

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Failure to File Supplemental Statement of Water Diversion and Use
for the 2021 through 2022 Reporting Year

Frank Borges
Diversion(s) Reported Under Statement(s) S017685

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Frank Borges (“Respondent”) is alleged to have violated Title 23, Chapter 2.7, Article 2, section 920 of the California Code of Regulations.
2. Water Code section 5101 states, in part, “Each person who...diverts water shall file with the board a statement of their diversion and use...For diversions after September 30, 2021, the statement...shall be filed before February 1.”¹
3. Water Code section 5104 states, in part, “Supplemental statements shall be filed annually...For diversions after September 30, 2021, the supplemental statement...shall be filed before February 1.”
4. Title 23, Chapter 2.7 of the California Code of Regulations (“Water Diversion and Use Report Regulations”) identifies requirements for mandatory filing of reports to the State Water Resources Control Board (“State Water Board”). Specifically, Article 2, section 920 of the Water Diversion and Use Report Regulations states that Supplemental Statements of Water Diversion and Use (“Supplemental Statement”) shall be filed electronically with the State Water Board annually, detailing the amount of water diverted and used within the twelve-month reporting period.
5. Title 23, Chapter 2.7, Article 2, section 908 of the California Code of Regulations states, “Failure to meet the requirements of this chapter is a violation subject to civil liability of up to \$500 per day pursuant to Water Code section 1846.”

¹ Recent statutory changes amended Annual Water Diversion and Use Report deadlines. Effective September 24, 2021, Senate Bill (AB) 155 amended, among other things, the deadline to submit initial and supplemental statements of diversion and use as required under Water Code sections 5101 and 5104.

6. Water Code section 1846(a) 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:...(2) a regulation or order adopted by the [State Water Board]." Civil liability may be imposed administratively by the State Water Board pursuant to Water Code section 1055.
7. The Executive Director for the State Water Board may 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 the authority to issue ACL complaints to the Deputy Director for the Division ("Deputy Director"). Pursuant to Resolution 2012-0029, the Deputy Director is authorized to issue 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 has redelegated this authority to the Assistant Deputy Director.

ALLEGATIONS

9. The Respondent, or Respondent's predecessor in interest, previously filed an initial Statement of Water Diversion and Use report for Statement(s) S017685 ("subject claim of right(s)"), as required under Water Code section 5101.
10. The Respondent must, pursuant to Water Code section 5104, file a Supplemental Statement of Water Diversion and Use annually, before February 1 of each year.
11. The Respondent must, pursuant to section 920 of the Water Diversion and Use Report Regulations, file the Supplemental Statement of Water Diversion and Use electronically before February 1 of each year on forms available at the State Water Board's website.
12. The Respondent failed to file their supplemental statement(s) for the subject water right(s) by February 1, 2023.
13. On August 11, 2023, the Division sent a Notice of Violation ("NOV") via United States Postal Service informing the Respondent that the required supplemental statement(s) have not been received. The NOV informed the Respondent that if the delinquent supplemental statement(s) were filed by August 25, 2023, then the Division would not issue an ACL Complaint.
14. The NOV informed the Respondent that failure to submit the supplemental statement is a violation of the Water Diversion and Use Report Regulations for which the potential civil liability of five hundred dollars (\$500) may be assessed for each day that the supplemental statement was not submitted after the deadline.
15. As of September 5, 2023, the Respondent has not filed the supplemental statement(s) for the subject claim of water right(s). The supplemental statement(s) is now 216 days late.

PROPOSED CIVIL LIABILITY

16. Under Water Code section 1846, subdivision (a)(2), “a person or entity may be liable... in an amount not to exceed five hundred dollars (\$500) for each day” the violation of a “regulation or order adopted by the Board” occurs.
17. The Respondent violated section 920 of the Water Diversion and Use Report Regulations by failing to file their supplemental statement by the February 1, 2023 deadline for the claims of right. Each day after the deadline a Supplemental Statement of Water Diversion and Use is not filed is a day in which the violation occurs.
18. As of the date of this ACL complaint, the Respondent’s supplemental statement has yet to be filed and is thus 216 days late. The maximum administrative civil liability is \$108,000 (216 days x \$500 per day x 1 report).
19. 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, 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.
20. The Water Diversion and Use Report Regulations were adopted by the State Water Board for the purpose of developing a publicly available database. The information contained within the database allows the State Water Board and the water user community access to information that is necessary to make informed water management decisions. The value of the database is directly tied to the amount and accuracy of information the State Water Board collects through compliance with the Water Diversion and Use Report Regulations.
21. Water diversion and use information is critical to understanding and planning for limited water supplies, identifying water conservation opportunities, assuring compliance with the quantity and seasonal use limitations of existing water rights, protecting water right holders’ priority of right, and providing for efficient management and use of water during times of shortages.
22. The value of the data contained within the supplemental statement corresponds 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 timely submit the supplemental statements.

23. The Respondent's supplemental statement(s) is past due. The length of time over which this violation has continued to occur is significant; the supplemental statement is now 216 days late. Moreover, as of the date of this Complaint, no action has been taken to correct this violation despite the August 11, 2023 NOV putting the Respondent on notice of the potential for formal enforcement action if the violation continued.
24. Having taken into consideration all relevant circumstances, including but not limited to the failure of the Respondent to submit the supplemental statement, 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 \$2,400 total (\$2400 per report x 1 report) in administrative civil liability ("Proposed Liability").

RIGHT TO HEARING

25. The Respondent may request a hearing on this matter before the State Water Board, Administrative Hearings Office ("AHO"). Any such request for hearing must be delivered to the AHO **within 20 days after the date that this notice is received** as required by Water Code section 1055, subdivision (b).
26. If the Respondent requests a hearing, the Respondent will have an opportunity to contest the allegations in this complaint and the imposition of a liability by the AHO. The AHO 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.
27. At the hearing, a Hearing Officer will consider whether to impose a monetary liability, 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.
28. **If the Respondent 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

Julé Rizzardo, Assistant Deputy Director
Division of Water Rights

Dated: September 5, 2023