

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

DIVISION OF WATER RIGHTS

In the Matter of License 9847 (Application 17913)

City of Santa Cruz

**ORDER APPROVING PETITION FOR
TEMPORARY URGENCY CHANGE**

SOURCES: Newell Creek tributary to San Lorenzo River thence Monterey Bay

COUNTIES: Santa Cruz

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

The City of Santa Cruz (Petitioner) requests that the State Water Resources Control Board (State Water Board) approve a Temporary Urgency Change to License 9847 (Application 17913) pursuant to Water Code section 1435. Petitioner requests authorization to temporarily reduce the bypass or release amount required by License 9847 from a minimum flow of 1 cubic foot per second (cfs) to 0.2 cfs.

2.0 BACKGROUND

Petitioner filed Application 17913 on December 12, 1957. A permit was issued on November 12, 1958, and License 9847 was issued on September 17, 1971. License 9847 provides Petitioner the right to divert up to 5,600 acre-feet of water per year from Newell Creek tributary to San Lorenzo River thence Monterey Bay. The water is authorized for storage in Newell Creek Reservoir, formerly Loch Lomond Reservoir. The season of diversion is September 1 of each year through July 1 of the succeeding year, and the purposes of use are Municipal, Domestic, Industrial, Recreational and Fire Protection. In addition to License 9847, Petitioner holds Permit 16123 for the diversion of water from the San Lorenzo River, for the season of September 1 of each year through June 1 of the succeeding year, and Permit 16601 for diversion from the San Lorenzo River from October 1 of each year through June 1 of the succeeding year. Petitioner also holds two other licenses on the San Lorenzo River, as well as pre-1914 appropriative water rights on several small coastal streams.

License 9847 is subject to the terms of a Stipulation and Agreement, dated on or about August 1, 1958, between the California Department of Fish and Wildlife (formerly Fish and Game) and Petitioner (formerly Santa Cruz County Flood control and Water Conservation District). The Stipulation and Agreement resolved a protest that had been filed by the Department of Fish and Wildlife to the original application, and included the following term to protect and preserve the fisheries and associated recreational resources of Newell Creek:

“Said applicant will at all times release or bypass from or through Newell Creek Reservoir Dam into the natural streambed of Newell Creek immediately below said dam a minimum of 1 cfs.”

License 9847 incorporates the terms of the Stipulation and Agreement by reference as follows:

“This license is subject to that certain stipulation and agreement entered into between the California Department of Fish and Game and the Santa Cruz County Flood Control and Water Conservation District, received by State Water Rights Board on September 15, 1958.”

Petitioner requests that the State Water Board temporarily reduce the bypass or release amount as provided in the Stipulation and Agreement to 0.2 cfs.

3.0 PUBLIC NOTICE OF THE PETITION

The State Water Board will issue, as soon as practicable, a notice of the temporary urgency change order pursuant to Water Code section 1438, subdivision (a). Pursuant to Water Code section 1438, subdivision (b)(1), Petitioner is required to publish the notice in a newspaper having a general circulation, and that is published within the counties where the points of diversion lie. The State Water Board will also mail or provide electronic copy of the notice to the interested parties who have requested notice of proposed temporary urgency changes and to other known interested parties. The State Water Board will post the notice of the temporary urgency change and a copy of the petition for temporary urgency change (and accompanying materials) on its website.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Pursuant to the California Environmental Quality Act (CEQA), Petitioner filed a Notice of Exemption (NOE) on January 30, 2014. Petitioner has determined that the change is exempt from the CEQA because it is an emergency project, it is carried out consistent with a state of emergency proclaimed by the Governor on January 17, 2014, it is consistent with the statutory exemption criteria for an emergency project, and it is consistent with a categorical exemption for existing facilities. (Pub. Resources Code, § 21080, subd. (b)(3), (4); Cal. Code Regs., tit. 14, § 15269, subd. (a) & (c), 15301.) Petitioner’s basis for claiming the exemptions is that its water situation is dire, and that its only source of stored water for drought protection is being depleted and must be protected to mitigate the effects of the drought emergency declared by the Governor and to prevent worse effects.

The State Water Board has reviewed the information submitted by Petitioner and has made its own independent finding that the change is consistent with multiple exemptions under the CEQA. The State Water Board will issue a Notice of Exemption for the change.

5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY URGENCY CHANGE

Water Code section 1435 provides that a permittee or licensee who has an urgent need to change the point of diversion, place of use, or purpose of use from that specified in the permit or license may submit a petition for temporary urgency change. The State Water Board’s regulations set forth additional procedural requirements. (Cal. Code Regs., tit. 23, §§ 805, 806.) The State Water Board’s regulations also clarify that requests for changes to permits or licenses other than changes in point of diversion, place of use, or purpose of use may be filed, subject to the same procedural requirements that apply to changes in point of diversion, place of use, or purpose of use. (*Id.*, § 791, subd. (e).)

Before approving a temporary urgency change, the State Water Board must make the following findings:

1. the permittee or licensee has an urgent need to make the proposed change;
2. the proposed change may be made without injury to any other lawful user of water;
3. the proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses; and
4. the proposed change is in the public interest.
(Wat. Code, § 1435, subd. (b)(1-4).)

5.1 Urgency of the Proposed Change

Petitioner has an urgent need to temporarily suspend the bypass and release requirements provided in License 9847 in order to preserve the water remaining in storage so that there will be sufficient water to meet essential health and safety needs.

Over a period ten years, from 2003 to 2012, the average water level of Newell Creek Reservoir has been 577 feet, as measured on April 1 of each year. This represents 98.95% of storage capacity, or 2.836 billion gallons. Due to the current drought conditions, upstream tributaries have all gone nearly dry and the flows in the main stem of Newell Creek are substantially reduced. As of January 28, 2014, the reservoir level has dropped to 557.90 feet, which represents 64.4% of storage, or 1.846 billion gallons.

Although the rate of inflow into Newell Creek Reservoir has been substantially reduced due to the current drought conditions, Petitioner is still required by License 9847 to release 1 cfs of water from Newell Creek at all times. If the Petitioner continues to be required to release 1 cfs, the Petitioner projects that, assuming no withdrawals for beneficial use from the reservoir, the Newell Creek Reservoir level will fall to approximately 556.4 feet elevation, which represents 63% of storage, or 1.783 billion gallons.

The Petitioner holds other rights for diversion from the San Lorenzo River, which represents the Petitioner's primary source of water. During normal winter months, the Petitioner is not required to withdraw water from Newell Creek Reservoir. However, the San Lorenzo River is currently flowing at near record low levels. As a result, the Petitioner is unable to divert any water from the San Lorenzo River at Felton. Thus, the Petitioner is required to withdraw water from Newell Creek Reservoir, which during normal years doesn't occur until the summer months.

The Petitioner's coastal water sources are severely constrained due to fishery protection considerations as well as the very low flows resulting from the lack of precipitation. Because of the critically dry weather pattern, the Petitioner has already had to initiate withdrawals from storage, something it normally does not do until the summer months, June through October. This stored water is essential for the Petitioner's municipal use, given the ongoing critically dry conditions and shortage of water from each of the Petitioner's other sources.

The Petitioner is currently working on the steps necessary to reduce demand in accordance with the five stage structure as described in its March 2009 *Water Shortage Contingency Plan*. On May 1, 2013, the Petitioner implemented Stage 1 (Water Shortage Alert) water restrictions, which are still in effect as of the date of this Order. On February 3, 2014, the Petitioner's Water Commission voted to recommend implementation of Stage 3 (Water Shortage Emergency) water restrictions. On February 11, 2014, the Petitioner's City Council scheduled a public hearing for February 25, 2014 to consider the recommendation.

Stage 3 of the Water Shortage Contingency Plan is primarily designed to reduce outdoor uses of water which normally initiate in May. This also accommodates the significant work necessary to prepare for effective implementation of this material level of demand cutbacks, including alterations to the Petitioner's utility billing system, billing schedule, and bill format. Given the recent precipitation, and assuming Council approval, it is now anticipated that Stage 3 will be in place by May 1, 2014, to deliver the desired demand reduction and water savings.

Absent significant precipitation events and the relief from the bypass and release requirement from Newell Creek Reservoir, Petitioner's water supply will approach a dangerously low level for supplying essential health and safety needs.

5.2 No Injury to Any Other Lawful User of Water

No downstream diverters of record would be injured by the requested change. According to the State Water Board records, the downstream right holders consist of seven riparian claims filed in Statements of Water Diversion and Use, and the Permits and Licenses held by Petitioner. Water being released from storage in Newell Creek for environmental purposes would not be available for diversion under the seven riparian claims.

5.3 No Unreasonable Effect Upon Fish, Wildlife, or Other Instream Beneficial Uses

Petitioner has indicated that it has consulted with representatives of both the National Marine Fisheries Services and the California Department of Fish and Wildlife, and neither agency presented any objection regarding the Petitioner's proposal to reduce the bypass/release requirement to 0.2 cfs. Both indicated that their agencies will not object to the petition for temporary urgency change.

Absent the releases from Newell Creek Reservoir, natural conditions downstream of the dam would be dry as they are today in the stream reaches upstream of the reservoir. Fish are currently unable to migrate up to this stream reach to spawn due to historically low flows on the lower San Lorenzo River, so maintenance of rearing in pools for juvenile fish already in the system is the primary consideration during the term of this petition, or until hydrologic conditions change substantially to the extent that adult migration is possible downstream.

It is anticipated that seepage and a reduced release from storage will provide sufficient flow to maintain a wetted channel for rearing in pools. Petitioner has committed to survey Newell Creek during the period of the change in order to: (1) identify areas where hydrologic continuity does not exist and (2) conduct thalweg depth surveys at critical riffles. In the event that conditions in Newell Creek downstream of Newell Creek Reservoir result in isolated pools and stranded fish, the Petitioner will take all necessary steps to avoid harm to any fish currently present in Newell Creek.

5.4 The Proposed Change is in the Public Interest

The proposed change is in the public interest. As of May 2013, Petitioner has implemented Stage 1 of its March 2009 *Water Shortage Contingency Plan*, requiring voluntary water conservation from all customer, restrictions on landscape irrigation, shutoff nozzles on all hoses, and adherence to the water waste ordinance. Petitioner has provided public notice of and is currently considering moving to Stage 3. If the current weather pattern continues, the volume of water available for health and safety purposes may be endangered. Conservation of the Petitioner's limited drought protection supply as proposed by this petition is essential to the public interest.

6.0 STATE WATER BOARD AUTHORITY

Resolution 2012-0029 delegates to the Deputy Director for Water Rights the authority to act on temporary urgency change petitions, and the Deputy Director for Water Rights has redelegated the authority.

7.0 CONCLUSIONS

Based on the foregoing and all available information, the State Water Board finds that:

1. The Petitioner has an urgent need to make the proposed change;
2. The proposed change may be made without injury to any other lawful user of water;
3. The proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses;
4. The proposed change, including any conditions imposed, is in the public interest.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT: the petition for temporary urgency change is approved and effective until 180 days from the date of this Order.

All existing terms and conditions of License 9847 remain in effect, except as temporarily amended by the following additional terms:

1. Notwithstanding the provisions of the Stipulation and Agreement, received by the State Water Board on September 15, 1958 and in effect between the California Department of Fish and Wildlife and the City of Santa Cruz, Petitioner shall at all times release or bypass from or through Newell Creek Reservoir Dam into the natural streambed of Newell Creek immediately below said dam the following minimum amounts:
 - (a) 0.2 cubic foot per second from the date of this Order through February 28, 2014; and,
 - (b) beginning March 1, 2014, either:
 - i. 0.2 cubic foot per second, provided Petitioner has adopted a program, and implemented such program by May 1, 2014, to meet the water reduction goals described in Stages 3 through 5 of the Petitioner's Water Shortage Contingency Plan; or,
 - ii. 1 cubic foot per second under all other conditions.
2. Petitioner shall monitor the effects of the amended release or bypass amount on fisheries resources and shall take all necessary steps to avoid harm to fish in Newell Creek. Petitioner shall conduct surveys along Newell Creek during the period of the change in order to: (1) identify areas where hydrologic continuity does not exist and (2) conduct thalweg depth surveys at critical riffles. In the event that hydrologic continuity is interrupted or critical riffle depths are inadequate, Petitioner shall immediately take all reasonable steps to avoid harm to fish in Newell Creek, including but not limited to an increase in the rate of water released from Newell Creek Reservoir above 0.2 cfs if required.

By March 1, 2014, Petitioner shall submit to the Deputy Director for Water Rights a plan for compliance with this term that describes the survey methods, frequency of surveys, planned efforts to coordinate with the California Department of Fish and Wildlife and National Marine Fisheries Service, and a list of reasonable steps the Petitioner may take to avoid harm to fish in Newell Creek.

3. Petitioner shall reduce water demand by 20% of normal water use by instituting water rationing and promoting conservation as described in its March 2009 *Water Shortage Contingency Plan*.

By July 1, 2014, Petitioner shall submit to the Deputy Director for Water Rights a written report that summarizes all activities conducted to ensure compliance with the requirements of this Order. The report shall, at a minimum, include a description of the Petitioner's efforts to date to comply with the requirements of this Order and the amount of reduction of water use, including percentage of normal use, achieved as a result of such efforts.

4. Petitioner shall immediately notify the State Water Board if any significant change in storage conditions in Newell Creek Reservoir occurs that warrants reconsideration of this Order.

5. This Order does not authorize any act that results in the taking of a threatened or endangered species, or any act that 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. sections 1531 to 1544). If a "take" will result from any act authorized under this Order, the Petitioner shall obtain authorization for an incidental take permit prior to construction or operation. Petitioner shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary urgency change authorized under this Order.
6. The State Water Board reserves jurisdiction to supervise the temporary urgency change under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: FEB 14 2014