

IMPROVING WATER RIGHT ENFORCEMENT AUTHORITY

A Report to the State Water Resources Control Board
and
the Delta Stewardship Council

by

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INTRODUCTION

Compared to its water quality authority, the State Water Resources Control Board's (State Water Board) water right monitoring and enforcement authority is weak.

Deficiencies include:

- 1) There are no direct penalties for violation of the terms and conditions of a water right permit or license. The State Water Board may only impose penalties where the violation amounts to an unauthorized diversion or use of water, or where the State Water Board has already issued a Cease and Desist Order for the violation and that violation continues.
- 2) While the State Water Board has general authority to conduct investigations, its authority to require water right monitoring and reporting, and to allow access for investigations should be more specific. There are no Administrative Civil Liabilities (ACLs) for failure by licensees to provide required reports.
- 3) For violation of the State Constitutional Prohibition against the waste or unreasonable use of water, a convoluted process of issuing an order finding a violation, issuing a Cease and Desist Order of continuing violation, and then conducting a third proceeding to impose ACL must currently be followed.

Enhancing the State Water Board's water rights authority will benefit the state's ability to improve water supply planning and make sound water use decisions. Delayed or postponed compliance can foster situations where individuals make decisions, take action, or fail to take action that are adverse to the public interest in maximizing the reasonable and beneficial use of water and in protecting the environment. Efficient and timely water rights enforcement promotes a level playing field where all persons must play by the same rules and not conduct unfair business practices.

Weak enforcement authority and an unnecessary abundance of process are apparent when comparing existing water right enforcement authorities with water quality enforcement laws. While the discharge of waste to water is a privilege, not a right, water is owned by the people of the state and the property right extends to the use of this shared resource. Accordingly, the enforcement program in the water right arena should be enhanced to approach that of water quality enforcement authorities.

A look at Water Code section 1052 exemplifies weaknesses in water right enforcement authority. This section presently authorizes the State Water Board to impose ACLs, which are monetary penalties, for trespass which has been interpreted to include an unauthorized diversion of or use of water. The State Water Board also has limited authority to impose ACLs for violations of Cease and Desist Orders (Water Code section 1845). However, ACLs cannot be directly imposed for other water right violations such as permit terms violations and failures to perform monitoring and reporting. In analogous water quality enforcement situations, the State and Regional

Water Boards have broad authority to require reports and impose ACLs (See generally Water code sections 13201, 13265, 13267, 13268, 13323, and 13350).

In 2009, the State Water Board was granted authority to impose ACLs for persons who violate the requirement for filing Statements of Water Diversions and Use (Water code section 5107). Similar authority to impose ACLs for violations by water right permittees and licensees is lacking.

Finally, the current process for enforcing the constitutional prohibition against the waste or unreasonable use of water is unnecessarily convoluted. First an Order finding a violation must be adopted. Second, a Cease and Desist Order must be issued for a continuing violation. Lastly, a third proceeding must be conducted to assess ACLs. Notice by personal service or certified mail is required at each step. If service is not completed, the process cannot continue. Service options similar to the ones contained in the water quality enforcement program (see Water Code 13323) should be made available.

DELTA VISION

In 2006, the Delta Vision process was created to find a durable vision for sustainable management of the Sacramento-San Joaquin Delta. In 2008, the Delta Vision Blue Ribbon Task Force released its Delta Vision Strategic Plan. Both the Strategic Plan and the Delta Vision Comprehensive Implementation Plan recognized the deficiencies of the existing water rights enforcement program. Both documents recommended improvements to the State Water Board water rights program which are critical for the improvement and restoration of the Delta. The Delta Reform Legislation of 2009 contains some improvements, including an expanded Statements of Water Diversion and Use Program and increased water rights enforcement staff. Other provisions, initially included in proposed legislation in 2009, were not adopted. It is the recommendation of this report that additional water right administrative and enforcement authority be provided to the State Water Board.

SPECIFIC RECOMMENDATIONS¹

A. Administrative Civil Liabilities for Permit/License Term Violations and for Violations of Monitoring Requirements

- 1) *Section 1846 is added to the Water Code, to read:*
1846. (a) Any person or entity who violates any term or condition of a permit, license, certificate, or registration issued under this division or any order or regulation adopted by the board under Section 275 may be liable in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs.
(b) Civil liability may be imposed administratively by the board pursuant to Sections 1055, 1055.2, 1055.3, and 1055.4.
(c) All funds recovered pursuant to this section shall be deposited in the Water Rights Fund.
- 2) *Section 1847 is added to the Water Code, to read:*
1847. (a) Any person or entity subject to a technical or monitoring provision requirement specified in Section 1051.1, who violates that reporting requirement, makes a material misstatement in any record or report submitted under that technical or monitoring requirement, or tampers with or renders inaccurate any monitoring device required under that requirement shall be liable for a sum not to exceed five hundred dollars (\$500) for each day in which the violation occurs.
(b) Civil liability may be imposed administratively by the board pursuant to Sections 1055, 1055.2, 1055.3, and 1055.4.
(c) All funds recovered pursuant to this section shall be deposited in the Water Rights Fund.
(d) This section applies to any reporting or monitoring requirement established under any permit, license, certificate, registration, decision or order, or regulation issued by the board pursuant to this division, Section 275, or Article 7 (commencing with Section 13550) of Division 7, or the public trust doctrine.

¹ Other proposals, including Senate Bill No. 681 of the 2009-2010 Regular Legislative Session and State Water Board Legislative proposals, contained broader enforcement recommendations as well as recommendations for more efficient administration of existing authorities. For example, recommendations were made to authorize the State Water Board to take interim relief actions in pending water right proceeding and to increase the maximum penalty amounts that can be assessed. While these recommendations have merit, the recommendations in this report are more focused and represent a feasible set of water rights enforcement enhancements that should be enacted.

B. Technical and Monitoring Report Requirement and Inspections

- 1) Section 1051.1 is added to the Water Code, to read:
1051.1. (a) In conducting any investigation or proceeding specified in Section 275 or 1051, the board may order any person or entity that diverts or uses water to prepare and submit to the board any technical or monitoring program reports related to that person's or entity's diversion or use of water as the board may specify. The costs incurred by the person or entity in the preparation of reports required pursuant to this subdivision shall bear a reasonable relationship to the need for the report and the benefit to be obtained from the report. If the preparation of individual reports would result in a duplication of effort, or if the reports are necessary to evaluate the cumulative effect of several diversions or uses of water, the board may order any person or entity subject to this subdivision to pay a reasonable share of the cost of preparing reports.
(b) Any order issued under this section shall be served by personal service, registered mail, or in accordance with Article 3 (commencing with Section 415.10) of, and Article 4 (commencing with Section 416.10) of, Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure on the party required to submit technical or monitoring program reports or to pay a share of the costs of preparing reports. Unless the board issues the order after a hearing, the order shall inform the party of the right to request a hearing within 20 days after service is complete. If the party does not request a hearing within that 20-day period, the order shall take effect as issued. If the party requests a hearing within that 20-day period, the board may adopt a decision and order after conducting a hearing.
(c) Upon application of any person or entity or upon its own motion, the board may review and revise any order issued pursuant to this section, in accordance with the procedures set forth in subdivision (b)
- 2) Section 1051.2 is added to the Water Code, to read:
1051.2. (a) (1) In conducting any investigation or proceeding specified in Section 275 or 1051, the board, may inspect the facilities of any person or entity to ascertain whether the purposes of Section 100 and this division are being met and to ascertain compliance with any permit, license, certification, registration, decision, order, or regulation issued under Section 275.

The board is authorized to obtain an inspection warrant pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedures for purposes of an inspection under this section.

C. Service of Process

- 1) Section 1055 of the Water Code is amended to read:
1055. (a) The executive director of the board may issue a complaint to any person or entity on which administrative civil liability may be imposed pursuant to Section 1052, Article 4 (commencing with Section 1845) of Chapter 12 of Part 2 of Division 2, or Section 5107. The complaint shall allege the act or failure to act that constitutes a trespass or violation, the provision of law authorizing civil liability to be imposed, and the proposed civil liability.
(b) The complaint shall be served by personal notice, certified mail, or in accordance with the manner of service of a summons under Article 3 (commencing with Section 415.10) of, and Article 4 (commencing with Section 416.10) of, Chapter 4 of Title 5 of Part 2 of Code of Civil Procedure, and shall inform the party served that the party may request a hearing not later than 20 days from the date service is complete. The hearing shall be before the board or a member of the board, in accordance with Section 183.
(c) The board, after any necessary hearing, may adopt an order setting administrative civil liability, or determining that a liability shall not be imposed.
(d) Orders setting administrative civil liability shall become effective and final upon issuance thereof and payment shall be made.
- 2) Section 1834 of the Water Code is amended read:
1834. (a) In the event that a violation of executive director of the event that a violation of a requirement described in subdivision (d) of Section 1831 is occurring or threatening to occur, the board shall give notice by personal notice, certified mail, or in accordance with the manner of service of a summons under Article 3 (commencing with Section 415.10) of, and Article 4 (commencing with Section 416.10) of, Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure, pursuant to which the party shall be informed that he or she may request a hearing not later than 20 days from the date on which the notice is complete, to the person allegedly

engaged in the violation. The notice shall contain a statement of facts and information that would tend to show the proscribed action, and notification of the requirements of subdivision (b).

- (b) *Unless a written request for a hearing signed by or on behalf of the notified party is delivered to or received by mail by the board within 20 days after service is complete, the board may adopt a cease and desist order, based on the statement of facts and information set forth in the notice, without a hearing.*

CONCLUSIONS

- 1) The State Water Board's enforcement authority for water right is inconsistent with its broad enforcement authority over water quality matters.
- 2) The recommendations contained in this report would enhance the ability of the State Water Board to take appropriate enforcement actions over water right matters.