

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Violation of Annual Reporting Requirements by

DAVID J O'LEARY

(Application A027443, License 12900)

SOURCE: UNNAMED STREAM, DAVIS CREEK

COUNTY: MENDOCINO

YOU ARE HEREBY GIVEN NOTICE THAT:

1. DAVID J O'LEARY (referred to herein as Licensee) is alleged to have violated Title 23, Chapter 2.7, Article 2, section 929 of the California Code of Regulations. Section 929 requires annual use reports to be filed by July 1st of the succeeding year for every water right License.
2. Water Code section 1846, subdivision (a)(2), provides that the State Water Board may administratively impose civil liability to any person or entity who violates a regulation or order adopted by the State Water Board not to exceed \$500 for each day in which the violation occurs. Water Code section 1846, subdivision (c) provides that civil liability may be imposed administratively by the State Water Board pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director for the State Water Board may issue a complaint to any person or entity to whom administrative civil liability (ACL) may be imposed. On June 5, 2012, 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. State Water Board Resolution 2012-0029 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

ALLEGATIONS

4. Senate Bill X7-8, which was signed into law in 2009, authorized the State Water Board to adopt regulations requiring online reporting of water diversions. Consistent with the Senate Bill, the State Water Board has adopted regulations requiring annual reporting of water diversion and use under permits and licenses (Annual Use Report), and developed a new online Report Management System (RMS) as a component of the enhanced Water Right Information Management System (eWRIMS). The regulation specifying annual permittee and licensee reporting requirements is codified at Title 23, Chapter 2.7, Article 2, sections 925 and 929 of the California Code of Regulations.
5. In January 2016, the Division of Water Rights (Division) mailed out a notice to Licensee reminding Licensee of the requirement to submit the 2015 Annual Use Report by June 30, 2016, as required pursuant to the California Code of Regulations and notifying Licensee that the 2015 Annual Use Report must be filed online. The notice provided instructions on how to access the RMS system and submit the 2015 Annual Use Report online and also notified Licensee to contact the Division by phone or email with any questions regarding the new reporting process.
6. Licensee failed to submit the 2015 Annual Use Report online by the deadline, June 30, 2016.
7. On August 25, 2016, the Division mailed out a deficiency letter requesting that the 2015 Annual Use

Report be submitted within 30 days and warned of the potential for enforcement with monetary penalties should the violation persist. As of November 28, 2016, 95 days after the date of the August 25, 2016, letter, Licensee has failed to submit their 2015 Annual Use Report to the Report Management System.

PROPOSED CIVIL LIABILITY

8. California Water Code section 1846(a)(2) provides that the State Water Board may administratively impose civil liability to any person or entity who violates a regulation or order adopted by the State Water Board in an amount not to exceed \$500 for each day in which the violation occurs.
9. As of November 28, 2016, Licensee has been in violation for 150 days. Based on the days of violation described in the previous paragraph, the maximum liability for the violations alleged is **\$75,000** (150 days at \$500/day).
10. In determining the appropriate amount of a civil liability, California Water Code section 1055.3 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.
11. In this case, the 2015 Annual Use Report was due by June 30, 2016. Despite the January 2016 initial notification and August 25, 2016 deficiency letter, Licensee to date has failed to submit the 2015 Annual Use Report. Failure to comply with the reporting requirements in a timely manner harms the Division's ability to accurately track water diversions from the source and effectively regulate the resources it is required to protect. Having taken into consideration all relevant circumstances, including but not limited to the failure of Licensee to submit the 2015 Annual Use Report, the harm of the missing Annual Report to the Division'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 recommends the imposition of **\$10,000** in administrative civil liability (Proposed Liability).

CONDITIONAL SETTLEMENT OFFER

12. To promote resolution of the alleged annual use filing violations and administrative efficiency, the Division makes the following conditional settlement offer (Conditional Offer). Licensee can avoid further enforcement action and settle the alleged failure to file annual use violation by agreeing to comply with the terms of the Conditional Offer, provided below, as well as in the *Acceptance of Conditional Settlement Offer and Waiver of Right to Hearing or Reconsideration* (Acceptance and Waiver) enclosed hereto as Exhibit "A."
13. This Conditional Offer requires Licensee to pay an Expedited Payment Amount of \$500, file the Annual Use Report within 20 days of receipt of this complaint, and waive the right to a hearing and reconsideration of the alleged violations. This Expedited Payment Amount is based on Licensee's failure to comply to date, maximum amount of allowed diversion under the License along with staff costs incurred in preparing the ACL complaint.
14. To accept the Conditional Offer, Licensee must:
 - a. Submit the 2015 annual use report online within **20** days of receipt of this complaint
 - b. Sign and return the Acceptance and Waiver within **20** days of receipt of this complaint, and
 - c. Remit the Expedited Payment Amount within **20** days of receipt of this complaint.

15. If there are extenuating circumstances that Licensee would like to discuss, such as an inability to pay the Expedited Payment Amount, then Licensee may contact Kathy Mrowka, Enforcement Section Manager, with that information as soon as possible but no later than the 20 days from receipt of this complaint.


RIGHT TO HEARING

16. Licensee 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).
17. If Licensee requests a hearing, Licensee 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, your hearing date will be one of the dates referenced in our included hearing notice. A separate notice setting the specific 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.
18. If Licensee requests 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.
19. If Licensee does not wish to request a hearing within 20 days of receipt of this complaint, Licensee shall waive the right to a hearing and reconsideration of this matter, and electronically file the necessary 2015 Annual Use Report and remit a cashier's check or money order for the Proposed Liability set forth in paragraph 11 above, to:

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

20. If Licensee neither requests a hearing within 20 days of the date this complaint is received nor accepts the Conditional Settlement Offer, 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



*John O'Hagan, Assistant Deputy Director
Division of Water Rights*

Dated: November 28, 2016