

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Failure to Submit Information of Water Diversion and Use by

Anthony F. Cubre Jr. Trustee

SOURCE: San Joaquin River

COUNTY: Fresno

YOU ARE HEREBY GIVEN NOTICE THAT:

1. On July 2, 2014, the State Water Board adopted emergency regulations for Curtailment of Water Diversions to Protect Senior Water Rights (California Code of Regulations, title 23, adding sections 875 and 878.3, and amending sections 878.1 and 879¹) (Regulations). The Regulations were reviewed by the Office of Administrative Law and went into effect on July 16, 2014. The Regulations establish a drought emergency curtailment method for post-1914 water right holders and requirements for riparian and pre-1914 rights holders to provide additional information in specific circumstances.
2. A violation of the Regulations is immediately enforceable by Administrative Civil Liability (ACL) of up to \$500 for each day of violation. (Wat. Code § 1846, subd. (a)(2).) This penalty is in addition to any fines for violation of a Cease and Desist Order (CDO) or to any ACL Complaint for unlawful diversion.
3. Pursuant to Regulations, section 879, subdivision (c), the Deputy Director for the Division of Water Rights (Division) has delegated authority to issue an Order requiring riparian or pre-1914 water right holders to provide additional information. Section 879, subdivision (c) states:

Upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 appropriative water right holder or upon receipt of information that indicates unlawful diversions of stored water by riparians or pre-1914 appropriative water right holders, the Deputy Director may issue an order under this article requiring such water right holders to provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year. Any water right holder receiving an order under this subdivision shall provide the requested information within five (5) days.

¹ All further section references are to California Code of Regulations, title 23 unless otherwise indicated.

BACKGROUND

4. The United States Bureau of Reclamation (Reclamation) appropriates and stores water from the San Joaquin River at Friant Dam on the boundary of Fresno and Madera Counties, pursuant to License 1986 and Permits 11885, 11886, and 11887, as part of the Central Valley Project. Reclamation has obligations under various contracts between Reclamation and water right claimants along the San Joaquin River between the dam and Gravelly Ford ("Holding Contracts") to maintain at least five (5) cubic feet per second (cfs) flow at Gravelly Ford.
5. In May 2014, the Division received a complaint against Reclamation alleging that there was not 5 cfs reaching Gravelly Ford. Reclamation staff informed the Division that it suspected unauthorized diversions between Friant Dam and Gravelly Ford. In June 2014, Reclamation conducted a survey of the San Joaquin River between Friant Dam and Gravelly Ford, and on July 14, 2014, Reclamation identified 20 potentially unauthorized diversions to Division staff. Additional information regarding these 20 diversions is necessary to determine if there have been unauthorized diversions or if there is potential for unauthorized diversion.
6. On August 7, 2014, Division staff observed 13 of the 20 potentially unauthorized diversions by boat from the San Joaquin River. Subsequent investigation by Division staff revealed that some of these diversions were not associated with any post-1914 appropriative rights, nor with any Statements submitted pursuant to Water Code section 5101 (i.e., regarding riparian or pre-1914 rights). Based on observations by Reclamation and Division staff during the two surveys, eight (8) of the potentially unauthorized pumps were operating at the time of one or both inspections. These eight (8) diversions appear to be serving parcels that may claim riparian rights. Reclamation releases water based on a schedule to meet its various obligations under contracts. During the months of March, April, and May 2014, the water released pursuant to the schedule did not meet the intended obligations consistently, indicating that there may have been unauthorized diversions of water below Friant Dam.
7. Division records indicate that there are riparian and pre-1914 appropriative water right claimants on the San Joaquin River between Friant Dam and Gravelly Ford for which Statements of Water Diversion and Use (Statements) have been filed pursuant to Water Code section 5101, as determined from the State Water Board's electronic water rights information management system (eWRIMS) and Report Management System (RMS). Additional information regarding these known diversions is necessary to determine if there have been unauthorized diversions or if there is potential for unauthorized diversion.
8. On November 6, 2014, the Deputy Director for the Division of Water Rights issued Order WR 2014-0030-DWR (Information Order) affecting all existing and potential pre-1914 and riparian water right claimants along the San Joaquin River between Friant Dam and Gravelly Ford to obtain necessary information, pursuant to section 879, subdivision (c) to investigate the complaint against Reclamation and determine whether unauthorized diversions have occurred or were occurring. The recipients of the Information Order were required to provide specific information identified in the Order within five (5) days of the receipt of the Order, pursuant to Water Code section 879(c).

ALLEGATIONS

9. Anthony F. Cubre Jr Trustee (Diverter) owns property identified by Fresno County Assessor as Parcel Number 016-440-50S. A potentially unauthorized diversion was identified at this site during a survey of the San Joaquin River between Friant Dam and Gravelly Ford. On November 6, 2014, the Division mailed the Information Order to Diverter notifying Diverter of the requirement to provide specific information within five (5) days of the receipt of the Order.

10. According to mail delivery tracking information available through the U.S. Postal Service's website, the Information Order was delivered certified by the U.S. Postal Service to Diverter on November 10, 2014.
11. Diverter was required to submit the information required under the Information Order by November 15, 2014, five (5) days following receipt of the Information Order. The Division received a letter from Diverter on November 18, 2014 stating that he received the Information Order and would try to submit the required information within 30 days. In a letter dated February 19, 2015, the attorney for Diverter stated that the property is riparian. However, information subsequently received by the Division indicates that Diverter's property is actually subject to a Bureau of Reclamation Holding Contract, No. 106. In any event, the Information Order applies to Diverter. As of February 28, 2015, Diverter has not submitted any of the substantive information identified in the Information Order.

PROPOSED CIVIL LIABILITY

12. Under Regulations, section 879(c), the deadline for submittal of information identified in the Information Order by Diverter was November 15, 2014. Water Code section 1846, subdivision (a) provides that the State Water Board may administratively impose civil liability pursuant to Water Code section 1055 for violation of the Regulations in an amount not to exceed \$500 per day of violation. Diverter failed to provide the required information by November 15, 2014, thus starting the count for days of violation.
13. As of February 28, 2015, Diverter had not provided the required information and had been past the deadline for providing the information by 105 days; therefore, Diverter is subject to a maximum civil liability in the amount of \$52,500 (105 days at \$500 per day).
14. In determining the appropriate amount of a civil liability, 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.
15. In this case, the information identified in the Order was due by November 15, 2014. Failure to provide the information requirements in a timely manner harms the Division's ability to accurately track water diversions from the water course and effectively regulate the resources it is required to protect. Diverter has not yet complied with the Order.
16. Having taken into consideration all relevant circumstances, including, but not limited to, Diverter's failure to submit the required information, the harm of the missing information 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 Assistant Deputy Director of Water Rights recommends the imposition of \$52,500 in ACL (Proposed Liability).

CONDITIONAL SETTLEMENT OFFER

17. To promote resolution of the alleged reporting violations, the Assistant Deputy Director of Water Rights makes the following Conditional Settlement Offer (Conditional Offer). Diverter can avoid further enforcement action and settle the alleged failure to provide information of water diversion and use violation by agreeing to comply with the terms of the Conditional Settlement Offer, provided below, as well as in the "Acceptance of Conditional Settlement Offer and Waiver of Right to Hearing or Reconsideration" (hereafter "Acceptance and Waiver") attached hereto as Exhibit "A."

18. The Conditional Offer requires Diverter to pay an expedited payment amount (hereinafter "Expedited Payment Amount") of \$5,000, provide the information required in the Order, and waive the right to a hearing and reconsideration of the alleged violations.
19. To accept the Conditional Offer, you must sign and return the Acceptance and Waiver along with the Expedited Payment Amount and provide the necessary information within 20 days of receipt of this complaint.
20. If there are extenuating circumstances that you would like to discuss, such as an inability to pay the Expedited Payment Amount, then you can contact the Division with that information as soon as possible but no later than the 20 days from receipt of this complaint.

RIGHT TO HEARING

21. Diverter 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 you receive this complaint. (Water Code, sec. 1055, subd. (b).)
22. If Diverter requests a hearing, Diverter 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, a separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date. The State Water Board may convene a settlement conference prior to noticing a hearing date.
23. If Diverter 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.
24. If Diverter does not remit the Acceptance and Waiver, the Expedited Payment Amount, and electronically file the necessary information, or request a hearing within 20 days of the date this complaint is received, then the State Water Board will issue a final 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: **MAR 17 2015**

ORDER NO. 20xx-00xx-DWR

EXHIBIT A

ACCEPTANCE OF CONDITIONAL SETTLEMENT OFFER
AND WAIVER OF RIGHT TO HEARING AND RECONSIDERATION

Anthony F. Cubre Jr Trustee
Source: San Joaquin River
County: FRESNO

By signing below and returning this Acceptance of Conditional Settlement Offer and Waiver of Right to Hearing and Reconsideration (Acceptance and Waiver) to the State Water Resources Control Board (State Water Board), Anthony F. Cubre Jr Trustee hereby accepts the State Water Board's conditional settlement offer (Conditional Offer) and waives the right to a hearing before and reconsideration by the State Water Board regarding violations alleged in the Administrative Civil Liability Complaint issued to Diverter (ACL Complaint) to which this Acceptance and Waiver is attached as Exhibit "A," as well as the draft Cease and Desist Order (draft CDO) issued concurrently therewith.

Anthony F. Cubre Jr Trustee agrees to perform the following within 20 days of receipt of the ACL Complaint and draft CDO:

- **Pay administrative civil liability as authorized by California Water Code section 1846, subdivision (c) in the amount of \$5,000** (Expedited Payment Amount) by cashier's check or by certified check made payable to the "State Water Resources Control Board" for deposit into the Water Rights Fund, which shall be deemed payment in full of any civil liability pursuant to California Water Code section 1846 (c), that otherwise might be assessed for the violations described in the ACL Complaint.
- **Provide the necessary Information of Water Diversion and Use required by Order WR 2014 – 0030-DWR (Order) and the draft CDO.**

Anthony F. Cubre Jr Trustee understands that this Acceptance and Waiver waives the right to contest the allegations in the draft CDO and ACL Complaint and the civil liability amount proposed for those violations.

Anthony F. Cubre Jr Trustee understands that the failure to submit payment of the Expedited Payment Amount, information required by the Order and draft CDO, along with the signed Acceptance and Waiver within 20 days of receipt of this notice, shall render the State Water Board's Conditional Offer void. If the State Water Board's Conditional Offer is deemed void due to Anthony F. Cubre Jr Trustee's non-performance, then the State Water Board will issue a final CDO and ACL Order and seek recovery of the full liability amount proposed in the ACL Complaint.

Anthony F. Cubre Jr Trustee understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the draft CDO or ACL Complaint. Providing the information required in the Order does not in any way establish or constitute evidence of a right to divert or use water.

Upon execution by Anthony F. Cubre Jr Trustee, the Acceptance and Waiver and Expedited Payment Amount shall be mailed to the following:

**Conditional Settlement Offer
State Water Resources Control Board
Division of Water Rights
Enforcement Section
Attn: Ms. Kathy Mrowka
P. O. Box 2000
Sacramento, CA 95812-2000**

Anthony F. Cubre Jr Trustee understands that this Acceptance and Waiver is not final until it is formally endorsed by the Division of Water Rights.

I hereby affirm that I am duly authorized to act on behalf of and to bind Anthony F. Cubre Jr Trustee in the making and giving of this Acceptance and Waiver.

Anthony F. Cubre Jr Trustee

By: _____
Signed Name Date

Printed or typed name

Title

IT IS SO ORDERED PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 11415.60

Approval of the Acceptance and Waiver has been delegated to the Assistant Deputy Director for Water Rights by State Water Board Resolution 2012-0029, and approval shall not limit the authority of the Executive Director or the Deputy Director for Water Rights, as delegated, to initiate any enforcement actions for the unauthorized diversion or use of water, for any future violations of the Water Code, or violation of the terms of the Acceptance and Waiver.

By: _____
John O'Hagan, Assistant Deputy Director
Division of Water Rights Date