

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

**DIVISION OF WATER RIGHTS**

**ORDER WR 2015 - 0031- EXEC**

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In the Matter of Unauthorized Diversion and Use of Water by

Mark Hodgetts

**ORDER APPROVING SETTLEMENT AGREEMENT  
AND CEASE AND DESIST ORDER**

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**BY THE EXECUTIVE DIRECTOR<sup>1</sup>**

**1.0 INTRODUCTION**

This matter comes before the Executive Director of the State Water Resources Control Board (State Water Board or Board) following the issuance of a draft Cease and Desist Order (Draft CDO) and an Administrative Civil Liability Complaint (ALCL) to Mark Hodgetts (Hodgetts). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Division Prosecution Team) and Hodgetts have agreed to settle this matter in lieu of proceeding to a hearing. The issuance of a decision or order pursuant to a settlement agreement is authorized under Government Code section 11415.60.

**2.0 BACKGROUND**

Hodgetts owns Trinity County Assessor Parcel Numbers (Parcel/s) 014-370-21-00 and 014-370-29-00. Both Parcels are riparian to Hayfork Creek in Trinity County. Parcel 014-370-21-00 includes a surface water diversion facility that Hodgetts uses to fill water trucks for bulk water delivery and sale. This overhead fill station can draw water from a point of diversion on Hayfork Creek or from municipal supply provided by Trinity County Waterworks District 1 (District).

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<sup>1</sup> State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

Hodgetts does not have a Statement of Water Diversion and Use on file with the Division for past diversions from Hayfork Creek, nor a permit or license authorizing the diversion of water from Hayfork Creek for use and transport off of Parcel 014-370-21-00. Under a riparian claim of right, any water that is diverted from Hayfork Creek must be put to direct use on property that is riparian to Hayfork Creek.

On July 16, 2015, the Division Prosecution Team issued a Draft CDO to Hodgetts. The Draft CDO orders Hodgetts to take a number of actions including: (1) immediately cease and desist diversion from Hayfork Creek for bulk water delivery and use on non-riparian property; (2) file a Statement of Water Diversion and Use; and (3) limit bulk water hauling of District water to the place of use as identified in the District's water right License 7756 and Permits 15437, 20624, and 20625.

On July 31, 2015, Hodgetts submitted a timely request for hearing on the Draft CDO.

On August 27, 2015, the Division Prosecution Team issued an ACLC to Hodgetts alleging that Hodgetts unlawfully diverted water from Hayfork Creek for bulk water sales to non-riparian properties which constitutes an unauthorized diversion and a trespass against the State of California in violation of Water Code section 1052, and failed to file a Statement of Water Diversion and Use as required by Water Code sections 5100 et. seq. The ACLC recommends an administrative civil liability in the amount of \$35,000 for the alleged violations based on relevant circumstances, including economic benefit derived from unauthorized diversion and use of water, deterrence, and cost of enforcement.

On August 19, 2015, the State Water Board issued a notice of public hearing on the Draft CDO for October 5-6, 2015. On September 3, 2015, the State Water Board issued a revised notice that extended the deadline for submittal of notices of intent

to appear and expanded the scope of the hearing to include the ACLC. This hearing was subsequently postponed upon receipt of a settlement agreement.

Hodgetts and the Division Prosecution Team engaged in settlement discussions and mutually agreed to settle the matters identified in the ACLC and Draft CDO in lieu of a hearing.

### **3.0 SETTLEMENT AGREEMENT**

Hodgetts and the Division Prosecution Team executed the Settlement Agreement attached hereto. The general terms of the settlement are that Hodgetts: 1) waives his right to hearing on the ACLC and Draft CDO; 2) withdraws his request for hearing; 3) waives his right to reconsideration of this order; 4) agrees to the cease and desist provisions as described in the Settlement Agreement and incorporated herein; and 5) is subject to administrative civil liability in the amount of \$35,000, without reduction, payable within 30 days of issuance of this Order, to be deposited into the Water Rights Fund pursuant to Water Code section 1054, et seq.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the attached Settlement Agreement between the Division Prosecution Team and Hodgetts is approved and is incorporated by reference into this order.

This order constitutes a cease and desist order for purposes of Division 2, Part 2, chapter 12 of the Water Code (commencing with section 1825). Violations of this Settlement Agreement and order will be subject to further enforcement under Water Code section 1845 at the discretion of the State Water Board.

Upon the failure of any person or entity to comply with a cease and desist order issued by the State Water Board, and upon the request of the State Water Board, the Attorney General shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining

order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a).)

Section 1845, subdivision (b) of the Water Code provides:

(1) A person or entity who violates a cease and desist order issued pursuant to this chapter may be liable in an amount not to exceed the following:

(A) If the violation occurs in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions, ten thousand dollars (\$10,000) for each day in which the violation occurs.

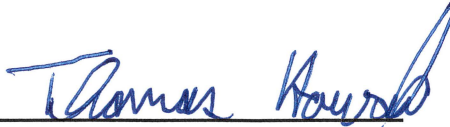
(B) If the violation is not described by subparagraph (A), one thousand dollars (\$1,000) for each day in which the violation occurs.

(2) Civil liability may be imposed by the superior court. The Attorney General, upon the request of the board, shall petition the superior court to impose, assess, and recover those sums.

(3) Civil liability may be imposed administratively by the board pursuant to Section 1055.

STATE WATER RESOURCES CONTROL BOARD

Dated: 10/2/15

  
Thomas Howard  
Executive Director

## SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between Mark Hodgetts (Hodgetts) and the Prosecution Team of the State Water Resources Control Board's ("State Water Board") Division of Water Rights ("Division Prosecution Team") and is executed on this 18<sup>th</sup> day of September, 2015. 21<sup>st</sup> (J.O.)

### RECITALS

1. Hodgetts owns Trinity County Assessor Parcel Numbers (Parcel/s) 014-370-21-00 and 014-370-29-00. Both Parcels are riparian to Hayfork Creek in Trinity County.
2. Parcel 014-370-21-00 includes a surface water diversion facility that Hodgetts uses to fill water trucks for bulk water delivery and sale. On March 21, 2014 Hodgetts stated to Division staff that he purchased the property with the existing diversion piping works and structure in 2007. Hodgetts stated that he has been operating his diversion facility since 2008 which includes filling water trucks for dust control and fire protection for use at various locations in the surrounding area. According to Hodgetts, the existing diversion works consisted of a 4-inch pipe that was used to divert water for a saw mill operation which existed years ago. Since purchasing the property, Hodgetts built an overhead fill station for water trucks. This overhead fill station can draw water from a point of diversion on Hayfork Creek or from municipal supply provided by Trinity County Waterworks District 1 (District).
3. Hodgetts is not licensed with the California Department of Public Health to deliver potable water.
4. Hodgetts does not have a Statement of Water Diversion and Use (Statement) on file with the Division for past diversions from Hayfork Creek, nor a permit or license authorizing the diversion of water from Hayfork Creek for use and transport off of Parcel 014-370-21-00. Under a riparian claim of right, any water that is diverted from Hayfork Creek under a riparian right must be put to direct use on property that is riparian to Hayfork Creek.
5. The municipal supply provided to Hodgetts fill station by the District is diverted from Big Creek and Hayfork Creek under the District's License 7756 and/or Permits 15437, 20624 and 20625. The District diverts and provides water for municipal use within the District's place of use (POU) as identified in License 7756 and/or Permits 15437, 20624 and 20625.
6. On January 6, 2014, Hodgetts applied for a California Department of Fish and Wildlife (CDFW) Lake and Streambed Alteration Agreement (LSAA) for his point of diversion in Hayfork Creek.
7. On January 31, 2014 CDFW deemed Hodgetts' LSAA application incomplete for missing or insufficient information and informed Hodgetts of the need to obtain a water right from the State Water Board to use water diverted from Hayfork Creek for bulk water hauling to non-riparian property.

8. March 21, 2014, Hodgetts contacted the Division to inquire about California Water Code laws and regulations that identify where he can use water that he diverts from Hayfork Creek to Parcel 014-370-21-00. Division staff informed Hodgetts that the diversion activities that he described is not allowed under a riparian claim of right and constitutes an unauthorized place of use. Division staff stated to Hodgetts that he would need to submit an application to appropriate water. Division staff provided Hodgetts the contact information for the Division's Permitting and Licensing Section.
9. On April 11, 2014, Hodgetts submitted an Application to Appropriate Water (Application) to the Division. The Application seeks to appropriate 4,000 gallons per day from Hayfork Creek during the months of March 1 to October 31 for dust control, compaction, domestic and fire suppression purposes. The application identifies Hodgetts' Parcel 014-370-21-00 as the place of use. The designation of the place of use was solely identified as and limited to Parcel 014-370-21-00. Hodgetts place of use designation is inconsistent with prior statement by Hodgetts to Division staff and made on his LSAA application submitted to CDFW, which indicates that water is being transported off the parcel for bulk water sales.
10. On October 8, 2014, Division permitting staff issued an acceptance letter for Hodgetts's Application (Acceptance Letter). In the letter Hodgetts was required to take the following steps:
  - 1) Pay annual fees;
  - 2) Prepare an environmental setting and baseline description to assist with the preparation of California Environmental Quality Act documentation;
  - 3) Prepare a Water Availability Analysis;
  - 4) Immediately submit a Statement to the Division; and
  - 5) Restrict the place of use for water diverted from Hayfork Creek solely to Parcel 014-370-21-00.
11. On July 16, 2015 the Division Prosecution Team issued a Draft Cease and Desist Order (CDO) to Hodgetts via email and certified mail, the certified mail copy was received on August 3, 2015. The proposed CDO orders Hodgetts to take the following steps:
  - 1) Immediately cease and desist unauthorized diversion from Hayfork Creek;
  - 2) Prohibited from selling and/or transporting water from Hayfork Creek Parcel 014-370-21-00 for use on non-riparian property. Hodgetts shall immediately disconnect the overhead fill station from the Hayfork Creek diversion works and render it incapable of providing Hayfork Creek water for bulk water sales;
  - 3) Within 30-days file a Statement of Water Diversion and Use for past diversion from Hayfork Creek;
  - 4) Install a measuring device to measure the volume of water diverted from Hayfork Creek. All water diverted from Hayfork Creek must be for direct diversion and

use on Parcels 014-370-21-00 and 014-370-29-00 only, unless you obtain necessary appropriative water rights for other uses;

- 5) Provide to the Division written authorization from the District to conduct bulk water hauling operations within the District's place of use (POU) as identified in License 7756 and/or Permit 15437, 20624 and 20625;
  - 6) Maintain, and provide to the Division upon request, records of: (1) all surface water diversion from Hayfork Creek on Parcel 014-370-21-00; (2) the source, quantity, and deliver location of all water sold and delivered from the diversion facilities; and (3) retain copies of monthly billing statements received from the District; and
  - 7) Submit a summary and photographic evidence of all actions taken to prevent any future unauthorized diversion and use of water.
- 12.** On July 31, 2015, Hodgetts submitted a timely request for hearing on the Draft CDO. The State Water Board Hearing Team has scheduled a hearing on the Draft CDO for October 5-6, 2015.
- 13.** In response to a number of complaints, Division Prosecution Team conducted an investigation into Hodgetts bulk water hauling operations that included two site inspections and remote surveillance of Parcel 014-370-21-00. Division Staff's findings from the investigation included the following:
- 1) Bulk water sales from the fill station located on Parcel 014-37-21-00 have continued, and the overhead fill station can draw water from a point of diversion on Hayfork Creek and/or from the District municipal supply.
  - 2) Based on District billing records, surveillance footage, and Division staff knowledge and understanding of the Hayfork Creek Point of Diversion (POD), Hodgetts diverted and transported approximately 177,649 gallons (0.5 acre-feet) of water from Hayfork Creek over 18 days between May 18 and June 15, 2015.
  - 3) Hodgetts has failed to file a Statement for the Hayfork Creek POD on Parcel 014-370-21-000.
- 14.** On August 27, 2015, the Division Prosecution Team issued an Administrative Civil Liability Complaint (ACLC) to Hodgetts alleging that Hodgetts unlawfully diverted water from Hayfork Creek for bulk water sales to non-riparian properties which constitutes an unauthorized diversion and a trespass against the State of California in violation of California Water Code section 1052, and failed to file a Statement of Water Diversion and Use (Statement) as required by Water Code sections 5100 et. seq. The ACLC recommends an Administrative Civil Liability in the amount of \$35,000 for the alleged violations based on relevant circumstances, including economic benefit derived from unauthorized diversion and use of water, deterrence consideration and cost of enforcement.
- 15.** On August 31, 2015, the Division Prosecution Team filed a request to consolidate hearing on the CDO and ACLC at the October 5-6, 2015 hearing. At the time of this

Settlement Agreement, the State Water Board is scheduled to hear the ACLC and Draft CDO on October 5-6, 2015.

16. In lieu of hearings on the matter, Hodgetts and the Division Prosecution Team agree to settle the matters identified in the ACLC and Draft CDO through this Settlement Agreement.
17. This Settlement Agreement will be submitted to the State Water Board's Executive Director for approval and adoption pursuant to Government Code section 11415.60 as a decision by settlement and will become effective when the State Water Board's Executive Director issues an order approving the settlement.

NOW, THEREFORE, in consideration of these Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, Hodgetts and the Division Prosecution Team do hereby agree to settle the ACLC and Draft CDO as follows:

1. **Recitals Incorporated.** The preceding Recitals are incorporated herein.
2. **Settlement Conditionally Confidential.** Unless and until the State Water Board's Executive Director issues an order approving this Settlement Agreement, this Settlement Agreement is a confidential settlement document subject to all of the limitations on admissibility set forth in California Evidence Code sections 1152 and 1154. Furthermore, pursuant to Government Code section 11415.60, this Settlement Agreement is not admissible in an adjudicative proceeding or civil action for any purpose.
3. **Administrative Civil Liability.** Hodgetts shall be subject to administrative civil liability in the amount of \$35,000. This amount, without reduction, is based on the relevant circumstances discussed in the ACLC and the estimated costs incurred by State Water Board staff to investigate and prosecute the administrative civil liability and cease and desist enforcement actions that are the subject of this Settlement Agreement.
4. **Administrative Civil Liability Payment.** Within 30 days following the State Water Board Executive Director's approval of this Settlement Agreement, Hodgetts shall pay \$35,000 to the State Water Board. The State Water Board will deposit said funds in the Water Rights Fund pursuant to Water code sections 1054, et seq.
5. **Satisfaction of Administrative Civil Liability Complaint.** Hodgetts' full payment under paragraph 3 will be a complete and final satisfaction of the administrative civil liability described in the ACLC, and the State Water Board will not bring any further administrative civil liability or other enforcement action regarding any of the alleged violations described in the ACLC or CDO.
6. **Draft Cease and Desist Order.** Hodgetts and the Division Prosecution Team shall resolve the alleged unauthorized diversions or threatened unauthorized diversions as follows:
  - 1) Hodgetts shall immediately cease and desist any unauthorized diversion and use of water from Hayfork Creek.




- 2) Hodgetts is prohibited from selling and/or transporting water diverted from Hayfork Creek off of Hayfork Creek Parcel 014-370-21-00 for use on non-riparian property. Hodgetts shall permanently disconnect the overhead fill station from the Hayfork Creek diversion works and render it incapable of providing Hayfork Creek water for bulk water sales. The overhead fill station shall remain disconnected from Hayfork Creek until such time as the necessary appropriative water rights permit is issued by the Division.
- 3) Within 30 days of the date of this Order, Hodgetts shall file an Initial Statement of Water Diversion and Use for past diversion from Hayfork Creek in 2014 and shall continue to file Supplemental Statements as required. If Hodgetts has multiple diversion locations (e.g., directly diverting from a stream as well as impound water at a dam), a separate Statement is required for each diversion.
- 4) If Hodgetts intends to continue diverting surface water from Hayfork Creek for riparian uses, then within 60 days of the date of adoption of this Order, Hodgetts shall install a measuring device (e.g., in-line flow meter) to measure the volume of water diverted from Hayfork Creek. All water diverted from Hayfork Creek must be for direct diversion and use on Parcels 014-370-21-00 and 014-370-29-00 only, unless you obtain necessary appropriative water rights for other uses.
- 5) Prior to continuing any bulk water sales of municipal water supplied by the District, Hodgetts must obtain and provide to the Division written authorization from the District to conduct bulk water hauling operations within the District's place of use (POU) as identified in License 7756 and/or Permit 15437, 20624 and 20625. Hodgetts shall not transport water purchased from the District outside of the District's place of use and must maintain sufficient records to demonstrate compliance with the POU restrictions.
- 6) Hodgetts shall maintain, and provide to the Division upon request, records of: (1) all surface water diversion from Hayfork Creek on Parcel 014-370-21-00; (2) the source, quantity, and deliver location of all water sold and delivered from the diversion facilities; and (3) retain copies of monthly billing statements received from the District.
- 7) Within 60 days of the date of adoption of this Order, Hodgetts shall submit a summary and photographic evidence of all actions taken to prevent any future unauthorized diversion and use of water.
- 8) Within 60 day of adoption of this Order, Hodgetts shall revoke water rights application A032255 (Application), or convey the intent to pursue the Application by amending the place of use of the Application to accurately reflect the area where water will be delivered. If Hodgetts chooses to pursue the Application, then within 120 days of adoption of this Order, Hodgetts shall also submit to the Division an environmental setting and baseline description as requested in the October 8, 2014 Acceptance Letter. If Hodgetts chooses to pursue the Application, then Hodgetts shall continue to diligently pursue securing permits pursuant to the Application by satisfying all Division request for information, environmental documents, maps and fees within the designated time frames, or any extension of time granted by the Division.

7. **Enforcement of this Settlement Agreement.** The terms and conditions of the Settlement Agreement and this Order shall be treated as a final cease and desist order issued by the State Water Board pursuant to chapter 12 of the California Water Code (commencing with section 1825). Violations of this Settlement Agreement and the Order will be subject to further enforcement under Water Code section 1845 at the discretion of the State Water Resources Control Board.
8. **Board Authority.** This Settlement Agreement is not intended to and shall not be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law. Nothing in this Settlement Agreement shall excuse Hodgetts from meeting any other requirements that may be imposed hereafter by applicable legally binding legislation, regulation, or other authority.
9. **Hearing.** Upon execution of this Settlement Agreement by both parties, Hodgetts and the Division Prosecution Team shall request that the hearing in this matter be indefinitely postponed pending approval of this Settlement Agreement by the Executive Director. Upon approval of this Settlement Agreement by the State Water Board's Executive Director, Hodgetts' request for hearing on the ACLC and Draft CDO is withdrawn.
10. **Time is of the Essence.** The State Water Board is scheduled to hear this matter on October 5-6, 2015. Therefore, time is of the essence and the parties shall submit this Settlement Agreement and proposed implementing order to the Executive Director as soon as possible.
11. **Waiver of Reconsideration.** Hodgetts waives his rights to request reconsideration of the State Water Board Executive Directors' order approving this Settlement Agreement, provided no material modifications to this Settlement Agreement or additional requirements beyond the requirements of this Settlement Agreement are included in that order.
12. **Successors.** This Settlement Agreement is binding on any successors or assigns of Hodgetts and the State Water Board.
13. **Independent Judgment.** Each party represents and declares that in executing this Settlement Agreement it is relying solely on its own judgment, knowledge and belief concerning the nature, extent and duration of its rights and claims, and that it has not been influenced to any extent whatsoever in the execution of this Settlement Agreement by any representations or statements regarding any matters made by other parties hereto or by any person representing them. The parties are represented by counsel.
14. **No Precedent.** This Settlement Agreement involves unique facts and legal issues and shall not be used as a precedent decision of the State Water Board.
15. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
16. **Entire Agreement.** This Settlement Agreement reflects and represents the entire agreement between and among the parties and supersedes any and all prior understandings, representations, and agreements whether written or unwritten. Each party represents that it has not relied on any inducements, promises or representations made by the other party other than those contained in this Settlement Agreement.

17. **Mutual Agreement.** The parties have agreed to the particular language in this Settlement Agreement, and this Settlement Agreement shall not be construed against the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.
18. **Counterparts.** This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.
19. **Reasonableness of Settlement.** The parties represent and warrant that this Settlement Agreement is made in good faith and in full recognition of the implications of such agreement.
20. **Section Headings.** The parties intend that the paragraph headings of this Settlement Agreement be used solely as a convenient reference and that they shall not in any manner amplify, limit, modify or otherwise aid in the interpretation of this Settlement Agreement.
21. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving the Settlement Agreement.
22. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
23. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
24. **State Water Board Is Not Liable.** Neither the State Water Board members nor the Board's staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by Hodgetts, or his employees, agents, representatives, or contractors in carrying out activities pursuant to this Settlement Agreement, nor shall the State Water Board, its members or staff be held as parties to or guarantors of any contract entered into by Hodgetts or his employees, agents, representatives, or contractors in carrying out activities pursuant to this Settlement Agreement.

Dated: 9/21, 2015

  
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John O'Hagan  
Assistant Deputy Director  
State Water Board, Division of Water Rights  
Prosecution Team

Dated: 9/18, 2015

  
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Mark Hodgetts