

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2003 -

In the Matter of
Permit 14853 (Application 21883) of
NORTH GUALALA WATER COMPANY, and
Request for Determination of Legal Classification of Groundwater
Appropriated under this Water Right Permit

SOURCE: Groundwater In Alluvium Under North Fork Gualala River
COUNTY: Mendocino

ORDER DENYING RECONSIDERATION

1.0 INTRODUCTION

In this order, the State Water Resources Control Board (SWRCB) denies reconsideration of SWRCB Order WRO 2003-0004. The reasons for this action are provided below.

On February 19, 2003, the SWRCB adopted Order WRO 2003-0004. Order WRO 2003-0004 determines that the groundwater extracted by North Gualala Water Company (North Gualala) from its Wells 4 and 5, and that would be extracted from prospective wells 6 and 7, is extracted from a subterranean stream flowing through a known and definite channel.

2.0 BACKGROUND

2.1 Allowable Grounds For Reconsideration

The SWRCB may order reconsideration on all or part of a decision adopted by the SWRCB upon petition by any interested person. (Wat. Code, § 1122.) The SWRCB's regulation lists the following causes upon which a petition for reconsideration may be filed:

“(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.)

2.2 Alleged Grounds For Reconsideration

As grounds for reconsideration of Order WRO 2003-0004, North Gualala presents arguments (1) that Order WRO 2003-0004 is not supported by evidence in the administrative record; (2) that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced during the hearing; (3) that the order contains errors of law. Based on its allegations, North Gualala requests that the SWRCB grant its petition for reconsideration, vacate Order WRO 2003-0004, and issue a new order ruling that the groundwater pumped by North Gualala’s wells is percolating groundwater.

In support of its allegation that Order WRO 2003-0004 is not supported by evidence in the administrative record, North Gualala points to four statements in the findings that North Gualala alleges are incorrect. To support its allegation that relevant evidence exists that, in the exercise of reasonable diligence, could not have been produced during the hearing, North Gualala presents a new declaration from one of its witnesses, commenting on Order WRO 2003-0004. To support its allegation that the order contains errors of law, North Gualala refers generally to the arguments it made in its comments on the drafts of Order WRO 2003-0004. North Gualala does not repeat its earlier arguments, nor does it identify any of its earlier arguments with specificity.

3.0 DISCUSSION

3.1 Allegations That Statements in the Findings Are Not Supported by Evidence in the Record

3.1.1 Analysis Of Proposed Wells 6 And 7

North Gualala objects to the references in Order WRO 2003-0004 to North Gualala’s proposed Wells 6 and 7. North Gualala points to such references in Order WRO 2003-0004 at page 5, first

paragraph; page 5, second paragraph; page 3, first paragraph; and page 21, second paragraph. The references to Wells 6 and 7 and the determination that they would take water from a subterranean stream, however, are responsive to North Gualala's specific request that the SWRCB decide the classification of groundwater that would be pumped by any future wells that North Gualala might develop on its property in the Elk Prairie. In a letter dated January 11, 2002, asking the SWRCB to conduct a hearing on the legal classification of groundwater, North Gualala's attorney specifically requested that the SWRCB do the following:

“Specifically, North Gualala requests that the State Water Board hold an evidentiary hearing, and issue a decision or order, on the issue of the legal classification of the groundwater pumped by North Gualala's Wells 4 and 5 and whether or not North Gualala needs an appropriative water-right [sic] permit to pump these wells. North Gualala requests that this hearing and the decision or order also address the issue of the legal classification of the groundwater that would be pumped by any other wells that North Gualala might develop in the future on its property in the Elk Prairie that is depicted in the middle of the enclosed map.”

In response to this request, the SWRCB listed two key issues in the Notice of Public Water Right Hearing that it issued on March 5, 2002. The key issues are:

- “1. Are North Gualala Wells 4 and 5 extracting groundwater that is subject to the laws governing surface water rights, including the requirement of a permit or license to appropriate the water?
- “2. Would North Gualala extract groundwater that is subject to the laws governing surface water rights if it installs and pumps groundwater from new wells on its property in the Elk Prairie area?”

During the hearing, North Gualala identified the future wells for which it had requested classification as Wells 6 and 7. Based on North Gualala's description of Wells 6 and 7, they would take water from the alluvium in the subterranean channel.

North Gualala now claims narrowly that there is no evidence in the record that North Gualala is considering constructing these wells at this time, and on that basis argues that the references to

these wells are incorrect. North Gualala admits that North Gualala's witness included a discussion of these wells in a 1998 report it entered in evidence as exhibit NGWC 8. The discussion is at pages 29-35 of NGWC 8. The same witness identified the locations of Wells 6 and 7 in Figure 18, attached to NGWC 7, which is his written testimony. Additionally, the witness discussed Wells 6 and 7 in NGWC 7 at pages 22 and 23. In his testimony, the witness refers to the wells as "potential" wells, rather than "proposed" wells. If the population North Gualala serves continues to grow, it may decide to add wells or increase pumping rates in the future. This order amends Order WRO 2003-0004 to refer to Wells 6 and 7 as "potential" wells.

3.1.2 Nature Of Letter Telling North Gualala It Needs A Permit To Extract Groundwater

North Gualala states that Order WRO 2003-0004, at page 7, first paragraph, mischaracterizes a letter from the SWRCB to North Gualala dated December 21, 1992, and that this paragraph also mischaracterizes North Gualala's decision in 1998 to pursue adding its wells to water right Permit 14853 as points of diversion from the river. The paragraph in question is a very abbreviated history of the events and communications that led to the addition of Wells 4 and 5 as points of diversion in Permit 14853. The fourth sentence in the first paragraph on page 7 of the order states that, "[I]n December 1992, based on the hydrogeology report produced by the neighboring company, the Division recommended to North Gualala that it obtain a water right permit for Wells 4 and 5." The December 21, 1992, letter, however, more forcefully states that, "[T]he NGWC must file a water right application for appropriation of water from well No. 4 or any other existing or new wells drilled in the alluvial aquifer of the Gualala River System." This order amends the fourth sentence of the first paragraph on page 7 in Order WRO 2003-0004 to read: "In December 1992, based on the hydrogeology report produced by the neighboring company, the Division ~~recommended to~~ directed North Gualala ~~that it to file~~ to obtain a water right ~~permit application for Wells 4 and 5~~ Well 4 and any other existing or new wells drilled in the alluvial aquifer of the Gualala River System."

The seventh sentence in the first paragraph on page 7 of the order states that, "[I]n response, North Gualala petitioned for a change of point of diversion under Permit 14853, seeking to delete

the infiltration gallery as a point of diversion and add Wells 4 and 5 as points of diversion.” In the context in which it appears, this sentence incorrectly represents the sequence of events. This sentence is revised to read: “In response, the attorney for North Gualala petitioned requested, in a letter dated June 4, 1998, that the Division continue to process the petition that North Gualala filed in 1994 for a change of point of diversion under Permit 14853, seeking to delete the infiltration gallery as a point of diversion and add Wells 4 and 5 as points of diversion.”

3.1.3 Flow Direction and Conflicts in Evidence

North Gualala argues that footnote 5 on page 19 of Order WRO 2003-0004 is misleading and incorrect. North Gualala wants the third sentence of this footnote to state that it is just a report of the opinion of the DFG witness, and impliedly wants it not to be a finding of the SWRCB. Further, North Gualala argues that the entire footnote ignores North Gualala’s rebuttal testimony. North Gualala asserts that its rebuttal testimony was successful in demonstrating that the opinions of the DFG expert regarding flow direction are not supported by the available data and are contrary to basic principles of groundwater hydrology. The SWRCB disagrees with this assertion.

By attacking footnote 5, North Gualala is arguing that the SWRCB should add an additional element to the test for determining the existence of a subterranean stream flowing through a known and definite channel under Water Code section 1200. That element would require that the groundwater flow parallel with the sides of the subterranean channel everywhere that a well might be inserted. North Gualala takes too narrow a view of how water must flow in a subterranean stream. North Gualala in effect argues that to be flowing “through” a known and definite channel, groundwater must be flowing constantly, and without deviation, parallel to the sides of the channel. The use of the term “through” in section 1200, however, does not mean that, to be in a subterranean stream, water has to flow constantly parallel to the sides of the channel.¹ In *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597, 628-629 [57 P. 585], the trial

¹ “Through” is defined in the Merriam-Webster Collegiate Dictionary, tenth edition. As a function word, it is used “to indicate movement into at one side or point and out at another,” or “by way of,” or “to indicate passage from one end or boundary to another.” “Through” is used as a function word in section 1200.

court in jury instruction 21 described a stream as including water flowing along and in a natural channel, whether above or below the surface, and whether in an widened channel or an underground lake, if it is moving. Because, as the court pointed out, instantaneous flow directions in a stream may differ from the general course of a stream, the precise direction of flow at any single point cannot be part of the test for determining the presence of a subterranean stream flowing through a known and definite channel. (See Wat. Code, § 1200.) The court distinguished water in a stream from water not in a stream by stating:

“And, on the other hand, water which has not formed part of such stream, and is not moving in such underground channel, but comes from surface water, or from rains and floods sinking into the ground and passing through the soil by gravitation, having no general direction, although it may eventually find its way into some stream or water course and materially add to the water thereof, yet while so passing through the ground is not a stream or water course, but is part of the soil, and is the property of the owner thereof.”

Footnote 5 points out that the record does contain substantial evidence in the form of testimony and exhibits presented by a qualified expert witness that explains why the groundwater is flowing from north to south at North Gualala's production wells. First, due to the subsurface conditions beneath Elk Prairie, one would not expect the groundwater to flow parallel to the channel at that location. (R.T., p. 150.) At the location of the wells, the less-permeable clay sediments in the alluvium near the wells tend to force the subterranean streamflow into the more permeable parts of the alluvium, making it easier for the groundwater to flow around, rather than through, the clay sediments. Second, the presence of clay deposits influences the groundwater gradient beneath North Gualala's property by causing the groundwater to flow in a more southerly direction in that area. (R.T., pp. 97, 98, 150, 210.)

As discussed in Order WRO 2003-0004 in section 4.3.1, water in the channel flows in a gradient from a higher to a lower elevation within the channel. Based on the evidence, the observed deviation of the groundwater flow direction at the wells from a predominantly east to west direction of the channel is consistent with a general downstream flow of the subterranean stream. (NGWC 8, figs. 4-4; 4-5.)

The second sentence of footnote 5 states: "DFG's expert witness testified that groundwater flows predominantly from east to west just upstream of North Gualala's production wells. (R.T., pp. 206-208.)" This sentence is correct, both as a report of what was said and to make the point that substantial evidence exists in the record to explain the direction of flow.² The evidence in the record demonstrates that water is in fact flowing generally downstream within the channel under Elk Prairie, following a hydraulic gradient and following the path of least resistance. The fact that water in a natural system such as this does not flow in a uniform direction demonstrates the reason why the early court decisions do not include flow direction as an element in deciding the presence of a subterranean stream flowing through known and definite channels. Indeed, it is unlikely that any groundwater would be deemed to be in a subterranean stream if an element of the test was that it had to flow constantly in a uniform direction.

3.1.4 Analogy to Surface Stream Behavior

North Gualala objects to footnote 6 on the basis that "[t]here is absolutely no evidence in the record regarding the 'behavior of a surface stream,' nor is there any evidence regarding the various alleged aspects of surface water flows that are discussed in the footnote." Footnote 6 states: "This test is also consistent with the behavior of a surface stream. In a surface stream, the flow may deviate or even reverse at points from the general direction of flow as water enters from a tributary, flows around a barrier, or moves along the bottom of the stream. Likewise, such deviations may occur in a subterranean stream." The premise in footnote 6, that a subterranean stream is governed by the same rules that apply to surface streams, is supported by *Pomeroy*. (*Pomeroy*, at 124 Cal. 597, 632, stating "... subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams.")

² North Gualala argues narrowly that there are no data that prove the direction of flow upstream of North Gualala's wells. The absence of data on flow does not mean, however, that an expert witness cannot determine the direction of flow based on other information. The expert witness for the DFG presented his expert testimony regarding the direction of flow. His testimony was based on his expertise, on the maps and other information in a report on Streamflow Measurements on the North Fork and Little North Fork Gualala River near Elk Prairie prepared for North Gualala by Rau and Associates, Inc., and on North Gualala's well drilling logs which show both the clay layer and the groundwater levels. (DFG 27, including figs. 1 & 2; DFG 25; NGWC 8, App. B.) He also applied his expertise by using the few data points available in North Gualala's stream gage and monitoring well data regarding streamflow to project the flow direction and gradient that would be expected upstream. These sources of information and the expert testimony all are substantial evidence.

As discussed above in section 3.1.3, the specific direction of flow at a given location is not an element of the test for determining that groundwater is in a subterranean stream flowing through known and definite channels. As with footnote 5, this footnote addresses North Gualala's argument that groundwater is not flowing through a known and definite channel unless it is flowing consistently parallel to the sides of the channel. Footnote 6 simply recognizes the physical characteristics of water flow. In this regard, it should be noted that the Little North Fork Gualala River joins the North Fork Gualala River from the north just downstream of North Gualala's production wells at Elk Prairie. (See Figure 1, at page 6 of Order WRO 2003-0004.) While no evidence exists one way or the other, the presence of this tributary stream potentially could affect the subterranean flow of water in the channel under the North Fork Gualala River. North Gualala does not attempt to prove that footnote 6 is wrong. The physical means by which water flows is a matter of common knowledge. Accordingly, this footnote is unchanged.

3.2 Allegation that Relevant Evidence Exists that, in the Exercise of Reasonable Diligence, Could Not Have Been Produced during the Hearing

If relevant new evidence exists that, in the exercise of reasonable diligence, could not be produced during the administrative hearing, the existence of the evidence would be grounds for reopening the hearing. North Gualala submits a new Declaration of Joseph C. Scalmanini as Exhibit A attached to its petition for reconsideration. North Gualala argues that Exhibit A is relevant evidence that it could not have produced during the hearing. The basis for this argument is that Exhibit A consists of comments on Order WRO 2003-0004, which the SWRCB adopted on February 19, 2003. North Gualala argues that it could not comment on the content of the order until it was adopted. This argument, however, is specious. This ground of reconsideration is rejected for the reasons discussed below.

First, North Gualala knew the content of the order before it was adopted, and it filed comments. Second, the purported "new evidence" consists of information combined with arguments, all of which North Gualala and other parties either could have produced or did produce at the hearing. Additionally, the "new evidence" falls within the scope of the notice of hearing, thereby putting North Gualala on notice during the hearing that this type of information would be relevant. If

North Gualala did not present this evidence for tactical reasons, that is not an adequate excuse to justify going back to hearing when North Gualala does not like the result. Finally, to the extent that North Gualala did not produce this information in its case in chief, it could have produced this information on rebuttal, since it is responsive to the DFG's case in chief. Mr. Scalmanini testified as an expert witness for North Gualala during the hearing, both during North Gualala's case in chief and during North Gualala's rebuttal case. Exhibit A addresses matters that were discussed during the hearing and in briefing following the hearing.

Exhibit A addresses the following matters: (a) the shape of the subterranean channel; (b) whether or not there is a detailed examination of the hydrogeology of the area in question; (c) the application of the fourth element of the test in Decision 1639 for the classification of groundwater as part of a subterranean stream; (d) the statewide implications of Order WRO 2003-0004. All of these matters were raised and discussed during the hearing and in briefs filed by the parties. All of these matters are within the scope of the notice of hearing. Each party presented a case in chief based on evidence, including written testimony, that the party had submitted to the SWRCB and the other party a month in advance of the hearing. Each party presented rebuttal evidence. Each party presented closing briefs. After the SWRCB released a draft order, North Gualala filed extensive comments on that draft and on a subsequent draft. Mr. Scalmanini, the declarant in Exhibit A, was the author of expert written testimony presented by North Gualala, testified and was cross-examined in the hearing, testified again on rebuttal, and filed extensive written comments with the SWRCB on its drafts of Order WRO 2003-0004. In short, he had every opportunity to comment on the every one of the above matters before the SWRCB adopted the order.

3.2.1 Proposed Evidence Regarding the Shape of the Channel

The discussion of the shape of the subterranean channel is based on Figure 1, which is a close-up view of the above-ground sides of the subterranean channel of the North Fork Gualala River in the Elk Prairie area. Area maps in the hearing record show this channel in context. (See NGWC 9, 10, 11; DFG 27, figs. 1 & 2.) In particular, it appears that Figure 1 attached to Exhibit A is based on an enlarged version of part of NGWC 11, which is a U.S. Geological Survey map of the Gualala Quadrangle topographic map. The close-up view shows a point on

the river where a tributary, the Little North Fork Gualala River, joins the North Fork Gualala River from the north and on the south, the combined channel sharply turns southward. This is not new evidence, and does not justify reopening the hearing.

3.2.2 Proposed Evidence Regarding the Adequacy of the Examination of the Hydrogeology of the Area

Mr. Scalmanini's discussion in Exhibit A of the adequacy of the examination of the hydrogeology consists of argument as to what evidence is needed to find that groundwater is in a subterranean stream flowing through a known and definite channel. Under the argument presented, no evidence other than that obtained by drilling wells and measuring groundwater flows would be considered valid evidence. North Gualala made essentially this same argument during the hearing, in its closing arguments, and in its comments on the drafts of Order WRO 2003-0004. This is argument, not new evidence, and does not justify reopening the hearing.

3.2.3 The Fourth Element of the D-1639 Test is Satisfied

Mr. Scalmanini argues in his declaration that Order WRO 2003-0004 eliminates the fourth element of the test set forth in SWRCB Decision 1639 for finding that a subterranean stream is flowing through a known and definite channel. This element of the test states, simply, "4. Groundwater must be flowing in the channel." Order WRO 2003-0004 finds that groundwater is flowing in the channel. Additionally, although the exact direction of flow is not an element and can vary at specific locations, the order finds that the groundwater is flowing in a stream down-gradient (i.e., downstream) in the channel. Mr. Scalmanini's new declaration in Exhibit A claims that all underground water is moving, and that because it is moving, the fourth element specified in Order WRO 2003-0004 always will be satisfied. This argument misrepresents the order. By finding that all the elements are present, the order finds that the groundwater has gathered and is flowing in the subterranean stream channel. This circumstance is the opposite of that in which the *Pomeroy* court would have decided that the groundwater was percolating. (*Pomeroy*, at 124 Cal. 597, 629.) Exhibit A provides no new evidence on this subject, and does not justify reopening the hearing.

3.2.4 The Statewide Implications of Order WRO 2003-0004

Finally, Mr. Scalmanini argues that Order WRO 2003-0004 will have sweeping statewide effects on groundwater diversions. Order WRO 2003-0004 addresses this argument in footnote 1 on page 3, in response to earlier arguments. The allegations regarding statewide implications are policy arguments and unsupported assertions regarding several valleys in California, not new evidence. They do not justify reopening the hearing.

3.3 Allegation of Errors of Law

North Gualala argues in its petition for reconsideration that Order WRO 2003-0004 contains uncorrected errors of law that North Gualala discussed in its letters dated December 30, 2002 and February 14, 2003 commenting on the first and second drafts of Order WRO 2003-0004. North Gualala does not specify in its petition for reconsideration the purported errors of law. North Gualala's arguments already have been addressed adequately. This alleged ground of reconsideration is rejected.

4.0 CONCLUSION

This order denies the petition for reconsideration. In sections 3.1.1 and 3.1.2 of this order, the SWRCB agrees to amend Order WR 2003-0004 with respect to references to Wells 6 and 7, which North Gualala may construct in the future, and with respect to the historical references to a 1992 letter from the Division of Water Rights to North Gualala. These changes in terminology have no substantive effect on the outcome of this proceeding. The allegations discussed in sections 3.1.3 and 3.1.4 arguing that there is no substantial evidence to support the findings are rejected. The allegation that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced during the hearing, is rejected. Finally, the allegation that Order WRO 2003-0004 contains errors of law vaguely refers to earlier letters without specifying the arguments, and is rejected for lack of substance.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied, and Order WRO 2003-0004 is amended as follows:

D R A F T

April 24, 2003

1. The references to "proposed" wells 6 and 7 at pages 3, 5, and 21 in Order WRO 2003-0004 are amended to be references to "potential" wells 6 and 7. On page 5, the seventh sentence of the first paragraph is revised to read:

"Additionally, North Gualala is ~~considering adding proposed~~ asking the SWRCB to consider potential Wells 6 and 7 in the Elk Prairie area."

2. The fourth sentence of the first paragraph on page 7 in Order WRO 2003-0004 is amended to read:

"In December 1992, based on the hydrogeology report produced by the neighboring company, the Division ~~recommended to~~ directed North Gualala that it to file obtain a water right permit application for Wells 4 and 5 Well 4 and any other existing or new wells drilled in the alluvial aquifer of the Gualala River System."

3. The seventh sentence in the first paragraph on page 7 in Order WRO 2003-0004 is amended to read:

"In response, the attorney for North Gualala ~~petitioned requested~~, in a letter dated June 4, 1998, that the Division continue to process the petition that North Gualala filed in 1994 for a change of point of diversion under Permit 14853, seeking to delete the infiltration gallery as a point of diversion and add Wells 4 and 5 as points of diversion."

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 May 6, 2003.

AYE:

NO:

ABSENT:

ABSTAIN:

Maureen Marché
Clerk to the Board