

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

ORDER WR 2015 - 0023 - EXEC

In the Matter of the Diversion and Use of Water by
FLOCCHINI ESTATE, LLC, AND ANDREW J. FLOCCHINI

**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 (Draft CDO) and an Administrative Civil Liability complaint (Complaint) to Flocchini Estate, LLC, and Andrew J. Flocchini (Flocchini). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Division Prosecution Team) and Flocchini 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

Flocchini owns and operates a reservoir located at 7078 Lakeville Highway, Petaluma, Sonoma County APN 068-110-007. Flocchini began operating the reservoir in the early 1950s, and since approximately 2002 has used the reservoir to irrigate a vineyard on the property. The Division of Water Rights has no record of a water right authorizing the

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.

storage of water in the reservoir other than the pending appropriative right Application 032424 submitted on May 15, 2015.

On March 8, 2013, the Division Prosecution Team issued a Complaint and a Draft CDO against Flocchini, alleging that Flocchini unlawfully diverted water to storage in the reservoir, which constitutes an unauthorized diversion and a trespass against the State of California in violation of California Water Code section 1052.

On April 3, 2013, Flocchini timely requested hearings on the Complaint and Draft CDO. At the time of this Settlement Agreement, the State Water Board was scheduled to hear the Complaint and Draft CDO on June 1, 2015, which was subsequently postponed.

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

3.0 SETTLEMENT AGREEMENT

Flocchini and the Division Prosecution Team executed the Settlement Agreement attached hereto. The general terms of the settlement are that Flocchini: (1) withdraws its request for hearing on the Complaint and Draft CDO, waives rights to reconsideration of this Order, and agrees to the terms for cease and desist as described in the Settlement Agreement and incorporated herein, and (2) is subject to administrative civil liability in the amount of \$42,000.00, 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.

Section 6.b of the Settlement Agreement provides that "Flocchini may continue to divert water to storage while the appropriative right application for permit is pending...." Unless and until a water right application is approved and a permit issued by the State Water Board, Division of Water Rights, diversion of water to storage for beneficial use may still

constitute a trespass against the State subject to administrative liability. The Division Prosecution Team lacks authority to approve or allow water appropriation, so the statement in provision 6.b must be read to apply to the Division Prosecution Team's enforcement discretion, meaning that the Division Prosecution Team will not seek any further penalties for the unauthorized diversion of water so long as certain terms in the Settlement Agreement are met. Furthermore, nothing in the settlement agreement or this Order shall excuse Flocchini from applicable legislation, regulation, order, or any other requirements or restrictions imposed by the Board or pursuant to its delegated authority.

ORDER

IT IS HEREBY ORDERED THAT the attached Settlement Agreement between the Division Prosecution Team and Flocchini 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 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



Thomas Howard
Executive Director

Dated: JUL 16 2015

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between Flocchini Estate, LLC, and Andrew J. Flocchini ("Flocchini") 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 this 28th day of May, 2015.

RECITALS

1. Flocchini owns and operates a reservoir located at 7078 Lakeville Highway, Petaluma, Sonoma County Assessor Parcel Number (APN) 068-110-007. Flocchini's family predecessors constructed the reservoir in the early 1950s, and began operating the reservoir to irrigate a vineyard in 2002. The Division has no record of a water right authorizing the storage of water in the reservoir except as described below.
2. On February 7, 2011, Division staff conducted an inspection of the Flocchini property, accompanied by Andrew and Nicholas Flocchini. During the inspection, Division staff found that the reservoir diverts surface water to storage in the reservoir from an Unnamed Stream and concluded the diversion is subject to the permitting authority of the State Water Board. Flocchini stated that the use of water from the reservoir is irrigation of a 29 acre vineyard. Flocchini disclosed that he has a well but the well water is not added to the reservoir or used to irrigate the vineyard due to high mineral content. No other sources of water were disclosed.
3. By letter dated September 20, 2011, the Division notified Flocchini that storage of water in a reservoir without an existing water right is considered to be an unauthorized diversion of water. The letter directed Flocchini to: (1) provide evidence satisfactory to the State Water Board that demonstrates the reservoir does not store water, or can be operated without storing water subject to the State Water Board's permitting authority; (2) remove the reservoir or render it incapable of storing water; or (3) file an application with the State Water Board seeking permission to appropriate water. Flocchini was also required to file an initial Statement of Water Diversion and Use (Statement) pursuant to Water Code section 5100, et. seq.. Flocchini was given 45 days to submit a response indicating the intended course of action and an implementation plan with a schedule.
4. Flocchini filed an Initial Statement of Diversion and Use on September 29, 2011. The Division accepted the Initial Statement on November 13, 2011. The Initial Statement claims that the water is diverted pursuant to a pending appropriative right application.
5. As of March 8, 2013, Flocchini had not complied with any of the directives set forth in the September 20, 2011, letter, other than filing the Initial Statement.
6. On March 8, 2013, the Division Prosecution Team issued an Administrative Civil Liability Complaint ("ACLC") and a Draft Cease and Desist Order ("Draft CDO")

Flocchini Settlement Agreement

against Flocchini, alleging that Flocchini unlawfully diverted water to storage in the reservoir, which constitutes an unauthorized diversion and a trespass against the State of California in violation of California Water Code section 1052. The ACLC recommends an Administrative Civil Liability in the amount of \$42,000, based on the relevant circumstances, including the equivalent cost to pump groundwater to replace an estimated 13 acre-feet per annum (afa) of evaporative losses and water used for irrigation during the years 2010, 2011 and 2012, plus the costs of water right filing fees, staff costs to bring the matter to hearing and, in accordance with Water Code section 1055.3, an additional amount based on the continued diversion and storage without corrective action following the September 20, 2011, notification.

7. On April 3, 2013, Flocchini timely requested hearing on the ACLC and Draft CDO. At the time of this Settlement Agreement, the State Water Board is scheduled to hear the ACLC and Draft CDO on June 1, 2015.
8. Flocchini filed Supplemental Statements of Diversion and Use for 2011, 2012 and 2013 on June 2, 2014.
9. Flocchini filed an application for an appropriative water right (Application 032424) for the reservoir on May 15, 2015. Flocchini submitted the necessary fees along with the Application (\$1,184.50 for Division of Water Rights fees; \$850 for Department of Fish and Wildlife Streamflow Protection Standards review).
10. The ACLC and Draft CDO use Division staff calculations that the reservoir has a surface area of 3.4 acres and an estimated capacity of 29 acre-feet (af). Flocchini subsequently provided evidence of a reservoir survey by a registered civil engineer that established the reservoir has a surface area of 3.55 acres and a capacity of 22.3 af. Consumptive use by evaporation is estimated by Flocchini's consulting engineer to be 13.3 afa, and consumptive use by irrigation is estimated to be 9 afa. Flocchini's Application 032424 uses these calculations, and Division staff finds them to be reliable.
11. Flocchini agrees to diligently pursue securing the appropriative water right permit sought in Application 032424 and to comply with the rest of the items listed in "Option 2" of the Draft CDO.
12. In lieu of hearings on the matter, Flocchini and the Division Prosecution Team agree to settle the matters identified in the ACLC and Draft CDO through this Settlement Agreement.
13. 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.

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NOW, THEREFORE, in consideration of these Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, Flocchini 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.** Flocchini shall be subject to administrative civil liability in the amount of \$42,000. This amount, without reduction, is based on the relevant circumstances, including replacement costs for evaporation losses of 13.3 afa for the 3 year period covered in the ACLC plus an additional amount based on the continued diversion, storage and use without corrective action following the September 20, 2011, notification, 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, Flocchini shall pay \$42,000 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.** Flocchini's full payment under paragraph 4 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.
6. **Draft Cease and Desist Order.** Flocchini and the Division Prosecution Team agree to settle the Draft CDO as follows:
 - a. Flocchini shall diligently pursue securing a permit under Application 032424 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; and
 - b. Flocchini may continue to divert water to storage while the appropriate water right application for permit is pending, if within 90 days of the date of the Order implementing this Settlement Agreement Flocchini submits a Diversion Analysis Study (Study) that is completed by a qualified person or

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entity for review and acceptance by the Assistant Deputy Director for Water Rights. This Study shall include: 1) a stream classification determination for the point of diversion and any downstream tributaries, 2) a determination of the upstream limit of anadromy in relation to the point of diversion, and 3) a cumulative diversion analysis to evaluate the effects of the unauthorized diversion in combination with all senior diverters of record, on instream flows needed for fishery resources protection. The Study shall be conducted consistent with the guidelines established in the former or current State Water Board Policy for Maintaining Instream Flows in Northern California Coastal Streams; and

- c. Within 90 days of receiving notice of the Assistant Deputy Director's acceptance of the Study, Flocchini shall file an Interim Reservoir Operation Plan ("Operation Plan"). The Operation Plan shall demonstrate how Flocchini will operate the reservoir to comply with any conclusions reached in the Study regarding the season of diversion and a minimum bypass flow and how Flocchini will measure and monitor project operations for compliance. If the Assistant Deputy Director determines, based on the studies, that the project cannot continue to divert and provide instream flows needed for fishery resources protection, then the Operation Plan shall demonstrate how Flocchini will cease the diversion of water to storage until either: (1) further studies are performed and a permit is issued for the project; or (2) a permit is denied. The Operation Plan must include an implementation schedule. Once the Operation Plan has been approved by the Assistant Deputy Director for Water Rights, Flocchini must implement and comply with the Operation Plan in accordance with the implementation schedule.
 - d. If the State Water Board denies or cancels Flocchini's water right application, then within 150 days of the State Water Board issuing that decision, Flocchini shall submit a plan to the Assistant Deputy Director for Water Rights for permanently rendering the reservoir incapable of storing water subject to the permitting authority of the State Water Board. The plan shall include a time schedule not to exceed two years for completion of the proposed alteration and the identification of any permits or agreements necessary from other federal, state, and local agencies to complete the work. Flocchini shall diligently comply with all provisions and time schedules of the plan. If Flocchini is unable to comply fully with the plan due to other federal, state, or local agencies with authority over the work required, Flocchini shall immediately alert the Assistant Deputy Director for Water Rights of the reason for the delay and any problems with fully complying with the provisions of the plan and diligently work to overcome such obstacles.
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

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Order will be subject to further enforcement under Water Code section 1845 at the discretion of the State Water Resources Control Board.

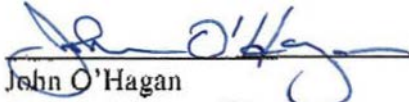
8. **Hearing.** Upon execution of this Settlement Agreement by both parties, Flocchini and the Division Prosecution Team shall request that the hearing in this matter be indefinitely postponed pending approval of this Settlement Agreement by the Executive Director. Upon approval of this Settlement Agreement by the State Water Board's Executive Director, Flocchini's request for hearing on the ACLC and Draft CDO is withdrawn.
9. **Time is of the Essence.** The State Water Board is scheduled to hear this matter on June 1, 2015. Therefore, time is of the essence and the parties shall submit this Settlement Agreement and proposed implementing order to the Executive Director before noon on May 28, 2015, and sooner if possible.
10. **Waiver of Reconsideration.** Flocchini waives its right to request reconsideration of the State Water Board Executive Director's 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.
11. **Successors.** This Settlement Agreement is binding on any successors or assigns of Flocchini and the State Water Board.
12. **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.
13. **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.
14. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
15. **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.
16. **Mutual Agreement.** The parties have agreed to the particular language in this Settlement Agreement, and this Settlement Agreement shall not be construed against

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the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.

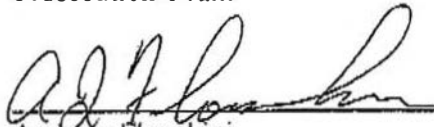
17. **Counterparts.** This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.
18. **Reasonableness of Settlement.** The parties represent and warrant that this Settlement Agreement is made in good faith and in full recognition of the implications of such agreement.
19. **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.
20. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving Settlement Agreement.
21. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
22. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
23. **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 Flocchini, or its directors, officers, 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 Flocchini's directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement.

Dated: 5/28 2015



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

Dated: 5/28 2015



Andrew Flocchini
Flocchini Estate, LLC