

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

DIVISION OF WATER RIGHTS

In the Matter of Unauthorized Diversion by the
Garrapata Water Company
Cease and Desist Order WR 2008-00XX-DWR

SOURCE: Garrapata Creek thence Pacific Ocean

COUNTY: Monterey County

YOU ARE HEREBY GIVEN NOTICE THAT:

Garrapata Water Company (GWC) is alleged to have violated or is threatening to violate Water Code section 1831, which states:

The State Water Resources Control Board (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 CDO 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 GWC 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 Cease and Desist Order 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 of 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 February 21, 1990, GWC filed Application 29664 with the 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.

- 2) 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.
- 3) 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 California Environmental Quality Act (CEQA); and 3) whether Application 29664 should be approved and what conditions should apply.
- 4) 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.
- 5) 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.
- 6) 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.
- 7) 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.
- 8) 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.
- 9) 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 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 us (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.

- 10) 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 a CDO in conformance with Water Code section 1831.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, that GWC shall take the following corrective actions and satisfy the time schedules outlined herein:

1. GWC shall immediately cease diverting any water in excess of the amounts prescribed in Permit 21010 until such time the State Water Board issues, or recognizes in writing, water rights sufficient to cover GWC's additional unauthorized diversions.
2. GWC shall within 60 days of the date of this order, provide a Compliance Plan for approval by the Assistant Deputy Director for Water Rights. The Plan shall include copies of all written records maintained in compliance with Term 9 of Permit 21010. The Plan shall describe the corrective actions GWC will take to ensure that average monthly diversion rates do not exceed 0.11 cfs, and annual amounts do not exceed 35 AFA. The Plan shall also identify how GWC will comply with all other terms and conditions of the permit. The Plan should identify any water conservation measures that are necessary and the time schedule for implementation of these conservation measures.
3. GWC shall submit monthly, beginning at the end of the month in which this order is adopted, a record of its weekly diversion amounts and observations of the upstream and downstream flow in the channel of Garrapata Creek made under the conditions of Permit 21010 and any measures it has taken to conserve water within its service area during the month. The records shall be submitted to the Assistant Deputy Director for Water Rights until directed otherwise.
4. If it is determined that additional water rights are required to meet GWC's existing demands, even with conservation measures, GWC shall file an application for additional water rights and diligently pursue processing of the application by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division.
5. GWC shall comply with any written directive of the Assistant Deputy Director for Water Rights regarding modifications to monitoring of diversions or changes to plans submitted in compliance with this order and submit the changes within the time frame specified.

In the event that GWC fails to comply with the requirements, GWC shall be in violation of this CDO and subject to monetary penalties and further enforcement actions as described below:

Failure of any person to comply with a CDO issued by the State Water Board pursuant to this chapter may subject that person to further enforcement action, including assessment of civil liability of up to one thousand dollars a day and referral to the Attorney General 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).)

STATE WATER RESOURCES CONTROL BOARD

*James W. Kassel, Assistant Deputy Director
Division of Water Rights*

Dated: