

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Failure to Submit Online Curtailment Certification Form

EUGENE F DRAKE

Water Right ID(s) S000030

YOU ARE HEREBY GIVEN NOTICE THAT:

1. EUGENE F DRAKE (Diverter) is alleged to have violated title 23, division 3, chapter 2, article 24, section 879 of the California Code of Regulations.
2. On May 10, 2021, Governor Gavin Newsom issued a Proclamation Declaring a State of Emergency (Drought Proclamation) in 41 counties, including those within the Sacramento-San Joaquin Delta watershed. The Drought Proclamation declared that the Sacramento-San Joaquin Delta watershed is facing substantial water supply and ecosystem challenges due to extreme drought. The Drought Proclamation orders the State Water Resources Control Board (State Water Board) to consider “adopting emergency regulations to curtail water diversions when water is not available at water rights holders' priority of right or to protect releases of stored water.”
3. On August 3, 2021 the State Water Board adopted California Code of Regulations, title 23, sections 876.1 through 879.2 (Emergency Regulations). The Emergency Regulations were reviewed by the Office of Administrative Law and went into effect on August 19, 2021.
4. The Emergency Regulations authorize the Deputy Director of the Division of Water Rights to issue curtailment orders requiring recipients to cease diversions when water is determined to be unavailable at the water right holder's or claimant's priority of right.
5. Section 876.1 subdivision (b) of the Emergency Regulations authorizes the Deputy Director of the Division of Water Rights to issue curtailment orders to water right holders, requiring the curtailment of water diversion and use.

6. Section 879 subdivision (d)(1) of the Emergency Regulations states “all water right holders issued a curtailment order pursuant to section 876.1 are required, by the deadlines specified in the initial order but no sooner than seven calendar days of the date of the [curtailment] order, to submit under penalty of perjury a certification that they will continue to take actions to comply with section 876.1 which includes monitoring the State Water Board’s drought webpage or subscribe to the State Water Board’s Delta Drought email distribution list. Water Code section 1846, subdivision (a)(2) states: “a person or entity may be liable for a violation of any of the following in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs:...a regulation or order adopted by the Board.”
7. Water Code section 1055 grants the Executive Director for the State Water Board authority to issue an Administrative Civil Liability (ACL) Complaint to any person or entity to whom administrative civil liability may be imposed.
8. The Executive Director delegated this authority to the Deputy Director for Water Rights. Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized 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. This authority has been redelegated to the Assistant Deputy Director.

ALLEGATIONS

9. The Diverter is the owner of record for Water Right ID(s) S000030
10. On August 20, 2021, the Deputy Director issued an Order Imposing Water Right Curtailment and Reporting Requirements in the Sacramento-San Joaquin Delta Watershed (Curtailment Order).
11. Pursuant to Emergency Regulation section 876.1, subdivision (b), the Division of Water Rights sent the Curtailment Order through United States Postal Service Certified Mail to the addresses listed in the Division’s electronic Water Rights Information Management System and through electronic mail to all parties enrolled in the State Water Board’s list-service. The Division also published the Curtailment Order and a list of all recipients on the State Water Board’s website on the same day that the Curtailment Order was issued. It is the responsibility of the water rights holders to join this email list-service to stay updated on current curtailment actions and requirements.
12. The Curtailment Order required submission of Sacramento-San Joaquin Water Right Curtailment Certification online forms (Curtailment Certification) by September 3, 2021, for each water right.
13. The Curtailment Order provided an Internet website address and the unique Login and Password for each water right allowing diverters or their agents to complete the Online Curtailment Certification form.

14. On a weekly basis, Division staff reviewed Online Curtailment Certification data submitted by diverters. The Diverter failed to file the Online Curtailment Certification form for the subject water right(s) by September 3, 2021.
15. On May 6, 2022, the State Water Board Division of Water Rights sent the Diverter a Notice of Violation (NOV) notifying the Diverter that the Online Curtailment Certification Form had not been received as of the date of the NOV.
16. The Notice of Violation informed the Diverter that failure to submit the Online Curtailment Certification Form is a violation of the Emergency Regulations adopted by the Board for which the potential civil liability of five hundred dollars (\$500) may be assessed for each day that the form was not submitted after the deadline.
17. As of June 6, 2022, the Diverter has still not filed the Online Curtailment Certification Form as required by the Curtailment Order.

PROPOSED CIVIL LIABILITY

18. Water Code section 1846 states that a person or entity may be liable for a violation of a regulation adopted by the State Water Board in an amount not to exceed five hundred dollars for each day in which the violation occurs.
19. The Diverter is alleged to have violated the Emergency Regulation by failing to file an Online Curtailment Certification Form within seven days of issuance of the Curtailment Order as required by Emergency Regulation section 879. Each day that each Online Curtailment Certification Form is not filed by the deadline is a day of violation of the Emergency Regulation.
20. Each Online Curtailment Certification Form not filed electronically with the Board by the deadline is a separate violation of the Emergency Regulation. Diverter failed to file the Online Curtailment Certification Form constituting a violation.
21. As of June 6, 2022, the violation continued unabated for 275 days. The maximum liability for the violation alleged is \$137,500 (number of water rights x 275 days x \$500).
22. In determining the appropriate amount of a civil liability, both Water Code section 1848(d) and Water Code section 1055.3 provide that the State Water Board shall consider all relevant circumstances, including, but not limited to, all of the following factors: 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 any corrective action undertaken by the violator.

23. The Emergency Regulations were adopted by the State Water Board in response to Governor Newsom's Declaration of a state of emergency due to drought conditions. Water supply shortages are occurring throughout the state. The Online Curtailment Certification Form is an essential component of the Curtailment Order. Data submitted as part of the curtailment certification is critical for developing water availability calculations and identifying water conservation and transfer opportunities, especially during drought.
24. The value of the data contained within the Online Curtailment Certification Form correspond(s) to its timely submittal, and therefore an increased time lapse between the deadline and the ultimate submittal date results in increased harm to the regulatory program. The State Water Board's forecasting of water availability and ability to regulate the resources it is required to protect is diminished by the failure to submit the Online Curtailment Certification Form. Timely information availability is most important during drought, because water supplies are continually assessed.
25. The Online Curtailment Certification Form(s) was/were due by September 3, 2021, but has/have not been submitted. The length of time over which this violation occurs is significant; the Online Curtailment Certification Form is now at least 275 days late. Moreover, as of the date of this Complaint no action has been taken to correct this violation despite the May 6, 2022, Notice of Violation putting the Diverter on notice of the potential for formal enforcement action if the violation continued.
26. Having taken into consideration all relevant circumstances, including but not limited to the failure of the Diverter to submit the Online Curtailment Certification Form, the harm of the missing data to the State Water Board's effectiveness in regulating water diversions, staff costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the Division of Water Rights Prosecution Team recommends the imposition of \$1,000 in administrative civil liability (Proposed Liability).

RIGHT TO HEARING

27. The Diverter may request a hearing on this matter before the State Water Board. Any such request for hearing must be sent to the Board within 20 days after the date that this notice is received as required by Water Code section 1055, subdivision (b).
28. If the Diverter requests a hearing, the Diverter will have an opportunity to contest the allegations in this complaint and the imposition of a fine by the Board. The Board will issue a notice setting the specific time and place for the hearing. The hearing notice will be mailed not less than 10 days before the hearing date.
29. At the hearing, the Board will consider whether to impose a monetary fine, and if so, whether to adjust the Proposed Liability within the amount authorized by statute. Any Board order imposing an ACL shall be final and effective upon issuance.

EUGENE F DRAKE

30. If the Diverter does not request a hearing within 20 days, then the right to a hearing on the matter is waived. The Assistant Deputy Director for the Division of Water Rights may then issue a final Administrative Civil Liability Order assessing the Proposed Liability.

STATE WATER RESOURCES CONTROL BOARD

A handwritten signature in black ink that reads "Julie Rizzardo". The signature is written in a cursive, flowing style.

Julé Rizzardo, Assistant Deputy Director
Division of Water Rights

Dated: June 6, 2022