

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

ORDER WR 2010 - 0028 - EXEC

In the Matter of the Diversion and Use of Water by
Garrapata Water Company

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

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 a draft Cease and Desist Order (CDO) and an Administrative Civil Liability (ACL) complaint to the Garrapata Water Company (GWC). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights prosecution team (Division Prosecution Team) and GWC 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. The settlement is approved.

2.0 BACKGROUND

On February 21, 1990, GWC filed Application 29664 with the State Water Board Division of Water Rights (Division). GWC sought to divert water at a rate of 0.11 cubic foot per second (cfs), totaling 81 acre-feet per annum (afa) from the underflow of Garrapata Creek by means of direct diversion for municipal and irrigation purposes.

The Division distributed a notice of the application to interested parties on January 3, 1992. The application was protested by three parties. The protests related to riparian rights, riparian habitat, and fishery concerns dependent upon adequate year-round flows.

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

After a hearing, the State Water Board issued Decision 1639 on June 17, 1999, concluding that GWC was diverting water from the subterranean stream of Garrapata Creek within the State Water Board's permitting authority, and that Application 29664 was not categorically exempt from the California Environmental Quality Act unless GWC modified its project to limit its application to existing use of 35 afa. By letter dated June 18, 1999, GWC requested that its application be reduced from 81 afa to 35 afa.

Division Decision 99-01, issued on September 24, 1999, approved issuance of a permit pursuant to GWC's Application 29664. The Decision authorized GWC to divert up to 35 afa from the Garrapata Creek subterranean stream from January 1 to December 31 of each year, with a maximum rate of diversion not to exceed 0.11 cfs. To further ensure this diversion did not have an adverse effect on steelhead, riparian habitat and other public trust resources within the lower portion of Garrapata Creek, the permit requires GWC to cease diversions if visible flow does not exist downstream of its point of diversion but does exist within 100 yards upstream.

On October 13, 1999, GWC accepted Permit 21010. GWC is required to record meter readings on or about the first of each month and supply these readings to the State Water Board with its annual Progress Report by Permittee. GWC failed to record meter readings for July 2001, August and September 2002, March 2003, May and July through October 2004, February through May 2005, and November 2006. Additionally, except for year 2002, the annual diversion amounts reported by GWC consistently exceeded the 35 afa amount authorized by Permit 21010. Although these excess diversions have been small, GWC failed to take any corrective actions and publicly acknowledged that except for one year, GWC has always exceeded the 35 afa limitation. In addition, a GWC representative advised customers that each property owner should continue to have the freedom to use the amount of water that is reasonably needed without a penalty being imposed and also stated that violations were of no concern to anyone.

On June 10, 2008, the Division Prosecution Team issued an ACL in the amount of \$14,400 and a Draft CDO against GWC, alleging continuing unauthorized diversion and use of water and lack of corrective action to prevent such violations. This ACL amount includes an estimate of about \$1,400 annually for the avoided cost of 1 to 7 acre-feet of water per year in the local area.

On June 19, 2008, GWC timely requested hearings on the ACL and Draft CDO. A hearing before the State Water Board was scheduled for February 22, 2010.

GWC and the Division Prosecution Team agree to settle the matters identified in the ACL and Draft CDO through this Settlement Agreement in lieu of hearings on said matters.

3.0 SETTLEMENT AGREEMENT

GWC and the Division Prosecution Team engaged in settlement discussions and reached an agreement on language that is mutually acceptable and is contained in the Settlement Agreement that is attached hereto. The general terms of the settlement are that GWC:

(1) withdraws its request for hearing on the ACL and CDO, and agrees to the terms for cease and desist as described herein, and (2) is subject to administrative civil liability in the amount of \$6,303.

This decreased amount reflects GWC's ability to pay and evidence showing the excess diversions in GWC's system were primarily caused by system leaks that have now been corrected. GWC's total annual diversion for 2009 was 28 afa. The Division Prosecution Team agrees that GWC's customers have taken a proactive role in assisting GWC in this matter; and may voluntarily remit payment for any ACL imposed in this case.

ORDER

IT IS HEREBY ORDERED THAT the attached Settlement Agreement between the Division's Prosecution Team and GWC is approved and is incorporated by reference into this Order.

IT IS FURTHER ORDERED THAT pursuant to sections 1831 through 1836 of the Water Code, GWC shall immediately cease and desist its unauthorized diversion of water from Garrapata Creek and comply with the following corrective actions pursuant to the schedules specified:

- a) Upon receipt of this Order, GWC shall immediately cease diverting any water in excess of the amounts prescribed in Permit 21010 until such time the State Water Board issues, or recognizes in writing, water rights sufficient to cover GWC's additional unauthorized diversions. If and until such additional rights are issued or recognized by the State Water Board, GWC shall not add any new service connections to its system. Should any system

failure be a cause for potential excess diversion, GWC shall promptly submit in writing to the Assistant Deputy Director for Water Rights an explanation or justification for any future diversions in excess of the amounts authorized in Permit 21010 and any additional water rights acquired.

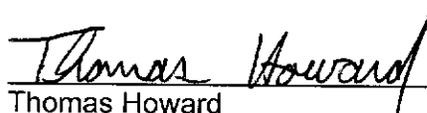
- b) Within 60 days of the date of this Order, GWC shall provide a Compliance Plan (plan) for approval by the Assistant Deputy Director for Water Rights. GWC submitted a proposed plan in the context of settlement, in which GWC agrees to report on a monthly basis via email to the State Water Board, GWC's weekly water usage, upstream and downstream weekly observations of the flow in Garrapata Creek from June 1 to October 30 of each year for compliance with Condition 9 of Permit 21010, and any leaks or other system failures that may impact water usage. For water conservation and customer service, GWC proposes to communicate its water consumption rates (both the previous and current month) to all property owners on a monthly basis with tips on water conservation practices. If GWC timely submits a final plan consistent with its proposed plan, this requirement will be considered satisfied.
- c) GWC shall submit monthly, beginning at the end of the calendar month in which this Order is adopted, a record of its weekly diversion amounts and its observations of the upstream and downstream flow in the channel of Garrapata Creek made under the conditions of Permit 21010, along with any measures GWC has taken to conserve water within its service area during the month. The records shall be submitted to the Assistant Deputy Director for Water Rights until directed otherwise. If GWC operates consistent with its compliance plan, as identified in paragraph b) of this Order, this requirement will be satisfied.
- d) If it is determined that additional water rights are required to meet GWC's existing demands, even with conservation measures, GWC shall file for additional water rights and diligently pursue processing of the filing by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division. The Settlement Agreement does not obligate the Division's approval of any such filing.

- e) GWC shall comply, to the best of its abilities given the constraints of the condition of the existing water infrastructure and the Public Utilities Commission regulations, with any written directive of the Assistant Deputy Director for Water Rights regarding modifications to monitoring of diversions or changes to its plan submitted in compliance with paragraph b) of this Order. If for any reason GWC is unable to comply with any such directives or time frames for actions, GWC shall provide prompt notice and a written explanation via email to the Assistant Deputy Director for Water Rights.

Upon the failure of any person or entity to comply with a CDO issued by the State Water Board pursuant to chapter 12 of the Water Code (commencing with section 1825), 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) Any person or entity that violates a cease and desist order issued pursuant to this chapter may be liable for a sum not to exceed 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 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.

Dated: 9/9/10


Thomas Howard
Executive Director

Attachment

Subject to Evidence Code
Sections 1152 and 1154

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between the Garrapata Water Company (GWC) and the Prosecution Team of the State Water Resources Control Board's Division of Water Rights (Division Prosecution Team) and is executed this ~~25th~~ day of ~~March~~ 13th April 2010.

RECITALS

- A. On February 21, 1990, GWC filed Application 29664 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). GWC sought to divert water at a rate of 0.11 cubic foot per second (cfs) totaling 81 acre-feet per annum (AFA) from the underflow of Garrapata Creek by means of direct diversion. The water would be used for municipal and irrigation purposes.
- B. The Division distributed a notice of the application to interested parties on January 3, 1992, and the application was protested by three parties. The protests related to riparian rights, riparian habitat, and steelhead and other fishery concerns dependent upon adequate year-round flows.
- C. After a hearing, the State Water Board issued Decision 1639 on June 17, 1999, in which the Board concluded that GWC was diverting water from the subterranean stream of Garrapata Creek within the State Water Board's permitting authority, and Application 29664 was not categorically exempt from CEQA unless GWC modified its project to limit the amount of water in its application to existing use of 35 AFA. By letter dated June 18, 1999, GWC requested that its application be reduced from 81 AFA to 35 AFA.
- D. Division Decision 99-01, issued on September 24, 1999, approved issuance of a permit pursuant to GWC's Application 29664 subject to the constraints of the CEQA exemption. The Decision authorized GWC to divert up to 35 AFA from the Garrapata Creek subterranean stream from January 1 to December 31 of each year. The maximum rate of diversion cannot exceed 0.11 cfs. To further ensure this diversion did not have an adverse effect on steelhead, the riparian habitat and other public trust resources within the lower portion of Garrapata Creek, the permit requires GWC to cease diversions if visible flow does not exist downstream of its point of diversion but does exist within 100 yards upstream.
- E. On October 13, 1999, GWC accepted Permit 21010. GWC is required to record meter readings on or about the first of each month and supply these readings to the State Water Board with its annual Progress Report by Permittee.
- F. On June 10, 2008, the Division Prosecution Team issued an Administrative Civil Liability Complaint (ACL) and a Draft Cease and Desist Order (Draft CDO)

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against GWC alleging continuing unauthorized diversion and use of water and lack of corrective action to prevent such violations.

- G. On June 19, 2008, GWC timely requested hearings on the ACL and Draft CDO. A hearing before the State Water Board was scheduled for February 22, 2010.
- H. GWC and the Division Prosecution Team agree to settle the matters identified in the ACL and Draft CDO through this Settlement Agreement in lieu of hearings on said matters.
- I. 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, GWC and the Division Prosecution Team do hereby agree to settle the ACL 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.** Based on information received during settlement discussions regarding GWC's ability to pay and corrective actions taken by GWC to repair leaks in its water distribution system, GWC shall be subject to administrative civil liability in the amount of \$6,303. This amount includes \$6,000 for 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. The civil liability also includes \$303 as the annual water right fees for water diverted in excess of the amount authorized in Permit 21010 during the three years prior to the draft enforcement action. This amount shall be paid in full no later than six (6) months following the State Water Board Executive Director's approval of this Settlement Agreement.
4. **Satisfaction of ACL Complaint.** GWC's timely full payment under paragraph 3 will be a complete and final satisfaction of the administrative civil liability described in the ACL.

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5. **Draft Cease and Desist Order.** GWC and the Division Prosecution Team agree to settle the Draft CDO as follows:
- a) Upon receipt of the State Water Board Executive Director's order approving this Settlement Agreement, GWC shall immediately cease diverting any water in excess of the amounts prescribed in Permit 21010 until such time the State Water Board issues, or recognizes in writing, water rights sufficient to cover GWC's additional unauthorized diversions. If and until such additional rights are issued or recognized by the State Water Board, GWC shall not add any new service connections to its system. Should any system failure be a cause for potential excess diversion, GWC shall promptly submit in writing to the Assistant Deputy Director for Water Rights an explanation or justification for any future diversions in excess of the amounts authorized in Permit 21010 and any additional water rights acquired.
 - b) GWC shall within 60 days of the date of the State Water Board Executive Director's order approving this Settlement Agreement provide a Compliance Plan (plan) for approval by the Assistant Deputy Director for Water Rights. GWC has submitted a proposed compliance plan in the context of settlement, in which GWC agrees to report on a monthly basis via email to the State Water Board, GWC's weekly water usage, upstream and downstream weekly observations of the flow in Garrapata Creek from June 1 to October 30 of each year for compliance with Condition 9 of Permit 21010, and any leaks or other system failures that may impact water usage. For water conservation and customer service, GWC proposes to communicate its water consumption rates (both the previous month and current month) to all property owners on a monthly basis with tips on water conservation practices. If GWC timely submits a final plan consistent with its proposed compliance plan, this requirement will be considered satisfied.
 - c) GWC shall submit monthly, beginning at the end of the month in which the State Water Board Executive Director adopts an order approving this Settlement Agreement, a record of its weekly diversion amounts and observations of the upstream and downstream flow in the channel of Garrapata Creek made under the conditions of Permit 21010 and any measures it has taken to conserve water within its service area during the month. The records shall be submitted to the Assistant Deputy Director for Water Rights until directed otherwise. If GWC operates consistent with its compliance plan, as identified in Condition 5.b) of this Settlement Agreement, this requirement will be satisfied.
 - d) If it is determined that additional water rights are required to meet GWC's existing demands, even with conservation measures, GWC shall file for additional water rights and diligently pursue processing of the filing by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division. This Settlement Agreement does not obligate the Division's approval of

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any such filing. If GWC's filing is not approved, GWC must promptly re-file for additional water rights with the Division and diligently pursue that filing to approval, if necessary.

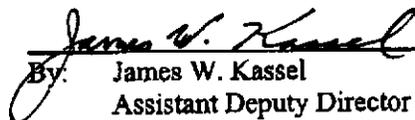
- c) GWC shall comply, to the best of its abilities given the constraints of the condition of the existing water infrastructure, and the Public Utilities Commission regulations, with any written directive of the Assistant Deputy Director for Water Rights regarding modifications to monitoring of diversions or changes to its plan submitted in compliance with Condition 5.b) of this Settlement Agreement. If for any reason GWC is unable to comply with any such directives or time frames for actions, GWC shall provide prompt notice and a written explanation via email to the Assistant Deputy Director for Water Rights.
6. **Withdrawal of Hearing Request.** Upon approval of this Settlement Agreement by the State Water Board's Executive Director, GWC's request for hearing on the ACL and Draft CDO will be deemed withdrawn.
7. **Waiver of Reconsideration.** GWC waives its right to request reconsideration of the State Water Board Executive Director's order approving this Settlement Agreement, provided no additional requirements are included in that order beyond the requirements of this Settlement Agreement.
8. **Successors.** This Settlement Agreement is binding on any successors or assigns of GWC and the State Water Board.
9. **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.
10. **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. This Settlement Agreement also shall not be construed to be an admission by GWC of the liability or of any of the allegations set forth in the ACL and Draft CDO.
11. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
12. **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 with regard to the ACL and Draft CDO. 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.

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- 13. **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.
- 14. **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.
- 15. **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.
- 16. **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.
- 17. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving Settlement Agreement.
- 18. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
- 19. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.

Dated: 13 ^{April} ~~March~~, 2010

State Water Board Division of Water Rights
Prosecution Team


By: James W. Kassel
Assistant Deputy Director

Dated: 25 March, 2010

Garrapata Water Company


By: