

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

ORDER WR 2009-0036-EXEC

In the Matter of the Diversion and Use of Water by

North Gualala Water Company

SOURCE: North Fork Gualala River tributary to Gualala River thence Pacific Ocean

COUNTY: Mendocino

**ORDER APPROVING SETTLEMENT AGREEMENT
AND IMPOSING TERMS FOR CEASE AND DESIST**

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 (CDO) and an Administrative Civil Liability (ACL) complaint to the North Gualala Water Company (North Gualala). In accordance with the attached Stipulation and Settlement Agreement, the State Water Board's Division of Water Rights prosecution team (Prosecution Team) and North Gualala 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. The settlement is approved.

2.0 BACKGROUND

On August 26, 1964, North Gualala filed Application 21883 with the Division of Water Rights (Division). North Gualala sought to directly divert water at a rate of 2 cubic feet per second (cfs) year-round from the North Fork Gualala River. The water would be used for municipal purposes. North Gualala holds water right Permit 14853, which was issued pursuant to Application 21883.

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.

In 1974, North Gualala petitioned the State Water Board for a change in the place of use authorized under Permit 14853. The Department of Fish and Game (DFG) protested the change petition, and as a dismissal condition, requested that the minimum bypass flows of Term 9 be increased. The State Water Board did not receive an objection by North Gualala to DFG's proposal. On December 13, 1978, the State Water Board issued an order approving North Gualala's petition. The order also added a requirement for a streamflow measuring device (Term 10) and modified Term 9 by increasing the minimum bypass flow requirements to the following:

40 cfs, or the natural flow if it is less, during the period of November 15 to February 29

20 cfs, or the natural flow if it is less, during the period of March 1 to May 31

4 cfs, or the natural flow if it is less, during the period of June 1 to November 14

On October 24, 2008, the State Water Board issued an Administrative Civil Liability Complaint and a draft Cease and Desist Order to North Gualala. North Gualala received these documents on October 28, 2008. On November 10 and 12, 2008, North Gualala filed timely requests for hearings on the ACL and Draft CDO.

The State Water Board scheduled a hearing on the ACL and draft CDO for May 27, 2009. On May 12, 2009, the Prosecution Team and North Gualala executed the attached settlement agreement.

3.0 SETTLEMENT AGREEMENT

North Gualala and the Prosecution Team engaged in settlement discussions and reached an agreement on language that is mutually acceptable and is contained in the Settlement Agreement that is attached hereto. The general terms of the settlement are that North Gualala:

- a) revokes its request for hearing on the ACL and CDO, and agrees to the terms for cease and desist as described herein;
- b) agrees to file either (i) a petition for change in the existing bypass term in Permit 14853, or (ii) a new application to appropriate water, to address North Gualala's inability to meet its current bypass term during the November 15 through March 31 period when North Gualala's bypass flows are less than the minimum bypass amount specified in North Gualala's permit; and diligently pursue processing of the application or petition;

- c) remits payment of \$11,600, with \$7,252 going to the State Water Board for recovery of costs already expended, and the remaining \$4,348 going to either the State Water Board or towards installation, activation, operation and maintenance of the proposed streamflow measurement device described in paragraph 4 of the settlement agreement; and
- d) complies with all other terms of the settlement agreement.

ORDER

IT IS HEREBY ORDERED THAT the attached Stipulation and Settlement Agreement between the Division's Prosecution Team and North Gualala is approved and is incorporated by reference into this Order.

IT IS FURTHER ORDERED THAT pursuant to section 1831 through 1836 of the Water Code, North Gualala shall cease and desist from violating the terms and conditions of Permit 14853 and comply with the following corrective actions pursuant to the schedules specified:

1. North Gualala shall submit a revised version of the water supply contingency plan that was submitted to the Division by cover letter of May 18, 2000, within 120 days from the effective date of this order. The revised plan shall correct the deficiencies to the original plan as specified in the August 23, 2000 letter from the Division, and shall address how municipal water demands will be met when flows in the North Fork Gualala River fall below the bypass flow requirements specified in Permit 14853. The plan shall include the following elements:
 - Information on present and anticipated municipal water demand on a monthly basis, and anticipated peak daily demand and peak demand averaged over a 30-day period;
 - Identification of the minimum amount of water needed to maintain the health and safety of those served by the North Gualala;
 - Availability of water from the North Fork Gualala River to meet municipal demand while complying with applicable bypass flow requirements;
 - Availability of water from other sources to meet municipal water demand when flows in the North Fork Gualala River fall below the minimum bypass flow;
 - Evaluation of alternative water supply projects if needed to meet current and/or anticipated municipal water demand; and
 - A conservation plan to be implemented if curtailment of diversions is needed in order to comply with bypass flow requirements and other water right permit conditions. The plan

should include a description and analysis of current and proposed measures to limit or reduce water demand. The analysis shall include contingency plans to limit new service connections if other measures are insufficient to reduce anticipated demand to the level of reliable water supplies available to North Gualala.

2. Until such time as a contingency plan is submitted by North Gualala and approved by the Deputy Director for Water Rights² (Deputy Director), North Gualala shall not make any new service connections to its existing water supply system, unless such connections were the subject of an intent-to-serve letter dated prior to October 28, 2008. North Gualala shall provide the Deputy Director with a 30-day written notification prior to making any service connection pursuant to an intent-to-serve letter dated prior to October 28, 2008.

3. North Gualala shall submit a revised version of the surface streamflow measurement plan that was submitted to the Division by cover letter of October 31, 2000, within 90 days from the effective date of this order. The plan will correct the deficiencies to the original plan as specified in the April 2, 2001 letter from the Division, and will describe the proposed method to measure the surface flow of the North Fork Gualala River. The plan shall include the following elements:
 - Dates and frequency of measurements, including but not limited to the minimum dates specified in Term 3 of Order WR 99-09-DWR;
 - Location below the influence of North Gualala's diversion point where measurements shall be taken;
 - Method by which measurements shall be taken;
 - Method by which the DFG and other interested parties shall be notified of proposed measurements;
 - Method by which staff or consultants will be trained in the particular measurement method proposed; and
 - Method by which measurement records will be made and the results reported to the Division.

Upon the failure of any person or entity to comply with a CDO issued by the State Water Board pursuant to chapter 12 of the Water Code (commencing with section 1825), and upon

² Formerly Chief of the Division of Water Rights.

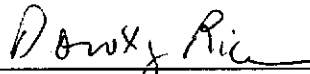
the request of the State Water Board, the Attorney General shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a).)

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.

JUN - 9 2009

Dated: _____



Dorothy Rice
Executive Director

Attachment

**SETTLEMENT DOCUMENT, SUBJECT TO LIMITATIONS ON ADMISSIBILITY
IN EVIDENCE CODE SECTIONS 1152 AND 1154
(5/12/09)**

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between the North Gualala Water Company ("North Gualala") and the Prosecution Team of the State Water Resources Control Board's Division of Water Rights (the "State Water Board Prosecution Team") and is executed on May 12, 2009.

RECITALS

A. North Gualala holds water-right Permit 14853, which was issued on Application 21883.

B. On October 24, 2008, the State Water Board Prosecution Team sent a letter to North Gualala, transmitting copies of an Administrative Civil Liability Complaint (the "ACL") and a draft Cease and Desist Order (the "Draft CDO"). North Gualala received these documents on October 28, 2008.

C. On November 10 and 12, 2008, North Gualala filed timely requests for hearings on the ACL and Draft CDO.

D. The State Water Resources Control Board (State Water Board) has scheduled a hearing on the ACL and Draft CDO for May 27, 2009. The present deadline for filing exhibits and testimony for this hearing is May 13, 2009.

E. North Gualala and the State Water Board Prosecution Team desire to settle the pending issues regarding the ACL and Draft CDO in lieu of proceeding with the May 27, 2009 hearing. The parties desire to make this settlement so that North Gualala and the State Water

Board can focus on constructive actions to bring North Gualala's water system into full compliance with all regulatory requirements.

F. 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.

NOW, THEREFORE, in consideration of these recitals and the mutual promises contained in this agreement, North Gualala and the State Water Board's Prosecution Team agree to settle the ACL and Draft CDO as follows:

1. The preceding recitals are true.
2. 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 in California Evidence Code sections 1152 and 1154.
3. Within 30 days after approval of this Settlement Agreement by the State Water Board's Executive Director, North Gualala will pay \$7,252 to the State Water Board, as described in paragraph 4 below. By October 15, 2009, North Gualala will pay \$4,348 to either the State Water Board, or to the Gualala River Watershed Counsel for installation, activation, operation, maintenance or telemetry of data of the proposed streamflow measuring device that is described in paragraph 4 below. None of this latter payment may be used to cover any work by North Gualala in the assistance with establishing this measuring device. If this latter payment goes towards the proposed streamflow measuring device, then a copy of the payment shall be submitted to the State Water Board on October 15, 2009. These payments will be a complete

and final settlement and satisfaction of the administrative civil liability described in the ACL, and the State Water Board Prosecution Team will not bring any further administrative civil liability or other enforcement action regarding any of the past alleged violations described in the ACL.

4. Of the ACL sum described in paragraph 3, \$7,252 shall go to the State Water Board for recovery of staff costs expended to review the existing project and develop the enforcement documents, as estimated in the ACL complaint. The remaining \$4,348 shall go to either the State Water Board, or towards installation, activation, operation and maintenance of the proposed streamflow measuring device to be situated approximately one half mile downstream of North Gualala's point of diversion on the North Fork Gualala River, at the site of the previous USGS gage. If this proposed streamflow measuring device becomes operational prior to the deadline for submittal of the revised surface streamflow measurement plan pursuant to paragraph 3 of the draft CDO, as revised below, then North Gualala may use this streamflow measuring device for monitoring compliance with the bypass conditions of its permit, provided that this streamflow measuring device is maintained and operated so that it accurately measures streamflow at least once every fifteen minutes and the records of streamflow are available to the State Water Board via internet. If North Gualala decides to use this streamflow measuring device for monitoring compliance with the bypass conditions of its permit, and if this streamflow measuring device is maintained and operated by the Gualala River Watershed Counsel so that it accurately measures streamflows as described above, then North Gualala shall not be required to submit the streamflow measurement plan. If North Gualala decides not to use this streamflow measuring device for monitoring compliance with the bypass conditions of its permit, then North Gualala shall submit and implement the revised surface streamflow measurement plan pursuant

to paragraph 3 of the draft CDO. Prior to any change in the location of the measuring site, North Gualala must first receive the approval of the Deputy Director for Water Rights to make such a change.

5. Upon approval of this Settlement Agreement by the State Water Board's Executive Director, North Gualala will be deemed to have withdrawn its requests for a hearing on the ACL and the Draft CDO and North Gualala will not oppose issuance of a final cease and desist order with the text of the Draft CDO, with "15 days" in paragraph 3, line 2 on page 6 changed to "90 days."

6. The State Water Board's Prosecution Team will not issue any new administrative civil liability complaint to North Gualala or take any other enforcement action against North Gualala for any violation of the bypass term of water-right Permit 14853, so long as North Gualala is complying with the all of the provisions of the final cease and desist order and with the revised water supply contingency plan (and any necessary subsequent revisions to this plan) that will be required by this order, unless the State Water Board's Prosecution Team first receives evidence of harm to fish caused by any such violation. Nothing in this paragraph prevents the State Water Board's Prosecution Team from issuing a new administrative civil liability complaint or bringing a new enforcement action for any violation by North Gualala of this final cease and desist order. North Gualala will not be deemed to be out of compliance with the final cease and desist order or any revised water supply contingency plan if North Gualala's compliance with this order or this plan is delayed by the State Water Board in its processing of any water-right application or petition that North Gualala files to implement this plan.

7. In addition to submitting a revised version of the water supply contingency plan as expressed in paragraph 1 of the draft CDO, North Gualala shall, within 30 days of the date this

settlement agreement is approved by the Executive Director, submit either:

- a) a petition for change in the existing bypass term in Permit 14853; or
- b) a new application to appropriate water.

Any change petition or new application to appropriate water must address North Gualala's inability to meet its current bypass term during the November 15 through May 31 period when North Fork Gualala River flows are less than the minimum bypass amounts specified in Permit 14853.

8. North Gualala, upon filing of either the petition for change or the application described in paragraph 7, shall diligently pursue processing of the petition or application 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

9. Successors. This Settlement Agreement shall be binding on any successors or assigns of North Gualala or the State Water Board.

10. Independent Judgment. Each party represents and declares that in executing this Settlement Agreement it is relying solely on its own judgment, belief, and knowledge concerning the nature, extent, and duration of its rights and claims, and that it has not been influenced to any extent whatsoever in executing this Settlement Agreement by any representations or statements regarding any matters made by the other parties hereto or by any person representing them.

11. No Precedent. This Settlement Agreement involves unique facts and legal issues and shall not be deemed a precedent decision of the State Water Resources Control Board. This Settlement Agreement also shall not be construed to be an admission by North Gualala of liability or any of the allegations in the ACL or the Draft CDO.

12. Additional Documents. Each party agrees that it will cooperate fully in executing

any additional and further documents necessary to give full effect to this Settlement Agreement.

13. Entire Agreement. This Settlement Agreement contains the entire agreement between the parties and supersedes and replaces any and all prior understanding, 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.

14. Mutual Agreement. The parties have agreed to the particular language in this Settlement Agreement, and this Agreement shall not be construed against the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.

15. 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.

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. Section Headings. The parties intend that the section headings of this Settlement Agreement be used solely for convenience of reference and that they shall not in any manner amplify, limit, modify, or otherwise be used in the interpretation of this Settlement Agreement.

18. Effective Date. This Settlement Agreement shall become effective immediately on signature of the State Water Board Executive Director's Order Approving the Settlement Agreement.

19. Choice of Law. This Settlement Agreement shall be interpreted and governed by the laws of the State of California.

20. Authorization. Each party warrants that the individual executing this Settlement

Agreement on behalf of such party is duly authorized to do so.

Dated: May 12, 2009

STATE WATER RESOURCES CONTROL BOARD,
DIVISION OF WATER RIGHTS
PROSECUTION TEAM

By: James W. Kassel
James W. Kassel
Assistant Deputy Director

Dated: May 12, 2009

NORTH GUALALA WATER COMPANY

By: John H. Bower
John H. Bower, President