

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

DIVISION OF WATER RIGHTS

ORDER WR-2018-0006-DWR

In the Matter of Violation of Annual Use Reporting Requirements by

BANK OF NY MELLON TRUST

SOURCE: EMIGRANT RAVINE CREEK

COUNTY: EL DORADO

Assistant Deputy Director Jule Rizzardo, Division of Water Rights (Division), through authority delegated by the State Water Resources Control Board (State Water Board), hereby issues an Administrative Civil Liability Order (ACL Order) to BANK OF NY MELLON TRUST (Licensee). On November 28, 2016, the Division of Water Rights issued an Administrative Civil Liability Complaint (ACL Complaint) against Licensee (attached), which is hereby incorporated by reference as part of this Order.

THE STATE WATER BOARD, OR ITS DELEGEE, FINDS AS FOLLOWS:

1. Licensee is the owner of record for License 1888.
2. On February 19, 2016, the Division of Water Rights issued a notice to Licensee reminding Licensee of the requirement to submit the 2015 Annual Use Reports by June 30, 2016, as required pursuant to the California Code of Regulations and notifying Licensee that the 2015 Annual Use Report must be filed online.
3. Licensee failed to submit the 2015 Annual Use Report for License 1888 online by the deadline, June 30, 2016.
4. On August 25, 2016, the Division mailed out a deficiency letter requesting that the 2015 Annual Use Report for License 1888 be submitted within 30 days and warned of the potential for enforcement with monetary penalties should the violation persist.
5. On November 28, 2016, the Division Prosecution Team issued an ACL Complaint against Licensee. The ACL Complaint alleges that Licensee failed to submit the 2015 Annual Use Report for License 1888 by the June 30, 2016, deadline in violation of section 929 of the Regulations, and recommends an Administrative Civil Liability in the amount of \$10,000 for this violation.
6. The ACL Complaint included a Conditional Settlement Offer, which allowed for a reduced liability amount of \$250, provided that Licensee submit the Annual Use Report within 20 days of receipt of the ACL Complaint, along with a signed acceptance of the Conditional Settlement Offer and waiver of the right to hearing and reconsideration.
7. The Division Prosecution Team sent the ACL Complaint to Licensee via certified mail. The United States Postal Service has confirmed that the ACL Complaint was delivered to Licensee on November 29, 2016.
8. Licensee did not request a hearing within 20 days of receipt of the Complaint, in accordance with Water Code 1055(b).

9. Licensee did not submit the acceptance of the Conditional Settlement Offer within 20 days of receipt of the Complaint and not did not pay the reduced liability amount.
10. The Division issued a last chance letter on January 16, 2018, to Licensee offering a reduced penalty in exchange for submitting the 2015 Annual Use Report within 30 days.
11. Licensee did not submit the 2015 Annual Use Report for License 1888.
12. Pursuant to California Water Code section 7, the State Water Board is authorized to delegate authority to the Deputy Director of Water Rights. State Water Resources Control Board Resolution No. 2012-0029 (Resolution) delegates some of the State Water Board's authority to the Deputy Director of Water Rights. Section 4.9.2 of the Resolution authorizes the Deputy Director to issue an order imposing Administrative Civil Liability when a Complaint has been issued and no hearing has been requested in the period provided by California Water Code section 1055. Section 4.9.2 of the Resolution allows this authority to be redelegated to the Assistant Deputy Director of Water Rights. This authority has been redelegated to the Assistant Deputy Director of Water Rights.
13. California Water Code section 1055(c) and Resolution No. 2012-0029 authorize the Assistant Deputy Director to issue an ACL Order to Licensee assessing an administrative civil liability in the amount proposed in the November 28, 2016, ACL Complaint.
14. California Water Code section 1055.3 states that when determining the appropriate amount of civil liability to be imposed, the State Water Board shall take into consideration all relevant circumstances, including but not limited to the extent of the harm caused by the violation, the nature and persistence of violation, the length of time over which the violation occurs, and the corrective actions, if any, taken by the violator.
15. In this case, Licensee did not submit the 2015 Annual Use Report after receiving both the ACL Complaint and January 16, 2018, deficiency letter. Licensee took no steps to accept the Conditional Settlement Offer. In consideration of these relevant circumstances, the State Water Board has determined that the appropriate proposed penalty is \$10,000.

IT IS HEREBY ORDERED THAT:

1. The attached Administrative Civil Liability Complaint is fully incorporated herein and made part of this Order.
2. In adopting this Order, the State Water Board, or its delegee, have considered all relevant circumstances, including but not limited to those specifically identified in the ACL Complaint, as required by California Water Code section 1055.3 in determining that Licensee shall be assessed the civil liability of \$10,000.
3. Licensee shall remit, within 30 days of the date of this Order, a check or money order payment of the full penalty of \$10,000 to:

State Water Resources Control Board
Division of Water Rights
Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

4. Fulfillment of Licensee's obligations under this Order constitutes full and final satisfaction liability for the alleged violation specifically identified in this Order. The State Water Board reserves the right to take further enforcement action for any future violations.
5. The Assistant Deputy Director of the Division of Water Rights is authorized to seek recovery of the liability imposed, as authorized by California Water Code section 1055.4, or refer this matter to the Office of Attorney General for further enforcement action if Licensee fails to comply with remitting payment of the full penalty within 30 days of the date of this Order.

STATE WATER RESOURCES CONTROL BOARD



*Jule Rizzardo, Assistant Deputy Director
Division of Water Rights*

Dated:

MAR 07 2018

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Violation of Annual Reporting Requirements by

BANK OF NY MELLON TRUST
(Application A006549, License 1888)

SOURCE: EMIGRANT RAVINE CREEK

COUNTY: EL DORADO

YOU ARE HEREBY GIVEN NOTICE THAT:

1. BANK OF NY MELLON TRUST (referred to herein as Licensee) is alleged to have violated Title 23, Chapter 2.7, Article 2, section 929 of the California Code of Regulations. Section 929 requires annual use reports to be filed by July 1st of the succeeding year for every water right License.
2. Water Code section 1846, subdivision (a)(2), provides that the State Water Board may administratively impose civil liability to any person or entity who violates a regulation or order adopted by the State Water Board not to exceed \$500 for each day in which the violation occurs. Water Code section 1846, subdivision (c) provides that civil liability may be imposed administratively by the State Water Board pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director for the State Water Board may issue a complaint to any person or entity to whom administrative civil liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. State Water Board Resolution 2012-0029 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

ALLEGATIONS

4. Senate Bill X7-8, which was signed into law in 2009, 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 a new online Report Management System (RMS) as a component of the enhanced Water Right Information Management System (eWRIMS). 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.
5. In January 2016, the Division of Water Rights (Division) mailed out a notice to Licensee reminding Licensee 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 Licensee 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 Licensee to contact the Division by phone or email with any questions regarding the new reporting process.
6. Licensee failed to submit the 2015 Annual Use Report online by the deadline, June 30, 2016.
7. 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. As of November 28, 2016, 95 days after the date of the August 25, 2016, letter, Licensee has failed to submit their 2015 Annual Use Report to the Report Management System.

PROPOSED CIVIL LIABILITY

8. California Water Code section 1846(a)(2) provides that the State Water Board may administratively impose civil liability to any person or entity who violates a regulation or order adopted by the State Water Board in an amount not to exceed \$500 for each day in which the violation occurs.
9. As of November 28, 2016, Licensee has been in violation for 150 days. Based on the days of violation described in the previous paragraph, the maximum liability for the violations alleged is **\$75,000** (150 days at \$500/day).
10. In determining the appropriate amount of a civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator.
11. In this case, the 2015 Annual Use Report was due by June 30, 2016. Despite the January 2016 initial notification and August 25, 2016 deficiency letter, Licensee to date has failed to submit the 2015 Annual Use Report. Failure to comply with the reporting requirements in a timely manner harms the Division's ability to accurately track water diversions from the source and effectively regulate the resources it is required to protect. Having taken into consideration all relevant circumstances, including but not limited to the failure of Licensee to submit the 2015 Annual Use Report, the harm of the missing Annual Report to the Division's effectiveness in regulating water diversions, staff costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the Division recommends the imposition of **\$10,000** in administrative civil liability (Proposed Liability).

CONDITIONAL SETTLEMENT OFFER

12. To promote resolution of the alleged annual use filing violations and administrative efficiency, the Division makes the following conditional settlement offer (Conditional Offer). Licensee can avoid further enforcement action and settle the alleged failure to file annual use violation by agreeing to comply with the terms of the Conditional Offer, provided below, as well as in the *Acceptance of Conditional Settlement Offer and Waiver of Right to Hearing or Reconsideration* (Acceptance and Waiver) enclosed hereto as Exhibit "A."
13. This Conditional Offer requires Licensee to pay an Expedited Payment Amount of \$250, file the Annual Use Report within 20 days of receipt of this complaint, and waive the right to a hearing and reconsideration of the alleged violations. This Expedited Payment Amount is based on Licensee's failure to comply to date, maximum amount of allowed diversion under the License along with staff costs incurred in preparing the ACL complaint.
14. To accept the Conditional Offer, Licensee must:
 - a. Submit the 2015 annual use report online within **20** days of receipt of this complaint
 - b. Sign and return the Acceptance and Waiver within **20** days of receipt of this complaint, and
 - c. Remit the Expedited Payment Amount within **20** days of receipt of this complaint.

15. If there are extenuating circumstances that Licensee would like to discuss, such as an inability to pay the Expedited Payment Amount, then Licensee may contact Kathy Mrowka, Enforcement Section Manager, with that information as soon as possible but no later than the 20 days from receipt of this complaint.


RIGHT TO HEARING

16. Licensee may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date that this notice is received as required by Water Code section 1055, subdivision (b).
17. If Licensee requests a hearing, Licensee will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, your hearing date will be one of the dates referenced in our included hearing notice. A separate notice setting the specific time and place for the hearing will be mailed not less than 10 days before the hearing date. The Division may convene a settlement conference prior to noticing a hearing date.
18. If Licensee requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the Water Code and/or its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall be final and effective upon issuance.
19. If Licensee does not wish to request a hearing within 20 days of receipt of this complaint, Licensee shall waive the right to a hearing and reconsideration of this matter, and electronically file the necessary 2015 Annual Use Report and remit a cashier's check or money order for the Proposed Liability set forth in paragraph 11 above, to:

State Water Resources Control Board
Division of Water Rights
Attn: Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

20. If Licensee neither requests a hearing within 20 days of the date this complaint is received nor accepts the Conditional Settlement Offer, then the State Water Board will issue an ACL Order and seek recovery of the liability imposed as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



*John O'Hagan, Assistant Deputy Director
Division of Water Rights*

Dated: **November 28, 2016**

EXHIBIT A

**ACCEPTANCE OF CONDITIONAL SETTLEMENT OFFER
AND WAIVER OF RIGHT TO HEARING AND RECONSIDERATION**

BANK OF NY MELLON TRUST
Source: EMIGRANT RAVINE CREEK
County: EL DORADO
License: 1888

By signing below and returning this Acceptance of Conditional Settlement Offer and Waiver of Right to Hearing and Reconsideration (Acceptance and Waiver) to the State Water Resources Control Board (State Water Board), BANK OF NY MELLON TRUST, (Recipient) hereby accepts the conditional settlement offer (Conditional Offer) and waives the right to a hearing before the State Water Board regarding the Administrative Civil Liability Complaint issued to Recipient (ACL Complaint), to which this Acceptance and Waiver is attached. Additionally, the Recipient waives the right to reconsideration of any order adopting the settlement agreement. These waived proceedings are the venues through which the violations alleged in the ACL Complaint could be disputed.

Recipient understands that this Acceptance and Waiver waives the Recipient's right to contest the allegations in the ACL Complaint and the civil liability amount for such violations.

Recipient agrees to perform the following within 20 days of receipt of the ACL Complaint:

- **Pay administrative civil liability as authorized by California Water Code section 1846(a)(2), in the sum of \$250** (Expedited Payment Amount) by cashier's check or by certified check made payable to the "State Water Resources Control Board" for deposit into the Water Rights Fund, which shall be deemed payment in full of any civil liability pursuant to California Water Code section 1846(a)(2) that otherwise might be assessed for the violations described in the ACL Complaint.
- **Electronically file the necessary 2015 Annual Use Report**

Recipient understands that failure to fulfill the above obligations and submit the signed Acceptance and Waiver within 20 days of receipt of the ACL Complaint shall render the Conditional Offer void. If the Conditional Offer is deemed void due to Recipient's non-performance, then the Assistant Deputy Director for Water Rights will issue a final ACL Order for the amount of \$10,000 for the failure to file violation and shall seek recovery.

Recipient understands that providing incomplete data or data that are not true and correct to the best of Recipient's knowledge could subject the Recipient to additional fines and void the settlement agreement.

Recipient understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the ACL Complaint. Once signed (executed) by Recipient, the Acceptance and Waiver shall be mailed to the following address:

Conditional Settlement Offer
State Water Resources Control Board
Division of Water Rights
Attention: Enforcement Unit
P.O. Box 2000
Sacramento, CA 95812-2000

Recipient understands that this Acceptance and Waiver is not final until it is approved by the State Water Board or by the Deputy Director for Water Rights under delegated authority or by the Assistant Deputy Director for Water Rights under redelegated authority.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Recipient in the making and giving of this Acceptance and Waiver.

Signature

Date

Printed or typed name

Title

(Relationship to Recipient, if not Recipient)

Please return the completed Acceptance and Waiver by mail to the address above.