

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

DIVISION OF WATER RIGHTS

ORDER WR 2009-00XX-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion of Water by
Eddie Vierra Farms

SOURCE: Burns Cutoff, Middle River and Trapper Slough

COUNTY: San Joaquin County

YOU ARE HEREBY GIVEN NOTICE THAT:

The State Water Resources Control Board (State Water Board or Board) is authorized under California Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Eddie Vierra Farms (Eddie Vierra) to cease and desist an unauthorized diversion, collection and use of water in violation of section 1052 of the Water Code.

Eddie Vierra is alleged to have violated or is threatening to violate Water Code section 1831, which provides:

The State Water Board is authorized to issue a Cease and Desist Order (CDO) when it determines that any person is violating or threatening to violate any of the following:

- (1) The prohibition set forth in section 1052 against the diversion or use of water subject to division 2 (commencing with section 1000) of the Water Code other than as authorized by division 2.
- (2) Any term or condition of a permit, license, certification, or registration issued under division 2 of the Water Code.
- (3) Any decision or order of the board issued under part 2 (commencing with section 1200) of division 2 of the Water Code, section 275, or article 7 (commencing with section 13550) of chapter 7 of division 7 of the Water Code, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

On {DATE}, and in accordance with the provisions of section 1834 of the California Water Code, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against Eddie Vierra for the violation and threatened violation of the prohibition against unauthorized diversion and use of water. Pursuant to State Water Board Resolution 2007-0057, the Deputy Director for Water Rights is authorized to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a CDO in accordance with Water Code section 1831 et seq. State Water Board Resolution 2007-0057 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.

FACTS AND INFORMATION

The facts and information upon which this CDO is based are as follows:

1. On July 16, 2008, the State Water Board adopted a Strategic Workplan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Workplan). The Workplan emphasized the State Water Board's responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the Delta. As described in the Workplan, the Division initiated an investigation of the basis of water rights of existing diverters within the Delta. The Workplan also identified that, if and when illegal diversions were found, those diversions would be subject to enforcement action and directed to cease diversions, obtain a legal water right, or pursue a contract for water supplies with the Department of Water Resources, United States Bureau of Reclamation, or another party.
2. On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands within the Delta. Based on reviews of U.S. Geological Survey maps, aerial photography, and San Joaquin County Assessors Maps, the Division sent letters to each property owner that was determined to have been irrigating in the last few years, and for whom the Division has no record of any basis of right for water diversion. The Division requested that each property owner either: inform the Division within 60 days as to the basis of their right by filing a Statement of Water Diversion and Use with appropriate evidence; define a contractual basis for diversion of water; or cease diversion of water until a basis of right is secured. The letter also informed the contacted property owners that a failure to respond may result in enforcement action.
3. The Division mailed a copy of the February 18, 2009 letter to Eddie Vierra, as owners of San Joaquin County Assessor Parcel Nos. 131-190-04, 131-190-05 and 131-270-09. Eddie Vierra filed separate Statements of Water Diversion and Use on April 14, 2009 for (1) parcel 131-260-02 served with water from Burns Cutoff, (2) parcel 131-180-05 served with water from Middle River by the Woods Irrigation Company and Woods Robinson Vasques pumps, and (3) parcels 131-190-04, 131-190-05, 131-270-08 and 131-270-09 served with water from Trapper Slough. All three statements claim riparian and pre-1914 appropriative rights to irrigate various crops on the subject properties. The statements identify a season of diversion from March through November with the 1800's being the year of first use. The Statement also identifies that water is applied based on crops and climate but the annual amount diverted is unspecified.
4. Eddie Vierra is current owner of License 1345 (Application 5121). This license authorizes the diversion of 4.7 cubic-feet per second from May 1 to September 1 of each year from Burns Cutoff to irrigate 377.6 acres within Roberts Island. Eddie Vierra's parcel 131-260-02 contains 104.5 acres of the 377.6 acre place of use. Division staff concludes that License 1345 provides Eddie Vierra with a post-1914 basis of right to irrigate parcel 131-260-02 from May 1 through September 1 of each year. However, the diversion of water from Burns Cutoff to this parcel identified by Eddie Vierra's Statement of Water Diversion and Use as being made under pre-1914 appropriative and riparian right has not been adequately supported by evidence.
5. On September 23, 2009, the Division mailed a certified letter (Certification #7001 0320 0001 1831 6283) to Eddie Vierra at 522 1st Street, Escalon, CA 95320. The U.S. Postal Service confirms delivery of this letter on September 23, 2009. The letter advised that the San Joaquin County Assessor's Parcel maps show that these parcels do not have continuity to a surface stream. This lack of continuity indicates that a riparian basis of right typically would not exist. The letter requested that Eddie Vierra provide additional evidence to support the riparian claim for parcels 131-190-04, 131-190-05 and 131-270-09 have been preserved and/or documentation supporting initiation and continuous use of water under the pre-1914 claim of right. The letter warns of potential enforcement if an adequate response is not received. Parcel 131-270-08 should have been listed with the other parcels shown above since it contains a small part of the field acres irrigated.

6. The Statement of Water Diversion and Use filed by Eddie Vierra states that 174 acres of alfalfa were planted within parcels 131-190-04, 131-190-05, 131-270-08 and 131-270-09 in 2009. Crop data published by the San Joaquin County Agricultural Commission and aerial photographs indicate that about 174 acres of alfalfa has been grown on these parcels since 2004. According to the 1980 California Department of Water Resources publication "*Crop Water Use in California*," alfalfa has an estimated annual water consumption use of 4.1 acre-feet per acre. The estimated annual consumptive use of water for irrigation by Eddie Vierra on parcels 131-190-04, 131-190-05, 131-270-08 and 131-270-09 for the past five years has been 713 acre-feet.
7. On November 11, 2009, Jennifer Spaletta of Herum Crabtree, attorneys representing Eddie Vierra, requested extension of time until January 23, 2010 to submit additional evidence to support a basis of right for Eddie Vierra's diversions. The Division currently is lacking evidence to support diversions to parcels 131-190-04, 131-190-05, 131-270-08 and 131-270-09 in 2009. The Division also has insufficient evidence supporting riparian and/or pre-1914 claims of right for the irrigation of parcel 131-260-02 in excess of License 1345 and parcel 131-180-05 served with water from Middle River. Acceptable information would include, but is not limited to: a chain of title supporting riparian status for the parcel; any evidence which supports an existing or implied preservation of the riparian right established prior to severance of the parcel from the stream or other riparian parcels; evidence which verifies the first year of irrigation on the parcel prior to 1914 and documents the subsequent continuous use of water; or statements which provide an alternative valid basis of right for diversions of water to the parcel.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, Eddie Vierra shall immediately cease and desist from diverting water to parcels 131-190-04, 131-190-05, 131-270-08, 131-270-09 and 131-180-05 and shall cease and desist from diverting water in excess of the rights under License 1345 for the purpose of serving parcel 131-260-02 until the following are satisfied:

- (1) Eddie Vierra shall submit to the Division sufficient evidence establishing a basis of right or a water supply contract to serve these properties. No diversions shall be made to these parcels until Eddie Vierra receives approval from the Assistant Deputy Director for Water Rights to exercise the water right or contract.
- (2) Within 90 days of the date of this Order if no basis of right can be established, Eddie Vierra shall submit a plan showing how and when it will permanently remove the diversion works serving parcels 131-190-04, 131-190-05, 131-270-08 and 131-270-09. For parcel 131-180-05, Eddie Vierra shall provide sufficient evidence that diversions from the Woods Irrigation Company system serve the property and diversions under rights claimed by Eddie Vierra have been curtailed. Upon approval of the plan by the Assistant Deputy Director for Water Rights, Eddie Vierra shall diligently take the actions identified in the approved plan.
- (3) Because a portion of the diversions from Burns Cutoff by Eddie Vierra to parcel 131-260-02 is authorized by License 1345 (Application 5121), Eddie Vierra shall install an inline flow meter at the Kuckuk Pump within 90 days of the date of this Order. The inline flow meter shall be capable of registering instantaneous flow and total cumulative flow through the meter. Immediately after installation of the meter, Eddie Vierra shall maintain monthly records of the total amount of water diverted through the meter and records of the crop type and acreage served under License 1345, including parcels other than parcel 131-260-02. Eddie Vierra shall submit these records annually using the new Online Reporting System available online at: <http://www.waterboards.ca.gov/waterrights/>.

Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845 subd. (a).) Any person or entity that violates a CDO issued pursuant to chapter 12 may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Wat. Code, § 1845, subd. (b).) Civil liability may be imposed by the superior court or administratively by the State Water Board pursuant to Water Code section 1055.

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel
Assistant Deputy Director for Water Rights

Dated: