

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

DIVISION OF WATER RIGHTS

ORDER WR 2005-0001-DWR

In the Matter of Permit 12947B (Applications 12919B)

Cease and Desist Order No. 262.31-15

**Mendocino County Russian River Flood Control and
Water Conservation Improvement District**

SOURCE: East Fork Russian River

COUNTY: Mendocino County

The State Water Resources Control Board (SWRCB) is authorized under California Water Code section 1831, subdivision (a), to issue a cease and desist order (CDO) when it determines that any person is violating or threatening to violate any requirement described in subdivision (d). Under section 1831, subdivision (d) of the Water Code, the SWRCB may issue a CDO in response to a violation or threatened violation of any of the following:

- (1) The prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to Division 2 (commencing with section 1000) of the Water Code.¹
- (2) Any term or condition of a permit, license, certification, or registration issued under Division 2 of the Water Code.
- (3) Any decision or order of the board issued under Part 2 (commencing with section 1200) of Division 2 of the Water Code, Section 275, or Article 7 (commencing with section 13550) of Chapter 7 of Division 7 of the Water Code, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

On October 26, 2004, and in accordance with the provisions of section 1834 of the California Water Code, the SWRCB, Division of Water Rights (Division) provided notice of the CDO against Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino) for the violation and threatened violation of: (1) the prohibition against unauthorized diversion and use of water; (2) terms and conditions of water right Permit 12947B; and (3) SWRCB Decision 1030 and SWRCB Order 74-30. A hearing on the matter was to be held February 9, 2004. By letter dated December 30, 2004, Mendocino notified the Division that its Board of Trustees unanimously agreed to accept this revised CDO, and to waive its rights to a hearing. The Division has withdrawn the original draft CDO No. 262.31-12 in favor of this order.

FACTS AND INFORMATION

The facts and information upon which this CDO is based are as follows:

¹ Water Code section 1052, subdivision (a) states that "The diversion or use of water subject to this division other than as authorized in this division is a trespass."

1. Mendocino is the holder of Permit 12947B (Application 12919B) which authorizes the diversion of water from the East Fork Russian River from January 1 to December 31 of each year not to exceed: 1) 53 cubic feet per second (cfs) by direct diversion and 2) 122,500 acre-feet per annum by storage. The combined direct diversion and redirection of stored water under Permit 12947B shall not exceed 8,000 acre-feet per annum (afa). SWRCB Decision 1030, Order 74-30 and Permit 12947B provide that the direct diversion and redirection of stored water shall not occur until Mendocino provides a description of the location of each point of diversion and a statement of the quantity of water to be diverted at each point of diversion with the SWRCB. The authorized purposes of use under Permit 12947B includes municipal, industrial, domestic, irrigation, and recreational uses.
2. Permit 12947 was one of three permits for the Russian River Project originally approved in SWRCB Decision 1030, authorizing storage of water behind Coyote Dam (Lake Mendocino) and diversion and redirection of stored water at points of diversion and redirection along the Russian River. The SWRCB subsequently divided Permit 12947 into Permits 12947A and 12947B by SWRCB Order 74-30. The Sonoma County Water Agency (Sonoma) operates Coyote Dam and holds Permit 12947A (Application 12919A). Both Permits 12947A and 12947B authorize diversion of water that is surplus to diversions that have been continuous since 1949 when the Coyote Dam Project was built. These "pre-1949 rights" were estimated to equal 8,100 acre-feet in Mendocino County at the time of Decision 1030, and the SWRCB may accept new applications for pre-1949 appropriations if the applicant provides documentation of continuous beneficial use of water since 1949. Water available for pre-1949 diversions includes natural flows of the Russian River and imported water from the South Fork Eel River. In most years, monthly inflow to Lake Mendocino is sufficient to meet pre-1949 demands in Mendocino and Sonoma Counties. In extremely dry years, pre-1949 users may benefit from the release of stored project water.
3. In accordance with SWRCB Order 91-07, the Russian River is declared fully appropriated from July 1 to October 31 in Mendocino County. This precludes post-1949 appropriations of water between July 1 and October 31 of each year from the main stem of the Russian River in Mendocino County filed after the Russian River was listed as fully appropriated, except those made under, and charged to, Mendocino's allotted 8,000 acre feet under Permit 12947B.
4. On May 29, 1980, the Superior Court for the County of Mendocino issued Stipulated Judgment No. 42059 (Judgment), which entitles the Redwood Valley County Water District (Redwood) to divert water that is surplus to Mendocino's needs within the 8,000 acre-feet authorized by Mendocino's Permit 12947B. Any water within the 8,000 acre-feet allocation for Mendocino not put to beneficial use is considered surplus water, and may be sold to Redwood. The surplus water purchased from Mendocino is Redwood's only water supply from May 1 to October 31 of each year. In accordance with the Judgment, payments for the surplus water are to be made on August 1 of each year for the previous fiscal year of use. At such time as no surplus water is available, Mendocino is required to notify Redwood in writing. If there is a disagreement about the existence of surplus water, settlement of the dispute occurs through arbitration, as specified in the Judgment.
5. Redwood is a post-1949 appropriator that diverts water under its own Permit 17593 from November 1 to April 30, and diverts additional water under Mendocino's Permit 12947B pursuant to the Judgment. By Order WR 79-15, the SWRCB added Redwood's service area, as it existed at that time, to Mendocino's permitted place of use. In the order, the SWRCB specified that Mendocino would supply Redwood's place of use to the extent such water was surplus to the needs of Mendocino and until such time that water was needed by Mendocino. The water was to be used for domestic purposes and irrigation of a maximum of 3,500 acres.
6. In 1997-98, Mendocino filed and the SWRCB approved a petition for extension of time in order to develop full beneficial use of water authorized under Permit 12947B. The time extension expires December 31, 2005.

7. Mendocino has historically submitted progress reports and reports identifying points of diversion and rediversion to tabulate annual amounts diverted under its permit. The Division identified problems with Mendocino's reports, including discrepancies in the reported points of diversion, Mendocino's accounting of natural flow, and the inability of Mendocino to determine its beneficial use of water under Permit 12947B.
8. On June 26, 2000, Mendocino adopted Ordinance No. 00-1 to allow Mendocino to enter into water sale contracts with its users and require its users to comply with the terms and conditions of Permit 12947B. Litigation ensued challenging the validity of the ordinance. Final disposition of the matter in favor of Mendocino occurred on June 30, 2004.
9. On October 17, 2001, Division staff met with Mendocino's representatives to discuss deficiencies in Mendocino's accounting for use of the 8,000 acre-feet authorized under Permit 12947B. Mendocino claimed that the full 8,000 acre-feet had been beneficially used; however, Division staff was not satisfied with the accounting methodology. Division staff expressed concern regarding Mendocino's compliance with permit term 5, requiring identification of each point of diversion, and the corresponding amount of water being diverted and beneficially used at each point of diversion. Mendocino agreed to submit the appropriate information necessary to determine use of the 8,000 acre-feet allotment by January 2002. The voters elected new members to the Mendocino Board, who took office on December 10, 2001.
10. On November 23, 2001, Mendocino adopted Resolution No. 01-03, which prohibits use of Mendocino's water outside its designated place of use. The resolution directs Mendocino's Executive Director, upon discovery of any wrongful use of Mendocino's water, to notify the SWRCB and to request enforcement action as may be appropriate. On February 25, 2002, Mendocino adopted Resolution No. 02-01, which amends Resolution No. 01-03 to require the Board to take action rather than the Executive Director. To date, the Division has not received any notice under this provision.
11. As part of its 2001 Compliance and Enforcement Program, the Division inspected numerous permits and licenses within Mendocino's service area in the Russian River watershed in Mendocino County. Numerous permittees and licensees were found to have diverted water in excess of their permitted or licensed amounts and seasons, or outside the places of use authorized under their permits and licenses. Many of these water right holders claimed that their excess diversions were covered under Mendocino's Permit 12947B.
12. By certified letter dated March 14, 2002, the Division notified Mendocino that although the licensees and permittees claiming use under Mendocino's permit were included in its annual progress reports, Mendocino reported larger diversion amounts for these projects than had been calculated by the Division. The Division advised Mendocino that some of the projects may include irrigated lands outside its authorized place of use and that a change petition may be necessary. In addition, Mendocino still had not submitted the data requested in the October 17, 2001 meeting. The Division provided Mendocino until July 1, 2002, to submit this data.
13. Mendocino responded to the Division's letter on April 12, 2002, and submitted the location of the points of diversion, crop type and acreage of its users. No data were submitted to identify places of use served and quantity of water used from each point of diversion. Mendocino stated that it was updating records to make them more accurate.
14. On April 17, 2002, Division staff again met with Mendocino representatives to discuss issues pertaining to the use of water under Mendocino's permit and what the Division would require for licensing. The Division notified Mendocino that it must submit data identifying who was using water, the point(s) of diversion and place of use for each user, the rate of diversion for each user, and the

purpose(s) of use under Permit 12947B.² Mendocino agreed to submit the 2000 and 2001 progress reports by July 1, 2002. On May 16, 2002, the Division extended the deadline to October 1, 2002.

15. On October 3, 2002, Mendocino submitted its 2000 and 2001 progress reports. The reports did not identify individual points of diversion such as those previously submitted, nor did it identify places of use. The report was based mostly on estimates because power consumption data were no longer available. Division compliance reports indicate that Mendocino's estimates are higher than actual usage. In addition, the report's estimates of riparian diversions may be inaccurate because they appear to include some diversions of imported Eel River water, which is not available to riparian water right users. The Division requested a meeting to discuss actual acreage being irrigated, frost protection use, potential reduction in the calculation of the amounts used under the permit due to diversions outside the authorized place of use, and annual duty amounts and their distribution for estimated applied water. The Division advised that until Mendocino identified, mapped and submitted the locations of points of diversion and points of rediversion, Mendocino was in violation of its permit.
16. On October 15, 2002, Mendocino adopted Resolution 4-02 declaring a state of emergency of its water supply. Mendocino petitioned the SWRCB to grant relief from the in-stream flow releases from Lake Mendocino required by Decision 1610.³ By letter dated November 12, 2002, the Division stated that ordering reduced releases could potentially harm coho salmon and steelhead trout in violation of the state and federal Endangered Species Acts. The Division suggested that further studies were needed within the Russian River watershed in order for the SWRCB to modify the minimum flow requirements of Permit 12947A.
17. Mendocino attempted to have Redwood cut its diversions by 50 percent due to conditions at Lake Mendocino and pursuant to SWRCB Decision 1610. The Division advised Mendocino that Redwood should reduce its diversions if it was pumping water under Sonoma's Permit 12947A, but because Redwood claimed to divert water under Permit 12947B, it was not conditioned by Decision 1610.
18. On November 1, 2002, Mendocino's consultant, PSOMAS, submitted a draft report showing Mendocino's use of water under Permit 12947B and included a scenario whereby Eel River water was considered foreign flow. The report indicated that Mendocino fully used its 8,000 acre-foot allotment by mid-September of 2002, assuming Redwood was using Mendocino's water.
19. On November 13, 2002, Division staff met again with Mendocino representatives to discuss the unresolved compliance issues with Permit 12947B. Regarding riparian landowners claiming rights to imported Eel River water, the Division stated that Decision 1030 allowed for diverters to apply to appropriate water by permit if they could prove continuous use before 1949. Division staff informed Mendocino that Decision 1030 did not restrict pre-1949 diverters within Mendocino boundaries to 8,100 acre-feet. Pre-1949 users had priority over Mendocino and could submit a petition for change in place of use; however, increases in amount or season would not be authorized. Regarding Mendocino's progress reports, differences in Mendocino's and the Division's calculations of water use demonstrated that Mendocino's estimates might not be accurate. Mendocino's consultant, PSOMAS, agreed to review its records and report back to the Division.

² There was a question about whether frost protection would be included within irrigation use for the purpose of Permit 12947B. Ultimately, SWRCB counsel concluded that frost protection was indeed authorized under Mendocino's permit because the change in regulation specifying frost protection as a separate purpose of use from irrigation occurred after the SWRCB issued Permit 12947B to Mendocino. The Division advised Mendocino to carefully review the total rate of diversion by its users before allowing additional diversions for frost protection because several large vineyard operations might easily combine to exceed the 53 cfs authorized rate of diversion.

³ SWRCB Decision 1610 amended Term 18 of Sonoma's Permit 12947A to require minimum flows in the Russian River between the East Fork Russian River and Dry Creek to protect fishery and recreation use in the Russian River and Lake Mendocino.

The Division reminded Mendocino that it was still responsible for identifying each point of diversion and re-diversion using water claimed under its permit. Mendocino agreed to prepare a list of points of diversion it served under Permit 12947B. Division staff showed Mendocino maps of the 12,100 acre gross place of use for irrigation covered by its permit and the boundary of the claimed Mendocino service area, which indicate that the authorized place of use differs significantly from Mendocino's service area. The Division suggested that Mendocino review its records to determine the accuracy of the maps and stated that a petition for change in place of use may be necessary to cover irrigation service areas outside Mendocino's authorized place of use. Mendocino agreed to submit a work plan addressing these matters.

20. By letter dated December 5, 2002, Mendocino notified the Division and Redwood that the 8,000 acre-feet allotment under Mendocino's Permit 12947B had been used up for the year, and there was no more water for Redwood to divert under Permit 12947B. Redwood requested arbitration on the issue of availability of surplus water. To date the arbitration hearing has not taken place because neither Redwood nor Mendocino can decide on a third neutral arbitrator. Redwood has not paid Mendocino for any diversions of water since the arbitration was requested.
21. Mendocino has since filed new applications to appropriate additional water from the East Fork Russian River, and in this process, submitted a list of points of diversion for the new applications. The list includes details such as user's name, coordinate locations, parcel numbers, approximate acreage to be served, crop type, and the uses of water for each point of diversion. Mendocino also submitted a map showing the proposed place of use under the new applications and the location of the points of diversion identified on the list. The proposed place of use includes Redwood, Potter Valley Irrigation District, City of Ukiah, Millview County Water District (Millview), Willow County Water District (Willow), Rogina Water Company, East Sanel Irrigation District (East Sanel), Hopland Public Utility District, Capella Water District, and River Estates Mutual Water Company. Portions of the areas served by these Districts for irrigation purposes may be outside the 4,096 net acreage within the 12,100 acre place of use authorized for irrigation under Mendocino's Permit 12947B. In addition, portions of Redwood's and Willow's boundaries are outside the Mendocino service boundary authorized for all uses under Mendocino's Permit 12947B. Currently Redwood, Millview, Willow, and East Sanel are shown as users of water under Mendocino's Permit 12947B in its 2000-2001 progress report.
22. In October 2004, Mendocino notified the Division that it had initiated a process of entering into water agreements with its historic water users. Mendocino adopted Ordinance No. 00-01 and Resolution No. 04-03 to provide a method by which Mendocino can accurately measure the amount of water used by its customers. Customers who wish to purchase a specific amount of water under Permit 12947B will enter into a Uniform Water Supply Agreement (Agreement). While the Agreement does require customers to meter and measure the quantity of project water, it does not clearly specify how the customer should differentiate water diverted under any alternative bases of right. Moreover, Division staff believe that additional public notice is necessary in order to make clear that the Agreement is the only method by which the District will allow a user to claim water under Permit 12947B.
23. On January 28, 2004, the Federal Energy Regulatory Commission (FERC) issued an order amending the hydroelectric license for Potter Valley Project No. 77 that required operational and physical modifications to the project for the benefit of federally threatened salmonids. This order could reduce the amount of Eel River water that historically has been released to the Russian River, thereby affecting the amount of water available to diverters in Mendocino's service area and subsequently affecting the amounts taken under Mendocino's permit.

24. Mendocino has not submitted the work plan as agreed to in the November 13, 2002 meeting, leaving many issues related to points of diversion, place of use, and amounts used under Permit 12947B unresolved. Failure to properly account for water used under its permit constitutes actual or threatened unauthorized diversions due to the uncertainty of the availability of water for users who need to claim use under Mendocino's permit because their diversions cannot solely be covered by their own water rights. To the extent that these users are not authorized to divert under Mendocino's Permit 12947B, but Mendocino's failure to properly account for water used under its permits leads these users to believe their uses are authorized under Mendocino's Permit 12947B, Mendocino is a contributing cause to unauthorized diversion and use by these users. To the extent that these users are authorized to divert under Mendocino's Permit 12947B, but Mendocino does not acknowledge that their use is authorized under Mendocino's permit or account for those diversions in determining what other diversions to make or authorize pursuant to Permit 12947B, the diversions made by these users and Mendocino, in combination, create a threatened violation of the limitations in Mendocino's Permit 12947B. There is an actual or threatened unauthorized use because Mendocino has served or may serve water outside its authorized place of use. There is an actual or threatened violation of terms under Permit 12947B and SWRCB Decision 1030 and Order 74-30 which provide that the direct diversion and rediversion of stored water shall not occur until Mendocino files a description of the location of each point of diversion and a statement of the quantity of water to be diverted at each point of diversion with the SWRCB.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, that Mendocino shall take the following corrective actions and satisfy the following time schedule:

1. Commencing on the date that this Order is issued, cease diverting water to serve areas outside of the authorized place of use, or purposes not authorized by Mendocino's permit, unless or until such time as a change order or transfer order authorizing such use is obtained from the SWRCB.
2. Within 60 days from the date that this Order is issued, Mendocino shall submit a Compliance and Monitoring Plan (Plan) that adequately identifies how it will account for water diverted under Permit 12947B. The Plan shall be submitted for approval by the Chief of the Division of Water Rights. To the extent some of this information has already been submitted to the Division, Mendocino shall specify which record and how it satisfies the requirements below. The Plan shall show how and when Mendocino will achieve the following:
 - A description of the location of each point of diversion and rediversion covered by Permit 12947B. The capacity of the diversion works at each point and the extent of any other basis of right being used at that point should also be identified.
 - A map that specifies each point of diversion and associated place of use served under Mendocino's permit.
 - An accurate monthly accounting of the quantity of water actually diverted at each of the points of diversion and rediversion covered by Permit 12947B, with identification of the amount diverted under any alternative right and the amount diverted under the 8,000 acre-feet authorized under Permit 12947B. Mendocino shall show the computational steps used to account for the water use authorized under its permit.

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- A process for advance determination of whether individual diversions will be covered under Permit 12947B for the next year. To the extent feasible, the determinations shall be made before the diversion or use is initiated. Where a determination in advance is not feasible, the process shall provide for a determination as soon as reasonably possible. The process shall include procedures to cease the diversion or use forthwith upon a determination that water is no longer available for use under Permit 12947B, or if the process fails to result in a prompt determination. The process shall include an accounting system to assure that Mendocino is informed of and can account for all diversions made by each user of Mendocino's permit. The process shall include a provision by which each water user shall notify Mendocino before making any diversion or use in reliance on Permit 12947B. The Plan should specify the annual time period for its accounting, and the method by which Mendocino will forecast demand for summer months where other sources of water are not available.
- A process to measure or account for the multiple sources of water making up the flow available in the Russian River. This analysis is necessary to determine whether riparian and pre-1949 diversions are in excess of water actually available and to identify the water available for beneficial use under Permit 12947B. The process can be independently developed by Mendocino or cooperatively developed with the Sonoma County Water Agency. The process shall accurately reflect the daily flow of the Russian River within Mendocino County using best available data, and also identify or calculate:
 - Eel River water bypassed at Coyote Dam;
 - natural flow of East Fork Russian River bypassed at Coyote Dam;
 - total inflow into Lake Mendocino;
 - precipitation and evaporation at Lake Mendocino;
 - Redwood Valley diversion from Lake Mendocino;
 - storage collection at Lake Mendocino;
 - storage releases at Coyote Dam;
 - West Fork Russian River flow;
 - total tributary inflow to main stem Russian River within Mendocino County below Coyote Dam;
 - water available for riparian diversions, and to the extent possible, the total riparian diversions being exercised within Mendocino's place of use;
 - water available for pre-1949 diversions, and to the extent possible, the total pre-1949 diversions being exercised within Mendocino's place of use;
 - water available for diversion and use under Mendocino's and Sonoma's permit (project water);
 - total amount of project water claimed for beneficial use under Permit 12947B; and
 - water bypasses for instream and downstream uses below Mendocino County required by Decision 1610.

Mendocino shall specify the methods by which it will report and monitor each point of diversion. Mendocino may include a schedule for installing additional gauges. Mendocino shall submit an example of the report format showing the monthly summary of daily records used to compute Mendocino's beneficial use under Permit 12947B.

Mendocino shall respond to any deficiencies with the plan identified by the Division within a time period provided by the Division. Mendocino shall implement and comply with the Plan immediately upon final approval by the Division.

3. Mendocino shall notify all users within its place of use that if they are diverting water without a written agreement with Mendocino, they may not rely on a claim that their water use is all or in part diverted under Permit 12947B. The notification should warn that Mendocino will request the SWRCB to investigate and initiate formal enforcement action against diversions not authorized by Mendocino's permit or some other alternate basis of right. Mendocino shall notify diverters claiming riparian rights within Mendocino's place of use that they may not divert Eel River water pursuant to a riparian water right or in excess of their correlative share, particularly during dry years. The Division may request that Mendocino seek additional information and evidence from diverters that claim alternative bases of right for water used within Mendocino's place of use.
4. Mendocino shall develop a plan by which a timely determination can be made between Redwood and Mendocino regarding whether surplus water was available for the year 2002, specifically for the months of November and December, which is binding on both parties. Mendocino should consult with Redwood in formulating this plan. Mendocino shall submit this plan within 30 days of the date this Order is issued. Mendocino shall implement the plan immediately upon final approval by the Chief of the Division of Water Rights. Nothing in this Order shall be construed to bar compelling arbitration under section 1281.2 of the Code of Civil Procedure. If Mendocino decides that petitioning the court to compel arbitration is the most effective and efficient plan to reach a timely determination on the issue of surplus water in 2002, Mendocino is encouraged to do so.

Upon the failure of any person or entity to comply with a CDO issued by the SWRCB pursuant to this chapter, the Attorney General, upon the request of the SWRCB, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a).) Section 1845, subdivision (b) of the Water Code provides:

- (1) Any person or entity that violates a cease and desist order issued pursuant to this chapter may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
- (2) Civil liability may be imposed by the superior court. The Attorney General, upon request of the board [SWRCB], shall petition the superior court to impose, assess, and recover those sums.
- (3) Civil liability may be imposed administratively by the board [SWRCB], pursuant to section 1055.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY

*Victoria A. Whitney, Chief
Division of Water Rights*

Dated: January 7, 2005