

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

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Unauthorized Diversion by the

GARRAPATA WATER COMPANY

SOURCE: Garrapata Creek thence Pacific Ocean

COUNTY: Monterey County

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Garrapata Water Company (GWC) is alleged to have violated Water Code section 1052, subdivision (a), which states:

"The diversion or use of water subject to [division 2 of the Water Code (commencing with section 1000)] other than as authorized in [division 2] is a trespass."
2. Water Code section 1052, subdivision (b), provides that the State Water Resources Control Board (State Water Board) may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom administrative civil liability (ACL) may be imposed. On May 17, 1999, the Executive Director delegated to the Deputy Director for Water Rights the authority to issue a complaint to impose an ACL under Water Code section 1055, subdivision (a). Pursuant to State Water Board Resolution 2007-0057, 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 2007-0057 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director of Water Rights. This authority has been redelegated.

ALLEGATIONS

4. The following facts provide the basis for the alleged trespass:
 - a) On February 21, 1990, GWC filed Application 29664 with the Division of Water Rights (Division). GWC sought to divert water at a rate of 0.11 cubic foot per second (cfs) totaling 81 acre-feet per annum (AFA) from the underflow of Garrapata Creek by means of direct diversion. The water would be used for municipal and irrigation purposes.
 - b) The Division distributed a notice of the application to interested parties on January 3, 1992, and the application was protested by three parties. The protests related to riparian property rights, riparian habitat, and steelhead and other fishery concerns all dependent upon adequate year-round flows.

- c) A hearing was requested by GWC's owner, Donald Layne, dated July 14, 1997. The hearing was to determine: 1) whether the water in the alluvium of the valley of Garrapata Creek is part of a subterranean stream flowing through a known and definite channel therefore within the State Water Board's permitting authority; 2) whether the project is exempt from the California Environmental Quality Act (CEQA); and 3) whether Application 29664 should be approved and what conditions should apply.
- d) During the hearing, the Department of Fish and Game (DFG) was concerned with the possible significant impact to steelhead trout from GWC's diversion of water. At that time, steelhead trout were listed as *threatened pursuant to the federal Endangered Species Act* and were a State Species of Special Concern. The evidence in the Division's record indicates that steelhead trout reside in Garrapata Creek. (DFG Exhibit 6, p. 2; DFG Exhibit 7, P.1; DFG Exhibit 8; DFG Exhibit 9, p.4; T1, 164: 17-21; T11, 343: 1-S.) Relatively minor changes in the environment that would be considered insignificant elsewhere may constitute significant impacts where they would adversely affect an endangered species. Southern Steelhead are still listed as a State Species of Special Concern and a threatened species pursuant to the federal Endangered Species Act.
- e) Decision 1639, issued June 17, 1999, concluded that GWC was diverting water from the subterranean stream of Garrapata Creek within the State Water Board's permitting authority, and Application 29664 was not categorically exempt from CEQA unless GWC modified its project to limit the amount of water in its application to existing use of 35 AFA. By letter dated June 18, 1999, GWC requested that its application be reduced from 81 AFA to 35 AFA.
- f) Division Decision 99-01, issued on September 24, 1999, approved issuance of a permit pursuant to GWC's Application 29664 subject to the constraints of the CEQA exemption. The Decision authorized GWC to divert up to 35 AFA from the Garrapata Creek subterranean stream from January 1 to December 31 of each year. The maximum rate of diversion cannot exceed 0.11 cfs. To further ensure this diversion did not have an adverse effect on steelhead, the riparian habitat and other public trust resources within the lower portion of Garrapata Creek, the permit requires GWC to cease diversions if visible flow does not exist downstream of its point of diversion but does exist within 100 yards upstream.
- g) On October 13, 1999, GWC accepted Permit 21010. GWC is required to record meter readings on or about the first of each month and supply these readings to the State Water Board with its annual Progress Report by Permittee.
- h) Progress Reports by Permittee for Permit 21010 have been submitted to the Division annually reporting the amount diverted from 1999 to 2007. GWC failed to record meter readings for: July 2001, August and September 2002, March 2003, May and July through October 2004, February through May 2005, and November 2006. Additionally, except for year 2002, the annual diversion amounts reported by GWC have consistently exceeded the 35 AFA amount authorized by Permit 21010. GWC diversions in excess of 35 AFA are unauthorized diversions.
- i) GWC has been aware of these excess diversions and has failed to take any corrective actions to secure additional water rights, or to reduce unauthorized diversions. By letter dated February 9, 2008, Donald and Barbara Layne, owners of GWC, wrote to their fellow property owners and stated that, "Except for one year, we (GWC) have always exceeded the 35 acre foot limitation. In 2007 we (GWC) used 40 acre feet of water." The letter states that there is no way to ensure compliance short of making all of the property owner's lives miserable with water rationing. The letter identifies that GWC's use of water in excess of the 35 AFA is known to the State Water Board and GWC has never received a letter from the State Water Board about the overuse. The Layne's state that, "Each of the property owners should continue to have the freedom to use the amount of water that we reasonably need without a penalty being imposed." Similarly, in the Garrapata Mutual Water Company Minutes dated August 27, 2006, Mr. Layne

interjected that these violations were of no concern to anyone; that these rules are never enforced; and the State Water Board does not care.

- j) GWC's continuing unauthorized diversion and use of water, repeated violation of its monthly record-keeping permit term, and lack of corrective action to prevent such violations support issuance of an ACL complaint in conformance with Water Code section 1052.

PROPOSED CIVIL LIABILITY

5. The basis of this complaint is GWC's unauthorized diversion and consumptive use of water from Garrapata Creek since the year 2000 in excess of the amount authorized by Permit 21010. This unauthorized diversion and use of water constitutes a trespass within the meaning of Water Code section 1052, subdivision (a).
6. The maximum civil liability that can be imposed by the State Water Board in this matter is \$500 for each day in which the trespass occurred. Between 2000 and 2006, GWC has made unauthorized diversions on at least 69 days, therefore, a maximum civil liability of \$34,500 could be considered (\$500 per day x 69 days) for the trespass.
7. In determining the amount of 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 any corrective action taken by the violator. In this case, GWC directly diverted from Garrapata Creek in an excess of the 35 AF of water over the course of the last 6 out of 7 years and subsequently used that water for municipal purposes. GWC's continued unauthorized diversions have reduced the amount of water available for the southern steelhead trout fishery and other riparian habitat. While adverse impacts of unauthorized water diversions on the steelhead trout fishery have not been quantified for this case, unauthorized diversions of water have been shown to contribute to the cumulative impact of reducing habitat for steelhead trout. The State of California lists the southern steelhead as a species of special concern and the National Marine Fisheries Service, on August 18, 1997, listed the steelhead trout as threatened under the Federal Endangered Species Act. As of the date of this Complaint, Permittee has failed to take corrective actions.
8. GWC received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying the additional water or pumping groundwater from a well, foregoing the cost of filing for a water right, and foregoing the cost of annual water right fees assessed other water right permit holders. The Division estimates the avoided cost for obtaining 1 to 7 AF of water in the local area to be about \$1,400 annually and GWC would have had to divert an average of an additional 11.4 days each year at the authorized diversion rate to secure these amounts. Additionally, the Division estimates that its staff cost to review the existing project and develop the enforcement documents to be \$6,000. The water right filing fee for 7 acre-feet would be \$1,000 and the annual water right fee for the last 3 years would be \$303.
9. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL in the amount of \$14,400. This liability amount is the minimum liability recommended by the Division, although the State Water Board may consider a different liability if this matter goes to hearing.

RIGHT TO HEARING

10. GWC 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 this notice is received. (Water Code, § 1055, subd. (b).)

11. If GWC requests a hearing, it 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, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.

12. If GWC 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 its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.

13. If GWC does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth in paragraph 9 above, to:

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

14. If GWC does not request a hearing and does not remit the ACL, the State Water Board may seek recovery of the ACL as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD

**ORIGINAL SIGNED BY
JAMES W. KASSEL FOR:**

*Victoria A. Whitney, Deputy Director
Division of Water Rights*

Dated JUN 10 2008