petitioner. A copy of the letter was served by first-class mail upon Petitioner.

On August 6, 2020, the AHO's Presiding Hearing Officer sent a memorandum responding to the Assistant Deputy Director's clarifying questions from her July 23, 2020 letter. The Presiding Hearing Officer restated that he deemed Petitioner's request for hearing withdrawn and that the Division may proceed as if Petitioner "never had requested a hearing." A copy of the memorandum was served by first-class mail and electronic mail upon Petitioner and the Prosecution Team. The record indicates representatives of Petitioner and the Prosecution Team exchanged communications on August 10 and 11, 2020, regarding the procedures exercised in this matter, Petitioner's right to petition for reconsideration, and Petitioner's request for Division assistance regarding diversion measurement and reporting.

On September 15, 2020, the Division issued Order WR 2020-0106-DWR, assessing administrative civil liability against Petitioner in the amount of \$2,000, as proposed under the ACL Complaint. Petitioner received the ACL Order mailing via certified mail on September 21, 2020.

On October 6, 2020, the State Water Board received Petitioner's timely petition for reconsideration via electronic mail. The petition is signed by Petitioner, who states, in part:

. . . I requested a hearing as provided as a relief procedure. I did not know a revivification stating a hearing was still desired was a requirement to have a hearing. The Board stated they sent me a letter requesting revivification although I never received constructive notice of the requirement. I have requested a copy of that notification, but to date have never received a copy.

Basically, the issue is that the law provides for a hearing, but the Board's policy effectively eliminates that right with threats of higher fines. I took the additional risk of asking for a hearing because the fine was disproportionate to the crime and emergency circumstances beyond my control dominated my life during this time period. . . .

I readily admit I was aware of the reporting requirements and payment of fee and I erred in not responding soon enough to your reminder that I hadn't reported on the 172-acre feet of water, of which I used none. . . .

Move on to the alleged letter from you asking me to confirm I wanted the hearing I had already requested. There are only two people in my office, a secretary and me. Neither of us have any memory of ever receiving an email, phone call or letter making that request. In my previous letter, I openly stated it was not likely but was possible that a letter came that somehow didn't register with either of us.I have never received that letter. . . .

Petitioner requests abatement of the administrative civil liability penalty assessed in Order WR 2020-0106-DWR. On December 30, 2020, via electronic mail to Petitioner, with an electronic copy to the Prosecution Team and AHO, the State Water Board acknowledged receipt of the Petitioner's petition for reconsideration. Nothing in the petition or elsewhere in the record indicates that Petitioner is represented by counsel.

4.0 DISCUSSION

4.1 *The petition's cause for reconsideration and compliance with applicable procedural requirements*

Petitioner specifies that the basis of his petition for reconsideration is subdivision (a) of section 768: "Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing." Petitioner argues that had requested a hearing and should not have had his request deemed withdrawn when he did not respond to the Notice of Public Hearing by filing an NOI. Petitioner further argues that neither he nor the other person in his office has recollection or evidence that they ever received the Notice of Public Hearing. This theory of reconsideration involves legal issues, but the petition does not enclose the required statement of points and authorities in support of legal arguments raised in the petition. (See § 769, subd. (c).)

Petitioner also stated that he could not comply with subdivision (a)(6) of section 769, which requires that a petition include the statement that the petition and any accompanying materials have been sent to all interested parties.

Procedural defects alone could be sufficient bases for denying consideration. However, Petitioner's allegations of procedural irregularity, though legal in nature, may be adequately addressed in this instance primarily through consideration of facts and evidence in the record. Additionally, by copying representatives of the Prosecution Team when filing the petition via electronic mail, the record supports that Petitioner did effectively send copies of the petition and any accompanying materials to the only other identified interested party.

4.2 *The petition lacks merit and should be denied*

Petitioner requests reconsideration primarily due to alleged procedural irregularities or abuse of discretion that prevented him from having a fair hearing. In his petition for reconsideration, Petitioner specifically objects to the AHO's requiring parties to file NOI's and deeming Petitioner's failure to file an NOI as effective withdrawal of Petitioner's request for hearing.

Petitioner indicates the issues he intended to raise at hearing. First, he states that he intended to object to the Prosecution Team's "very offensive" conditional settlement offer, which he views as threatening parties into paying a reduced penalty and foregoing administrative remedies. Second, Petitioner states that he intended to argue that relevant circumstances did not support a \$2,000 penalty. In a letter dated July 1, 2019, included in Petitioner's request for hearing, Petitioner states that in 2018 his home in Redding was "burned to the ground" in the Carr Fire and that his home in Florida suffered "significant damage" from Hurricane Michael. As noted above and in his

eventual report of licensee, Petitioner also states that he did not divert or use any water under License 10004 in 2018.²

Petitioner readily admits he was aware that a report of licensee is required by regulation to be filed annually by April 1 regardless of whether any water was diverted or used under that license in the prior calendar year. While Petitioner undoubtedly experienced considerable personal hardship from the aforementioned disasters in 2018, these events apparently did not prevent Petitioner from receiving and responding to the ACL Complaint, including by requesting a hearing, corresponding with the Division, and belatedly filing the report of licensee. Nor did these circumstances reasonably prevent Petitioner from complying with the fair, standard hearing procedures.

As noted above, on April 9, 2020, the AHO issued a Notice of Public Hearing regarding the ACL Complaint against Petitioner. Consistent with the longstanding practice of the State Water Board in administering water rights hearings, the Notice of Public Hearing specified that any party, explicitly including the Prosecution Team and Petitioner, intending to participate in the hearing must file an NOI by email, postal mail, or hand delivery. The AHO explicitly stated that the deadline for filing an NOI was May 21, 2020, six weeks from the AHO's issuance of the Notice of Public Hearing. The AHO explicitly stated that a Petitioner's failure to file an NOI could result in the AHO's deeming Petitioner's request for hearing withdrawn.

The AHO served Petitioner, via certified mail to Petitioner's mailing address included in the Division's records and the letterhead of Petitioner's hearing request, with the Notice of Public Hearing, for which K.D. Hawkins signed a return receipt on April 16, 2020. K.D. Hawkins is copied on Petitioner's petition filed by electronic mail and has served as an apparent agent of Petitioner and Brent Owen, Inc. in both previous and subsequent correspondences with Division staff. It is deduced from this evidence and Petitioner's own statements that K.D. Hawkins is the secretary Petitioner identifies as the only other person in his office and as lacking "any memory of ever receiving" the Notice of Public Hearing. Attached to this order, for parties' reference, are copies of the Notice of Public Hearing and the return receipt from the administrative record. The State Water Board concludes that the AHO's service of the Notice of Public Hearing was both proper and effective.³

The record lacks any subsequent response from Petitioner by the May 21, 2020 NOI filing deadline, or in June or July of 2020. Consistent with State Water Board water rights hearing practices and the AHO's Notice of Public Hearing regarding Petitioner's ACL Complaint specifically, the AHO deemed Petitioner's request for rehearing to have been withdrawn. Consistent with delegated authority for complaints in which hearing

² Aside from License 10004, Petitioner has no other California water rights claims or statements filed with the Division in his name, but he states in his petition, "I farm rice, I use about 6,000-acre feet of pre[-]1914 water per year."

³ In addition to effective service via certified mail of the original Notice of Public Hearing on April 16, 2020, Petitioner's assertion that he "never received" a copy of the notice is refuted by evidence that counsel for the Prosecution Team also provided a copy to Petitioner via electronic mail on August 12, 2020.

has not been requested, the Assistant Deputy Director subsequently issued Order WR 2020-0106-DWR, assessing the \$2,000 administrative civil liability penalty recommended in the ACL Complaint.

The record lacks factual or legal support for finding an irregularity in the proceedings, a ruling, or an abuse of discretion by which Petitioner was prevented from having a fair hearing. To the contrary, Petitioner had an opportunity to file an NOI and to participate in the hearing scheduled for June 19, 2020. Petitioner was effectively served with the Notice of Public Hearing and did not file an NOI within the time specified or thereafter. The Presiding Hearing Officer's and Assistant Deputy Director's actions following Petitioner's failure to file an NOI were neither irregular nor abuses of discretion.

There is no valid basis to now reverse or abate the administrative civil liability assessed in Order WR 2020-0106-DWR. Petitioner's petition for reconsideration lacks merit and should be denied.

5.0 CONCLUSION

For the foregoing reasons, the State Water Board finds that the challenged action, Order WR 2020-0106-DWR, is appropriate and proper. Petitioner's petition for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED that:

1. The petition for reconsideration filed by Brent Owen (Petitioner) is denied.
2. Within forty-five (45) days of the date of this order, Petitioner shall remit any outstanding portion of the \$2,000 payment required by Order WR 2020-0106-DWR by check or money order payable to:

State Water Resources Control Board
Division of Water Rights
Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

3. As required by Water Code sections 1055.3 and 1848, in adopting this order, the State Water Board or its delegee has considered all relevant circumstances, including but not limited to those specifically identified in the ACL Complaint, Order WR 2020-0106-DWR, and Petitioner's petition for reconsideration.

4. The State Water Board's right to take enforcement action against Petitioner for violation of this order or for failure to timely submit other water rights reports or statements is reserved.

Dated: March 23, 2022

ORIGINAL SIGNED BY:
Eileen Sobeck
Executive Director