

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

DIVISION OF WATER RIGHTS

ORDER WR 2015 –00XX-DWR

CEASE AND DESIST ORDER

In the Matter of Threat of Unauthorized Diversion and Violation of Emergency Regulations
for Reporting Requested Information by

Mike Passalaqua and Peder Hoy

SOURCES: Tuolumne River

COUNTY: Stanislaus

Mike Passalaqua and Peder Hoy (collectively Diverters) have failed to provide information as required in State Water Resources Control Board (State Water Board or Board) Order WR-2015-0022-DWR, issued pursuant to 23 Cal. Code Regs. § 879, subdivision (c), an emergency regulation adopted pursuant to Water Code section 1058.5. Diverters have also violated or threaten to violate California Water Code section 1052, which prohibits the unauthorized diversion or use of water. Water Code section 1831 authorizes the State Water Board to issue a Cease and Desist Order (CDO) requiring Diverters to cease their diversion and use of water and come into compliance with the Water Code.

On {Date}, and in accordance with the provisions of Water Code section 1834, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against Diverters. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights 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. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to Resolution 2012-0029:

The State Water Board, or its delegee, finds that:

DROUGHT ACTIONS

1. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
2. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
3. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
4. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and

Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.

5. On October 31, 2014, the State Water Board issued a "Notice of Temporary Opportunity to Divert Water under Previously Curtailed Water Rights for Sacramento and San Joaquin River Watershed." The State Water Board temporarily lifted the curtailment of water rights for post-1914 water rights holders in the Sacramento-San Joaquin watershed and continued the opportunity to divert until 7 AM on November 3, 2014. The temporary lifting of the curtailment was based upon a predicted rain event.
6. On November 19, 2014, the State Water Board temporarily lifted the curtailment of post-1953 water rights in the Sacramento-San Joaquin watershed. The State Water Board did not issue any further notice of water unavailability for 2014.
7. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
8. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the on-going severe drought conditions present urgent challenges across the state including water shortages for municipal use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions persist. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2014, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
9. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.
10. On July 15, 2015, the State Water Board issued a clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring water right holders to curtail diversions under affected water rights, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded. However, for purposes of noticing water rights holder of the unavailability of water for their priority of right, the Unavailability Notices remain in effect.

PASSALACQUA - HOY WATER RIGHT

11. Diverters are the owners of a post-1914 appropriative water right under License 1173 (Application A005269). License 1173 allows for the direct diversion of 2.08 cubic feet per second of water from the Tuolumne River between May 1st and October 1st. The priority date for License 1173 is November 15, 1926.

12. On June 18, 2014, Division staff conducted an inspection of the Diverters' property, point of diversion (POD), and place of use to determine compliance with the notice that there was no water available for appropriation under the priority of License 1173. When the inspection was scheduled, Division staff informed the Diverters that the State Water Board has found that there is no water available under all post-1914 appropriative water rights in the San Joaquin River watershed. During the inspection, the Diverters indicated that they received the May 27, 2014 unavailability notice. At the inspection, Division staff observed that the Diverters were diverting water from the Tuolumne River from the same POD listed in their water right license for irrigation of 172 acres located on Stanislaus County Assessor's Parcel Numbers (APN) 017-045-027, 017-045-028 and 017-045-018. The Diverters' parcels are the same as the place of use that is shown on the place of use map for License 1173. Division staff asked the Diverters what basis of right they were diverting under. The Diverters indicated that they were diverting under a riparian basis of right. During the inspection, Division staff informed the Diverters that their properties do not meet the criteria for a riparian basis of right because the properties are not contiguous with the Tuolumne River.

FAILURE TO PROVIDE REQUIRED INFORMATION

13. On May 5, 2015, the Deputy Director for the Division of Water Rights issued Order WR 2015-0022-DWR (Information Order) to the Diverters to obtain necessary information, pursuant to 23 Cal. Code Regs., section 879, subdivision (c) to investigate and determine whether unauthorized diversions have occurred or were threatening to occur. Section 879(c) is a drought emergency regulation adopted pursuant to Water Code section 1058.5.
14. As the recipients of the Information Order, the Diverters were required to provide specific information identified in the Order within thirty (30) days of the receipt of the Order, pursuant to Water Code section 879(c).
15. According to mail delivery tracking, the Information Order was delivered certified by the U. S. Postal Service to Diverters on May 8, 2015 (Mike Passalacqua) and May 15, 2015 (Peder Hoy).
16. Diverters were required to submit the information required under the Information Order by a deadline of June 15, 2015, thirty (30) days following delivery of the Information Order.
17. As of October 20, 2015, Diverters have not submitted the information identified in the Information Order. Therefore, the Division does not have information that indicates that the Diverters have a valid basis of right for water diverted by the Diverters after receiving the 2014 and 2015 Notices of Unavailability of Water.
18. The circumstances described above indicate that Diverters have failed to submit the information required under the Information Order. The Information Order was issued pursuant to 23 Cal. Code Regs. Section 879, subdivision (c), a drought emergency regulation adopted pursuant to Water Code section 1058.5. Thus, Diverters are subject to a CDO pursuant to Water Code section 1831, subdivision (d)(4), which provides that the State Water Board may issue a CDO in response to a violation or threatened violation of a regulation adopted under section 1058.5.

THREAT OF UNAUTHORIZED DIVERSIONS

19. Diverters have claimed they divert water under a riparian basis of right when water is unavailable under their appropriative water right License 1173. According to the parcel ownership information available to Division staff, the Diverters' point of diversion (POD) is on a parcel contiguous with the Tuolumne River. However, the Diverters do not own the POD parcel. Neither of the Diverters' parcels are contiguous with the Tuolumne River, which is one of the criteria that typically must be satisfied when exercising a riparian basis of right.

20. Based on a review of US Bureau of Land Management patent maps, a portion of the current place of use was never riparian. Therefore, water diverted from the Tuolumne River under a riparian basis of right cannot be used on at least a portion of the combined area of the two parcels owned by the Diverters. The Division does not have information to determine if the remainder of the place of use has retained riparian water rights after the parcels were subdivided.
21. Aerial maps of the place of use dated March 31, 2015, show that approximately three quarters of the place of use is green and had been planted with crops while the remainder shows an immature orchard.
22. On August 27, 2015, Division staff observed a corn crop on a portion of the place of use that was never riparian. Because the crops and orchard require irrigation, the Diverters need a source of water. The Diverters do not have an alternate source of water to the Tuolumne River nor have the Diverters provided documentation of an alternate basis of right to divert water from the Tuolumne River. The aforementioned facts support the conclusion that the Diverters had diverted water from the Tuolumne River in 2015 without a valid basis of right for the purposes of irrigation.
23. The circumstances described above indicate that Diverters are diverting or are threatening to divert water without a valid basis of right. Diversion without a valid basis of right constitutes unauthorized water diversion and use. Unauthorized diversion is prohibited, and is a trespass. (Wat. Code § 1052.) Thus, Diverters are subject to a CDO pursuant to Water Code section 1831, subdivision (d)(1), which provides that the State Water Board may issue a CDO in response to a violation or threatened violation of the prohibition in section 1052 against unauthorized diversion.
24. This enforcement action takes into consideration that there was no water available to divert under the priority of License 1173 during the identified violation periods in 2014 and 2015. The Diverters claimed an alternate, more senior, basis of right when water was not available under their license. However, Diverters have not provided the required information to support their claims. Consequently, Diverters lack a basis for diversion under all claimed basis of right until such time as water becomes available to divert under License 1173.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the California Water Code, that:

1. Diverters shall immediately cease diversions under claim of a riparian right from the Tuolumne River for use on the portion of their land that was never riparian.
2. Diverters shall immediately cease riparian diversions for use on the portion of their land that appears not to be riparian until they provide documentation that the lands retain a valid riparian right by providing the information required under Order WR 2015-0022-DWR (Order) and the Division concurs that the information is supportive of a riparian right. The submittal requirements are summarized in (A) through (C). Irrespective of whether Diverters are in possession of documentation supporting their riparian right claim, Diverters are required to provide the diversion information and all other information required by the Order which is in their possession or which they can obtain.
 - (A) The monthly amounts of water diverted and the basis of right allowing for the diversions for each month in 2014 and January through October 2015, and the anticipated monthly amount of water to be diverted and the basis of right for each month in 2015 beginning with November 2015. For direct diversion, the diversion information shall include the total amount of water diverted in the month and the maximum rate of diversion for each month. For storage, the diversion information shall include the quantity collected to storage each month. For all methods of diversion, you are requested to identify the method used to determine the amounts reported (Wat. Code § 5103(e).) and the primary use of water. This information shall be filed electronically at:
http://water24a/waterrights/water_issues/programs/ewrims/curtailment/wateruseinfo.shtml.

- (B) Identification and location of the POD and place of use for water right being claimed for each POD, the purpose of use, and the place of use being served with acreage and crop type, if applicable. All documentation supporting the type of water right claimed, including the property patent date and patent map, if riparian right. If pre-1914 right is claimed, a copy of notice filed with the county, copy of property deed, and all other information supporting the pre-1914 right pertaining to initial diversion and continued beneficial use of water. This information is an attachment to the report filed in (A) and must be filed electronically and mailed to:
SWRCB-2014informational-order@waterboards.ca.govmailto:SWRCB-2014informational-order@waterboards.ca.gov.
- (C) The monthly diversion amount for each month starting with November 2015 shall be submitted by the fifth (5th) of each succeeding month until the drought proclamations and orders described in Paragraph 8 above are rescinded. This information shall be filed electronically at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/wateruseinfo_actual.php.
3. Diverters shall immediately cease diversions under License 1173 until such time as hydrologic conditions change as a result of storm events or general improvement in the watershed. This condition is considered lifted upon State Water Board notification that diversions under the license may resume.

Consequences of Non-Compliance

In the event Diverters fail to comply with the requirements of this Order, Diverters shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to Water Code section 1845. Violation of a CDO issued during a period for which the Governor has issued a proclamation of state of emergency based on drought conditions is subject to the imposition of administrative civil liability, pursuant to Water Code section 1845, subdivision (b)(1)(A) in the amount not to exceed \$10,000 for each day in which the violations occurs, or referral to the Attorney General to take further injunctive enforcement actions as described in Water Code section 1845, subdivision (a):

Upon the failure of any person to comply with a cease and desist order issued by the Board, pursuant to this chapter, the Attorney General, upon request of the 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.

Reservation of Enforcement Authority and Discretion

Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including, but not limited to, the authority to bring enforcement against Diverters for unauthorized diversion or use of water in violation of Water Code section 1052.

Regulatory Changes

Nothing in this Order shall excuse Diverters from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

Compliance with Other Regulatory Requirements

Nothing in this Order shall excuse Diverters from meeting any additional regulatory requirement that may be imposed by other local, state, or federal regulatory entities for corrective actions taken by Diverters to

comply with this Order.

Exemption from CEQA

This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a) (2), Title 14, of the California Code of Regulations.

STATE WATER RESOURCES CONTROL BOARD

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

Dated:

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