

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

ORDER WR 2020-____

In the Matter of the Administrative Civil Liability Complaint
against

**Timberlake Estates Homeowners Association
Water Right License 7716 (Application A017108)**

SOURCE: Unnamed creek, tributary to Bunch Creek thence North Fork American River

COUNTY: Placer

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 July 1, 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 Timberlake Estates Homeowners Association (Respondent), holder of

water-right License 7716, which was issued on April 6, 1966 on Application A017108. 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 re delegated this authority to the Assistant Deputy Director.

The ACL Complaint contained the following allegations: (a) Respondent is the owner of record of water-right License 7716; (b) Respondent failed to file the Annual Diversion Water Diversion and Use Report for its 2018 diversions and use by the April 1, 2019 deadline; (c) on June 12, 2019, the Division sent Respondent a Notice of Deficiency, which notified Respondent that the Division had not received Respondent's Annual Diversion and Use Report for 2018; (d) the Notice of Deficiency informed Respondent that the failure to file an Annual Diversion and Use Report is a violation of a Board regulation, title 23, California Code of Regulations, section 929, for which a civil liability of \$500 may be assessed for each day that the report is not submitted after the April 1, 2019 deadline; and (e) as of July 1, 2019, Respondent still had not filed the Annual Diversion and Use Report.

The ACL Complaint stated that the total maximum potential liability for Respondent's failure to file this annual report was \$45,000, based on an alleged violation for 90 days and the maximum penalty of \$500 per day under Water Code section 1846 (90 x \$500 = \$45,000). 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. (Exh. PT-7.)

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: (a) submit the licensee report for 2018 diversions under License 7716 within 20 days after Respondent’s receipt of the ACL Complaint; (b) sign and return the “Acceptance and Waiver” that was 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 amount and waive its right to contest the ACL Complaint; and (c) 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, then the offer would be “voidable” and Respondent “may” be subject to the ACL Complaint’s full proposed liability amount of \$2,000.¹

2.2 Respondent’s Submittal of Licensee Report

On July 7, 2019, Respondent electronically submitted its Report of Licensee for 2018 for License 7716 to the Division’s electronic Water Right Information System.

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.

2.3 Respondent's Request for Hearing

On July 10, 2019, Respondent sent a letter to the AHO, which requested a hearing on the ACL Complaint. The AHO received this letter on July 11. Respondent did not accept the Division's Expedited Settlement Offer.

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 9, 2020, the AHO issued its Notice of Public Hearing in this matter. The AHO held its hearing as scheduled on June 19, 2020. Kenneth Petruzzelli of the Board's Office of Enforcement appeared as the attorney for the Division's Prosecution Team and Roberto Cervantes, Supervising Water Resource Control Engineer and head of the Division's Enforcement Section, testified for the Prosecution Team. Debra Shaffer, Treasurer of Respondent, appeared and testified for Respondent.

2.5 Authority to Assess Civil Liability

California Code of Regulations, title 23, section 929, requires holders of water-right licenses to submit Annual Water Diversion and Use Reports for each year's diversions and use no later than April 1 of the following year. (See Wat. Code, §§ 1840-1841.)

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 in which the violation occurs.

3.0 DISCUSSION

3.1 Administrative Civil Liability

It is undisputed that Respondent did not file its Report of Licensee for 2018 until July 7, 2019. This was after the April 1, 2019 deadline in California Code of Regulations, title 23, section 929, subdivision (b). The sole question here is what amount of civil liability, if any, should be imposed on Respondent for its 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

During the hearing, Mr. Cervantes discussed the Water Code section 1055.3 and section 1848, subdivision (d) factors.

Regarding the “extent of harm” factor, Mr. Cervantes testified that information included in annual water-right licensee 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. (June 19, 2020 Recording of Hearing (Recording) 27:49-28:19.) He

testified that, without this information, the Board is limited in its ability to issue accurate permits or grant petitions, determine availability of water and the likelihood a diversion may cause harm, conduct timely and accurate billings for water use, conduct efficient, fair and accurate drought management, develop instream flow requirements and protect public trust resources, build and calibrate water resource planning models, and respond to and evaluate complaints and alleged illegal diversions. He testified that, on an aggregate basis, “these types of water right violations undermine the validity and transparency of the water rights system.” (Exh. PT-9, p. 6; Recording 28:20-29:22.)

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 water-right reports, and that the Division issued the ACL Complaint to Respondent only after conducting these outreach efforts. (Exh. PT-9, pp. 6-7; Recording 24:10-27:07; 29:23-30:09.)

Regarding the “length of time over which the violation occurs” factor, Mr. Cervantes testified: (a) 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-9, p. 7; Recording 30:12-30:48); (b) “[t]he value of the data and information included in the annual report for inclusion in water availability forecasting is diminished when not obtained timely” (Recording 30:12-30:26); and (c) late-filed reports contribute to “water resource modeling uncertainty and inaccuracy” (*id.* 30:26-30:48).

Regarding the “corrective action” factor, Mr. Cervantes testified that Respondent filed its annual report on July 7, 2019, which was after significant efforts by the Division to compel Respondent to comply with the filing requirement. (Exh. PT-9, p. 7; Recording 30:53-31:25.)

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 taking into account the resources spent by the State Water Board compelling the Diverter to file the requisite Annual Report.” (Exh. PT-9, p. 8.) Mr. Cervantes testified that Respondent’s filing on July 7, 2019 did not warrant a reduction in the proposed penalty. (Recording 30:50-31:28.)

The Division’s expedited settlement offer that was enclosed with the ACL Complaint provided for a civil liability amount of \$500. This offer was conditioned on Respondent’s filing its water-right licensee report for 2018 within 20 days and waiving its right to a hearing. 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-9, p. 8; Recording 32:10-32:18.) 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-7, exh. A, p. 1.)

3.4 Respondent’s Testimony and Arguments

During the hearing, Ms. Shaffer testified that Respondent is a small homeowners association that covers 19 parcels. (Recording 1:20:12-1:21:35.) She testified that

Respondent's primary purpose is to maintain roads that serve these parcels. (*Id.*) She testified that the pond covered by water-right License 7716 catches rainfall runoff that flows through an unnamed creek into the pond, that there is no way to stop the pond from collecting this runoff, and that, once the pond fills every year, it spills any remaining inflow. (*Id.* 1:22:20-1:23:40.) The authorized purposes of use in License 7716 are recreation and wildlife enhancement. The pond dries up each year by summer. (*Id.* 1:24:17-1:24:35.) Ms. Shaffer testified that, through telephone conversations with Division staff, she has learned how to complete the annual report forms, the pond now has a staff gage, and she has prepared a spreadsheet of staff gage readings to help her complete the annual reports. (*Id.* 1:24:37-1:26:07.)

Ms. Shaffer testified that, beginning in 2017, her husband has had some very serious medical conditions that required him to be hospitalized for over 80 days in 2017 and over 40 days in 2018. (Recording 1:26:33-1:27:01.) Her request for hearing states that her husband was in a hospital in San Francisco from late June through July 4, 2019, and that, as a result, she was not able to file the licensee report for 2018 until July 7, 2019. (See also Recording 1:27:41-1:28:42.) She emphasized that she completed this filing the day before she received the ACL Complaint on July 8.² (*Id.* 1:28:11-1:28:27.) She testified that she understands the importance of timely filings of the annual licensee reports and that she personally will pay any penalty that the Board imposes on Respondent. (*Id.* 1:31:07-1:31:46.)

² The Division's records confirm that Ms. Shaffer filed the report on July 7 and received the ACL Complaint on July 8, 2019. (See exhibits PT-8 and PT-11.)

Ms. Shaffer testified that, after she received the ACL Complaint, she called Division staff and asked them if they could dismiss the ACL Complaint because she already had filed the 2018 licensee report. She testified that Division staff told her that the only thing she could do at that time to contest the complaint was to request a hearing. (Recording 1:29:00-1:29:49.)

Ms. Shaffer testified that she did not accept the Division's settlement offer because she did not want to waive Respondent's right to a hearing. She wanted an opportunity to explain the circumstances and reasons for the late filing. She testified that her understanding was that, even if she did not accept the Division's offer and instead requested a hearing, the maximum penalty would be \$500. (Recording 1:29:34-1:30:15.)

3.5 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."

3.5.1 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 licensee reports like the one involved in this hearing, are necessary for the Division and the Board to be able to timely 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. Even though the water-right license involved in this hearing is only for a small pond on an ephemeral creek, the cumulative effects of all late filings of annual water-right reports are significant.

3.5.2 Nature and Persistence of Violation

During the hearing, Mr. Cervantes testified about a Prosecution Team exhibit that lists the filing dates for Respondent's annual water-right licensee reports for 2008 through 2019. (Exh. PT-8.) Although this exhibit indicates that Respondent's filings of its annual reports for several years before 2018 may have been late, Mr. Cervantes did not argue that the Board should consider the lateness of those prior reports when it evaluates the nature and persistence of Respondent's violation. (See exh. PT-9, pp. 6-7.)

Ms. Shaffer's testimony indicates that she now understands the importance of making timely filings, and the Prosecution Team's exhibit indicates that Respondent filed its water-right licensee report for 2019 on March 7, 2020, which was before the April 1, 2020 deadline. (Exh. PT-8.)

3.5.3 Length of Time Over Which the Violation Occurred

Respondent filed its water-right licensee report for 2018 on July 7, 2019, which was 97 days after the April 1, 2019 deadline.

3.5.4 Corrective Action

Respondent corrected the violation by filing the licensee report for 2018 on July 7, 2019.

3.5.5 Other Relevant Circumstances

Other relevant circumstances are: (a) Ms. Shaffer was solely responsible for preparing and filing Respondent's water-right licensee report for 2018 and was preoccupied with her husband's serious medical problems during the first half of 2019; and (b) Ms. Shaffer was contrite during the hearing, took full responsibility for the late filing, acknowledged the importance of timely filings, and timely filed Respondent's water-right licensee report for 2019.

3.5.6 Conclusion Regarding Amount of Liability

Under Water Code section 1846, subdivision (a)(2), the maximum civil liability the Board may impose here is \$45,000. The amount is based on a maximum liability of \$500 for each day on which a violation occurs and the ACL Complaint's allegation of 90 days of violations between April 1, when Respondent's water-right licensee report for 2018 was due, and July 1, when the ACL Complaint was issued.³

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.

³ The period from April 1 to July 1 actually contains 91 days. We use the 90 days described in the ACL Complaint to determine the maximum potential administrative civil liability.

The Board concludes that \$500 is the appropriate civil liability amount here. While the Division's offer required Respondent to waive its right to a hearing to obtain this reduced civil liability amount, we do not believe that Respondent should be penalized for exercising its right to a hearing. Respondent complied with the part of the Division's settlement offer that required Respondent to file its water-right licensee report for 2018 within 20 days of Respondent's receipt of the ACL Complaint, and Respondent did not take any actions after its receipt of the ACL Complaint and settlement offer that would justify higher a civil liability amount. Also, during the hearing Ms. Shaffer acknowledged the importance of filing Respondent's future annual water-right licensee reports on time, and she has done so with Respondent's report for 2019. Consistent with Mr. Cervantes's testimony, we believe that \$500 civil liability here will be "high enough to encourage voluntary compliance in the future." (See exh. PT-9, p. 8.)

4.0 CONCLUSION

Respondent is required to pay administrative civil liability in the amount of \$500 for its failure to file its water-right licensee report for 2018 by the April 1, 2019 deadline.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board imposes administrative civil liability of \$500 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 \$500, 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 its 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 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 _____, 2020.

AYE:
NAY:
ABSENT:
ABSTAIN:

Jeanine Townsend, Clerk to the Board