

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

ORDER WR 2013-0015-EXEC

In the Matter of the Diversion and Use of Water by
GRR VINEYARD, LLC

ORDER APPROVING SETTLEMENT AGREEMENT

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 an Administrative Civil Liability Complaint ("ACL Complaint") AND notice of Proposed Cease and Desist Order ("Proposed CDO") to GRR Vineyard LLC ("GRR Vineyard") on March 8, 2012. In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team ("Division Prosecution Team") and GRR Vineyard 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

The Division Prosecution Team alleges in the ACL Complaint and Proposed CDO that a reservoir ("Reservoir") had been identified on the GRR Vineyard Property. The ACL Complaint asserted that the State Water Board had no record of any filed Statements of Water Diversion or Use or any appropriative water right authorizing the diversion of water for the Property, and that GRR Vineyard needed to apply for a water right if the Reservoir

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.

was collecting water from a surface stream. The State Water Board proposed a total liability of \$15,700 for the alleged unauthorized diversion, storage and use of water and for the alleged failures to file Statements of Water Diversion and Use.

On March 23, 2012, GRR Vineyard timely requested hearings on the ACL Complaint and Proposed CDO. At the time of this Settlement Agreement, the State Water Board had not scheduled hearings for the ACL Complaint and Proposed CDO.

GRR Vineyard and the Division Prosecution Team engaged in settlement discussions and mutually agreed to settle the matters identified in the ACL Complaint and Proposed CDO in lieu of hearings.

3.0 SETTLEMENT AGREEMENT

GRR Vineyard and the Division Prosecution Team executed the Settlement Agreement attached hereto. The general terms of the settlement are that without admitting to any of the findings or allegations in the ACL Complaint or Proposed CDO, GRR Vineyard: (1) agrees to the terms for cease and desist as described in the Settlement Agreement and incorporated herein, (2) is subject to administrative civil liability in the amount of \$9,000, 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., and (3) withdraws its request for hearing on the ACL Complaint and Proposed CDO upon adoption of this Order.

ORDER

IT IS HEREBY ORDERED THAT the attached Settlement Agreement between the Division's Prosecution Team and GRR Vineyard 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 Resources Control 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) 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.

STATE WATER RESOURCES CONTROL BOARD


Thomas Howard
Executive Director

Dated: **MAR 14 2013**

SETTLEMENT AGREEMENT

This Settlement Agreement ("Settlement Agreement") is entered into by and between the Prosecution Team of the State Water Resources Control Board ("State Water Board"), Division of Water Rights ("Division") ("Division Prosecution Team"), and GRR Vineyard, LLC ("GRR Vineyard"), as of February 19, 2013. The State Water Board and GRR Vineyard shall sometimes be referred to herein individually as "Party" and collectively as "Parties."

RECITALS

- A. GRR Vineyard owns land in Napa County on Dry Creek Road in Napa, California identified as Assessor's Parcel No. 035-120-036 ("Property").
- B. On August 18, 2011, the Division Prosecution Team mailed a letter to certain property owners within the Napa River Watershed in Napa County, including GRR Vineyard, notifying them that there may be a potential unauthorized use and diversion of waters on their properties ("Notice Letter").
- C. On March 8, 2012, the State Water Board issued to GRR Vineyard an Administrative Civil Liability Complaint ("ACL Complaint") and Notice of Proposed Cease and Desist Order ("Proposed CDO") alleging the unauthorized diversion of water within the Napa Watershed in Napa County. Specifically, in the ACL Complaint, the State Water Board alleged that a reservoir ("Reservoir") had been identified on the GRR Vineyard Property. The ACL Complaint asserted that the State Water Board had no record of any filed Statements of Water Diversion or Use or any appropriative water right authorizing the diversion of water for the Property, and that GRR Vineyard needed to apply for a water right if the Reservoir was collecting water from a surface stream. The State Water Board proposed a total liability of \$15,700 for the alleged unauthorized diversion, storage and use of water and for the alleged failures to file Statements of Water Diversion and Use.
- D. The Proposed CDO required GRR Vineyard to file a Statement for the diversion of water in question and to cease and desist from diversion and use of water at the Reservoir, or take the following specified corrective actions: (1) submit a Registration form for a small domestic use or livestock stockpond if applicable; or (2) file for an appropriative water right permit that would authorize the diversion and use of water at the Reservoir, and submit an operational plan that demonstrates how the Reservoir will be operated in conformance with the requirements set forth in the Policy for Maintaining Instream Flows in Northern California Coastal Streams ("Instream Flow Policy")¹.
- E. On March 23, 2012, GRR Vineyard, through its counsel, timely requested hearings before the State Water Board on both the ACL Complaint and the Proposed CDO.

¹ On October 16, 2012, after notice of the ACL Complaint and Proposed CDO was issued, the State Water Board vacated Resolution 2010-0021 which adopted the Instream Flow Policy. Accordingly, the Instream Flow Policy is no longer in effect.

- F. The Parties met on several occasions to discuss the ACL Complaint, Proposed CDO, and the proposed penalty. Subsequently the Parties reached agreement to settle this matter in lieu of hearings.
- G. On August 13, 2012, the State Water Board issued its requirements for a new Registration process for small irrigation reservoirs including the "Resolution Establishing General Conditions to be Applied to Small Irrigation Use Registrations for Diversion." The State Water Board adopted a fee schedule through emergency regulations on September 19, 2012 and is now accepting applications for Small Irrigation Use Registrations for storage.
- H. The Parties have engaged in settlement negotiations and agree to settle the matter without administrative or civil litigation and by presenting this Settlement Agreement to the State Water Board Executive Officer for adoption as an Order by settlement, pursuant to Government Code section 11415.60. The Prosecution Team believes that the resolution of the alleged violations is fair and reasonable and fulfills its environment objectives and that the settlement is in the best interest of the public.
- I. This Settlement Agreement will become effective when the State Water Board or its Delegee issues an Order approving the settlement.

AGREEMENT

NOW, THEREFORE, in consideration of these Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, GRR Vineyard and the Division's Prosecution Team do hereby agree to settle the ACL Complaint and Proposed CDO as follows:

1. **Recitals Incorporated.** The preceding Recitals are incorporated herein.
2. **Settlement Conditionally Confidential.** Unless and until the State Water Board or its Delegee 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. **Payment.** GRR Vineyard agrees to pay a total amount of \$9,000 to the State Water Board, payable to the State Water Rights Fund pursuant to Water Code Sections 1052, *et seq.* This amount includes, but is not limited to, the costs incurred by the State Water Board staff to investigate and prosecute the ACL Complaint and Proposed CDO that are the subject of this Settlement Agreement. GRR Vineyard shall make this payment within thirty [30] days following the State Water Board's approval of this Settlement Agreement.
4. **Binding Resolution.** The Parties agree that, upon execution of the Order by the State Water Board or its Delegee, this Settlement Agreement represents a final and binding resolution and settlement of all claims, violations or causes of action involving unauthorized diversion, storage and use of water or failure to file Statements of Water Diversion and Use, as alleged in the ACL Complaint or the

Proposed CDO, up through the Effective Date of this Agreement, against GRR Vineyard and its parents, subsidiaries, affiliates, partners, successors, heirs, assigns, and their officers, directors, partners, employees, representatives, agents and attorneys.

5. **Release.** The Parties shall and do release, discharge and covenant not to sue or pursue any civil or administrative claims against one another, including the Parties' officers, agents, directors, employees, contractors, subcontractors, attorneys, representatives, predecessors in interest, and successors and assigns for any and all claims or causes of action which arise out of or are related to the violations alleged in the ACL Complaint or the Proposed CDO, except as specifically set forth herein.

6. **Satisfaction of Administrative Civil Liability.** GRR Vineyard's payment in Paragraph 3 herein will be a complete and final satisfaction of the alleged administrative civil liability for unauthorized diversion, storage or use of water at, or failure to file Statements of Water Diversion and Use for, the GRR Vineyard Property described in the ACL Complaint, up to and including the Effective Date of the Settlement Agreement. In consideration of this Settlement Agreement, the State Water Board will not bring any further administrative liability or other enforcement action regarding any of the alleged past violations described in the ACL Complaint, up to and including the Effective Date of this Settlement Agreement. In its discretion, the Division may make future findings based on significant new information or new adopted enforcement policies and initiate enforcement proceedings for any future violation of the Water Code, the State Water Boards regulations, the terms of this Agreement, or the terms of any permit or license issued to GRR Vineyard, provided, however, the Division shall not initiate civil liability proceedings for matters covered in this Settlement Agreement while GRR Vineyard is in compliance with this Settlement Agreement. If GRR Vineyard successfully completes its Settlement Agreement obligations, all liability and remedies for the alleged violations will be deemed fully resolved and settled through the completion date.

7. **Stipulations for Cease and Desist Order.** GRR Vineyard and the State Water Board jointly stipulate and agree to settle the Proposed CDO as follows:
 - a. Within 30 days following GRR Vineyard's receipt of the State Water Board's Order approving this Settlement Agreement, GRR shall begin the process of applying for a Small Irrigation Use Registration ("Registration") for the collection of water to storage in its reservoir utilizing the State Water Board forms and procedures by providing a copy of a completed Registration form to the Water Rights Coordinator of the appropriate regional office of the California Department of Fish and Wildlife ("DFW") and provide evidence to the Assistant Deputy Director of Water Rights of submitting such form to DFW. GRR Vineyard may divert and store water subject to the State Water Board's permitting authority while this Registration request is pending. Within 30 days of GRR Vineyards receiving either (1) additional terms and conditions that are acceptable to GRR Vineyard, or (2) clearance from DFW, GRR Vineyard shall submit the original Registration form, a copy of the terms and conditions or clearance provided by DFW, and all required fees to the State Water Board. In the event that the State Water Board does not accept GRR Vineyard's Registration, GRR Vineyard retains and does not waive any

legal rights that it may have to appeal or otherwise challenge the State Water Board's rejection of the Registration. If GRR Vineyard obtains a Registration, then it is not required to comply with Paragraphs 7(b) or 7(c) of this Settlement Agreement.

- b. If the Registration is not accepted/approved or if an appeal or legal action relating thereto is unsuccessful, or if GRR Vineyard elects not to complete the Registration process, GRR Vineyard will file an appropriative water rights application with the Division for storage and use of water in the Reservoir. The Application shall be filed within ninety (90) days of the State Water Board's rejection of the Registration or GRR's election. GRR Vineyard also has the option to submit this water rights application at any time prior to a State Water Board decision on the Registration and, upon request, the State Water Board will place the application in abeyance after its acceptance until action is taken on the Registration. GRR Vineyard will be responsible for paying its annual water rights fees during the period that the application is held in abeyance. GRR Vineyard will diligently pursue securing such permit by providing the required information to the Division and payment of necessary fees. If the GRR Vineyard Registration is rejected or if GRR Vineyard elects not to complete the Registration process, within 180 days thereafter, GRR Vineyard will complete a stream classification determination, determine the upstream limit of anadromy, and conduct a cumulative diversion analysis based on the former or then current State Water Board Policy for Maintaining Instream Flows in Northern California Coastal Streams ("Diversion Analysis Studies") for review by the Assistant Deputy Director. Within 90 days of receiving notice of the Deputy Directors acceptance of the Diversion Analysis Studies, GRR Vineyards shall file an Interim Reservoir Operation Plan which may contain standard monitoring, reporting and reservoir survey conditions ("Operation Plan") that is mutually acceptable to GRR Vineyard and the Assistant Deputy Director for Water Rights. The Operation Plan will require GRR's diversion and use to comply with the conclusions reached in the Diversion Analysis Studies. Once the Operation Plan has been approved by the Assistant Deputy Director, GRR Vineyard must implement and comply with the Operation Plan. GRR may divert and store water subject to the State Water Board's permitting authority while it is complying with the requirements of this paragraph. In the event that the State Water Board does not grant to GRR Vineyard the appropriative rights permit that it applies for, GRR Vineyard retains and does not waive any legal rights that it may have to appeal or otherwise challenge the permit denial.
- c. In the event that GRR Vineyard's Registration is withdrawn or not accepted and its application for appropriative water rights is denied, then GRR Vineyard must cease diverting water subject to the State Water Board permitting authority unless at the time of denial there is some other then-applicable legal means, or an engineering means acceptable to the Assistant Deputy Director, of bringing the reservoir into compliance. The Parties shall convene a meeting within 90 days after both events have occurred to discuss possible alternative actions to ensure the reservoir is brought in to compliance with then-applicable legal requirements. GRR Vineyard will then implement one of those remedies approved by the Assistant Deputy Director which may include rendering the reservoir incapable of storing water subject

to the State Water Board's jurisdiction if necessary to comply with applicable law.

- d. Within 30 days following GRR Vineyard's receipt of the State Water Board's Order approving this Settlement Agreement and without waiving its legal position that the Reservoir is not diverting surface water to storage that is subject to the State Water Board's water rights permitting authority, then GRR Vineyard shall file a Statement of Water Diversion and Use for the collection of water to storage from the unnamed stream at the dam creating its Reservoir for 2012 diversions and shall continue to file supplemental statements as required.
8. **Enforcement of CDO Terms.** The terms and conditions of Paragraph 7 of this Settlement Agreement and the Order approving this Settlement Agreement, are enforceable by the State Water Board. Violations of those terms may be subject to further enforcement under Water Code section 1845 at the discretion of the State Water Board. However, any enforcement actions must comply with Water Code section 1055.2.
9. **Support.** The Parties agree to support, advocate for, and promote the Order approving this Settlement Agreement before the State Water Board and/or the Executive Director.
10. **Hearing Request.** Upon approval of this Settlement Agreement by the State Water Board or its Delegee, such as the Executive Director, GRR Vineyard's request for hearing on the ACL Complaint and Proposed CDO is withdrawn.
11. **Waiver of Reconsideration.** GRR Vineyard waives its right to require reconsideration of the State Water Board's order approving this Settlement Agreement, provided no modifications to this Settlement Agreement or additional requirements beyond the requirements of this Agreement are included in that order.
12. **Entire Agreement.** This Settlement Agreement contains the entire agreement between the Parties and supersedes and replaces 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.
13. **Successors.** This Settlement Agreement shall be binding on and for the benefit of successors and assigns of GRR Vineyard or of its Property and of the State Water Board.
14. **Mutual Agreement.** This Settlement Agreement shall not be construed against the Party preparing it, but shall be construed as if the Parties jointly prepared it and any uncertainty and ambiguity shall not be interpreted against any one Party.
15. **Authority to Execute Settlement Agreement.** Each Party executing this Settlement Agreement in a representative capacity represents and warrants that he or she is authorized to execute this Settlement Agreement on behalf of and to bind the entity(ies) on whose behalf he or she executes the Settlement Agreement.

16. **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.
17. **Modification of Settlement Agreement.** This Settlement Agreement shall not be modified by any of the Parties by oral representation made before or after the execution of this Settlement Agreement. All modifications must be made in writing and approved by the parties.
18. **No Admission.** In settling this matter, GRR Vineyard does not admit to any of the findings or allegations in the ACL Complaint or the Proposed CDO. GRR Vineyard has not waived, and shall not be deemed to have waived, its legal positions that the Reservoir is not located on a natural watercourse or that the Reservoir is diverting surface water to storage that is not subject to the State Water Board's water rights permitting authority. Neither this Settlement Agreement nor any payment, conduct or action pursuant to this Settlement Agreement shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgment of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule, or regulations. However, this Settlement Agreement and/or any actions or payment pursuant to this Settlement Agreement may constitute evidence in actions seeking compliance with this Settlement Agreement. Furthermore, GRR agrees that in the event of any future enforcement actions by the State Water Board for the types of violations alleged in the ACL Complaint or Proposed CDO, this Settlement Agreement may be used as evidence of a prior enforcement action when considering relevant circumstances as required by Water Code section 1055.3, and GRR retains and does not waive its right to argue that this circumstance should not result in any increase in a liability or penalty.
19. **Exemption from CEQA.** Issuance of this Settlement Agreement is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with section 15321(a)(2) of Title 14 of the California Code of Regulations.
20. **Section Headings.** The Parties intend that the section headings in this Settlement Agreement be used solely for convenience for reference and that they shall not in any manner amplify, limit, modify or otherwise be used in the interpretation of the Settlement Agreement.
21. **Counterparts.** This Settlement Agreement may be executed and delivered in any number of counterparts and by facsimile signature, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.
22. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board's Order approving this Settlement Agreement.
23. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.

IT IS SO AGREED AND STIPULATED:

James W. Kassel
James W. Kassel
Assistant Deputy Director
State Water Board Division of Water Rights,
Prosecution Team

2/19/13
Date

Marc Rafael
Marc G. Rafael
Manager
GRR Vineyard LLC

02/15/2013
Date