

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010 - 0014- EXEC

In the Matter of the Diversion and Use of Water by
Gallo Glass Company

**ORDER APPROVING SETTLEMENT AGREEMENT
AND CEASE AND DESIST ORDER**

BY THE EXECUTIVE DIRECTOR:¹

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 Gallo Glass Company (Gallo). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights prosecution team (Prosecution Team) and Gallo 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

Gallo holds four water right licenses for diversion and use on the Twin Valleys Ranch in Sonoma County (APN 110-200-002, APN 110-200-4, and APN 110-230-008): Licenses 3697 (Application 010795), 4216 (Application 014178), 4729A (Application 013684A), and 5559 (Application 013384).

On January 23, 2009, Gallo submitted water right Application 31743 to appropriate up to 253 acre-feet for diversion to storage at the Twin Valley Ranch Reservoir (Reservoir), and also

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.

submitted a number of change petitions to bring Gallo's existing licenses into conformance with current and future operations.

On April 20, 2009, the Division Prosecution Team issued an Administrative Civil Liability Complaint (ACL) and a Draft Cease and Desist Order (Draft CDO) against Gallo, alleging an unauthorized diversion of water to storage from the Russian River and numerous violations of the water right licenses identified above.

On May 11, 2009, Gallo timely requested hearings on the ACL and Draft CDO. At the time of this Settlement Agreement, the State Water Board had not scheduled hearings for the ACL and Draft CDO.

Gallo and the Division Prosecution Team agree to settle the matters identified in the ACL and Draft CDO through this Settlement Agreement in lieu of hearings on said matters.

3.0 SETTLEMENT AGREEMENT

Gallo 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 Gallo: (1) withdraws its request for hearing on the ACL and CDO, and agrees to the terms for cease and desist as described herein, and (2) is subject to administrative civil liability in the amount of \$73,000. Of this amount, Gallo shall pay to the State Water Board \$39,800 within 30 days of issuance of this order, to be deposited into the Water Rights Fund pursuant to Water Code section 1054, et seq., with the remaining \$33,200 to be irrevocably deposited by Gallo into an escrow-type account. The \$33,200 shall be treated as a suspended administrative civil liability and used to fund a Supplemental Environmental Project, consistent with the terms of the Settlement Agreement and the State Water Board's Policy on Supplemental Environmental Projects. If a sufficient project is not identified within 90 days of this order, these funds shall be released to the State Water Board 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 Gallo and the Division's Prosecution Team is approved and is incorporated by reference into this Order.

IT IS FURTHER ORDERED THAT pursuant to sections 1831 through 1836 of the Water Code, Gallo shall cease and desist its unauthorized diversion of water from the Russian River and comply with the following corrective actions pursuant to the schedules specified:

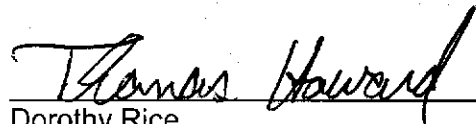
- a. Within 90 days of this order, Gallo will prepare and submit to the Division a survey of the Reservoir from a registered Civil Engineer. Gallo also will prepare and submit evidence of (1) installation of a staff gauge correlating depth and capacity to allow accurate determination of storage volume at various storage levels, and (2) installation of a flow meter on the line from its Russian River point of diversion to the Reservoir, and on the line from the Reservoir to the place of use.
- b. Gallo will maintain daily records of water diverted to the Reservoir and water diverted from the Reservoir, as well as monthly storage level records, and will provide such records to the Division as reasonably requested. The records shall include readings even if water is not diverted.
- c. Until a permit is issued on Gallo's Application 31743, Gallo will not divert any water from the Russian River to its Reservoir from December 1 of each year through April 30 of the succeeding year. From May 1 through November 30 of each year, Gallo will limit its diversions from the Russian River to the quantities and seasons currently authorized under Licenses 3697, 4216, 4729A, and 5559. Gallo agrees not to exceed a total diversion amount of 750 acre-feet per year under all of the existing licenses. Gallo will maintain records described in ordering paragraph b. above to confirm that diversions to storage do not occur during the December through April period, and that the reservoir storage does not increase in the reservoir during this period, except for incidental precipitation. Gallo will also maintain adequate records to demonstrate that its total diversions from the Russian River occur only between May 1 and November 30 of each year and do not exceed 750 acre-feet.

- d. To the extent that Gallo requires additional water to meet water demands on the property, Gallo will use other sources of supply that do not require a water right permit from the State Water Board, or otherwise will seek a temporary permit in accordance with Water Code section 1425, *et seq.*
- e. Gallo will diligently pursue Application 31743 and petitions filed on Licenses 3697, 4216, 4729A, and 5559, will pay all fees associated with said application and petitions, and will provide information reasonably requested by the Division. Gallo will cooperate with the Assistant Deputy Director for Water Rights regarding the monitoring and reporting specified herein and prosecution of Application 31743 and petitions on Licenses 3697, 4216, 4729A, and 5559.

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 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.

Dated: 3/17/2010


Dorothy Rice
Executive Director

Attachment

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between the Gallo Glass Company ("Gallo") and the Prosecution Team of the State Water Resources Control Board's Division of Water Rights ("Division Prosecution Team") and is executed this 3 day of ~~December 2009.~~ *February, 2010.*

RECITALS

- A. Gallo holds four State Water Resources Control Board ("State Water Board") water right licenses for diversion and use on the Twin Valleys Ranch in Sonoma County (APN 110-200-002, APN 110-200-4, and APN 110-230-008). The State Water Board licenses include L003697 (Application 010795), L004216 (Application 014178), L004729A (Application 013684A), and L005559 (Application 013384).
- B. On January 23, 2009, Gallo submitted State Water Board water right Application 031743 to appropriate up to 253 acre feet for diversion to storage at the Twin Valley Ranch Reservoir ("Reservoir"), and also submitted a number of State Water Board petitions to bring Gallo's existing licenses into conformance with current and future operations.
- C. On April 20, 2009, the Division Prosecution Team issued an Administrative Civil Liability Complaint ("ACL") and a Draft Cease and Desist Order ("Draft CDO") against Gallo alleging an unauthorized diversion of water to storage from the Russian River and numerous violations of the water right licenses identified above.
- D. On May 11, 2009, Gallo timely requested hearings on the ACL and Draft CDO. At the time of this Settlement Agreement the State Water Board has not scheduled hearings for the ACL and Draft CDO.
- E. Gallo and the Division Prosecution Team agree to settle the matters identified in the ACL and Draft CDO through this Settlement Agreement in lieu of hearings on said matters.
- 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 in consideration of the mutual covenants set forth in this Settlement Agreement, Gallo and the Division's Prosecution Team do hereby agree to settle the ACL and Draft CDO as follows:

1. **Recitals Incorporated.** The preceding Recitals are incorporated herein.

2. **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.
3. **Administrative Civil Liability.** Gallo shall be subject to administrative civil liability in the amount of \$73,000. This amount includes \$6,660 for estimated costs incurred by State Water Board staff to investigate and prosecute the administrative civil liability and cease and desist enforcement actions that are the subject of this settlement agreement. The civil liability also includes the cost of a Supplemental Environmental Project (SEP) in the amount of \$33,200, as described below. The cost of the SEP will be referred to as the SEP amount and will be treated as a Suspended Administrative Civil Liability.
4. **Supplemental Environmental Project.** Within 90 days following the State Water Board Executive Director's approval of this Settlement Agreement, Gallo shall irrevocably deposit \$33,200 into an escrow account, or some other similar type of segregated account subject to State Water Board control, to fund a Supplemental Environmental Project (SEP) within the Russian River watershed of Sonoma County approved by the State Water Board's Executive Director. The State Water Board's Executive Director and Gallo shall reach agreement on an appropriate SEP within 60 days of the Executive Director's approval of this Settlement Agreement. The SEP must conform to the requirements specified in the State Water Board's Policy on Supplemental Environmental Projects (SEP Policy) dated February 3, 2009, and shall include a time schedule with specific milestones for implementation and completion of the SEP. Gallo shall be responsible for ensuring that the approved SEP is undertaken and completed with due diligence. Meeting identified milestones shall indicate due diligence.
 - a. Gallo and the Division's Prosecution Team agree to pursue, to the extent practicable, an appropriate SEP.
 - b. The State Water Board's Executive Director will timely review any SEP proposed by Gallo and will not unreasonably withhold approval of a SEP proposed that is consistent with paragraph 4.
 - c. Payments for the SEP may be made to an organization or consultant mutually agreed to by Gallo and the State Water Board's Executive Director, but shall not be used to fund any costs incurred by Gallo associated with the SEP.
 - d. The entire payment for the SEP shall be expended, and construction and implementation of the SEP completed, within a reasonable time following the State Water Board Executive Director's approval of this Settlement Agreement.
 - e. Any part of the specified SEP payment amount not expended within a reasonable time in conformity with this agreement shall be immediately due to the State Water Board as a suspended penalty.

- f. In the event that Gallo is not able to demonstrate to the reasonable satisfaction of the State Water Board staff that it has spent the entire SEP amount for the completed SEP, Gallo shall either 1) undertake an additional SEP acceptable to the State Water Board; or 2) pay the difference between the Suspended Administrative Civil Liability and the amount Gallo can demonstrate it actually spent on the SEP, as an administrative civil liability. Gallo shall advise State Water Board staff within thirty days of a request, whether it elects to propose an additional SEP or pay the additional administrative civil liability within 15 days of its response. Any new SEP proposal shall be made within 60 days of Gallo's response. If the new SEP proposal is not accepted, Gallo shall pay the additional administrative civil liability within 30 days of its receipt of the notice that the SEP proposal is not accepted. State Water Board acceptance of an additional SEP shall not be unreasonably withheld.
- g. Prior to implementation of the SEP, Gallo, and/or the entity contracted or engaged to perform the SEP shall submit documentation, if necessary, under penalty of perjury, stating an opinion that the SEP meets or exceeds the requirements of the SEP Policy, California Environmental Quality Act (CEQA) and/or other applicable environmental laws.
- h. As requested by the State Water Board, Gallo and/or the entity contracted or engaged to perform the SEP shall provide monthly reports of progress to the State Water Board's Assistant Deputy Director for Water Rights on the 15th day of each month, beginning the calendar month following the Executive Director's approval of the SEP. These reports must likewise be provided to the State Water Board's Division of Financial Assistance, as required by the SEP Policy.
- i. Gallo and/or the entity contracted or engaged to perform the SEP shall permit inspection of the SEP by State Water Board staff upon reasonable notice.
- j. On or before completion of the SEP, Gallo shall submit a certified statement documenting Gallo's expenditures during the completion period for the SEP. Gallo shall provide any additional information requested by State Water Board staff which is reasonably necessary to verify Gallo's SEP expenditures.
- k. Within 30 days after completion of the SEP, Gallo shall submit a report, submitted under penalty of perjury, stating that the SEP has been completed in accordance with the terms of this Settlement Agreement. The report may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for State Water Board staff to evaluate the completion of the SEP and the costs incurred by Gallo.
- l. Whenever Gallo or its agents, contractors or subcontractors publicizes one or more elements of the SEP, they shall state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action by the State Water Board against Gallo.

In the event that Gallo and the State Water Board's Executive Director do not reach agreement on an appropriate SEP within the Russian River watershed of Sonoma County that is consistent with the State Water Board's SEP Policy within 90 days of the Executive Director's approval of this Settlement Agreement, or such longer

Subject to Evidence Code
Sections 1152 and 1154

period if the parties agree in writing, the \$33,200 identified in this paragraph 4 shall be released to the State Water Board for deposit in the Water Rights Fund pursuant to Water Code sections 1054, et seq.

5. **Administrative Civil Liability Payment.** Within 30 days following the State Water Board Executive Director's approval of this Settlement Agreement, Gallo will pay to the State Water Board \$39,800. Payment under this paragraph is in addition to obligation described in paragraph 4 above. The State Water Board shall deposit said funds in the Water Rights Fund pursuant to Water Code sections 1054, et seq.
6. **Satisfaction of ACL Complaint.** Gallo's full payments under paragraph 4 and paragraph 5, together, will be a complete and final satisfaction of the administrative civil liability described in the ACL, 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 ACL.
7. **Draft Cease and Desist Order.** Gallo and the Division Prosecution Team agree to settle the Draft CDO as follows:
 - a. Within 90 days of State Water Board approval of a Settlement Agreement, Gallo will prepare and submit to the Division a survey of the Reservoir, from a registered Civil Engineer, and will prepare and submit evidence of installation of a staff gauge correlating depth and capacity to allow accurate determination of storage volume at various storage levels. Gallo also will prepare and submit evidence of installation of a flow meter on the line from the diversion point to the Reservoir, and on the line from the Reservoir to the place of use.
 - b. Gallo will maintain daily records of water diverted to the Reservoir and water diverted from the Reservoir, as well as monthly storage level records, and will provide such records to the Division as reasonably requested. The records shall include readings even if water is not diverted.
 - c. Until a permit is issued on Gallo's Application 31743, Gallo will not divert any water from the Russian River to its Reservoir from December 1 of each year through April 30 of the succeeding year. From May 1 through November 30 of each year, Gallo will limit its diversions from the Russian River to the quantities and seasons currently authorized under Licenses 3697, 4216, 4729A, and 5559. Gallo agrees not to exceed a total diversion amount of 750 acre-feet per year under all of the existing licenses. Gallo will maintain records described in paragraph 6.b. to confirm that diversions to storage do not occur during the December through April period, and that the reservoir storage does not increase in the reservoir during this period, except for incidental precipitation. Gallo will also maintain adequate records to demonstrate that its total diversions from the Russian River occur only

between May 1 and November 30 of each year and do not exceed 750 acre-feet.

- d. To the extent that Gallo requires additional water to meet water demands on the property, Gallo will use other sources of supply that do not require a water right permit from the State Water Board, or otherwise will seek a Temporary Permit in accordance with Water Code section 1425, *et seq.*
 - e. Gallo will diligently pursue Application 31743 and petitions filed on Licenses 3697, 4216, 4729A, and 5559, will pay all fees associated with said application and petitions, and will provide information reasonably requested by the Division. Gallo will cooperate with the Assistant Deputy Director for Water Rights regarding the monitoring and reporting specified herein and prosecution of Application 31743 and petitions on Licenses 3697, 4216, 4729A, and 5559.
8. **Withdrawal of Hearing Request.** Upon approval of this Settlement Agreement by the State Water Board's Executive Director, Gallo's request for hearing on the ACL and Draft CDO will be deemed withdrawn.
 9. **Satisfaction of Draft CDO.** Gallo's acceptance of and compliance with this Settlement Agreement satisfies Gallo's liability for diversion and use from the Russian River that is identified in the Draft CDO. The Division will not bring further enforcement actions against Gallo for any matter addressed in the ACL and Draft CDO, so long as Gallo is in compliance with this Settlement Agreement. This paragraph is not intended to limit the Division's authority to pursue enforcement actions against Gallo for activities that were not identified in the Draft ACL and CDO.
 10. **Waiver of Reconsideration.** Gallo waives its right to request reconsideration of the State Water Board Executive Director's order approving this Settlement Agreement, provided no additional requirements are included in that order beyond the requirements of this Settlement Agreement.
 11. **Successors.** This Settlement Agreement is binding on any successors or assigns of Gallo and the State Water Board.
 12. **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.
 13. **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. This Settlement

Agreement also shall not be construed to be an admission by Gallo of the liability or of any of the allegations set forth in the ACL and Draft CDO.

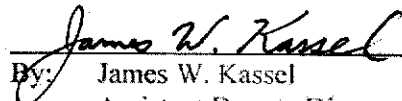
14. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
15. **Entire Agreement.** This Settlement Agreement reflects and represents the entire agreement between and among the parties 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.
16. **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.
17. **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.
18. **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.
19. **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.
20. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving Settlement Agreement.
21. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
22. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
23. **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 Gallo (or the entity contracted or engaged to perform the SEP, where applicable), its 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

Subject to Evidence Code
Sections 1152 and 1154

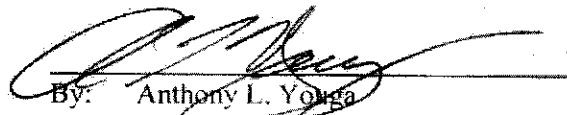
as parties to or guarantors of any contract entered into by Gallo, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement.

Gallo and the entity contracted or engaged to perform the SEP covenant not to sue or pursue any administrative or civil claim or claims against the State Water Board, or its officers, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by this Settlement Agreement or the SEP.

Dated: 3 ~~August, 2009~~ State Water Board Division of Water Rights
February, 2010 Prosecution Team


By: James W. Kassel
Assistant Deputy Director

Dated: 3 ~~AUGUST 2009~~ Gallo Glass Company
February, 2010


By: Anthony L. Yonga
Treasurer