

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 and Violation of Terms and Conditions for
Permit 20496 (Application 28883)

by

Ernest Righetti & Sons

SOURCE: West Corral de Piedra Creek thence Pismo Creek

COUNTY: San Luis Obispo County

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Ernest Righetti & Sons (Righetti) 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) For the 2009-2010 water year, Righetti collected a total of 655 acre-feet of appropriative water subject to the permitting authority of the State Water Board. The 655 acre-feet excludes 40 acre-feet reported as carryover storage from the prior year¹ and a net 16 acre-feet of groundwater pumped into the reservoir².
 - b) Of the 655 acre-feet collected, 591 acre-feet was collected to storage under Permits 12887, 14086 and 15444 (Applications 17840, 21061 and 22704) with the remaining 64 acre-feet collected to storage under Permit 20496 (Application 28883).

¹ Righetti Spreadsheet - December 1, 2009 reported storage

² Righetti Spreadsheet - 51 acre-foot May 31, 2010 groundwater amount less the 35 acre-foot quantity reported on December 1, 2009

- c) Term 23 of Permit 20496, which is not included in Permits 12887, 14086 and 15444, requires any water collected during the previous storage season to be released on July 1 at a rate of 2 cubic feet per second (cfs) if the July 1 through June 30 precipitation at the Cal Poly rain gage did not exceed 26 inches. Term 23 explicitly states,

“Beginning July 1, the permittee shall release all water stored in the preceding storage season under this permit unless the total rainfall at the Cal Poly Gage for the period of July 1 of the previous year to June 30 of the current year is greater than or equal to 26.0 inches. Releases shall be made at the rate of 2 cubic feet per second. In the event that the total rainfall is no longer measured and/or recorded at the Cal Poly Gage, the permittee shall correlate the equivalent of 26.0 inches at the Cal Poly Gage to an alternative gage acceptable to the Chief of the Division of Water Rights. Upon written approval by the Chief of the Division of Water Rights, the correlated rainfall at the alternative gage will be the standard for determining whether water is available for storage.”

State Water Board Decision 1627, resulting from the 1990 hearing on whether to approve Application 28883, implemented Term 23. Within that hearing, a witness for Righetti testified that it is reasonable to assume precipitation at the Cal Poly gage was representative of the precipitation at the reservoir since the Righetti property and the Cal Poly gage both lie on the same isohyets. As a result of that testimony and 119 years of records for the Cal Poly gage, the State Water Board chose the Cal Poly gage as the measurement site for Term 23.

- d) On June 30, 2010, only 19 inches of accumulated precipitation was reported at the Cal Poly gage.
- e) On June 30, 2010, Division of Water Rights (Division) staff notified Robert Saperstein, counsel for Righetti, by letter and email that Term 23 had been triggered and the 64 acre-feet of water collected under Permit 20496 would need to be released beginning on July 1 at a rate of 2 cfs.
- f) Mr. Saperstein replied on July 1, 2010 that Righetti was contesting the reliability of the Cal Poly rain data and was seeking reconsideration of Term 23’s measurement location. Division staff replied in a July 1, 2010 email to Mr. Saperstein that the Division requires adherence to the permit term conditions and the 64 acre-foot quantity of water was to be released starting July 1, 2010.
- g) Mr. Saperstein replied again in a July 8, 2010 letter requesting modification of Term 23 and a stay in its implementation. The Division responded on August 17, 2010 with a letter notifying Righetti that a change petition is required to alter the terms and conditions of the permit. In addition, the requested stay in implementing Term 23 was untimely as for the 2009-2010 Term 23 season, as the estimated date of completion for releasing the 64 acre-foot quantity of water had already passed, based on the number of days required to release 64 acre-feet at a constant 2 cfs rate.
- h) On September 16, 2010, Mr. Saperstein withdrew Righetti’s request for Term 23 modification and indicated that Righetti had been releasing water for the past few weeks at 250 gallons per minute (gpm) above the required release rate. Mr. Saperstein then stated the release rate would be increased to 2 cfs to account for the remainder of water stored under Permit 20496. The required release rate for periods outside the collection season is any net water entering the reservoir, less reported riparian diversions, as calculated on the monthly Righetti spreadsheet. The required release rate is independent of the 64 acre-foot quantity of water subject to Term 23. Thus, Righetti is obligated to release the normal required release rate plus any additional quantity, such as the 2 cfs Term 23 rate, if applicable. Using the most recent spreadsheet submitted on December 7, 2010, Righetti’s reservoir operation record shows only four days in the July 1, 2010 to December 6, 2010 time period (September 24, 25, 26 and 28) where a bypass flow greater than or equal to Term 23’s required 2 cfs (899 gpm) release rate was reported.

- i) In accordance with the Division's October 21, 2009 letter, Righetti is required to submit monthly records of diversion and use by the 5th of the following month. Division staff received Righetti's monthly spreadsheet for November 2010 and a partial December 2010 period and noted a 22.1 acre-feet shortage in the quantity of water released from July 1, 2010 to December 6, 2010. This 22.1 acre-foot deficiency was arrived at by comparing the required releases (calculated inflow + 64 acre-feet Term 23 amount - riparian diversions) vs. actual releases (measured bypass releases).

PROPOSED CIVIL LIABILITY

5. The basis of this complaint is Righetti's unauthorized storage of water from West Corral de Piedra Creek from July 1, 2010 to December 6, 2010. Had Righetti released the 64 acre-feet of stored water at the rate of 2 cfs beginning on July 1, as specified in Term 23, the 64 acre-feet quantity would have been discharged by July 16, 2010 (4 acre-feet per day for 16 days). Instead, Righetti delayed the release and only complied with the 2 cfs release rate on four days in late September. As of December 6, 2010, a total of 86.1 acre-feet of water was required to have been released (22.1 acre-feet of inflow subject to bypass + 64 acre-feet under Term 23). As of December 6, 2010, only 64.1 acre-feet of water had been released resulting in the 22.1 acre-feet deficiency.
6. A clear violation exists from July 1, 2010 to at least September 1, 2010, as Righetti has acknowledged the Term 23 releases did not begin until a week prior to Mr. Saperstein's September 16, 2010 letter. Even after that, Righetti made the required releases at the required rate on only four days. Since the entire 86.1 acre-foot quantity of water has still not been released, the number of days subject to the civil liability includes the entire July 1, 2010 to December 6, 2010 period (159 days as of December 6, 2010). This unauthorized storage of water constitutes a trespass within the meaning of Water Code section 1052, subdivision (a).
7. 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. (Wat. Code, § 1052, subd. (b).) At 159 days, a civil liability of \$79,500 could be considered (\$500 per day x 159 days) for the trespass.
8. 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, Righetti was notified of the required release prior to July 1, 2010 and still did not comply with the Permit term, or with Division staff's emails and letters requesting compliance. In spite of affirmatively acknowledging responsibility to release the 64 acre-foot quantity of water in the September 16, 2010 letter, Righetti still failed to release the entire 64 acre-foot amount and failed to comply with the 2 cfs rate of release on all but four days.
9. Righetti's unauthorized storage has reduced the amount of water available for the fishery, riparian habitat and downstream domestic uses.
10. Righetti received an economic advantage over other legitimate water diverters in the area by foregoing releasing the water and storing it for later use. Righetti admits in the July 8, 2010 letter from its counsel that 60 acre-feet of water, which is roughly the amount needed to irrigate 25 acres of avocados, is worth approximately \$250,000. Based on this estimate, the 22.1 acre-foot deficiency is worth a prorated amount of \$92,083.
11. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL in the amount of **\$79,500**. The Division recommends this liability amount given the economic advantage Righetti would receive from use of the water stored in violation of the terms of Permit 20496, and Righetti's failure to take corrective action even after repeated admonitions. The State Water Board may consider a different liability if this matter goes to hearing.

RIGHT TO HEARING

12. Righetti 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. (Wat. Code, § 1055, subd. (b).)
13. If Righetti requests a hearing, Righetti 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.
14. If Righetti 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.
15. If Righetti 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

16. If Righetti 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, Assistant Deputy Director
Division of Water Rights*

Dated: JAN 3 2011