

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 99 - 011

In The Matter Of
Petitions for Reconsideration by
Coast Action Group and Don McDonald
Regarding Division of Water Rights Order WR 99-09-DWR

Which Approved
Changes in Points of Diversion and Place of Use of Water Diverted by
NORTH GUALALA WATER COMPANY

Under Permits 543 1, 5432, 11535, and 14853
(Applications 9372, 9454, 18098, and 21883)

SOURCES: North Fork Gualala River, Robinson Gulch, Big Gulch, and Fish Rock Creek

COUNTY: Mendocino

ORDER REQUIRING PREPARATION OF WATER SUPPLY CONTINGENCY
PLAN AND DISMISSING PETITIONS FOR RECONSIDERATION

1.0 INTRODUCTION

This order addresses two petitions for reconsideration of Order WR 99-09-DWR entered by the State Water Resources Control Board's (SWRCB) Division of Water Rights (Division) on August 27, 1999. Order WR 99-09-DWR approved a petition to add points of diversion to Permit 14853 and a petition to add to the place of use under Permits 543 1, 5432, 11535, and 14853. All of the permits are held by the North Gualala Water Company (hereinafter referred to as permittee or NGWC) which provides water to the town of Gualala. The permits authorize diversion of water for municipal use from various streams that are tributary to the Pacific Ocean in Mendocino County. The petitions for reconsideration were filed by the Coast Action Group and Don McDonald.

This order reviews the arguments of the petitioners and amends Permit 14853 to require NGWC to prepare a contingency plan for meeting municipal water demands at times when flows in the North Fork Gualala River are insufficient to allow for diversion of water under Permit 14853

while meeting applicable bypass flow requirements. For the reasons discussed below, the SWRCB finds that the specific actions requested in the petitions for reconsideration are not supported by the record and the petitions are dismissed.

2.0 SUMMARY OF PETITIONS

Order WR 99-09-DWR amends NGWC's permits for diversion of water from the North Fork Gualala River, Robinson Gulch, Big Gulch, and Fish Rock Creek. Both petitions for reconsideration are primarily concerned with the potential impact of water diversions under Permit 1.4853 on fish and fishery habitat in the North Fork Gualala River and the downstream estuary. The petitions for reconsideration are summarized below.

2.1 Petition for Reconsideration Submitted by Coast Action Group

The petition for reconsideration filed by the Coast Action Group refers to evidence in the record regarding the importance of instream flows for protection of fish and requests the SWRCB to consider: (1) establishing a limitation on the number of hookups served by permittee, (2) requiring permittee to obtain alternative water sources, and (3) imposing limitations on permittee's "production capacity."

The accompanying Points and Authorities submitted by the Coast Action Group state that reconsideration is justified under Title 23, California Code of Regulations, section 768, subdivisions (b) and (c). The regulations cited by the petitioner authorize reconsideration when a decision is not supported by substantial evidence or when there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced earlier. The additional evidence referred to by the petitioner includes: (1) an August 31, 1999 letter from a Department of Fish and Game employee reporting on flow measurements taken in 1988 that are below the minimum bypass flow established in Permit 14853, and (2) an August 16, 1999 letter from the National Marine Fisheries Service which recommends that "no additional water hookups or further diversion of flows from the North Fork Gualala River be permitted until a coordinated watershed plan has been prepared for the Gualala River and adopted by Mendocino County and the State Water Resources Control Board."

Coast Action Group's petition states that, although it asks for reconsideration of the conditions established in Decision WR 99-09-DWR, it does not request rescission of the decision to change the point of diversion.'

2.2 Petition for Reconsideration Submitted by Don McDonald

The petition for reconsideration filed by Don McDonald asks the SWRCB to reconsider adoption of his previous recommendations as set forth in items 1 and 7 on page 3 of a memorandum from Mr. McDonald dated January 15, 1998. Item 1 on page 3 of that memorandum recommended reducing the maximum allowed pumping rate on the North Fork Gualala River from 2 cubic feet per second (cfs) to 1 cfs. Item 7 recommended requiring permittee to undertake an immediate search for an offstream reservoir site to store winter run-off for use during low flow periods.

Mr. McDonald refers to a statement in a March 1989 Department of Health Services memorandum that questions whether Robinson Creek and Big Gulch are reliable sources of water during extended drought periods. Mr. McDonald states that any inference that Robinson Creek and Big Gulch provide a "safe and plentiful backup source" of water to the North Fork Gualala River is misleading and untrue. Mr. McDonald also disputes the finding on page 6 of the Order WR 99-09-DWR that the protestants did not submit any evidence that moving the point of diversion will adversely affect the fishery. In support of his argument that the change will adversely impact the fishery, Mr. McDonald cites evidence in the record showing that pumping from wells has affected flows in the Gualala River and states that evidence allows one to "extrapolate the negative impact to the North Fork and estuary" The petitioner also contends that Order WR 99-09-DWR is in violation of the California Environmental Quality Act. Finally, Mr. McDonald argues that the change in the point of diversion under Permit 14853 has resulted in a "taking of anadromous fish and nursery habitat from endangered species of Salmonids."

Mr. McDonald did not submit a separate statement of points and authorities in support of his request for reconsideration as required by Title 23, California Code of Regulations, section 768. From the information in his request for reconsideration, however, it appears that the petitioner

believes the Order WR-99-09-DWR is not supported by evidence in the record and is contrary to law.

3.0 ANALYSIS OF ISSUES

Order WR 99-09-DWR was issued in response to petitions to change authorized points of diversion and to revise the place of use for water diverted under previously issued permits. The order does not authorize issuance of a new permit or diversion of additional water, nor does the order revise the previously established bypass flow requirements applicable to water diversion under Permit 14853. Although some parties expressed concern about preserving sufficient **instream** flows for fish, there were no fishery studies provided to the Division to justify revision of the previously established bypass flow requirements set forth in the permit. In view of evidence that channel conditions make it impractical to establish a permanent, continuous flow measuring device below the NGWC point of diversion, Permit 14853 was amended to require the permittee to develop a surface flow measurement plan to ensure compliance with applicable bypass flow requirements.¹

The North Fork Gualala River provides habitat for steelhead trout and coho salmon. Coho salmon in the Gualala River have been classified as threatened under the Federal Endangered Species Act. (61 Federal Register 56138.)² The need to maintain **instream** flows for protection of fish in the North Fork Gualala River and the Gualala River is not in dispute. The evidence referred to by petitioners regarding the condition and importance of fishery resources supports the need for including a condition in Permit 14853 to protect **instream** flows. However, the

¹ The flow of the North Fork Gualala River is to be measured on June 1, July 1, August 1 and weekly thereafter until December 15 of each year. If the recorded flow is less than 4.5 cubic feet per second (cfs) during the period of June 1 through November 14, or less than 40 cfs during the period of November 15 through December 15, then the permittee is required to take daily flow measurements and regulate diversions in order to comply with minimum flow requirements. (Order WR 99-09-DWR, pp. 9 and 10.)

² The Coast Action Group petition refers to a letter from the National Marine Fisheries Service dated August 16, 1999, which states that **steelhead** trout in the Gualala River are also listed as threatened under the Federal Endangered Species Act. Review of 62 Federal Register 43937 and 43944 shows that although the Central California Coast Evolutionary **Significant** Unit of steelhead trout are listed as threatened, the unit does not extend as far north as the Gualala River.

record provides no basis for revising the existing bypass flow requirements set forth in Permit 14853, nor do either of the petitions request revision of those requirements.

Rather, the petitioners request that the SWRCB adopt a number of other requirements aimed at ensuring or increasing the probability that NGWC will be able to meet its municipal water demand without violating the bypass flow requirements specified in Permit 14853. As discussed in Sections 2.1 and 2.2 above, the revisions requested by petitioners include limiting the number of hookups, requiring permittee to reduce its pumping capacity, and requiring permittee to develop additional sources of water.

The limited flow records for the North Fork Gualala River make it impossible to determine the extent of the problem, if any, that NGWC may face in complying with applicable bypass flow requirements in Permit 14853 while meeting its municipal water supply needs. The Coast Action Group petition refers to several flow measurements taken by a Department of Fish and Game (DFG) biologist in 1989 near NGWC's point of diversion on the North Fork Gualala River. (Letter dated August 31, 1999, from DFG biologist Bill Cox summarizing measurements taken in July and September 1989.) Although only a few measurements were taken, those measurements indicate that flows fell below the 4 cfs minimum bypass flow required by Permit 14853.

The conclusion that NGWC may have trouble meeting municipal water demands while complying with applicable bypass flow requirements is also supported by a memorandum in the SWRCB files on Application 2 1883. (Memorandum dated January 29, 1998, from the Mendocino County Water Agency to the Mendocino County Planning Department.) The memorandum evaluates a report on stream flow measurements in the North Gualala River and a second report on groundwater pumping impacts. Although the memorandum does not identify the flows present at particular dates, it states that Well 4 on the North Fork Gualala River is the NGWC's primary water source, and that the bypass flow requirements applicable to that source have been violated in the past. The Mendocino County Water Agency memorandum expresses concern about continued growth of municipal water demand in a situation where the reliability of NGWC's primary water supply is in question.

The bypass flow condition in Permit 14553 requires the presence of specified minimum flows or the natural flow, whichever is less. Thus, if the natural flow is less than the specified minimum flow for a particular date, NGWC is not authorized to divert any water from the North Fork Gualala River. If NGWC's municipal water demand could not be met from other sources, then NGWC would be in the position of either not supplying municipal water demands or violating the bypass flow conditions specified in its permit for protection of fish. Although NGWC has been in compliance with bypass flow requirements at the time of past Division inspections, the 1989 flow measurements and the Mendocino County Water Agency's ~~information~~ ^{information} as to the question of whether NGWC can meet its municipal water demands and comply with bypass flow requirements on an ongoing basis.

The SWRCB has the continuing responsibility and authority under the public trust doctrine to consider the effect of water diversions upon public trust resources and to avoid or minimize harm to those resources to the extent feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 427 [189 Cal.Rptr. 346, 365].) The SWRCB must consider the amount of water needed for preservation and enhancement of fish and wildlife and must regulate water appropriations on such terms and conditions as will best protect the public interest. (Water Code sections 1243 and 1253.)

Based on the findings above, the SWRCB concludes that it is reasonable to require NGWC to prepare a water supply contingency plan to address how municipal water demands can be met when the bypass flow requirements specified in Permit 14853 limit NGWC's ability to divert from the North Fork Gualala River. The plan should include the following elements:

1. Information on present and anticipated municipal water demand on a monthly basis and during periods of peak demand;
2. Availability of water from the North Fork Gualala River to meet municipal demand while complying with applicable bypass flow requirements;
3. Availability of water ~~from~~ other sources to meet municipal water demand;
4. Evaluation of alternative water supply projects if needed to meet anticipated municipal water demand; and

5. A description and analysis of current and proposed measures to limit or reduce water demand including water conservation measures to be implemented if curtailment of diversions is needed in order to comply with bypass flow requirements and other water right permit conditions. The analysis shall include contingency plans to limit new service connections if other measures are insufficient to reduce demand to the level of reliable water supplies available to the permittee.

The water supply contingency plan required by this order may utilize information from existing water conservation planning documents, but any such information should be updated to reflect current studies and information on NGWC's water supply and demands.³ Based on the information developed in NGWC's water supply contingency plan, it may be appropriate at a future time to require additional actions to reduce water demand, to develop alternative sources of supply, or to otherwise revise the conditions of Permit 14853. The record before the SWRCB at the present time, however, does not establish a sufficient basis for requiring the actions requested by petitioners.

4.0 CONCLUSION

The focus of Order WR 99-09-DWR was on addressing changes requested in the petitions filed by NGWC. The SWRCB concludes that the amendments to the conditions of NGWC's permits adopted in Order WR 99-09-DWR are supported by the record and that it was appropriate to approve the change petitions subject to the specified conditions." The SWRCB also concludes,

³ The files on Water Right Permit 14853 show that NGWC previously questioned whether its Well 4 near the North Fork Gualala River is within the SWRCB's permitting authority. The water supply contingency plan identified in this order is required as a condition of Water Right Permit 14853. Under article X, section 2 of the California Constitution and Water Code section 100, however, all diversion and use of water in California is subject to reasonable use restrictions and a prohibition on unreasonable diversion or method of diversion. Adverse impacts to fish and wildlife are among the factors that provide a basis for determining that a water diversion may be unreasonable. (United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, 129-130 [227 Cal.Rptr. 161, 187]; SWRCB Order WR 95-4, p. 17.) Water Code section 275 directs the SWRCB to take all appropriate actions to prevent waste or unreasonable use and unreasonable methods of diversion. The SWRCB's authority to regulate water use to comply with the reasonable use and diversion requirements of the California Constitution and Water Code extends to water use under all types of rights. (Imperial Irrigation District v. State Water Resources Control Board (1990) 225 Cal.App.3d 548, 275 Cal.Rptr. 250.) Thus, the SWRCB's authority to require the operator of a well to prepare a water supply contingency plan to avoid or reduce impacts on public trust resources is not limited to situations where the well is deemed to be under the SWRCB's permitting authority.

⁴ The SWRCB agrees with the conclusion on page 8 of Order WR 99-09-DWR that there is no substantial evidence in the record that the changes authorized by the order may have a significant effect on the environment. Therefore, adoption of a mitigated negative declaration was appropriate. Similarly, there is no evidence in the record to support the contention that the change in point of diversion will result in a significant increase in water diversions or [footnote continues on next page]

however, that there is substantial evidence in the record to establish that NGWC may have difficulty in meeting municipal water demands without violating the conditions of Permit 14853. Therefore, in the exercise of its continuing authority over the diversion of water by NGWC, the SWRCB concludes that an additional condition should be added to Permit 14853 to require NGWC to prepare a water supply contingency plan as set forth in the order below.

Although the record supports the need to maintain sufficient **instream** flow for protection of fish, there is insufficient evidence in the record to take the specific actions requested by the petitioners. Therefore, the petitions for reconsideration are dismissed. The SWRCB may exercise its continuing authority to take further action in **future** proceedings as appropriate based on information to be developed in the water supply contingency plan and any other relevant evidence.

ORDER

IT IS HEREBY ORDERED THAT Permit 14553 shall be amended to include the following additional condition:

Permittee shall prepare an acceptable water supply contingency plan to 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:

1. Information on present and anticipated municipal water demand on a monthly basis and during periods of peak demand;
2. Availability of water from the North Fork Gualala River to meet municipal demand while complying with applicable bypass flow requirements;
3. Availability of water **from** other sources to meet municipal water demand;

otherwise adversely affect fish or fish habitat. **In** fact, the requirement for the permittee to develop a water supply contingency plan pursuant to provisions of this order will reduce the potential for permittee's diversions to adversely impact steelhead trout or **coho salmon**. For purposes of clarification, **the SWRCB** notes that **conditions 3 and 6** on pages 9 and 10 of Order **WR 99-09-DWR** apply to Permit 14853 and not to the other permits addressed by that order.

4. Evaluation of alternative water supply projects if needed to meet anticipated municipal water demand; and
5. A description and analysis of current and proposed measures to limit or reduce water demand including water conservation measures to be implemented if curtailment of diversions is needed in order to comply with bypass flow requirements and other water right permit conditions. 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 permittee.

The plan shall be prepared and submitted to the Chief of the Division of Water Rights by March 30, 2000. The Chief of the Division of Water Rights shall review the plan to determine if it adequately addresses the problem of maintaining sufficient instream flows for protection of fish while providing water to meet essential municipal demand. The SWRCB may exercise its continuing authority to take further action as appropriate based on information developed in the water supply contingency plan and any other relevant evidence.

IT IS FURTHER ORDERED THAT the petitions for reconsideration filed by Coast Action Group and Don McDonald are dismissed.

CERTIFICATION

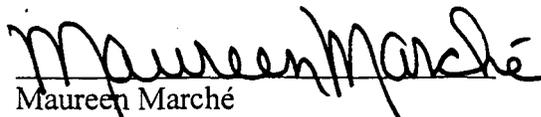
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 18, 1999.

AYE: James M. Stubchaer
John W. Brown
Arthur G. Baggett, Jr.

NO: None

ABSENT: Mary Jane Forster

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

