

## ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

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In the Matter of Failure to Comply with Emergency Curtailment Regulations

**James Funsten**  
Water Right ID A023766

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### YOU ARE HEREBY GIVEN NOTICE THAT:

1. James Funsten (“The Diverter”) is alleged to have violated Title 23, Division 3, Chapter 2, Article 24, section 879 (a) of the California Code of Regulations.
2. On April 21, 2021, Governor Gavin Newsom issued a Proclamation Declaring a State of Emergency in Mendocino and Sonoma counties due to drought conditions in the Russian River Watershed (Drought Proclamation). The Drought Proclamation declares that the Russian River watershed is facing substantial water supply and ecosystem challenges due to extreme drought. The Drought Proclamation orders the State Water Board to consider “adopting emergency regulations to curtail water diversions when water is not available at water rights holders' priority of right or to protect releases of stored water.”
3. On June 15, 2021, the State Water Board adopted California Code of Regulations, title 23, sections 877 through 879.21 (Emergency Regulations). The Emergency Regulations were reviewed by the Office of Administrative Law and went into effect on July 12, 2021.
4. The Emergency Regulations provide the State Water Resources Control Board's Division of Water Rights and water users within the Russian River watershed a methodology for determining the extent to which water is unavailable for diversion at water users' priority of right. It also authorizes the Deputy Director of the Division of Water Rights to issue curtailment orders requiring recipients to cease diversions, in the event that Lake Mendocino storage targets are not met (for Upper Russian River watershed curtailments) or when flows are insufficient to support all water right priorities (for Lower Russian River watershed curtailments.)
5. Section 877.3 of the Emergency Regulations authorizes the Deputy Director of the Division of Water Rights to issue curtailment orders to water right holders, requiring the curtailment of water diversion and use.
6. Section 879 subdivision (a) of the Emergency Regulations states “all water right holders issued a curtailment order under [Article 24] are required, within seven days, to submit under penalty of perjury a certification of one or more” of the applicable actions.

7. Water Code section 1846(a)(2) states: “a person or entity may be liable for a violation of any of the following in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs:...a regulation or order adopted by the Board.”
8. Water Code section 1055 grants the Executive Director for the State Water Board authority to issue an Administrative Civil Liability (ACL) Complaint to any person or entity to whom administrative civil liability may be imposed.
9. The Executive Director delegated this authority to the Deputy Director for Water Rights. Pursuant to State Water Board Resolution 2012-0029, 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. This authority has been redelegated to the Assistant Deputy Director.

### **ALLEGATIONS**

10. The Diverter is the owner of record for Water Right ID A023766.
11. On August 10, 2021, the Deputy Director issued Curtailment Orders to all water rights within the Lower Russian River watershed.
12. Pursuant to Emergency Regulation section 877.2, subdivision (e)(1), the Division of Water Rights sent the Curtailment Order/s to the address listed in the Division’s electronic Water Rights Information Management System. The Division also published the Curtailment Order and a list of all recipients on the State Water Board’s website on the same day that the Curtailment Order was issued, and sent the Curtailment Order to all parties who had enrolled in the State Water Board’s email list-service. It is the responsibility of the water rights holders to join this email list-service to stay updated on current curtailment actions and requirements.
13. The Curtailment Order states:

“Within seven calendar days of issuance of this curtailment order, all water right holders or their agents receiving the Curtailment Order are required to submit, under penalty of perjury, an Online Curtailment Certification Form (Form). The Form confirms cessation of diversion under your water right and whether you are pursuing an exception to the curtailment order. Timely and accurate completion of the Form can avoid unnecessary enforcement proceedings.”

The Curtailment Order provided a URL, and the unique Login and Password for each water right that allows diverters or their agents to complete the Online Curtailment Certification form.
14. On a weekly basis, Division staff reviews Online Curtailment Certification data submitted by diverters. The Diverter failed to file the Online Curtailment Certification form for the subject water right within seven days of the issuance of the Curtailment Order.

15. On September 28, 2021, the State Water Board Division of Water Rights sent the Diverter a Notice of Violation notifying the Diverter that the Online Curtailment Certification Form had not been received within seven days of the issuance of the Curtailment Order.
16. The Notice of Violation informed the Diverter that failure to submit the Online Curtailment Certification Form is a violation of the Emergency Regulations adopted by the Board for which the potential civil liability of five hundred dollars (\$500) may be assessed for each day that the form was not submitted after the deadline.
17. As of October 15, 2021, the Diverter has still not filed the Online Curtailment Certification Form as required by the Curtailment Order.

### **PROPOSED CIVIL LIABILITY**

18. Water Code section 1846 states that a person or entity may be liable for a violation of a regulation adopted by the State Water Board in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs.
19. The Diverter is alleged to have violated the Emergency Regulation by failing to file an Online Curtailment Certification Form within seven days of issuance of the Curtailment Order as required by Emergency Regulation section 879. Each day that each Online Curtailment Certification Form is not filed by the deadline is a day of violation of the Emergency Regulation.
20. Each Online Curtailment Certification Form not filed electronically with the Board by the deadline is a separate violation of the Emergency Regulation. Diverter failed to file the Online Curtailment Certification Form constituting a violation.
21. As of October 15, 2021, the violation continued unabated for 59 days. The maximum liability for the violation alleged is \$29,500 (59 days x \$500).
22. In determining the appropriate amount of a civil liability, both Water Code section 1848(d) and Water Code section 1055.3 provide that the State Water Board shall consider all relevant circumstances, including, but not limited to, all of the following factors: 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 undertaken by the violator.
23. The Emergency Regulations were adopted by the State Water Board in response to Governor Newsom's Declaration of a state of emergency due to drought conditions. Water supply shortages are occurring throughout the state. The Online Curtailment Certification Form is an essential component of the Curtailment Order. Data submitted as part of the curtailment certification is critical for developing water availability calculations and identifying water conservation and transfer opportunities.

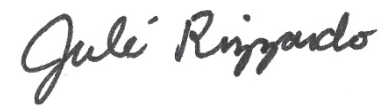
24. The value of the data contained within the Online Curtailment Certification Form to the public and the State Water Board correspond(s) to its timely submittal, and therefore an increased time lapse between the deadline and the ultimate submittal date results in increased harm to the regulatory program. The State Water Board's forecasting of water availability and ability to regulate the resources it is required to protect is diminished by the failure to submit the Online Curtailment Certification Form.
25. The Online Curtailment Certification Form was due by August 17, 2021 but has still not been filed with the State Water Board. The length of time over which this violation occurs is significant; the Online Curtailment Certification Form is now at least 59 days late. Moreover, as of the date of this Complaint no action has been taken to correct this violation despite the September 28, 2021 Notice of Violation putting the Diverter on notice of the potential for formal enforcement action if the violation continued.
26. Having taken into consideration all relevant circumstances, including but not limited to the failure of the Diverter to submit the Online Curtailment Certification Form, the harm of the missing data to the State Water Board's effectiveness in regulating water diversions, staff costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the Division of Water Rights Prosecution Team recommends the imposition of \$1,000 in administrative civil liability (Proposed Liability).

#### **RIGHT TO HEARING**

27. The Diverter may request a hearing on this matter before the State Water Board. Any such request for hearing must be delivered to, or received by mail by, the Board within 20 days after the date that this notice is received as required by Water Code section 1055, subdivision (b).
28. If the Diverter requests a hearing, the Diverter will have an opportunity to contest the allegations in this complaint and the imposition of a fine by the Board. The Board will issue a notice setting the specific time and place for the hearing. The hearing notice will be mailed not less than 10 days before the hearing date.
29. At the hearing, the Board will consider whether to impose a monetary fine, and if so, whether to adjust the Proposed Liability within the amount authorized by statute. Any Board order imposing an ACL shall be final and effective upon issuance.
30. If the Diverter does not request a hearing within 20 days, then the right to a hearing on the matter is waived. The Assistant Deputy Director for the Division of Water Rights may then issue a final Administrative Civil Liability Order assessing the Proposed Liability.

James Funsten

STATE WATER RESOURCES CONTROL BOARD

A handwritten signature in black ink that reads "Julé Rizzardo". The signature is written in a cursive, flowing style.

Julé Rizzardo, Assistant Deputy Director  
Division of Water Rights

Dated: October 20, 2021