

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER WR-99-09-DWR

In the Matter of Minor Protested Petition
to Change Permits 5431, 5432, 11535, and 14853
NORTH GUALALA WATER COMPANY
(Applications 9372, 9454, 18098, and 21883, respectively).

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

COUNTY: Mendocino

PROTESTANTS: California Department of Fish and Game, California Trout,
Jerome P. Lucey, et al.

ORDER APPROVING PETITION TO ADD POINTS OF DIVERSION
TO PERMIT 14853 AND PETITION TO ADD TO THE PLACE OF USE
FOR PERMITS 5431, 5432, 11535, AND 14853

BY THE DIVISION OF WATER RIGHTS

1.0 INTRODUCTION

The State Water Resources Control Board (SWRCB) issued permits to North Gualala Water Company (Company) authorizing diversion of water from various streams tributary to the Pacific Ocean in Mendocino County.

On November 4, 1994, the Division of Water Rights (Division) received a second petition from the Company to add two vertical wells to Permit 14853, and on December 26, 1995, the Division received a petition to add 13 parcels to the place of use for Permits 5431, 5432, 11535, and 14853. The petitions were protested, and the Division conducted a minor petition field investigation to gather information pursuant to Water Code section 1704.1. After consideration of all available information, the Division finds (1) the petition to add points of diversion to Permit 14853 should be approved subject to conditions; and (2) the petition to add 13 parcels (as shown on the map accompanying the petition) to the place of use for Permits 5431, 5432, 11535, and 14853 should also be approved subject to conditions.

2.0 BACKGROUND – PETITION TO ADD POINTS OF DIVERSION TO PERMIT 14853

Permit 14853 was issued September 3, 1965 for 2.0 cfs for municipal use to be diverted year-round from an offset well located at the confluence of the Little North Fork and the North Fork of the Gualala River approximately two miles east of the Town of Gualala in Mendocino County (See Figure 1). In response to a petition submitted by the permittee, the SWRCB issued an order in 1978 which changed the place of use, added three new terms to the permit, including a measuring device requirement to measure bypass flows, and amended the existing Term 9 to read:

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.

The above term was developed by the Department of Fish and Game (DFG) as a means to resolve their protest and was accepted by the Company.

Permit 14853 is one of four permits that are held by the Company to cover water diversions to the community of Gualala. The combined rate of diversion for Permits 5431, 5432, 11535, and 14853 is 4.16 cfs with a maximum annual limitation of 1,730 acre-feet per annum.

Due to concerns regarding the drinking water quality from the offset wells near the confluence of the Little North Fork Gualala River, the Company decided to abandon the original point of diversion under Permit 14853 and in 1989 drilled Well No. 4, a 142-foot-deep vertical well. The Company contends that this well pumps percolating groundwater, but Division staffs evaluation of available evidence leads to the conclusion that the water pumped from Well No. 4 flows in a subterranean stream and, therefore, is under the SWRCB's permitting authority. Although the Company did not concede that the water is pumped from a subterranean stream, the Company filed a petition with the Division in November 1994 to add **points of diversion** to cover Wells Nos. 4 and 5 and delete the original point of diversion.

Well No. 4, the primary source of water for the place of use, has a maximum output of approximately 250-260 gpm (0.55 – 0.58 cfs). The water from the well meets the State of California's safe drinking water standards with minimal treatment. Typical demand for Well No. 4 is 180,000 to 200,000 gpd. Well No. 5 will be used as a back-up supply in the event of a problem with Well No. 4. The Company also has observation and water quality sampling wells (Nos. 1, 2, and 3), but these wells will not be used for municipal water production. The Company has not specified whether the maximum output of Well No. 4 can be expanded to 2.0 cfs (the amount stated on Permit 14853). The Company

has indicated that at full build-out the demand will be at or near 1 .0 cfs as described in the Gualala Town Plan.

A controversy has existed for many years surrounding the measuring device for the bypass flow. Division engineering staff has inspected the diversion site several times over the years, and each time the permittee has been in compliance with the permit. However, there is a possibility in most years that flows in the river will be less than the bypass requirements prior to the onset of winter rains as well as during the winter and spring months of most drought years. Since Well No. 4 is the Company's primary water supply, it is highly unlikely that the Company would be able to shut down this point of diversion when flows in the river are less than the required minimums, without generating potential health and safety problems, unless the Company takes other actions to prevent these problems.

2.1 Protests Submitted Against Petition to Change Permit 14853

Protests were received from the following parties:

Salmon Unlimited	Jerome P. Lucey
H. L. Joseph	California Trout
The Sea Ranch Association	Trout Unlimited of California/ Anglers of California
Donald McDonald	California Department of Fish and Game
S. W. Kelly	

The above protests were based on environmental concerns, primarily adverse impacts to spawning and rearing habitat for anadromous fish and compliance with the bypass amounts required by the permit.

2.2 Comments on the Draft Order and Initial Study / Draft Negative Declaration

A draft copy of this Order and the Initial Study/Draft Negative Declaration were circulated for 35 days beginning on May 12, 1999 for review and comment. Twenty-three copies were mailed directly to federal and state governmental agencies and interested parties that had expressed interest in reviewing these documents. Eleven copies were circulated by the California Governor's Office of Planning and Research to various state agencies. With the exception of the response from the Coast Action Group all of the comments were submitted within the specified review period.

Comments were received from:

Alan B. Lilly, North Gualala Water Company
Don McDonald-Fisheries Advocate
Brian Hunter, Regional Manager, California Department of Fish and Game, Central Coast Region
Jim Edmondson, Conservation Director, California Trout
Alan Levine, Coast Action Group.

Following is a summary of the comments received:

- The North Gualala Water Company requests clarification of the wording in Terms 3 and 6 of the Order. Because Terms 3 and 6 of the Order supercede Term 10 of Permit 14853, the Company requests Term 10 be deleted. In addition, the Company reserves its rights to assert in subsequent proceedings that the water that is pumped from the Company's Well No. 4 and Well No. 5 is percolating groundwater that is not subject to the SWRCB's water right permitting authority.
- Don McDonald requests that the State Water Resources Control Board order North Gualala Water Company and the Gualala Redwoods Co. to undertake a "Baseline Fishery Study" at no cost to North Gualala Water Company ratepayers. Mr. McDonald also submitted a memorandum dated January 15, 1998 regarding the need for continuous stream flow measurements in the North Fork of the Gualala River.
- The Department of Fish and Game requests that the flow measurement schedule proposed in the Order be modified to require daily flow measurements whenever the recorded stream flow is 4.5 cfs or less. The Department also requests that the Gualala Water Company be restricted to the current level of diversion until an alternative water source has been developed.
- California Trout requests that the SWRCB be required to prepare an Environmental Impact Report because the Steelhead Trout and Coho Salmon are listed under the federal Endangered Species Act.
- The Coast Action Group requests that the SWRCB prepare a "full EIR, or provide additional mitigations that will provide adequate protections for this resource" because there is no assurance that the terms and conditions described in the Draft Order will be enforced.

Based upon consideration of the comments received on the Draft Order and Initial Study/ Draft Negative Declaration and the Company's responses to the comments, the Division modified the Order where appropriate.

3.0 BACKGROUND-PETITION TO ADD TO THE PLACE OF USE FOR PERMITS 5431, 5432, 11535, AND 14853

Permits 543 1 and 5432 were both issued November 3, 1939 for diversion from Robinson Gulch and Big Gulch of 1.0 cubic foot per second (cfs) each, year-round. Permit 11535 was issued September 4, 1958 for diversion from Fish Rock Creek for 0.16 cfs year-round, and Permit 14853 was issued September 3, 1965 for diversion from North Fork Gualala River for 2.0 cfs year-round. These permits have received numerous extensions of time over the years to allow the Company to fully develop its use of water. On September 21, 1993, Division staff conducted a compliance field investigation. During the investigation, staff discovered that the Company's current service area was larger than the place of use

shown for the Company's water right permits. In response, the Company filed a petition to add 13 parcels to its authorized place of use (See Figure 4). Protests were received from Coast Action Group and Don McDonald. Both protests were based on environmental considerations and assert that additional hookups will further exacerbate low flow conditions on the North Fork Gualala River. However, the Company has not indicated that the expansion of its place of use will require any additional water above what it is already authorized under its existing water right permit.

4.0 MINOR PETITION FIELD INVESTIGATION

Division staff conducted a field investigation on October 7, 1998 to gather information on the Company's petitions. Approximately 30 interested persons attended the investigation, including the petitioner John Bower, president of the Company. The following protestants were represented:

California Department of Fish and Game
Coast Action Group
Jerome P. Lucey
Don McDonald
California Trout

5.0 ISSUES

The SWRCB's primary considerations when deciding whether a petition to change a permit should be granted are: (1) whether the proposed change will in effect initiate a new right, or (2) whether the proposed change will cause injury to any other legal user of water or to the environment. The protests received are primarily concerned with the effect of the change on the environment. Consideration of a petition to change is limited to the effect of the change and not other issues related to the effects of the underlying water right.

5.1 Proposed Change in Point of Diversion

The issue regarding the change in point of diversion is whether moving the point of diversion upstream from the previously permitted location to offset Wells Nos. 4 and 5 will have adverse impacts on the environment.

5.1.1 Riparian Habitat

The protestants raised the issue that the relocation of the point of diversion to Wells Nos. 4 and 5 will cause adverse impacts to the adjacent riparian vegetation on the North Fork Gualala River. Well No. 4 was installed in 1992 and has been in operation since that time. Division staff has visited the site on several occasions over the past six years. At the October 7, 1998 field investigation, staff viewed the original point of diversion, Wells Nos. 4 and 5, and the riparian corridor from the confluence of the Little North Fork Gualala

River to a point directly above Well No. 4. During each of these visits, staff noted that the riparian vegetation appeared to be well developed and healthy. Based upon staffs observations and review of the available information, there is no evidence to suggest that the installation and operation of Wells Nos. 4 and 5 has caused any significant adverse impacts to the riparian vegetation in the vicinity of the wells.

5.1.2 Fishery Resources

Although the effect of the Company's diversion on anadromous fish is the primary concern of protestants, no information was presented to indicate that moving the point of diversion upstream from the previously permitted location to Wells Nos. 4 and 5 would have adverse impacts to the fishery. However, many protestants were concerned that the Company may not be meeting the bypass flows required by the permit. This concern is amplified by the Company's reliance on Well No. 4 as the major source of its water supply and its inability to meet demand should it be required to reduce diversion from Well No. 4 to meet bypass flow requirements.

The Division's most recent compliance investigation was made September 21, 1993. The inspecting engineer reported that the conditions for measuring flows in the area of the diversion are generally poor. The stream has a considerable amount of sand and gravel in the channel. Low flows move from one backwater pool to the next. Free flow usually exists only in short reaches between pools. These reaches are often braided and very shallow, making streamflow measurement extremely **difficult**. No bedrock formations are apparent in the channel. The Division concluded that it is impossible to establish an adequate stage/flow relationship without constructing an artificial control structure and measuring device. Permit 14853 is for a relatively small amount of water from a **large** saturated channel of sand and gravel through which the underflow of the river passes. The impacts of these diversions on the surface flow are most likely spread over a prolonged period of time. At present, the maximum pumping capacity of Well No. 4 is 0.55 cfs to 0.58 cfs. The total amount authorized for diversion under Permit 14853 from the North Fork Gualala River is 2.0 cfs. Observations and measurements taken to date are therefore based upon the effects of the diversion of approximately 29 percent of the total permitted amount. Consequently, these observations and measurements do not reflect the potential effects of the diversion of the maximum amount authorized.

During the October 7, 1998 field investigation, several protestants stated that the Company should be required to install and maintain a device capable of continuously measuring the surface flow of the North Fork Gualala River. There was a mixed response regarding the problems associated with the installation and maintenance of a continuous, flow-measuring device. The DFG representative acknowledged the problems associated with the installation and maintenance of such a device, but reiterated that some type of **instream** flow-measuring device should be required to determine compliance with the surface flow bypass requirements. DFG also indicated that the permittee should provide advance notice and access to interested parties to observe the measurements as they are taken. The Company was generally in agreement with this approach.

Division staff suggested that due to the difficulties associated with installing and maintaining a continuous, **instream** flow-measuring device, the Company should periodically take manual flow measurements and report the results to DFG and the Division, and make the results available to the public upon request. In response, the representative from DFG stated that low-flow periods, which may in some years extend into December, are of particular concern. Surface flow should be measured regularly during low flows, but measurement is not necessary during the high winter flows. The Company's representative responded that he was not opposed to this approach. He also agreed that the Company could provide advance notice of the measuring schedule and invited DFG personnel to observe and participate.

Division Staff further suggested that the Company prepare a plan to measure the surface flow of North Fork Gualala River. This plan should include, but not be limited to a description of measurement locations and the type of equipment to be used. The objective of the plan is to demonstrate compliance with Permit Term 9 (see section 2.0 above) and the amount of water diverted for use. The plan should be submitted to the Chief of the Division of Water Rights for approval.

5.2 Will addition of the 13 designated parcels cause injury to any legal user of water or to the environment?

The petition to change the place of use proposed the addition of 13 parcels located on either side of Highway 1, between Triplett Gulch and Roseman Creek, approximately 6 to 6.5 miles north of the Town of Gualala as shown on a map on file with the SWRCB. Eleven of the thirteen parcels are already developed. The expansion of the service area was accomplished with approval from the County under a Coast Development Use Permit 34-92 dated April 15, 1993. Protestants expressed concern that such an addition would lead to increased diversions from the North Fork Gualala River. However, the Company has stipulated in the petition that the increase in the place of use will not require any additional water above the amount the Company was allotted in Permit 14853.

6.0 COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT

The SWRCB is Lead Agency with respect to the pending petitions to change the water right permits held by the Company pursuant to the California Environmental Quality Act (CEQA) and is therefore responsible for the preparation and circulation of the appropriate CEQA documentation. CEQA requires the SWRCB to determine whether approval of these petitions will have a significant effect upon the environment. The Division has conducted a preliminary review for these petitions pursuant to CEQA.

The County of Mendocino prepared and circulated an Initial Study and a Draft Negative Declaration for the installation of a 6,000-linear-foot extension of a 6-inch water main. The purpose of this extension was to provide water service to 60 additional parcels including the 13 parcels described in the petition to expand the place of use. The State Office of Planning and Research circulated the Initial Study and Draft Negative

Declaration for review by governmental agencies in March of 1987. Mendocino County concurrently circulated these documents for public review. The Mendocino County Board of Supervisors adopted the Negative Declaration on July 23, 1987.

The protestants have asserted that the SWRCB must prepare and circulate a cumulative Environmental Impact Report (EIR) for these petitions. Cumulative effects of a proposed project are defined by CEQA [California Code of Regulations, Title 14, § 15065 (c)] as “the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” Moving the point of diversion and adding 13 single-family residences to the authorized place of use does not constitute a cumulative impact to the physical environment. The protestants have not presented any evidence nor have they cited any persuasive authority in support of their assertion.

The existence of public controversy over the environmental effects of a project does not require preparation of an EIR if there is no substantial evidence before the Lead Agency that the project may have a significant effect upon the environment [Calif. Code of Regulations, Title 14, § 15064 (g)(5)]. There is no substantial evidence in the record nor have the protestants presented any substantial evidence that approval of the change petitions will have any significant effect upon the environment. As a result of the preliminary review, the Division prepared and circulated an Initial Study and a proposed Negative Declaration on May 12, 1999. The Division recommends that the SWRCB adopt the Negative Declaration after modification to reflect the terms contained in this Order.

7.0 CONCLUSION

After consideration of all available information, the Division finds:

- (1) The petition to delete the **onstream** diversion point and add points of diversion for Wells Nos. 4 and 5 to Permit 14853 should be approved subject to conditions; and
- (2) The petition to add 13 parcels (as shown on the map accompanying the petition) to the place of use for Permits 543 1, 5432, 11535, and 14853 should be approved subject to conditions.
- (3) Term 9 of Permit 14853 requiring bypass flows for the protection of fish and wildlife should remain as amended by the December 13, 1978 Water Right Order.
- (4) The development by the Company of a surface flow measuring plan is necessary to comply with the measuring device requirement of Term 10 of Permit 14853.

ORDER AMENDING PERMIT

IT IS HEREBY ORDERED that:

- (1) The following point of diversion identified in Water Right Permit 14853 be deleted:

S 1,100 feet and E 1,750 feet from the NW corner of Section 23, being within the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 23, T11N, R15W, MDB&M

And the following points added:

Point 1 (Well No. 4): California Coordinate Zone 2, N 413,200; E 1,571,000, within the NW $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 23, T11N, R15W, MDB&M

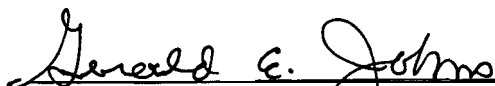
Point 2 (Well No. 5): California Coordinate Zone 2, N 413,250; E 1,571,350, within the NW $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 23, T11N, R15W, MDB&M

- (2) The place of use for Water Right Permits 5431, 5432, 11535, and 14835 be amended to read as follows:

Within the service area of the North Gualala Water Company, being within Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 20, 21, 22, 23, 26, 27, 28, and 34, T11N, R15W, MDB&M and Sections 12 and 13, T11N, R16W, MDB&M, as shown on the map dated December 26, 1995 on file with the State Water Resources Control Board

- (3) Permittee shall measure the flow of the North Fork Gualala River pursuant to the measurement plan described in Term 6 of this Order on June 1, July 1, and August 1, and weekly thereafter until December 15 of each year. If during the period of June 1 through November 14, any recorded flow is less than 4.5 cfs, and during the period of November 15 through December 15 any recorded flow is less than 40 cfs, measurements shall be taken on a daily basis to determine whether diversion is permitted. If during the period November 1 through December 15, Permittee finds that flows are consistently above 40 cfs, Permittee may choose to visually estimate flows. The specifics of this requirement shall be addressed in the surface flow measurement plan required by Term 6 of this Order. Permittee shall notify the Department of Fish and Game and other interested parties of the times stream measurements will be taken to allow a representative to be present. Permittee shall provide a copy of the flow measurement data to the Division of Water Rights and the Department of Fish and Game, and make a copy available for public review by January 1 of each year. Such annual measurements shall commence October 1, 1999.

- (4) Permittee shall allow representatives of the State Water Resources Control Board and the California Department of Fish and Game reasonable access to the project works to determine compliance with the terms of this permit.
- (5) Should any buried archeological materials be uncovered during project activities, such activities shall cease within 100 feet of the find. The Chief of the Division of Water Rights shall be notified of the discovery, and a professional archeologist shall be retained by the applicant to evaluate the find and recommend appropriate mitigation. Construction activities in the area of the find shall resume only after the completion of the recommended mitigation, as approved by the Chief of the Division of Water Rights.
- (6) Permittee shall, in consultation with staff of the Division of Water Rights, prepare a surface flow measurement plan which shall describe the proposed method to measure the surface flow of the North Fork Gualala River below the influence of the Company's diversion to ensure compliance with the bypass amounts required in Term 9 of the permit. This plan shall be submitted in writing to the Chief of the Division of Water Rights for approval within 60 days of the date of this Order.
- (7) Term 10 of Permit 14853 is superceded by Terms 3 and 6 of this Order and is therefore deleted from Permit 14853.
- (8) The permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A section 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain an incidental take permit prior to construction or operation. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.


For Harry M. Schueller, Chief
Division of Water Rights

Dated: 8/27/99