

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

**ORDER WR 2024-0048-EXEC**

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In the Matter of Water Right Application A033057

**Nancy K. Donovan**

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SOURCE: Unnamed Stream tributary to Maple Creek thence Rancheria Creek  
thence the Navarro River

COUNTY: Mendocino

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**ORDER DENYING REQUEST FOR A CASE-BY-CASE EXCEPTION AND  
REJECTING APPLICATION**

**BY THE EXECUTIVE DIRECTOR:<sup>1</sup>**

**1.0 INTRODUCTION**

This order concerns a water right application 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 with the State Water Resources Control Board (State Water Board or Board) by Nancy K. Donovan (Applicant). The application seeks approval to divert water to storage in two reservoirs formed by onstream dams located on an Unnamed Stream tributary to Maple Creek thence Rancheria Creek thence the Navarro River in Mendocino County.

This order denies the exception request and rejects application A033057.

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<sup>1</sup> State Water Board [Resolution 2023-0036](#) delegates to the Executive Director the authority to conduct and supervise the activities of the State Water Board.

## 2.0 PROCEDURAL BACKGROUND

The Applicant and her husband, Stephen J. Peters (Mr. Peters), submitted application A030926 on May 13, 1999. The application proposed to appropriate 30 acre-feet of water per year by collection to storage in two reservoirs formed by onstream dams. The Applicant and Mr. Peters sought water for irrigation, frost protection, fire protection, and stockwatering purposes. The source of water was an Unnamed Stream tributary to Maple Creek thence Rancheria Creek thence the Navarro River. By [order](#) dated August 5, 2010, the Board's Division of Water Rights (Division) canceled the application for failure to provide information pursuant to Water Code sections 1275 and 1276.

Division staff inspected the Applicant's property on September 15, 2010. Following the inspection, the State Water Board concluded that surface water was being diverted to storage without a basis of right and notified the Applicant and Mr. Peters of this conclusion and potential civil liability. On June 14, 2012, the State Water Board issued an Administrative Civil Liability (ACL) Complaint and a draft Cease and Desist Order (CDO) against the Applicant and Mr. Peters, alleging, among other things, that water was unlawfully diverted to storage into the subject onstream reservoirs. Both the Applicant and Mr. Peters timely requested a hearing on the ACL Complaint and draft CDO. After postponing and rescheduling the hearing multiple times at the request of the Applicant and Mr. Peters, the Board issued a Notice of Rescheduled Public Hearing on July 21, 2016. The Applicant timely filed a Notice of Intent to Appear at the hearing but Mr. Peters did not, which constituted a withdrawal of Mr. Peters' hearing request. The Applicant did not appear for the October 12, 2016 hearing. The State Water Board hearing officers determined that the Applicant's failure to appear for the hearing constituted a withdrawal of her hearing request and directed the ACL Complaint and draft CDO back to the Division for further enforcement actions as appropriate without further notice. Acting pursuant to delegated authority, the Division issued an ACL and CDO on November 9, 2016. (Board [Order WR 2016-0025-DWR.](#)) The Applicant and Mr. Peters timely filed a petition for reconsideration requesting a new hearing and a stay of the November 9, 2016 order. The petition for reconsideration was denied on March 24, 2017. (Board [Order WR 2017-0009-EXEC.](#))

The 2016 ACL and CDO assessed civil liability of \$40,000 and required that the Applicant and Mr. Peters cease the unauthorized diversion of water, file a Statement of Water Diversion and Use for the diversion of water at each of the reservoirs, and pursue one of two corrective action options: (1) file an appropriative water right application for storage and use of the water in the reservoirs; or, (2) submit a plan to permanently render the reservoirs incapable of storing water subject to the State Water Board's permitting authority. The Applicant chose option one,<sup>2</sup> filed water right application A033057 with the State Water Board on June 27, 2019, and paid the \$40,000 civil liability on January 2, 2020.

### **3.0 WATER RIGHT APPLICATION**

Application A033057 requests a permit to divert up to 30 acre-feet of water per year to storage from an unnamed stream tributary to the Navarro River stream system in Mendocino County. The proposed points of diversion and storage locations are the two existing onstream reservoirs, which the Applicant estimates to have capacities of 21.5 and 11.4 acre-feet. Stored water would be used for irrigation and frost protection of an 8-acre vineyard, fire protection, as well as fish and wildlife preservation and enhancement and stockwatering at the reservoirs. The application requests a season of diversion from November 1 of each year through May 31 of the following year.

### **4.0 NORTH COAST INSTREAM FLOW POLICY**

The North Coast Instream Flow 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

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<sup>2</sup> Option one of the 2016 ACL and CDO discussed the Policy's applicability to and requirements for new water right applications, and provided that if the Board denied or canceled the water right application filed under this option, the Applicant and Mr. Peters would be required to, within 150 days, submit a plan to permanently render the reservoirs incapable of storing water subject to the permitting authority of the Board that satisfies the requirements set forth in option two.

coastal streams entering northern San Pablo Bay and extends to five counties: Marin, Sonoma, and portions of Napa, Mendocino, and Humboldt counties.

As the water right application in question proposes to divert water from a source tributary to the Navarro River in Mendocino County, the application is within the geographic area of the Policy and must comply with its provisions.

The primary objective of the 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 with a particular focus on anadromous salmonids and their habitat. It prescribes protective measures regarding the season of diversion, minimum bypass flow, and maximum cumulative diversion.

An onstream dam is defined in Policy section 2.4 as “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. These requirements are specific to the stream classification where the onstream dam is located. Class 1 streams are characterized by the presence of fish, seasonally or year-round. Class 2 streams are characterized by the presence of seasonal or year-round habitat for aquatic non-fish vertebrates and/or aquatic benthic macroinvertebrates. For both Class 1 and Class 2

streams, section 2.4 of the Policy generally prohibits the State Water Board from accepting new applications to divert water by means of an onstream dam.<sup>3</sup>

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. Section 9.0 provides that a request for a case-by-case exception must contain the following: (1) a detailed description of the reason for the request; (2) the Policy provisions that are involved; (3) documentation of the reasons why the exception will not compromise maintenance of instream flows in the Policy area; and (4) an explanation of how the public interest will be served by the exception. The Board's consideration of a case-by-case exception request is limited to the Policy provisions stated in the case-by-case exception request. The Policy places the burden on the applicant to provide sufficient information for the Board to make the required findings and grant the exception request.

On July 22, 2019, the State Water Board informed the Applicant that although her application was made in a bona fide attempt to conform to the rules and regulations of the State Water Board and to the law, the application was defective for two reasons.<sup>4</sup> The first was nonpayment of the required Streamflow Protection Standards filing fee required by Public Resources Code section 10005. By letter dated July 31, 2019, the Applicant submitted the required fee payment to the Board. The second reason the application was defective was that the application proposed the diversion of water by means of two onstream dams in the Policy area, and thus was potentially subject to the prohibition described in Policy section 2.4. At that time the Board did not have sufficient information to determine the classification of the streams where the two dams were located. The State Water Board subsequently determined that the stream reaches

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<sup>3</sup> Policy section 2.4 includes certain criteria that allow for the acceptance of new applications to divert water by means of an onstream dam, but those criteria are not met here.

<sup>4</sup> Water Code sections 1270 and 1271 specify the process for perfecting applications that are defective.

upstream and downstream of both reservoirs are Class 2 streams.<sup>5</sup> Therefore, the onstream dams trigger Policy section 2.4.2's prohibition of acceptance of new applications to divert water by means of an onstream dam on a Class 2 stream.

In accordance with State Water Board Order WR 2012-0011-EXEC,<sup>6</sup> by letter dated January 24, 2024, the State Water Board informed the Applicant of the Board's stream classification. The Board's January 24, 2024 letter also stated that the application would be rejected due to the prohibition on acceptance of new applications for onstream dams in Policy section 2.4, unless the Applicant provided the Division, within 90 days, either: (1) notification of intent to conduct a stream survey and documentation of qualifications of the Applicant's selected fisheries biologist; or (2) a completed request for a case-by-case exception to this Policy prohibition. The letter explained the Policy's four required components for filing a case-by-case exception stated above and provided a link to information regarding case-by-case exception requests (including sample exception requests) on the State Water Board's website as well as Division staff contact information.

On April 23, 2024, the Applicant submitted a brief letter concurring with the Board's stream classification determination and requesting "Application A033057 be accepted using the case-by-case exception process per the Instream Flow Policy." The Applicant's letter did not include a detailed explanation of the reason for the request, the policy provisions involved, any documentation for the reasons why the exception would not compromise maintenance of instream flows, or an explanation of why the public interest would be served. The only evidence offered in support of the exception request was a single sentence stating that the Applicant's vineyard had been "certified Fish

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<sup>5</sup> Initial Stream Classification Recommendation for Application A033057 of Nancy Donovan, Navarro River stream system, Mendocino County (Jan. 22, 2024), from Senior Environmental Scientist (Supervisory) Matthew McCarthy, Division of Water Rights, to File for Application A033057, at p. 5.

<sup>6</sup> [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.

Friendly Farming.”<sup>7</sup> This letter did not provide sufficient information for the Board to make the findings required by Policy section 9.0 and grant the exception request.

## 5.0 CONCLUSION

The State Water Board cannot grant a case-by-case exception request that does not contain the components required by Policy section 9.0. The Applicant’s exception request is defective, and the Applicant has not provided the items listed in the State Water Board’s January 24, 2024 letter explaining the requirements for a case-by-case exception request. Therefore, Policy section 2.4.2 provides that the application cannot be accepted and must be rejected.

This order does not modify or suspend Board Order WR 2016-0025-DWR. The Applicant remains responsible for timely and full compliance with all requirements of Board Order WR 2016-0025-DWR, including any triggered by the adoption of this order.

### ORDER

**IT IS HEREBY ORDERED** that the Applicant’s case-by-case exception request is denied and application A033057 is rejected. Any requirements or timelines in State Water Board Order WR 2016-0025-DWR triggered by the denial or cancellation of a water right application begin as of the date this order is adopted.

November 22, 2024

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Dated



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Eric Oppenheimer  
Executive Director

<sup>7</sup> The Applicant’s letter included no details regarding this certification. Division staff confirmed that the Applicant’s property appears to be enrolled in the Fish Friendly Farming Environmental Certification Program run by the California Land Stewardship Institute, a non-profit organization. According to the [program’s website](#), the program offers farmers access to expertise on issues such as erosion and soil loss, stream bank failure, and water quality degradation. Enrollment in the program does not appear to provide any of the information required in a case-by-case exception request or reasons why granting the case-by-case exception for application A033057 would not compromise maintenance of instream flows or would serve the public interest.