

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

ORDER WR 2017-0010-EXEC

In the Matter of the Diversion and Use of Water by
MIKE PASSALAUQUA AND PEDER HOY

**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 (ACLC) against Mike Passalauqua and Peder Hoy. In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team, Mr. Passalauqua, and Mr. Hoy (collectively referred to as the Settling Parties) 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. Passalauqua owns APN 017-045-027 (approximately 10.0 acres) and the Hoy Revocable Trust (Trust), of which Mr. Hoy is a trustee, owns APN 017-045-028 (approximately 49.55 acres) and APN 017-045-018 (approximately 118.3 acres), all in Stanislaus County, California. Mr. Passalauqua owned APN 017-045-028 until

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.

transferring that parcel to the Trust on or around May 5, 2014. Until that transfer, APNs 017-045-027 and -028 were one parcel, APN 017-045-006.

These parcels are within the place of use designated for Water Right License 1173 (A005269). License 1173 allows for the direct diversion of 2.08 cubic feet per second of water from the Tuolumne River between about May 1st and October 1st, with a priority date of November 15, 1926.

On October 29, 2015, the Assistant Deputy Director for the Division Water Rights issued a Draft CDO and ACLC against Mr. Passalaqua and Mr. Hoy. The Draft CDO and ACLC alleged that Mr. Passalaqua and Mr. Hoy failed to provide information that was required by State Water Board Order [WR-2015-022-DWR](#), an order issued pursuant to regulations adopted pursuant to Water Code section 1058.5. The Draft CDO and ACLC also alleged that Mr. Passalaqua and Mr. Hoy violated Water Code section 1052 by diverting water from the Tuolumne River during periods in 2014 and 2015 when there was no water available under the priority of License 1173.

On November 18 and 19, 2015, Mr. Hoy and Mr. Passalaqua timely requested a hearing on the Draft CDO and ACLC. The hearing was postponed at the request of the Settling Parties. The Settling Parties engaged in settlement discussions and mutually agreed to settle the matters identified in the Draft CDO and ACLC in lieu of a hearing.

3.0 SETTLEMENT AGREEMENT

The Settling Parties executed the Settlement Agreement attached hereto. The general terms of the settlement are that Mr. Passalaqua and Mr. Hoy: (1) withdraw their requests for hearing on the Draft CDO and ACLC; (2) waive their rights to reconsideration of this Order; (3) agree to take the actions described in the Settlement Agreement and incorporated herein; and (4) agree to pay a total amount of \$45,000, for which they are jointly and severally liable, 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 of Water Rights Prosecution Team and Mike Passalaqua and Peder Hoy 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 the Settlement Agreement, and thereby this Order, are 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).)

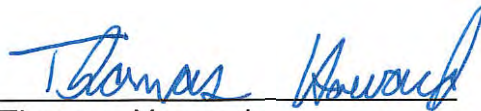
Section 1845, subdivision (b) of the Water Code provides:

- (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: 4/11/17


Thomas Howard
Executive Director

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 7th day of ~~February~~ ^{March}, 2017, by and between Mike S. Passalacqua and Peder Hoy and the Prosecution Team of the State Water Resources Control Board's ("State Water Board") Division of Water Rights ("Division"). Mr. Passalacqua, Mr. Hoy and the Prosecution Team are collectively referred to here as the Settling Parties.

RECITALS

1. Mike Passalacqua owns APN 017-045-027 (approximately 10.0 acres), and Peder K. Hoy and Doris J. Hoy, as Trustees of the Hoy Revocable Trust dated September 16, 1999 (Hoy) own APN 017-045-028 (approximately 49.55 acres) and APN 017-045-018 (approximately 118.3 acres), all in Stanislaus County, California. Mr. Passalacqua owned APN 017-045-028 until transferring that parcel to Hoy on or around May 5, 2014. Until that transfer, APNs 017-045-027 and -028 were one parcel, APN 017-045-006.
2. These parcels are within the place of use designated for Water Right License 1173 (A005269). License 1173 allows for the direct diversion of 2.08 cubic feet per second of water from the Tuolumne River between about May 1st and October 1st, with a priority date of November 15, 1926. On or around December 14, 2015, Mr. Passalacqua notified the Division of his assignment of License 1173 to Mr. Hoy.
3. On October 29, 2015, the Assistant Deputy Director for Water Rights issued an Administrative Civil Liability Complaint ("ACLC") and a Draft Cease and Desist Order ("Draft CDO") against Mike Passalacqua and Peder Hoy, alleging that they failed to provide information required under State Water Board Order WR-2015-022-DWR, an order issued on May 5, 2015, pursuant to regulations adopted pursuant to Water Code section 1058.5, and that they diverted water from the Tuolumne River during periods in 2014 and 2015 in which State Water Board staff had determined that there was no water available to serve water rights at the priority of License 1173, in violation of Water Code section 1052. Neither Mr. Hoy nor Mr. Passalacqua timely complied with Order WR-2015-022-DWR, although Mr. Hoy submitted a partial response after the compliance deadline. Water Rights staff did not contact Mr. Hoy or Mr. Passalacqua regarding late, missing or incomplete responses to Order WR-2015-022-DWR prior to serving the ACLC and Draft CDO.
4. The ACLC recommends an Administrative Civil Liability in the amount of \$332,500, based on the relevant circumstances alleged therein, including: Mike Passalacqua and Peder Hoy's failure to submit all of the required information, the harm of the missing information to the Division's effectiveness in regulating water diversions, alleged unauthorized diversions, together with the overall need to preserve the integrity of the regulatory program. The recommended ACLC amount was based on the Prosecution Team's available information at the time, which indicated that the entire License 1173 place of use lacked continuity with the Tuolumne River, thus having no

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apparent claim to a riparian right that would have covered diversions during the relevant periods in 2014 or 2015. Order WR-2015-022-DWR directed Mr. Passalaqua and Mr. Hoy to provide information to substantiate the claim to a riparian right for the subject property, but neither Mr. Passalaqua nor Mr. Hoy submitted such information until after issuance of the ACLC.

5. On November 18 and 19, 2015, respectively, Peder Hoy and Mike Passalaqua timely requested hearing on the ACLC and Draft CDO. The State Water Board Hearing Team scheduled hearing to commence on October 14, 2016, although, at the time of this Settlement Agreement, the hearing has been postponed at the request of the Settling Parties to engage in settlement negotiations.
6. In August 2016, Peder Hoy provided a chain of title to the Prosecution Team, indicating that the parcels identified above retain riparian rights by deed to the Tuolumne River, with the exception of the portion of APN 017-045-018 located in the NE1/4 of Section 17, T 4S, R8 E, MDB&M, which portion comprises approximately 30 acres. Mr. Hoy also later provided information to the Prosecution Team indicating that approximately 11 acres of the portion of APN 017-045-018 located in the NE1/4 of Section 17 is within the service area of Modesto Irrigation District (MID) and could have been irrigated with MID water in 2014 and 2015. Mr. Hoy now asserts that all of the relevant property, including the portion located in the NE1/4 of Section 17, retains pre-1914 appropriative rights, although he did not make such assertion nor submit any supporting documentation in response to Order WR-2015-022-DWR. For the purposes of this Settlement Agreement, the Prosecution Team concurs that the property owned by Mr. Hoy and served by License 1173 located outside of the NE1/4 of Section 17 retains riparian rights by deed. Lacking information to assess the assertion of pre-1914 rights for any of the property, the Prosecution Team takes no position on that assertion.
7. For purposes of this Settlement Agreement, the Settling Parties agree that, in 2014 and 2015, Mr. Hoy irrigated a total of approximately 20 acres within the NE1/4 of Section 17 with pumped Tuolumne River water, including approximately 12 acres of immature almonds and approximately 8 acres of corn. At the time that this irrigation occurred, the irrigated crops in the NE1/4 of section 17 were part of larger fields with the majority of the irrigated field covered by the riparian right, noted above in Recital 6. Peder Hoy alleges that, at the time of the irrigation, he was operating under a good faith belief that the property within the NE1/4 of Section 17 was also covered by the riparian right.
8. The Prosecution Team alleges that, based on current information, water was unavailable to serve Mr. Hoy's License 1173 from June through September, 2014, and from May through September, 2015. Mr. Hoy disputes that water was unavailable for his License during these periods, and also alleges that irrigation did not occur in September of each year. The Settling Parties do not admit or deny each other's allegations regarding water availability for License 1173 for these time periods. For the purposes of settlement, the Settling Parties agree that during these periods, Mr.

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Hoy diverted and used a total of approximately 67 acre-feet of Tuolumne River water on the NE1/4 of Section 17 over 16 diversion days (29 acre-feet over 8 diversion days in the 2014 period and 38 acre-feet over 8 diversion days in the 2015 period).

9. Mr. Passalaqua and Mr. Hoy received Order WR-2015-022-DWR on May 8 and 15, 2015, respectively. Response was due from both no later than June 15, 2015. On July 2, 2015, Mr. Hoy provided a partial response, but did not reflect actual diversion amounts for 2014 or 2015 (to that date), nor documentation for the claimed riparian right, nor claim of pre-1914 right, nor any use of contract water. Mr. Hoy submitted additional information pursuant to the Order beginning on November 18, 2015, with additional submittals during December, 2015, April, 2016, and August, 2016. Mr. Passalaqua did not submit any response to the Order, and contends that his response, as far as the right claimed, the supporting documents for the right, and the amounts diverted, was included in Mr. Hoy's responses.
10. The Settling Parties have engaged in settlement negotiations and agree to settle the matters identified in the ACLC and Draft CDO through this Settlement Agreement in lieu of hearing.
11. The Settling Parties will submit this Settlement Agreement and a draft approving order to the Hearing Team for approval and adoption by the State Water Board's Executive Director pursuant to Government Code section 11415.60 as a decision by settlement, and this Settlement Agreement will become effective when the State Water Board's Executive Director issues an order approving the settlement, provided that the Settling Parties concur in any substantive changes to the approving order proposed by the Hearing Team or Executive Director.

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

12. **Recitals Incorporated.** The preceding Recitals are incorporated herein.
13. **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.
14. **Payment Amount.** Mike Passalaqua and Peder Hoy shall pay a total of \$45,000 as directed herein to resolve all violations alleged in the ACLC. Mr. Passalaqua and Mr. Hoy shall be jointly and severally liable for this Payment Amount.

- 15. Consideration of Relevant Circumstances.** The Prosecution Team has determined for purposes of Water Code section 1055.3 that the Payment Amount in Paragraph 14 is an appropriate resolution to the violations alleged in the ACLC based on consideration of the relevant circumstances, including the alleged failure to timely submit all of the required information under Order WR-2015-022-DWR, the alleged harm of the missing information to the Division's effectiveness in regulating water diversions, the overall need to preserve the integrity of the regulatory program, the diversion and use of water to serve non-riparian lands during periods when Division staff had determined that there was insufficient water supply available for License 1173, the staff costs incurred in investigating the alleged violations and in preparing the ACLC, the commitments set forth in Paragraph 19 below, and the settlement purpose of this Agreement.
- 16. No Admission of Liability.** Payment of the amount set forth in Paragraph 14 is a compromise for settlement purposes only and not an admission of liability by Mr. Passalaqua or Mr. Hoy for any violations alleged in the ACLC, nor an admission of agreement by Mr. Passalaqua or Mr. Hoy to the Prosecution Team's characterization of the relevant circumstances set forth in Paragraph 15.
- 17. Administrative Civil Liability Payment Due Date.** The Payment Amount set forth in Paragraph 14 is due within 30 days following the State Water Board Executive Director's approval of this Settlement Agreement. The State Water Board will deposit said funds in the Water Rights Fund pursuant to Water code sections 1054, et seq.
- 18. Satisfaction of Administrative Civil Liability Complaint.** Mike Passalaqua and Peder Hoy's full payment of the Payment Amount 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.
- 19. Draft Cease and Desist Order.** The Settling Parties agree to settle the Draft CDO as follows:
- a. Peder Hoy and his successors/assigns will not divert water from the Tuolumne River under a riparian claim of right for the portion of APN 017-045-018 in the NE1/4 of Section 17. Prior to diverting water from the Tuolumne River under a pre-1914 claim of right for any portion of the place of use covered by License 1173, including the portion of APN 017-045-018 in the NE1/4 of Section 17, Peder Hoy or his successors/assigns shall submit to the Division the evidence supporting the pre-1914 claim for acceptance. If the Division accepts the evidence, Hoy or his successors/assigns shall separately report under a Statement of Water Diversion and Use the monthly amounts diverted under riparian right and pre-1914 right.
 - b. Peder Hoy and his successors/assigns will purchase replacement water and/or use groundwater for irrigation on the relevant portion of the NE1/4 of Section

17 during future periods of unavailability of water for License 1173 and during all periods outside of the authorized season of use under License 1173. Because the existing fields on APN 017-045-018 do not correspond with the boundaries of the NE1/4 of Section 17, Mr. Hoy and his successors/assigns may comply with this provision by demonstrating the purchase of sufficient replacement water or the use of sufficient groundwater to account for the water demands on the relevant portion of the NE1/4 of Section 17 based on the average monthly diversion duty that year for other fields with same crop. Mr. Hoy and his successors/assigns will document any such purchase or use as part of the annual water diversion and use reports for License 1173, and/or as part of any Statement filing under claim of riparian right and/or pre-1914 right. Nothing in this agreement waives the right of Peder Hoy or his successors/assigns to challenge any finding of unavailability of water for License 1173 by the State Water Resources Control Board or staff for any subsequent year.

- c. Mr. Hoy, with the written concurrence of Mr. Passalaqua, will work with the Division to correct or change the place of use for License 1173 to include all of APN 017-045-018, and remove areas not served.

20. Enforcement of this Settlement Agreement. The terms and conditions of the Settlement Agreement and the implementing 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 enforcement under Water Code section 1845 at the discretion of the State Water Resources Control Board.

21. Request for Executive Director Approval and Postponement of Hearing. Upon execution of this Settlement Agreement by each of the Settling Parties, the Settling Parties shall submit this Settlement Agreement and a proposed order approving this Settlement Agreement to the Hearing Team, and shall jointly request that: 1) the Hearing Team bring the Settlement Agreement and proposed order to the Executive Director for consideration and approval; 2) the Hearing Team bring any proposed substantive changes to the approving order language to the settling parties for consideration prior to approval by the Executive Director; and 3) the Hearing Team postpone the hearing in this matter indefinitely pending the Executive Director's approval of this Settlement Agreement.

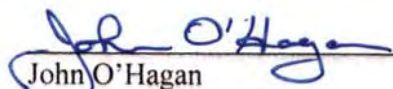
22. Opportunity for All Parties to Comment. The Settling Parties acknowledge that although the consent of other parties is not required before the State Water Board, or the Executive Director under State Water Board Resolution No. 2012-0061, can approve a proposed settlement agreement between the Prosecution Team and a party subject to a proposed enforcement action, the Notice of Public Hearing provides that the Hearing Team will give all parties the opportunity to comment on any settlement submitted to the State Water Board or the Executive Director for approval.

- 23. Hearing Requests.** Mike Passalaqua and Peder Hoy's requests for hearing on the ACLC and Draft CDO shall be deemed withdrawn upon approval of this Settlement Agreement by the State Water Board's Executive Director, provided that the Settling Parties concur in any substantive changes to the draft approving order proposed by the Hearing Team or Executive Director. If the Settling Parties do not concur in any substantive changes to the approving order proposed by the Hearing Team or Executive Director, this Settlement Agreement shall be deemed void and the parties shall request that the matter be placed back on calendar for hearing.
- 24. Time is of the Essence.** Time is of the essence and the Settling Parties shall submit this Settlement Agreement and proposed implementing order to the Executive Director before noon on February 28, 2017, and sooner if possible.
- 25. Waiver of Reconsideration.** Mike Passalaqua and Peder Hoy each waive the 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.
- 26. Successors.** This Settlement Agreement is binding on any successors or assigns of Mike Passalaqua, Peder Hoy, and the State Water Board.
- 27. 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.
- 28. 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.
- 29. Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
- 30. 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.
- 31. 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.

Passalaqua/Hoy Settlement Agreement

32. **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.
33. **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.
34. **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.
35. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving Settlement Agreement.
36. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
37. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
38. **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 Mike Passalaqua or Peder Hoy, or their 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 Mike Passalaqua or Peder Hoy's directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement.
39. **No Waiver of Other Requirements.** Nothing in this Settlement Agreement or any implementing Order shall excuse Mike Passalaqua or Peder Hoy from applicable legislation, regulation, order or any other requirements or restrictions imposed by the State Water Board or pursuant to its delegated authority.

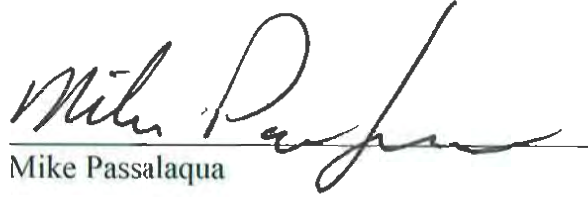
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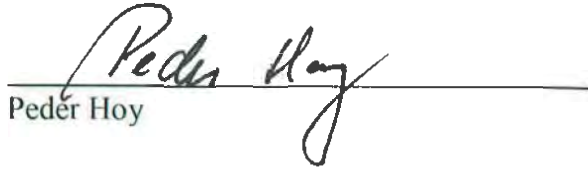
John O'Hagan
Assistant Deputy Director
State Water Board, Division of Water Rights
Prosecution Team

Passalaqua/Hoy Settlement Agreement

Dated: 3/6/2017 2017


Mike Passalaqua

Dated: 3/6/2017 2017


Peder Hoy