

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001 - 14

In the Matter of
Permit 14853 (Application 21883) of
NORTH GUALALA WATER COMPANY.

SOURCE: North Fork Gualala River
COUNTY: Mendocino

**ORDER DENYING RECONSIDERATION
OF DECISION DISAPPROVING
WATER SUPPLY CONTINGENCY PLAN AND
SURFACE FLOW MANAGEMENT PLAN**

BY THE BOARD:

1.0 INTRODUCTION

By letter dated April 2, 2001, the Chief, Division of Water Rights, disapproved the Surface Flow Management Plan and the Water Supply Contingency Plan submitted by the permittee, North Gualala Water Company (North Gualala). The plans are required under water right Permit 14853. On May 1, 2001, North Gualala filed a timely petition for reconsideration of the decision disapproving the two plans. This Order of the State Water Resources Control Board (SWRCB) denies reconsideration and affirms the decision of the Chief, Division of Water Rights with modifications.

2.0 BACKGROUND

2.1 Historical Context

North Gualala provides water service to the Town of Gualala in Mendocino County. Permit 14853 is one of four water right permits held by North Gualala. A predecessor of the SWRCB issued Permit 14853 to North Gualala on September 3, 1965. Permit 14853 authorizes diversion of up to 2.0 cubic feet per second (cfs) for municipal use from the North Fork Gualala River. Combined with the other three permits, which are for diversions from other water

courses, North Gualala has rights to divert up to 4.16 cfs with a maximum diversion of 1730 acre-feet per annum (afa).

In 1978, the SWRCB approved a petition for change in place of use filed by North Gualala. In addition to adding parcels to the place of use, the 1978 SWRCB order amended Term 9 of the permit, which requires bypass flows for fish and wildlife protection and added further conditions to Permit 14853, including a measuring device requirement to measure bypass flows. The amendment to Term 9 was requested by the Department of Fish and Game (DFG) in 1974 as a means to resolve its protest of the petitioned change. The SWRCB advised North Gualala by letter that it would include this amendment and treat its inclusion as a dismissal of the DFG protest unless North Gualala objected. There is no response from North Gualala in the file. Order WR-99-09-DWR concludes that North Gualala accepted the amendment to resolve the protest of DFG to the change in place of use. North Gualala now alleges that it did not consent to the amendment. In any event, however, North Gualala had an opportunity to challenge the change in the bypass flow requirements, made in 1978, through a petition for reconsideration and/or a petition for writ of mandate at that time, and did not do so.

On August 27, 1999, the Chief, Division of Water Rights, signed Order WR-99-09-DWR. Order WR-99-09-DWR approves a petition to add thirteen parcels to the places of use of Permits 14853, 11535, 5432, and 5431 and approves a second petition to add two vertical wells near the North Fork Gualala River as points of diversion under Permit 14853 and delete the previous point of diversion. Both approvals were subject to new or amended terms and conditions. The change in point of diversion approved North Gualala's movement of its point of diversion upstream to the two wells, identified as Well No. 4 and Well No. 5. Previously, North Gualala diverted water from the surface of the stream at an infiltration gallery at the confluence of the North Fork Gualala River and the Little North Fork Gualala River. North Gualala changed its point of diversion to obtain better quality water. North Gualala reserved the right to assert in subsequent water right proceedings that the water pumped from Wells 4 and 5 is percolating ground water that is not subject to the SWRCB's water right permitting authority. North Gualala did not challenge Order WR-99-09-DWR, but two other parties filed petitions for reconsideration.

The Chief, Division of Water Rights, in Order WR-99-09-DWR added terms and conditions that include requiring a surface flow measurement plan for the North Fork Gualala River in the reach below the influence of North Gualala's diversion, to ensure that the instream flow requirements (called bypass flow requirements) in Term 9 of the permit are met. The order also sets a schedule for making the measurements, and requires that the measurements commence October 1, 1999.

In response to petitions for reconsideration of Order WR-99-09-DWR, the SWRCB, on November 18, 1999, adopted Order WR 99-011. Order WR 99-011 dismisses the petitions for reconsideration and adds a requirement for a water supply contingency plan to address how municipal water demands will be met when flows in the North Fork Gualala River fall below the instream flow requirements in Term 9 of Permit 14853. The plan was due to the Chief, Division of Water Rights, by March 30, 2000.

2.2 Inadequate Compliance With Requirements To Submit The Plans

North Gualala submitted its Surface Flow Measurement Plan to the Chief, Division of Water Rights, on October 26, 1999. By letter dated January 7, 2000, the Chief, Division of Water Rights, made specific recommendations and directed that the plan be amended and resubmitted with the recommended changes within 60 days. By letter dated May 17, 2000, North Gualala disagreed with the Chief's interpretation of Term 9. North Gualala filed a revised Surface Water Measurement Plan on May 17, 2000. This plan made some of the recommended changes.

North Gualala submitted its Water Supply Contingency Plan by letter dated May 18, 2000. By letter dated August 23, 2000, the Chief, Division of Water Rights, advised North Gualala that both plans are inadequate, specified the changes or types of changes that were needed, and directed that amended plans be submitted by October 1, 2000. By letter from its attorney dated October 31, 2000, North Gualala expressed disagreement with the August 23, 2000, letter. North Gualala included with its letter a revised Surface Flow Measurement Plan that did not include the measurement locations and measurement methods required by the Chief, Division of Water Rights.

The October 31, 2000 draft Surface Water Management Plan meets the requirements regarding measurement dates specified by the Chief, Division of Water Rights. It is deficient, however, as follows:

1. While the Plan provides that the measurement location will be at least 1000 feet downstream from Well 4 as required, it does not specify a set location for making the measurements. The Plan instead indicates that the measurement location will change at the discretion of the person making the measurement. A moveable measurement point is not acceptable because it will produce inconsistent results.
2. While the Plan adequately specifies the method of daily measurement using a staff gage and using a flow meter whenever the level changes on the staff gage, the Plan would allow the interval between flow meter readings to exceed one week, contrary to the requirements specified by the Chief, Division of Water Rights. This could result in inaccurate measurements.

The May 18, 2000 draft Water Supply Contingency Plan is deficient as follows:

1. It does not plan for an alternative supply when the instream bypass flow requirements in Term 9 preclude diversion of water under Permit 14853.
2. It does not clearly identify what actions North Gualala will take to increase the amount of water it can obtain from alternative sources when the surface flow in the North Fork Gualala River falls below the minimum under Term 9.
3. While North Gualala has a water conservation plan, it has not provided any analysis of the extent to which the measures in its water conservation plan are adequate to deal with curtailments of diversion from Wells 4 and 5. North Gualala asserts that if it has to curtail its pumping from Wells 4 and 5 when the flows in the North Fork Gualala River are less than specified in Term 9, it will have to develop a water supply project. The draft Water Supply Contingency Plan discusses options including drilling a well, treating the water from Well 3 which has high levels of iron and manganese, desalinization, and construction of an off

stream reservoir. To provide an adequate Water Supply Contingency Plan, North Gualala must further investigate alternative methods of water supply, including an off stream storage reservoir.

3.0 DIVISION CHIEF DECISION

By letter dated April 2, 2001, the Chief, Division of Water Rights, advised North Gualala through its attorney that both the Surface Flow Measurement Plan and the Water Supply Contingency Plan are not approved as currently drafted. The letter indicates that the Surface Flow Measurement Plan would be approved if it included the changes specified in the Division of Water Rights' letter dated January 7, 2000. The letter points out the inadequacies that must be corrected in the Water Supply Contingency Plan. The letter advises North Gualala that the SWRCB may take enforcement action if the plans are not correctly completed and implemented or if North Gualala otherwise does not meet the terms and conditions of Permit 14853. The April 2, 2001, letter also advises North Gualala that if it disagrees with the action disapproving the two plans, it can file a petition for reconsideration within thirty days from the date of the letter.

4.0 THE PETITION FOR RECONSIDERATION

4.1 Basis for Petition for Reconsideration

The SWRCB may order reconsideration on all or a part of a decision adopted by the SWRCB or by an officer or employee of the SWRCB upon petition by any interested person. (Wat. Code § 1122.) The causes for reconsideration of a decision or order are set forth in the regulations of the SWRCB at California Code of Regulations, title 23, section 768, as follows:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(23 Cal. Code Regs. § 768)

North Gualala filed its petition for reconsideration with the SWRCB on May 1, 2001. North Gualala alleges grounds for reconsideration under all four of the above causes. The petition for reconsideration specifically requests that the decision in the April 2, 2001 letter be vacated and that the SWRCB conduct a hearing to determine (1) the legal classification of the water pumped by Wells 4 and 5,¹ (2) the correct interpretation of Term 9, and (3) the adequacy of the Surface Flow Measurement and Water Supply Contingency Plans.

4.2 Discussion

The specific action from which North Gualala seeks reconsideration is the disapproval of the two plans. The disapproval of these plans is based on the Division Chief's interpretation of the terms and conditions in Permit 14853, including Term 9. The April 2, 2001 letter is not based on any determination as to whether a permit is required for the diversions from Wells 4 and 5.² Instead, it is based on the terms and conditions in the permit. Accordingly, a review of the need for a permit to divert water from these wells is not properly before the SWRCB with respect to the petition for reconsideration currently under consideration. Such a review could be conducted in a separate proceeding, as discussed below.

With respect to Term 9 and the adequacy of the two plans, North Gualala argues that the Division of Water Rights is incorrectly interpreting Permit 14853, Term 9. Term 9 provides:

“For the protection of fish and wildlife, permittee shall during the period:
(a) from November 15 through February 29, bypass a minimum of 40 cubic feet per second; (b) from March 1 through May 31, bypass a minimum of 20 cubic feet per second; (c) from June 1 through November 14, bypass a minimum of 4 cubic feet per second. The total streamflow shall be bypassed whenever it is less than the designated amount for that period.”

¹ North Gualala reserved its argument, when it petitioned to add Wells 4 and 5 as points of diversion and delete the previous point of diversion from Permit 14853, that the water pumped by these wells is percolating ground water, and consequently is not subject to the requirement to have a permit to appropriate the water. The basis for North Gualala's argument is Water Code section 1200, which requires permits or licenses to appropriate water only if the water is surface water or is in a subterranean stream flowing through known and definite channels. North Gualala is arguing, therefore, that the water from Wells 4 and 5 is not in a subterranean stream flowing through known and definite channels.

² In 1994, North Gualala petitioned for a change in Permit 14853 that substitutes Wells 4 and 5 for the infiltration gallery as points of diversion of water from the North Fork Gualala River. The Chief, Division of Water Rights, approved the petitioned change in 1999. (Order WR-99-09-DWR.) Although North Gualala asserts that no water right permit is required for the diversions from Wells 4 and 5, North Gualala has not requested cancellation of this permit.

North Gualala takes the position that it is not required to cease diverting under this term so long as the operation of the wells does not induce water flowing on the surface of the North Fork Gualala River to percolate into the aquifer that supplies the wells, and so long as it does not directly divert from the surface flow of the river. Based on its position regarding Term 9, North Gualala argues there are no periods when it cannot divert water from Wells 4 and 5 under Permit 14853. Therefore, it argues it does not need to identify alternative methods for obtaining a water supply, does not need to construct a reservoir to store winter flows, and does not need to consistently measure streamflows in the North Fork Gualala River.

In other words, North Gualala argues that because of the change in point of diversion, the bypass flow requirement in Term 9 has no effect on its current diversions from Wells 4 and 5, and that it can now divert water at times when it could not have diverted water before the SWRCB approved its change of point of diversion pursuant to Orders WR-99-09-DWR and WR 99-011. North Gualala's position also means that the requirement of Order WR 99-011 that it prepare a Water Supply Contingency Plan was rendered a nullity because of the change in point of diversion approved as part of Orders WR-99-09-DWR and WR 99-011.

The North Fork Gualala River has been designated by the National Marine Fisheries Service as critical habitat for Central California Coast coho salmon, which are listed as threatened under the federal Endangered Species Act. (61 Fed.Reg. 56138 (1996).) Northern California steelhead, which also are present in the North Forth Gualala River, were listed as threatened under the federal Endangered Species Act in 2000. With these listings, there would have been an environmental impact if the SWRCB had in fact relieved North Gualala of the bypass requirement in Orders WR-99-09-DWR and WR 99-011. The SWRCB, however, adopted a negative declaration under CEQA because there was no adverse effect on the environment. Thus, North Gualala's interpretation is inconsistent with the SWRCB's filing of a negative declaration instead of an environmental impact report. Further, acceptance of North Gualala's interpretation of Term 9 would mean that the SWRCB's action in approving the change petition effectively eliminated a key permit term for protection of instream beneficial uses without considering whether instream beneficial uses would be adequately protected without the term. This result would be inconsistent with both CEQA and the SWRCB's public trust responsibilities.

The flaw in North Gualala's position is that it focuses attention on Term 9 outside of the context of the rest of Permit 14853. Term 9 must be read in context. As discussed above, the only current points of diversion of water under Permit 14853 are at Wells 4 and 5.³ (See Order paragraph 1, Order WR-99-09-DWR.) Therefore, Term 9 must apply to diversions from Wells 4 and 5. Likewise, the permit terms requiring a Surface Flow Measurement Plan and a Water Supply Contingency Plan, which were added at the same time when the points of diversion were changed to add Wells 4 and 5 and to delete the infiltration gallery, must apply to diversions from Wells 4 and 5. If the permit terms do not apply to diversions from Wells 4 and 5, the logical conclusion of North Gualala's argument is that Term 9, and all of the terms added concurrently with the change in point of diversion involving Wells 4 and 5,⁴ would not apply to any diversion of water under the permit, and therefore would be meaningless. North Gualala's interpretation is not a reasonable construction of the permit. Further, it disregards the SWRCB's discussion in Order WR 99-011 of the bypass flow requirement set forth in Term 9.

The analysis of issues in Order WR 99-011, which denied reconsideration of the Division Chief's decision to approve the change in points of diversion, centers on the conflict between meeting the instream flows for fish versus serving the municipal water demands. Clearly, the SWRCB recognized that Term 9 is applicable to the diversion of water from Wells 4 and 5. Because Term 9 is applicable, and water from Well 4 is North Gualala's primary source of water, the SWRCB found it necessary in Order WR 99-011 to require North Gualala to prepare a water supply contingency plan that will ensure that it has water for municipal demands at times when it cannot divert water from Wells 4 and 5. North Gualala did not challenge Order WR 99-011 within the time allowed for challenges to SWRCB water right orders. (Wat. Code § 1126(b).)

In its argument, North Gualala raises a question as to whether "total streamflow" in the last sentence of Term 9 refers to both the surface flow of the river and the subterranean flow, or only the surface flow. The purpose of this term is to protect fish and wildlife uses of the streamflow

³ If the water from Wells 4 and 5 is percolating ground water, no water right permit is needed to divert water from these wells. North Gualala, however, clearly intends to keep Permit 14853 in effect and has not requested cancellation of the permit.

⁴ The other terms added to Permit 14853 concurrent with the change in point of diversion include Order paragraphs 3 and 6 (surface flow measurement) in Order WR-99-09-DWR, and the term added by SWRCB Order WR 99-011 (water supply contingency).

by ensuring that the instream flow does not fall below the specified level. Fish cannot use a stream when it does not have surface flow. Therefore, the language clearly refers to maintaining the surface flow. It accomplishes this by restricting all diversions, including underground diversions, which may cause reductions in surface flows. The point of the last sentence in Term 9 is that if the surface flow falls below the specified level, the diversions of water under the permit must cease.⁵

In view of the lack of any need for a permit if the only water diverted is percolating ground water, it is clear that Permit 14853, since it authorizes diversion only of underground water, includes an implied finding that the water being diverted is flowing in a subterranean stream within a known and definite channel. (See Wat. Code, § 1200.) North Gualala asked the SWRCB for this set of points of diversion in Permit 14853, and in 1999 it received the changes it requested, subject to terms and conditions. North Gualala did not challenge the terms and conditions when it had an opportunity to do so. North Gualala's current attempt to rewrite the terms and conditions requiring streamflow measurement, plans, and curtailments of diversions to avoid the requirements is an obvious misinterpretation, and is too late.

North Gualala also argues that an evidentiary hearing was needed before the Chief, Division of Water Rights, could disapprove the two plans. This argument is dependent on North Gualala's position that the SWRCB must conduct a hearing to determine the legal classification of the water pumped from Wells 4 and 5 and to interpret the permit before disapproving the plans. As discussed above, the classification of the underground water is not properly before the SWRCB in the petition for reconsideration. Further, it is not necessary to determine the classification of the water before disapproving plans that are inconsistent with the permit. Finally, as demonstrated above, the SWRCB can determine the meaning of the terms and conditions of the permit by reading the permit and the orders pertaining to the permit, obviating any need for a hearing.

⁵ Term 9 uses the word "bypass" to describe the amount of water that must pass the point of diversion before water can be diverted under Permit 14853. This word is confusing in the context of the current points of diversion. Term 9 was added when North Gualala had only a surface diversion, and the SWRCB retained it unchanged when it approved the change in point of diversion from the surface diversion to the two wells. In the context of the current points of diversion, Term 9 must be interpreted as meaning that North Gualala cannot divert water from the two wells unless the specified amounts of water are present in the surface flow.

Based on the above discussion, the petition for reconsideration is denied. This order requires North Gualala to file its Surface Water Measurement Plan forthwith, amended as directed in the letter dated January 7, 2001 from the Chief of the Division of Water Rights to North Gualala. If North Gualala does not immediately submit adequate plans for streamflow measurement, the Division of Water Rights may take enforcement action.

With respect to the Water Supply Contingency Plan, North Gualala may wish to seek changes in the terms and conditions of Permit 14853, including Term 9, that affect the ability of North Gualala to divert water under Permit 14853. Potential changes, and requirements for supporting documentation, are discussed in Section 5.0 of this order, below. Changes in the terms and conditions could affect the content of the Water Supply Contingency Plan or the need for the plan. In order to give North Gualala an opportunity to file a petition for changes, this order grants a time extension of six months from the date of this order for North Gualala to file the Water Supply Contingency Plan. This order also grants additional six-month extensions, at the discretion of the Chief, Division of Water Rights, if North Gualala is diligently pursuing such a petition for changes.

5.0 AVAILABLE MEANS OF RESOLVING NORTH GUALALA'S WATER SUPPLY PROBLEM

It is apparent that North Gualala does not want the SWRCB to revoke Permit 14853, even though it argues that it should not be subject to the terms and conditions in the permit. To this end, North Gualala is seeking in its petition for reconsideration either to obtain a determination by the SWRCB that Wells 4 and 5 do not pump water that is subject to Water Code section 1200 et seq., or a determination that the terms and conditions in Permit 14853 do not mean what they say. As discussed above, the request for a determination of the classification of ground water is not properly before the SWRCB under the petition for reconsideration. Also as discussed above, the construction North Gualala advances for the terms and conditions is not reasonable.

Instead of advocating a strained interpretation of the terms and conditions that it has difficulty meeting, or defying the terms and conditions in its permit, North Gualala could petition for changes in the terms and conditions. Although Water Code section 1700, et seq., discusses only petitions for changes in point of diversion, place of use, and purpose of use, the regulations of the

SWRCB provide a procedure for processing petitions for other changes, as well. (Cal. Code Regs., tit.23, § 791(e).) The SWRCB has continuing authority over water right permits and licenses to make changes in the terms and conditions. (Wat. Code, §§ 100, 275.)

Any petition for changes in the bypass requirements in Term 9 should include specific flow proposals and should be supported by information that includes any agreements North Gualala has reached with fishery agencies such as Department of Fish and Game and National Marine Fisheries Service. In addition, such a petition must be supported by the results of a study that shows the effect on surface flows of pumping from Wells 4 and 5 under varying streamflow conditions ranging from relatively low to high flows, including periods when surface flows fall below the bypass flow requirement in Term 9. The Division of Water Rights could process a change petition with North Gualala's current petition for extension of time. Environmental documentation may be necessary before the SWRCB can approve either petition. The water right holder is financially responsible for the cost of preparing environmental documentation.

Finally, whether as a defense in an enforcement proceeding under section 1052 of the Water Code or as part of an independent proceeding initiated at North Gualala's request, North Gualala can ask the SWRCB to determine whether the water pumped from Wells 4 and 5 is flowing in an underground stream with a known and definite channel or is percolating ground water. Although such a request is not properly before the SWRCB in the context of the plans for surface water measurement and for water supply contingency, it can be raised separately.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration is denied, and the decision of the Chief, Division of Water Rights, disapproving the Surface Water Measurement Plan and the Water Supply Contingency Plan, is affirmed. Permit 14853 is amended as follows:

1. The term of Permit 14853 added by Order WR 99-011, is amended to read as follows:

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:

- a. Information on present and anticipated municipal water demand on a monthly basis and during periods of peak demand;
- b. Availability of water from the North Fork Gualala River to meet municipal demand while complying with applicable bypass flow requirements;
- c. Availability of water from other sources to meet municipal water demand;
- d. Evaluation of alternative water supply projects if needed to meet anticipated municipal water demand; and
- e. 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 within six months after the date of this order. If the Permittee files a petition for changes in the terms and conditions of Permit 14853 affecting the bypass flow requirements, and diligently pursues that petition, the due date may be extended by the Chief of the Division of Water Rights for six months per extension, if the Chief finds that Permittee is diligently pursuing the petition. Among other things, to establish diligence with respect to a petition for changes in the bypass flow requirements, Permittee must promptly provide supporting documentation that includes the results of a study that shows the effect on surface flows of pumping from Wells 4 and 5 under varying streamflow conditions ranging from relatively low to high flows, including periods when surface flows fall below the bypass flow requirement in Term 9. Permittee also must provide funding for any required environmental documentation in connection with the petition.

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 demands. 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.

2. The Chief of the Division of Water Rights is authorized to approve a variance in the bypass flow requirements in Term 9 for the purpose of conducting a study that shows the effect on surface flows of pumping from Wells 4 and 5 under varying streamflow conditions ranging from relatively low to high flows, including periods when surface flows fall below the bypass flow requirement in Term 9.

CERTIFICATION

The undersigned, Clerk 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 June 21, 2001.

AYE: Arthur G. Baggett, Jr.
 Peter S. Silva
 Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

/s/
Maureen Marché
Clerk to the Board