

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

Division of Water Rights

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Unauthorized Diversions and Violation of Emergency Regulations
for Reporting Requested Information by

Mike Passalaqua and Peder Hoy

SOURCE: Tuolumne River

COUNTY: Stanislaus

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Mike Passalaqua and Peder Hoy (collectively Diverters) are alleged to have failed to provide information required under State Water Resources Control Board (State Water Board or Board) Order WR-2015-0022-DWR, an order issued pursuant to regulations adopted pursuant to Water Code section 1058.5.
2. California Water Code section 1846, subdivision (a)(2), provides that any person or entity violating a regulation or order adopted by the State Water Board may be liable in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs. Water Code section 1846, subdivision (c) provides civil liability may be imposed administratively by the State Water Board pursuant to Water Code section 1055.
3. Diverters are also alleged to have trespassed against the State of California in the form of an unauthorized diversion and use of water from the Tuolumne River during the 2014 and 2015 irrigation seasons.
4. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
5. Water Code section 1055, subdivision (a), provides that the Executive Director of the Board may issue a complaint to any person or entity on which Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

BACKGROUND INFORMATION

6. Diverters are the owners of a post-1914 appropriative water right under License 1173 (Application A005269). License 1173 allows for the direct diversion of 2.08 cubic feet per second of water from the Tuolumne River between May 1st and October 1st. The priority date for License 1173 is November 15, 1926.
7. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
8. On January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
9. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
10. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds. The 2014 Unavailability Notice applies to License 1173.
11. On June 18, 2014, Division staff conducted an inspection of the Diverters' property, point of diversion (POD), and place of use to determine compliance with the notice that there was no water available for appropriation under the priority of License 1173. When the inspection was scheduled, Division staff informed the Diverters that the State Water Board has found that there is no water available under all post-1914 appropriative water rights in the San Joaquin River watershed. During the inspection, the Diverters indicated that they received the May 27, 2014 unavailability notice. At the inspection, Division staff observed that the Diverters were diverting water from the Tuolumne River from the same POD listed in their water right license for irrigation of 172 acres located on Stanislaus County Assessor's Parcel Numbers (APN) 017-045-027, 017-045-028 and 017-045-018. The Diverters' parcels are the same as the place of use that is shown on the place of use map for License 1173. Division staff asked the Diverters what basis of right they were diverting under. The Diverters indicated that they were diverting under a riparian basis of right. During the inspection, Division staff informed the Diverters that their properties do not meet the criteria for a riparian basis of right because the properties are not contiguous with the Tuolumne River.
12. On January 23, 2015, the State Water Board issued a "Notice of surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
13. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the on-going severe drought conditions present 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 confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.

14. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with a Post-1914 Appropriative Right" (April 2015 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The April 2015 Unavailability Notice applies to License 1173.
15. On May 5, 2015, the Deputy Director for the Division of Water Rights issued Order WR 2015-0022-DWR (Information Order) to the Diverters to obtain necessary information, pursuant to 23 Cal. Code Regs., section 879, subdivision (c) to investigate and determine whether unauthorized diversions have occurred or were threatening to occur. Section 879(c) is a drought emergency regulation adopted pursuant to Water Code section 1058.5.

ALLEGATIONS

Failure to Provide Required Information

16. Diverters are alleged to have failed to provide information required under State Water Board Order WR-2015-0022-DWR, an order issued pursuant to regulations adopted pursuant to Water Code section 1058.5.
17. As the recipients of the Information Order, the Diverters were required to provide specific information identified in the Order within thirty (30) days of the receipt of the Order, pursuant to Water Code section 879(c).
18. According to mail delivery tracking, the Information Order was delivered certified by the U. S. Postal Service to Diverters on May 8, 2015 (Mike Passalacqua) and May 15, 2015 (Peder Hoy).
19. Diverters were required to submit the information required under the Information Order by a deadline of June 15, 2015, thirty (30) days following delivery of the Information Order.
20. As of October 20, 2015, Diverters have not submitted the information identified in the Information Order. Therefore, the Division does not have information that indicates that the Diverters have a valid basis of right for water diverted by the Diverters after receiving the 2014 and 2015 Notices of Unavailability of Water.

Unauthorized Diversions

21. Diverters are alleged to have trespassed against the State of California in the form of an unauthorized diversion and use of water from the Tuolumne River during the 2014 and 2015 irrigation seasons.
22. According to the parcel ownership information available to Division staff, the Diverters' point of diversion (POD) is on a parcel contiguous with the Tuolumne River. However, the Diverters do not own the POD parcel. Neither of the Diverters' parcels are contiguous with the Tuolumne River, which is one of the criteria that typically must be satisfied when exercising a riparian basis of right.

23. Based on a review of US Bureau of Land Management patent maps, a portion of the current place of use was never riparian. Therefore, water diverted from the Tuolumne River under a riparian basis of right cannot be used on at least a portion of the combined area of the two parcels owned by the Diverters. The Division does not have information to determine if the remainder of the place of use has retained riparian water rights after the parcels were subdivided.
24. Aerial maps of the place of use dated March 31, 2015, show that approximately three quarters of the place of use is green and had been planted with crops while the remainder shows an immature orchard.
25. On August 27, 2015, Division staff observed a corn crop on a portion of the place of use that was never riparian. Because the crops and orchard require irrigation, the Diverters need a source of water. The Diverters do not have an alternate source of water to the Tuolumne River nor have the Diverters provided documentation of an alternate basis of right to divert water from the Tuolumne River. The aforementioned facts support the conclusion that the Diverters had diverted water from the Tuolumne River in 2015 without a valid basis of right for the purposes of irrigation.
26. On August 29, 2013, the Diverters submitted a Report of Licensee for diversions of water in 2012. The diverters reported diverting 900 acre-feet of water for each month from April through September 2012. The reported amounts appear to be erroneous because that amount of water would be excessive for irrigation use. However, the months for which diversions were reported are consistent with agricultural irrigation schedules for crops and orchards.
27. Division staff calculated Diverters' water consumption for 2014 and 2015 since Notices of Unavailability were issued, as well as the number of days of unauthorized diversions based on evapotranspiration data obtained from the California Polytechnic State University, San Louis Obispo and Diverters' pump capacity. Evapotranspiration data was specific to crop type, county, and dry year conditions. Based on these parameters, Division staff calculated the total water diversion amounts for 2014 and 2015 to be 244 acre-feet and 278 acre-feet, respectively, for a total of 522 acre-feet of unauthorized diversions. This equates to a total of 21.6 inches of irrigation for the majority of the 2015 irrigation season. Typically, crops require 24-36 inches of irrigation per irrigation season. Based on the total diversion amounts and the Diverters' pump capacity, the number of days of diversion for 2014 and 2015 are 46 days and 53 days, respectively.

PROPOSED CIVIL LIABILITY

28. Water Code section 1846, subdivision (a) provides that the State Water Board may administratively impose civil liability pursuant to Water Code section 1055 for violation of State Water Board regulations in an amount not to exceed \$500 per day of violation.
29. As of October 20, 2015, Diverters had not provided the required information and had been past the deadline for providing the information by 127 days. Therefore, Diverters are subject to a maximum civil liability in the amount of \$63,500 (127 days at \$500/day).
30. Water Code section 1052, subdivision (c) provides that the State Water Board may impose civil liability for committing a trespass against the State in an amount not to exceed \$1,000 per day of violation and \$2,500 for each acre-foot of water diverted. An unauthorized diversion is considered a trespass against the State.
31. Based on the above water demand calculations, Diverters may be subject to a maximum civil liability in the amount of \$1,404,000 (522 acre-feet of water at \$2,500/acre-foot and 99 days of diversions at \$1,000/day).
32. For failure to provide required information and for unauthorized diversions, the Diverters are subject to a **total maximum civil liability in the amount of \$1,467,500** (\$63,500 + \$1,404,000).

33. In determining the appropriate amount of a civil liability, Water Code section 1846, subdivision (d), and Water Code section 1055.3 require that the State Water Board consider all relevant circumstances, including, but not limited to, 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.
34. In this case, the information identified in the Order was due by June 15, 2015. Failure to provide the information requirements in a timely manner harms the Division's ability to accurately track water diversions from the water course and effectively regulate the resources it is required to protect. Diverters have not yet complied with the Order.
35. Additionally, Diverters have made unauthorized diversions of water from the Tuolumne River during the most extreme drought in decades, when there was insufficient water supply available for Diverters claimed water right. Diverters were aware that the State Water Board had determined that there was insufficient water supply available for Diverters claimed water right. These unauthorized diversions have reduced or threatened to reduce the amount of water available for downstream water right holders during an extreme drought emergency.
36. Diverters received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying replacement water during the violation period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 522 acre-feet of water during the 2014 and 2015 irrigation seasons, Diverters avoided purchased water costs of at least \$130,500.
37. The Division estimates that its staff cost to investigate the failure to provide required information and unauthorized diversion issues and develop the enforcement documents to be \$8,000.
38. Having taken into consideration all relevant circumstances, including, but not limited to, Diverters' failure to submit the required information, the harm of the missing information to the Division's effectiveness in regulating water diversions, unauthorized diversions, and staff costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the **Assistant Deputy Director of Water Rights recommends the imposition of \$332,500 in Administrative Civil Liability (Proposed Liability)**.
39. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

RIGHT TO HEARING

40. Diverters may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date that you receive this complaint. (Water Code, sec. 1055, subd. (b).)
41. If Diverters request a hearing, Diverters will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date. The State Water Board may convene a pre-hearing conference prior to noticing a hearing date.
42. If Diverters request a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board

may take any appropriate action in accordance with Water Code sections 100, 275, and 1050 et seq. of the Water Code and/or its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall be final and effective upon issuance.

43. If Diverters do not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth above to: State Water Resources Control Board Division of Water Rights Enforcement Section P.O. Box 2000 Sacramento, CA 95812-2000
44. If Diverters do not request a hearing and do not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



*John O'Hagan, Assistant Deputy Director
Division of Water Rights*

Dated: **OCT 29 2015**