

Appendix H. Timely and Appropriate Enforcement Actions

The State Water Board has a number of enforcement tools to respond to water right violations. This section describes these options and discusses procedures that are common to some or all of these options.

H.1.0 Informal Enforcement Actions for Lower Priority Violations

For low priority violations, State Water Board staff may recommend an informal enforcement action. The purpose of an informal enforcement action is to quickly bring a violation to the water diverter's attention and to give the diverter an opportunity to voluntarily correct the violation and return to compliance as soon as possible. The State Water Board, however, may take a formal enforcement action in place of, or in addition to, an informal enforcement action. Continued or repeated violations should trigger a formal enforcement action.

H.2.0 Formal Enforcement Actions

A formal enforcement action is a statutorily authorized enforcement action. Formal enforcement actions should contain findings of fact that establish all of the statutory requirements of the specific statutory provision being utilized. The actions listed below present options available for water right enforcement.

H.2.1 Administrative Civil Liability (ACL) Complaints

Pursuant to Water Code section 1052, an unauthorized diversion or use of water is a trespass against the State subject to a maximum civil liability of \$500 per each day of unauthorized diversion or use of water. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue an ACL complaint to any person or entity on which the ACL may be imposed.

Water Code section 1055.3 provides that:

In determining the amount of civil liability, the board shall take into consideration 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.

The Water Code does not specify how these factors are to be weighed or combined when setting the actual dollar amount of liability. The manner in which the State Water Board considers these factors for any given situation is up to the discretion of the Board within the limits of the statutory maximum. The liability should be high enough to take into consideration the market value of the water used, the costs to the State Water Board in taking enforcement action, and the effects on other water users and instream uses of water of diverting and using water without authorization. The amount of liability

should serve as a deterrent to future unauthorized diversions by the diverters. The liability shall be assessed within the statutory maximum amount and at a minimum at a level that recovers the staff costs and economic benefits, if any, associated with the acts that constitute the violation.

The State Water Board may allow a person or entity to satisfy no more than 50 percent of the monetary assessment imposed in an ACL order by completing or funding one or more Supplemental Environmental Projects (SEPs). SEPs are projects that enhance the beneficial uses of the waters of the State, provide a benefit to the public at large, and are not otherwise required of the person or entity. The State Water Board will consider allowing any person or entity against whom an ACL complaint is issued to satisfy no more than 50 percent of the ACL by completing or funding an SEP if the SEP is consistent with the provisions of the State Water Board's Water Quality Policy on Supplemental Environmental Projects.

The State Water Board will consider the following factors and any other appropriate factors when setting the liability amount:

Avoided costs

The avoided cost should represent the true cost the violator would have to spend to legally acquire water equivalent to the water supply illegally diverted. This amount is based on the average value of water available in the area of the diversion. If water is not available in the area, the highest regional water cost will be used. Avoided water right fees will be included. Any investment costs for the infrastructure necessary to deliver water to the point of use also may be considered if the infrastructure does not already exist.

Economic benefit amount

The economic benefit amount is any savings or monetary gain derived from the acts that constitute the violation in addition to the avoided cost. Economic benefit includes all savings from, and all income and profits resulting from, the use of the illegally diverted water over the time period of that use. This could include benefits resulting from the time value of money.

Deterrent amount

The civil liability should be set at a level that will deter future noncompliance by the violator or others in the same regulated community. In establishing this amount, the State Water Board will consider both the violator's culpability and the extent of harm associated with the violation as follows:

Culpability

The culpability amount will be determined based on the nature and persistence of the violation, length of time that the violation has continued, the diverter's knowledge of water rights requirements, the diverter's role in construction and operation of the diversion project, responsiveness to previous notifications by the State Water Board or the Division, and any voluntary efforts undertaken or not undertaken to correct the violation. A diverter's knowledge of the water right system will be assessed based on information in the State Water Board's records. A diverter's participation in construction may be determined using the County Assessor's records (dates of ownership) and aerial or topographic maps (dates for project existence). Finally, the State Water Board will consider any corrective actions that were taken, or actions that were prescribed but not taken, as well as any falsification of records.

Extent of harm amount

The State Water Board will estimate an amount that mitigates for any harm to public trust resources known to be specifically caused by the violation. The State Water Board will consult with CDFW, USFWS and NMFS in estimating liability amount for impacts to fish and wildlife resources.

Staff costs

Staff costs will be calculated for all State Water Board staff time expended on the investigation of the violation, preparation and review of the staff report, and preparation and review of the enforcement action. The staff costs will include salary, benefits and all overhead costs. The civil liability amount should, at a minimum, be set at a level that recovers economic benefit plus staff costs.

Ability to pay

There are situations when it is appropriate to consider ability to pay when setting a liability amount. The ability to pay administrative civil liability is limited by diverter's revenues and assets. In some cases, it is in the public interest for the diverter to continue in business and bring operations into compliance. If there is strong evidence that administrative civil liability would result in widespread hardship to the service population or undue hardship to the diverter, it may be reduced on the grounds of ability to pay. Any consideration of ability to pay shall be supported by tax or other financial records. The State Water Board may also consider increasing administrative civil liability to assure that the enforcement action will have a deterrent effect for a water diverter having a greater ability to pay.

H.2.2 Cease and Desist Order (CDO)

The State Water Board may issue an order to cease and desist when it determines that any person is violating, or threatening to violate (1) the prohibition set forth in Water Code section 1052 against the unauthorized diversion or use of water; (2) any term of condition of a water right permit, license, certificate, or registration; or (3) any decision or order of the State Water Board issued pursuant to part 2 (commencing with section 1200) of the Water Code, Water Code section 275, or article 7 (commencing with section 13550) of chapter 7 of division 7 of the Water Code (relating to water reuse).

The State Water Board must provide notice of the proposed CDO by certified mail. The notice shall contain a statement of facts and information that would tend to show the proscribed action and inform the respondent that unless a request for hearing is received by the State Water Board within a certain time period, the State Water Board may adopt the CDO without a hearing. After notice and an opportunity for hearing, the State Water Board may adopt, modify, revoke, or stay in whole or in part any CDO.

Under this policy, the State Water Board will issue a Notice of CDO commensurate with any ACL complaint issued for the unauthorized diversion or use of water within the policy area. A notice of CDO shall also be issued for any priority violation within the policy area that is not subject to an ACL complaint.

A CDO issued in accordance with this policy shall clearly identify the actions required to come into compliance and a schedule for compliance. Any violation of a CDO adopted by the State Water Board shall be a priority violation. The State Water Board may consider imposing civil liability for an amount not to exceed \$1,000 for each day of violation. The State Water Board may also consider requesting the Attorney General to petition the superior court to impose civil liability, or for the issuance of prohibitory or injunctive relief.

H.2.3 Revocation of Permits and Licenses

The State Water Board may revoke a permit or license pursuant to Water Code sections 1410 or 1675, respectively. The State Water Board may revoke a permit to appropriate water if work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use in accordance with the permit and applicable statutes or regulations. A license may be revoked if the State Water Board finds that the licensee has not put water to a useful or beneficial use, has ceased to put water to such use, or has failed to observe any of the terms and conditions in the license.

The State Water Board must provide notice of the proposed revocation. The notice must contain a statement of facts and information on which the proposed revocation is based. Unless a request for hearing is received, the State Water Board may act on the proposed revocation without a hearing.

H.2.4 Administrative Civil Liability for Failure to File Statements of Water Diversion and Use

Water Code section 5101 requires persons who divert water to file a statement of diversion and use with the State Water Board unless certain exemptions apply. Pursuant to new legislation that goes into effect on February 2, 2010, any person who fails to file a statement as required by Water Code section 5101 for a diversion or use that occurs after January 1, 2009, is subject to administrative civil liability in the amount of \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the State Water Board has called the violation to the person's attention. (Wat. Code, § 5107, subd. (b) & (c)(1), added by Stats. 2009-10, 7th Ex. Sess. 2009, ch. 2, § 6.) The State Water Board will contact the owners of identified water diversion facilities in the policy area with no known basis of right and inform them that they must either file a statement of diversion and use or explain why they are not required to file a statement pursuant to Water Code section 5101. Persons who are required to file a statement but fail to do so within the time allowed will be assessed administrative civil liability consistent with Water Code section 5107. The State Water Board will review the information contained in the statements of water diversion and use that are filed as a result of this notification to identify which water diversions are likely to be unauthorized and to identify the potential impacts of the diversions. This information will be used to determine enforcement priorities within the policy area.