

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

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

Administrative Civil Liability 262.5-46

North San Joaquin Water Conservation District

SOURCE: Mokelumne River tributary to San Joaquin River

COUNTY: San Joaquin County

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The North San Joaquin Water Conservation District (District) 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 Chief of the Division of Water Rights (Division) the authority to issue a complaint or impose civil liability under Water Code section 1055, subdivision (a). On May 16, 2002, the State Water Board delegated authority to the Division Chief to issue an order imposing administrative civil liability when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. (State Water Board Resolution 2002-0106.)

ALLEGATIONS

4. The following facts provide the basis for the alleged trespass:
 - a) The District is owner of Permit 10477 (Application 12842), which authorizes the direct diversion of 80 cubic feet per second (cfs) and collection of 20,000 acre-feet per year from the Mokelumne River from December 1 of each year to July 1 of the succeeding year for Municipal, Domestic, Industrial, Irrigation and Recreational uses. Direct diversion is limited to no more than 40 cfs at any one pumping facility. The permit allows a total of 20,000 acre-feet per annum (afa) to be diverted per water year.
 - b) The State Water Board has granted the District three extensions of time to complete full beneficial use of water under Permit 10477. In 1992 the District entered into a stipulated agreement with the East Bay Municipal Utility District, the Department of Fish and Game (DFG), and the California Sportfishing Protection Alliance to resolve the protests over its 1991 time extension petition. As part of the last order granting an extension of time in 1992, the State Water Board incorporated terms of the stipulated agreement by adding Terms 15 and 23 to the District's permit. Term 15 states, "No water shall be diverted under this permit during the 1992 or subsequent water years, until the permittee has constructed screening facilities

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adequate to protect fishlife and/or has entered into an operating agreement with the Department of Fish and Game [DFG] that will protect fishlife." If fish screens are constructed, then DFG is required to notify the Division of its approval of the plans in writing. Term 23 provides that: "No diversion shall be made under this permit until an agreement has been reached between the permittee and the [DFG] with respect to flows to be bypassed for aquatic life," or failing to reach such agreement, until further order is entered by the State Water Board.

- c) Term 15 prohibits the District from diverting water until the District constructs fish screens or enters into an operating agreement with DFG that protects fishlife. The Division's records indicate that in 1993 the District installed a temporary fish screen loaned to it by DFG for that diversion season. By letter dated April 8, 1993, DFG informed the District that the temporary installation would be unacceptable on a permanent basis and that DFG expected the District to develop a long-term solution.
- d) In a letter to the Division dated October 13, 2005, the District states that, at the end of the 1993 diversion season, an employee in DFG's Screen Shop said not to bother installing fish screens in the future. The Division, however, has no record that this is DFG's official position with respect to compliance with Term 15. In fact, in 2005, DFG staff informed the State Water Board that DFG does not agree with the District's statement that the District does not need to comply with Term 15.
- e) Term 23 prohibits the District from diverting water until the District and DFG reach an agreement regarding bypass flows or, failing to reach such an agreement, until the State Water Board enters an order regarding those flows. The State Water Board has not entered any such order pertaining to Permit 10477 and there is no evidence that the District has entered into an agreement with DFG.
- f) The District filed a fourth petition for extension of time in December 2000, and a petition to add a point of diversion and a place of underground storage in May 2004. The latter petition is for a proposed pilot groundwater recharge and extraction project funded by a Cal-Fed Conjunctive Use Grant Application that was revised in 2003. As part of the Division's review and consideration of these petitions, Division staff conducted a field inspection of the District's permitted project on February 2, 2006, to determine the District's maximum amounts beneficially used and overall compliance with terms and conditions of the permit. Division staff found that between 1993 and 2000, the District's maximum direct diversion amounts were 14.4 cfs and 3,200 afa being taken from the Mokelumne River. The District has diverted a total of 8,200 acre-feet over the 2003, 2004 and 2005 irrigation seasons. Neither point of diversion covered by the permit was equipped with a fish screen that complies with Term 15. In addition, Division staff contacted DFG, which informed Division staff that DFG is not aware of any construction of permanent fish screens or of any operating agreement as required by Term 15.
- g) In June 2005, the United States Bureau of Reclamation (Bureau) made a Finding of No Significant Impact for the District's proposed pilot recharge project. The Bureau concluded that the threatened Central Valley steelhead occurs in the Mokelumne River near the project site with some steelhead residing in the area and other steelhead migrating upstream from about late summer through early spring, and juveniles migrating downstream April through June. The Bureau's finding was made with an understanding that the new pump would be screened to National Marine Fisheries Service's standards to avoid impacting the endangered Central Valley steelhead. The District's existing two pumping facilities are not currently equipped with suitable fish screens and, therefore, may adversely impact the steelhead.
- h) As of the date of this complaint, the District has not demonstrated compliance with Terms 15 or 23.
- i) Since 1993 the District has diverted and used water in violation of Term 23, and it has diverted water in violation of Term 15 since at least 1994.

PROPOSED CIVIL LIABILITY

5. The basis of this complaint is the District's unauthorized diversion or use of water from the Mokelumne River during the irrigation seasons of 2003, 2004 and 2005. During these irrigation seasons, the District diverted water from the Mokelumne River using its two existing pumping facilities for irrigation purposes within its service area. The District's diversion or use of water from the Mokelumne River without compliance with Terms 15 and 23 of Permit 10477, or another basis of right, is a trespass against the State pursuant to Water Code section 1052, subdivision (a). The maximum civil liability that can be imposed by the State Water Board is \$500 for each day in which an unauthorized diversion or use of water, or trespass, occurred. Assuming 150 days of irrigation each year, the District had 450 days of unauthorized diversion or use of water. A maximum civil liability of **\$225,000** can be considered for the trespass.
6. 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 the corrective action taken by the violator. In this case, the District has diverted water from the Mokelumne River for at least 12 years without complying with both Terms 15 and 23, which govern fish screen construction and bypass flows. Although the Division has not quantified the precise harm caused by the District's unauthorized diversions, the District's diversions may adversely impact the salmon, steelhead, and other aquatic resources that Terms 15 and 23 were intended to protect.
7. The District has received an economic advantage over other water users in the area by foregoing the costs of constructing fish screens and any bypass flows. The Department of Water Resources' California Water Plan for 2005 identifies San Joaquin County water rates at \$74 per acre-foot from the State Water Project (SWP), an average of \$28 per acre-foot from the Central Valley Project (CVP), and maximum price paid by farmers of \$80 per acre-foot. Using \$50 per acre-foot, which is the average of the SWP and CVP water rates rounded to the nearest five acre-feet, and the District's diversion amount of 8,200 acre-feet over the 2003, 2004 and 2005 irrigation seasons, the District's estimated avoided cost for water in the last three years is \$410,000 (\$50 X 8,200 acre-feet). Additionally, the Division estimates that its staff cost to conduct the field inspection, prepare an inspection report and the enforcement documents to be approximately \$9,400.
8. Having taken into consideration all the factors described above, the Chief of the Division proposes that an administrative civil liability be imposed in the amount of **\$66,400**, which is approximately equivalent to three years of violation based on reported water use (114 days over three irrigation seasons at \$500 per day) plus \$9,400 in Division staff costs. The 114 days were calculated using the District's monthly diversion amounts over the 2003, 2004 and 2005 irrigation seasons divided by the maximum rate of diversion at any one pumping facility under Permit 10477 (40 cfs or 79.34 acre-feet per day¹) and rounded up to the nearest whole day. This amount discounts the maximum liability in this case to achieve settlement with the District, streamline the enforcement process, and avoid the expense of a hearing before the State Water Board. This liability amount is the minimum liability recommended by the Division, and the State Water Board may consider the maximum liability if this matter goes to hearing.

¹ The Division used a conversion factor of 1 cfs equaling 1.9835 acre-feet per day.

RIGHT TO HEARING

- 9. The District 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 complaint is received. (Wat. Code, § 1055, subd. (b).)
- 10. If the District requests a hearing, it 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.
- 11. If the District 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 order setting an ACL shall become final and effective upon issuance.
- 12. If the District 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 8 above, to:

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

- 13. If the District 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:

*Victoria A. Whitney, Chief
 Division of Water Rights*

Dated: 11/30/06

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