

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

ORDER WR 2013-0020-EXEC

In the Matter of the Diversion and Use of Water by

**GIESE NEILL & COELINGH KATHLEEN TRUST, AND
NEILL GIESE AND KATHLEEN COELINGH (TRUSTEES)**

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 Giese Neill and Coelingh Kathleen Trust, and Neill Giese and Kathleen Coelingh (Diverter) on March 16, 2012. In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Division Prosecution Team) and Diverter 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 Diverter's 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 Diverter needed to apply for a water right if the Reservoir was collecting

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.

water from a surface stream. The State Water Board proposed a total liability of \$ 6,300 for the alleged unauthorized diversion, storage, and use of water and for the alleged failures to file Statements of Water Diversion and Use.

On April 3, 2012, Diverter verbally requested a hearing before the State Water Board on both the ACL Complaint and the Proposed CDO. A written request for a hearing on both the ACL Complaint and the Proposed CDO was subsequently received by the State Water Board on April 11, 2012. At the time of this Settlement Agreement, the State Water Board had not scheduled hearings for the ACL Complaint and Proposed CDO.

Diverter 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

Diverter and the Division Prosecution Team executed the Settlement Agreement attached hereto. The general terms of the settlement are that Diverter: (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 \$ 5,300, payable within 30 days of issuance of this Order, to be deposited into the Water Rights Fund, pursuant to California 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 Diverter is approved and is incorporated by reference to 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 California 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. (California Water Code, § 1845, subd. (a).)

Section 1845, subdivision (b) of the California 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: JUN 04 2013

SETTLEMENT AGREEMENT

This Settlement Agreement (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 the Giese Neill & Coeling Kathleen Trust, and Neill Giese and Kathleen Coeling (Diverter), as of May 28, 2013. State Water Board and Diverter shall sometimes be referred to herein individually as "Party" and collectively as "Parties."

RECITALS

- A. Diverter owns Assessor's Parcel Number (APN) 025-440-015 in Napa County, California (Property).
- B. On August 18, 2011, the Division mailed a letter (Notice Letter) notifying property owners in Napa County that a reservoir had been identified on their property. The Notice Letter informed Diverter that there may be an unauthorized diversion and use of water on their property for which they could be subject to enforcement and the imposition of liability. The Notice Letter requested that Diverter take one of the following actions: (1) if Diverter is claiming an existing basis of right or diverting water not subject to the State Water Board's permitting authority, then he should submit evidence supporting those facts within 30 days of the receipt of the Notice Letter; or (2) If Diverter agrees that the diversion was subject to the permitting authority of the State Water Board, then the Notice Letter gave Diverter 60 days to develop and submit a corrective action plan to prevent the unauthorized diversion of water. The Division Prosecution Team did not receive a response to the Notice Letter from the Diverter. Diverter assert that they did not receive the Notice Letter.
- C. On March 16, 2012, the State Water Board issued to Diverter 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, State Water Board alleged that a reservoir (Reservoir) had been identified on the Property. The ACL Complaint asserts 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 Diverter 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 \$6,300 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 Diverter 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 Instream Flow Policy.

- E. On April 3, 2012, Diverter verbally requested a hearing before the State Water Board on both the ACL Complaint and the Proposed CDO. A written request for a hearing on both the ACL Complaint and the Proposed CDO was subsequently received by the State Water Board on April 11, 2012.
 - a. 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 Director for adoption as an order by settlement, pursuant to Government Code section 11415.60. The Division 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.
- F. During the course of the settlement negotiations, Diverter submitted an application for Small Domestic Use Registration (Registration) and a Statement of Diversion and Use for the reservoir that is the subject of the ACL complaint and Proposed CDO.
- G. This Settlement Agreement will become effective when the State Water Board's Executive Director 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, Diverter 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'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. 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. **Administrative Civil Liability.** Diverter shall be subject to and agrees to pay administrative civil liability in the amount of \$ 5,300. This amount includes, but is not limited to, the costs incurred by State Water Board staff to investigate and prosecute the ACL Complaint and Proposed CDO that are the subject of this Settlement Agreement. Diverter shall make this payment within [30] days following the State Water Board Executive Director's approval of this Settlement Agreement. The State Water Board will deposit the above liability amount in the Water Rights Fund pursuant to Water Code section 1054, et seq.
4. **Satisfaction of Administrative Civil Liability.** Diverter's full payment in Paragraph 3 herein will be a complete and final satisfaction of the administrative civil liability described in the ACL Complaint and Proposed CDO, and the Division Prosecution Team will not bring any further administrative liability or other enforcement actions

regarding any of the alleged violations described in the ACL Complaint and Proposed CDO. The Division retains its full discretion and authority, however, to bring enforcement for violation not otherwise addressed in the ACL Complaint and Proposed CDO, and/or for violations which may occur in the future.

5. **Stipulations for Draft Cease and Desist Order.** Diverter and the State Water Board jointly stipulate and agree to settle the Draft CDO as follows:
 - a. Diverter agrees to diligently pursue the previously submitted application for Registration. Diligent pursuit includes the timely submission of all necessary fees, and any additional information requested by the California Department of Fish and Wildlife (formerly Department of Fish and Game) (DFW) or the State Water Board.
 - b. If DFW or the State Water Board rejects Diverter's registration application, then within 30 days of DFW or the State Water Board issuing that decision Diverter shall: (1) file an appropriative water right application with the Division and comply with Paragraph c. below; or (2) inform the State Water Board that they will not pursue a water right permit and will comply with paragraph d. below.
 - c. Diverter will diligently pursue securing such permit by providing the required information to the Division and payment of necessary fees. Within 90 days of filing an appropriative water rights application, Diverter shall submit a reservoir operation plan ("Operation Plan") to the Division for acceptance by the Assistant Deputy Director for Water Rights. The Operation Plan must demonstrate to the satisfaction of the Assistant Deputy Director for Water Rights how the reservoir will be operated; (1) in compliance with any then applicable instream flow policy; or (2) without storing additional water subject to the State Water Board's permitting authority until a permit is issued.
 - d. In the event that neither Diverter's Registration nor its application for appropriative water rights is approved, then within 150 days of the State Water Board decision denying the application becoming final, Diverter shall submit a plan to the Assistant Deputy Director for Water Rights for permanently rendering the reservoir incapable of storing water subject to the permitting authorization of the State Water Board.
6. **Statement of Diversion and Use:** Diverter shall continue to file supplemental statements of diversion and use as required.
7. **Support:** The Parties agree to support, advocate for, and promote the Order approving this Settlement Agreement before the Executive Director.
8. **Enforcement of CDO Terms:** The terms and conditions of Paragraph 5 of this Settlement Agreement and the Order approving this Settlement Agreement are enforceable by the State Water Board as a final cease and desist order pursuant to chapter 12 of the California Water Code (commencing with section 1825). Violations of this Settlement Agreement and/or the order approving this Settlement Agreement will be subject to further enforcement under Water code section 1845 at the discretion of the State Water Board.

9. **Waiver of Right to Hearing:** Upon approval of this Settlement Agreement by the State Water Board or its Delegee, Diverter's request for hearing on the ACL Complaint and Proposed CDO is withdrawn.
10. **Waiver of Right to Reconsideration:** Diverter waives its right to require reconsideration of the State Water Board's order approving this Agreement, provided no material modifications to this Agreement or additional requirements beyond the requirements of this Agreement are included in that order.
11. **Successors:** This Settlement Agreement shall be binding on successors and assigns of Diverter 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. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
14. **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.
15. **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 preparing it, but shall be construed as if the Parties jointly prepared it. Any uncertainty and ambiguity in the language of this Settlement Agreement shall not be interpreted against any one Party.
16. **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.
17. **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.
18. **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.
19. **Exemption from CEQA:** Issuance of this Settlement Agreement is exempt from the provisions of the California Environmental Quality Act (Public Resources Code

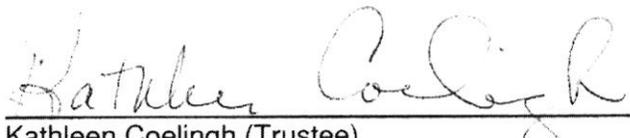
section 21000 et seq.), in accordance with section 15321(a)(2) of Title 14 of the California Code of Regulations.

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 Executive Director's Order Approving Settlement Agreement.
23. **Choice of Law:** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
24. **Authorization:** Each Party warrants that the individual executing this Settlement Agreement on behalf of such Party is duly authorized to do so.

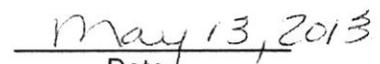
IT IS SO AGREED AND STIPULATED:

James W. Kassel
Assistant Deputy Director for the Division of Water Rights
Prosecution Team

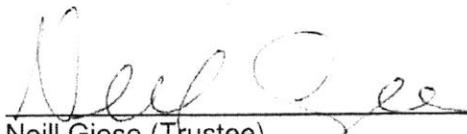
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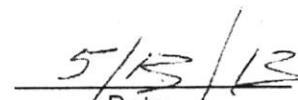
Kathleen Coelingh (Trustee)
Giese Neill & Coelingh Kathleen Trust



Date



Neill Giese (Trustee)
Giese Neill & Coelingh Kathleen Trust

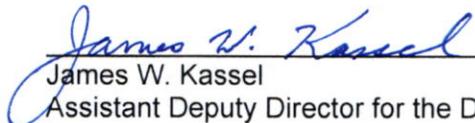


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IT IS SO AGREED AND STIPULATED:



James W. Kassel
Assistant Deputy Director for the Division of Water Rights
Prosecution Team

5/28/13

Date

Kathleen Coelingh (Trustee)
Giese Neill & Coelingh Kathleen Trust

Date

Neill Giese (Trustee)
Giese Neill & Coelingh Kathleen Trust

Date