

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

ORDER WR 2021-0001

In the Matter of the Administrative Civil Liability Complaint
against

James V. Simoni
Statement of Water Diversion and Use S000486

SOURCE: Uvas Creek, tributary to Pajaro River

COUNTY: Santa Clara

ADMINISTRATIVE CIVIL LIABILITY ORDER

BY THE BOARD:

1.0 INTRODUCTION

This matter came to the State Water Resources Control Board (State Water Board or Board) as a proposed order prepared by the Presiding Hearing Officer of the Board's Administrative Hearings Office (AHO), pursuant to Water Code section 1114, subdivision (c)(1). Pursuant to Water Code section 1114, subdivision (c)(2)(A), the Board adopts the AHO's proposed order in its entirety.

2.0 LEGAL AND PROCEDURAL BACKGROUND

2.1 Administrative Civil Liability Complaint

On October 18, 2019, Julé Rizzardo, an Assistant Deputy Director of the Board's Division of Water Rights (Division), issued an Administrative Civil Liability Complaint (ACL Complaint) to James V. Simoni (Respondent), owner of record of the water-right claims in Statement S000486. (See Supplemental Statement for 2018, filed June 9, 2020 (2018 Supp. Statement).) Ms. Rizzardo issued this ACL Complaint under the authority the Board's Executive Director delegated to the Deputy Director for Water Rights. The Deputy Director subsequently redelegated this authority to the Assistant Deputy Director.

The ACL Complaint contained the following allegations: (a) Respondent, or Respondent's predecessor, previously filed an initial Statement of Water Diversion and Use for Statement S000486; (b) Respondent was required to file, and failed to file, the supplemental statement of water diversion and use for his 2018 diversions and use by the July 1, 2019 deadline; (c) on August 30, 2019, the Division sent Respondent a notice of deficiency, which notified Respondent that the Division had not received Respondent's supplemental statement for 2018; (d) the notice of deficiency informed Respondent that the failure to timely file a supplemental statement is a violation of a Board regulation, California Code of Regulations, title 23, section 920, for which civil liability of \$500 may be assessed for each day after the July 1, 2019 deadline that the supplemental statement is not submitted; and (e) as of October 18, 2019, Respondent still had not filed the supplemental statement.

The ACL Complaint stated that the total maximum potential liability for Respondent's failure to file this annual supplemental statement was \$54,000, based on an alleged violation for 108 days and the maximum penalty of \$500 per day under Water Code section 1846 (108 x \$500 = \$54,000). The ACL Complaint stated that, having taken into consideration all relevant circumstances, the Division's Prosecution Team recommended the imposition of \$2,000 in administrative civil liability.

The ACL Complaint stated that Respondent could request a hearing on this matter, and that any request for hearing must be postmarked within 20 days of the date Respondent was served with the ACL Complaint.

The ACL Complaint contained an "EXPEDITED SETTLEMENT OFFER." The ACL Complaint stated that, to accept this offer, Respondent must: (1) submit the required supplemental statement for Statement S000486 for 2018 within 20 days after Respondent's receipt of the ACL Complaint; (2) sign and return the "Acceptance and Waiver" enclosed with the ACL Complaint within 20 days of Respondent's receipt of the ACL Complaint, under which Respondent would accept the \$500 administrative civil liability and waive his right to contest the ACL Complaint; and (3) remit the "Expedited Settlement Amount" of \$500 within 30 days of the Board's issuance of a stipulated administrative civil liability order. Text at the end of the settlement offer stated that, if

Respondent did not accept the offer within 20 days, the offer would be “voidable” and the Respondent “may” be subject to the ACL Complaint’s full proposed liability amount of \$2,000.¹

2.2 Respondent’s Supplemental Statement for 2018

On June 9, 2020, Respondent electronically submitted his supplemental statement for his 2018 diversions and use under Statement S000486 to the Division’s electronic Water Rights Information Management System (eWRIMS) Report Management System (RMS). Respondent’s supplemental statement for 2018 states the purposes of use were domestic (for 2 to 16 people and landscaping) and stockwatering (50 cow-calf units and 2-3 bulls). (2018 Supp. Statement, p. 1.) The supplemental statement states under part 4, “Amount of Water Diverted and Used”, that Respondent diverted 250 acre-feet directly, and diverted or collected to storage an additional 250 acre-feet, a total of 500 acre-feet, during each month in 2018. (*Id.*)

Under “Additional Remarks,” Respondent wrote:

This declaration is not under penalty of perjury. I have no way of verifying its contents. These are estimates. The water right is a riparian right. As a user I am entitled to draw water from the creek as long as there is water flowing. On this creek in lean times the water is allocated on a schedule. This form will not allow a true submittal. It requires one to check the under penalty of perjury box to submit the form. If one does not check the box the form is not submitted and the right holder is prosecuted for non submittal. No one in the administration returns calls to discuss an alternative plan. The process totally lacks due process.

2.3 Respondent’s Request for Hearing

On November 19, 2019, Respondent sent a letter to the AHO, which requested a hearing on the ACL Complaint. Respondent did not accept the Division’s Expedited Settlement Offer.

¹ Because the Division’s ACL Complaint referred to and discussed this expedited settlement offer, and because the Division included a copy of the settlement offer with the complaint, the Division has waived any argument that the settlement offer is inadmissible in this proceeding under Evidence Code sections 1152 and 1154.

2.4 Administrative Hearings Office Proceedings

Water Code section 1112, subdivision (a)(1) provides that, subject to some exceptions not applicable here, a hearing officer from the AHO shall preside over a hearing on a complaint issued under Water Code section 1055.

On April 15, 2020, the AHO issued its notice of public hearing in this matter. The notice explained the hearing procedures and stated that any person who wanted to participate in the hearing must file a notice of intent (NOI) to appear by June 3, 2020. The AHO set the hearing for July 8, 2020. The AHO sent copies of the notice of hearing to Ms. Rizzardo and Respondent by certified mail, return receipt requested. On April 18, 2020, Mr. Simoni signed the receipt for the copy sent to him, which the U. S. Postal Service then returned to the AHO.

On June 2, the Prosecution Team filed its NOI with the AHO. On June 19, Patrick Lewis, an attorney with the Board's Office of Enforcement, e-mailed the AHO and asked if any of the parties for whom hearings had been set for July 8 (which included Respondent) had filed NOIs. The presiding hearing officer's reply e-mail stated that the AHO had not received NOIs from any of these parties and that the AHO would not be holding the hearings that had been scheduled for July 8.

On June 23, 2020, Respondent sent a letter by U.S. mail to Ms. Rizzardo and the AHO. His letter indicated that he is an attorney and stated that he had a court hearing for a client on July 8. Respondent's letter raised various legal arguments and requested dismissal of the ACL Complaint. Enclosed with this letter were copies of Respondent's supplemental statements of water diversion and use for 2016 through 2019, all of which Respondent submitted to the eWRIMS RMS on June 9, 2020, an NOI dated June 23, 2020, and a copy of an e-mail dated June 8, 2020 addressed to the Presiding Hearing Officer. The AHO never received this e-mail, because it was incorrectly addressed to "DWR@waterboard.ca.gov", even though the AHO's hearing notice stated that parties should send e-mails to the AHO at "AdminHrgOffice@waterboards.ca.gov". Respondent's June 23, 2020 letter did not state whether Respondent knew of the scheduling conflict before his court hearing was set for July 8, and the letter did not state when Respondent was available to participate in the AHO hearing.

The AHO received Respondent's June 23 letter on June 30, 2020. On July 2, the hearing officer sent Respondent a letter via e-mail and U.S. mail (with a copy to the Prosecution Team's attorney). This letter explained that Respondent had had six weeks between April 18, when he received the AHO's hearing notice and June 3, the deadline for filing NOIs, to file the one-page NOI with the AHO, and that Respondent's June 9 e-mail did not go through to the AHO because Respondent used an incorrect e-mail address. This letter stated that, under these circumstances, the AHO could deem Respondent's November 19, 2019 request for a hearing to be withdrawn. However, rather than taking that action, the AHO's letter listed several dates and times to reschedule the hearing.

After additional communications, the hearing officer sent an e-mail to the parties on July 13, advising them that the AHO had re-scheduled the hearing for July 24, 2020.

On July 14, Ms. Rizzardo sent a letter to the hearing officer. This letter argued that Respondent waived his right to a hearing when he did not file a timely NOI, and, for this reason, the Division objected to the AHO's re-scheduling the hearing.

On July 15, 2020, the AHO circulated a supplemental hearing notice with the new hearing date. On July 16, 2020, the hearing officer sent an e-mail to Mr. Lewis, with a copy to Respondent, explaining that he would not cancel the hearing and that, during the hearing, Mr. Lewis could raise the Prosecution Team's arguments about the rescheduling of the hearing.

The AHO held the hearing on July 24, 2020. Mr. Lewis appeared as the lead attorney for the Division's Prosecution Team, and John Prager, another attorney in the Office of Enforcement, assisted. Roberto Cervantes, Supervising Water Resource Control Engineer and head of the Division's Enforcement Section, testified for the Prosecution Team. James Simoni appeared and testified for Respondent.

2.5 Authority to Assess Civil Liability

California Code of Regulations, title 23, section 920, provides that, after the Water Board receives an initial statement of diversion and use, the diverter must submit supplemental statements for each year's diversions and use no later than July 1 of the following year. (See Wat. Code, § 5104.)

Water Code section 1846 authorizes the State Water Board to impose administrative civil liability, pursuant to Water Code section 1055, on any person or entity that violates a regulation adopted by the Board. Under these statutes, the Board may impose such administrative civil liability in an amount not to exceed \$500 per day for each day during which the violation occurs.

3.0 DISCUSSION

3.1 Administrative Civil Liability

It is undisputed that Respondent did not file his supplemental statement of water diversion and use for 2018 until June 9, 2020. This was well after the July 1, 2019 deadline in California Code of Regulations, title 23, section 920, subdivision (a). The sole question here is what amount of civil liability, if any, should be imposed on Respondent for this late filing.

3.2 Statutory Factors

Water Code section 1055.3 and section 1848, subdivision (d) state that, in determining the appropriate amount of civil liability, the Board shall take into account “all relevant circumstances, including, but not limited to”: (a) “the extent of harm caused by the violation,” (b) “the nature and persistence of the violation,” (c) “the length of time over which the violation occurs,” and (d) “the corrective action, if any, taken by the violator.”

3.3 Prosecution Team’s Testimony and Arguments

At the beginning of the hearing, Mr. Lewis asked that the Division’s July 14, 2020 objection to the re-scheduling of the hearing after Respondent did not file a timely NOI be noted for the record, stating that the “unpredictable and dynamic nature of AHO’s procedural adjustments” has led to “workload-associated conflicts within the Division.” (July 24, 2020 Recording of Hearing (Recording) 9:45-10:13.)

During the hearing, the Prosecution Team’s witness, Mr. Cervantes, discussed the Water Code section 1055.3 and 1848, subdivision (d) factors.

Regarding the “extent of harm” factor, Mr. Cervantes testified that information included in annual water-right reports is critical for administering water rights and managing water supply, and that the State Water Board and the public need to understand when,

where, how, and why water is used to ensure water is being put to beneficial use. (Exh. PT-11, p. 6; Recording 33:34-34:18.) He testified that, without this information, the Board is limited in its ability to perform seven essential functions: (1) issue accurate permits and grant petitions, (2) determine availability of water and the likelihood a diversion may cause harm, (3) conduct timely and accurate billings for water use, (4) conduct efficient, fair and accurate drought management, (5) develop instream flow requirements and protect public trust resources, (6) build and calibrate water resource planning models, and (7) respond to and evaluate complaints of alleged illegal diversions. (Recording 34:18-34:55.) He testified that, on an aggregate basis, “these types of water rights violations undermine the validity and transparency of the water rights system.” (Exh. PT-11, p. 6; see also Recording 34:56-35:05.)

Regarding the “nature and persistence of the violation” factor, Mr. Cervantes testified about the Division’s outreach efforts to the regulated community regarding water users’ obligations to file annual statements, and that the Division issued the ACL Complaint to Respondent only after conducting these outreach efforts. (Exh. PT-11, p. 6; Recording 35:06-35:50.) He explained staff were not required to notify the regulated community of the applicable filing deadlines, but that they attempted to do so on four separate occasions before issuing the ACL Complaint. (Recording 29:20-29:50.) Outreach included: (1) holding a water measurement workshop on Jan. 18, 2019; (2) issuing reminder letters on February 15, 2019; (3) sending a mass e-mail reminder on the LYRIS list on June 18, 2019; and (4) sending final notice of deficiency letters on August 30, 2019. (Exh. PT-11, pp. 3, 6; Recording 29:51-33:16.) The last line of the August 30, 2019 letter provided an e-mail address and telephone number for diverters to use if they had questions about the reporting procedures or penalties. (Recording 57:14-57:39.)

Mr. Cervantes testified that Division staff did not call Respondent to inform him of his failure to file his supplemental statement of water diversion and use for 2018, but Division staff did conduct the outreach efforts discussed above. (Recording 40:16-40:52.) Mr. Cervantes explained that the law does not require Division staff to call diverters or verify information submitted in annual reports, and the Division receives 18,000 annual reports each year. (Recording 53:13-53:42.) Mr. Cervantes testified that

the Division keeps records of returned mail, and that neither the letter the Division sent to Respondent on February 15, 2019 nor the letter the Division sent to Respondent on August 30, 2019 was returned as undeliverable. (Recording 49:04-52:38.)

Mr. Cervantes testified that all Division staff are trained to respond to calls to the telephone number provided in the notice of deficiency letter, and that the call log showed a call from Mr. Simoni on June 15, 2020, which was two months after the AHO issued its notice of hearing. (Recording 57:50-58:36.)

Regarding the “length of time over which the violation occurs” factor, Mr. Cervantes testified that, as of the date of the ACL Complaint, Respondent’s violation had persisted for 90 days, and that, considering the Division’s attempts to contact Respondent during this period, this length of time was significant. (Exh. PT-11, pp. 6-7; Recording 36:12-36:23.) Mr. Cervantes testified that the value of data in annual water-right reports is diminished when the data are not provided on time, and that delays in filing statements contribute to inaccuracy and uncertainty in water resource planning. (Exh. PT-11, pp. 6-7; Recording 36:02-36:11.)

Regarding the “corrective action” factor, Mr. Cervantes testified that Respondent filed his supplemental statement on June 9, 2020, which was 344 days after the deadline, and this filing occurred only after significant efforts by the Division. (Exh. PT-11, p. 7; Recording 36:34-36:52.) Mr. Cervantes testified that Respondent’s action did not merit a reduction in the proposed penalty. (Recording 36:55-37:05.)

Mr. Cervantes testified that the Prosecution Team’s proposed civil penalty of \$2,000 “represents four days of violations,” and that the Division believes this is the “minimum amount suitable to deter future noncompliance, while accounting for the resources spent by the State Water Board staff compelling the Diverter to file the requisite Annual Report.” (Exh. PT-11, p. 7.)

The Division’s expedited settlement offer enclosed with the ACL Complaint provided for a proposed civil liability amount of \$500. The Division conditioned the offer on Respondent’s filing his supplemental statement for 2018 within 20 days and waiving his right to a hearing. (Recording 37:14-37:36.) Mr. Cervantes testified that the \$500 amount of the Division’s settlement offer was “low enough to encourage voluntary

corrective action, but still high enough to encourage voluntary compliance in the future.” (Exh. PT-11, p. 7; see also Recording 37:47-37:52.) The settlement offer stated that failure to accept the offer within 20 days would render the offer “voidable” and “may” subject Respondent to the full proposed liability amount of \$2,000. (Exh. PT-6, Exh. A, p. 1.)²

3.4 Respondent’s Testimony and Arguments

Mr. Simoni testified that he diverts water from Uvas Creek using one or two pumps and a flip valve connected to an irrigation line. (Recording 2:05:23-2:05:55.) He uses this water for domestic use for 2 to 16 people, for irrigation of approximately 100 acres of crops for the maintenance and raising of cattle, and for stockwatering for 50 to 60 mother cows. (Recording 2:06:49-2:10:33; 2018 Supp. Statement, p. 1.) He testified that he became the primary owner of the water-right claims in Statement S000486 on April 23, 2006. (Exh. PT-4, p. 1; Recording 1:38:10-1:39:09.) He testified that riparian water is essential to his ranch’s functioning. (Recording 1:10:35-1:10:46.)

Mr. Simoni testified that a judge appointed a watermaster when Mr. Simoni was in high school, in a proceeding he identified as *Simoni v. Mellin et al.*, Santa Clara County Superior Court Case No. 121636. (Recording 2:11:41-2:12:38.) Mr. Simoni testified that this watermaster now is retired and does not file annual reports with either the Water Board or the court. (Recording 1:52:30-1:53:10; 2:11:01-2:12:38.) Since the watermaster retired, the neighbors have voluntarily gone on a pumping schedule during times of drought. (Recording 1:52:53-1:53:10.)

Mr. Simoni argued that the ACL Complaint against him should be dismissed as “constitutionally invalid” because the statutory reporting framework does not require the

² At the conclusion of Mr. Cervantes’ testimony, Mr. Simoni objected to the Prosecution Team offering Exhibits PT-1 through PT-11 into evidence. Mr. Simoni objected on the grounds that the exhibits are hearsay and violate his Sixth Amendment right to confront his accusers. (Recording 1:07:27-1:08:02.) The hearing officer noted the objection and admitted the exhibits subject to the rules on use of hearsay evidence in Government Code section 11513. (*Id.* 1:08:03-1:09:09.).

Water Board to provide formal notice to people required to file supplemental statements before their filing deadline. (Recording 13:40-14:06; 14:39-15:08; 2:40:52-2:41:48.)

Regarding the supplemental statements, Mr. Simoni stated that he believes “the only valid question the State Water Board can ask is, ‘What did you do with the water?’” and that the Water Board may not require reporting of monthly diversion amounts, especially for the Uvas Creek riparian system, which he said is “a self-enforcing system.”

(Recording 15:09-15:34.)³ He argued that, if there is water in the creek, then each landowner with land beside the creek may divert as much as he wants under *Simoni v. Mellin, supra*. (Recording 15:35-16:34.) Mr. Simoni argued that there is no need for “extreme oversight; this is an attempt to take by regulation.” (Recording 16:20-16:38.)

Mr. Simoni argued that the annual water-right reporting requirements are unconstitutional because the Water Board’s electronic reporting form “requires you to give answers they determine you can give” and there is “no good space to state your objections.” (Recording 16:35-17:08.) He said he has a problem with the form’s requirement that it be executed “under penalty of perjury”, which creates an “Orwellian scenario which punishes you for not telling a lie.” (Recording 17:09-17:32; 2:42:14-2:42:23; 2:48:40-2:48:48.)

Mr. Simoni said he thinks the water-right reporting requirements have a “chilling effect” because recording amounts of diverted water could mean in the future “they” would say, “well, you don’t get any more than that amount.” (Recording 18:45-19:07; 2:42:43-2:43:02; 2:48:49-2:50:12.)

Mr. Simoni said that he has tried for 20 years to “get a discussion with the State Water Board” and he argued the Board has been “issuing edicts” and “not discussing why we should comply.” (Recording 19:16-20:48; 1:11:48-1:11:58; 1:41:21-1:41:46.)

Mr. Simoni discussed the letters he sent to the Division in 1994 and 1995.

(Respondent’s exhs. A & B.) His 1994 letter states “we have no way of estimating the usage without assistance as there is no meter.” Mr. Simoni testified that he sent these

³ Mr. Simoni said the riparian-rights system is self-enforcing because if a diverter does not use the water, it “goes down the creek . . . then the public has use of it.” (Recording 17:33-17:56.)

letters because he questioned why he was being asked to report his diversions from Uvas Creek which was “already taken care of as a riparian creek”. (Recording 1:11:58-1:13:11.) Mr. Simoni maintained that the Division’s response to his 1995 letter (Respondent’s exhs. F & G) “was not in English” and that this was the only correspondence he received in 20 years. (Recording 1:13:12-1:13:33; 1:37:10-1:38:10.)

Mr. Simoni testified that, in 1995, he filed a “guess” and he had “no idea what the number [S000486] meant.” (Recording 1:55:56-1:56:10.) Mr. Simoni testified that “it was unclear to him what water right was being asked about.” (Recording 1:39:23-1:39:34.)⁴

Mr. Simoni argued that the alleged damage or harm from his not filing supplemental statements of water diversion and use “was not realistic” as to this section of Uvas Creek. (Recording 1:40:16-1:40:40.) He argued that “[t]he uses are governed by a judicial determination,” and “I can use water as much as I want because that is my property right.” (Recording 1:40:40-1:41:09.) As for the statutory factors in Water Code sections 1055.3 and 1848, subdivision (d), Mr. Simoni argued that “there is no harm to the reporting system” because the reporting “doesn’t stop how they can manage how much water is in the state and being used in the state.” (Recording 1:44:15-1:45:30.) He testified that he and his neighbors “have the right to determine how much water is used in a riparian section.” (Recording 1:45:00-1:45:40.)

3.5 Rulings on Parties’ Objections

At the start of the hearing, the Prosecution Team objected to the re-scheduling of the hearing after Respondent did not file a timely NOI. We overrule this objection.

Although Respondent’s actions required the AHO to re-schedule the hearing on short notice, both the Prosecution Team and the Respondent were able to present their testimony and arguments and the AHO held a fair hearing.

⁴ Mr. Simoni holds water-right License 10354 (Application A020439), which authorizes diversions from Hay Canyon, a tributary of Uvas Creek, and has filed annual licensee reports for it. The confusion he refers to here may concern which diversions and use to report under this license and which diversions and use to report under S000486.

At the conclusion of the Prosecution Team’s testimony, Respondent objected on Sixth Amendment grounds to the use of the Prosecution Team’s exhibits. We overrule this objection. Although Respondent did not specify which part of the Sixth Amendment he contends applies here, he presumably was relying on the part that gives criminal defendants the right to confront adverse witnesses. Because the present proceeding is not a criminal proceeding, the Sixth Amendment right to confrontation does not apply. (See, e.g., *People v. Sanchez* (2016) 63 Cal.4th 665, 680, fn. 6.) Also, all these exhibits were admissible under either Evidence Code section 1280 (exception to hearsay rule for official records) or under Government Code section 11513, subdivision (d) (to supplement or explain Mr. Cervantes’s testimony).

3.6 Analysis

As discussed above, Water Code section 1055.3 and section 1848, subdivision (d), direct the Board, in determining the amount of civil liability, to consider “all relevant circumstances, including, but not limited to,” the following factors: (a) “the extent of harm caused by the violation,” (b) “the nature and persistence of the violation,” (c) “the length of time over which the violation occurs,” and (d) “the corrective action, if any, taken by the violator.”

3.6.1 Extent of Harm Caused by the Violation

The State Water Board agrees with the Prosecution Team that timely filings of annual water-right reports, including supplemental statements, are necessary for the Division and the Board to timely and effectively administer California’s water rights system. The Board also agrees that violations of the report-filing requirements, including failures to file annual reports by the applicable deadlines, undermine the validity and transparency of the water rights system. Contrary to Respondent’s arguments, these harms apply to any failure to timely file an annual water-right report. There is no exception for the Uvas Creek system or any other stream system in California.

3.6.2 Nature and Persistence of the Violation

As Mr. Cervantes testified, the Division conducted outreach efforts to advise diverters of the need to file their supplemental statements, gave them opportunities to file their

supplemental statements late without incurring any penalties, and only issued the ACL Complaint after making these outreach efforts. (Exh. PT-11, p. 6.)

Although the ACL Complaint concerns only Respondent's failure to timely file his statement for his 2018 diversions and use, Respondent did not file each of his supplemental statements for 2009 through 2017 until several years after the applicable filing deadline.⁵ Also, Mr. Simoni's hearing testimony indicates that he still questions the importance of timely filings and whether it is even necessary for him to file annual reports.

3.6.3 Length of Time Over Which the Violation Occurred

Respondent filed his supplemental statement for 2018 on June 9, 2020, which was 344 days after the July 1, 2019 filing deadline and over seven months after he received the ACL Complaint.

3.6.4 Corrective Action

Respondent submitted his supplemental statement for his 2018 diversions and use on June 9, 2020. While this filing cured Respondent's failure to file a timely supplemental statement, there are some very serious deficiencies in the supplemental statement Respondent filed.

Respondent's supplemental statement states that the purposes of use of the diverted water are domestic, for 2 to 16 persons and landscaping, and stockwatering, for 50 cow-calf units and 2 to 3 bulls. For domestic use in fully plumbed homes, 55 to 75 gallons per day per person is considered reasonably necessary. (Cal. Code Regs., tit. 23, § 697, subd. (b).) For 16 people and the high end of this range, this equates to 36,000 gallons per month, which equals 0.11 acre-foot per month.⁶ For stockwatering,

⁵ Respondent filed his supplemental statement for 2009 in 2018, his supplemental statements for 2010 through 2015 in 2019, and his supplemental statements for 2016, 2017 and 2018 in 2020.

⁶ 16 people x 75 gallons per person per day x 30 days per month = 36,000 gallons per month. 36,000 gallons / 325,850 gallons per acre-foot = 0.11 acre-foot.

30 gallons per head per day is considered reasonable. (*Id.*) For 53 head of cattle, this equates to 47,700 gallons per month, which equals 0.15 acre-foot per month.⁷

Although Respondent's 2018 supplemental statement did not list irrigation in the purpose of use section, Respondent testified that he uses some of the water he diverts from Uvas Creek for irrigation of 100 acres of pasture to support his livestock. (Recording 2:06:49-2:10:33.) For irrigation of most portions of the Central Valley and elsewhere in the State where similar conditions prevail, which we assume includes Respondent's lands in Santa Clara County, one cubic-foot per second (cfs) of continuous flow is considered to be sufficient to irrigate 50 to 150 acres. (Cal. Code Regs., tit. 23, § 697, subd. (a)(1).) For 100 acres and the highest application rate in this range, the amount of water reasonably necessary to irrigate 100 acres is 119 acre-feet per month.⁸

Considering these numbers, Respondent's estimated total maximum reasonable water use is approximately 120 acre-feet per month during the irrigation season.⁹

Respondent's supplemental statement for 2018 lists 250 acre-feet of direct diversions and an additional 250 acre-feet of diversions or collection to storage, a total of 500 acre-feet, for each month of the year (a total of 6,000 acre-feet for 2018). These numbers, which far exceed the estimated maximum reasonable monthly water use discussed above, are not plausible. Even during the irrigation season, a diversion of 500 acre-feet per month would require application of water to a depth of almost five feet over the entire 100 acres of pasture. Over the entire year, the diversion of 6,000 acre-feet would require application of water to a depth of almost sixty feet over this area. It is

⁷ 53 head of cattle (50 cow-calf units and 3 bulls) x 30 gallons per head per day x 30 days per month = 47,700 gallons per month. 47,700 gallons / 325,850 gallons per acre-foot = 0.15 acre-foot.

⁸ 1 cfs per 50 acres x 100 acres = 2 cfs. 2 cfs x 1.9835 acre-feet per cfs-day = 3.967 acre-feet per day. 3.967 acre-feet per day x 30 days per month = 119 acre-feet per month.

⁹ 0.11 + 0.15 + 119 = 119.26 acre-feet. Landscape irrigation is listed under domestic uses in Respondent's supplemental statement, but no landscape area is specified. Absent any specific information about the size of this area, we estimate that the maximum total reasonable water use was approximately 120 acre-feet per month. This estimate includes slightly less than one acre-foot per month for landscape irrigation.

inconceivable that Respondent diverted or used this much water. These numbers are particularly implausible for the non-irrigation season (normally November through March), when irrigation normally is not necessary.¹⁰

Respondent's 2018 supplemental statement states that Respondent's diversions are not measured. (2018 Supp. Stmt., p. 1, ¶ 5.b.) California Code of Regulations, title 23, section 932, requires diverters to "install and maintain a measuring device or employ a measurement method capable of measuring the rate of diversion, rate of collection to storage . . . and the total volume of water diverted or collected to storage," unless the diversion is subject to an exemption.¹¹ The effective date of this regulation was January 1, 2018 for diverters with rights or claimed rights to divert more than 10 acre-feet of water per year. (Cal. Code Regs., tit. 23, § 932, subd. (c)(1)(C).) The Board's regulations provide for alternate compliance plans (Cal. Code Regs., tit. 23, § 935), and Respondent's supplemental statement of water diversion and use for 2018 states that an alternative compliance plan was submitted on July 1, 2010. However, Respondent did not submit a copy of this plan during the hearing and it is unlikely that he submitted such a plan in 2010, which was six years before the regulation went into effect in 2016. Here, "corrective action" is not just filing a supplemental statement; it is filing an accurate supplemental statement that indicates compliance with all applicable requirements, including requirements regarding measurements of amounts of

¹⁰ It is unclear why Respondent has listed 250 acre-feet as being diverted to storage each month. Respondent did not present any evidence that there is any facility in which he could store water diverted from Uvas Creek. Moreover, riparian rights do not authorize the storage of water in a reservoir during the wet season for subsequent use during the dry season. (*Seneca Consolidated Gold Mines Co. v. Great Western Power Co.* (1930) 209 Cal. 206, 216-217.)

¹¹ Respondent has not argued that he is exempt from these measuring requirements, and none of the exemptions appears to apply here. California Code of Regulations, title 23, section 932, subdivision (a)(2), provides that any person who has previously diverted or intends to divert more than 10 acre-feet of water per year and is required under Water Code Part 5.1 to file a Statement of Water Diversion and Use must install and maintain a measuring device.

diversions. Respondent did not do this when he filed his supplemental statement for 2018.¹²

3.6.5 Other Relevant Circumstances

As discussed in the following section of this order, Respondent has raised numerous arguments in opposition to the statutory and regulatory requirements that he properly meter and measure his diversions and prepare accurate supplemental statements of water diversion and use. Respondent's arguments generally ignore the applicable requirements and demonstrate an unwillingness to attempt to comply with these requirements.¹³

3.6.6 Responses to Respondent's Arguments

In his pre-hearing letters to the AHO and during the hearing, Respondent made several arguments. We address these arguments here.

1. AHO's Use of E-mail Notices. Respondent argues that the AHO's use of e-mail to notify Respondent of hearing deadlines was procedurally invalid. (See Respondent's July 21, 2020 letter to AHO, p. 2.)

The fundamental problem with this argument is that Respondent did not file an NOI by the June 3, 2020 deadline, even though he received the hearing notice on April 18, 2020, which specified this deadline. Without this NOI, the AHO could not know the best method of transmitting messages to Respondent. This problem was compounded by Respondent's use of an incorrect e-mail address (discussed above)

¹² Respondent filed his supplemental statement for his 2019 diversions and use before the July 1, 2020 deadline. This supplemental statement states that the diversion is measured, but it does not contain any attachments regarding measurement equipment or any measurement data files. Also, it contains the same implausible monthly diversion amounts that were listed in the supplemental statement for 2018. (2019 Supp. Stmt., pp. 1-2.)

¹³ The present matter just involves Respondent's failure to file his supplemental statement of water diversion and use for 2018 by the applicable deadline, and the statutory factors that the Board may consider in determining the appropriate amount of civil liability for this failure to make a timely filing. The Board is not expressing any view on whether Respondent has violated Water Code section 5107 by making a willful misstatement in any of his supplemental statements, or California Code of Regulations, title 23, section 938, by failing to measure the amounts of his diversions.

when he attempted to communicate with the AHO on June 9. The AHO did not receive any communications from Respondent until June 30, which was several weeks after the June 3 NOI filing deadline and only eight days before the July 8 hearing date. The AHO appropriately addressed these communication failures of Respondent by re-scheduling the hearing to July 24. This gave both parties sufficient time to prepare for the hearing.

2. Annual Division of Water Rights Notifications to Supplemental Statement Filers.

Respondent argues that the Water Board's annual water-right reporting requirements are "constitutionally invalid" because the Board does not notify diverters each year of the filing requirements. (See Recording 13:40-14:06; 14:39-15:08; 2:40:52-2:41:48.)

Respondent has not demonstrated that there is any constitutional requirement for the Board to notify filers of supplemental statements of their filing deadlines. Moreover, the Division of Water Rights formally notified Respondent through a letter dated February 15, 2019 of the July 1, 2019 filing deadline. (Exh. PT-2.) The Division also notified Respondent on August 30, 2019 of his failure to meet this deadline, which was more than six weeks before the Division issued its ACL Complaint. (Exh. PT-5.)

3. Compliance with Annual Reporting Requirements. Respondent argues that it is impossible for him to determine how to comply with the Water Board's reporting requirements, and particularly to determine how to separately report his Hay Canyon diversions and his Uvas Creek diversions. He asserts that Board staff have not responded to his inquiries, except for a "cryptic" reply to his 1995 letter "that made no sense." (Respondent's July 21, 2020 letter to AHO, pp. 2-3.)

Respondent's 1995 letter transmitted Respondent's supplemental statement of water diversion and use for 1992-1994 and asked the Board to inform him "what legislation started this additional reporting requirement." (Respondent's exh. B.)

The Division responded by sending Respondent a copy of his 1995 letter with mark-ups. This response confirmed that the supplemental statement forms were for Respondent to report his riparian use. (Respondent's exh. F.) Answering Respondent's question about the legislation, Division staff attached a note to Respondent's letter. The note stated, "The attached material is sent in reply to your recent request. If it does not meet the purpose of your inquiry, please communicate further with" the Board, and listed the

Board's mailing address. (*Id.*) Division staff also marked the letter "See attached / WR." (Respondent's exh. G.) During the hearing, Respondent did not submit a copy of the document that apparently was attached to the Division's 1995 response.

Respondent's November 19, 2019 letter to the AHO states that Respondent had "called the division [sic] of Water Rights many times and no one has returned my calls." (Respondent's exh. D.) However, during the hearing Respondent did not list the dates of any of these calls or any information about any messages he claims he left.

Subject to some exceptions that do not apply here, each person who diverts water in California is required to file an initial statement of water diversion and use (Water Code § 5101) and annual supplemental statements (Water Code § 5104). The Division's website provides e-mail and telephone contact information for people who want to contact Division staff for assistance in completing the forms.¹⁴ The Division's website also has several tutorial videos about filing requirements.¹⁵ If a diverter needs additional technical assistance, the Division's website contains a list of technical consultants¹⁶ and attorneys¹⁷ who work with water rights. If necessary, Respondent should seek assistance from qualified technical consultants or attorneys to prepare his supplemental statements. If Respondent has a specific question about how to fill out the supplemental statement form, then he may contact the Division, and, if necessary, follow up with a written inquiry.

As Mr. Cervantes testified, the Division receives 18,000 water-right reports each year. Considering this large volume, the Division cannot be expected to review each supplemental statement and follow up with each filer on any inconsistencies. Respondent ultimately is responsible for filling out each year's supplemental statement form with accurate information and submitting it to the Division by the applicable deadline. A general statement that "Division staff did not return my calls" is not a valid excuse for non-compliance.

¹⁴https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_diversion_reporting/

¹⁵ <https://www.waterboards.ca.gov/videos/rms.html>

¹⁶ https://www.waterboards.ca.gov/waterrights/board_info/consultants_list.html

¹⁷ https://www.waterboards.ca.gov/waterrights/board_info/consulting-attorneys.html

4. Superior Court Decision and Watermaster. Respondent argues that the Water Board may not require the reporting of Respondent's diversions under his claimed riparian right because his and his neighbors' riparian rights were adjudicated and a watermaster was appointed. (Respondent's July 21, 2020 letter to AHO, p. 3.)

Water Code section 5101 contains an exception to the requirement to file statements of water diversion and use for diversions that are included in annual reports filed with the court or the Board by a watermaster appointed by the court or pursuant to a statute to administer a final judgment determining rights to water. (Wat. Code, § 5101, subd. (e).) The exception may have applied when the watermaster appointed to administer the judgment in *Simoni v. Mellin, supra*, was performing his duties. However, Respondent testified that this watermaster has retired and no longer is filing any reports with the court or the Board, so this exception does not apply here. (Recording 1:52:30-1:53:10; 2:11:01-2:12:38.)

5. Application of Reporting Requirements to Riparian Diverters. Respondent argues that the system under which he and his neighbors divert water is "self-enforcing" such that if there is water in the creek, Respondent may divert as much as he wants under his claimed riparian rights. He then argues that there is no reason for diverters of water under riparian rights claims to have to file supplemental statements. Thus, in his request for hearing, Respondent stated "I would like to see an improvement or elimination of the reporting requirement as the riparian water rights system is self enforcing." (Respondent's exh. D.) In his June 23, 2020 letter to the AHO, Respondent states: "I do not see how any law can constitutionally require the reporting or [sic] a riparian right." (Respondent's June 23, 2020 letter to AHO, p. 2.)

There is no general exception in Water Code section 5101 for diversions under riparian rights claims. For the reasons described in detail in Mr. Cervantes's testimony, the Board needs to receive timely and accurate reports of all amounts of water diverted under riparian rights claims in California so that the Board can effectively administer California's water rights system. Respondent has not submitted any legal authorities regarding his constitutionality argument.

6. Measurement Requirements. Respondent argues that it is inappropriate for the Board to require Respondent to measure the amounts of water he diverts each month and that installing measurement facilities would destroy the “economic viability” of his ranch. (Respondent’s June 23, 2020 letter to AHO, p. 2.) Respondent asks “[w]hat is [sic] alternative compliance without meters is acceptable”? (Respondent’s July 21, 2020 letter to AHO, p. 4.)

The Legislature decided to require metering and reporting of water diversions when it adopted Water Code sections 1840 and 1841 in 2015. Section 1841 authorized the Board to adopt regulations requiring the measurement and reporting of water diversions and use. Following this statute, the Board adopted comprehensive regulations. (Cal. Code Regs., tit. 23, §§ 931-938.)

In appropriate cases, diverters may prepare alternative compliance plans and seek approval of them under section 935 of these regulations. Respondent has not demonstrated that he attempted to prepare and submit such an alternative compliance plan. Under section 935, the diverter is responsible for preparing any proposed alternative compliance plan. It is not appropriate for Respondent to attempt to shift this responsibility to the Division of Water Rights or the Board.

7. Computerized Reporting Forms. Respondent argues that it is inappropriate for the Board to require Respondent to use the Board’s electronic filing system to file his supplemental statements. He also argues it is inappropriate for the Board to require that he sign the supplemental statement forms under penalty of perjury before submitting the forms electronically, and that there is no space for objections. (Respondent’s June 23, 2020 letter to AHO, p. 2; Respondent’s July 21, 2020 letter to AHO, p. 3)

In 2009, the Division started requiring diverters to use the Division’s electronic filing system for supplemental statements of water diversion and use so the Division could create a uniform database of these reports. With this database, the Division can use the data in the supplemental statements to facilitate many of the Division’s activities regarding the administration of water rights in California. Contrary to Respondent’s argument, the supplemental statement forms contain a “Remarks” section in which

Respondent may state his objections, as Respondent did when he prepared his supplemental statements for each year between 2009 and 2018. The person preparing a supplemental statement also may attach documents, including documents stating objections, to the supplemental statement before filing it. Because the Board needs accurate information, the requirement that the supplemental statement be signed under penalty of perjury is appropriate.

8. Possible “Chilling Effect”. Respondent argues that the reporting requirements for supplemental statements could have a “chilling effect”, because the Board could use the data in the reports to limit future diversions. (Recording 18:45-19:07; 2:42:43-2:43:02.)

Respondent does not cite any legal authority for his argument that the possible existence of such a “chilling effect” would prevent the Board from implementing the statutes that require diverters to file supplemental statements.

9. Impacts of Respondent’s Diversions. Respondent argues that the damage or harm from his diversions was not “realistic” as to his part of the Uvas Creek, and therefore that no regulation is necessary. (Recording 15:09-16:34.)

The present case concerns measurement and reporting of diversions, not regulation of them. For the reasons discussed earlier in this order, measurement and reporting is critically important for all diversions of water in California, regardless of their effects.

10. Respondent’s Other Arguments and Motion to Dismiss ACL Complaint. The Board rejects all other arguments made by Respondent for or during the hearing in this matter. The Board denies Respondent’s motion to dismiss the ACL Complaint.

3.6.6 Conclusions Regarding Amount of Liability

Under Water Code section 1846, subdivision (a)(2), the maximum civil liability the Board may impose here is \$54,000. This amount is based on a maximum liability of \$500 for each day on which a violation occurs and the ACL Complaint’s allegation of 108 days of violations between July 1, when Respondent’s supplemental statement for 2018 was due, and October 17, the day before the ACL Complaint was issued. The ACL Complaint states that, having taken into consideration all relevant circumstances, the

Prosecution Team recommends imposition of \$2,000 in administrative civil liability. The Division's settlement offer provided for a reduced civil liability amount of \$500.

The Board concludes that \$6,000 is the appropriate civil liability amount here. We believe that this civil penalty amount, which is substantially higher than the recommended amount in the ACL Complaint, is appropriate for several reasons. First, Respondent did not file his supplemental statement until almost one year after the filing deadline. Such substantial delays seriously undermine the Division of Water Rights' and the Board's ability to timely and effectively administer California's water rights system. Second, the statement for 2018 that Respondent finally filed clearly contains very substantial overstatements of the amounts that Respondent diverted in 2018. These significant inaccuracies significantly diminish the value of the data in Respondent's supplemental statements. Third, Respondent has made no effort to measure, or even to accurately estimate, the amounts of his monthly diversions despite the applicable statutory and regulatory requirements. Fourth, Respondent's filing for 2018 continued his persistent pattern of late, obviously inaccurate filings that began with the supplemental statement he filed for 2009. Fifth, Respondent still has not demonstrated any willingness to attempt to correct most of these deficiencies. This unwillingness is demonstrated by his supplemental statement for 2019, which, although filed before the deadline, contains the same obviously inaccurate monthly diversion amounts. This unwillingness also is demonstrated by the many meritless arguments (discussed above) Respondent made before and during the hearing.

4.0 CONCLUSION

Respondent is required to pay administrative civil liability in the amount of \$6,000 for failure to file his supplemental statement for 2018 by the July 1, 2019 deadline.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board imposes administrative civil liability of \$6,000 on Respondent.
2. Respondent shall remit, within 30 days of the date of this Order, a check or money order payable to the State Water Resources Control Board in the amount of \$6,000, and shall transmit it to:

State Water Resources Control Board
Division of Water Rights
Enforcement Section
P. O. Box 2000
Sacramento, CA 95812-2000

3. Fulfillment by Respondent of his obligations under this Order will constitute full and final satisfaction of Respondent's liability for the violations described in this Order. The State Water Board retains its right to take further enforcement actions for any other or future violations.
4. If Respondent does not make the payment described in paragraph 2 above by the deadline specified in that paragraph, then this Order authorizes the Assistant Deputy Director for the State Water Board's Division of Water Rights to seek recovery of the administrative civil liability imposed, pursuant to Water Code section 1055.4.

CERTIFICATION


The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 5, 2021.

AYE: Chair E. Joaquin Esquivel
Vice Chair Dorene D'Adamo
Board Member Tam M. Doduc
Board Member Sean Maguire
Board Member Laurel Firestone

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board