

# Memorandum

Date: September 15, 2015

To: Ms. Felicia Marcus, Board Chair  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812  
Via Fax (916) 341-5400  
E-mail [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)

Attention: Paul Murphey



From: **Neil Manji**, Regional Manager  
Northern Region  
California Department of Fish and Wildlife  
601 Locust Street  
Redding, CA 96001

**Subject: California Department of Fish and Wildlife Policy Statement on the Proposed Cease and Desist Order and Administrative Civil Liability against Mark Hodgetts, Hayfork Creek, tributary to South Fork Trinity River in Trinity County**

Enclosed is the California Department of Fish and Wildlife's (Department) Policy Statement for the Hearing for Mark Hodgetts, Hayfork Creek, tributary to South Fork Trinity River in Trinity County, before the State Water Resources Control Board on October 5, 2015. Department staff will attend the Hearing and be available to read the Policy Statement into the record at the Board's request.

If you have any questions, please contact Senior Environmental Scientist (Specialist) Suzanne Turek at (530) 225-2282 or [suzanne.turek@wildlife.ca.gov](mailto:suzanne.turek@wildlife.ca.gov).

ec: Skyler Anderson and Taro Murano  
State Water Resources Control Board  
[sanderson@waterboards.ca.gov](mailto:sanderson@waterboards.ca.gov), [tmurano@waterboards.ca.gov](mailto:tmurano@waterboards.ca.gov)

Curt Babcock, Donna Cobb, Suzanne Turek, Kate Grossman and Jane Arnold  
California Department of Fish and Wildlife  
[curt.babcock@wildlife.ca.gov](mailto:curt.babcock@wildlife.ca.gov), [donna.cobb@wildlife.ca.gov](mailto:donna.cobb@wildlife.ca.gov),  
[suzanne.turek@wildlife.ca.gov](mailto:suzanne.turek@wildlife.ca.gov), [katherine.grossman@wildlife.ca.gov](mailto:katherine.grossman@wildlife.ca.gov),  
[jane.arnold@wildlife.ca.gov](mailto:jane.arnold@wildlife.ca.gov)

Before the  
State Water Resources Control Board  
October 5, 2015

In the Matter of Proposed Cease and Desist Order and Administrative Civil Liability Mark Hodgetts, Hayfork Creek tributary to South Fork Trinity River	Policy Statement of the California Department of Fish and Wildlife
---	---

The California Department of Fish and Wildlife (Department) thanks the Hearing Officers and Board Members of the State Water Resources Control Board (SWRCB) for the opportunity to express our interest and policy in regards to this matter. The Department's mission is to manage California's diverse fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public.

Fish and wildlife resources are held in trust for the people of the State of California. Under Fish and Game Code section 711.7, the Department is designated as trustee for the State's fish and wildlife resources. Fish and Game Code section 1802 grants the Department jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of those species. Additionally, Fish and Game Code section 1600 et seq. grants the Department jurisdiction over projects that substantially divert water from lakes, rivers, or streams.

The Department seeks to maintain native fish, wildlife, plant species and natural communities for their intrinsic and ecological value, and for their benefits to all citizens in the State. This includes habitat protection and maintenance of habitat in sufficient amounts and quality to ensure the conservation of all native species and natural communities. The Department is also responsible for oversight and assurance of the diverse uses of fish and wildlife including recreational, commercial, scientific, and educational.

As trustee agency for the aquatic resources in this State, the Department has a material interest in assuring that water flows within streams are maintained at levels that are adequate for long-term protection, maintenance, and proper stewardship of these resources. Hayfork Creek supports Chinook salmon, steelhead trout, foothill yellow-legged frog, western pond turtle, and other sensitive aquatic species. Historically, Southern Oregon/Northern California Coast coho salmon also inhabited Hayfork Creek (personal communication with Department Fisheries Environmental Scientist Bernard Aguilar for Trinity County, on September 3, 2015; California Natural Diversity Database, <http://www.dfg.ca.gov/biogeodata/cnddb/>). However, unauthorized diversions and excessive use of water from Hayfork Creek continues to be an ongoing threat to the survival of these sensitive aquatic species. It is the mission of the Department to ensure the conservation and protection of these sensitive resources.

Both Chinook salmon and steelhead trout spawn and rear in Hayfork Creek, a tributary to South Fork Trinity River (personal communication, Bernard Aguilar). Hayfork Creek not only supports native aquatic species onsite, but in higher water (non-drought) years, also has the potential to contribute flow crucial to supporting the anadromous fish and other species in the lower reaches. Seasonal water temperatures, low enough to protect anadromous fish and other native aquatic life, holding and rearing habitat, along with timely attraction flows for migration are critical to supporting all life stages of Chinook salmon, steelhead, and other aquatic species in all anadromous streams, including Hayfork Creek.

In addition to their many other values, anadromous fish are important to California's economy. In 2008 and 2009, the Governor of California declared States of Emergency for commercial salmon fishing, resulting in an estimated loss of over \$500 million dollars to California's economy and thousands of jobs (Governor's States of Emergency Proclamations, 2008 and 2009). Recovery of listed salmonids to support commercial, recreational, and Tribal fisheries is important to the economy of California and an integral strategy for recovery plans for listed salmonids. In January, 2014, the Governor declared a Drought State of Emergency. Since that time, the number of calls to the Department, concerning stream diversions and impacts to fish and wildlife contributing to existing low streamflows have increased substantially. Thus, the Department believes this diversion when viewed in the context of the State of Emergency may be contributing to existing low stream flow conditions impacting Public Trust resources.

The Department cautions that water diversions from Hayfork Creek have the potential to cause site-specific and/or cumulative adverse impacts by degrading established instream habitat for Chinook salmon, steelhead trout, and other native aquatic species. The Department understands that this hearing by the SWRCB is addressing Mark Hodgetts' diversion of substantial amounts of water from Hayfork Creek without an apparent basis of right for a period of more than seven years, diversion of water from Hayfork Creek for the purpose of bulk water sales, under a riparian right and the use of the water on property not riparian to the source (violation of Water Code section 1052), and failing to file a State of Water Diversion and Use with the Division of Water Rights for his riparian water use. The Department is very concerned that the fish in Hayfork Creek have already experienced deleterious effects from water diversions and cannot withstand additional unauthorized water diversions, especially during low-flow periods. The Department encourages the SWRCB to place great weight on the need to preserve existing flows in Hayfork Creek for protection of instream habitat as a beneficial use of water for Chinook salmon, steelhead, and other native and sensitive aquatic life.

We should note that Mr. Hodgetts applied for a lake and streambed alteration agreement (LSAA) by submitting a notification (Notification) to the Department, pursuant to Fish and Game Code section 1600 et seq., in January 2014 for the diversion of water from Hayfork Creek, under the business name of Wet Pup Trucking. The Department deemed the Notification incomplete as it was missing a complete project description, including how much water was to be diverted each day, and Mr. Hodgetts did not have a valid basis of right to transport water off the riparian parcel adjacent to Hayfork Creek. When the Department issues a LSAA for the diversion of water, that discretionary action is based on the applicants' lawful water right. Mr. Hodgetts is transporting water off-site; to do so, he must obtain a valid basis of right through the SWRCB. In a verbal communication with Mr. Hodgetts in March 2014, he indicated he fills only two to three 3,000-gallon water tenders per day during non-emergency situations during the diversion season. This statement was inconsistent with what was indicated on Mr. Hodgetts' Application to Appropriate Water (Application) from the SWRCB that only 4,000 gallons per day, from May 1-October 30, would be diverted from Hayfork Creek. The Application also stated that the water was to be used on Mr. Hodgetts' riparian parcel adjacent to Hayfork Creek (Assessor Parcel Number 014-370-21-00) which was inconsistent with information provided to the Department. Mr. Hodgetts had stated previously to Department staff that his water tenders go throughout the Hayfork Creek watershed for dust abatement and soil compaction purposes. To this date, the Department has not received the additional information requested from Mr. Hodgetts to finalize his Notification to permit the Department to issue the LSAA; therefore, his diversion from Hayfork Creek is in violation of Fish and Game Code section 1600 et seq.

The Department takes seriously its responsibility to safeguard the natural resources of California that it holds in trust for the public, including those aquatic resources in Hayfork Creek. To that end, the Department firmly supports the proposed Cease and Desist Order and Administrative Civil Liability before the Board. We believe that such action is consistent with the Fish and Game Code and will be in the public's best interest overall. The diversion is being utilized without the benefit of permits with mitigations and protective terms to prevent harm to Public Trust resources. Because of the low-flow conditions of Hayfork Creek and the status of anadromous fish dependent on adequate instream flows, the Department believes the unauthorized diversion (subject of this hearing) by Mark Hodgetts has the potential to harm Public Trust resources in Hayfork Creek.