

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015—0013—EXEC

In the Matter of the Petition for Reconsideration of

HANNES MACE, AS CO-TRUSTEE OF THE NANCY Z. WARD REVOCABLE TRUST

Regarding Order WR 2014-0018-DWR
Imposing Administrative Civil Liability Upon Nancy Z. Ward

SOURCES: Unnamed Stream

COUNTY: Shasta

**ORDER GRANTING PETITION FOR RECONSIDERATION, IN PART, AND MODIFYING
ORDER WR 2014-0018-DWR**

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

Hannes Mace (Mr. Mace), as co-trustee of the Nancy Z. Ward Revocable Trust, petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of Order WR 2014-0018-DWR.² Order WR 2014-0018-DWR imposes administrative civil liability upon Nancy Z. Ward (Ms. Ward) in the amount of \$10,000.00 for her failure to comply with Order WR 2013-0045-DWR, which requires Ms. Ward to cease and desist her violation of the term in her water license requiring her to file an annual report of her water diversion and use. For the following reasons, I find that Order WR 2014-0018-DWR was appropriate and proper

¹ State Water Resources Control Board (State Water Board or Board) Resolution 2012-0061 delegates to the Executive Director the authority to conduct and supervise the activities of the Board. Unless a petition for reconsideration raises matters that the Board wishes to address or requires an evidentiary hearing before the Board, the Executive Director's consideration of a petition for reconsideration of an order imposing administrative civil liability falls within the scope of the authority the Board delegated in Resolution 2012-0061. Accordingly, the Executive Director has the authority to: 1) refuse to reconsider the order or decision for which reconsideration is sought; 2) deny the petition; 3) set aside or modify the decision or order for which reconsideration is sought; or 4) take other appropriate action. (See Cal. Code Regs., tit. 23, § 770, subd. (a).)

² Mr. Mace's petition makes mention of his desired reconsideration Order WR 2013-0045-DWR. As discussed *infra*, Order WR 2013-0045 was adopted on October 7, 2013 and, consequently, the time to petition for reconsideration of that order has elapsed. (Wat. Code, § 1122.)

based upon the information available at the time it was issued. On the basis of new information brought to the State Water Board's attention for the first time in Mr. Mace's petition for reconsideration, however, I find grounds to reduce the administrative civil liability that Order WR 2014-0018-DWR imposes. I therefore grant Mr. Mace's petition, in part, and modify Order WR 2014-0018-DWR to reduce the administrative civil liability imposed to \$3,000.00.

2.0 LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND

Ms. Ward holds License 11374 authorizing her to divert water from an unnamed stream in Shasta County. A term of Ms. Ward's license requires her to file an electronic report of water diversion and use for the prior calendar year (annual use report) on or before June 30th of each year. (Cal. Code Regs., tit. 23, § 929.) In January 2013, the Division of Water Rights (Division) mailed a notice to Ms. Ward reminding her of the requirement that she file an annual use report for 2012 on or before June 30, 2013. Ms. Ward did not file an annual use report on or before June 30, 2013.

Division staff then prepared and transmitted to Ms. Ward a draft cease and desist order (Draft CDO) directing her to cease and desist her violation of the term of her license requiring her to file her 2012 annual use report on or before June 30, 2013. (Wat. Code, § 1831, subds. (a), (d)(2).) The Draft CDO directed Ms. Ward to file her annual use report or request a hearing before the State Water Board within twenty days of her receipt of the Draft CDO. (Wat. Code, § 1834, subd. (a).) Ms. Ward received the Draft CDO via certified United States mail on August 27, 2013. (*Ibid.*) Ms. Ward neither filed her annual use report nor requested a hearing within twenty days of her receipt of the Draft CDO.

On October 7, 2013, James W. Kassel, then-Assistant Deputy Director of the Division's Permitting and Enforcement Branch (Assistant Deputy Director), issued Order WR 2013-0045-DWR, directing Ms. Ward to cease and desist her violation of the term of her license requiring her to file her 2012 annual use report on or before June 30, 2013.³ (Wat. Code, § 1834, subd. (b).) Order WR-2013-0045-DWR became effective upon its issuance. (Wat. Code, § 1832.)

³ In Resolution 2012-0029, the State Water Board delegated the authority to issue cease and desist orders pursuant to Water Code section 1834, subdivision (b) to the Deputy Director for Water Rights (Deputy Director) and empowered the Deputy Director to redelegate this authority to the Assistant Deputy Directors. On July 6, 2012, the Deputy Director redelegated this authority to the Assistant Deputy Director of the Permitting and Enforcement Branch.

On October 25, 2013, the Assistant Deputy Director issued an administrative civil liability complaint (complaint) against Ms. Ward. The complaint proposed that administrative civil liability be imposed upon Ms. Ward in the amount of \$10,000.00 for violation of Order WR 2013 0045-DWR. (Wat. Code, §§ 1845, subds. (b)(1), (3); 1055.) The complaint informed Ms. Ward of her right to request a hearing within twenty (20) days of her receipt of the complaint. (Wat. Code, § 1055, subd. (b).) The complaint also made a conditional settlement offer, offering to settle the complaint if Ms. Ward filed her annual use report and paid \$1,000.00 within twenty (20) days of her receipt of the complaint. Ms. Ward received the complaint via certified United States mail on October 29, 2013. (*Ibid.*) Ms. Ward neither accepted the conditional settlement offer nor requested a hearing within twenty days of her receipt of the complaint.

On April 29, 2014,⁴ John O'Hagan, then-Acting Assistant Deputy Director, issued Order WR 2014-0018-DWR, imposing administrative civil liability upon Ms. Ward in the amount of \$10,000.00 for violation of Order WR 2013-0045-DWR.⁵ On May 27, 2014, Mr. Mace filed a petition for reconsideration (hereafter, petition) of Order WR 2014-0018-DWR.

2.2 FACTUAL BACKGROUND

In his petition, Mr. Mace presents relevant information to the State Water Board for first time. Mr. Mace argues that Ms. Ward was unable to timely file her 2013 annual use report on the basis of the following facts.

Mr. Mace's petition asserts that Ms. Ward suffered a stroke on November 6, 2012 that has left her incapacitated. Mr. Mace, along with one or more unidentified individuals, has assumed the role of trustee of the Nancy Z. Ward Revocable Trust, which has control over some—but not all—of Ms. Ward's assets. Mr. Mace sets forth facts concerning the state of Ms. Ward's health and her estate too numerous to recite; it shall suffice to simply say that several members of Ms. Ward's family have been embroiled in a dispute over Ms. Ward's care and control of her estate.

⁴ The State Water Board is directed to act on a petition for reconsideration within 90 days of the date upon which the Board adopts the decision or order that is the subject of the petition. (Wat. Code, § 1122.) If the Board fails to act during that 90-day period, a petitioner may seek judicial review, but the Board retains jurisdiction to act on the petition. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see also *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145-48; *Edwards v. Steele* (1979) 25 Cal.3d 406, 409-10; State Water Board Order WQ 98-05-UST at pp. 3-4.)

⁵ In Resolution 2012-0029, the State Water Board delegated the authority to issue orders imposing administrative civil liability pursuant to Water Code section 1055 to the Deputy Director for Water Rights (Deputy Director) and empowered the Deputy Director to redelegate this authority to the Assistant Deputy Directors. On July 6, 2012, the Deputy Director redelegated this authority to the Assistant Deputy Director of the Permitting and Enforcement Branch.

Mr. Mace argues that Ms. Ward was unable to comply with the terms of her license and, given the protracted dispute over her estate, no one else was in a position to do so on her behalf.

Mr. Mace concedes that a conservatorship over both Ms. Ward's person and estate has existed since March 2013. From March 2013 until October 2013, Roy F. Peters (Mr. Peters) served as conservator of Ms. Ward's person and estate. Mr. Mace asserts that Mr. Peters was hindered in his ability to effectively carry out Ms. Ward's affairs by legal disputes between members of Ms. Ward's family over control of her estate and by Mr. Peters' own failing health.

In October 2013, John Grimes (Mr. Grimes) relieved Mr. Peters as conservator of Ms. Ward's estate and Courtney Bryant, Ms. Ward's granddaughter, relieved Mr. Peters as conservator of Ms. Ward's person. By November 2013, Mr. Grimes had begun his new duties and "has [an] effective beginning in establishing his presence." Mr. Mace asserts that Mr. Grimes has discharged his duties effectively since that time.

3.0 GROUND S FOR RECONSIDERATION

Within thirty (30) days of adoption of a State Water Board order or decision, any interested person may file a petition for reconsideration of the order or decision pursuant to Water Code section 1122 and California Code of Regulations, title 23, sections 768-770. Section 768 of the Board's regulations provides that an interested person may petition for reconsideration upon any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

On reconsideration, the State Water Board may:

- "(1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration set out in [California Code of Regulations, title 23, section 768]; or

- (2) After review of the record, including any hearing transcript and any material submitted in support of the petition:
 - (A) Deny the petition upon a finding that the decision or order was appropriate and proper; or
 - (B) Set aside or modify the decision or order; or
 - (C) Take other appropriate action.”

(Cal. Code Regs., tit. 23, § 770, subd. (a).)

4.0 DISCUSSION

I have reviewed the record in this matter. I find that Mr. Mace timely filed his petition, and I further find that Order 2014-0018-DWR (hereafter, Order) was appropriate and proper given the information available to the Assistant Deputy Director when he issued it. Upon review of the new information that Mr. Mace presents in his petition, however, I find that the amount of civil liability imposed upon Ms. Ward should be reduced to reflect the unusual circumstances surrounding her failure to file her 2013 annual use report.

I find that the Assistant Deputy Director indeed considered all relevant circumstances presented to him at the time he issued the Order and therefore complied with the requirements of Water Code sections 1055.3 and 1845, subdivision (c). Because Ms. Ward did not request a hearing after the Assistant Deputy Director issued the complaint, however, the circumstances of Ms. Ward’s health and control over her affairs were not part of the record before the Assistant Deputy Director. Consequently, the Assistant Deputy Director was unable to consider: 1) Ms. Ward’s inability to file the annual use report herself due to her incapacitating stroke; 2) the potential inability of her then-conservator to file the annual use report due to legal disputes over control of Ms. Ward’s estate or his own failing health; and 3) the potential inability of her then-conservator to request a hearing on either the Draft CDO or the complaint due to legal disputes over control of Ms. Ward’s estate or his own failing health. Having considered these facts, I find it appropriate to reduce the amount of administrative civil liability imposed upon the Manuli Trust.

I also find, however, that Mr. Grimes has had authority to file the 2012 annual use report on Ms. Ward’s behalf since at least November 2013, but has not done so. Though I have great

sympathy for Ms. Ward's condition, she, or her conservator, are still required to comply with the Board's regulations, which require filing the 2012 annual use report. Mr. Grimes' failure to do so has caused the Board to expend unnecessary costs in an effort to bring Ms. Ward into compliance.

Mr. Mace has not proposed an appropriate course of action other than to make a general request that the Board reconsider the Order and "abate the penalties." I find that California Code of Regulations, title 23, section 770, subdivision (a)(2)(C) empowers me to take any appropriate action following review of the record, and I further find that I am constrained neither by the amount of civil liability that the Order imposes nor the action that Mr. Mace requests.⁶ I find that an appropriate civil liability should reflect both: 1) the unusual circumstances surrounding Ms. Ward's failure to file her 2012 annual use report and 2) the fact that Ms. Ward's conservator has yet to file the report on her behalf. Upon consideration of the foregoing facts and all other relevant circumstances, I reduce the civil liability imposed upon Ms. Ward to \$3,000.00. (Cal. Code Regs., tit. 23, § 770, subd. (a)(2)(C).) Absent evidence of any limitations upon the powers of the conservator of Ms. Ward's estate, I can reasonably infer that the conservator possessed the authority to file the annual use report on Ms. Ward's behalf, and I urge him to do so immediately.⁷

To the extent that Mr. Mace's petition asserts any other reasons that the Order should be reconsidered, I find that his petition fails to raise substantial issues related to the causes for reconsideration set forth in the Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).)

⁶ Though State Water Board Order WQ 89-11 states that the Board will "generally give great deference to a decision by a Regional Board when considering administrative civil liability orders," this standard is not applicable to my review of a decision by the Division of Water Rights. While the Regional Water Quality Control Boards are independent agencies whose findings and conclusions are entitled to great deference, the Division of Water Rights is a subordinate division of the State Water Resources Control Board. When, as here, I act with the Board's authority, I exercise my independent judgment in reviewing the Division of Water Rights' actions.

⁷ Further, even if Ms. Ward is incompetent, she is still subject to civil liability for failure to file an annual use report. A person is subject to civil liability for violating a cease and desist order the State Water Board issues and such civil liability may be imposed administratively by the Board itself or by the Superior Court. (Wat. Code, § 1845, subd. (b).) Were the question of whether to impose civil liability upon Ms. Ward to be before the Superior Court, no degree of mental incompetence would excuse liability: "a person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person." (Civ. Code, § 41.) Consequently, Ms. Ward's mental status does not preclude the Board from imposing civil liability upon her.

5.0 CONCLUSION

For the foregoing reasons, I find that Order WR 2014-0018-DWR was appropriate and proper based upon the information available to the Assistant Deputy Director at the time it was issued, but that on the basis of the new, relevant information in Mr. Mace's petition, a reduction in the amount of civil liability is appropriate. I therefore grant Mr. Mace's petition for reconsideration, in part, and reduce the amount of administrative civil liability imposed to \$3,000.00.

ORDER

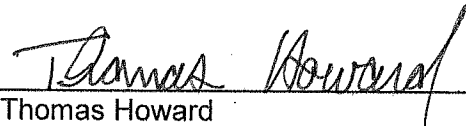
IT IS HEREBY ORDERED that:

1. Mr. Mace's petition for reconsideration of Order WR 2014-0018-DWR is granted, in part.
2. Order WR 2014-0018-DWR is modified to reduce the amount of civil liability imposed upon Ms. Ward to \$3,000.00.
3. Nancy Z. Ward, or the conservator of her estate, shall remit within thirty (30) days of the date of this Order, a cashier's check or money order in the amount of \$3,000.00 to:

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

4. If Ms. Ward fails to remit the outstanding penalty imposed by this order within thirty (30) days of the date of this order, the Assistant Deputy Director is directed to seek recovery of the outstanding liability, pursuant to Water Code section 1055.4.
5. Pursuant to Water Code section 1123, this order shall have the same force and effect as Order WR 2014-0018-DWR.
6. The State Water Resources Control Board's right to take future enforcement action against Ms. Ward for any future violations is reserved.

Dated: 3/19/15



Thomas Howard
Executive Director