

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

DIVISION OF WATER RIGHTS

ORDER WR 2017-0002-EXEC

In the Matter of Violation of Annual Reporting Requirements by

James J. Wittler

ORDER APPROVING SETTLEMENT AGREEMENT

BY THE EXECUTIVE DIRECTOR¹

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 an Administrative Civil Liability (ACL) Complaint to James J. Wittler. In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Division Prosecution Team) and Mr. Wittler 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

Mr. Wittler is the owner of record for Permit 21002 (A029313), which has a priority date of August 4, 1998 and allows for the diversion of up to 170 acre-feet per year from Lone Tree Creek for irrigation of up to 55 acres.

On February 19, 2016 the Division of Water Rights issued a notice to Mr. Wittler, reminding him of the requirement to submit the 2015 Annual Use Report by June 30, 2016, as required pursuant to the California Code of Regulations and notifying Mr. Wittler that the 2015 Annual Use Report must be filed online.

Mr. Wittler failed to submit the 2015 Annual Use Report for Permit 21002 (A029313) online by the deadline, June 30, 2016.

¹ 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.

On August 25, 2016, the Division mailed out a deficiency letter requesting that the 2015 Annual Use Report be submitted within 30 days and warned of the potential for enforcement with monetary penalties should the violation persist.

On November 28, 2016, the Division Prosecution Team issued an Administrative Civil Liability Complaint (“ACLC”) against Mr. Wittler, alleging that Mr. Wittler had failed to submit the 2015 Annual Use Report for Permit 21002 (A029313) by the June 30, 2016 deadline in violation of Title 23, Chapter 2.7, Article 2, section 925 of the California Code of Regulations.

On December 1, 2016 Mr. Wittler timely requested a hearing on the ACLC. At the time of this Settlement Agreement, the State Water Board is scheduled to hear the ACLC on February 13, 2017. On the same date, Mr. Wittler filed the required 2015 Annual Use Report for Permit 21002 (A029313).

Mr. Wittler and the Division Prosecution Team engaged in settlement discussions and mutually agreed to settle the matters identified in the ACLC in lieu of hearing.

3.0 SETTLEMENT AGREEMENT

Mr. Wittler and the Division Prosecution Team executed the Settlement Agreement attached hereto. The general terms of the settlement are that Mr. Wittler: (1) withdraws his request for hearing on the ACLC, waives his right to reconsideration of this Order, and agrees to the terms and conditions described in the Settlement Agreement and incorporated herein, and (2) is subject to administrative civil liability in the amount of \$1,000 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 Mr. Wittler 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 California Water Code (commencing with section 1825). Violations of this Settlement Agreement and the Order will be subject to further enforcement under California 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).)

STATE WATER RESOURCES CONTROL BOARD



Thomas Howard
Executive Director

Dated: FEB 13 2017

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between James J. Wittler 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 9th day of ~~January~~, February, 2017.

RECITALS

1. Mr. Wittler is the owner of record for two appropriative water rights and two riparian claims of water right:
 - a. Permit 21002 (A029313) has a priority date of August 4, 1998 and allows for the diversion of up to 170 acre-feet per year from Lone Tree Creek for irrigation of up to 55 acres,
 - b. License 6504B (A012717B) has a priority date of September 27, 1948 and allows for the diversion of up to 21.9 acre-feet per year from Lone Tree Creek for irrigation of up to 5 acres,
 - c. Statement S024703 was initially filed on December 18, 2014 claiming a riparian right to divert water from Lone Tree Creek for direct irrigation of 36 acres, and
 - d. Statement S024704 was initially filed on December 18, 2014 claiming a riparian right to divert water from Lone Tree Creek for direct irrigation of 36 acres.
 - e. Statement No. S024699 was initially filed on October 30, 2014 claiming a riparian right to divert water from Lone Tree Creek for direct irrigation of 36 acres. This Statement was missing information and later considered incomplete.
2. Senate Bill X7-8 authorized the State Water Board to adopt regulations requiring online reporting of water diversions. Consistent with the Senate Bill, the State Water Board has adopted regulations requiring annual reporting of water diversion and use under permits and licenses (Annual Use Report), and developed an online Report Management System as a component of the enhanced Water Right Information Management System (eWRIMS). Electronic reporting has been required since 2009. The regulation specifying annual permittee and licensee reporting requirements is codified at Title 23, Chapter 2.7, Article 2, sections 925 and 929 of the California Code of Regulations (Regulations).
3. On February 19, 2016 the Division of Water Rights (Division) issued a notice to Mr. Wittler, reminding him: (a) of the requirement to submit the 2015 Annual Use Report by June 30, 2016 as required pursuant to the Regulations, and (b) notifying Mr. Wittler that the 2015 Annual Use Report must be filed online. The notice provided instructions on how to access the RMS system and submit the 2015 Annual Use Report online and also notified Mr. Wittler

to contact the Division by phone or email with any questions regarding the reporting process.

4. Mr. Wittler failed to submit the 2015 Annual Use Report for Permit 21002 (A029313) online by the deadline, June 30, 2016. The annual report for License 6504B (A012717B) was filed on July 1, 2016.
5. On August 25, 2016, the Division mailed out a deficiency letter requesting that the 2015 Annual Use Report for Permit 21002 be submitted within 30 days and warned of the potential for enforcement with monetary penalties should the violation persist.
6. On November 28, 2016, the Division Prosecution Team issued an Administrative Civil Liability Complaint ("ACLC") against Mr. Wittler, alleging that Mr. Wittler had failed to submit the 2015 Annual Use Report for Permit 21002 (A029313) by the June 30, 2016 deadline in violation of section 925 of the Regulations. The ACLC recommends an Administrative Civil Liability in the amount of \$10,000 for this violation, and includes a settlement offer with reduced liability of \$1,000, provided the required Annual Use Report is submitted within 20 days and there is a waiver of right to hearing and reconsideration.
7. On December 1, 2016 Mr. Wittler timely requested a hearing on the ACLC. On this same date, Mr. Wittler filed the required Annual Report for Permit 21002 (A029313). At the time of this Settlement Agreement, the State Water Board is scheduled to hear the ACLC on February 13, 2017.
8. On January 20, 2017, the Division Prosecution Team met with Mr. Wittler and his counsel to discuss the potential of settling the ACLC.
9. In lieu of a hearing on the matter, Mr. Wittler and the Division Prosecution Team agree to settle the matter identified in the ACLC through this Settlement Agreement.
10. 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, Mr. Wittler and the Division Prosecution Team do hereby agree to settle the ACLC 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.** Mr. Wittler shall be subject to administrative civil liability in the amount of \$1,000. This amount was initially offered as an expedited payment option within the ACLC, provided Mr. Wittler filed the required Annual Report for Permit 21002 (A029313) within 20 days of receipt of the ACLC. Mr. Wittler did in fact file the required Annual Report one day after he received the ACLC.
4. **Administrative Civil Liability Payment.** Within 30 days following the State Water Board Executive Director's approval of this Settlement Agreement, Mr. Wittler shall pay \$1,000 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. **Actions to be taken by Diverter.** To further settle issues related to Mr. Wittler's Annual Use Reports, Mr. Wittler agrees to the following:
 - a. Within 30 days of the Executive Director's Order approving this Settlement Agreement, Mr. Wittler shall update the personal contact information (name, address, telephone number and email address) on file with the State Water Board for each of the water rights mentioned herein to ensure that future notices sent electronically or otherwise will be received. Mr. Wittler shall update this information annually with all Annual Use Reports, if necessary;
 - b. Within 30 days of the Executive Director's Order approving this Settlement Agreement, Mr. Wittler shall review, revise, and submit new versions of the 2014 and 2015 Annual Use Reports for Permit 21002 (Application A029313) and License 6504B (A012717B). The new versions shall be submitted online to the State Water Board and accurately reflect diversions that occurred during 2014 and 2015 when availability of water was limited due to drought conditions. Mr. Wittler shall not duplicate reporting of diversion amounts under the license, permit and/or the claimed rights covered by Statements of Water Diversion and Use;
 - c. Within 30 days of the Executive Director's Order approving this Settlement Agreement, Mr. Wittler shall review, revise, and submit new versions of the 2015 Supplemental Statements of Diversion and Use for Statements S024703 and S024704 online to the State Water Board, if deemed appropriate. In completing these Supplemental Statements, Mr. Wittler shall consider the availability of natural flow in Lone Tree Creek under his claimed riparian right;
 - d. Within 60 days of the Executive Director's Order approving this Settlement Agreement, Mr. Wittler shall determine if a riparian claim is appropriate and sufficient to cover his diversions at the point of diversion currently not covered by License 6504B or Permit 21002. Within the same 60-day period, Mr. Wittler shall either inform the State Water Board that he will rely on a riparian claim for this point of

diversion, or shall file a Petition for Change in Point of Diversion to include this point of diversion under Permit 21002 (A029313). If a Petition is filed, Mr. Wittler shall submit all necessary information and required fees for the petition, and diligently pursue processing of the petition by timely submitting all requested information from the State Water Board; and

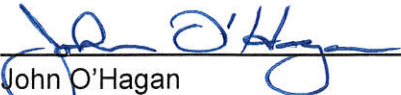
- e. Mr. Wittler shall comply with measuring and reporting regulations adopted by the State Water Board on January 19, 2016, Resolution No. 2016-0005 by accurately measuring and reporting diversion and use information for the year of 2016 by the appropriate due date for each water right and claim of water right.
6. **Satisfaction of Administrative Civil Liability Complaint.** Mr. Wittler's full payment under paragraph 4 and completion of the terms and conditions under paragraph 5 will constitute 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.
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 Mr. Wittler from meeting any other requirements that may be imposed hereafter by applicable legally binding legislation, regulation, or other authority.
9. **Hearing.** Upon approval of this Settlement Agreement by the State Water Board's Executive Director, Mr. Wittler's request for hearing on the ACLC is withdrawn.
10. **Time is of the Essence.** The State Water Board is scheduled to hear this matter on February 13, 2017. 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.** Mr. Wittler 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 Mr. Wittler 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 Mr. Wittler, 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 Mr. Wittler or his employees, agents, representatives, or contractors in carrying out activities pursuant to this Settlement Agreement.

Dated: February 9,
January __, 2017



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

Dated: January 26, 2017



James J. Wittler