

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

DIVISION OF WATER RIGHTS

ORDER WR 2008 –00XX-DWR

CEASE AND DESIST ORDER

In the Matter of Violation of Terms and Conditions of Permit 14853 by the

NORTH GUALALA WATER COMPANY

Enforcement Action #0

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

COUNTY: Mendocino County

YOU ARE HEREBY GIVEN NOTICE THAT:

The State Water Resources Control Board (State Water Board) is authorized under California Water Code section 1831 to issue a Cease and Desist Order (CDO) when it determines that any person is violating or threatening to violate any of the following:

- (1) The prohibition set forth in section 1052 against the diversion or use of water subject to division 2 (commencing with section 1000) of the Water Code other than as authorized by division 2.
- (2) Any term or condition of a permit, license, certification, or registration issued under division 2 of the Water Code.
- (3) Any decision or order of the board issued under part 2 (commencing with section 1200) of division 2 of the Water Code, section 275, or article 7 (commencing with section 13550) of chapter 7 of division 7 of the Water Code, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

On {ADD DATE}, and in accordance with the provisions of section 1834 of the California Water Code, the State Water Board, Division of Water Rights (Division) provided notice of the proposed CDO against the North Gualala Water Company (NGWC) for the violation and threatened violation of terms and conditions contained in Permit 14853 (Application 21883).

FACTS AND INFORMATION

The facts and information upon which this CDO is based are as follows:

1. On August 26, 1964, NGWC filed Application 21883 with the Division of Water Rights (Division). NGWC sought to directly divert water at a rate of 2 cubic foot per second (cfs) year-round from the North Fork Gualala River. The water would be used for municipal purpose.

2. The California Department of Fish and Game (DFG) filed a protest against A21883 on the basis of injury to the instream resources of steelhead and silver salmon. The protest was resolved when both parties agreed to the inclusion of a permit term (Term 9) requiring NGWC to bypass the following minimum stream flows:

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

On September 3, 1965 Permit 14853 (P14853) was issued to NGWC with the above minimum bypass requirements.

3. In 1974, NGWC petitioned the State Water Board for a change in the place of use authorized under P14853. DFG protested the change petition, and as a dismissal condition, requested that the minimum bypass flows of Term 9 be increased. The State Water Board did not receive an objection by NGWC to DFG's proposal. On December 13, 1978, the State Water Board issued an order approving NGWC's petition. The order also added a requirement for a stream flow measuring device (Term 10) and modified Term 9 by increasing the minimum bypass flow requirements to the following:

40 cfs, or the natural flow if it is less, during the period of November 15 to February 29
20 cfs, or the natural flow if it is less, during the period of March 1 to May 31
4 cfs, or the natural flow if it is less, during the period of June 1 to November 14

4. In 1988, Division staff conducted a complaint investigation into allegations by two separate parties that NGWC violated its permit by diverting when minimum bypass flows could not be met. A report of the investigation, dated January 17, 1989, contained staff's finding that there was insufficient evidence to conclude that a violation of the permit occurred, however staff found NGWC's stream flow measuring device to be deficient. A follow-up inspection by Division staff on May 8, 1989 found that the deficiency had been corrected.
5. Due to concerns regarding drinking water quality from the permitted diversion point, NGWC drilled wells in the alluvial aquifer of the Gualala River. Well 4 proved to be sufficiently productive to prompt NGWC to suspend its diversion of surface water from North Fork Gualala River. In submitting its progress reports for the years 1990 through 1992, NGWC stated that no water had been used under P14853. NGWC believed that its diversion from Well 4 was from percolating groundwater and outside the State Water Board's permitting authority. On December 21, 1992 Division staff notified NGWC that, consistent with the findings of a November 5, 1992 Hydrogeologic Assessment Report, prepared by Richard C. Slade, R.G., the Division considered the source of Well 4 to be a subterranean stream, and therefore subject to the permitting authority of the State Water Board. Reserving the right to provide evidence contradicting the Division's position, NGWC filed a petition with the State Water Board in February 1993 to add Well 4 and future Well 5 as points of diversion under P14853¹. The petition was noticed to the public and numerous parties submitted protests based on environmental and public trust considerations.
6. In 1993, Division staff conducted a compliance inspection regarding the diversion facilities under P14853. In a report dated November 18, 1993, staff found that the permitted point of diversion had been abandoned in favor of an alternative unauthorized well. NGWC had already filed a change petition for this new point of diversion. NGWC also did not have a stream flow measuring device as required by Term 10 of the permit. Staff agreed that the physical conditions of the river make a permanent and readable piece of equipment nearly impossible to maintain, although other methods of determining stream flow measurements are available. Staff also concluded there was a relatively small potential for adverse impacts to fisheries due to diversions at that time.

¹ The change petition also included a request to add 13 parcels to the place of use. Because it has no bearing on this enforcement action, all references to action involving the change in place of use have been omitted for brevity.

7. In response to another complaint filed against NGWC for unauthorized diversions (also at Well 4) under P14853, Division staff conducted a complaint investigation in 1994. In a report dated September 28, 1994, staff concluded that NGWC was diligently pursuing its change petition, and that the concerns of the complainant would be addressed through the petition process. On November 2, 1994, NGWC requested amending the change petition to delete all points of diversion except existing Well 4 and future Well 5. Although NGWC and the protestants formed a conflict resolution group which, for several years, attempted to resolve the protests against the change petition, a resolution was never reached.
8. By Memo dated January 15, 1998, Luhdorff and Scalmanini, Consulting Engineer for NGWC, released a final report entitled *Investigation of Ground-Water Occurrence and Pumping Impacts at Elk Prairie*. The report summarized the investigation to determine the classification of groundwater pumped from Well 4. The report concluded that the groundwater pumped from Well 4 was percolating groundwater and not subject to the permitting authority of the State Water Board. By letter dated May 4, 1998, the Chief of the Division of Water Rights² (Division Chief) notified NGWC that the Division disagreed with Luhdorff and Scalmanini's findings.
9. Division staff conducted a field investigation on October 7, 1998 to gather information necessary to resolve the protests to NGWC's change petition. Staff concluded that the petition should be approved and that additional conditions be added to the permit. On August 27, 1999, the Division Chief signed State Water Board Order WR 99-09-DWR, which included the following amendments to P14853:
 - Delete the original point of diversion and add Wells 4 and 5 as points of diversion, and
 - Replace Term 10 with terms requiring NGWC to measure the flow of the North Fork Gualala River per a schedule provided for in the order and a method to be approved by the Division Chief.
10. NGWC did not challenge Order WR 99-09-DWR, but two other parties filed petitions for reconsideration by the State Water Board. In response to these petitions, the State Water Board adopted State Water Board Order WR 99-011, which dismissed the petitions for reconsiderations and added a requirement for a water supply contingency plan to address how NGCW will meet municipal water demands when the flows in the North Fork Gualala River fall below the minimum bypass requirements of Term 9.
11. NGWC submitted to the Division Chief a Surface Flow Measurement Plan (Measurement Plan) on October 26, 1999, and a Water Supply Contingency Plan (Contingency Plan) on May 18, 2000. The Division Chief found both plans to be inadequate. Several attempts were made by both parties to reach an agreement on the plans. Finally, by letter dated April 2, 2001, the Division Chief advised NGWC that it could file a petition for reconsideration with the State Water Board if it disagreed with the Division's action disapproving the plans. NGWC filed a petition on May 1, 2001, requesting the State Water Board to hold a hearing not only on the adequacy of the plans, but also on the legal classification of the water pumped by Wells 4 and 5 and the correct interpretation of Term 9 (whether bypass flows must be met so long as operation of the wells do not affect surface flow). The State Water Board held a hearing on the petition, and on June 21, 2001 adopted State Water Board Order WR 2001-14 denying reconsideration, affirming the decision of the Division, and amending the requirements of the Contingency Plan including authorization for the Division Chief to approve a variance in the bypass flow requirements for the purpose of studying the effects of pumping from Wells 4 and 5 on surface flows.
12. On July 19, 2001, NGWC filed a lawsuit against the State Water Board in the Mendocino County Superior Court to seek a judicial determination on the legal classification of the groundwater pumped by Wells 4 and 5. In consultation with the presiding judge, NGWC and the State Water Board agreed that if NGWC made a proper request for hearing on the issue the State Water Board would follow through and issue a decision or order by the end of 2002. On January 11, 2002,

² Currently Deputy Director for Water Rights.

NGWC made such a request of the Board. The State Water Board held a hearing on the request, and on February 19, 2003 adopted State Water Board Order WR 2003-0004, which determined that the groundwater pumped by NGWC's Wells 4 and 5 (along with the proposed Wells 6 and 7) is extracted from a subterranean stream and is therefore under the permitting authority of the State Water Board. NGWC's petition for reconsideration of the order was denied by the State Water Board on May 6, 2003.

13. NGWC pursued its lawsuit against the State Water Board. In 2004, the Mendocino County Superior Court upheld the State Water Board's determination, ruling that NGWC's wells fell under the permitting authority of the State Water Board. NGWC appealed the case, and in 2006 the Appellate Court upheld the ruling of the Superior Court. In August 2006, the California Supreme Court denied review of the litigation.
14. As of this date, NGWC does not have an approved Contingency Plan or Measurement Plan. In a December 14, 2006 letter to Division staff, NGWC stated that they have received an estimate from an engineering firm of \$700,000 to prepare a report that will contain all the information required by Orders WR 99-011 and WR 2001-14. Because NGWC did not have the funds to cover this expense, it sought authorization with the California Public Utilities Commission (PUC) for a rate increase to cover the costs of the report. NGWC estimates that, if the rate increase is approved, the report will be completed by the end of 2008. On March 13, 2008, the PUC approved Resolution W-4678, giving NGWC the authority to borrow \$100,000 from the Departments of Public Health (DPH) and Water Resources (DWR) for the purpose of financing a planning study on NGWC's water system. This loan amount appears to be inadequate to fund the cost of the report so additional loans from DPH, DWR, or other sources will be necessary.

DPH issued Compliance Order No. 02-03-08CO-002 on September 9, 2008. This order contains a finding that NGWC does not have sufficient water rights to provide a reliable and adequate supply of pure, wholesome, healthful and potable water in accordance with California Health and Safety Code section 116555, subdivision (a) (3), and cannot provide source capacity to meet maximum daily demand requirements in accordance with California Code of Regulations, title 22, section 64554. This order is based on the following:

- The maximum daily demand in 2003 and 2004 was 299 gallons per minute (gpm) and the maximum daily demand with the current 1,033 service connections is 313 gpm.
- The maximum available supply from all surface sources is 100 gpm.
- The maximum reliable supply from Wells 4 and 5 is zero (0) gpm as diversions from these wells must be terminated when the bypass flows cannot be met.

The order further requires NGWC to submit a Source Capacity Planning Study by October 1, 2009 that includes information concerning NGWC's ability to reliably and adequately serve the existing service connections in compliance with all applicable laws and regulations and a discussion of NGWC's water rights. The order also requires NGWC to submit a plan of action by March 1, 2010, to address or resolve source capacity deficiencies including, but not limited to, increased water conservation, acquisition of additional source capacity and water rights, and/or restrictions on new service connections.

15. Regardless of whether NGWC is in compliance with the term requiring approved Contingency and Measurement Plans, P14853 is explicit in its requirement to cease diversion when minimum bypass flows are not available. To ensure that adequate flows are available, P14853 requires NGWC to take flow measurements of the North Fork Gualala River by a prescribed schedule and to report the measured results to the Division. Between June 1 and December 15, the schedule requires a minimum of weekly measurements, and daily measurements if the flow falls below the bypass minimum.

16. Based on reports of measurements taken from 2004 through 2007, there were at least 11 days in which the flows measured by NGWC were below the required minimum bypass flows. In addition, there was one day in which Division staff measured a flow that was below the required minimum bypass. NGWC has admitted that diversions from Well 4 have continued daily throughout the years 2004 through 2007.
17. Based on rainfall data recorded at the nearby Yorkville station, Division staff determined that an additional 46 days of diversion almost certainly occurred during 2004 through 2007 when, flows in the North Fork Gualala River were less than the required minimum³.
18. The potential for additional violations is very high as the NGWC has almost no additional sources of acceptable quality water on which to rely when the bypasses cannot be met.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, NGWC shall cease and desist from violating the terms and conditions of permit 14853 and comply with the following corrective actions pursuant to the schedules specified:

1. NGWC shall submit a revised version of the water supply contingency plan that was submitted to the Division by cover letter of May 18, 2000 within 120 days from the effective date of this order. The revised plan shall correct the deficiencies to the original plan as specified in the August 23, 2000 letter from the Division, and shall address how municipal water demands will be met when flows in the North Fork Gualala River fall below the bypass flow requirements specified in P14853. The plan shall include the following elements:
 - Information on present and anticipated municipal water demand on a monthly basis, and anticipated peak daily demand and peak demand averaged over 30 day period;
 - Identification of the minimum amount of water needed to maintain the health and safety of those served by the NGWC;
 - Availability of water from the North Fork Gualala River to meet municipal demand while complying with applicable bypass flow requirements;
 - Availability of water from other sources to meet municipal water demand when flows in the North Fork Gualala River fall below the minimum bypass flow;
 - Evaluation of alternative water supply projects if needed to meet current and/or anticipated municipal water demand; and
 - A conservation plan to be implemented if curtailment of diversions is needed in order to comply with bypass flow requirements and other water right permit conditions. The plan should include a description and analysis of current and proposed measures to limit or reduce water demand. The analysis shall include contingency plans to limit new service connections if other measures are insufficient to reduce anticipated demand to the level of reliable water supplies available to NGWC.
2. Until such time as a contingency plan is submitted by NGWC and approved by the Deputy Director for Water Rights⁴ (Deputy Director), NGWC shall not make any new service connections to its existing water supply system, unless such connections were the subject of an intent to serve letter dated prior to *{the date that this draft Cease & Desist Order is received by the NGWC}*. NGWC shall provide the Deputy Director with a 30-day written notification prior to making any service connection pursuant to an intent to serve letter dated prior to *{the date that this draft Cease & Desist Order is received by the NGWC}*.

³ Days in which insignificant rainfall followed days of measured violations.

⁴ Formerly Chief of the Division of Water Rights.

3. NGWC shall submit a revised version of the surface streamflow measurement plan that was submitted to the Division by cover letter of October 31, 2000 within 15 days from the effective date of this order. The plan will correct the deficiencies to the original plan as specified in the April 2, 2001 letter from the Division, and will describe the proposed method to measure the surface flow of the North Fork Gualala River. The plan shall include the following elements:
- The dates and frequency of measurements, including but not limited to the minimum dates specified in Term 3 of Order WR 99-09-DWR;
 - The location below the influence of NGWC's diversion point where measurements shall be taken;
 - The method by which measurements shall be taken;
 - The method by which the DFG and other interested parties shall be notified of proposed measurements;
 - The method by which staff or consultants will be trained in the particular measurement method proposed; and
 - The method by which measurement records will be made and the results reported to the Division.

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

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel
Assistant Deputy Director for Water Rights

Dated: