

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Material Misstatement in a Statement of Water Diversion and Use by

LOUIS AND DARCY CHACON
Statement of Water Diversion and Use No. 000042 (S000042)

SOURCE: Price Creek, tributary to Trinity River

COUNTY: Trinity

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Louis and Darcy Chacon (the Diverters) are alleged to have violated California Water Code section 5107(b), which prohibits knowingly making a material misstatement in a Statement of Water Diversion and Use (Statement).
2. California Water Code section 5107, subdivision (c)(3) provides that the State Water Resources Control Board (State Water Board) may administratively impose civil liability pursuant to section 1055 in an amount of \$25,000 for knowingly making a material misstatement in a Statement, plus \$1,000 per day for each additional day on which the violation continues if the person fails to correct the violation within 30 days after the State Water Board has called the violation to the attention of that person.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on which Administrative Civil Liability (ACL) may be imposed pursuant to section 5107. The Executive Director delegated this authority to the Deputy Director for Water Rights, who has redelegated this authority to the Assistant 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.

ALLEGATIONS

4. Water Code section 5101 requires that each person who, after December 31, 1965, diverts water shall file with the State Water Board, prior to July 1 of the succeeding year, a statement of his or her diversion and use, subject to certain exceptions not relevant to the Diverters.
5. The Diverters divert water from Price Creek in Trinity County under a riparian claim of right and, as such, are required to file a Statement under Water Code section 5101.
6. Water Code section 5104 requires that Supplemental Statements be filed annually, before July 1 of each year. Supplement Statements shall contain the quantity of water diverted, the rate of diversion by month in the preceding calendar year, and any change in the other information contained in the preceding statement.

7. The Diverters hold Statement of Water Diversion and Use (Statement) No. S000042 with a claim of riparian right from Price Creek, tributary to Trinity River. The Diverters do not hold any appropriative water right permits or licenses and have filed no other Statements of Diversion and Use with the State Water Board.
8. Between the diversion years 2002 through 2008, the Diverters filed paper versions of Supplemental Statements. Beginning with the 2009 diversion year, the Division converted to an electronic system to file supplemental statements that required the inclusion of monthly maximum rates of diversion, monthly diversion total amounts, and monthly amounts beneficially used.
9. The Diverters filed Supplemental Statements for S000042 for the diversion years 2009 through 2013 on or before June 20, 2014, and they initially reported instantaneous rates of direct diversion up to 1×10^{20} cubic feet per second (cfs) and monthly amounts of storage and/or beneficial use of 1×10^{20} acre-feet (af). The reported quantities are not physically possible; 1×10^{20} af is orders of magnitude larger than the volume of water on planet Earth. In addition, diversion and use under a riparian claim for right such as the Diverters' does not extend to storage.
10. The Diverters commented in the 2009 through 2013 Supplemental Statements that their water right is a "broad right without limitations on the amount of water used," and that the information provided is a strictly voluntary and non-committal estimate. They also commented that the limitations on the Division's software have prevented them from filing their Statements "in the same manner since its origin" (i.e. without specifying diversion rates and amounts).
11. The quantities reported distort the State Water Board's records. The Division attempted to contact the Diverters by telephone to advise them of the need to correct the Supplemental Statements, but was unable to speak to the Diverters directly. Division staff nonetheless left messages over voicemail requesting a return call.
12. On May 28, 2015, the Division sent the Diverters a Notice of Violation (NOV) via certified mail. The NOV put the Diverters on notice that they were in violation of Water Code section 5107, could be subject to substantial penalties, and advised them to revise the Supplemental Statements for 2009 through 2013 within 30 days of receipt of the notice.
13. On June 3, 2015, the Diverters received the NOV. On June 29, 2015, the Diverters submitted revised Supplemental Statements for 2009 through 2013. The revised Supplemental Statements reported a maximum rate of direct diversion of 29.52 cfs; and an annual diversion amount of 21,383.04 af. The Diverters again commented that the water right is a "broad right without limitations" on the amount of water and that the information provided is a strictly voluntary and non-committal estimate.
14. On June 25, 2016, the Diverters submitted Supplemental Statements for the diversion years 2014 and 2015 and reported an annual diversion amount of 21,383.04 af, noting that the type of diversion is "both Direct Diversion and Diversion to Storage." In the 2014 and 2015 Supplemental Statements the Diverters again commented that the water right is a "broad right without limitations" on the amount of water and that the information provided is a strictly voluntary and non-committal estimate.
15. The 21,383.04 acre-feet of water the Diverters claimed to divert per year in their revised Supplemental Statements for 2009 through 2013 and for their Supplemental Statements for 2014 and 2015 is, again, orders of magnitude more than they reasonably could have put to beneficial use, which the Division has estimated at 218 af per year.
16. The estimated maximum annual demand for the use reported by the Diverters on their Supplemental Statements is 217 acre-feet per year for 15 acres of their mixed crop irrigation, including trees on the property; 0.55 acre-foot per year for stockwatering of their 40 head of mixed stock; 0.84 acre-foot per year for domestic use for 10 persons; and no amount for the 'on-demand only' nature of fire protection uses; for a total of approximately 218 acre-feet per year. This estimated maximum use is

based on demands published in Appendixes I, II, and III of the Division of Water Rights booklet of instructions for completing forms to file an application to appropriate water.

17. Pursuant to Senate Bill (SB) 88, the State Water Board adopted a regulation (California Code of Regulations Title 23, Chapter 2.8) to implement new measurement requirements for all water right holders who divert more than 10 acre-feet of water per year, including statement holders. The required device accuracy and monitoring frequency are determined by the volume of water diverted and/or the face value of the water right. Larger diversions and larger reservoirs or ponds have more stringent measurement and monitoring requirements and more stringent requirements for the installation and certification of measurement devices. For diversions greater than or equal to 1,000 acre-feet per year, the measurement device installation deadline was January 1, 2017.
18. Subsequent to the adoption of the measurement regulations, the Diverters submitted Supplemental Statement for S000042 for the diversion year 2016 on July 14, 2017, and reported a maximum rate of direct diversion of 250,000 GPD; and a total annual amount of 9.206664 acre-feet of water diverted and used for their claimed purposes of use. The Diverters noted that the type of diversion is “both Direct Diversion and Diversion to Storage.”
19. In the 2016 Supplemental Statement, the Diverters again commented that the water right is a “broad right without limitations” on the amount of water and that the information provided is a strictly voluntary and non-committal estimate.
20. The estimated minimum demand for the purposes of use reported on Supplemental Statement for diversion year 2016 is approximately 24 acre-feet per year for 15 acres of mixed crops and 0.12 acre-foot per year for domestic use for 2 persons; for a total of 24.12 acre-feet per year. This is more than twice the annual use of 9.206664 acre-feet that the Diverters reported in 2016 for this demand. This estimated minimum use is based on demands published in Appendix I of the Division of Water Rights booklet for instructions for completing forms to file an application to appropriate water for domestic use, and California Department of Water Resources, Agricultural Land and Water Use Estimates of applied water for the Trinity River Analysis Unit (2010) for irrigation use.
21. After the May 28, 2015 NOV brought the clearly erroneous reports to the Diverters’ attention they had an opportunity to correct this obvious error. Instead, they submitted revised Supplemental Statements for 2009 through 2013 that, again, reported use orders of magnitude greater than any reasonable demand estimate; and then continued to report the revised amounts for two more years. In 2017, when the requirement for large diverters to install measurement devices went into effect, the Diverters reported an annual diversion and use amount of less than 10 acre-feet for the diversion year 2016; and just under the minimum threshold for installing measuring devices set by Title 23, Chapter 2.8, section 932 of the California Code of Regulations.
22. Erroneous reporting of such a magnitude are material misstatements. Furthermore, given both the magnitude of the material misstatements and the comments the Diverters included with their supplemental Statements, it is reasonable to infer they knowingly and intentionally misstated the rate and quantity of their diversions each time, in each Supplement Statement. Consequently, the Diverters are currently in violation of California Water Code section 5107, subdivision (b).

PROPOSED CIVIL LIABILITY

23. California Water Code section 5107(c)(3) provides that the State Water Board may administratively impose civil liability pursuant to Section 1055 to any person or entity for knowingly making a material misstatement in a Statement filed under section 5100 et. seq. The maximum civil liability may not exceed \$25,000 for knowingly making a material misstatement in a Statement, plus \$1,000 for each day on which the violation continues if the person fails to correct the violation within 30 days after the board has called the violation to the attention of that person.

24. The Division identified the violation, and called it to the Diverters attention in the May 28, 2015 NOV, which was received on June 3, 2015. The Diverters then submitted revised Supplemental Statements which failed to correct the violation. The maximum liability for these alleged violations is \$25,000 for each Supplemental Statement that contains a material misstatement. Each supplemental Statement for the past eight diversion years (2009 through 2016) contains a material misstatement; for a total liability of \$200,000. Additionally, \$1,000 per day, per violation, may be assessed beginning on the 31st day after receiving the NOV, and failing to cure the five violations described in the NOV for the diversion years of 2009-2013. As of February 16, 2018, these violations have continued for 958 days, resulting in an additional per day liability of \$4,790,000. Therefore, the maximum statutory penalty that the State Board may assess is \$4,990,000 (\$200,000 + \$4,790,000).
25. In determining the appropriate amount of a civil liability, California Water Code sections 5107, subdivision (e), requires 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.
26. In this case, the Diverters continued to violate California Water Code section 5107, subdivision (c)(3) by knowingly making material misstatements in their Supplemental Statements by misreporting rates of diversion and quantities diverted and beneficially used orders of magnitude greater than any reasonable estimate of use, and by subsequently dramatically under-reporting their diversion and use in the most recent Supplemental Statement in an apparent effort to avoid new requirements for installing diversion measuring devices. In addition, the Diverters claim storage diversions unavailable to riparian claimants.
27. Despite two prior notifications (Division phone message requesting the Diverters to return the call and the May 28, 2015 NOV), the Diverters continued to knowingly materially misstate the rates of diversion and quantities diverted and beneficially used in the 2009 through 2013 supplemental Statements. With knowledge of the potential penalties for knowingly making material misstatements on a Statement of Diversion and Use, the Diverters three more times knowingly materially misstated the rates of diversion and quantities diverted and beneficially used in the 2014 through 2016 Supplemental Statements. Failure to comply with the reporting requirements harms the Division's ability to accurately track water diversions from sources, determine whether water is available for other legal users of water, and effectively regulate the resources it has a statutory duty to protect.
28. Having taken into consideration all relevant circumstances, including but not limited to the failure of the Diverters to properly report the 2009 through 2016 use, the harm of knowingly materially misstating the 2009 through 2016 uses to the Division's effectiveness in regulating water diversions, 40 hours of staff time resulting in \$5,800 of staff costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the Division recommends the imposition of \$205,800 in administrative civil liability (Proposed Liability).

RIGHT TO HEARING

29. The 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 this notice is received as required by Water Code section 1055, subdivision (b).
30. If the Diverters request a hearing, the 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, a separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date. The Division may convene a settlement conference prior to noticing a hearing date.

31. If the 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 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.
32. If the Diverters do not request a hearing within 20 days of receipt of this complaint, then the State Water Board will issue an ACL Order and seek recovery of the liability imposed as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

*Julé Rizzardo, Assistant Deputy Director
Division of Water Rights*

Dated: FEB 16 2018