

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

ORDER WR 2022-0151

In the Matter of Water Right Applications A032563A and A032563B

Robert C. Mann Trust

SOURCE: Unnamed Stream tributary to Pepperwood Creek thence House Creek
thence the Wheatfield Fork Gualala River

COUNTY: Sonoma

**ORDER PARTIALLY GRANTING REQUEST FOR A CASE-BY-CASE
EXCEPTION, ACCEPTING AN APPLICATION, AND REJECTING AN
APPLICATION**

BY THE BOARD:

1.0 INTRODUCTION

This matter comes before the State Water Resources Control Board (State Water Board or Board) pursuant to water right applications for consumptive and non-consumptive uses and a request for a case-by-case exception to the Policy for Maintaining Instream Flows in Northern California Coastal Streams (North Coast Instream Flow Policy or Policy) filed by the Robert C. Mann Trust (Applicant). The applications and request seek approval to divert water to storage in a reservoir formed by an onstream dam. The Applicant filed these applications and the case-by-case exception request as part of the corrective actions required by State Water Board Order WR 2015-0025 to address the unauthorized diversion of water to storage.

In this order, the State Water Board denies the request for a case-by-case exception with regard to the application to appropriate water for consumptive uses and therefore rejects application A032563A. The State Water Board grants the exception request with regard to the application to appropriate water for historical non-consumptive beneficial uses and accepts application A032563B, and also amends this application to include the incidental beneficial use of stockwatering.

2.0 PROCEDURAL BACKGROUND

In 2011, after inspecting an onstream dam and reservoir located on property owned by the Applicant, the State Water Board concluded that surface water was being diverted to storage without a basis of right and notified Robert C. Mann of this conclusion and potential civil liability. On June 14, 2012, the State Water Board issued an Administrative Civil Liability Complaint and draft Cease and Desist Order to both Robert C. Mann (individual and trustee) and the Applicant (collectively, Mann), alleging Mann was diverting surface water to storage in the reservoir for later use without a basis of right, thereby committing violations of the Water Code's prohibition of the unauthorized diversion or use of water. At Mann's request, the Board held a public hearing in 2014.

On July 21, 2015, the Board adopted State Water Board Order WR 2015-0025, which imposed administrative civil liability and required Mann to cease and desist unauthorized diversions and take certain corrective actions. Among other things, Order WR 2015-0025 required Mann to develop, submit, and implement a compliance plan either (1) resulting in the issuance of a water right permit authorizing storage in the reservoir, (2) causing the dam impounding water to be removed, or (3) rendering the dam incapable of impounding water and capable of bypassing all natural flows. Mann has pursued the first option.

The Policy became effective on February 4, 2014 and establishes principles and guidelines for maintaining instream flows for the protection of fishery resources, while minimizing water supply impacts on other beneficial uses, including irrigation,

municipal use, and domestic use. The geographic scope of the Policy encompasses coastal streams from the Mattole River to San Francisco as well as coastal streams entering northern San Pablo Bay and extends to five counties: Marin, Sonoma, and portions of Napa, Mendocino, and Humboldt counties.

3.0 WATER RIGHT APPLICATIONS

On January 11, 2016, the Applicant filed application A032563 to appropriate water with the State Water Board's Division of Water Rights (Division). The application, as originally filed, requested a permit to divert and store 249 acre-feet per year (afy) of water from an unnamed stream tributary to Pepperwood Creek thence House Creek thence the Wheatfield Fork Gualala River in Sonoma County (Unnamed Stream), for both consumptive and non-consumptive beneficial uses on the Applicant's property. The proposed storage location is an existing onstream reservoir with an estimated capacity of 249 acre-feet.

On June 10, 2016, application A032563 was split into two applications (A032563A and A032563B) pursuant to California Code of Regulations, title 23, section 686, which requires separate applications for consumptive and non-consumptive beneficial uses, with an exception for certain incidental beneficial uses. Application A032563A includes the consumptive uses of irrigation (71 afy) and stockwatering (5 afy) while application A032563B includes 173 afy for the non-consumptive uses of recreational, fish and wildlife preservation and enhancement, and fire protection. The beneficial use of irrigation was requested by the Applicant for the irrigation of a new vineyard. All other beneficial uses in the applications are existing uses.

4.0 NORTH COAST INSTREAM FLOW POLICY

The water right applications propose the diversion of water from the Unnamed Stream to surface storage by means of the existing onstream dam. As the Unnamed Stream is a tributary to Pepperwood Creek in Sonoma County, the applications are within the geographic area covered by the Policy. The Unnamed Stream where the dam is located is a Class 2 stream according to the stream classification system of

the Policy. Class 2 streams are characterized by the presence of seasonal or year-round habitat for aquatic non-fish vertebrates and/or aquatic benthic macroinvertebrates.

The primary objective of the North Coast Instream Flow Policy is to ensure that the State Water Board administers water rights in a manner that maintains instream flows needed for the protection of fishery resources, including anadromous salmonids and their habitat. An onstream dam is a structure in a stream channel that impedes or blocks the passage of water, sediment, woody debris, or fish. Onstream dams can impact salmonids by (1) preventing fish passage and blocking access to upstream spawning and rearing habitat; (2) intercepting and retaining spring and summer flows without providing continuous flow releases below the onstream dam (i.e., bypass flows); (3) intercepting and retaining sediments/gravels that would otherwise replenish downstream spawning gravels; (4) intercepting and retaining large wood that would otherwise provide downstream habitat structure; and (5) creating slow-moving, lentic (lake-like) habitats that favor non-native species that may prey on anadromous salmonids or compete for food and shelter.

The Policy contains requirements for the permitting of onstream dams to address the adverse effects that onstream dams have on instream flows. Among these requirements, Policy section 2.4.2 contains a provision that prohibits the acceptance of new applications to divert water by means of an onstream dam on a Class 2 stream unless the dam meets certain criteria, including being located above an existing permitted or licensed reservoir that provides municipal water supply or is under the jurisdiction of the Federal Energy Regulatory Commission.¹ The

¹ Policy section 2.4.2's prohibition is consistent with the Policy principle that construction or permitting of new onstream dams should be restricted. The 2002 Draft Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams (Draft Guidelines), jointly developed by the California Department of Fish and Game and the National Marine Fisheries Service,

Applicant's onstream dam does not meet the criteria that would allow for the acceptance of the applications.

The Policy also contains a provision that allows applicants to request a case-by-case exception to any Policy provision. Section 9.0 of the Policy provides that the Board may grant a case-by-case exception request where it determines that: (1) the exception will not compromise maintenance of instream flows in the Policy area; and (2) the public interest will be served. A request for a case-by-case exception must specify the Policy provisions that are involved, and the Board's consideration of a case-by-case exception request is limited to those provisions. In accordance with State Water Board Order WR 2012-0011-EXEC,² by letter dated March 10, 2016, Division staff informed the Applicant that the applications would be rejected due to the Policy's section 2.4.2 prohibition unless the Applicant submitted a request for case-by-case exception to the Policy's prohibition.

4.1 Case-by-Case Exception Request: Maintenance of Instream Flows

On March 27, 2020, the Applicant acknowledged that the dam is located on a Class 2 stream and filed a request for a case-by-case exception to Policy section 2.4.2's prohibition. The exception request asserted that granting the exception will not compromise the maintenance of instream flows and provided information related to each of the five potential impacts of onstream dams on salmonids (enumerated in section 4.0 of this order). First, the exception request indicated that the dam would not prevent fish passage as it is located more than 7,000 feet above the upper limit

recommended that new permits not allow the construction or maintenance of onstream dams on Class 2 streams. The Policy's Scientific Basis Report found that the Draft Guidelines' onstream dam prohibition would be protective of anadromous salmonids in the Policy area, as would allowing some existing onstream dams on Class 2 streams which meet bypass and mitigation requirements designed to protect and restore ecosystem functions.

² [Order WR 2012-0011-EXEC](#) provides that when applications are subject to rejection due to the prohibition in Policy section 2.4, applicants should be afforded the opportunity to either contest the stream classification or request a case-by-case exception.

of anadromy due to the steep gradient of the Unnamed Stream and the presence of multiple permanent barriers to fish passage below the reservoir. Second, regarding the interruption and retention of spring and summer flows, the Applicant provided some calculations regarding water supply and demand. Third, the exception request noted that while the dam is storing some material, gravel is a minor component of the watershed's soil and the dam likely prevents fine sediments, which can have a detrimental impact on fish habitat, from moving downstream to areas where fish reside. Fourth, the Applicant provided information showing a lack of mature trees near the reservoir combined with the steep gradient downstream of the reservoir indicates that the Unnamed Stream likely does not contribute significant amounts of woody debris to areas where fish reside. Fifth, the exception request noted an apparent lack of non-native species in the reservoir that, combined with the reservoir's location upstream of the upper limit of anadromy, indicates the threat of non-native species to anadromous fish is low.

Applicants requesting case-by-case exceptions to the Policy's provisions that prohibit onstream dams on Class 1 and 2 streams may propose specific conditions with the exception request to be included in the application that would reduce the potential for the project to compromise the maintenance of instream flows. The Board may consider such conditions in weighing whether to approve the exception request. Here, the Applicant has not proposed any conditions for the Board's consideration.

The State Water Board has evaluated the Applicant's exception request with respect to the maintenance of instream flows and five potential impacts of onstream dams on salmonids. The Applicant's onstream dam is located above the upper limit of anadromy, which the Policy defines as the upstream end of the range of anadromous fish that currently are, or have been historically, present year-round or seasonally, whichever extends the farthest upstream. Thus, the dam will not prevent fish passage and does not currently appear to create a lake-like habitat that favors non-native species with potential to prey upon anadromous salmonids or compete

with salmonids for food and shelter. Information in the record indicates that the reservoir usually fills to capacity early in the season and that later rainfall events that produce runoff necessary for fish habitat pass through the reservoir. The reservoir, with an estimated capacity of 249 acre-feet, loses an estimated 28 afy due to evaporation and seepage and 5 afy for existing stockwatering use, which does not result in a substantial reduction in water levels in the reservoir. Therefore, although the dam does not bypass flows, only a small amount of flow is retained by the dam during spring and summer. The lack of gravel in the watershed's soil and lack of trees generating large woody debris near the reservoir reduce the extent of the dam's impacts on the downstream movement of gravels and large woody debris.

Application A032563B proposes the diversion of water to storage in the reservoir for in-situ non-consumptive uses that are consistent with historical operation of the reservoir. Acceptance and consideration of this application to permit historical reservoir uses is not likely to result in significant adverse effects to instream flows.

Application A032563A requests, among other things, the right to divert to storage and withdraw up to 71 afy of water for the irrigation of a new 118-acre vineyard. Allowing application A032563A to proceed with irrigation of the new vineyard would result in large amounts of water withdrawn from storage in the reservoir each year between May 1 and November 15, which would negate some of the current benefits of leaving the water in the reservoir. With irrigation, reservoir levels could be drawn down to a point that downstream reaches experience interruptions in natural flow variability such that the magnitude and frequency of naturally occurring immediate and high flows necessary for natural channel maintenance may be reduced or eliminated. The applicant did not present studies to evaluate this potential impact, and no relevant specific conditions were included within the application.

Granting the exception request to allow the Applicant to proceed with an application for a permit to continue to operate the reservoir in a manner similar to historical operation will not compromise the maintenance of instream flows in the Policy area.

However, proceeding with an application for a project to withdraw large amounts of water from the reservoir is likely to compromise the maintenance of instream flows.

4.2 Case-by-Case Exception Request: Public Interest

The exception request also asserted that granting the exception is in the public interest. In support of this assertion, the request indicated that the reservoir provides suitable habitat for the California red-legged frog (*Rana aurora draytonii*), a federally threatened species, and the northwestern pond turtle (*Actinemys marmorata*), a California species of special concern, and that the latter have been observed using the reservoir. The Applicant also noted that the reservoir provides a valuable resource for firefighting agencies in the event of a wildfire as it can be accessed by air or land. In addition, the request contended that the reservoir may be a site of historical significance, provides an important source of wetlands, and supports stockwatering operations important to the Applicant.

According to the Applicant, the onstream dam was constructed approximately 65 years ago to help control soil erosion movement and conserve heavy winter runoff, with the secondary benefits of having water available for livestock and fire protection. Water diverted and stored in the reservoir is currently used for stockwatering, fire protection, and fish and wildlife preservation and enhancement. Under the current operation of the dam and reservoir as a “fill and spill” facility, significant amounts of the stored water are retained, providing for the enhancement of non-fish aquatic organisms and wildlife, as well as a source of water for fire protection purposes. In addition to these non-consumptive uses, the Applicant seeks to continue the existing consumptive stockwatering use of up to 5 afy for a maximum of 300 head of cattle.

The State Water Board has evaluated the Applicant’s exception request with respect to the public interest. The State Water Board and California Regional Water Quality Control Board, North Coast Region have listed the Gualala River as impaired under section 303(d) of the Clean Water Act due to excessive sediment. The reservoir is

likely beneficial in that it may prevent the movement of large amounts of fine sediment to downstream areas where fish reside. The dam's long period of operation may have resulted in a large amount of fine sediment being retained in the reservoir that would be difficult to stabilize should the reservoir need to be removed. In addition, the large size of the reservoir and location upstream of the upper limit of anadromy reduce the likelihood that any benefits of dam removal and subsequent riparian habitat restoration would offset the loss of sediment control the reservoir provides. The Applicant should be allowed the opportunity to pursue a water right permit to continue operating the reservoir in a manner that reduces sediment loading downstream, provides habitat for non-fish aquatic vertebrates, and serves as a source of water for fire protection. However, allowing the Applicant to proceed with an application to withdraw large amounts of water from the reservoir would disrupt this historical operation of the reservoir and would disrupt the reservoir's current "fill and spill" features. As discussed in section 4.1 of this order, allowing the withdrawal of a large amount of water from the reservoir may reduce reservoir levels to a point that downstream reaches experience interruptions in natural flow variability such that the magnitude and frequency of naturally occurring immediate and high flows necessary for natural channel maintenance are reduced or eliminated.

It is in the public interest to partially grant the exception request to allow the Applicant to proceed with an application for a permit to continue to operate the reservoir in a manner similar to historical operation. However, it is not in the public interest to proceed with an application for a project to withdraw large amounts of water from the reservoir for a new consumptive beneficial use.

5.0 CONCLUSION

For the reasons discussed above, application A032563A should be rejected in accordance with Policy section 2.4.2 and application A032563B should be accepted. As application A032563B does not include stockwatering as a purpose of use, it should be amended to include incidental stockwatering. The face value of

application A032563B will remain at 173 afy, since the stockwatering use is incidental and constitutes a small quantity relative to the non-consumptive uses.

This order is limited to the matter of whether to grant an exception request to the prohibition against accepting applications as specified in a provision of Policy section 2.4.2.³ The accepted application will be subject to all other applicable provisions of the Policy. The findings and determinations in this order are based on the limited information available for consideration. During the processing of the application, the State Water Board will consider additional criteria and information.

Once an application is accepted, the State Water Board must fulfill its obligations under the California Environmental Quality Act (CEQA) prior to any potential approval of the proposed project. (Pub. Res. Code, § 21000 et seq.) In addition to fulfilling its CEQA responsibilities, the State Water Board must comply with its obligations under the Water Code, the California Code of Regulations, the public trust doctrine, and all Board policies applicable in the context of processing the water right application.

The order does not modify or suspend State Water Board Order WR 2015-0025. Mann remains responsible for timely and full compliance with all requirements of State Water Board Order WR 2015-0025, including any triggered by the adoption of this order.

ORDER

IT IS HEREBY ORDERED THAT:

1. The case-by-case exception request that would allow the Robert C. Mann Trust to proceed with an application for a permit to continue to operate the

³ An exception to a specific Policy provision does not constitute an exception to any other Policy provisions. Applicants may file separate requests for case-by-case exceptions to other Policy provisions.

reservoir in a manner similar to historical operation is granted, and application A032563B is accepted. Application A032563B is amended to add incidental stockwatering as a beneficial use of water. Any requirements or timelines in State Water Board Order WR 2015-0025 dependent on the grant of an exception or the Deputy Director's acceptance of an appropriative water right application begin as of the date this order is adopted.

2. The case-by-case exception request that would allow the Robert C. Mann Trust to proceed with an application for a permit to expand the use of water stored in the reservoir for irrigation is denied, and application A032563A is rejected.

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, 2022.

AYE: Chair E. Joaquin Esquivel
Vice Chair Dorene D'Adamo
Board Member Sean Maguire
Board Member Laurel Firestone
Board Member Nichole Morgan

NAY: None

ABSENT: None

ABSTAIN: None


Jeanine Townsend for
Clerk to the Board