STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
JANUARY 6, 2015

ITEM 2

SUBJECT

CONSIDERATION OF A PROPOSED ORDER DENYING WITHOUT PREJUDICE THE PETITION OF R.D.C. FARMS, INC.; RONALD & JANET DEL CARLO; EDDIE VIERRA FARMS, LLC; DIANNE E. YOUNG; SCHMIDT HIGHWAY 4 RANCH, LLC; GARY AND JULIE ABATE; DINO AND NICOLE DEL CARLO; GEORGE AND PAM VIERRA; MARCHINI LAND CO., PTP; AND RENZO AND EVELYN MENCONI TO RECONSIDER THE HEARING OFFICERS' OCTOBER 15, 2014 RULING (REF: WOOD IRRIGATION COMPANY CDO - SUPPLEMENTAL HEARING) - MIDDLE RIVER IN SAN JOAQUIN COUNTY

DISCUSSION

On September 4, 2014, State Water Resources Control Board (State Water Board) provided Woods Irrigation Company (Woods) customers within Woods' service area[1], and parties to State Water Board Order WR 2012-0012 proceeding with Advance Courtesy Notice of tentative dates for a supplemental hearing and pre-hearing conference. Pursuant to Condition 1 of Order WR 2012-0012, the purpose of this supplemental hearing is for customers of Woods to "participate as parties, call witnesses, and cross-examine witnesses that have already testified on behalf of other parties, in order to supplement the evidentiary record with evidence of water rights held by the Woods' customers."

Woods and some Woods customers requested delay and raised additional objections. On October 15, 2014, State Water Board hearing officers Vice-Chair Frances Spivy-Weber and Member Steven Moore, issued a ruling on the Landowners' comments (ruling).

On November 14, 2014, R.D.C. Farms, Inc.; Ronald & Janet Del Carlo; Eddie Vierra Farms, LLC; Dianne E. Young; Schmidt Highway 4 Ranch, LLC; Gary and Julie Abate; Dino and Nicole del Carlo; George and Pam Vierra; Marchini Land Co., PTP; and Renzo and Evelyn Menconi (collectively, "Landowners") petitioned the State Water Board to reconsider the October 15, 2014 ruling. Petitioners allege that the hearing officer's ruling will deny them due process rights for two reasons. First, they allege that Petitioner's due process rights will be violated if the Board reopens the hearing per the determination in WR Order 2012-0012, rather than restarting the hearing for all parties. Secondly, Petitioners allege that the Board failed to properly notice the landowners.

The Proposed Order denies the petition for reconsideration without prejudice because the petition is not ripe.

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[1] In Order WR 2012-0012, although the State Water Board referred to petitioners R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC, Dianne E. Young, and Warren P. Schmidt, Trustee of the Schmidt Family Revocable Trust, as Woods' "Customers", participation in the proposed hearing will not be limited to only these petitioners. Woods' customers include landowners within Woods' service area.

POLICY ISSUES

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of approving this item.

REGIONAL BOARD IMPACT

None

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the proposed order

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012 to Enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-

In the Matter of the Petitions for Reconsideration of the

R.D.C. FARMS, INC.; RONALD & JANET DEL CARLO; EDDIE VIERRA FARMS, LLC; DIANNE E. YOUNG; SCHMIDT HIGHWAY 4 RANCH LLC; GARY AND JULIE ABATE; DINO AND NICOLE DEL CARLO; GEORGE AND PAM VIERRA; MARCHINI LAND CO. PTP; AND RENZO AND EVELYN MENCONI

Regarding Procedural Rulings In Reopened

Woods Irrigation Company Cease and Desist Order Hearing

ORDER DENYING RECONSIDERATION WITHOUT PREJUDICE

BY THE BOARD

1.0 INTRODUCTION

On February 1, 2011, the State Water Resources Control Board (State Water Board or Board) adopted Order WR 2011-0005, which included a Cease and Desist Order (CDO) against Woods Irrigation Company's diversion of water above a rate of 77.7 cubic feet per second, absent submission of additional information by landowners. Multiple parties (including R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC, and Dianne E. Young of the instant petition) requested reconsideration. The State Water Board issued Order WR 2012-0012 granting reconsideration in part, on August 7, 2014. Order WR 2012-0012 deleted the ordering portion of Order WR 2011-0005; delineated the rest of the decision as non-precedential; and ordered that the hearing be re-opened for the limited purpose of allowing the customers of Woods Irrigation Company participate as parties, including submission of evidence, cross-examination of witnesses from the existing parties, and presentation of legal and policy arguments. Prior to issuance of Order WR 2012-0012, multiple parties – including some of the instant petitioners – sued the State Water Board over Order 2011-0005, and received a favorable trial court judgment on due process and jurisdictional grounds. (*Young v.*

State Water Resources Control Board (San Joaquin County Superior Court, No. 39-2011-00259191-CU-WM-STK April 11, 2011).) Issuance of Order WR 2012-0012 mooted the due process arguments, and the State Water Resources Control Board prevailed on the jurisdictional issues in the Court of Appeal. (*Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397.)

R.D.C. Farms, Inc.; Ronald & Janet Del Carlo; Eddie Vierra Farms, LLC; Dianne E. Young; Schmidt Highway 4 Ranch, LLC; Gary and Julie Abate; Dino and Nicole del Carlo; George and Pam Vierra; Marchini Land Co., PTP; and Renzo and Evelyn Menconi, (hereinafter "Petitioners") purport to petition for reconsideration from a determination by the hearing officers in the upcoming reopened Woods Irrigation Company Cease and Desist Order hearing. Petitioners argue that the hearing officers' ruling deprives them of due process in two ways. First, they argue that the ruling violates due process because the Petitioners "must be allowed to participate in the proceeding from the beginning to have a meaningful opportunity to be heard." Secondly, they argue that the Board should have investigated and potentially issued individual CDOs to Petitioners prior to bringing them in to the proceedings, because "the original draft CDO issued to Woods in 2009 did not implicate the Landowners' [Petitioners'] water rights," and it is unclear what is going to be at issue in the hearing for the Landowners [Petitioners]."

The petition for reconsideration is dismissed as premature: the ruling does not finally determine the rights of parties or impose penalties or sanctions and may therefore be challenged as part of a petition for reconsideration of any final decision or order adopted by the Board after the close of the hearing, if the hearing process and order itself do not resolve the concerns raised.

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a decision or order within 30 days on any of the following grounds:

(a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

(b) [t]he decision or order is not supported by substantial evidence;

(c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) [e]rror in law.

(Cal. Code Regs., tit. 23, § 768; Wat. Code § 1122.)

A petition must be accompanied by a statement of points and authorities in support of legal issues raised in the petition. (Cal. Code Regs., tit. 23, § 769, subd. (c).)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id*., subd. (a)(2)(A)-(C).) The State Water Board may elect whether or not to hold a hearing on the petition for reconsideration. Here, Petitioner has not requested such a hearing.

This order addresses the principal issues raised by Petitioners. To the extent, if any, that this order does not address all of the issues raised by Petitioners, the State Water Board finds that either these issues are insubstantial or that Petitioners has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (Cal. Code Regs., tit. 23, §§ 768-769, 1077.)

3.0 BACKGROUND

Each of the Petitioners is a landowner within the service area for the Woods Irrigation Company and a co-owner of the Woods Irrigation Company. On December 28, 2009, the State Water Board's Division of Water Rights issued a draft Cease and Desist Order

against diversions by Woods Irrigation Company greater than 77.7 cfs from Middle River. Woods Irrigation Company requested a hearing, which was held on June 7, 24, 25, 28 and July 2, 2010. Prior to the first hearing date, various landowners in the Woods Irrigation Company's service area, including some of the Petitioners, requested that the hearing be re-noticed directly to individual landowners in the service area. The hearing officer ruled that it was not necessary at this point to notice individual landowners as the decision would not be binding on them, but that there was the potential to hold the hearing open for additional evidence or to craft any order adopted to address landowner concerns.

On February 1, 2011, the State Water Board adopted Order WR 2011-0005. Order WR 2011-0005 was a 63 page decision that addressed a range of legal theories and a substantial evidentiary record examined over the five days of hearing. It concluded with a Cease and Desist Order against Woods Irrigation Company's diversion of water above a rate of 77.7 cubic feet per second, absent the provision of additional information regarding individual landowners' rights or needs, and imposing additional monitoring requirements. The parties to the hearing did not produce convincing evidence of an unlawful diversion or threat of unlawful diversion for up to 77.7 cubic feet per second, an amount set forth in Woods Irrigation Company's 1911 contracts to furnish water. The parties did, however, produce convincing evidence of unlawful diversion and the threat of further unlawful diversion above 77.7 cubic feet per second. Order WR 2011-0005 established an expedited administrative process to allow landowners to present evidence of any additional rights beyond that which Woods presented.

Multiple individuals and organizations (including R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC, and Dianne E. Young of the instant petition) requested reconsideration of Order WR 2011-0005 on March 2, 2011. Relevant to the petition here, some requested to be allowed to participate as parties in the Woods CDO hearing. On the same day they petitioned for reconsideration of WR 2011-0005, multiple parties, including some of the instant petitioners, filed for writ of mandate

against the State Water Board over Order WR 2011-0005. On April 11, 2011, the petitioners for writ of mandate received a favorable trial court judgment on due process and jurisdictional grounds. (*Young v. State Water Resources Control Board* (Super. Ct. San Joaquin County, 2011, No. 39-2011-00259191-CU-WM-STK).)

On August 7, 2011, while the *Young* case was pending on appeal, the State Water Board issued Order WR 2012-0012 granting reconsideration in part. Order WR 2012-0012 deleted the ordering portion of Order WR 2011-0005; declared the rest of the order non-precedential; and ordered that the hearing be re-opened for the limited purpose of allowing the customers of Woods Irrigation Company to participate as parties, including submission of evidence, cross-examination of witnesses, and presentation of legal and policy arguments. (*Id.* at 13.)

Issuance of Order WR 2012-0012 mooted the due process issue in the *Young* case. (*Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 400.) The State Water Board entered into a stipulation to refrain from moving forward with the reopened Woods CDO hearing until appellate determination of the jurisdictional issues in the *Young* case. On September 4, 2013, State Water Board prevailed on the jurisdictional issues in the Court of Appeal. (*Id.* at pp. 403-407.) On November 13, 2013 the Supreme Court of California denied the petition for review.

In April 2014, the hearing team contacted attorneys for petitioners and for Woods Irrigation Company to compile contact information to notice Woods' customers for a reopened hearing. On September 4, the team issued a courtesy notice to all Woods' customers and to the other CDO hearing parties setting the reopened Woods hearing for early March 2015. The attorney for Petitioners responded to the courtesy notice with a range of concerns, including an assertion that only holding a new hearing – not reopening the Woods hearing to allow landowners to submit additional evidence and argument – could fulfill landowners' due process rights.

On October 15, 2014, the hearing officers issued a ruling on all the concerns expressed in response to the courtesy notice. The hearing officers held that reopening the hearing did not violate landowners' due process rights and that the hearing did not improperly shift the burden of proof for landowners, as alleged. The ruling also postponed the hearing until June of 2015, allowing for considerable time to prepare for hearing after the pre-hearing conference, where concerns regarding the issues and scope of the hearing could be raised. The ruling did not address the issue of draft CDOs to landowners, as the comments on the courtesy notice did not raise that concern.

4.0 DISCUSSION

Petitioners allege that the hearing officers' ruling will deny them due process rights for two reasons. First, they allege that Petitioners' due process rights will be violated if the Board reopens the hearing per the determination in WR Order 2012-0012, rather than restarting the hearing for all parties. Secondly, Petitioners allege that the Board failed to properly notice the landowners.

Petitioners' petition for reconsideration is premature and therefore denied.

The hearing officers' ruling is a procedural ruling in the context of an adjudicative proceeding. As such, the hearing officers' ruling is not a decision or order within the meaning of Water Code section 1122, but is a ruling made as part of the process leading to the formulation and issuance of a decision or order. (See Cal. Code Regs, tit. 23, § 648, subd. (a) [an adjudicative proceeding is "an evidentiary hearing for determination of facts pursuant to which the State [Water] Board … formulates and issues a decision"].) As in the case of other procedural rulings that do not finally determine the rights of the parties or impose penalties or sanctions, the hearing officers' ruling may be challenged as part of a petition for reconsideration when the State Water Board issues a final decision or order after the close of the hearing, if the Petitioners believe the due process issues were not satisfactorily addressed in the hearing itself.

The Water Code provisions governing reconsideration and judicial review do not contemplate petitions for reconsideration of procedural rulings until after the completion of the proceedings as part of which those procedural rulings are issued. Water Code section 1122 requires that a petition for reconsideration must be filed within thirty days of issuance of the decision or order. If a procedural ruling were subject to review immediately after it is issued by the hearing officer, then the time to seek review of that ruling would expire by the time the State Water Board issues a decision or order in the underlying proceeding. Yet the State Water Board has routinely considered procedural issues as part of its review of petitions for reconsideration, and has never granted reconsideration of a hearing officer's ruling in a pending proceeding. Water Code section 1123 states that reconsideration may occur "on all pertinent parts of the record," further underscoring the point that reconsideration occurs after the hearing is held and a record formed. Water Code section 1126, subdivision (c) provides that judicial review is pursuant to section 1094.5 of the Code of Civil Procedure. Section 1094.5 of the Code of Civil Procedure, in turn, provides for judicial review of a "final" decision or order issued "as a result" of an administrative proceeding. Furthermore, the language of California Code of Regulations, title 23, section 768 specifically calls out as grounds for reconsideration "[i]rregularity in … any ruling … by which the person *was prevented* from having a fair hearing." This use of the past tense indicates that the remedy is not intended to provide interlocutory relief from rulings that a party fears will prevent a future hearing from being fair.

The procedural history of the Woods CDO hearing sheds light on the difficulties and inconsistencies that would arise if a hearing officer's procedural ruling were subject to reconsideration. Petitioners' counsel and some of the instant petitioners raised due process concerns regarding landowner notice and participation prior to the Woods CDO hearing in 2010. The hearing officer determined that it was inappropriate to allow late intervention into the hearing or to postpone the hearing for re-noticing. Petitioners did

not petition for reconsideration for this ruling.[1] Had the ruling itself been subject to reconsideration, the time for reconsideration would have passed before Order WR 2011-0005 was issued. (See Wat. Code, § 1122 [30-day time limit for petitions or for reconsideration on Board's own motion].) Petitioners would have been unable to determine the extent to which the decision impacted them prior to petitioning for reconsideration and prior to the deadline for any challenge to the reconsideration order. Similarly, the reconsideration period for the evidentiary and procedural issues raised during the proceeding, and ruled on during the proceedings or in written rulings issued July 19, 2010 and August 27, 2010 would have run prior to issuance of Order WR 2011-0005 and would have been isolated from consideration at reconsideration of the decision in the case. The parties would not have the benefit of Order WR 2011-0005 to identify which contrary rulings ultimately caused them harm. Such piecemeal consideration would be contrary to the thrust of Water Code section 1123, which contemplates a holistic review on reconsideration. (*Id.* [requiring review "on all the pertinent parts of the record" and allowing consideration of additional evidence or reopening of hearings for cause].)

Requesting reconsideration on procedural hearing officer rulings is analogous to an interlocutory appeal. In the California judicial system, the "final judgment rule" prevents an appeal from a judgment that does not dispose of all the causes of action between the parties. (*Morehart v. County of Santa Barbara* (1995) 7 Cal.4th 725, 743.) The rule limits interlocutory appeals for several reasons. Interlocutory appeals burden the courts by clogging the docket with multiple appeals, while producing delay and uncertainty in the trial courts. In addition, later actions by the trial court may render the interlocutory appeal moot by altering the rulings, and a complete record will establish whether any alleged error was harmless or not. (*Id.*at 741 [citing *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966-67].)

[1] Instead, they appropriately petitioned for reconsideration of the final decision – Water Right Order 2011-0005, and *[footnote continues on next page]*

This instance demonstrates that the same concerns hold in this setting, as well. The issue of how to address landowners' concerns regarding the diversion limitations in the Woods CDO, Order WR 2011-0005, was raised and addressed for the first time in pre-hearing rulings prior to the Woods CDO hearing. The issue was raised again during the hearing itself, and in Order WR 2011-0005 the Board delayed implementation of curtailments under the CDO and adopted an expedited administrative procedure for landowners to submit additional evidence should they be harmed by the Woods CDO, in order to address these concerns. The Board addressed the due process issues for a third time and granted reconsideration: Order WR 2012-0012 ordered the reopening of the proceeding for the limited purpose of including information by the landowners, in order to allow resolution of the petitioners' due process issues without resort to the appellate courts.

As counsel for Petitioners recommended in their original comments to which the hearing officers responded, and as noted in the hearing officers' ruling, there will be a pre-hearing conference to address the scope and issues of the hearing approximately six months before the scheduled hearing. Procedural concerns will also be considered administratively during the issuance of a decision in the reopened hearing and potentially during reconsideration of any order adopted after the hearing. Injecting further delay and uncertainty into the proceedings, which are crafted to include extensive internal review processes, is unwarranted. The hearing process itself provides multiple opportunities to alter the complained-of ruling. Petitions for reconsideration of procedural rulings are not only uncontemplated in the statutory scheme for hearings, they can cause issues to come before the Board and potentially the courts at a time before they are ripe for consideration.

Additionally, the effect of any alleged due process errors on landowners will be determined through the hearing process itself. As a result of the re-opened hearing, the Board may or may not adopt a CDO limiting Woods Irrigation Company's diversions,

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the Board did grant reconsideration of the due process concerns in Order WR 2012-0012.

and if the Board does adopt a CDO, it may do so under circumstances that prevent the injuries that the landowner parties have alleged cause them harm.

We hold that petitions for reconsideration before the final disposition of a matter before the Board are not allowed.

It is further worth noting that the petition purports to raise as issues of "reconsideration" an issue outside the scope of the hearing officers' ruling, namely the contention that individual landowners required individualized notices of draft CDOs in order to move forward with the hearing.

5.0 CONCLUSION

For the reasons elaborated above, the petition for reconsideration is denied. This denial is without prejudice to the parties' ability to raise any issues included in the petition at a time when those issues are ripe for consideration.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

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 January 6, 2015.

AYE:

NAY:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board